THE UNITED KINGDOM'S HUMAN RIGHTS ACT 1998 IN THEORY AND PRACTICE

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I. INTRODUCTION

THIS essay assesses the significance of the United Kingdom's Human Rights Act (HRA) 1998 on legal theory and practice. Part II considers its constitutional context and significance; Part III deals with whether the European Convention on Human Rights has been 'incorporated'. Part IV deals with its entry into force. The two principal methods used by the HRA to relate to (1) statutory interpretation and (2) a duty on public authorities or those exercising public functions. We consider these in turn. Part V analyses the interpretative obligation contained in the Act, the power for higher courts to make a 'declaration of incompatibility', and effects of such a declaration. Part VI explores the new statutory duty imposed by the Act. Part VII assesses the Act's remedial provisions. Part VIII notes the particular provision made for freedom of expression and freedom of religion. Part IX discusses the issues of 'horizontal effect' and the 'margin of appreciation'. Part X concludes with an assessment of the significance of the HRA on legal theory and practice—just how big a difference has it made and will it make?

II. CONSTITUTIONAL CONTEXT AND SIGNIFICANCE

The HRA of 9 November 1998 was a significant development in legal and political culture.[1] It was imaginative and, in a sense, *revolutionary*. It was also passed in the midst of major constitutional reforms intended to 'modernise' UK politics.[2] The reforms including devolution[3] to Scotland,[4] Wales,[5] and

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1. 'It is now plain that the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary', *R v Director of Public Prosecutions, ex parte Kebilene and Others, R v Director of Public Prosecutions, ex parte Rechah*, [2000] 2 AC 326, 374–5, [1999] 4 All ER 801, 838, Lord Hope.

2. R. Hazell, 'Reinventing the Constitution: Can the State Survive?', [1999] PL 84; J. Beatson, C. Forsyth and I. Hare (eds.) *Constitutional Reform in the United Kingdom: Practice and Principles* (1998); Lord Irvine, 'Constitutional Reform and a Bill of Rights' [1997] EHRLR 483.

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Northern Ireland.[6] The devolution measures to Scotland and Wales, which were effective before the substantive entry into force of the HRA, limited the power of the devolved authority and their respective executives by reference to consistency with the ECHR.[7] The same applies to the powers devolved to Northern Ireland in pursuance of the Belfast Good Friday Agreement of 10 April 1998.[8] The HRA applies to England and Wales, Scotland and Northern Ireland.[9] It does not apply to the Channel Islands or the Isle of Man.[10]

The 'revolutionary' nature of the HRA is important for a State which makes much of the *evolutionary* path of its constitutional history generally, and its 'civil liberties' in particular.[11] The legal history of efforts to incorporate the

3. See S. Grosz, J. Beatson and P. Duffy, *Human Rights: The 1998 Act and the European Convention* (1999), ch. 7. The Judicial Committee of the Privy Council has an important role in resolving devolution disputes, see Schedule 6 of the Act; *Hoekstra and Others v Her Majesty's Advocate*, *The Times*, 31 Oct. 2000, 18; *Montgomery v Her Majesty's Advocate and the Advocate General for Scotland* [2001] UKHRR 124 (PC) (disagreement about whether there was a devolution issue).

4. See Scotland Act 1998, ss. 29(2)(d), 57, 126(1), 129(2); A. Millar, 'Human Rights and the Scottish Parliament' [1998] EHRLR 260; Lord Hope, 'Opinion: Scotland and Devolution' [1998] EHRLR 367; *The Scotland Bill, Devolution and Scotland's Parliament*, House of Commons Research Paper 98/1 (7 Jan. 1998); C. Munro, 'Scottish Devolution: Accommodating a Restless Nation', 6 Int. J. on Minority and Group Rights', (1998/99) 95; N. Burrows, 'Unfinished Business: The Scotland Act 1998', 62 MLR (1999) 241; A. Roux (ed.), *Human Rights and Scots Law: Comparative Perspectives on the Incorporation of the ECHR* (2001). A detailed audit was carried out by the Scottish executive to identify potential ECHR challenges. Some legislation has been introduced to deal with incompatibilities.

5. See Government of Wales Act 1998, ss. 107, 108(1), 153(2); *The Government of Wales Bill: Devolution and the National Assembly*, House of Commons Research Paper 97/129 (14 Dec. 1998).

6. See B. Thompson, 'Transcending Territory: Towards an Agreed Northern Ireland', 6 Int. J. on Minority and Group Rights' (1999) 221.

7. On the extensive Scottish human rights jurisprudence see the website of the Scottish courts: <http://www.scotscourts.gov.uk>; *Procurator Fiscal, Dunfermline and H.M. Advocate General for Scotland v Brown*, PC [2001] UKHRR 333 (requirement to give evidence of identity of car driver did not violate Article 6 of Convention) *H.M. Advocate v Little* [1999] SLT 1145; *Crummock (Scotland) Ltd v H.M. Advocate*, *The Times*, 9 May 2000; 'Human Rights in Scotland: The European Convention, the Scotland Act and the Human Rights Act', (The Scottish Executive, <http:www.scotland.gov.uk)>.

8. See Northern Ireland Act 1998, ss. 6(2)(c), 24, 98(1), 100 and Schedule 14. See B. Dickson, 'New Human Rights Protections in Northern Ireland' (1999) 24 EL Rev., Human Rights Issue, 3; C. Harvey and S. Livingstone, 'Human Rights and the Northern Ireland Peace Process' [1999] EHRLR 162. A number of steps have been taken. Executive power was devolved in Dec. 1999.

9. HRA, s. 22(6).

10. For an explanation of their respective positions see HL Debs, 19 Jan. 1998, cols. 1307–8 (Lord Williams). Separate legislation will incorporate the ECHR in Jersey, Guernsey and the Isle of Man. The HRA also does not apply to any of the British Overseas Territories.

11. On the state of civil liberties in the UK prior to the HRA, but with a strong eye towards its entry see Halsbury's Laws of England, vol. 8(2), *Constitutional Law and Human Rights* (1996), separately reprinted as A. Lester and D. Pannick (eds.), *Constitutional Law and Human Rights* (1999). For post-HRA perspectives see D. Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn) (forthcoming, 2001); H. Fenwick, *Civil Rights—New Labour, Freedom and the Human Rights Act* (2001). That the 'liberty' approach can still be of significance was evident in *R v Secretary of State for Health ex parte C* [2000] UKHRR 639 (Department of Health's maintenance of a consultancy service index with the names of alleged child abusers was not unlawful).

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ECHR into UK has been well rehearsed.[12] The manifesto of the Labour Government, which came to power in May 1997, contained a commitment to incorporate the ECHR.[13] A White Paper, *Rights Brought Home*,[14] was published on 24 October 1997 along with the Human Rights Bill.[15] The HRA of November 1998 represented the fulfilment of the Labour party's commitment.[16] It is notable that the passing of the HRA was greeted with almost universal acclaim from legal and political commentators.[17] There was widespread agreement on the watershed in legal, political and historical terms that the HRA represented.[18]

To understand the constitutional significance of the HRA it is necessary to appreciate the purposes and extent to which it was possible to use the ECHR in the different jurisdictions within the UK.[19] The formal position of non-incorporation, as represented by the judicial high-water mark of the House of Lords' decision in *Brind*, remained intact.[20] However, there had clearly been

12. See C. A. Gearty, 'The United Kingdom', in C. A. Gearty (ed.) *European Civil Liberties and the European Convention on Human Rights*, 53; R. Singh, *The Future of Human Rights in the United Kingdom*, ch. 2 (1997).

13. See J. Straw and P. Boateng, (both Members of Parliament), *Bringing Rights Home*, Consultation Paper [1997] EHRLR 71. 'The commitment to introduce into domestic law a document devoted not to social and economic rights but to civil and political rights was . . . a significant step away from socialism and towards liberal constitutionalism', Dignam and Allen, n. 270 below, 101. However, it is notable that it was Labour governments that negotiated and ratified the ECHR (1950) and accepted the right of individual petition (1965).

14. Cm 3782.

15. House of Lords, Bill 119 of 1997–8; The Human Rights Bill [HL], Bill 119 of 1997–8: The European Convention on Human Rights, House of Commons Research Paper 97/68 (27 May 1997). The Bill was a Home Office Bill. There was a Ministerial Sub-Committee on the Incorporation of the ECHR, chaired by Lord Irvine. See *The Human Rights Bill [HL], Bill 119 of 1997–98: Some Constitutional and Legislative Aspects*, House of Commons Research Paper 98/24 (13 Feb. 1998); B. Markesinis, (ed.), *The Impact of the Human Rights Bill on English Law* (1998); J. Wadham, 'Bringing Rights Half-way Home' [1997] EHRLR 141; F. Klug, 'Rights Brought Home: A Briefing on the Human Rights Bill With Amendments' (The Constitution Unit, Nov. 1997).

16. A significant factor in ensuring fulfilment was that the party leader, John Smith, who had given the commitment had died before Labour took power. Incorporation was seen as part of his personal legacy.

17. A leading critic is K. Ewing, 'The Human Rights Act and Parliamentary Democracy', 62 MLR (1999) 79. Some critics would assert that the Labour government did not fully realise the massive significance of the HRA on government and administration. It is difficult to substantiate that criticism. See also Clements, n. 307 below.

18. For the Parliamentary record see HL vol. 582, cols. 824, 1227; vol. 583, cols. 466, 490, 533, 754, 771, 823, 1091, 1138; vol. 584, cols. 1252, 1317; vol. 585, cols. 379, 747; vol. 593, col. 2084; HC vol. 306, col. 796; vol. 312, 975; vol. 313, col. 1294; J. Cooper and A. M. Williams (eds), *Legislating for Human Rights* (2000). See also C. A. Gearty, 'The Impact of The Human Rights Act 1998', in Roux n. 4 above.

19. See generally M. Hunt, *Using Human Rights in English Courts* (1997); M. Beloff and H. Mountfield, 'Unconventional Behaviour? Judicial Uses of the European Convention on Human Rights in England and Wales' [1996] EHRLR 476; M. Fordham, *Judicial Review Handbook*, (2 edn), 139–44 (1997); R. Clayton and H. Tomlinson, *Law of Human Rights* (2000), ch.2. Cf. F. Klug and K. Starmer, 'Incorporation Through The Back Door' [1997] PL 223;

20. *R v Secretary of State for the Home Department, ex parte Brind* [1991] AC 696.

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much greater judicial receptivity for a number of years.[21] This was evidenced, *inter alia*, by greater weight being accorded to the ECHR[22] and notions of fundamental rights[23] in statutory interpretation, developments in the scope and application of judicial review post-*Brind*, the development of the common law as reflection of ECHR rights,[24] informing the exercise of judicial discretion,[25] reviewing the exercise of powers conferred for the purpose of bringing the law into line with the ECHR,[26] the 'most anxious scrutiny' applied in cases involving the liberty of individuals,[27] an understanding of the concept of irrationality that took it close to, if not indistinguishable from, one of proportionality,[28] and a striking increase in 'extra-judicial' writings on human rights and in favour of incorporation.[29] There was also a greater willingness by some judges to use the language of rights and to consider a 'rights-based' model of judicial review.[30] These were all ways in which ECHR was being given some degree of '*effect*' in UK law.[31] According to its Preamble, what the HRA does is to

21. See R. Singh, n. 12 above, ch. 1.

22. In 1996 the position in Scotland had been aligned to that in the rest of the UK, see A. Grotian, 'The European Convention—A Scottish Perspective' [1996] EHRLR 511.

23. See Lord Hoffman in *R v Secretary of State for the Home Department ex parte Simms* [1999] 3 WLR 328 on the constitutional principle of 'legality'.

24. *Derbyshire County Council v Times Newspaper Ltd* [1992] QB 770 at pp. 812 and 830. The House of Lords reached the same decision on the substance but without needing to rely on the ECHR [1993] AC 534; *Reynolds v Times Newspapers* [1999] 4 All ER 609; *R v Secretary of State for the Home Department ex parte Q* [2000] UKHRR 386. See also *Turkington and Others v Times Newspapers* [2001] UKHRR 184 (contemporary interpretation of a 'public meeting') on which see I. Loveland, 'Freedom of Political Expression: Who Needs the Human Rights Act?', PL [2001] 233.

25. *Attorney-General v Guardian Newspapers* [1987] 1 WLR 1248; *R v Ministry of Defence, ex parte Smith* [1996] QB 517; *R v Secretary of State for the Home Department, ex parte McQuillan* [1995] 4 All ER 400; *R v Khan* [1997] AC 558 (on admissibility of evidence obtained through covert surveillance): the European Court of Human Rights found violations of Articles 8 and 13 but not Article 6(1) (12 May 2000); *R v Gokal* [1997] 2 Cr.App.R. 266 (on admissibility of hearsay evidence).

26. See *R v Secretary of State, ex parte Norney* [1995] 7 Admin.LR 48.

27. See *Bugdaycay v Secretary of State for Home Department* [1987] AC 514; N. Blake, 'Judicial Review of Discretion in Human Rights Cases' [1997] EHRLR 391; *R v Secretary of State for the Home Department ex parte Simms* [1999] 3 WLR 328 can be interpreted as going beyond the *Brind* approach.

28. See *R v Chief Constable of Sussex, ex parte International Traders Ferry Ltd* [1997] 2 All ER 65. Judicial review, even at the anxious scrutiny level, was insufficient to satisfy Article 13 ECHR in *Lustig-Prean and Beckett v UK, Smith and Grady v UK* (ECtHR, Sept. 1999).

29. See J. Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights', [1993] PL 59; Lord Irvine, 'Judges and Decision-Makers: The Theory and Practice of *Wednesbury* Review' [1996] PL 59; S. Sedley, 'Human Rights: A Twenty First Century Agenda', [1995] PL 39; id., 'A Bill of Rights for Britain' [1997] EHRLR 458; Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights' [1992] PL 397; Lord Bingham, 'The European Convention on Human Rights: Time to Incorporate', in R. Gordon and R. Wilmot-Smith (eds.), *Human Rights in the United Kingdom*, ch. 1 (1996); id., 'Opinion: Should There Be A Law To Protect Rights of Personal Privacy?' [1996] EHRLR 450. In the House of Lords debates on the HRA only Lord McCluskey was opposed.

30. See *R v Lord Chancellor, ex parte Witham* [1997] 2 All ER 779; Young, n. 299 below.

31. Other routes by which the ECHR can be given effect are through EC and EU law, see *Booker Aquaculture Ltd. v Secretary of State for Scotland* [2000] UKHRR 1. See Grosz *et al*.,

give '*further effect*' to the rights and freedoms guaranteed in the ECHR.[32] Under s. 2 (1), specified Articles of the ECHR are 'to have effect for the purposes of this Act subject to any designated reservation or derogation . . .'. From this perspective, the HRA pushes the existing developments onwards by putting 'Convention rights' at the heart of the judicial system.[33] The HRA is adapted onto the existing UK parliamentary sovereignty/common law model. The closest comparative model is the New Zealand system.[34] Much of the discussion and debate on the HRA was also informed by the experience of the Canadian Charter of Rights and Freedoms.[35] The HRA works by a kind of osmosis. Along with the devolution legislation it explicitly introduces human rights principles and discourse into the UK legal systems. In terms of understanding the thinking behind the HRA, it is helpful to keep in mind the statement of the Lord Chancellor that, 'the design of the bill is to give the courts as much space as possible to protect human rights, short of a power to set aside or ignore Acts of Parliament'.[36] For such a radical constitutional change, it is a well-crafted and readable Act of Parliament. Under the HRA, all courts and tribunals are to be obliged to take account of and apply the Convention rights. Human rights are complementary to ordinary rights and are given effect through the existing remedies system. This means that everyone affected, and that is a massive range of natural and legal persons, has to consider human rights points on a day to day basis and as a matter of course. In some circumstances, the system in the HRA can operate strongly in favour of individuals. Their rights can be declared, applied and they can receive compensation, though it will be modest if at all.[37] The HRA takes account of and builds on

n. 3 above, para. 1.18–1.23; M. Demetriou, 'Using Human Rights Through EC Law' [1999] EHRLR 484. More generally see P. Alston, (ed.), *The EU and Human Rights* (1999); D. McGoldrick, 'The European Union After Amsterdam? An Organisation With General Human Rights Competence?', in D. O'Keefe and P. Twomey (eds.), *Legal Issues of the Amsterdam Treaty* (1999); K. Feus (ed.), *The EU Charter of Fundamental Rights* (2000). The Council of Europe is extremely concerned at the risks of having two sets of fundamental rights. See Recommendation 1439 (2000), Resolution 1210 (2000) and Order No. 651 (25 Jan. 2000) of the Parliamentary Assembly of the Council of Europe. The Assembly has invited negotiations to enable the EU to accede to the ECHR as soon as possible, Resolution 1228, Recommendation 1479 and Order 567 (2000), 29 Sept. 2000.

32. The HRA does not diminish the pre-existing level of human rights protection, s. 11.

33. See J. Laws, 'The Limitations of Human Rights' [1998] PL 254.

34. See M. Taggert, 'Tugging the Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990' [1998] PL 266; A. S. Butler, 'The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 is a Bad Model for Britain', 17 OJLS (1997) 323; B. Emmerson, 'Opinion: This Year's Model: The Options for Incorporation' [1997] EHRLR 313.

35. 'The Impact of the Human Rights Act: Lessons from New Zealand and Canada', The Constitution Unit (London), (May 1999); B. McLachlan, 'The Canadian Charter and the Democratic Process', in C. A. Gearty and A. Tomkins (eds.), *Understanding Human Rights*, ch. 2 (1996); T. Ison, 'A Constitutional Bill of Rights—The Canadian Experience', 60 MLR (1997) 499 (critical of the 'damage' done by the Canadian Charter); G. W. Anderson (ed.) *Rights and Democracy: Essays in UK/Canadian Constitutionalism* (1999); Leigh, n. 202 below. On the use of Canadian jurisprudence see Part V below.

36. HL Debs, 3 Nov. 1997, col. 1228.

37. See Part VI below.

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the UK's current constitutional procedures and the principle of the sovereignty of Parliament. The result was a sophisticated solution under which Parliament still formally makes the law and the judges interpret it, but now they must do so in accordance with the HRA.[38] The government rejected the idea of new Constitutional Court or Supreme Court as in the United States and Germany.[39] This was considered wrong on historical grounds. In terms of principle, it considered that human rights should flow through the system.[40] The idea of establishing a Human Rights Commission was not accepted by the Government at the time of the White Paper because it was concerned at its impact on existing bodies concerned with human rights and preferred to see how the new arrangements under the HRA worked.[41] One arrangement put in place was a Joint Parliamentary Committee on Human Rights.[42] Its terms of reference are to consider and report on matters relating to human rights in the United Kingdom (excluding consideration of individual cases) and proposals for remedial orders under the HRA.

III. HAS THE EUROPEAN CONVENTION ON HUMAN RIGHTS BEEN 'INCORPORATED'?

In the debates and discussions on the HRA, there was commonly reference to the 'incorporation' of the ECHR. More precision is needed. In fact, the HRA 'incorporates' the greater part of the ECHR, but not all of it. More specifically, it 'incorporates' Articles 2–12, 14 ECHR, and Articles 1–3 of the First Protocol and Articles 1 and 2 of Protocol 6,[43] as read with Articles 16–18

38. In this sense the HRA is an interpretative Act, see Part V below; S. Kentridge, 'Parliamentary Supremacy and the Judiciary under a Bill of Rights: Some Lessons From the Commonwealth' [1997] PL 96.

39. See the interesting contribution by Lord Hoffman, 'Human Rights and the House of Lords', 62 MLR (1999) 159 who points to significant differences in the history, culture, and political structures of the three countries. The idea of a constitutional court was similarly rejected in the devolution context, see D. Oliver, 'The Lord Chancellor, the Judicial Committee of the Privy Council and Devolution' [1999] PL 1.

40. In a sense, this mirrors the approach taken to EC law in the European Communities Act 1972 (as amended).

41. White Paper, n. 14 above, paras. 3.8–3.12. Note though that a Human Rights Commission and an Equality Commission have been established for Northern Ireland, see Northern Ireland Act 1998, ss. 68, 73.

42. See 'A New Human Rights Committee for Westminster' (The Constitution Unit, 1999); HC Debs., vol. 61, col. 146 (15 Jan. 2001). David Feldman is legal adviser to the Committee. In 2001 the Committee issued its first substantive reports questioning the compatibility of a number of bills with the EHCR. Other reports in 2001 concerned the *Scrutiny of Bills*, HL 73 and HC 448, and *The Implementation of the HRA*, HL 66-I, HC 332-I of Session 2000–01 (hereinafter *Implementation Report*).

43. The government did not intend to abolish the death penalty, see the White Paper, n. 14 above, para. 4.12. The result came from a backbench amendment. See D. Judge, 'Capital Punishment: Burke and Dicey meet the European Convention on Human Rights' [1999] PL 6. The UK subsequently ratified the Sixth Protocol on 20 May 1999. Acceptance extended to Guernsey, Jersey and the Isle of Man. As of 1 June 2001, the Sixth Protocol has been ratified by thirty-nine of the Council of Europe's forty-three members. See *The Death Penalty—Abolition in Europe* (Council of Europe, 1999).

ECHR. These provisions are referred to in the HRA as the 'Convention Rights'. Protocols 1 and 6 have been accepted by the United Kingdom.[44] These Articles are to have effect for the purposes of the HRA subject to any 'designated derogation' or 'designated reservation'.[45] As of 1 September 2001, the UK has one existing reservation, namely that to Article 2 of Protocol 1 (right to education).[46] In February 2001 the UK withdrew its one existing derogation, namely to Article 5(3) of the ECHR (detention in Northern Ireland).[47] Provision is made for any future reservation or derogation.[48] Derogations have a five year expiry date unless this is extended by the Secretary of State for further five-year periods.[49] There is also provision for the periodic review of any 'designated reservation'.[50] Given that the Convention rights 'are to have effect for the purposes of this Act' it may be better, though somewhat subtle, to think not so much of 'incorporation' in terms of making the Convention rights part of domestic law,[51] but of giving 'further effect' to the Convention rights. Indeed, this is how the Long Title to the HRA describes it. Thus the Lord Chancellor explained that the ECHR under the Act was not being made 'part of our law', that the Act did 'not make the Convention directly justiciable', and that 'if Convention rights were incorporated into our law, they would be directly justiciable and would be enforced by our courts. That [was] not the scheme of the Act' . . . 'the Convention rights will not . . . in themselves become part of our domestic substantive law.'[52] Obviously then it makes no legal sense to suggest that the Convention rights are 'entrenched'.

Article 1 ECHR was not 'incorporated' on the basis that it is an interstate guarantee, nor was Article 15 on derogations or the Preamble.[53] More significantly, and controversially, Article 13 ECHR on the right to an effective remedy was also omitted. The Government's view was that its obligations

44. Protocols 4 and 7 have not. Protocol 7 will be accepted after some amendments to existing laws to remove inconsistencies, see the White Paper, n.14 above, para. 4.14–15; government review, n. 46 below. Its provisions can then become part of the 'Convention rights' after an order by the Secretary of State, HRA, s. 1(4). Protocol 4 remains under review.

45. HRA, s. 1(2).

46. The reservation is concerned with resources. After a review of its position under international human rights instruments the government announced that it needed to retain this reservation (Mar. 1999, Home Office website).

47. For the background see *Brogan v United Kingdom*, Series A, no. 145, (1988) 11 EHRR 117; *Brannigan and McBride v United Kingdom*, Series A, No. 258–B (1993), (1993) 17 EHRR 539. The UK considered that the derogation needed to be retained until provisions for a judicial element were introduced, review n. 46 above. In Feb. 2001, the UK's derogation was withdrawn on the basis that the Terrorism Act 2000 introduced a system of judicial authority after forty-eight hours, see SI 2001/1216 *Human Rights Information Bulletin*, No. 52 (Council of Europe), pp. 3–4.

48. See HRA, ss. 14, 15.

49. HRA, s. 16.

50. HRA, s. 17.

51. Cf. Lord Wade's Bill of 1977 which would have done this.

52. HL Debs 29 Jan. 1998, cols 421–2. See also HL Debs, 18 Nov. 1997, col. 508.

53. For discussion of these omissions see Brooke LJ in *Douglas and Zeta-Jones v Hello! Ltd*, n. 209 below; C. A. Gearty, 'The Human Rights Act 1998 and the Role of the Strasbourg Organs: Some Preliminary Reflections', in Anderson, n. 35 above, at 171–5.

under Article 13 were met by the passing of the HRA itself, and in particular by the remedies provision in s. 8 HRA.[54] The intent was that judges should keep within the scheme of remedies in s. 8, which was regarded as sufficient and clear.[55] Nonetheless, in direct response to questions from Lord Lester, the Lord Chancellor expressed the view that courts and tribunals could have regard to the requirements of Article 13 and the ECHR jurisprudence on it, in particular when considering the provisions of HRA, s. 8. This statement was clearly extracted with reference to its use on the basis of the *Pepper v Hart* doctrine on the use of Parliamentary statements for the purposes of statutory interpretation.[56]

There was no attempt in the HRA to add any new substantive rights and there was no adaptation of the ECHR to the UK system. Thus, there is no general right to equality,[57] no inclusion of social rights[58] or economic rights,[59] no express minority rights,[60] and no specific gender based rights.[61]

Whatever the precise form of 'incorporation' the HRA represents, it is also of a wider European significance that the UK has made the ECHR part of its domestic law. Most of the forty-three[62] members of the Council of Europe have now reached this position at least in terms of legal theory.[63] For this

54. In *Montgomery v Her Majesty's Advocate and the Advocate General for Scotland* [2001] UKHRR Lord Hope stated that s. 57 and Sched 6 of the Scotland Act 1998 had the same intention.

55. HL Debs. 18 Nov. 1997, col. 475.

56. See also Home Secretary, 312 HC Debs. 981, 20 May 1998; F. Klug, 'The Human Rights Act 1998, *Pepper v Hart* and All That', [1999] PL 246. On Article 13 see J. G. Merrills, *Human Rights in Europe* (4th edn) (2001) 194–7.

57. This is remedied by Protocol 12 to the ECHR (2000). See its Explanatory Report. Protocol 12 enlarges to 'any right set forth by law' the non-discrimination clause in Article 14. Twenty-five States have signed the Protocol but the UK has no plans to ratify. See G. Moon, 'The Draft Discrimination Protocol to the European Convention on Human Rights: A Progress Report' [2000] EHRLR 49; A. Lester, 'Equality and United Kingdom Law: Past, Present and Future' [2001] PL 77. Cf. Article 13 of the Treaty of European Union. There is a general equality clause in Article 26 ICCPR and in the Canadian Charter, see C. J. M. Kimber, 'Equality of Self-Determination', in Gearty and Tomkins, n. 35 above, 266; P. Duffy, 'A Case for Equality' [1998] EHRLR 134.

58. Cf the 1977 amendment to the Swedish Social Security Act (s. 6) that specified in detail what was meant by the right to social assistance.

59. See K. Ewing, 'The Human Rights Act and Labour Law', 27 Industrial Law Journal (1998) 275; id., 'Social Rights and Constitutional Law', [1999] PL 104. Cf the EU Charter of Fundamental Rights, n. 31 above, which includes some social rights.

60. Cf *Chapman v UK* (2001) E Ct HR, paras. 71 ff. As of 29 Feb. 2000 there were thirty States Parties (including two non-Member States) to the Council of Europe's Framework Convention for the Protection of National Minorities. The first State reports were received in Feb. 1999. The fFirst UK report was received on 26 July 1999. Cf Article 27 of ICCPR. For ECHR applications related to minorities see S. Poulter, 'The Rights of Ethnic, Religious and Linguistic Minorities' [1997] EHRLR 254.

61. See A. McColgan, *Women Under the Law* (1999); M. Eberts, 'The Canadian Charter of Rights and Freedoms: A Feminist Perspective', in P. Alston (ed.), *Promoting Human Rights Through Bills of Rights* (1999), 241–82 (on balance, experience under the Charter was positive).

62. Azerbaijan became the forty-third member in 2001.

63. The practical effect may be different. Ireland announced its intention to incorporate in 1999. The outstanding Scaninavian States are also politically committed to incorporation. More

reason some have argued that the focus of the European Court of Human Rights' jurisprudence may be on Central and Eastern Europe and beyond, rather than on Western Europe.[64]

IV. ENTRY INTO FORCE

A number of sections were brought into force before the substance of the Act. These were ss. 18, 19, 20, 21(1)–(4), (5) 22, and Schedule 4. The most significant of these was s. 19 on 'statements of compatibility' by Ministers in relation to Parliamentary Bills.[65] This introduced a new constitutional and Parliamentary procedure. Before the Second Reading of a Bill, the Minister introducing it has to make a 'declaration of compatibility' with the ECHR. This could and should operate as a powerful pre-legislative discipline on the government. At least since 1987 there has been a system of 'Strasbourg proofing' in the UK, but the HRA makes this more formalised and systematic and therefore likely to be more rigorous. It also takes place at an earlier stage. Evidence from Government Departments to the Joint Parliamentary Committee on Human Rights acknowledged that the new process revealed a number of inconsistencies and they were removed.[66] The practice has been that the Minister will make the statement of compatibility where they have been advised that it is more likely than not that the provisions of the Bill will withstand a challenge on Convention grounds.[67] Statements have been made in respect of Bills where there were serious concerns about compatibility with the ECHR.[68] There is also provision for the Minister to say that they can't say that Bill is compatible, but they want to do it anyway.[69] Thus, it is clear that Parliament can legislate in breach of the Convention. The hope is that it will change thinking in governments and the executive so that instead of asking 'What's the least we have to do to comply with the Convention?', they think 'How can we best give effect to the Convention?'[70] Although s. 19 only applied to primary legislation the

generally see R. Blackburn and J. Polakiewicz (eds.), *The European Convention on Human Rights—The Impact of the ECHR in the Legal and Political Systems of Member States over the Period, 1953–2000* (2001).

64. M. O'Boyle, 'Establishing the New European Court of Human Rights: Progress to Date' 4(3) Human Rights Law Review (Univ. of Nottingham), 3.

65. In force on 24 Nov. 1998, see SI 1998/2882. The other provisions indicated came into force with the HRA on 9 Nov. 1998, SI 2001/1851. See Clayton and Tomlinson, n. 19 above, 173–9.

66. See *Implementation Report*, n. 42 above.

67. See HL 5 May 1999, Written Answer, 93. The statement is reproduced in 'The HRA 1998: Guidance for Departments', 2nd edn (Home Office website), para. 36 and Annex A. See also para. 38 on good practice in relation to Private Members' Bills and para. 40 on secondary legislation.

68. Financial Services and Markets Bill (1999), Regulation of Investigatory Powers Bill (2000).

69. HRA, s. 19 (1)(b).

70. See 'Core Guidance for Public Authorities', Human Rights Task Force (on Home Office website), paras. 4, 6, 32, 39–42; *Implementation Report* n. 42 above (evidence of Home Secretary).

government decided in 1999 that where a Minister invites Parliament to approve a draft statutory instrument or statutory instrument subject to an affirmative resolution and when faced with Private Bills and private member's Bills, the Minister should volunteer their view on compatibility.

Where there has been a statement of compatibility, practice has varied in terms of how much Ministers give reasons supporting their statements. As for provisions the government thinks are not compatible, the government resisted an amendment that would have required a failure to make a statement of compatibility to be accompanied by reasons. The Lord Chancellor explained that the reasoning would inevitably be discussed by Parliament during the passage of the Bill.[71] The first example of a Minister being unable to say that a Bill was compatible was the Local Government Bill (2000). The source of the asserted incompatibility was identified as an amendment in the House of Lords, where the Bill had first been introduced, which prevented the repeal of s. 28 of the Local Government Act 1986. That provision appeared to the Minister to be incompatible with ECHR rights to freedom of expression and to respect for private life in relation to homosexuals.[72]

The substance of the HRA came into force on 2 October 2000 to coincide with the new legal year.[73] It was considered that a lengthy time of judicial and administrative training was necessary. Extensive programmes of professional and judicial training were organised[74] and an already extensive literature continued to expand.[75] The Cabinet Office established an official committee to monitor developments relating to the operation of the HRA.[76] The Home office established a Human Rights Unit and a Joint Ministerial/NGO Human Rights Task Force, chaired by the responsible Minister.[77] This was to help

71. See Guidance to Departments, n. 67 above, para. 39 (broad lines of the argument should be identified). On practice in New Zealand see P. A. Joseph, 'New Zealand's Bill of Rights Experience', in P. Alston (ed.) *Promoting Human Rights Through Bills of Rights* (1999), 283–317.

72. HC Official Record (6th Series) (23 March 2000), 624W.

73. See SI 2000/1851.

74. £5 million was budgeted for judicial and tribunal training. The training on the HRA was the largest training exercise by the Judicial Studies Board in its history.

75. For general treatments of the HRA see J. Wadham and H. Mountfield, *Blackstone's Guide to the Human Rights Act 1998*, 2nd edn (2000); A. Lester and D. Pannick (gen. eds.), *Human Rights Law and Practice* (1998) and 1st Supplement (2000); K. Starmer, *European Human Rights Law* (1999); P. Duffy, *A Guide to the Human Rights Act 1998* (1999); C. Baker (ed.) *Human Rights Act 1998: A Practitioner's Guide* (1998); P. Chandran, *A Guide to the Human Rights Act 1998* (1999); R. De Mello (gen. ed.), *The Human Rights Act 1998: A Practitioner's Guide* (1999); M. Hunt and R. Singh, *A Practitioner's Guide to the Impact of the Human Rights Act 1998* (forthcoming, 2001); Clayton and Tomlinson, n. 19 above; J. Simor and B. Emmerson, *Human Rights Practice* (loose-leaf, 2001); Grosz *et al*., n. 3 above; Markesinis, n. 15 above; S.Greer, 'A Guide to the Human Rights Act 1998', 24 E.L. Rev. (1999) 3; J. Coppel, *The Human Rights Act 1998: Enforcing the ECHR in Domestic Courts* (1999); K. Starmer and I. Byrne, *Blackstone's Human Rights Digest* (2001).

76. Two inter–departmental lawyers' groups were also established to discuss developments and to disseminate advice and good practice.

77. A specific Home Office web-site has the texts of published guidance, a study guide and reports on departmental progress: <www.homeoffice.gov.uk/hract>. See D. Feldman, 'Whitehall, Westminster and Human Rights', *Public Policy and Management* (July 2001) 19–24.

create a culture of rights and increase public awareness about rights and responsibilities inherent in the Convention. Non-governmental-organisations including Charter 88, Human Rights Incorporation Project at King's College, Justice, Institute for Public Policy Research, 1990 Trust and Liberty were members of the taskforce.[78] Among its first tasks was the drafting of core guidance on the HRA for public authorities, guidance for departments and the submission of departmental reports identifying legislation and practice that might be susceptible to challenge under the HRA.

An interesting and important practical point is that in relation to a claim under the HRA that a public authority has acted unlawfully (see Part VI below), the HRA applies to all pending appeals as of the date of entry into effect of its main provisions.[79] This was done knowingly. The Government did not want two different results in two appeals heard together simply because of timing differences. The effect was that if an appeal was brought after the substance of the HRA came into force, the appellant could rely on the human rights point even though they could not do so at the earlier stage.[80] This had two consequences. First, it created an interest, both in parties and in terms of justice, in delaying cases so that an appeal was not heard until after 2 October 2000. In many cases the courts responded to this by simply assuming that the HRA was in force for the purposes of their decisions.[81] In *R v Lambert Ali and Jordan*[82] the CA accepted that, for the purposes of Article 6 ECHR, the combined effect of ss. 22(4), 7, and 8 was that the safety of any conviction had to be approached as if the HRA was in force when the judge summed up. Secondly, in cases considered before 2 October 2000 the human rights point was introduced anyway on the basis that it would inevitably be raised on appeal if had not been dealt with. Once the HRA came into force on 2 October 2000, then, by s. 22 (4), if the proceedings were brought by or at the instigation of a public authority then an individual could rely on the Convention rights 'whenever the act in question took place'.[83] However, if an individual brought the proceedings, he or she could not rely on the Convention rights in relation to an act taking place before HRA came into force.

78. There was also a liaison group including representatives of the Bar Council, Law Society, the Scottish, Welsh and Northern Ireland Executives, and the Northern Ireland Human Rights Commission.

79. HRA, ss. 7 (1)(b) and 7(6).

80. See *Shanshal v Al-Kishtaini*, CA, *The Times*, 8 Mar. 2001; K. Kerrigan, 'Unlocking the Human Rights Floodgates?' [2000] Crim.L.R. 71.

81. See e.g. *R v Lambert, Ali and Jordan* [2000] UKHRR 864 (CA assumed that the HRA was in force because it could have delayed judgment until after its entry into force).

82. [2000] UKHRR 864.

83. In *Kebilene*, n. 1 above, the House of Lords rejected the view that s. 22(4) read with s. 7(1)(b) only extended to the trial, 832, Lord Steyn. *In R (Ben-Abdulaziz) v Haringey Borough Council and Another*, *The Times*, 19 June 2001, the Court of Appeal held that proceedings for judicial review were not brought 'by or at the instigation of a public authority', namely the Crown, for the purposes of s. 22(4). In *R v Kansal*, *The Times*, 11 June 2001, the House of Lords expressed concern that the HRA could be used to found appeals on the basis that the law had changed and that this undermined the consistent practice of the Court of Appeal.

Section 22(4) was the cornerstone of the argument in *R v Director of Public Prosecutions, ex parte Kebilene and Others, R v Director of Public Prosecutions, ex parte Rechahi*.[84] This was the leading case in the interim period between the passing of the HRA and the entry into force of its substantive provisions. It produced sharply different opinions between a strong Divisional Court[85] and the House of Lords. It also illustrated how arguments based on the HRA were likely to be structured and how they should be dealt with procedurally in relation to Crown Court cases. In *Kebilene*, judicial review was brought to challenge the continuing decision of the Director of Public Prosecutions to consent to prosecutions under the Prevention of Terrorism (Temporary Provisions) Act 1989, s. 16A and 16B. The case was the first prosecution under these provisions in England and Wales. Section 16A created the offence of possessing items for the purpose of terrorism. It placed a burden on the defendant to prove that the article in his possession was for a non-terrorist reason. The nature of that burden was an open question. The trial judge had ruled that s. 16A reversed the legal burden of proof and was inconsistent with the presumption of innocence in Article 6(2) ECHR. Legal advice to the DPP contradicted this view but the judge affirmed his decision. The DPP indicated his intent to continue with the prosecutions. In the Divisional Court, Lord Bingham CJ stated that, 'If, at the time of the appeal hearing, the central provisions of the HRA had been brought into force, the applicants would be entitled to rely on s. 7(1)(b) and 22(4) of the 1998 Act and the convictions (on the hypothesis of inconsistency between s. 16A and the convention) would in all probability be quashed, at some not inconsiderable cost to the public purse and no obvious advantage to the public weal'.[86] Further, 'If properly construed, a provision of domestic legislation truly infringes the presumption of innocence, then any conviction based on that provision is likely, judged by the convention yardstick, to be unsafe.'[87] The Divisional Court rejected arguments based on legitimate expectation. The decision of the DPP was properly subject to judicial review. In exercising review the court did not usurp the legislative responsibility of Parliament or the independent decision-making responsibility of the DPP. The Divisional Court considered that the statutory provisions were clearly inconsistent with the ECHR, 'on their face, both sections undermine, in a blatant and obvious way, the presumption of innocence'.[88] The Divisional Court held that the DPP had acted unlawfully and granted a declaration to that effect. A unanimous House of Lords allowed the DPP's appeal. Central to the decision of the House was whether judicial review was appropriate. This turned in part on the inter-

84. [1999] 4 All ER 801, DC and HL.
85. Lord Bingham, CJ, Laws, LJ, Sullivan, J.
86. Ibid., 812.
87. Ibid., 814. See also *R v Francom*, CA, *The Times*, 24 Oct. 2000, 19 (a judge's directions are designed to achieve the fairness required by Article 6).
88. Ibid., 815, Lord Bingham, CJ. Similarly Laws, LJ, at 826.

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pretation of s. 29 (3) of the Supreme Court Act 1981.[89] For Lord Hobhouse, it was not correct either as a matter of the construction of s. 29(3) or as a matter of principle to use the device of purporting to review the conduct of the Director to obtain the re-litigation in the Divisional Court of an issue in the criminal trial.[90] For Lords Steyn, Slynn, Cooke and Hope, review was not excluded by s. 29(3) but the decision of the DPP was not amenable to judicial review in the absence of dishonesty, *mala fides* or an exceptional circumstance.[91] Their Lordships were concerned that the policy underlying the 1981 Act would be seriously undermined if it could be outflanked by framing the case as a challenge to the prosecutor's decision to enforce the law, rather than a challenge to the decision of the Crown Court judge to apply the law. They considered it important that once the 1998 Act was fully in force, it would not be possible to apply for judicial review on the ground that a decision to prosecute breached a convention right. The only remedy would be in the trial process or on appeal.[92] There was also a more general concern about how the HRA should operate,

> While the passing of the 1998 Act marked a great advance for our criminal justice system it is in my view vitally important that, so far as the courts are concerned, its application in our law should take place in an orderly manner which recognises the desirability of all challenges taking place in the criminal trial or on appeal. The effect of the judgment of the Divisional Court was to open the door too widely to delay in the conduct of criminal proceedings. Such satellite litigation should rarely be permitted in our criminal justice system.[93]

With respect to the issue of the compatibility of the provisions at issue with the presumption of innocence, all of their Lordships considered that, judged in the light of the jurisprudence under the ECHR, the issue was much more arguable than the Divisional Court had considered it to be. Their opinions will be closely considered in future challenges to the compatibility of various kinds of statutory provisions and how they operate in practice with the presumption of innocence. One possibility is that provisions may, under s. 3 HRA (see below), be 'read down' to become evidential burdens rather than persuasive burdens.[94] In *Kebilene* itself, when the case returned to trial, the judge construed s. 16A so as to be compatible with Article 6(2) by requiring the prosecution to discharge the ultimate burden of proof to the requisite criminal standard.[95]

89. 'In relation to the jurisdiction of the Crown court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make orders of mandamus, prohibition or certiorari as the High Court possesses in relation to the jurisdiction of an inferior court.'

90. *Kebilene*, n. 1 above, 856.

91. Ibid., 827, 833–6, 840.

92. Ibid. 834, Lord Steyn. See s. 9 HRA on proceedings in respect of judicial acts.

93. Ibid. 835–6, Lord Steyn.

94. More generally see P. Lewis, 'The Human Rights Act 1998: Shifting the Burden' [2000] Crim LR 667. In introducing the Terrorism Bill in December 1999, which retains the substance of the PTA's provisions, the Home Secretary made a statement of compatibility with Convention rights.

95. 14 Feb. 2000 (unreported).

V. THE 'NEW' INTERPRETATIVE OBLIGATION AND DECLARATIONS OF INCOMPATIBILITY

A. The 'new' interpretative obligation

The first method used by the HRA to give 'further effect' to Convention rights relates to statutory interpretation. The 'new' interpretative obligation is imposed in respect of all legislation. Section 3 HRA provides that:

> *So far as it is possible to do so*, primary legislation and subordinate legislation must be *read and given effect* in a way which is *compatible* with the Convention rights.

The first academic commentary on s. 3 described it as a 'deeply mysterious provision'.[96] An alternative view is that it is plain English. The interpretative obligation applies to legislation whenever enacted.[97] It therefore covers the whole range of legislation on criminal law, evidence, property, obligations, families, children, social security legislation, education, and social services. It also would extend to the European Communities Act 1972 (as amended) and other EC legislation.[98] The interpretative obligation applies generally, viz, to all courts and tribunals. There is also a good argument that it applies to any person or institution concerned with the interpretation of legislation on the basis that as a matter of legal doctrine legislation should be uniformly interpreted across the legal system. This is part of the contention that the HRA is of such fundamental significance in terms of legal culture and thinking.[99] It changes the way in which all persons concerned with the interpretation and

96. G. Marshall, 'Interpreting Interpretation in the Human Rights Bill', [1998] PL 167; id., 'Two Kinds of Compatibility: More about section 3 of the Human Rights Act 1998' [1999] PL 377; Lord Lester, 'The Art of the Possible—Interpreting Statutes under the Human Rights Act' [1998] EHRLR 665; id., 'Interpreting Statutes Under the Human Rights Act' [1999] Stat.LR 218; R. A. Edwards, 'Generosity and the Human Rights Act; the Right Interpretation' [1999] PL 401 (should be purposive rather than generous); Lord Irvine, 'Activism and Restraints: Human Rights and the Interpretative Process' [1999] EHRLR 350; Gearty, n. 18 above; Grosz *et al*., n. 3 above, ch. 3; Clayton and Tomlinson, n. 19 above, ch. 4.

97. For sophisticated analysis of the HRA in the context of the doctrine of implied repeal see Gearty, n. 18 above. Section 3 also applies to the HRA itself.

98. 'In the event of an inconsistency, a UK court would be obliged to follow the ECJ rather than the Strasbourg court because of the overriding nature of E.C. law and the express direction in section 3(1) of the European Communities Act 1972 to determine the meaning and effect of the Community provisions and any qualifying national measures in accordance with any relevant decision of the ECJ. Once an inconsistency is revealed, it is not "possible" to comply with the interpretative obligation under section 3 of the 1998 Act in a way which is fully compatible with the Convention rights without derogating from the supremacy of community law which is achieved by section 2 of the 1972 Act. While compatible interpretation act may be possible from a linguistic point of view, the court's duty, derived from the supremacy of Community law, makes it a legal impossibility', Grosz *et al*., n. 3 above, 1.22.

99. 'The Human Rights Act is a statute of peculiar significance which either represents in its enactment, or has the potential to bring about, change in the order of a cultural transformation', M. Hunt, 'The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession', 26 J Law & Soc. (1999) 86 at 87.

application of legislation think and work. Section 3 is a general obligation. There is no need to find ambiguity before s. 3 comes into play.[100]

What does 'so far as it is possible' mean?[101] Literally it means going as far as any interpretation which is possible, rather than impossible. In any context there comes a point at which an interpreter will say that a purported interpretation is not 'possible'. However, the design of the HRA is that legislation is to be interpreted in a particular way. Effectively, it creates a rebuttable presumption in favour of an interpretation consistent with Convention rights. In *Kebilene*, Lord Steyn described s. 3 as a 'strong interpretative obligation'.[102] Strictly speaking, it does not impliedly repeal earlier legislation.[103] However, the practical effect may be the equivalent in as much as the earlier legislation is interpreted as if it was impliedly repealed by a later Act containing inconsistent wording. As the Court of Appeal explained in *Donoghue v Poplar Housing and Regeneration Community Association Limited*, 'It is as though legislation which predates the HRA and conflicts with the Convention has to be treated as being subsequently amended to incorporate the language of section 3'.[104] However, as the obligation in s. 3 also applies to future legislation, such legislation cannot be read as impliedly repealing the HRA. Express wording to that effect would be necessary. In *Donoghue* the CA described s. 3 as 'mandatory' and gave some guidance on its use:

(*a*) unless the legislation would otherwise be in breach of the Convention section 3 can be ignored; (so courts should always first ascertain whether, absent section 3, there would be any breach of the convention),

(*b*) if the court has to rely on section 3 it should limit the extent of the modified meaning to that which is necessary to achieve compatibility;

(*c*) section 3 does not entitle the court to legislate; (its task is still one of interpretation, but interpretation in accordance with the direction contained in section 3),

(*d*) the views of the parties and of the Crown as to whether a constructive interpretation should be adopted cannot modify the task of the court; (if section 3

100. *R v A (Complainant's Sexual History)*, [2001] 3 All ER 1. Cf *Brind*, n. 20 above.

101. See F. Bennion, 'What interpretation is "possible" under section 3(1) of the Human Rights Act 1998?' [2000] Public Law 77 ('Section 3(1) . . . should be taken as requiring the enactment in question to be construed according to the Developmental method, thus bringing it in the wider European system of purposive construction', 91.

102. *Kebilene*, n. 1 above, 831. It is stronger than the interpretative obligation in s. 6 of the New Zealand Bill of Rights 1990, 'whenever an enactment can be given a meaning that is consistent with [the Bill of Rights]. See A. S. Butler, 'Declaration of Incompatibility or interpretation consistent with human rights in New Zealand' [2001] PL 28 discussing *R v Poumako* [2000] NZL. 695 ('the traditional approaches to interpretation cannot be fully jettisoned if parliamentary sovereignty is to be meaningfully preserved'). Professor J. C. Smith observed that 'Parliament will no longer, it seems be taken to have meant what it said' [1999] Crim. LR 996.

103. The system of 'declarations of incompatibility' (see below) reinforces this point on implied repeal. See C. Munro, *Studies in Constitutional Law*, 2nd edn (1999), 169; Clayton and Tomlinson, n. 19 above, 170–1.

104. [2001] EWCA CIV 595, para. 75, [2001] 3 WLR 183.

applies the court is required to adopt the section 3 approach to interpretation),

(*e*) where despite the strong language of section 3, it is not possible to achieve a result which is compatible with the convention, the court is not required to grant a declaration and presumably in exercising its discretion as to whether to grant a declaration or not it will be influenced by the usual considerations which apply to the grant of declarations.

> The most difficult task which courts face is distinguishing between legislation and interpretation. Here practical experience of seeking to apply section 3 will provide the best guide. However, if it is necessary in order to obtain compliance to radically alter the effect of the legislation this will be an indication that more than interpretation is involved.[105]

In *Starrs and Chalmers v Procurator Fiscal, Linlithgow*, Lord Reed doubted whether the relevant primary legislation might have been interpreted in accordance with s. 3 of the HRA but noted that the issue had not been fully argued.[106] In *Kebilene*, Lord Bingham in the Divisional Court took the view that it was 'undesirable to express any opinion, unauthoritatively, on whether, if s. 3 of the 1998 Act were in force, it would be possible to read and give effect to s. 16A and 16B in a way which is compatible with Convention rights'.[107] In *Turkington and Others v Times Newspapers*,[108] Lord Cooke was of the view that if s. 7 and para. 9 of the Schedule in the Defamation Act (Northern Ireland) (1955) were the only relevant rules of law, it might well have been necessary to stretch their language beyond its natural and ordinary ambit. However, as the legislation expressly left intact the common law privilege and this complied with the ECHR, s. 3 HRA was not needed.[109] In *R v Canterbury Crown Court ex parte Regentford Ltd*[110] the company argued that it would be 'possible', even if difficult, to construe the words 'relating to trial on indictment' in s. 29(3) as not applying to a decision of the judge on costs made after the trial was complete. Given that possibility, the court was obliged under s. 3 to follow that interpretation. The Divisional Court stated that under s. 3 HRA, the Convention right in relation to which a legislative provision was incompatible when read in particular way had to be identified. Section 29(3) of the Supreme Court Act 1981 was concerned with judicial review and there was no ECHR right to have decisions reviewed. Therefore, s. 3 HRA did not compel the court to place an interpretation on s. 29(3) contrary to that already placed on it by previous decisions. *R (H) v Mental Health Review Tribunal, North and East London Region and Another*[111] concerned s. 73 of the Mental

105. Ibid., paras. 75–6. The CA would not insert the word 'reasonable' into the relevant statutory provision because the effect would be very wide and would defeat Parliament's intention of providing certainty, ibid., para. 77.
106. [2000] UKHRR 78 .
107. *Kebilene*, n. 1 above, 817. Laws, J took the same view, 827.
108. [2001] UKHRR 184.
109. Ibid., 204.
110. [2001] HRLR 18, *The Times*, 6 Feb. 2001, 22.
111. [2001] HRLR 36, *The Times*, 2 Apr. 2001, 25.

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Health Act 1983 which did not require a tribunal to discharge a patient if it could not be shown that they were suffering from a mental disorder that warranted detention (ie it reversed the burden of proof). The issue was whether this could be given an interpretation which was compatible with the Convention. The Court of Appeal held that it 'was under a duty to strive to interpret statutes in a manner compatible with the Convention but that approach did not permit the court to interpret a requirement that a tribunal had to act if satisfied that a state of affairs did not exist as meaning that it had to act if not satisfied that a state of affairs did exist. The two were patently not the same'.

B. Using Convention jurisprudence and comparative jurisprudence

Under section 2 of the HRA, a court or tribunal which is determining a question which has arisen in connection with a convention right must *take into account* any **C**onvention jurisprudence of Court, the Commission, and the Committee of Ministers.[112]

This obligation to take account of Convention jurisprudence is not limited to cases involving the UK,[113] and is not limited to the Convention rights for the purposes of the HRA.[114] After November 1999, the jurisprudence has only come from the Court because the Commission has gone as a consequence of Protocol 11 and the Committee of Ministers no longer has the function of deciding cases.[115] Taking into account is not the same as being bound and a specific amendment that would have made the jurisprudence binding was rejected.[116] The Lord Chancellor explained that the courts needed 'flexibility and discretion' in 'developing human rights law'. The suggestion was that the Convention jurisprudence constituted a minimum floor of rights protection but it is open for the judges to raise the ceiling of rights protection. Possible areas where they might do so would be where they considered that the Strasbourg jurisprudence was outdated or where higher standards could be set, for example, on the rights of homosexuals or transsexuals.[117] For example, while under ECHR jurisprudence 'family' and 'family life' have not been interpreted beyond partners of the opposite sex, the House of Lords has held in the context

112. See Gearty, n. 53 above, 175–91; Grosz *et al*., n. 3 above, ch. 2.

113. See HL Debs, 18 Nov. 1997, col. 513 (Lord Chancellor).

114. So it would include Articles 1 and 13.

115. The new European Court of Human Rights began in November 1998 but the old Commission continued to work for one more year. See A. R. Mowbray, 'The Composition and Operation of the New European Court of Human Rights' [1999] PL 219.

116. See HL Debs, 19 Jan. 1998, cols. 1268–72. Note that there is no system of binding precedent in Strasbourg jurisprudence. The Court tends to follow its own jurisprudence but there has been the appearance of reversal on a few occasions. Cf s. 3(1) European Communities Act 1972.

117. On transsexuals the European Court has indicated to States that they need to stay abreast of relevant medical and psychological understandings, see *Sheffield and Horsham v UK*, (1999) 27 EHRR 163. See Karsten, n. 278 below; Lord Chancellor, HL Debs, vol. 513, col. 514.

of tenancy protection that two persons of the same sex could establish a 'family'.[118] In *R v Secretary of State for the Home Department ex parte Anderson and Taylor*[119] Sullivan J stated that a decision of a Secretary of State in the fixing of a prison tariff was of a sort which should attract the protection of Article 6 ECHR. However, he was reluctant to depart from a consistent line of European Convention jurisprudence and domestic authority to the contrary.

In *Clancy v Caird*[120] Lord Sutherland stated that the decisions of the European Commission and the Court,

> are not to be treated in the same way as precedents in our own law. Insofar as principles can be extracted from these decisions, those are the principles which will have to be applied. It is, however, clear from ECHR decisions that the decision in any particular case will depend on the particular facts and circumstances of that case considered in the context of the legal system of the state concerned. While the general principles to be applied remain constant, the actual decision in each case may vary, depending upon the way in which the principles are applied to the facts of that particular case.[121]

In *R v Davis, Rowe and Johnson*[122] the Court of Appeal stated that the obligation to 'take into account' seemed to be something less than an obligation 'to adopt' or 'to apply'. However, it also recognised that in applying s. 2 HRA it would be difficult to go behind a decision of the European Court of Human Rights arising out of the same factual background without doing serious injury to the intent and purpose of the HRA. Once there have been decisions under the HRA the normal UK precedent system will apply. In *R v Central Criminal Court ex parte The Guardian, The Observer and Martin Bright*,[123] the Divisional Court accepted that it was bound by the reasoning of the House of Lords and the Court of Appeal regarding the Convention and that it should not re-examine decisions of the European Court of Human Rights. In *R v Governor of Her Majesty's Prison Brockhill ex parte Evans*[124] the House of Lords discussed whether the effect of some decisions under the HRA might make it necessary to depart from the traditional declaratory view of the common law and declare that certain rulings only had prospective effect.[125] On the facts of the case, involving the unlawful detention of an individual, their Lordships did find it necessary to decide the issue.

118. *Fitzpatrick v Sterling Housing Association Ltd* [2000] UKHRR 25, citing, inter alia, *Brashi v Stahl Associates Co* (1989) 544 NYS 2d 784.
119. [2001] HRLR 33.
120. [2000] UKHRR 509.
121. Ibid., 513.
122. [2000] UKHRR 683.
123. 21 July 2000.
124. [2000] UKHRR 836.
125. The ECJ has such a doctrine. See also the discussion in *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349.

In *Kebilene*, Lord Hope suggested that the HRA would be given the generous and purposive construction appropriate to constitutional and human rights provisions.[126] In *R v Lambert, Ali and Jordan*[127] Lord Woolf CJ stated that in taking account of the ECHR jurisprudence it was necessary to have in mind the nature of the Convention as an instrument for the protection of fundamental rights. He cited with approval the comments of Lord Wilberforce on interpreting the provisions of a written constitution in *Minister of Home Affairs and Another v Collins, Macdonald, Fischer and Another*,[128]

> It involves giving a broad and purposive approach not a rigid approach to the language of the Convention, an approach which will make the Convention a valuable protection of the fundamental rights of individual members of the public as well as society as a whole.[129]

The likelihood that New Zealand and Canadian jurisprudence on human rights would regularly be considered in the developing jurisprudence under the HRA soon proved correct. The overall effect of the HRA has been a significant increase in the use of comparative jurisprudence, with Canadian materials having the strongest influence.[130] It will be interesting to observe how US jurisprudence is dealt with and whether it is effectively treated as less persuasive than, for example, New Zealand or Canadian jurisprudence. In *The Queen on the Application of Pelling v Bow County Court*[131] the Divisional Court stated that the citation of a particular US authority and the importance placed on it

> only serve to underline the very great caution that must be exercised before cases decided under different human rights provisions from those that govern us are claimed to illuminate questions in our own law. The provisions and assumptions and jurisprudence of the First and Fourteenth Amendments to the United States' constitution . . . are not the same, indeed are in some respects very different from, the requirements and jurisprudence of Art 10 of the European Convention.[132]

In the first year of cases reported in the United Kingdom Human Rights Reports, the non-UK material considered was as follows: United Nations' Basic Principles on the Independence of the Judiciary (1985), United Nations Charter (1945), International Covenant on Civil and Political Rights (1966),

126. *Kebilene*, ibid., 838–9, citing *A-G of Hong Kong v Lee Kwong-Kut* [1993] AC 951, *Minister of Home Affairs v Fisher* [1980] AC 319; *A-G of The Gambia v Momodou Jobe* [1984] AC 689.

127. [2000] UKHRR 864.

128. [1980] AC 319.

129. [2000] UKHRR 864 at 869.

130. See, eg, *Starrs v Procurator Fiscal, Linlithgow* [2000] UKHRR 78 (four Canadian judgments); *Clancy v Caird* [2000] UKHRR 509 (extensive discussion of Canadian decisions).

131. [2001] UKHRR 165.

132. Ibid., 179. The US case was *Richmond Newspapers Inc v Virginia* (1980) 448 US 555. A similar note of caution was sounded by Brooke LJ in *Douglas and Zeta-Jones v Hello! Ltd*, n. 209 below, para. 76, 'This case vividly illustrates the rule that the courts in this country should be very cautious, now that the Human Rights Act is in force, when seeking to derive assistance from judgments in other jurisdictions founded on some different rights-based charter.'

US Restatement of the Law of Torts (1981), UN Convention Relating to the Status of Refugees (1951) and the Protocol (1967), Universal Declaration on the Independence of Justice (1983), British Columbia Motor Vehicle Act (1979), Canadian Charter of Rights and Freedoms (1982), Canadian Combined Investigations Act (1970), Canadian Constitution Act (1867), Canadian Federal Criminal Code, Canadian Human Rights Act (1960), Quebec Charter of Human Rights and Freedoms, Territorial Court Act (Canadian Northwest Territories), Netherlands Code of Criminal Procedure, New Zealand Bill of Rights (1990), Constitution of the Republic of South Africa, American Convention on Human Rights, New York City Rent and Eviction Regulations, and the US Bill of Rights. This has been a healthy development and a partial reversal of the historical reliance on UK jurisprudence in Commonwealth jurisdictions.[133] Academic literature is frequently cited in HRA cases.[134] This is consistent with the more general trend in recent years to cite such material.

C. The interpretative obligation in s. 3 and 'Declarations of Incompatibility' in s. 4

The HRA does not give the courts the power to strike down primary legislation. However, in s. 4 it created a new power for the some courts to make a 'Declaration of Incompatibility' with convention rights.[135] They can only be made by the House of Lords, the Judicial Committee of the Privy Council, the Courts-Martial Appeal Court, the High Court of Justiciary (sitting otherwise than as a trial court or a court of session), the High Court, and the Court of Appeal. The courts which deal with the vast majority of cases, viz, Magistrates Courts, Crown Courts and County Courts, cannot make them. This limitation was deliberate. A Declaration of Incompatibility is a powerful weapon in political and moral terms. It can be made in respect of provisions of primary legislation (including Orders in Council made under the Royal Prerogative).[136] It can also be made in respect of subordinate legislation

133. Cf the broader jurisprudential linking of the Human Rights part of the South African Constitution, see D. Van Wyk, J. Dugard, B. De Villiers, and D. Davis, *Rights and Constitutionalism—The New South African Legal Order* (1996). Cf also B. Markesinis (ed.) *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century* (1994).

134. Note, however, *R v Havering Magistrates Court ex parte DPP*, [2001] HRLR 23 in which Poole J referred to a clear and proper distinction between citations from case law and statute on the one hand and from academic commentary on the other.

135. Grosz *et al*., n. 3 above, paras. 3.43–3.51. The New Zealand Bill of Rights Act does not contain such a power but one was asserted by Thomas J in *R v Poumako* [2000] NZLR 695.

136. For details see HRA, s. 21(1) and for critical analysis see P. Billings and B. Pontin, 'Prerogative Powers and the Human Rights Act' [2001] PL 21 (noting the 'profoundly arbitrary nature of the application of the Act to some prerogative powers, but not others'); D. B. Squires, 'Judicial Review and the Prerogative after the Human Rights Act', 116 LQR [2000] 572. An amendment that would have allowed courts to make a declaration of incompatibility where there was an absence of legislation was rejected by the government, See HL Debs, 24 Nov. 1997, cols. 15–16.

(which includes Acts of the Scottish Parliament, the Northern Ireland Parliament and Assembly),[137] if (disregarding any possibility of revocation) the primary legislation prevents the removal of the incompatibility.[138] The relevant courts 'may' make a Declaration of Incompatibility if it is satisfied that the provision is incompatible with a convention right. A Declaration of Incompatibility is discretionary but it would presumably require the most exceptional of circumstances for it not to be granted.[139] Where a court is considering making a Declaration of Incompatibility, the Crown has a right to be joined.[140]

As of 2 April 2001 there had been three declarations of incompatibility. The first was in *R v Secretary of State for Environment, Transport and the Regions ex parte Holding & Barnes plc and Others*[141] where the Divisional Court pronounced a Declaration of Incompatibility in respect of procedure requiring the Secretary of State to make decisions following referrals of planning applications or following inquiries by planning inspectors on appeals from planning permission refusals. The legislation included planning decisions under Country Planning Act 1990, s. 1 of Transport & Works Act 1992 (proposed railway order), Highways Act 1980 (proposed highway order) and Acquisition of Land Act 1981 (proposed compulsory purchase orders). The Divisional Court held that the Secretary of State was not an impartial and independent tribunal; further, that review by the High Court did not render the process compliant with Article 6, as their view was limited to legality and not the merits, and the inspector did not make the decision. As the legality of the procedure was provided by primary legislation, it remained lawful, despite the incompatibility with Article 6(1), by virtue of the exception in s. 6(2) of the HRA 1998. The House of Lords allowed the appeal by the Secretary of State.[142] The provisions were not incompatible because the decisions were subject to judicial review which ensured the compatibility of the overall procedure.

The second declaration of incompatibility was in *R (H) v Mental Health Review Tribunal, North and East London Region and Another*.[143] The Court

137. Ibid.

138. HRA, s. 4 (3)(4). See 'The Impact of the Human Rights Act upon subordinate legislation promulgated before October 2, 2000' [2000] PL 358–67; D. Squires, 'Challenging Subordinate Legislation under the Human Rights Act' (2000) EHRLR 116.

139. See HL Debs, 18 Nov. 1997, col. 546 (Lord Chancellor).

140. HRA, s. 5. See The Criminal Appeal (Amendment) Rules 2000, SI 2000/2036, The Civil Procedure (Amendment No.4) Rules 2000, SI 2000/2092, Family Proceedings (Amendment) Rules 2000, SI 2000/2267, rule 10. *R v A* [2001] All ER (D) 215 (Home Secretary given leave to be joined as a party in an interlocutory appeal), see n. 146 below. In *Donoghue v Poplar Housing and Regeneration Community Association Limited* [2001] EWCA CIV 595, [2001] 3 WLR 183, the CA suggested that (i) the formal notice should always be given by the court with jurisdiction to make the declaration, (ii) a party should give as much informal notice to the Crown as possible, (iii) notices to the Crown should be given to a person named in the list published under s. 17 of the Crown Proceedings Act 1947.

141. UKHRR [2001] 270 (QBD).

142. [2001] 3 All ER 229.

143. [2001] HRCR 36.

of Appeal stated that in as much as ss. 72 and 73 of the Mental Health Act 1983 did not require a tribunal to discharge a patient if it could not be shown that they were suffering from a mental disorder that warranted detention, they were incompatible with Article 5 ECHR.

The third declaration was in *Wilson v County Trust Ltd (No.2)*.[144] The Court of Appeal held that the inflexible prohibition, imposed by s. 127(3) of the Consumer Credit Act 1974, against the making of an enforcement order in a case where a loan agreement signed by a debtor did not include the prescribed terms, infringed Article 6 and Article 1 of Protocol 1. It was not possible to read and give effect to the 1974 Act in a way that was compatible with the ECHR.

Incompatibility has been argued in a number of other cases. In *Anderson, Doherty and Reid v The Scottish Ministers and the Advocate General for Scotland*[145] it was submitted that aspects of the Mental Health (Scotland) Act 1999 were incompatible with the ECHR. The challenge failed. In *R v Y (rape)* (15 January 2001) the Court of Appeal expressed concern about the practical operation of section 41(3)(b) of the 1999 Youth Justice and Criminal Evidence Act on cross-examination of a complainant or the giving of evidence by a defendant charged with rape. The section protects complainants by limiting the possibility of questioning about their sexual history. In *R v A (Complainant's Sexual History)* the House of Lords dismissed the appeal by the Director of Public Prosecutions but did not make a declaration of incompatibility.[146] Section 41 was to be construed where necessary by applying s. 3 HRA and giving proper regard to the protection of the complainant. The trial judge had a power to allow the evidence to be given if and to the extent that its exclusion would result in an unfair trial for the defendant. In *Donoghue v Poplar Housing and Regeneration Community Association Limited*[147] it was argued that s. 21(4) of the Housing Act 1988 violated Articles 6 and 8 ECHR. The CA found no violation of those Articles, but it is interesting to note that the relevant government department indicated to the court that if it had found a violation it would have preferred the court not to interpret s. 21(4) constructively but instead to grant a declaration of incompatibility. Presumably this was because its preference was for clear legislative change. As noted above, the CA made it clear that the views of the parties on this issue did not modify the task of the court.[148]

144. [2001] 3 All ER 229.

145. [2000] UKHRR 439.

146. *T*[2001] 3 All ER 1. See also *In Re W and B (Children: Care Plan, In Re W (Child: Care Plan), The Times*, 7 June 2001, CA (no fundamental incompatibility between the Children Act 1989 and HRA but there needed to be adjustments and innovations in the construction and application of the Children Act in relation to care plans).

147. [2001] EWCA CIV 595, [2001] 3 WLR 183.

148. See text to n. 105 above.

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D. Effects of a declaration of incompatibility

A Declaration of Incompatibility 'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given'.[149] The intention was to avoid any of the kind of confusion that arose for example in respect of the legal validity of Sunday Trading laws while they were being challenged as contrary to EC law. The HRA also makes it clear that a Declaration of Incompatibility 'is not binding on the parties to the proceedings in which it is made'.[150] The intention would seem to be clear but it obviously creates an acute problem, for example, in the field of criminal law and in related areas such as detention under immigration powers. In *Kebilene* the Divisional Court was clear that a Declaration of Incompatibility on the legislation at issue there would probably have rendered the conviction 'unsafe' for appeal purposes.[151] It is hard to reconcile this with the Declaration not being 'binding' on the parties.[152]

Remedying violations which result from the operation of primary legislation, even where there is government support and Parliamentary will, might normally take up to two years. For this reason, the HRA introduces another constitutional innovation in the form of a 'fast-track' Parliamentary procedure. This can allow for remedial legislation in a short space of time. A Declaration of Incompatibility triggers the possible operation of these remedial powers in s. 10. This enables a Minister to respond to a Declaration, or a finding of the European Court of Human Rights against the UK,[153] by making an order to amend legislation so as to remove the incompatibility.[154] The section requires that the Minister considers that there are 'compelling reasons' for proceeding under it.[155] Schedule 2 to the HRA contains detailed provisions on remedial orders[156] and includes the power for the order to apply retrospectively.[157]

149. HRA, s. 4 (6)(a).

150. HRA, s. 4 (6)(b).

151. *Kebilene*, n. 1 above, 815, Lord Bingham, CJ.

152. It is also easy to imagine some family cases in which it would be difficult for the court not to seek to affect the positions of the parties.

153. This aspect of the legislation received virtually no recognition or comment. It reflects the practice of the UK to comply with judgments of the European Court but it is a very important institutionalisation of it. See Recommendation R (2000) 2 (19 Jan. 2000) of the Committee of Ministers of the Council of Europe on 'Re-examination or re-opening of certain cases at domestic level following judgments of the European Court of Human Rights, <http://www.coe.fr/cm/ta/rec/2000/2000r2.htm>.

154. Section 10 cannot be used in relation to a Measure of the Church Assembly or of the General Synod of the Church of England, s. 10(6).

155. The normal course will be to pass primary legislation through the normal Parliamentary processes.

156. There is a standard procedure and one for when matters are urgent, Schedule 2, para. 2(a)(b).

157. Schedule 2, para. (1)(1)(b). 'no person is to be guilty of an offence solely as a result of the retrospective effect of a remedial order', ibid., para.1(4). On the implications for Parliamentary Sovereignty see Feldman, n. 293 below.

As we have noted above, magistrates courts, crown courts, county courts, and all tribunals do not have the power to make Declarations of Incompatibility. How then will they deal with incompatibility arguments? They may simply refuse to hear argument to that end. Alternatively, their not having that power may make them strain to avoid any necessity for it by use of the interpretative obligation in s. 3. It certainly appeared to be the intention of the government that the s. 3 obligation would ensure compatibility in 99 per cent of the cases.[158] It would also be consistent with the 'declaration of compatibility' with the ECHR that will normally have been made by a Minister under s.19 (see Part III above). If such a statement was made then a court or tribunal should confidently be able to say that there must be a way of reading the legislation compatibly with the Convention rights. Conversely, if the Minister stated that he or she could not make such a statement, but wanted to pass legislation anyway, there will be a strong suggestion, if not a presumption of incompatibility.[159] That only certain courts may make a Declaration of Incompatibility may influence decisions on leave to appeal. It may also affect the method of appeal, for example, going from the Magistrates Court to the High Court by case-stated rather than to the Crown Court. This will give rise to some difficult strategic choices for legal advisers.

A Declaration of Incompatibility will put social, political, and legal pressure on the government to introduce remedial legislation. It will be hard for the relevant Minister to resist. If the government does resist,[160] and it is clear that it can do so, the applicant could then use the Strasbourg system. If they take the same view as UK courts, then the government will be obliged under the Convention to pass remedial legislation. They have always in practice done so. Indeed, as noted above, the HRA provides a fast-track Parliamentary procedure for responding to findings of a breach by the European Court of Human Rights. In the past it may have been more politically convenient for governments to justify remedial legislation as necessary to comply with international obligations, rather than with a judgment of a UK court indicating a need for legislative provision. Hopefully, given the political decision to 'incorporate' and to afford a central role and responsibility to judges, there should be a similar political imperative always to pass remedial legislation in response to a Declaration of Incompatibility. Such Declarations should, in any event, be rare.

The 'political imperative' to pass remedial legislation would clearly be weaker, if a UK court or tribunal has interpreted the Convention rights beyond Strasbourg case law. Again if the government ignored the Declaration of Incompatibility it would be taking a different view than the UK court and it

158. HL Deb., col. 840 (5 Feb. 1998). In *R v A (Complainant's Sexual History)*, [2001] 3 All ER 1, Lord Steyn described a declaration of incompatibility as a measure of last resort..

159. Such a statement might be used under the *Pepper v Hart* rule.

160. A suggested example of where a Government might resist is legislation on abortion. The example tends to be a tendentious one because there is no support in ECHR jurisprudence for a view that UK legislation on abortion is inconsistent with the ECHR.

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can put its arguments in Strasbourg (assuming an application is brought there). It will win in Strasbourg if the UK courts' interpretation goes further than the Convention requires, but lose if it does not.

E. Time-Frame

Putting all of the above elements together, there is a natural time-frame in which they work.

1. A process of pre-legislative scrutiny and a statement of compatibility by the Minister under s. 19.
2. Interpretation of the legislation in accordance with section 3—in the governments view this should work in 99 per cent of the cases.
3. In exceptional cases—1 per cent—a Declaration of Incompatibility by a higher court.
4. Followed by remedial legislation under s. 10.

VI. THE DUTY ON PUBLIC AUTHORITIES AND THOSE EXERCISING PUBLIC FUNCTIONS

The second method used by the HRA to give 'further effect' to Convention rights was the introduction of a duty on public authorities or those exercising public functions.[161] Under section 6:

> It is unlawful for a public authority to act in a way which is incompatible with a convention right

Turning this around, the HRA creates an enforceable duty on 'public authorities'[162] to act[163] in a manner which is compatible with Convention rights.[164] In the parliamentary debates there was repeated reference to the 'core public authorities' such as government departments, Home Office, Lord Chancellor's Department etc, local authorities, social services, police, prison officers, prison service, immigration officers, crown prosecution service, customs and excise, trading standards, Department of Trade and Industry Inspectors, probation service, Criminal Review Commission, British Broadcasting Corporation, Independent Television Commission.[165] The Convention rights bite on such

161. Grosz *et al*., n. 3 above, ch. 4; Clayton and Tomlinson, n. 19 above, ch. 5.

162. See N. Bamforth, 'The Application of the Human Rights Act to Public Authorities and Private Bodies', 58(1) Cambridge LJ (1999), 159.

163. See s. 6(6) on 'act'. See the discussion on failure to act in *Clancy v Caird* [2000] UKHRR 509.

164. The duty does not apply if the authority could not have acted differently because of primary legislation or was giving effect to primary legislation or provisions made under primary legislation which could not be read compatibly with the Convention rights, HRA, s.6(2).

165. See Lord Chancellor, HL Debs, 24 Nov. 1997, cols. 809–11. In *R v Advertising Standards Authority Ltd and Another, ex parte Matthias Rath BV and Another*, [2001] HRLR 22, the ASA did not argue, but would not concede, that it was a public authority.

'public authorities' in relation to all of their activities, that is, there is no public/private split. Thus, their internal structures and disciplines are under examination, as are their codes of practice and administrative guidelines. They will need policies on harassment, race, and sex discrimination that are Convention compliant. For example, the police[166] and government departments[167] have engaged in Convention audits of their legislation, practices and procedures. Very significantly, 'courts and tribunals' are also designated as public authorities and so the s. 6 duty also applies to them.[168]

The s. 6 duty is also extended to other bodies which exercise public functions.[169] Under s. 6 (3)(b) public authority includes 'any person certain of whose functions are of a public nature'.[170] The HRA thus adopts a functional definition. The functional definition of public authority and the public/private distinction reflected the government's desire 'to protect the human rights of individuals against the abuse of power by the state, broadly defined, rather than to protect them against each other' (Lord Chancellor).

Among the examples given of the bodies that it was intended would be covered were the Law Society, Railtrack, private security companies which run prisons or detention centres, water companies, other utility companies and doctors in a general practice who have a mixed National Health Service/ private practice, Jockey Club, churches, Press Complaints Commission, Royal National Lifeboat Institution, National Society for the Prevention of Cruelty to Children.[171] These would be treated as public authorities in relation to their public functions. In those respects they will need to be Convention compliant.[172] The HRA thus has a broader societal effect. It will change organisations and therefore change society itself. However, s. 6 (5) takes a body which

166. Cf. M.Colvin, *Under Surveillance: Covert Policing and Human Rights Standards* (JUSTICE, 1998).

167. See A. Finlay, 'The Human Rights Act: The Lord Chancellor's Department's Preparations for Implementation' [1999] EHRLR 512 (the first in a series of articles on government departments); *Implementation Report* n. 42 above.

168. HRA, s. 6(3)(a), Lord Chancellor, HL Debs, 24 Nov. 1997, cols. 810–11.

169. See D. Oliver, 'The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act' [2000] PL 476 (warning that 'In effect broad interpretations of "public authority" and "public function" would roll forward the frontiers of the state and roll back the frontiers of civil society, not by any means a politically neutral process', 477). However, the functional approach adopted by the HRA should mean that a private body exercising a public function could be subject to the s. 6 duty in one context but still be a victim of a Convention violation in another. Only governmental bodies cannot be a victim of an ECHR violation.

170. This does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament, s. 6 (3) (b). The rationale is the sovereignty of Parliament.

171. See, e.g., HL Debs. vol. 583, col. 812, 24 Nov. 1997 HRACee (HC), vol. 413, col. 407, 17 June 1998. Ewing, n. 17 above, 90, at n. 70, notes that 'judicial review proceedings under Order 53 will not always be available against such bodies'.

172. In response to the question whether 'a body that spends taxpayers' money, or fulfils a statutory function, or has Government appointees on its governing body constitute a public authority for the purposes of the Bill' the response was that 'That will be a matter for the courts, but it would appear likely to be so', HC Debs, 16 Feb. 1998, col.860 (Mr O'Brien).

exercises a public function out of the s. 6 duty 'if the nature of the act is private'.[173] This introduces another public/private divide into the law.[174] As a matter of policy, the Government would not accept any listing of bodies subject to the s. 6 duty.[175] The government accepted that bodies that would be recognised as such by the European Court of Human Rights would be public authorities.[176] It also appeared to accept though that bodies which had been held accountable or could be held accountable under the processes of judicial review would be caught and so that jurisprudence becomes crucial,[177] though not determinative.[178] The jurisprudence on judicial review of public law matters shows that it will sometimes be a difficult line to draw,[179] and it is a line which may change over time to reflect economic and social conditions. Wherever the line is drawn it will inevitably create invidious distinctions. Two individuals may be subjected to identical treatment but while one can claim for a human rights violation, the other can not. Bodies that will not be public authorities would include independent television companies and the press.

In *Donoghue v Poplar Housing and Regeneration Community Association Limited*[180] the Court of Appeal gave some important guidance on interpreting s. 6. Poplar was a housing association and a registered social landlord (RSL). 1.5 million dwellings are owned by RSLs. Poplar sought an order for possession against D, who held an assured shorthold tenancy. This was subject to s. 21(4) of the Housing Act 1988 which strictly limited the court's discretion not to make an order for possession. D argued that an order for possession would violate her rights to respect for private and family life under Article 8 ECHR. The Court of Appeal had to decide if Poplar was a 'public authority' within s. 6. It identified the most important factors. First, while s. 6 required a

173. See *Royal Society for the Prevention of Cruelty to Animals v Attorney-General and Another* [2001] All ER (D) 188 (RSPCA not a public authority and had no public functions. The regulation of membership was a private act within s. 6(5)).

174. See D. Oliver, *Common Values and the Public Private Divide* (1999).

175. HL Debs vol. 583, col.796 (24 Nov. 1997). Compare the list in the Freedom of Information Act 2000.

176. HC Debs. vol. 314, cols. 406, 408, 410 (17 June 1998). Presumably analogies will also be made with EC jurisprudence on what constitutes an emanation of the State, see *Foster v British Gas* [1990] 3 All ER 897; *National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School* [1997] 3 CMLR 630.

177. See *R v Panel on Take-Overs and Mergers, ex parte Datafin Plc* [1987] QB 815; *R v Advertising Standards Authority ex parte Insurance Services plc* [1989] Tr LR 169; *R v Football Association ex parte Football League* [1993] 2 All ER 833; *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 1 WLR 909; *R v Cobham Hall School ex parte S* [1988] ELR 389; *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705. See HC Debs vol 314, cols. 408–10 (17 June 1998).

178. See 'Core Guidance', n.70 above, para. 20.

179. See Fordham, n. 19 above, 314–17. See, for example, the fine line drawn between employment matters in *R v East Berkshire Health Authority, ex parte Walsh* [1985] QB 152 and *R v Prosecution Service, ex parte Hogg* (1994) Admin.L.R. 778; Ewing, n. 59 above, p. 285 (on employees of mixed functions).

180. [2001] EWCA CIV 595, [2001] 3 WLR 183 (Lord Woolf CJ gave the judgment of the court).

generous interpretation of who is a public authority, it was clearly inspired by the approach developed by the courts in identifying the bodies and activities subject to judicial review. The emphasis on public functions reflected the approach adopted in judicial review by the courts and text books since the decision in *R v Panel of Takeovers and Mergers, ex p. Datafin*.[181] Secondly, the local authority, in transferring its housing stock to Poplar, did not transfer its primary public duties to Poplar. Poplar was no more than the means by which it sought to perform those duties. Thirdly, the act of providing accommodation to rent was not, without more, a public function for the purposes of s. 6. Furthermore, that was true irrespective of the section of society for whom the accommodation was provided. Fourthly, the fact that a body was a charity or was conducted not for profit meant that it was likely to be motivated in performing its activities by what it perceived to be the public interest. However, this did not point to the body being a public authority. In addition, even if such a body performed functions that would be considered to be of a public nature if performed by a public body, nevertheless such acts may remain of a private nature for the purpose of ss. 6(3)(b) and 6(5). Fifthly, what could make an act, which would otherwise be private, public, was a feature or a combination of features which imposed a public character or stamp on the act. Statutory authority for what was done could at least help to mark the act as being public. So could the extent of control over the function exercised by another body which was a public authority. The more closely the acts that could be of a private nature were enmeshed in the activities of a public body, the more likely they were to be public. However, the fact that the acts were supervised by a public regulatory body did not necessarily indicate that they were of a public nature. This was analogous to the position in judicial review, where a regulatory body might be deemed public but the activities of the body which is regulated might be categorised private. Sixthly, the closeness of the relationship which existed between the local authority and Poplar. Poplar was created by the authority to take a transfer of local authority housing stock; five of its board members were also members of the local authority; Poplar was subject to the guidance of the local authority as to the manner in which it acted towards the defendant. Seventhly, the defendant, at the time of transfer, was a sitting tenant of Poplar and it was intended that she would be treated no better and no worse than if she remained a tenant of the local authority. While she remained a tenant, Poplar therefore stood in relation to her in very much the position previously occupied by the local authority. Even after identifying this long list of factors the court considered that it was still desirable to step back and look at the situation as a whole. As with the position on applications for judicial review, there was no clear demarcation line which could be drawn between public and private bodies and functions. In a borderline case, such as this, the decision was very much one of fact and degree. Taking into account

181. [1987] QB 815.

all the circumstances, the court concluded that while the activities of housing associations need not involve the performance of public functions, in this case, in providing accommodation for the defendant and then seeking possession, the role of Poplar was so closely assimilated to that of the local authority that it was performing public and not private functions. Poplar therefore was a functional public authority, at least to that extent. The court emphasised that this did not mean that all Poplar's functions were public. It would not even decide that the position would be the same if the defendant were a secure tenant. The activities of housing associations could be ambiguous. For example, their activities in raising private or public finance could be very different from those that were under consideration in the case. The court specifically stated that the raising of finance by Poplar could well be a private function. It is notable that the CA seemed intent on sending out a strong signal that public authority status should not be easily assumed. A close factual focus is necessary.

On the Article 8 ECHR issue, the court found no violation. Section 21(4) was necessary in a democratic society as a procedure for recovering possession of property at the end of a tenancy. On the question of whether the restricted power of the court was legitimate and proportionate this was considered to be an area of policy where the court should defer to the decision of Parliament. Given that the economic and other implications of any policy in this area were far-reaching, the decisions of Parliament on what was in the public interest had to be treated with the greatest deference.

The decision in *Donoghue* was almost immediately distinguished in *R (on the application of Heather) v Leonard Cheshire Foundation*.[182] The applicants sought judicial review of a decision to close a nursing home and relocate the residents to another of the LCF's homes. They also alleged a violation of Article 8 ECHR. The applicants argued that LCF exercised public functions because it received public funding, the home was State regulated, and that, had care not been provided by LCF, it would have been provided by the State which would have been accountable under public law. The court found that State funding and regulation, and the fact that local authorities were permitted to contract out the provision of services to third parties, did not mean that LCF exercised public functions. Nor did it exercise public functions under the HRA.

In *Parochial Church Council of Aston Cantlow and Wilmcote with Bellesley, Warwickshire v Wallbank and Another*[183] the Court of Appeal held that the Church Council was a public authority. It was an authority in the sense that it possessed power which private individuals did not possess to determine how others should act. In particular a notice to repair served on a rector had statutory force. It was public in the sense that it was created and empowered

182. QBD (Admin. Court), 15 June 2001 (unreported).
183. [2001] 3 All ER 393.

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by law, that it formed part of the Church by law established, and that its functions included the enforcement through the courts of a common law liability to maintain its chancels resting upon persons who need not be members of the Church. Even if this general analysis was incorrect the Church Council would for the same reasons be a legal person certain of whose functions, chancel repairs among them, were functions of a public nature.

A. Proceedings

A person who claims that a public authority has acted or proposes to act in a way which is made unlawful by s. 6 (1), may bring proceedings against the authority under the HRA in the appropriate court or tribunal (s. 7 (a)) or rely on the Convention right or rights concerned in any legal proceedings (s. 7 (b)). The Civil Procedure Rules provide that a claim under s. 7 (1)(a) may be brought in any court. The only exception is a claim in respect of a judicial act, which may only be brought in the High Court.[184]

B. The 'victim' requirement

Only a person who claims to be a 'victim' of the unlawful act may make a claim in respect of an unlawful act.[185] HRA, s.7 (3) provides that:

> If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a *victim* of that act.

The 'victim' requirement is one drawn from the ECHR and so that jurisprudence is relevant. Under it, 'victims' includes natural or legal persons, non-governmental organisations or groups of individuals who are directly affected by the unlawful act, or belong to a class of people who are potentially affected by the act in question, or are members of the family of the person directly affected.[186] It seems clear that the effect of s. 7 (3) is that it will not be enough to have satisfied the broader 'sufficient interest' test for judicial review purposes, even where a more liberal approach has developed.[187] An actual victim will be required.[188] In some cases an association may argue that it is

184. See SI 2000/2092. More generally RSC Order 53 is revoked and replaced by Part 54 (Judicial Review).

185. See J. Miles, 'Standing Under the Human Rights Act 1998: Theories of Rights Enforcement & the Nature of Public Law Adjudiation', 59 Camb.L.J (2000) 133.

186. See D. Harris, M. O'Boyle, and C. Warbrick, *Law of the ECHR*, 632–8 (1995).

187. See Fordham, n. 19 above, 436–51; *R v Secretary of State for Foreign Affairs, ex parte World Development Movement* [1995] 1 WLR 386; *R v Sefton Metropolitan Borough Council, ex parte Help the Aged* [1997] 4 All ER 532; *R v Lord Chancellor, ex parte Child Poverty Action Group* [1998] 2 All ER 755.

188. The Lord Chancellor indicated that courts would be able to continue to allow third parties to file amicus briefs in human rights cases, notwithstanding the victim requirement, HL Debs. 27 Nov. 1997, col. 832–3.

also a collection of individual victims.[189] Wherever the s. 7 (3) line is drawn it will mean that on a judicial review application the human rights point cannot be raised. That will appear very artificial in some cases and this may encourage the judiciary to take a broader approach to the victim requirement than that under the ECHR jurisprudence.[190] In *The Queen on the Application of Pelling v Bow County Court*[191] the Divisional Court was doubtful that the applicant, who sought to challenge the limitations on public hearings under the Civil Procedure Rules 1998 as an *actio popularis*, satisfied the victim requirement. However, locus was assumed as the respondent did not challenge the point.

VII. REMEDIES FOR UNLAWFUL ACTS

Under s. 8 (1),

> In relation to any act (or proposed act) of a public authority which a court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

The intention is that whatever remedies are normally at the disposal of the relevant court or tribunal, it should use them.[192] It may need to develop and refine them as courts have historically done. There is a fine line between this and creating new remedies outside of s. 8, which the Lord Chancellor indicated was not the intention.[193] The remedies may include damages but there are some specific limitations.[194] Damages may only be awarded by a court which has power to award damages or compensation in civil proceedings.[195] No award of damages is to be made unless, taking account of all the circumstances of the case including any other relief, remedy or order made (by that or any other court) and the consequences of any decision (by that or any other court) in respect of the unlawful act, the court is satisfied that it is necessary to afford 'just satisfaction' to the victim.[196] In determining whether to award damages or their amount the court must take into account the principles applied by the European Court of Human Rights under Article 41 ECHR.[197] Those

189. *R v Inspectorate of Pollution, ex parte Greenpeace (No.2)* [1994] 4 All ER 329.

190. See Grosz *et al*., n. 3 above, ch. 5. In *Biggin Hill Airport Ltd v Bromley London Borough Council, The Times*, 9 Jan. 2001, the issue of whether a group of residents of Bromley were victims was raised but not decided. Even assuming they were the judge considered that the court was not acting unlawfully in granting the declaration on the interpretation of a lease.

191. [2001] UKHRR 165.

192. See I. Leigh and L. Lustgarten, 'Making Rights Real: The Courts, Remedies, and the Human Rights Act', 58 CLJ 509; D. Feldman, 'Remedies for Violations of Convention Rights under the Human Rights Act', [1998] EHRLR 691; Grosz *et al*., n. 3 above, ch. 6; Clayton and Tomlinson, n. 19 above, chs 21–2.

193. See text to n. 56 above.

194. See M. Amos, 'Damages for Breach of the Human Rights Act 1998' [1999] EHRLR 179; Law Commission, No. 266, *Damages under the Human Rights Act* (2000).

195. HRA, s. 8 (2).

196. HRA, s. 8 (3).

197. See *R v Secretary of State for the Home Department ex parte Chahal (Karamjit Singh)* [2000] UKHRR 215 (assessing the relevant factors in EUCT's discretion to award damages).

principles are sparse in terms of substance. They suggest relatively few awards of damages, as often the mere finding of breach will be regarded as being just satisfaction. Even where compensation is awarded it is often small.[198] One specific exception from the general remedies provision is that damages may not be awarded in respect of judicial acts done in good faith, except to the extent required by Article 5(5) of the Convention (unlawful detention). The remedy for the former will be appeal or review as appropriate (s. 9 HRA). Finally, proceedings against a public authority under s. 7 (1)(b) are subject to a limitation period of one year or such longer period as the court or tribunal considers equitable.[199] Even this relatively short period is subject to any rule imposing a stricter time limit in relation to the procedure in question.

A. The two main techniques working together

Where courts and tribunals have to exercise discretion as between a range of interpretations they are subject to the s. 6 duty because of their designation as public authorities. The HRA thus imposes a duty on the courts and tribunals 'of acting compatibly with the Convention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals'.[200] Strictly speaking this could result in a magistrates court or a county court deciding not to follow an earlier House of Lords decision because it is inconsistent with the Convention.[201]

VIII. FREEDOM OF EXPRESSION AND FREEDOM OF RELIGION

A. Freedom of Expression

Section 12 contains a special provision on freedom of expression, which is only explicable by reference to the Parliamentary history of the Act. Section 12 partly resulted from press concerns that the Convention right to respect for private and family life under Article 8 ECHR alone, or in conjunction with the s. 3 HRA interpretative obligation being applied to the common law, would lead to the judiciary developing a 'right to privacy', thereby restricting freedom of the press.[202] The Press Complaints Commission was particularly

198. For a critical view see A. R. Mowbray, 'The European Court of Human Rights' Approach to Just Satisfaction' [1997] PL 647. See also R. Carnwath, 'E.C.H.R. Remedies from a Common Law Perspective', 49 ICLQ (2000) 517

199. HRA, s. 7 (5)(b).

200. HL Debs, 24 Nov. 1997, col 783 (Lord Chancellor). See also Ewing, n. 59 above.

201. See White Paper, n. 14 above, para. 2.8. See *R v Central Criminal Court ex parte The Guardian, The Observer and Martin Bright* [2000] UKHRR 796.

202. See generally 'The Human Rights Bill [HL], Bill 119 of 1997–8: Privacy and the Press', House of Commons Research Paper 98/25 (13 Feb. 1998); I. Leigh, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons From the Commonwealth', 58 ICLQ (1999) 57; R. Mullender, 'Privacy, Paedophilia and the European Convention on Human Rights: a Deontological Approach' [1998] PL 384; Sir Jonathon Mance, 'Privacy and Article 8 of the European Convention on Human Rights' (1999); Markesinis, n. 219 below.

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concerned at being held accountable under s. 6 for failing to ensure respect for Article 8 ECHR. Section 12 was devised in consultation with the PCC.

Section 12 applies 'if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression'.[203] It then builds in a series of procedural protections before remedies can be granted. These will make the courts particularly cautious about granting injunctions. Courts are also directed to have 'particular regard to the importance of the Convention right to freedom of expression' and, in relation to journalistic, literary, or artistic material, to have regard to the extent to which the material has or is about to become available to the public, or it is or would be in the 'public interest' for the material to be published and any relevant 'privacy code'.[204] Under s. 12(3) 'No such relief is to be granted as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed'. It is difficult to predict the substantive as distinct from the procedural impact of s. 12. ECHR jurisprudence gives particular weight to the public interest in freedom of expression, the place of the media in a democratic society and the importance of political discourse. Section 12 might become significant in a particular case if the balance between expression and privacy that emerged from applying s. 12 differed from an application of Convention jurisprudence on where the balance should be struck.[205] From the perspective of ECHR jurisprudence the national balance would come within its concept of the margin of appreciation.[206] In *Imutran Ltd v Uncaged, Campaigns Ltd v Another*[207] the Vice-Chancellor held that s. 12(3) introduced a 'marginally higher threshold test' for the grant of an order than that previously applied by the court under the *American Cyanamid Co v Ethicon Ltd*[208] test of 'a real prospect of success'. However, the difference between the two was so small there would not be many cases that satisfied the *American Cyanamid* but would fall under s. 12(3).

The operation of s. 12 was discussed in *Douglas and Zeta-Jones v Hello! Ltd*.[209] The Court of Appeal rejected any automatic primacy for freedom of expression. Sedley LJ explained that

203. 'Relief' includes any remedy or order (other than in criminal proceedings), HRA, s. 12(4). Criminal proceedings were excluded because it was considered that it would make trials very complicated.

204. Among the bodies which have privacy codes are the British Broadcasting Corporation, the Broadcasting Standards Commission, the Independent Television Commission, and the Press Complaints Commission.

205. However, an amendment that would have given precedence to Article 10 over Article 8 rights was rejected. See J. Griffiths and T. Lewis, 'The Human Rights Act s.12—Press Freedom over Privacy?', 10(2) Ent.L.R. (1999) 36.

206. See Part IX below.

207. [2001] 2 All ER 385.

208. [1975] AC 396.

209. [2001] UKHRR 270.

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> s. 12 of the Human Rights Act requires the court to have regard to Article 10 (as, in its absence, would s. 6). This, however, cannot, consistently with s. 3 and Article 17 [on abuse of rights], give the Article 10(1) right of free expression a presumptive priority over other rights. What it does is require the court to consider Article 10(2) along with 10(1), and by doing so bring into the frame the conflicting right to respect for privacy. This right, contained in Article 8 and reflected in English law, is in turn qualified in both contexts by the right of others to free expression. The outcome, which self-evidently has to be the same under both articles, is determined principally by considerations of proportionality.[210]

The impact on outcomes that approaching cases on the basis of Article 10 ECHR can have was illustrated in *Richmond Upon Thames London Borough Council v H and Others*.[211] This was concerned with whether restrictions on the publication of material concerning the alleged policy of a local authority in respect of trans-racial fostering arrangements were justified in a context where the interests of the children were not the paramount consideration. Bracewell J. held that in such a context there was no balancing exercise because the HRA weighted the balance in favour of expression. Those who sought to rely on one of the limitations in Article 10(2) could not do so by mere assertion. Proper evidence was required. Another striking illustration of the force of Article 10 ECHR was provided in *R v Secretary of State for Health v Wagstaff*[212] where the decision of the Secretary of State to hold an inquiry in private was irrational. The justifications offered for the curtailment of the freedoms in Article 10 ECHR were not persuasive and the court was not willing to treat the decision as 'policy-laden'. In *Venables and Another v News Group Newspapers and Others*[213] the claimants, then aged 11, had been convicted of a shocking murder of a child. The claimants were approaching the age of 18 when injunctions restricting the information that could be published on them would end. Applying English domestic law and the right to life in Article 2 ECHR, the Court held that it was necessary, in the exceptional circumstances of the case, to place the right to confidence above the right of the media to publish information about the claimants and to grant injunctions restraining the media from publication of information about the claimants' present whereabouts and appearance. Some limits to the use of Article 10 were expressed in *Ashdown v Telegraph Group Ltd*.[214] The court held that Article 10 could not be relied on to create defences to alleged infringement over and above those in the Copyright, Designs and Patents Act 1988. No decisions of the European Court of Human Rights suggested otherwise.

210. Ibid., para. 137.

211. [2001] FCR 541. See also *BBC, Petitioners (No.2), The Times*, 13 June 2000 (Article 10 of ECHR not breached by restricted television transmission of the Lockerbie trial).

212. [2000] UKHRR 875. See also *Ashworth Security Hospital v MGN Ltd*, *The Times*, 10 Jan. 2001. (order to newspaper to disclose identity of wrongdoers did not violate article 10).

213. [2001] 1 All ER 908.

214. Ibid., 6 Feb. 2001.

B. Freedom of Religion

The Parliamentary history also explains the appearance of s. 13 on freedom of religion.[215] Religious authorities and churches expressed fears that they would be challenged over the employment of suitable persons within religious organisations such as schools (in terms of personal belief),[216] requirements for religious marriages (for divorced persons or gay persons),[217] appointment to church positions (women priests or bishops), and in relation to the authority and tenets of ecclesiastical courts. Many of these fears are unfounded and unjustified in terms of ECHR jurisprudence. It was disappointing that religious authorities and churches feared a basic minimum of human rights. In terms of the HRA, religious authorities and churches would not normally be considered to be public authorities. Many of their functions are private, viz, admission to membership and priesthood, worship, running of the church. However, they do sometimes exercise public functions, for example, hospice care, education, and schooling. They wanted an exemption from the s. 6 duty to act compatibly with the Convention rights. The government rejected such an amendment but it did put in s. 13. Again, it is difficult to predict its likely impact. ECHR jurisprudence treats freedom of religion as a fundamental right. It might justify the national court or tribunal taking the view that in a particular case Article 9 outweighs, for example, article 8, 12 or 14, assuming it can do this consistently with ECHR jurisprudence.[218]

IX. HORIZONTAL EFFECT AND THE MARGIN OF APPRECIATION

A. Horizontal Effect

Another issue, which has attracted much attention, is whether the HRA will create any horizontal effects, that is as between private individuals or non-public authorities.[219] The ECHR is principally about the relationship between the individual and the State. The government's intention was that the HRA

215. See Ewing, n. 17 above, 93–5; P. Cumper, 'The Protection of Religious Rights under section 13 of the Human Right Act 1998' [2000] PL 254.

216. Another response of the government was to amend the then School Standards and Framework Bill so as to explicitly cover such appointments.

217. Cf 'Same-sex Marriage and Freedom From Discrimination in New Zealand', [1998] PL 396 on *Quilter v Attorney-General* (no prima facie discrimination).

218. An amendment that would have given absolute priority to Article 9 was rejected. For an exceptional case where a Church Council was considered to be a public authority see n. 183 above.

219. M. Hunt, 'The 'Horizontal Effect' of the Human Rights Act, [1998] PL 423 (Cited with appoval by Sedley LJ in *Douglas and Zeta-Jones v Hello! Ltd*, n. 209 above); H. W. R. Wade, 'Human Rights and the Judiciary', [1998] EHRLR 520; id., 'Horizons of Horizontality', 116 LQR (2000) 217; G. Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?', 62 MLR (1999) 824; N. Bamforth, 'The True Horizontal Effect of the Human Rights Act 1998', PL [2001] 34; B. Markesinis, 'Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons From Germany', 115 LQR (1999) 47. More generally see A. Clapham, *Human Rights in the Private Sphere* (1996).

should operate in the same way. The Lord Chancellor stated that, 'we have not provided for the Convention rights to be directly justiciable in actions between private individuals'.[220] Lord Justice Buxton has argued that the HRA follows the scheme of the ECHR and thus Convention rights are only assertable against public authorities.[221] However, in some circumstances the Convention can cover private relationships in the sense that the State can have 'positive obligations' to ensure that the legal system regulates those relationship in a way that the rights of individuals are respected.[222] Where it does so the court as a public authority may have to give horizontal effect to the Convention rights to ensure compliance with such a positive obligation. In *Douglas and Zeta-Jones v Hello! Ltd* [223] Brooke LJ commented that 'it might seem strange if the absence of Article 1 from our national statute relieved the judge from taking into account the positive duties identified by the court at Strasbourg when they develop the common law'.[224]

Under the HRA one private individual cannot bring an action against his or her neighbour alleging a breach of the right to privacy. In that sense the HRA does not create a new cause of action. However, an individual could bring proceedings against a local authority which failed, (because 'acts' covers omissions),[225] to exercise its powers so as to protect an individual's rights, for example, if there was evidence that one tenant was seriously harassing another. An individual could complain that a 'court or tribunal' hearing the dispute between two private individuals acted in a way that was incompatible with those rights, because the 'court or tribunal' is a public authority.[226]

A further argument is that the interpretative obligation in s. 3(1) is a general one and is not expressly directed at any particular body or person. It is clearly primarily concerned with the jurisdiction of courts but one can also argue that it is directed at public authorities. The Lord Chancellor appeared to suggest that this was the case:

> Having decided to adopt that interpretative approach [section 3(1)] it is of course helpful to the courts (and other public authorities) for the bill to signal what the position is intended to be where a compatible construction is impossible.[227]

Sections 3 and 6 can work in conjunction. The s. 3 obligation applies to all legislation, so it makes no difference if the particular dispute is between two private individuals (see *Wilson v County Trust*, n. 144 above). In addition, when interpreting and applying any legislation, and in developing the common law, the courts are under the Article 6 duty themselves, because they are a

220. See text to n. 52 above.
221. R. Buxton, 'The Human Rights Act and Private Law', 116 LQR (2000), 48.
222 See *Marckx v Belgium*, (1979) 2 EHRR 330; *X and Y v Netherlands* (1985), 8 EHRR 235.
223. [2001] UKHRR 223.
224. Ibid., para. 91. See also Sedley LJ, ibid., para. 130.
225. HRA, s. 6 (6).
226. HRA, s. 6 (3)(a).
227. HL Debs, 18 Nov. 1997, col 521.

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public authority, and so must not act in a way which is incompatible with a Convention right.[228] If this analysis is correct, then the HRA may achieve a substantial degree of horizontal effect even in the absence of a direct cause of action for a private individual against another private individual.[229] This approach received some judicial support from Sedley LJ in *Douglas and Zeta-Jones v Hello! Ltd*.[230] In *Turkington and Others v Times Newspapers*,[231] in response to the submissions of Lord Lester putting together ss. 3 and 6 HRA, Lord Cooke stated that, 'with the general spirit of Lord Lester's submissions about the Human Rights Act 1998, and his implicit proposition that in the field of communications the Act has 'horizontal' effect, I am in full accord'.[232] If the HRA does have some degree of horizontal effect, this only operates from its entry into force. It does not operate retrospectively. In *Shanshal v Al-Kishtaini* [233] the Court of Appeal stressed that it did not endorse the proposition that the claimant had a right under s. 6 HRA (the duty on the court as a public authority not to act unlawfully) to invoke the ECHR right to property retrospectively in respect of private law issues arising between one citizen and another. According to the court's research there was no decision under the HRA holding that s. 6 could be retrospectively applied by an appellate court to remove a common law defence of illegality raised by one private individual against another in private law proceedings based on a contractual or restitutionary claim, which were tried before the HRA was brought into effect. Academic commentary has also stressed the need for caution in introducing ECHR arguments into private disputes.[234]

A striking example of how the HRA can act on the common law was provided by *Parochial Church Council of Aston Cantlow and Wilmcote with Bellesley, Warwickshire v Wallbank and Another*.[235] The Court of Appeal held that the common law liability of a lay rector to repair the chancel of a church

228. See Lord Chancellor, text to n. 200 above; Lester and Pannick, n. 75 above, 31–2; id., 'The Impact of the Human Rights Act on Private Law: The Knight's Move', 116 LQR (2000) 380; Grosz and Beatson, ibid., 385.

229. 'Whether this is called direct or indirect effect or a new cause of action seems to be a matter of words and to make no intelligible difference', Wade, n. 219 above (2000). Lester and Pannick, 'The Impact of the Human Rights Act on Private Law: The Knight's Move', 116 LQR (2000) 380, disagree and argue that full horizontality based on s. 6 would frustrate the scheme of the HRA.

230. [2001] 2 All ER 289; [2001] EMLR 9, para. 129. See also *Royal Society for the Prevention of Cruelty to Animals v Attorney-General and Another* [2001] All ER (D) 188 (status of a court as a public authority did not infringe upon the question whether one party to the proceedings before it has a convention right to which another party is bound to give effect).

231. [2001] UKHRR 184.

232. Ibid., 202.

233. *The Times*, 8 Mar. 2001. See also *Biggin Hill Airport Ltd v Bromley London Borough Council*, *The Times*, 9 Jan. 2000 (third parties could not be joined to an action on the basis that their right under the ECHR would be infringed when the contract was entered into before HRA came into force).

234. See J. Howell, 'The Human Rights Act 1998: the "Horizontal Effect" on Land Law', in E. Cooke (ed.), *Modern Studies in Property Law* (2001) 149–60.

235. *The Times*, 15 June 2001.

or otherwise to meet the cost of repairs was rendered unenforceable by the HRA. The liability was a form of tax which violated Article 1 of Protocol 1 ECHR because it operated arbitrarily in attaching only to formerly 'glebe land' and arising at any time and for almost any amount. Alternatively the liability discriminated between owners of land which was formerly glebe land and that which was not. That discrimination did not have a reasonable and objective justification. It was not proportionate to levy the tax exclusively upon landowners whose property was once glebe.

B. MARGIN OF APPRECIATION

Another issue which attracted keen attention was whether the UK courts could and would use a 'margin of appreciation' doctrine.[236] The doctrine is a familiar one under the ECHR. The ECHR jurisprudence is detailed and extensive but often not jurisprudentially complex as compared, for example, with the jurisprudence of the ECJ or the US Supreme Court. Sometimes the ECHR has a standard or a rule. Something must be done (or not done). If it is not (or is), then there is a breach. Often though the way the ECHR works is not dissimilar to judicial review. It provides a series of principles or tests against which a set of legal circumstances are assessed. For example, a number of Articles of ECHR have a limitation clause attached. The approach is relatively formulaic:

- Is there an interference with the right?
- Is the limitation 'prescribed by law' or 'in accordance with the law'?: this is assessed by standards of accessibility, foreseeability, justification, relevancy and sufficiency,[237]
- Is the interference based on one of the grounds of limitation set out in the Convention, such as 'public morals'?
- Is the limitation 'necessary in a democratic society'?: this requires a 'pressing social need' and 'proportionality'.[238]

In assessing this necessity there comes into play one of the most fundamental jurisprudential concepts in the Convention, the *Margin of Appreciation*.[239]

236. R. Singh, M. Hunt, and M. Demetriou, 'Is there a Role for the "Margin of Appreciation" in National Law after the Human Rights Act' [1999] EHRLR 15; D. Pannick, 'Principles of Interpretation of Convention Rights under the Human Rights Act and the Discretionary Area of Judgment' [1998] PL 545; H. Fenwick, 'The Right to Protest, the Human Rights Act and the Margin of Appreciation', 62 MLR (1999) 491.

237. A common law rule can satisfy these tests. In *R v Advertising Standards Authority Ltd and Another, ex parte Matthias Rath BV and Another*, [2001] HRLR 22, adjudications published by the ASA under its non-statutory code were 'prescribed by law'.

238. Many cases fall on this hurdle, see *Goodwin v UK* (1996) 22 EHRR 123. See D. Feldman, 'Proportionality and the Human Rights Act 1998', in E. Ellis (ed.) *The Principle of Proportionality in the Laws of Europe* (1999), 117.

239. The origins of the concept lie in the consideration to derogations under Article 15. It does not just apply to Articles with limitation clauses. See *Osman v UK*, 5 BHRC, para. 147 (1998) on access to court; C. A. Gearty, 'Unravelling *Osman*', 64 MLR (2001) 159. In *T.P. and*

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There are critics of the concept's existence and of its use by the ECHR organs.[240] Others regard it as acceptable in principle and an appropriate concept in the subsidiary context in which it is used, but criticise its use in particular cases.[241]

The essence of the doctrine remains that stated by the European Court in *Handyside v UK* (1976),[242]

> By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the . . . 'necessity' of a 'restriction' or 'penalty' . . . it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context. Consequently, Article 10(2) leaves to the contracting states a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force. Nevertheless, Article 10(2) does not give the contracting states an unlimited power of appreciation.

It is the European Court that will ultimately judge. However, it counts heavily if the national courts have considered the ECHR point. Their jurisprudence factors into the margin of appreciation. The margin is different for each of the grounds of limitation, so the margin for 'morals' is wider than that for the protection of the 'authority of judiciary'. The narrower the margin the less should be variation between States. The European Court will look to European legislation and practice to assess the standards. A lot of variation will suggest a wide margin. If one State is way out of line with the rest, this will suggest that they are outside the margin.[243] The scope of the margin can change over time. If the margin of appreciation changes over time and UK courts have to take account of the jurisprudence under the Convention (HRA, s. 2), then their interpretation may change over time.

To return to the question—will the UK courts use the margin of apprecia-

K.M. v UK, ECtHR, Grand Chamber, 10 May 2000: paras. 84–103 (on Article 6) and 104–110 (on Article 13), and *Z v UK* paras. 78–104 (on Article 6) and paras. 105–11 (on Article 13) the Court shifted the emphasis of analysis from Article 6 to Article 13.

240. M. R. Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights', 48 ICLQ (1999), 632; C. Y. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1996); 'Seminar Report on the Margin of Appreciation: Its Legitimacy in Theory and Application in Practice', 19 HRLJ (1998) 1–36; A. McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights', 62 MLR (1999) 671; N. Lavender, 'The Problem of the Margin of Appreciation' [1997] EHRLR 380; Merrills, n. 56 above, 221–8.

241. See Harris *et al*., n. 186 above, 12–15, 290–301; P. Van Dijk and G. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 92–3, 3rd edn (1998).

242. (1976) 1 EHRR 737.

243. This was the situation of the UK legislation on homosexuality in Northern Ireland in *Dudgeon v UK* (1981) 4 EHRR 149. Submissions relying on variations in law and practice of States in the Council of Europe would need to have supporting evidence. In Strasbourg the judges themselves can possess knowledge of variations.

tion doctrine? A first response would suggest 'no'. This is because the doctrine is essentially about the relationship between the national systems and an international supervisory system. When it is simply the national courts and tribunals interpreting the Convention, then there is no relationship in issue.[244] Therefore, it is just not relevant. The UK courts and tribunals may afford a legitimate scope to political and official decisions and defer to some degree to expert opinion but in doing so this is not properly analysed as the 'margin of appreciation'. It is something different. The comments of Lord Hope in *Kebilene* on judicial deference have been widely recited in subsequent cases,

> in the hands of national courts . . . the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality.
>
> In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will refer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.[245]

Similarly, in *R v Lambert, Ali and Jordan*[246] Lord Woolf, in considering a challenge to reverse burdens of proof, stated that,

> It is also important to have in mind that legislation is passed by a democratically elected Parliament and therefore the courts under the Convention are entitled to and should, as a matter of constitutional principle, pay a degree of deference to the view of Parliament as to what is in the interest of the public generally when upholding the rights of the individual under the Convention. The courts are required to balance the competing interests involved.[247]

In *R v Secretary of State for the Home Department ex parte Turgut*[248] Simon Brown LJ described this discretionary area of judgment as 'a decidedly narrow

244. 'This technique is not available to the national court when they are considering convention issues arising within their own countries', *Kebilene*, n.1 above, 844, Lord Hope. See Laws, n. 33 above, 258; Beatson *et al*., n. 2 above 70 (Kentridge) 102 (Duffy), 107 (Lester), Grosz *et al*., n. 3 above, para. 2.05, CO-17.

245. See Lord Hope, ibid., citing Lester and Pannick, n. 75 above, para. 3.21; *Anderson, Doherty and Reid v The Scottish Ministers and the Advocate General for Scotland* [2000] UKHRR 439 (in assessing balance between right of patients and perceived dangers to members of the public the courts should give due deference to the assessment which the democratically elected legislature has made of the policy issues involved); *R v Stafford JJ. Ex parte Imbert* [1999] 2 Cr.App.R. 276 (Buxton LJ); Guidance for Departments, n. 67 above, paras. 84–88; *R v Lambert*, CA, *The Times*, 5 Sept. 2000 (courts should pay a degree of deference to the view of Parliament as to what was in the interest of the public generally while upholding the rights of the individual under the Convention).

246. [2000] UKHRR 864.

247. Ibid., 871. See also *Donoghue v Poplar Housing and Regeneration Community Association Limited*, pp. 927–9 above.

248. [2000] UKHRR 403.

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one'.[249] Other UK decisions have explicitly referred to the margin of appreciation. In *R v Secretary of State for Health ex parte Lally*,[250] Scott Baker J considered restrictions on child visits to patients in high security hospitals who had committed very serious offences as not breaching Article 8 ECHR. He stated that,

> The Convention required a balance to be struck between the rights of children and rights of patients and accordingly the secretary of state enjoyed a wide margin of discretion in determining what measures were appropriate.

In *Montgomery v Her Majesty's Advocate and the Advocate General for Scotland*,[251] Lord Hope stated that Article 6 ECHR was not subject to any words of limitation. It did not require or permit a balance to be struck between the rights it set out and other considerations such as the public interest. This is important as a starting point but its effect is simply to shift the debate to one of whether the standard of fairness in satisfied in the circumstances. Thus, in discussing the obligation of the UK under Article 13 ECHR to provide an effective remedy to secure the right to a fair trial, Lord Hope argued that the different approach taken in Scotland (where responsibility for the protection of the right lay in the first instance with the prosecutor) was 'within the margin of discretion' which was given to domestic legal systems under the ECHR.[252] However, Lord Hoffman was reluctant to accept, without further argument, that the concept of the margin of appreciation should be employed to enable the same provision of the Convention to be given different meanings according to whether it had been incorporated into the law of one part of the UK rather than another.[253] In *The Queen on the Application of Pelling v Bow County Court*[254] the Divisional Court stated that a discretionary judgment in the national court in the way that it applies the precepts of Article 6 was 'sometimes confused with the doctrine of the margin of appreciation, which is of course a doctrine available to the Strasbourg court and not available in those terms to the national authority'.[255] It then referred to the discretionary area of judgment identified by Lord Hope in *Kebilene*.[256]

A second response would suggest 'yes' because the doctrine is a central part of the Convention jurisprudence, which the courts have to take account of under s. 2 HRA. It is hard to see how you can take it out of the jurisprudence.

249. Ibid. 413.
250. *The Times*, 26 Oct. 2000 (QBD).
251. [2001] UKHRR 124 (PC).
252. Ibid. 142.
253. Ibid. 133.
254. Ibid. 165.
255. Ibid. 177.
256. See text to n. 245 above. See C. A. Gearty, 'Democracy and Human Rights in the European Court of Human Rights: A Critical Appraisal', 51 (3) NILQ (2000) 381 (failure distinctly to locate the margin of appreciation in a coherent theory of representative democracy is a missed opportunity', 387).

However, with the International Covenant on Civil and Political Rights (1966), which is essentially the equivalent of the ECHR only at the global level, the implementing body, the Human Rights Committee, makes a point of not using the concept of a 'margin of appreciation'.[257]

Yet a third response would say that you have first to appreciate what the margin of appreciation really means, and if you do so appreciate, then you realise that it is (arguably) a false question anyway. As the ECHR jurisprudence refers to an 'interference' with a right, then the margin of appreciation could be understood to mean that there is a violation but because of the margin of appreciation it is justified or excused (Point Y in Fig. 1). It is submitted that this is wrong. That a situation falls within the margin of appreciation means there is no breach of the Convention (Point Y in Fig. 2). This means that the crucial point is to ensure that the State does not fall below the bottom of the margin (Point X in Fig. 3). Only Fig. 3 is of concern to the national court. It is not concerned with the margin, only the bottom line.[258]

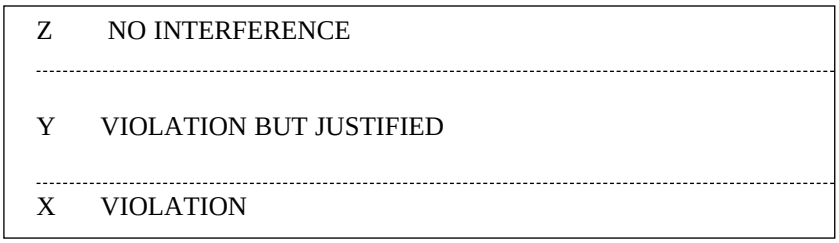

Fig. 1 Margin of Appreciation

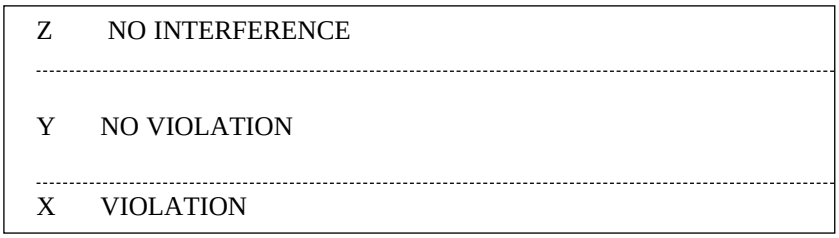

Fig. 2 Margin of Appreciation

257. This may be a matter of semantics. See D. McGoldrick and T. O'Donnell, 'Hate-Speech Laws: Consistency with National and International Human Rights Law', 18 Legal Studies (1998) 453 (considering in part the Human Rights Committee's decision in *Faurisson v France*).

258. Cf Hutchinson, n. 240 above, for two ways of understanding the margin. He accepts though that 'we are only ever interested in the bottom end of the margin of appreciation', 648.

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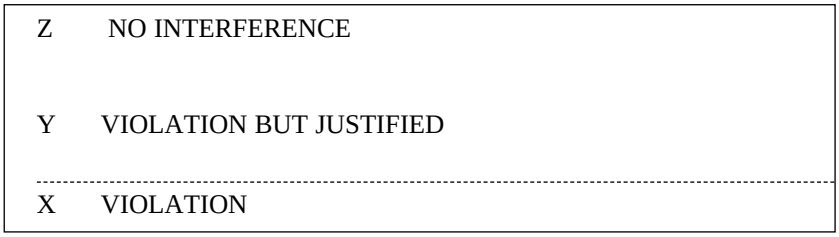

Fig. 3 No Margin of Appreciation

X. APPRAISING THE SIGNIFICANCE OF THE HRA

The HRA potentially affects all areas of practice but to differing degrees. A domestic human rights jurisprudence rapidly developed under the devolution legislation and once the HRA was brought into force.[259] Scottish decisions necessarily dominated because of the use of the ECHR in the devolution legislation.[260] The ECHR was thus raised in hundreds of cases in Scotland.[261] By 7 November 2000 there had been a reference to the 'human rights act' in over sixty reported cases.[262] From 2 October 2000 to 20 July 2001 there had been 167 cases concerned with the HRA.[263] It affected the outcome, reasoning or procedure in forty-five of them. In thirty-two cases the HRA claim was upheld. An extensive literature has canvassed the possible effects of the HRA on specific areas as diverse as administrative law[264] (which will necessarily be strongly affected by the procedural and remedial aspects of the HRA),[265] business and

259. The Home Office website contains a statistical analysis.
260. See nn. 3–8 above.
261. Over 600 cases, having a significant influence in sixty, estimate of K. Starmer.
262. Internet search of BAILLI.
263. Home Office Website.
264. See *R v An Immigration Officer ex parte Quaquah* [2000] UKHRR 375 (necessity for there to be identified countervailing circumstances which would compellingly outweigh an applicant's rights); *R v Secretary of State for the Home Department ex parte Mahmood (Amjad)*, UKHRR [2001] 307 (on approach to judicial review in the light of HRA), followed in *R v Secretary of State for the Home Department ex parte Peter Isiko and Susan and Shemo Isiko* (CA) [2001] UKHRR 385; *R (Daly) v Secretary of State for the Home Department*, *The Times*, 25 May 2001 (see in particular the judgments of Lord Steyn (on differences between *Wednesbury* and *Smith* approaches) and of Lord Cooke (day would come when it would be more widely recognised that *Wednesbury* was an unfortunately regressive decision in English administrative law).
265. See G. Nardell, 'Collateral Thinking: the Human Rights Act and Public Law Defences' [1999] EHRLR 293; M. Supperstone and J. Coppel, 'Judicial Review after the Human Rights Act' [1999] EHRLR 301; C. A. Gearty, 'Article 6(1) of the ECHR and Administrative Law' (1999); R. Gordon and T. Ward, *Judicial Review and the Human Rights Act* (2001); T. de la Mare, 'The Human Rights Act 1998: The Impact on Judicial Review' (1999) 4 Judicial Review (1999) 33 (arguing that the victim test does not apply to an application for judicial review whose sole purpose is to seek a declaration of admissibility); K. Steyn and D. Wolfe, 'Judicial Review and the Human Rights Act: Some Practical Considerations' [1999] EHRLR 614; R. C. Austin, 'The Impact of the Human Rights Act 1998 upon Administrative Law', 52 Current Legal Problems (1999), 200.

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commerce,[266] charity law,[267] children,[268] civil disputes,[269] company law,[270] covert surveillance,[271] competition law,[272] criminal law,[273] defamation,[274] education,[275] employment law,[276] environmental law,[277] family law,[278] immi-

266. See M. Smyth, 'The UK's Incorporation of the European Convention and its Implications for Business' [1998] EHRLR 273; id., *Business and the Human Rights Act 1998* (2000); N. Bratza, 'The Implications of the Human Rights Act 1998 for Commercial Practice' [2000] EHRLR 1.

267. See D. Morris, 'Charities, Politics and Freedom of Speech', 5 Charity Law and Practice Review (1999) 219; J. Warburton and A. Cartwright, 'Human Rights, Public Authorities and Charities', 6 Charity Law and Practice Review (2000) 169; *The Human Rights Bill [HL], Bill 119 of 1997–98: Churches and Religious Organisations*, House of Commons Research Paper 98/26 (13 Feb. 1998).

268. See J. Fortin, 'Rights Brought Home for Children', 62 Modern L.R. (1999) 350; P. R. Ghandhi and J. A. James, 'Parental Rights to Reasonable Chastisement and the European Court of Human Rights', 3 Int.J.H.R. (1999) 97; U. Kilkelly, T*he Child and the ECHR* (1999).

269. See S. Burn, 'The Right to a Fair Hearing in Civil Disputes', Human Rights (Mar. 2001, Jordans) 15.

270. See A. Dignam and D. Allen, *Company Law and the Human Rights Act* (2000).

271. S. Uglow, 'Covert Surveillance and the European Convention on Human Rights', Crim.L.R. (1999) 287.

272. See A. J. Riley, 'The Human Rights Act 1998: Triple Trouble for the OFT?', 8 (2) Nottingham LJ (1999)1.

273. See Archbold, *Criminal Pleading, Practice and Evidence* (1999), ch. 16; D. Cheney, L. Dickson, J. Fitzpatrick and S. Uglow, *Criminal Justice and the Human Rights Act 1998* (1999); B. Emmerson and A. Ashworth, *Human Rights and Criminal Justice* (2001); *The Human Rights Act and the Criminal Justice and Regulatory Process* (University of Cambridge Centre for Public Law, 1999); K. Starmer et al. *Criminal Justice, Police Powers and Human Rights* (2001). A. T. H. Smith, 'The Human Rights Act and the Criminal Lawyer: The Constitutional Context' (1999) Crim. LR 251; A. Ashworth, ibid., 'Article 6 and the Fairness of Trials', 261; S. D. Sharpe, 'Article 6 and the Disclosure of Evidence in Criminal Trials', ibid., 273; P. Leach, 'Automatic Denial of Bail and the European Convention', ibid., 300; R. Buxton, 'The Human Rights Act and Substantive Criminal Law', [2000] Crim.L 331 and reply by Ashworth, 564; T. Murphy and N. Whitty, 'What is a Fair Trial? Rape Prosecutions, Disclosure and the Human Rights Act', 8 Feminist Studies (2000) 113; Bail and the Human Rights Act (Law Commission, No. 157, 1999), which includes an Appendix by D. Feldman on the role of precedent in the ECHR case law and the potential impact of the HRA on the doctrine of *stare decisis* in English law.

274. See A. L. Young, 'Fact, Opinion, and the Human Rights Act 1998: Does English Law Need to Modify its Definition of "Statements of Opinion" to Ensure Compliance with Article 10 of the European Convention on Human Rights', 20 OJLS (2000) 89.

275. See A. Bradley, 'Scope for Review: The Convention Right to Education and the Human Rights Act 1998' [1999] EHRLR 395 (on Schools, Heads, Universities).

276. See G. S. Morris, 'The Human Rights Act and the Public/Private Divide in Employment Law', 27 Industrial Law Journal (1998) 293; id., 'The ECHR and Employment: To Which Acts Does it Apply?' [1999] EHRLR 469; S. Palmer, 'Human Rights: The Implications for Labour Law', 59 CLJ (2000) 168; D. J. Christie, 'Bringing Rights to the Workplace', [2000] Juridical Review 74; V. Craig, 'Employment Tribunals and the European Convention on Human Rights', [2000] Juridical Review 129; D. O'Dempsey, A. Allen, S. Belgrave and J. Brown, *Employment Law and the Human Rights Act 1998* (2001); R. W. Rideout, 'The Enforcement of Human Rights in Employment', 52 Current Legal Problems (1999), 239; Ewing, n. 59 above.

277. See *Garner's Environmental Law*, Special Bulletin on Human Rights (2000).

278. See H. Swindells, M. Kushner, A. Neaves, and R. Skilbeck, *Family Law and the Human Rights Act* (1999); See M. Horowitz, G. Kingscote, and M. Nicolls, *The Human Rights Act 1998—A Special Bulletin for Family Lawyers* (Family Law Service, 1999); I. Karsten, 'Atypical Families and the Human Rights Act: The Rights of Unmarried Fathers, Same Sex Couples and Homosexuals' [1999] EHRLR 195; Family Proceedings (Amendment) Rules 2000, SI 2000/2267; Family and Civil Procedure Practice Directions, Part 16; Practice Direction (Family Proceedings: Human Rights), *The Times*, 12 Oct. 2000.

gration,[279] immunities,[280] legal aid,[281] local authorities,[282] medical resources,[283] mental health,[284] planning,[285] property law,[286] welfare rights,[287] and utilities.[288] In terms of legal personality the protection of the ECHR extends beyond natural persons and includes legal persons such as companies, trade unions, political associations, non-governmental organisations, churches.[289]

Most commentators have assessed the significance of the HRA as enormous to the point of revolutionary.[290] A few voices have tried to play down how much it will change practical outcomes rather than language and thinking.[291] It is helpful to identify a series of areas in relation to which its theoretical and practical significance can be assessed.[292]

A. Constitutional Principles and Parliamentary Sovereignty

The deep constitutional significance of the HRA on fundamental principles of legality and the rule of law will only be felt over time.[293] As for Parliamentary

279. See N. Blake and L. Fransman (eds) *Immigration, Nationality and Asylum under the Human Rights Act 1998* (1999). The Statement of Changes in Immigration Rules (Cm 4851) took account of a Departmental HRA preparatory review.

280. More generally see I. Cameron, *National Security and the ECHR* (Kluwer/ Iustus Forlag, 2000).

281. See M. Beloff and M. Hunt, 'Current Topic: The Green Paper on Legal Aid and International Human Rights Law' [1996] EHRLR 5.

282. See M. Supperstone, J. Goudie and J. Coppel, *Local Authorities and the Human Rights Act 1988* (2000).

283. D. O'Sullivan, 'The Allocation of Scarce Resources and the Right to Life under the European Convention on Human Rights' [1998] PL 389. J. MacBride, 'Protecting Life: A Positive Obligation to Help', 24 ELRev. (1999) HR/43; M. Freeman, 'Death, Dying, and the Human Rights Act 1998', 52 Current Legal Problems (1999), 218. For a pre-HRA decision reflecting the importance of the right to life see *R v Lord Saville of Newdigate and others, ex parte A* and others [1999] 4 All ER 860. See also *National Health Service Trust v D*, [2000] 2 FLR 677 (approach of English courts on withholding medical treatment was consistent with the ECHR); *NHS Trust A v M, NHS Trust B v H, The Times*, 29 Nov. 2000 (principles in *Airedale National Health Trust v Bland* were not contrary to Articles 2 or 3 ECHR).

284. O. Thorold, 'The Implications of the European Convention on Human Rights for UK Mental Health Legislation', [1996] EHRLR 619 (pre-HRA assessment).

285. *County Properties Ltd v The Scottish Ministers*, *The Times*, 19 Sept. 2000 (violation of independence in planning process); I. Loveland, 'The Compatibility of the Land Use Planning System with article 6 of the ECHR' [2001] J.Planning Law 535.

286. Property law in its multifold dimensions may be more affected than expected for the right to property in the ECHR is one of the most fertile areas of development. See J. Howell, 'Land and Human Rights', [1999] Conveyancer 287.

287. See E. Palmer, 'Resource Allocation, Welfare Rights—Mapping the Boundaries of Judicial Control in Public Administrative Law', 20 OJLS (2000) 63.

288. See C. Graham, 'Human Rights and Public Utilities', 9 Utilities LR (1998) 52; S. Hamilton, 'The Human Rights Act and the Regulation of Utilities', 10 Utilities LR (1999) 115.

289. See Harris *et al*., n. 186 above, 630.

290. See Lord Irvine, 'The Development of Human Rights in Britain under an Incorporated Convention on Human Rights' [1998] PL 221.

291. See Lord Hoffman, n. 39 above, at 161, 'its potential impact has been greatly exaggerated'.

292. See also C. A. Gearty, n. 18 above.

293. See D. Feldman, 'The Human Rights Act 1998 and Constitutional Principles', 19 Legal

sovereignty, formally this remains intact.[294] Nonetheless, the strong likelihood is that the HRA is effectively entrenched for practical constitutional purposes.[295] In domestic constitutional terms this would equate it to the status of the European Communities Act 1972 (as amended). Both Acts are, in principle, subject to repeal by Parliament.[296]

B. A Domestic Bill of Rights?

Future constitutional historians may assess the significance of the HRA as the first step towards a specifically UK-tailored domestic Bill of Rights.[297] This may come about because a post-ontological stage has been reached. The question of whether the UK has a Bill of Rights or not is seen as foreclosed. The only question becomes that of its substantive content.[298] That opens the door to a much greater critique of appropriate 'rights' and creative thinking about additional rights drawing on other international instruments and comparative experience. Debate will have to address the limitations of the ECHR as the UK's central human rights norms—the scope of a general right to equality, inclusion of social rights or economic rights, minority rights.[299] The gender perspective of a UK Bill of Rights would almost certainly be stronger than the ECHR. The HRA may also be a spur to further constitutional reform and to law reform in particular areas.[300] The devolution process has added a further dimension to this by raising the possibility of the evolution of regional Bills of Rights, going well beyond the ECHR. The Northern Ireland Human Rights Commission is scheduled to submit draft advice on a Bill of Rights for Northern Ireland to the Secretary of State in 2001.[301]

Studies 1999, 165; S. Fredman, 'Judging Democracy: The Role of the Judiciary Under the Human Rights Act', 53 Current Legal Problems (2000) 99; The Human Rights Bill [HL], Bill 119 of 1997–8: Some Constitutional and Legislative Aspects, House of Commons Research Paper 98/27 (13 Feb. 1998); R. Hazell (ed.) *Constitutional Futures: A History of the Next Ten Years* (1999); F. Klug, 'Can Human Rights Fill Britain's Morality Gap?', 68(2) Political Quarterly (1997), 143.

294. 'It is crystal clear that the carefully and subtly drafted 1998 Act reserves the principle of parliamentary sovereignty', *Kebilene*, n. 1 above, 831, Lord Steyn. See N. Bamforth, 'Parliamentary Sovereignty and the Human Rights Act' (1999) PL 573.

295. See Feldman, nn. 293 above and 304 below.

296. Arguably there is a difference in international law terms if repeal of the EC Act was treated as necessarily violating EC treaties and the doctrine of supremacy in EC law. By contrast, repeal of the HRA would not violate the ECHR which has been interpreted as not requiring domestic incorporation.

297. See S. Kentridge, 'Parliamentary Supremacy and the Judiciary under a Bill of Rights: Some Lessons From the Commonwealth' [1997] PL 96.

298. See S. Sedley, *Freedom, Law and Justice* (Hamlyn Lectures, 1999).

299. See K. Ewing, 'The Politics of the British Constitution' [2000] PL 405 and reply by T. R. S. Allen at 374; J. Young, 'The Politics of the Human Rights Act', 26 J.Law & Soc. (1999) 27; T. Campbell, ibid., 6; *Implementation Report*, n. 42 above (evidence from NGOs).

300. See Mrs Justice Arden, 'Criminal Law at the Crossroads: The Impact of Human Rights from the Law Commission's Perspective and the Need for a Code' [1999] Crim. Law Rev. 439.

301. See C. Harvey, 'The Politics of Rights and Deliberative Democracy: The Process of Drafting a Northern Irish Bill of Rights' [2001] EHRLR 48.

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C. Developing a culture of human rights

This is necessarily a more sociological and long-term process which has to be understood along with other programmes of governmental modernisations.[302] There may be a change of consciousness with ECHR rights as a 'floor' not a ceiling. A constitutional system incorporating 'rights' could engender a 'rights based-thinking'.[303] The HRA could have the same effect on attitudes to rights and human dignity[304] as the Sex and Race Discrimination Acts had on public attitudes to discrimination in those fields and to discrimination generally. If the aim of the HRA is achieved then public authorities and those exercising public functions should be more sensitive to the human rights consequences of their policies, decisions, and activities. Human rights would have been 'mainstreamed'.The HRA may also have an effect on litigiousness.[305] That in turn may be partly conditioned by the availability or otherwise of legal aid[306] and the deterrent effects of cost orders on litigants relying on the HRA, particularly where the Crown is joined as a party. Restrictions on legal aid impact on potential human rights claims.[307] Even cases which are lost will stimulate public debate for change. Indeed, that may be the objective of individuals or organisations. Public interest litigation may gain a new impetus.[308] Non-governmental human rights organisations will look for and support test cases with their greater publicity and resources. In that context the Commission for Racial Equality, the Equal Opportunities Commission, the Disability Rights

302. See L. Clements and J. Young (eds), 'Human Rights: Changing the Culture', 26 J.Law & Soc. (special edn., 1999) 1; *Implementation Report*, n. 42 above (evidence from government departments and NGOs on building a human rights culture).

303. See F. Klug, K. Starmer and S. Weir, *The Three Pillars of Liberty* (1996); J. Black-Branch, 'Entrenching Human Rights Legislation under Constitutional Law: The Canadian Charter of Rights and Freedoms' [1998] EHRLR 312.

304. See D. Feldman, 'Human Dignity as a Legal Value', [1999] PL 682 (Part I), [2000] PL 61 (Part II); F. Klug, *Values for a Godless Age—the Story of the UK's New Bill of Rights* (2000).

305. The HRA was expected to increase the length and number of contested cases coming before the courts. The first year did not produce an increase in cases overall or a longer average time for cases, see *Implementation Report*, n. 42 above (evidence from Lord Chancellor).

306. The HRA does not specifically address legal aid. The Lord Chancellor indicated that 'proceedings related to rights under the Bill [would] receive their fair share of the money available under the reformed legal aid system', HL Debs, 27 Nov. 1997 col. 1092. In many cases a HRA point will be an additional ground of challenge or argument. In terms of legal aid forms a human rights point is the second highest category for which priority is granted. See the Access to Justice Act 1999. The availability of legal aid in criminal cases facilitates the greater possibility of HRA challenges in that field.

307. For trenchant criticism see L. Clements, 'The Human Rights Act—A New Equity or a New Opiate: Reinventing Justice or Repackaging State Control?', 26 J.Law & Soc. (1999) 72. See *Gayne v Vannet*, High Court of Judiciary (Sc), (1999) SLT 1292 (fixed fee limitations on legal aid funding did not breach Article 6 ECHR); *Procurator Fiscal, Fort William v Norman McLean and Peter McLean*, *The Times*, 4 June 2001, PC, (no inconsistency with Article 6 ECHR on the facts of the case where legal aid for defence lawyer was a fixed sum, but possibility of inconsistency not excluded). Remedial regulations were being considered by the Scottish executive. There may be an increase in the number of special costs orders.

308. See Singh, n. 12 above, ch. 7.

Commission[309] and the Data Protection Commissioner could play important roles.[310] The work of the new Joint Parliamentary Committee on Human Rights could be important.[311] Although the Government did not establish a Human Rights Commission, it indicated in the White Paper that it had 'not closed its mind to the idea' and suggested that the new Parliamentary Committee might wish to conduct an inquiry on the issue.[312] Some of the functions of a Human Rights Commission would be publicity and education.[313] It could also have the power to intervene or act as *amicus curiae* in legal proceedings.[314] Both of these are crucial to the effect of the HRA but there is little evidence of any national strategy or targeted resources for maintaining a human rights culture. One of the first tasks of the Joint Parliamentary Committee on Human Rights is to examine the case for a UK Human Rights Commission. As a result of government restructuring on 8 June 2001 responsibility for the government's human rights policy passed from the Home Office to the Lord Chancellor's Department.

A human rights jurisprudence rapidly developed. The impact should also be felt on legal scholarship with possible jurisprudential shifts because of the language of 'rights' rather than a 'liberties' or 'welfare approach'. Legal culture in terms of argumentation and analysis will inevitably have to evolve.[315] As the use of comparative and international case law increases so will interest in those disciplines. The teaching, training and practice of lawyers and judges will have to reflect this.[316] To the UK's distinguished contribution to the history and philosophy of rights will be added a pragmatic contribution. In turn, this should stimulate more sophisticated philosophical reflections.

309. See Disability Rights Commission Act 1999; B. Doyle, *Disability Discrimination Law* (3rd edn, 2001).

310. A report on '*The Future of Multi-Ethnic Britain*' (Runnymede Trust, Oct. 2000) recommended the establishment of an Equality Commission.

311. See n. 42 above. The establishment of the Committee was suggested in the White Paper, n. 4 above, paras. 3.6–3.7.

312. In 2001 the Committee called for evidence on this issue. See S. Spencer and I. Bynoe, *A Human Rights Commission: The Options for Britain and Northern Ireland* (IPPR, 1998); S. Beckett and I. Clyde, 'A Human Rights Commission for the United Kingdom: the Australian Experience' [2000] EHRLR 131.

313. In 2002 human rights was explicitly included in the national curriculum.

314. Cf *R v Greater Belfast Coroner ex parte Northern Ireland Human Rights Commission*, *The Times*, 11 May 2001 (majority decision that Commission had no such powers).

315. See M. Hunt, 'The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession', 26 J.Law & Soc. (1999) 86.

316. See *Barclays Bank v Ellis*, CA, *The Times*, 24 Oct. 2000, on citing human rights law (argument needed to be formulated and advanced in a plausible way); *Walker v Daniels* [2000] UKHRR 648 (essential to take a responsible attitude as to when it is right to raise a human rights point so that HRA is not discredited; Article 6 ECHR added nothing to the issue on appeal; judges need to be robust in resisting ECHR arguments when inappropriate); *R v Perry*, CA, 3 Apr. 2000 (unnecessary references to ECHR could bring it into disrepute); Practice Direction (Justices: Clerk to Court) *The Times*, 11 Oct. 2000 (responsibility of Justices Clerk to raise ECHR points).

D. Politicisation of the judiciary?

This is another imponderable but the refusal to create a special constitutional or human rights court probably assists in deflecting this criticism by involving the whole of the judiciary and tribunal membership. Their role is fundamental.[317] Lord Nicholls has argued that guardianship of constitutional rights is part of the accepted function of judges, that the value judgments under the HRA will not be different in kind or type from those judges have had to make in landmark common law cases, that judicial review was widely accepted as necessary and beneficial and that members of the House of Lords spend half of their time on the Privy Council adjudicating constitutional and human rights issues.[318] There appeared to be considerable enthusiasm in the judicial ranks for the HRA. Since November 1998 it has been referred to by judges in a wide range of cases. The judicial function has enhanced the extended interpretative technique represented by s. 3 HRA, and the possibility of declarations of incompatibility under s. 6 HRA. The complexity and sensitivity of some decisions, and the inevitable scrutiny to which they will be subject, will add further weight to critiques of the social and political composition of the judiciary and their judicial philosophies.[319] The central role of the judiciary under the HRA has given a renewed impetus to discussion of the idea of a new Judicial Services Commission for the appointment of the judiciary.[320] In recent years there have already been a series of reforms aimed at greater transparency and openness. The first Commissioner for Judicial Appointments was appointed in 2001.

E. The effect of giving 'further effect' to the ECHR

To the not insignificant extent that UK courts had been treating ECHR as *de facto* incorporated, for example, as reflected in the common law and in reviewing the exercise of an administrative discretion which affects the liberty of the individual, then giving 'further effect' will not make much practical

317. See Lord Irvine, n. 96 above; Lord Falconer, 'The Role of the Courts in the Devolution and Human Rights Arrangements', 21 Liverpool LR (1999) 1; I. Loveland, 'Incorporating the European Convention on Human Rights into UK law', (1999) Parliamentary Affairs 113; Cf K. Martens, 'Incorporating the European Convention: the Role of the Judiciary', [1998] EHRLR 6.

318. Millennial Lecture, Liverpool Law School, 3 Oct. 2000. 'Whilst there is some evidence of a more purposive and rights-centred approach in recent decisions, there have also been notable exceptions, and it is not difficult to find examples of cases in which the espousal of liberal canons of interpretation has been accompanied by disappointingly narrow decisions on the facts', N. Roberts, 'The Law Lords and Human Rights: The Experience of the Privy Council in Interpreting Bills of Rights', [2000] EHRLR 147 at 179.

319. See S. Tierney, 'Convention Rights and the Scotland Act: re-defining judicial roles', [2001] PL 38; J. A. G. Griffith, 'The Brave New World of John Laws', 63 MLR (2000) 159; id., 'The Common Law and the Political Constitution', 117 LQR [2001] 42 and reply by S. Sedley at 68; Fredman, n. 293 above. See also the evidence and examination of Lords Bingham, Phillips and Woolf in *Implementation Report*, n. 42 above.

320. Another factor is a possible challenge under the HRA against the Lord Chancellor based on Article 6 ECHR and relying on *McGonnell v UK*, ECtHR, *The Times*, 22 Feb. 2000.

difference. In *Re A (conjoined twins)*[321] after extensive consideration of medical law, family law, and criminal law, the Court of Appeal stated that there was nothing in the HRA that provided a different answer. Its effect was to confirm pre-existing law.[322]

F. Declarations of Incompatibility

Critics would argue that these are of limited significance because only higher courts can make such declarations and they only deal with a minority of cases. This criticism misses that point that such declarations were expected only in a small number of cases (only three as of 2 April 2001 and on one of those the appeal was allowed) and that their credibility might be undermined if they were made on a regular basis.

G. The interpretative obligation

It is submitted that this is the key to the significance of the HRA. The obligation will apply by all courts and tribunals, and may even apply more widely. It should ensure compatibility with the Convention rights in the vast majority of cases.

H. From discretion to duty?

This is one area where the practical impact of the HRA will be closely assessed. For example, empirical evidence would suggest that in most criminal cases in magistrates courts, the 'discretion' to exclude unfairly obtained evidence is rarely exercised. If the HRA changed the perception of the balance such that the only effective remedy for the human rights violation was to exclude the evidence, and that the court was obliged to do so to ensure that it, as a public authority, complied with s. 6, then it would effectively become a 'duty' to exclude. The same thinking could apply to the exercise of the same discretion in Crown courts. There is some support for this approach from New Zealand jurisprudence.[323] However, the early evidence was that the courts will not follow the duty approach but rather consider the issue of the overall fairness of the trial in the round.[324] In *R v B, Attorney-General's Reference No. 3*

321. [2001] UKHRR 1.

322. Article 2 ECHR applied only to cases where the purpose of the prohibited action was to cause death. It did not import any prohibition of the proposed operation other than those which were found in the common law of England.

323. See *R v H* [1994] 2 NZLR 143, *R v Grayson*, NZ Court of Appeal, 26 Nov. 1996. See also *R v Lambert, Ali and Jordan* [2000] UKHRR 864 (there could not be different standards of fairness under Article 6 ECHR).

324. *R v P and Others*, HL, *The Times*, 19 Dec. 2000 (the fair use of intercept evidence at a trial was not a breach of Article 6 ECHR even if it had been unlawfully obtained); *R v B, Attorney-General's Reference No.3 of 1999*, *The Times*, 15 Dec. 2000 (there was no principle of Convention law that unlawfully obtained evidence was not admissible); *Official Receiver v William George Stern and Mark Stephen Lawrence Stern* [2000] UKHRR 332.

of 1999[325] the House of Lords held that there was no ECHR principle that unlawfully obtained evidence was inadmissible. Evidence admitted under s. 78 of the Police and Criminal Evidence Act was 'in accordance with the law' for the purposes of Article 8.

In *R v Davis, Rowe and Johnson*[326] the Court of Appeal held that fairness and safety were different but related questions. The degree to which they were related would depend upon the circumstances of the case. A finding of the European Court of Human Rights that a criminal defendant had received an unfair trial did not necessarily mean that any subsequent conviction should be quashed. A conviction could never be 'safe' if there was doubt about guilt. However, the converse was not true. A conviction could be unsafe even where there was no doubt about guilt but the trial process had been vitiated by serious unfairness or significant legal misdirection. Usually it was sufficient for the court to consider whether, assuming the wrong decision on law or the irregularity had not occurred and the trial had been free from legal error, would the only reasonable and proper verdict have been one of guilty? On that basis there was no tension between s. 2(1)(a) Criminal Appeal Act 1968 and s. 3(1) HRA. In *R v Togher, Doran and Parsons*[327] the Court of Appeal took the view that if there was a breach of Article 6 it was almost inevitable that the conviction will be unsafe.

I. The public/private divide under s. 6

How and where the boundary is located will be important particularly in the areas of law affected, for example, employment law.[328] How large and invidious the resulting gap in human rights protection will be partly depends on how far the courts go in giving horizontal effect to the HRA on the basis of s. 3, s. 6, or their combined effect.

J. Horizontal Effect

There are strong arguments and early judicial support for the view that there can be a substantial degree of horizontal effect. If so, this makes the HRA of much wider practical significance.

325. [2001] AC 91.

326. [2000] UKHRR 683 (on the facts the convictions were found to be unsafe). See also *Locabail (UK) Ltd and Another v Waldorf Investment Corporation and Other (No.4)*, *The Times*, 13 June 2000 (a stay of proceedings would be granted pending an application to the European Court of Human Rights only where the remedy sought against the defendant State in that court would, if granted, lead to an alteration in the law directly affecting the rights of a party bearing upon the subject-matter of that litigation).

327. [2001] 3 All ER 463.

328. See Ewing, n. 59 above, Morris, n. 276 above, and Oliver, n. 174 above.

K. Margin of Appreciation

This is an open question but it has been submitted that it is much misunderstood.[329] The key focus will need to be on the degree of 'judicial deference' paid to the legislature and the executive.[330] A related issue is whether, now that Convention rights have been 'incorporated', the European Court of Human Rights will be more hands-off and rely on the margin to a greater extent. There is a distinct possibility that it will.[331]

L. Remedies and the absence of Article 13 from the incorporated 'Convention rights'

Much will turn on the approach to remedies. The language of the HRA is generally clear and there is explicit encouragement to the judiciary to ensure and if necessary evolve effective remedies. If this encouragement is taken then the absence of Article 13 should not prove to be significant. More problematic may be the situation where European Court of Human Rights jurisprudence in a particular context focuses on Article 13 itself as distinct from one of the 'incorporated rights'. The decisions in *T.P. and K.M. v UK* on the liabilities of local authorities for negligence in child care cases may be examples of this.[332]

M. The unpredictability of constitutional protection of human rights

If comparative and international experience is anything to go by, the HRA will tend to have a life of its own.[333] Its evolution will be shaped, *inter alia*, by accidents of litigation, the personnel who make a significant input to its evolution at critical junctures, the degree to which it enters into the socio-cultural consciousness of the community and its constituent parts, the training and education provided to those directly affected by it, and its more general educative role, perhaps in the context of teaching about citizenship. During the debate on the Bill, Lord Cooke, former President of the New Zealand Court of Appeal, made the point that you do not just need an Act, you need an 'act of mind to bring to a Bill of Rights a sympathetic legal climate, an understanding of its aims and a receptiveness to its purposes'.[334] In time the HRA may

329. See Part IX above.

330. Clayton and Tomlinson, n. 19 above, 251–7.

331. See Lord Hoffman, n. 39 above, who supports such an approach partly out of fear of imposition of 'Voltarean uniformity of values upon all member states' (see his discussion of the *Osman* case).

332. See n. 239 above.

333. See P. Alston (ed.), *Promoting Human Rights Through Bills of Rights* (1999).

334. See 'Mechanisms for Entrenchment and Protection of a Bill of Rights: The New Zealand Experience' [1997] EHRLR 492 at 495. See also Lord Reid in *Starrs v Chalmers*, n. 106 above, 'the Convention guarantees the protection of . . . rights through legal processes, rather than political processes'.

be classed with the Magna Carta, the American Declaration of Independence, and the French Declaration of the Rights of Man and of the Citizen, as a 'revolutionary' legal and historical document in the sense that it changed man's, and woman's, thinking. If so, it may not have turned the UK's political and legal culture upside down, but it may just have turned it the right way around.

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