RIGHTS BROUGHT HOME: THE UNITED KINGDOM ADOPTS A "CHARTER OF RIGHTS"

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INTRODUCTION

On 2 October 2000, the United Kingdom brought into full force and effect its *Human Rights Act 1998*,[1] bringing forth a new era in the protection of civil and political rights in the UK. Although the *HRA* received Royal Assent on 9 November 1998, the government in Westminster deliberately delayed its full implementation in order to allow for a period of training and preparation in light of the legislation's significance and application to all areas of UK law.[2] The Act has, however, been in force in Scotland, Wales and Northern Ireland in relation to the activities of the new Scottish Parliament and the new Welsh and Northern Irish Assemblies, since the Acts[3] creating these bodies make it legally impossible for their legislatures and executives to act in contravention of *Convention* rights as defined in the *HRA*.[4] Already, in Scotland, this has led to a significant number of cases invoking the *HRA*.[5] The courts, as well as commentators, appear to be developing a heady interest in the comparative value of the jurisprudence of the *Canadian Charter of Rights and Freedoms*.[6] Given the similarities between *Convention* rights and *Charter* rights, and the test of proportionality used in both documents, it may not be long before *HRA* jurisprudence is of similar interest to judges, lawyers and academics on this side of the Atlantic. As a result, this article aims to provide an overview of the key provisions of the *HRA*, indicating its scope for comparative constitutional analysis.

Since this article is intended for a Canadian audience, I must note at the outset that the *HRA* is *not* the British equivalent of the *Canadian Human Rights Act*,[7] nor its provincial equivalents. Viewed from a European perspective, such statutes, while important, are not human rights acts. They are equality acts or anti-discrimination statutes, aimed at protecting an important but specific human right, namely the right to be free from discrimination. Like Canada, the UK has several anti-discrimination statutes in place,[8] although the extension of this legislation to grounds other than sex and race admittedly has been slow,[9] and not of uniform application throughout the kingdom.[10]

While the enactment of the *HRA* may well instigate change in the area of UK equality law,[11] the *HRA* itself is a far broader measure. It extends protection to a much wider range of rights and freedoms, including the

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1 (U.K.), 1998, c. 42 [hereinafter *HRA*].

2 Extensive training programs have been held throughout the country for the civil service, the judiciary and the legal profession. For details, see A. Finlay, "The Human Rights Act: The Lord Chancellor's Preparations for Implementation" [1999] 5 E.H.R.L.R. 512.

3 See further the *Scotland Act 1998* (U.K.), 1998, c. 46; the *Government of Wales Act 1998* (U.K.), 1998, c. 38; and the *Northern Ireland Act 1998* (U.K.), 1998, c. 47.

4 *HRA*, s. 1. *Convention* rights refers to rights enshrined in the Council of Europe's *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur.T.S. 5. See *infra* text accompanying notes 14-31.

5 See, for example, *Starrs and Chalmers* v. *Procurator Fiscal, Linlithgow*, [1999] Scot. H.C. 241 and *Clancy* v. *Claird*, [1999] Scot. C.S. 266 concerning the independence of temporary and part-time judges, where reference was made to s. 11(d) of the *Charter* and *Valente* v. *The Queen*, [1985] 2 S.C.R. 673. The Scottish *HRA* cases are available online: <http://www.scotcourts.gov.uk> (last accessed: 1 October 2000).

6 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

7 R.S.C. 1985, c. H-6.

8 See the *Sex Discrimination Act 1975* (U.K.), 1975, c. 65 (augmented by European Community law) and the *Race Relations Act 1976* (U.K.), 1976, c. 74 (also augmented by European Community law).

9 It was not until 1995 that a third ground was added with the passage of the *Disability Discrimination Act 1995* (U.K.), 1995, c. 50.

10 Only Northern Ireland has legislation extending the prohibitions to the grounds of religion, political opinion and sexual orientation: *Fair Employment and Treatment (Northern Ireland) Order 1998*, S.I. 1998 (N.I. 21).

11 See further, B. Hepple, M. Coussey & T. Choudhury, *Equality: A New Framework - Report of the Independent Review of UK Anti-Discrimination Legislation* (Oxford: Hart Publishing, 2000) at 9.

right to life, the right to be free from torture, the right to liberty and security, the right to a fair trial, the right to freedom of expression, religion and assembly, and the right to respect for private and family life.[12] It also includes a right to the protection of property, a right to education, and a right to free elections,[13] and as such, is clearly more than an equality act. In short, the *HRA* is best viewed as a modern "Charter of Rights" for the UK.

"Rights Brought Home": The European Convention on Human Rights

Since the landslide election of the Labour Government in May 1997, the UK has embarked on an unprecedented package of constitutional reforms. These reforms have included the creation of new governments in Scotland, Wales and Northern Ireland; the abolition of hereditary peers and the election of a London mayor; and the introduction of a *Freedom of Information Act*.[14] The *HRA* however, in the words of the Lord Chancellor, "occupies a special place in the programme of reform,"[15] and within six months of Labour's election, a *Human Rights Bill* was placed before Parliament as part of its manifesto commitment to "Bring Rights Home."[16]

The rights to be "brought home" were those enshrined in the *Convention for the Protection of Human Rights and Fundamental Freedoms* (known as the *European Convention on Human Rights*),[17] the leading international human rights treaty,[18] and one to which the UK has pledged compliance since 1953.[19] Drafted in 1950 under the auspices of the Council of Europe,[20] and with the instrumental assistance of British officials,[21] the *Convention* enables both states and individuals to complain to an effective international tribunal (the European Court of Human Rights in Strasbourg, France) about alleged violations of certain fundamental rights. This has generated a significant body of case law[22] on the interpretation and application of what are called "*Convention* rights"[23] in the *HRA*. Since 1966, when the UK accepted the right of individual petition,[24] the *Convention* has also provided an important route for individuals (as opposed to states) to bring forth their complaints against the UK at the international level, many of which have been successful.[25] Taking a case to Strasbourg, however, is both costly and time-consuming, and the inability to litigate such rights effectively in British courts seemed contradictory in light of Britain's long-standing support for the *Convention* at the international level.

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12 These rights, derived from the substantive Articles of the *European Convention on Human Rights*, are reproduced in Part I of Schedule 1 of the *HRA*.

13 These rights, derived from the substantive Articles of the First Protocol to the *European Convention on Human Rights*, are reproduced in Part II of Schedule 1 of the *HRA*.

14 (U.K.), 2000, c. 36. See further, R. Blackburn and R. Plant, eds., *Constitutional Reform: The Labour Government's Constitutional Reform Agenda* (London: Longman, 1999).

15 Lord Irvine of Lairg, "Britain's Programme of Constitutional Change" (a speech to the University of Leiden, 22 October 1999), online: <http://www.open.gov.uk/lcd/speeches/1999/1999fr.htm> (last accessed: 1 October 2000).

16 In December 1996, a consultation paper entitled "Bringing Rights Home: Labour's Plans to Incorporate the European *Convention* into UK Law" was published by Labour MPs Jack Straw and Paul Boateng, and subsequently published in [1997] E.H.R.L.R. 71. On 23 October 1997, the *Human Rights Bill* received First Reading in the House of Lords, accompanied by the publication of a White Paper entitled *Rights Brought Home: The Human Rights Bill*, Cm 3782 (October 1997).

17 *Supra*, note 4.

18 Having attracted ratifications from 41 signatory states, the *Convention* grants a right of individual petition to roughly 800 million people in Europe. For general commentary, see D.J. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995) and P. van Dijk & G.J.H. van Hoof, 3rd ed., *Theory and Practice of the European Convention on Human Rights* (The Hague: Kluwer Law International, 1998).

19 The Treaty Office of the Legal Affairs Directorate of the Council of Europe maintains a useful web-based record of all *Convention* ratifications at <http://conventions.coe.int> (last accessed: 1 October 2000).

20 The Council of Europe is an inter-governmental organisation devoted to the promotion of democracy, the rule of law and the protection of fundamental rights. Its seat is located in Strasbourg, France. Although often confused with the 15-member European Union, which also has facilities in Strasbourg, the Council is a separate and distinct organisation. Further information on the Council of Europe can be found on its website at <http://www.coe.fr> (last accessed: 1 October 2000).

21 See G. Marston, "The United Kingdom's Part in the Preparation of the European Convention on Human Rights 1950" (1993) 42 I.C.L.Q. 796.

22 Available online at <http://www.echr.coe.int/> (last accessed: 1 October 2000).

23 *HRA*, s. 1.

24 Cabinet memoranda, available to the public after the passage of 30 years, clearly show that the UK delayed its acceptance of the right of individual petition so as to ensure the passage of a limitation period which would prevent the Burmah Oil company from challenging the *War Damage Act, 1965* (U.K.), 1965, c.18 on *Convention* grounds. See further, Lord Lester of Herne Hill QC, "UK Acceptance of the Strasbourg Jurisdiction: What Really Happened in Whitehall in 1965" [1998] P.L. 237.

25 At the time of the introduction of the *Human Rights Bill*, it was widely known that the UK was second only to Italy in the number of cases it had lost before the European Court of Human Rights.

THE BRITISH MODEL OF INCORPORATION

The *HRA* was enacted to end this anomaly,[26] although it offers more than a one-line provision saying that from here on, *Convention* rights are British rights which can be litigated in British courts. A specific model of incorporation was adopted, giving the incorporation of the *Convention* into UK law a uniquely British structure. This structure was chosen after much consideration of various options, including the Canadian model of an entrenched bill of rights with a notwithstanding clause. The Labour government was, however, wary of adopting such a model, having no written constitution into which a new Bill of Rights could be easily inserted, and being reluctant to give judges the power to strike down Acts of Parliament given the respect afforded to the doctrine of parliamentary sovereignty. It also had to contend with the traditional hostility of some elements of the British Left to giving further power to what they see as an insulated and unrepresentative judiciary.[27] In the end, a "distinctive and original English form of incorporation"[28] was adopted, bearing some resemblance to the *New Zealand Bill of Rights of 1990*,[29] but with its own innovations.

In essence, the British model is one that allows the courts as much space as possible to protect fundamental rights and freedoms, but falls short of allowing a court to strike down or set aside Acts of Parliament. This ensures a degree of coherence within British law, reconciling the desire for the improved accessibility of the *Convention* with the traditions of the common law and in particular the doctrine of parliamentary sovereignty. It is also a model that works both with and through the common law since many of the rights guaranteed by the *Convention*, and now by the *HRA*, have their origins in the common law.[30]

This use of a particularly British model of incorporation also means that as comparative scholars we cannot simply look to the *Convention* and its jurisprudence to determine the law of the UK. We must also take into account the specific provisions of the *HRA*, the stated purpose of which is to "give further effect" to the rights and freedoms guaranteed by the *Convention*.[31] This purpose is accomplished through three main mechanisms, to be discussed below. Briefly, these mechanisms are a new rule of statutory interpretation, a new means of pressuring Parliament for change, and a new cause of action for a statutory duty now imposed on all public authorities.

i) The Interpretative Obligation

With respect to the new rule of statutory interpretation, the key provision is section 3 of the *HRA* and in particular the opening words. Section 3(1) provides that, "[s]o 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." This is a strong provision, the importance of which can best be understood by considering what would have been required had the opening words been "so far as it is reasonable" or "so far as it is necessary" to comply with Parliament's intentions. The use of "so far as it is possible" is in essence an exhortation from Parliament to "strive"[32] to

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26 As explained by Prime Minister Tony Blair in the preface to the White Paper *Rights Brought Home*, *supra* note 16 at 1.

27 K.D. Ewing and C.A. Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (Oxford: Clarendon Press, 1990) at 262-275.

28 S. Kentridge QC, "Lessons from South Africa" in B. S. Markesinis, ed., *The Impact of the Human Rights Bill on English Law* (Oxford: Oxford University Press, 1998) at 25.

29 (N.Z.), 1990, No. 109. Section 6 of the *New Zealand Bill of Rights* requires that: "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in (the) Bill of Rights, that meaning shall be preferred to any other meaning." This requirement does not, however, extend to statutory provisions which contain clear limitations of fundamental rights, since these are viewed as enactments which can not be given a meaning that is consistent with the protected rights.

30 The right to a fair trial in Article 6 of the *Convention*, the right to personal liberty in Article 5, and the right to freedom of expression in Article 10 are but three examples now set out in Schedule 1 of the *HRA*. Moreover, section 11 of the *HRA* makes it clear that the common law system for the protection of rights remains intact, and that the right to bring *HRA* proceedings is additional to any pre-existing proceedings under common law.

31 See the Long Title of the *HRA*, *supra* note 1. Note, however, that not all of the substantive Articles of the *Convention* have been incorporated into the *HRA*. Article 1 (concerning a state's obligation to secure *Convention* rights to everyone within its jurisdiction) and Article 13 (concerning the right to an effective national remedy) have been deliberately omitted, a fact which caused much consternation during the parliamentary debates. However, when pressed on the issue, the Lord Chancellor made a parliamentary statement to the effect that courts could, through section 2 of the *HRA*, "take into account" the Strasbourg jurisprudence on Articles 1 and 13, thereby acknowledging that a British court was not foreclosed from giving these Articles some degree of domestic effect: see U.K., H.L., *Parliamentary Debates*, vol. 583, col. 477 (18 November 1997).

32 This is the verb used by the Lord Chancellor: U.K., H.L., *Parliamentary Debates*, vol. 583, col. 535 (18 November 1997).

find a meaning which is compatible with *Convention* rights, even if this involves giving a meaning which the words of the statute would not ordinarily bear.[33]

This rule of statutory construction is a significant departure from the past, where the British courts could only take international treaties into account to resolve statutory ambiguities.[34] This rule operates like an over-arching *Interpretation Act*, requiring lawyers and courts alike to interpret all legislation, whether it be past, present or future legislation, and whether it be an Act, Regulation or Order, so as to give effect "so far as it is possible" to *Convention* rights. This is not only a significant change to British law, but one with major implications for the doctrine of precedent. Post-October 2, there may well be statutes requiring a fresh interpretation, and there may well be cases where a court or tribunal cannot be bound by a previous interpretation, even of a higher court, if the *Convention* was not used in the interpretation of that statute before the *HRA*'s coming into force. As stated in the Government's own guidance material to its departments, "[t]he fact that a court may have interpreted a law in a certain way before, does *not* mean that after the coming into force of the *Human Rights Act*, it will interpret the provision in that same way."[35]

In carrying out its obligation under section 3, UK courts may well make use of various interpretative techniques, many of which will be familiar to Canadian lawyers and academics. First and foremost, the *HRA* must be considered a constitutional instrument and as such, it should receive a generous and purposive interpretation, as was suggested recently by Lord Hope of Craighead in *R.* v. *Director of Public Prosecutions ex parte Kebeline*, albeit in *obiter*.[36] This in essence will require the courts to look at the substance of what is involved, avoiding what has been termed the "austerity of tabulated legalism."[37] The courts will also be required by section 2 of the *HRA* to "take into account" the decisions of the Strasbourg institutions, including the decisions of the now-abolished European Commission on Human Rights.[38] However, more recent Strasbourg decisions will likely have greater weight since it is a key tenet of Strasbourg jurisprudence that the *Convention* is a "living instrument" whose interpretation may change over time to reflect present day conditions.[39] This may also mean that the outcome of a past Strasbourg case in which a British government department was involved is not an infallible guide as to what may happen under the *HRA*.[40] Nevertheless, because British courts need only "take into account" the Strasbourg jurisprudence, which remains non-binding under domestic law, an independent and possibly influential alternative analysis may emerge.[41] We may also see greater interest in other Commonwealth and Privy Council decisions, particularly if such cases provide, in the words of Lord Bingham of Cornhill, now the senior Law Lord, "helpful answers to analogous questions."[42]

With respect to the interpretation of new legislation, section 19 of the *HRA*[43] requires the Minister in charge of a Bill to make a statement in Parliament about the Bill's compatibility with *Convention* rights and these "statements of compatibility" are reproduced on the face of every new British Act of Parliament. The current practice is for the Minister to make a statement of compatibility if legal advice indicates that it is "more likely than not" that the

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33 See further, Lord Lester of Herne Hill QC, "The Art of the Possible: Interpreting Statutes under the Human Rights Act" [1998] 6 E.H.R.L.R. 665. But see also, G. Marshall, "Interpreting Interpretation in the Human Rights Bill" [1998] P.L. 167.

34 *R.* v. *Secretary of State for the Home Department ex parte Brind*, [1991] 1 A.C. 696 (H.L.).

35 Home Office, "Core guidance for public authorities: a new era of rights and responsibilities" at para. 35, online: <http://www.homeoffice.gov.uk/HRAct/coregd.htm> (last accessed: 1 October 2000).

36 [1999] 4 All E.R. 801 (H.L.). See also, D. Pannick, "Principles of Interpretation of Convention Rights under the Human Rights Act and the Discretionary Area of Judgment" [1998] P.L. 545, relying to some extent on *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321. But see R.A. Edwards, "Generosity and the Human Rights Act: the right interpretation?" [1999] P.L. 400, relying on P. W. Hogg, "Interpreting the Charter of Rights: Generosity and Justification" (1990) 28 Osgoode Hall L.J. 817.

37 *Minister of Home Affairs* v. *Fisher*, [1980] A.C. 319 at 328G-H (per Lord Wilberforce).

38 Since the *Convention* was first drafted, it has been amplified by a number of Protocols, the most recent of which was Protocol No. 11 (Eur.T.S. No. 155), which came into force in November 1998. This Protocol provided for a significant restructuring of the Strasbourg organs, essentially replacing the previous two-tier structure of a part-time Commission and Court with a single, permanent, full-time Court. Under the old structure, the Commission had been primarily responsible for determining the admissibility of complaints, and section 2 of the *HRA* makes it clear that these decisions can be "taken into account" by the British courts.

39 Amongst the many examples of the application of the "living instrument" principle, see *Tyrer* v. *United Kingdom*, [1978] 2 E.H.R.R. 1 at para. 31 (E.Ct.H.R.) concerning the judicial imposition of corporal punishment and *Marckx* v. *Belgium*, [1979] 2 E.H.R.R. 330 at para. 41 (E.Ct.H.R.) concerning the rights of illegitimate children.

40 This is, in fact, the advice being given to government departments: see "Core guidance," *supra*, note 35 at para. 31.

41 See, for example, *Procurator Fiscal, Dunfermline* v. *Brown* (5 December 2000), D.R.A. No. 3 of 2000 (P.C.).

42 U.K., H.L., *Parliamentary Debates*, vol. 582, col. 1247 (3 November 1997).

43 This provision came into force on November 24, 1998: *Human Rights Act 1998 (Commencement) Order 1998*, S.I. 1998/2882.

provisions of the legislation will stand up to challenge on *Convention* grounds.[44] While these statements do not determine, as a matter of law, an Act's compatibility, they do suggest a legislative intention to comply with the *Convention*, which could be of subsequent interpretative value before the courts. The work of the proposed Parliamentary Committee on Human Rights may also offer further interpretative assistance since one of its tasks will likely be to examine and report on the compatibility of questionable draft legislation.

Two final techniques worth noting are the techniques of "reading down" and "reading in"—techniques which may appear to contradict a commitment to parliamentary supremacy but which are not unheard of in the common law.[45] By "reading down" a broadly phrased statute in order to comply with the *Convention*, the UK courts will be in the position of choosing between two interpretations of a statutory provision, and opting for the narrower interpretation in order to comply with the *HRA*. By "reading in," the courts will insert words into a statute so as to make its provisions compatible with the *Convention*, even though Parliament never intended such words to be enacted. Given that the scope for these techniques is very broad, their future use could well determine the true impact of the *HRA*.

ii) Putting Pressure on Parliament for Change

As for the second mechanism, the key provision is section 4 concerning the unique innovation known as the "declaration of incompatibility." Where it is not possible to construe primary legislation as being compatible with the *Convention*, the higher courts in the UK[46] may make a declaration of that incompatibility pursuant to section 4 of the *HRA*. Such a declaration does not strike down the legislation, nor does it affect the validity, continuing operation or enforcement of the incompatibility.[47] It does, however, provide a clear signal from the courts that the impugned legislation is not *Convention*-proof and should, in theory, put pressure on Parliament (and more precisely, the Government) to take remedial action. The possibility of a subsequent adverse decision from Strasbourg may also increase the pressure.[48] Although there are no guarantees, the current Government has stated that a declaration of incompatibility will "almost certainly" prompt legislative change[49] and in such cases, the *HRA* provides a fast-track procedure in Parliament for remedying the incompatibility.[50]

Lower courts and tribunals, however, do not have the power to make declarations of incompatibility. When faced with legislation which they cannot construe to be compatible with *Convention* rights, they must simply apply the legislation, incompatibility and all. It is, however, implied that all courts and tribunals can quash subordinate legislation that is not compatible with *Convention* rights, unless the subordinate provision has to say what it does because of a provision of primary legislation.[51] This refers to what has been described by those attending the *HRA* training sessions as the "inevitable incompatibility," and it would appear to be the one circumstance where a court or tribunal may not set aside incompatible subordinate legislation.

iii) The New Cause of Action Concerning Public Authorities

The third mechanism worthy of special attention is the new statutory duty created by section 6 of the *HRA* which requires all "public authorities" in the UK to comply with *Convention* rights, with even a failure to act to be construed as non-compliance pursuant to section 6(6). This provision vastly expands the scope for judicial review of the actions of both central and local governments, while also requiring public authorities to take human rights principles into account in their day-to-day decision-making. Litigants may also rely on their *Convention* rights in any court proceeding involving a public authority,[52] and a breach of the

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44 See Home Office, "The Human Rights Act 1998 Guidance for Departments" at para. 36, online: <http://www.homeoffice.gov.uk/HRAct/guidance.htm> (last accessed: 6 February 2000).

45 For a pre-*HRA* example of "reading down," see *R.* v. *Secretary of State for the Home Department ex parte Simms and O'Brien*, [1999] 3 W.L.R. 328, where the House of Lords held that on a true construction, the Prison Rules did not authorise a total ban on journalistic interviews with prisoners. For a pre-*HRA* example of "reading in," see *Lister* v. *Forth Dry Dock and Engineering Co. Ltd.*, [1989] 1 All E.R. 1134, where the House of Lords read in certain words to ensure the compliance of a UK measure with a European Community directive.

46 *HRA*, s. 4(5) defines "court" for the purposes of s. 4 to include the House of Lords, the Judicial Committee of the Privy Council and the Court of Appeal, among others.

47 *HRA*, *ibid.*, s. 4(6)(a).

48 The UK remains bound to abide by its *Convention* obligations at the international level and so incorporation has not foreclosed the possibility of litigants taking their cases to Strasbourg once they have exhausted all possible domestic remedies.

49 *Rights Brought Home*, *supra* note 16 at para. 2.10.

50 See *HRA*, s. 10 and Schedule 2.

51 See *HRA*, ss. 4(3) and (4).

52 See *HRA*, s. 7 which provides for two kinds of proceedings. The first is a "free standing case" under section 7(1)(a), where a litigant takes a public authority directly to court for acting in

section 6 duty may be remedied by such relief as the court considers "just and appropriate" including an award of damages.[53] There is, however, one important qualification. Public authorities do not act unlawfully if they are acting so as to give effect to incompatible primary legislation, or inevitably incompatible subordinate legislation, since to allow otherwise would effectively nullify an Act of Parliament and so destroy the clear intention of the *HRA* to preserve parliamentary sovereignty.

As for who is a "public authority" for the purposes of the new statutory duty, the scope for application is very wide since the term is not exhaustively defined in the *HRA*. According to section 6(3)(b), any person "whose functions are functions of a public nature," other than the Houses of Parliament,[54] must act in a way which is compatible with *Convention* rights. This imposes a function-based test which is a practical necessity given the extent of privatisation in the UK. It may also result in certain hybrid-bodies being both public and private depending on the nature of the particular activity under scrutiny. Take Railtrack for example. It is a private company that, in relation to its work as a railway safety regulator, is a public authority and must abide by the *Convention*, but which falls outside the *Convention* when acting as a commercial property developer. Group 4 is another example, since it acts as a public authority when transporting prisoners, but not when offering its services to a supermarket or entering into a contract for the purchase of land. At this stage, however, it is not clear as to what is a "public authority," a point well illustrated by the story circulating among British lawyers about the BBC, which apparently sought two legal opinions as to whether it is a public authority or not, and naturally received two different answers.

One proposition that is certain, however, is that all courts and tribunals will be considered "public authorities" under the *HRA*, since section 6(3)(a) expressly defines them as such. This has led to an interesting debate, reminiscent of the early days before *Dolphin Delivery*,[55] about the *Act*'s true scope and, in particular, the extent of its application to disputes between private parties. The shorthand used for this debate is whether the *HRA* has "horizontal" as well as "vertical" effect.[56] Since a court is itself a public authority, it is under a statutory duty to abide by the *Convention* and so the argument is made that it will therefore be acting unlawfully if it fails to develop the law (both statute law and common law) in a way which is compatible with *Convention* rights. This would appear to apply even when the litigation before the court is taking place between private individuals. In an annual lecture given to senior members of the judiciary, one of Britain's leading public lawyers, Professor Sir William Wade QC, took the position that this meant that the *HRA* had full horizontal effect.[57] However, despite his personal stature and the forum in which he announced his view, Wade's position has not been broadly accepted,[58] and it remains to be seen just how far the *HRA* will apply between private parties.

THE FLAWS IN THE MODEL

As with any constitutional compromise, the *HRA* does contain weaknesses and ambiguities, the seriousness of which depend on one's perspective. The *Act* is not entrenched and so could be repealed by a subsequent statute, although at great political cost given the apparent public support for its coming into force. Some may also argue that the *Convention* itself is out of date, drafted as it was to reflect the concerns of a post-World War II Europe, and what is needed is a tailor-made or home-grown British Bill of Rights. This argument has some appeal, particularly in light of the gaps in the *Convention*, such as the lack of a search and seizure provision, the absence of any employee rights, and the weakness of the current equality provision, which does not provide a freestanding guarantee.[59] However, once the *HRA* takes hold, many feel that the

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way that is incompatible with Convention rights. The second is a "piggyback" procedure under section 7(1)(b), where the litigant invokes his or her *Convention* rights in the course of other proceedings involving the public authority, such as in the course of a criminal trial or in judicial review proceedings.

53 See *HRA*, s. 8 and M. Amos, "Damages for breach of the Human Rights Act 1998" [1999] 2 E.H.R.L.R. 178.

54 The only clear exemption: *HRA*, s. 6(3).

55 *Retail Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

56 See further, M. Hunt, " The 'Horizontal Effect' of the Human Rights Act" (1998) P.L. 423; I. Leigh, "Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?" (1999) 48 I.C.L.Q. 57 and G. Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: A Bang or a Whimper?" (1999) 62 Modern L.R. 824.

57 H. W .R. Wade, "Human Rights and the Judiciary" (1998) 5 E.H.R.L.R. 520 and H. W. R. Wade, "Horizons of Horizontality" (2000) 116 L.Q.R. 217.

58 See for example, the views of Lord Justice Buxton of the Court of Appeal in "The Human Rights Act and Private Law" (2000) 116 L.Q.R. 48.

59 The opening words of Article 14 reveal its dependent character: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground ..." A Protocol No. 12, which would provide an independent right not to be discriminated against by a public authority in respect of "any right set forth by law," is currently being considered by the member states of the Council of Europe to address this weakness: Hepple *et al*, *supra* note 11 at 9.

embedding of a human rights culture in Britain will eventually lead to an improved (and British) Bill of Rights, either by interpretation or enactment.

Changing the Culture

This embedding of a human rights culture is, in my view, the key consequence of the *HRA*. Its provisions, taken together, are intended to ensure a new human rights dialogue between the executive, the legislature and the courts, and it is hoped that human rights values will begin to permeate British public life. The invention of a "declaration of incompatibility" has wisely, within the British context, preserved the doctrine of parliamentary sovereignty while at the same time ensured that the debate concerning the remedying of incompatible legislation, and the consequent balancing of rights which that usually entails, will occur within the public rather than judicial arena. This enables both the media and interest groups to contribute to the debate through the ordinary political process, and may well be of interest to a Canadian audience long familiar with debates about the politicisation of the judiciary.

Canadian courts and lawyers will also find many fruitful comparisons between the guarantees of the Convention and those of the *Charter*, and the UK's incorporation of the former will hopefully lead to a greater appreciation of the value of international human rights law as a source of guidance in the domestic arena. The *HRA*'s coming into force may also lead to some interesting jurisprudential developments on what is public and what is private. In a world where private bodies, such as the mass media and multinational companies, may pose as significant a risk to the protection of human rights as various emanations of the state, a broader conception of public responsibility may be the *HRA*'s most lasting contribution. For now, however, we can only wait and see.❑

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