The United Kingdom Experience

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Introduction

I propose to tell the story of the United Kingdom's Bill of Rights, how it was obtained, the nature of the bill, and its effects. I will also offer some insights which others might usefully draw from this story to help in deliberations on a Bill of Rights for the Australian Capital Territory (ACT).

It has been fascinating to read some of the literature generated by the ACT consultative committee process. So much of it is familiar, though with a little twist added to reflect different contexts. Australia describes itself as the only common law country or Western democracy without a written statement of rights. In similar terms, the UK used to describe itself as the only Western democracy without a bill of rights or written constitution. While in Australia there are those who argue that the common law has not adequately protected fundamental rights and freedoms, in the UK the argument was made that the common law's entire contribution to anti-discrimination was the requirement that inn-keepers accept all travellers who were 'in a reasonably fit condition to be received'.[1]

The background

A crash course in the United Kingdom experience with bills of rights involves familiarity with three pieces of British political history.

First, the UK has never had much time for bills of rights and written constitutions, which it has always associated with former colonies and what used to be called the Continent (that is, the rest of Europe). Not entirely unfairly, many in the UK have argued that its freedoms reside in 'the silence of the law' or what UK courts call 'a *presumption* of liberty'. So when the UK did finally adopt a bill of rights in 1998, it did not seem quite 'British' to call it that. Instead, it was called the Human Rights Act (HRA). A curious point, for, as most of the world knows, Britain invented the term 'bill of rights' in 1689 (admittedly this was the only bill of rights in the world which gave more power to Members of Parliament than to the people).

Second, despite the UK's wariness of written rights, it was one of the first to ratify the European Convention on Human Rights (ECHR) in 1950. This was the nation's window into international human rights thinking. While ECHR supporters proclaim the ECHR is a distillation of English common law liberties drafted by English common law lawyers, detractors of the ECHR depict it as an offshoot of European law, a subspecies of the ever-expanding tentacles of the European Union (although historically the ECHR and the EU have not been strongly connected), thereby similarly missing the point. Even now, there is very little awareness of the direct and explicit inspiration gleaned by the drafters of the ECHR from the Universal Declaration of Human Rights (UDHR) and its overlap with the International Covenant on Civil and Political Rights (ICCPR), which is barely heard of in the UK.

Third, the main reason that the UK had not, historically, been attracted to bills of rights was because of the perceived vibrancy of its parliamentary democracy. In reality, though, the UK parliament has always struggled for independence from an overbearing executive. For parliamentary sovereignty, a doctrine with which most will be familiar, read executive sovereignty. A major achievement of the 1689 Bill of Rights was to replace the sovereign with the government of the day as the source of ultimate authority in the UK's unwritten constitution. The implications of not circumventing executive authority with a statement of the fundamental rights of the people were not realised until relatively recently.

The story

It was only when a government of the same political persuasion was repeatedly elected on a minority of the popular vote over an eighteen-year period and claimed a democratic mandate to eliminate cherished liberties—such as the rights to silence or free expression—that the limitations of the British system gradually became apparent in certain quarters.[2]

Until the 1980s, the ballot box had produced alternative governments in the UK, constrained in their actions through fear of losing subsequent elections. When this no longer occurred, some individuals (notably influential commentators, academics, politicians, lawyers, and writers) started to look with envy at the constitutions of other nations. These commentators asserted that being free unless the law says otherwise, which had long been the great boast of British liberty, was not such a great advantage when the law kept saying otherwise, and there were no means available by which it could be challenged. The problem was that the only alternative that appeared to be on offer—an entrenched bill of rights based on the American model where a Supreme Court can strike down Acts of Parliament—was an unattractive proposition to all but a small group of liberal lawyers. In the UK, there has never been a popular mandate to increase the writ of judges, whose narrow class, race, and gender composition has historically made them appear unlikely champions of the rights of dispossessed individuals or oppressed minorities. It seemed to most observers that the obvious benefits of a statement of fundamental rights in practice brought power to judges rather than power to the people.

The *content* of any future bill of rights was not realistically up for debate in the UK. The content was always going to comprise most, or all, of the rights in the ECHR and nothing but the ECHR. Some indulged in a measure of bill of rights blue-sky thinking, drafting dream bills of rights which were not very different from the one that South Africa adopted a few years later.

But in the UK context, any government introducing a bill of rights had in its favour the widely appreciated fact that the UK government was already bound by the judgements of the European Court of Human Rights in Strasbourg. It was fairer, quicker and cheaper for complainants, and more comfortable for judges to allow ECHR points to be heard before domestic courts who could then inject Strasbourg jurisprudence with a dose of British common law for good measure. It was time, therefore, in the words of the subsequent Labour Party consultation paper, to be *Bringing Rights Home*.[3] Over time a number of models for incorporating the ECHR into UK law were developed by a small group of academics and think tanks.[4] While such models were well respected in academic and legal circles, they all empowered the courts to overturn legislation. As such, they achieved little success.

Having briefly flirted with the idea of a bill of rights when Labour was last in power in the 1970s, the Conservative governments of the 1980s and 1990s were predictably opposed to any such document on the grounds that the British 'already enjoyed the greatest degree of liberty ...'[5] (Little known is the fact that Margaret

Thatcher's first election manifesto in 1979 expressed commitment to an 'all-party' discussion on a bill of rights.) In the early 1990s, the only party interested in a bill of rights was the Labour opposition. By 1992, they had lost four elections in a row. Led by John Smith, who had a long interest in constitutional reform, Labour was looking to adopt new radical policies on rights and democracy. This was partly the result of a genuine commitment to 'modernise' Britain's constitution, and partly a response to the need to replace other radical policies which Labour was in the process of discarding.

The sticking point in Labour's support for a bill of rights was the role of the judiciary and the absence of support, outside legal and liberal circles, for ending the primacy of parliament in the UK political system. When, some time ago, I read Hilary Charlesworth's description of the 'Australian discussion about rights' as 'locked into a repetitive debate about the legitimacy of judicial scrutiny of governmental action',[6] it was depressingly familiar to me.

It was into this cul-de-sac that I and my colleagues at the British pressure group Liberty (formerly the National Council for Civil Liberties (NCCL)) entered in the early 1990s. It seemed to us that there had to be an alternative way of looking at the issue of fundamental rights; there had to be a dimension to this debate other than the fight for ultimate authority between a *largely* unaccountable, *indirectly* elected executive and a *wholly* unaccountable *unelected* judiciary. The early Declarations and Bills of Rights were, after all, silent on the issue of enforcement. From the tenor of our modern debate, you would have been forgiven for thinking that the rallying cry of the French and American revolutionaries was liberty, equality and the overturning of legislation by the judiciary!

Liberty put forward the idea of a 'democratically entrenched bill of rights' in which parliament, through a new human rights scrutiny committee, would have a central role. Fortunately, Liberty's far too complex and unwieldy proposals for 'democratic entrenchment' were never taken very seriously. However, many commentators would agree that these proposals were successful in releasing the debate from an impasse.

Persuaded that bills of rights did not necessarily have to entail the end of parliamentary sovereignty, New Labour included a commitment to incorporate the ECHR into UK law in their 1997 manifesto. Once Labour was in power, the debate intensified amongst a small elite of academics, lawyers, and NGOs about which model of incorporation to adopt. Unfortunately the UK had no equivalent to the ACT consultative committee but some lobbyists were able to work informally with government advisors and civil servants to devise an appropriate bill of rights model. Much of the ensuing debate centred on the contrasting approaches of the 1982 Canadian Charter of Rights and the 1991 New Zealand Bill of Rights, and two camps emerged: the 'Canadophiles' and the 'New Zealandpros'.[7]

For Liberty, the Canadian model was equivalent to judicial entrenchment minus; the minus referring to the 'notwithstanding clause' which allows the legislature *explicitly* to pass statutes that bypass the Canadian Charter. In contrast, the New Zealand approach maintained parliamentary sovereignty. While the HRA drew on each of these models, it was deliberately crafted to deviate from both in certain crucial respects.

The Canadian approach was much closer to the American model than it seemed at first glance. This is because it is unpalatable to most governments of any political persuasion to pass legislation with a warning announcing that the legislation effectively breaches human rights. The evidence for this lies in the fact that the override has scarcely been used other than in the context of the specific constitutional issues surrounding Quebec.[8]

The newly-elected Labour government was not prepared to follow a model that could force them to declare a whole raft of proposed new legislation in breach of fundamental rights—from gun controls, to curbs on election spending and tobacco advertising—just because UK domestic courts might experience cases similar to those in American or Canada. Where was the persuasive international human rights jurisprudence to back up such judgements anyway? Few would have disagreed, including most of the UK judiciary, that such controversial social issues were ultimately best left to be decided by parliament (even one dominated by the executive). However flawed, the parliamentary process does at least allow for public debate and lobbying to a degree that is impossible through the courts.

As for the New Zealand model, its perceived drawback lay primarily in the idea that the courts were powerless to intervene *altogether* if they took the view that a clearly expressed statute breached the bill of rights. However, in recent developments in New Zealand the courts 'discovered' a declaratory power in the Bill of Rights, which appears reminiscent of the one in the HRA.[9]

The model

It is crucial to understand that although the HRA was passed as an unentrenched, ordinary Act of Parliament, it nevertheless acts as a 'higher law' in that it applies to all other legislation and policy, whether introduced before or after the HRA was enacted. The HRA requires the following:

- Before introducing any new Bill to Parliament, ministers must make a statement as to whether it is compatible with ECHR rights. This statement of compatibility is produced on the face of a bill along with financial information (s19). (Incidentally, in imitation of the Canadian model, this clause also gives ministers a chance to 'bypass' the HRA if they so wish. This has so far occurred only once.)
- A strong interpretive clause requires the courts to interpret legislation in a manner compatible with ECHR rights 'so far as it is possible to do so' (s3).
- Where it is not possible to do so the statute operates unaltered. However, the higher courts are empowered to 'make a declaration of incompatibility' if they are satisfied that an Act, or section of it, is incompatible with the ECHR (s4).
- Where there are 'compelling reasons to do so', the government can use subordinate legislation (known as a 'remedial order') to remove the incompatibility from the offending legislation without this becoming snarled up in the usual legislative timetable (s10). To prevent any abuse of this truncated parliamentary process, remedial orders must be scrutinised by the new Joint Select Committee on Human Rights before they are voted on by parliament.
- Subordinate legislation, such as Immigration regulations and Prison rules, can be overturned by the courts unless the offending provision is mandated by the parent statute (ss3 and 4).
- By the same token it is unlawful for public authorities, including ministers, officials, and the courts themselves, to act incompatibly with the ECHR unless this is an inevitable consequence of complying with an Act of Parliament (s6).
- By including courts and tribunals in the definition of public authorities, the interpretation and development of the common law, and private law in general, must also comply with ECHR rights. However, there is no route for individuals to sue other individuals or private bodies directly for breaching their human rights, unless the private body was carrying out a public function like education or health and safety (s6).

- The courts can grant any remedy, including awarding damages, for a breach of human rights by a public authority that lies within their jurisdiction (s8).
- Finally, whilst the courts must 'take into account' ECHR jurisprudence, they are not bound by it. This allows them to introduce the case law of other jurisdictions, such as Canada or South Africa (which they now do), as well as the provisions of other international treaties (like the CRC and ICCPR) (s2).

Perhaps more important than individual clauses was the *intention* behind the HRA. There were two key phrases government ministers frequently used, inside and outside parliament, to explain the Act's purpose: a) the development of a 'culture of rights',[10] and b) the creation of a 'serious dialogue about rights' between the judiciary and parliament.[11] There is no doubt that the HRA conferred powers on the courts that were previously denied them. They could apply ECHR jurisprudence in judicially reviewing the discretionary acts of ministers or other public officials for the first time. No longer would judges be stymied from declaring that a ban on gays in the military was a breach of human rights, for example, as they had been prior to the enforcement of the Act.[12]

One of the strongest, traditional arguments for judicially entrenched bills of rights, the protection of minorities from the majoritarian impulses of all parliamentary democracies, would be addressed through importing substantive human rights standards and values into what was formerly a *procedural* review of executive discretion. Judges would also have statutory permission to review primary legislation for the first time in British constitutional history. Before the HRA, in the absence of a written constitution, UK courts had been barred from considering the contents of legally enacted statutes *altogether*.

But there was no mistaking the fact that, in taking the HRA at face value, parliament still had the final say. Even if the courts were to reinterpret legislation to make it compatible with the ECHR, the government could still introduce new legislation to overturn this fresh judicial interpretation. Provided the new legislation was sufficiently clear, and its purpose explicitly articulated in parliament, the courts would not be able to touch it a second time. They would only be able to 'declare' it incompatible. And parliament would be free to ignore such a declaration if it wished. If complainants were unsatisfied, they could still appeal to the European Court of Human Rights in Strasbourg.

Interpretation

Predictably, there has been a tussle over the interpretation of the Act. Two competing views have emerged on what is meant by the injunction to interpret legislation in a manner compatible with the ECHR 'so far as it is possible to do so'. One senior judge, Lord Steyn, has maintained that unless a 'clear limitation on Convention rights is stated in terms', it should be possible to interpret an Act in a manner compatible with the ECHR.[13] In effect, this is the Canadian approach by another name. Lord Hope, an equally distinguished Law Lord, has dissented from this approach, in my view adhering more faithfully to the spirit *and* letter of the HRA. He has argued that before judges reinterpret an Act of Parliament under s3, they should look at the Act's meaning and purpose *as a whole*, not just any express intentions by Parliament as to whether it is compatible with the ECHR or not.[14]

It was on this basis that Hope understood his fellow judges' reinterpretation of new rape shield provisions—which were introduced by the government after the HRA came into force and were designed to protect alleged rape victims from intrusive questioning in court—turned the will of parliament on its head. Most of the judicial discretion which the new rape shield provisions sought to remove, on when to admit evidence of a woman's sexual history with the defendant, was reinstated. Following

Hope's logic, a more faithful reading of the HRA would have seen the courts issue a 'declaration of incompatibility', rather than effectively rewrite the new rape shield legislation.[15]

The same point applied in the celebrated case of *Offen*[16] when the courts reinterpreted (or again, effectively rewrote) the UK's infamous 'two strikes and you're out' legislation to reinstate judicial discretion on sentencing, which the new statute had intended to remove. In both this and the former case the courts effectively *read* the Canadian model *into* the HRA, despite the UK government's explicit rejection of the 'notwithstanding approach'.[17] The subject matter that was probably crucial; both cases concerned due process or fair trial issues.

In cases where judges have deemed themselves to have no special expertise, the New Zealand approach has surreptitiously crept into proceedings. This is evidenced by the courts' reluctance to review clearly expressed statutes *at all*, seemingly out of deference to parliament.[18] For example, in a recent prisoners' voting rights case, the court was reluctant even to *consider* whether the legislation in question breached the ECHR on the grounds on which Parliament had spoken in relation to the matter.[19] Yet the HRA was purposefully drafted to allow the courts to state their opinions freely *on any issue*, in the knowledge that this would not alter the law, and that parliament could choose to ignore Declarations of Incompatibility if it so wished. On the whole, however, I believe the model is working as intended. For instance, the interpretation clause (s3) has been used imaginatively, and in my view appropriately, to recognise same sex partnerships in legislation which previously applied only to spouses.[20]

The Declaration of Incompatibility provision has provided the missing link for which the UK was searching. Unlike the Canadian 'notwithstanding clause', the Declaration of Incompatibility provision is being used. A total of nine Declarations of Incompatibility have been made in the UK to date, although at the present time only three remain in place and not subject to appeal.[21] Neither could the Declarations be described as having been hopeless endeavours. In one case the remedial order (fast track) procedure was used swiftly to amend the Mental Health Act 1983 and, as a result, the burden of proof for continued detention was removed from the patient and placed on the detaining authority.[22] In another recent case, when the courts declared that the Home Secretary's power to set minimum terms to be served by convicted murderers was incompatible with the ECHR, the Government responded by announcing its intention to change the law by establishing a set of statutory principles within which judges would fix the minimum time that murderers should serve.[23]

It is important to note that most HRA cases involve the courts reviewing the decisions of officials rather than primary legislation. Alternatively it is often subordinate legislation, such as the Prison Rules, which the courts reinterpret or overrule. There has been no overloading of the courts with frivolous cases as predicted by numerous critical commentators in the period prior to the establishment of the HRA. In fact very few cases have been taken on HRA grounds alone since the Act came into force on 2 October 2000. Although the frenzied imagination of the tabloid press led to claims that school uniforms would be banned, prisoners would gain the right to strike, and sex in school showers would become unstoppable, the reality has been rather more mundane. Nevertheless, the influence of the Act has been important to the people who have benefited, for example, Mr and Mrs X, where a decision to put their child into permanent care was quashed as a breach of the HRA because they were not invited to the placement meeting; or Marian Hill, who would still not be working if she had not won financial support through the HRA for a registered foster carer for her 11-year-old brain-damaged son; or the family of Zahid Mubarik, whose vicious murder by his cellmate,

a well-known racist thug, led to changes in prison policy.[24] While criminal justice and prison policy dominate, significant changes have also occurred in housing, privacy law, and social welfare. Additionally, in relation to discrimination law, the HRA has had an impact on areas that the UK's anti-discrimination legislation is unable to reach.[25]

Evaluation

Has the UK Bill of Rights achieved its stated aims of enhancing rights dialogue and facilitating cultural change? The answer is somewhat mixed. The introduction of Ministerial Statements of Compatibility accompanying new bills to parliament, together with the courts' Declaration of Incompatibility procedure, have certainly enhanced the quality of debate on the nature of fundamental rights between the judiciary, executive, and legislature.[26]

The new Joint Committee on Human Rights is crucial in ensuring that parliament, as distinct from the government, is not cut out of that dialogue. The Committee has produced 24 reports for parliament, which scrutinise new legislation for compliance with the HRA on subjects ranging from homelessness to police reform. Included among these documents is its initial, influential report on the UK's post-September 11 *Anti-Terrorism, Crime and Security Bill 2001*, which appeared only two days after the bill was introduced. The report prompted the Home Secretary to make a number of changes to the bill.

Public debate on rights issues has also been enhanced (such as on the right of the terminally ill to assisted suicide or of celebrities to privacy from media intrusion) as a result of cases that could not effectively have been heard by domestic courts before the HRA. Government departmental reviews on human rights compliance have led to new legislation and policies *without* prompting from litigation.[27] Bodies such as the police, private security firms, and some service-providing NGOs have skilfully used the standards in the Act to evaluate 'voluntarily' their own procedures, training materials, and codes of ethics. One of most memorable occasions I have attended was a workshop run for, and by, people with learning difficulties and their carers, each of whom used ECHR values such as privacy, autonomy, and dignity to evaluate their relationships with each other.

The promise of widespread cultural change, on a par with that which flowed from the UK's anti-discrimination legislation of the 1970s, has not yet materialised.[28] Without any equivalent to Australia's Human Rights and Equal Opportunity Commission such widespread change is unlikely. However, there is, a current debate over whether to create a similar body in the UK.

Conclusion: Lessons for the ACT consultation process?

What, if anything, can the ACT gain from the UK experience? The differences in constitutional and political contexts are obvious. Australia has a federal system of government, the UK does not (the Northern Ireland Assembly and devolution to Scotland and Wales have resulted in different institutional arrangements for protecting human rights in each part of the UK, but the writ of the HRA applies to the UK as a whole). Australia has a written constitution enforced by judges, the UK does not (the UK's unwritten constitution is almost on a par with the monarch and established church as one of the English 'untouchables'). Australia has no bill of rights, but does have a Human Rights and Equal Opportunity Commission, which has led to some public appreciation of international human rights standards, and while the UK has a bill of rights, it has no equivalent commission and may never have one. However, what the two nations do share is a set of common law traditions, joint histories of scepticism concerning bills of rights, and political mistrust of any enhancement of the authority of the judiciary.

I offer three pieces of advice to the ACT Bill of Rights process. First, consult widely. Bills of Rights are supposed to be for everyone, not just academics and lawyers. An enterprise that begins as elitist can remain so. (I am aware that a consultative approach has been central to the ACT process, unlike the process undertaken in the UK.)

Second, it is crucial that the consultation process produces a clear statement of purpose which is then reflected in the bill of rights model chosen. Initially a number of radical and human rights lawyers insisted that the British model was unacceptably weak. Whilst much of this criticism has fallen away in the light of some landmark cases, it was partly based on a lack of clarity about the *purpose* behind incorporating the ECHR into the UK's bill of rights. Those who think the main function of bills of rights is to allow the courts to curb the majoritarian tendencies of parliament in all circumstances would not subscribe to such a point. However, the model chosen in the UK reflects a different approach. It accepts the wisdom that I encountered in the White Paper preceding the New Zealand Bill of Rights, which says, that 'in a great many cases where controversial issues arise for determination there is no "right" [human rights] answer'.[29] Or, to quote Julie Debeljak from her extremely useful comparative review of the UK and Canadian models, 'the salient point is that the non-absoluteness of rights accommodates diversity and difference of opinion about human rights ...'[30]

Where the ECHR refers to 'non-derogable' rights, such as the rights to life, and freedom from slavery and torture, human rights discourse tells us more about what is *not* permissible than what is certain. It provides a framework for deciding between competing rights rather than a set of technical rules. The British 'dialogue' model is intended to reflect that insight. The problem is that there is no preamble attached to the Act or any other authoritative source to clarify this point. A number of disputes over the interpretation of the HRA, in the courts and elsewhere, might have been avoided if one had existed. In straightforward terms, what was needed was a clearly labelled signpost marked 'the HRA is a dialogue model'.

The final piece of advice I would give to those involved in the ACT process is that it is as crucial to develop an ethical vision to support the case for a bill of rights, as it is to devise a model for enforcing rights in the courts. If there is to be widespread support for a bill of rights it is no use telling people in an advanced democracy like Australia or the UK that they are in the same place as the French or Americans in the late eighteenth century, or India in 1948, or South Africa in the aftermath of Apartheid. Instead, a related but different story must be devised.

What that story should be is difficult to establish. It sometimes appears that no progress at all is being made as human rights are assailed and world security is threatened. Such onslaughts on the very idea of human rights have a much wider following, of course, than those opposed to bills of rights. In the new context in which we are all now living—after September 11, Bali and Mombassa—it has never been more important to find the language to express the ethical vision driving the idea of fundamental human rights. If this idea is to remain inspirational in an era where many people fear the actions of non-state actors as much as states, and where governments toss aside cherished liberties in the name of protecting their citizens, then the relevance of rights must be demonstrated. To quote from the ACT Consultative Committee literature, rights are 'standards of behaviour we should be able to expect between individuals and groups'.[31] They are, in Hilary Charlesworth's words, 'the conditions necessary for people to live lives of dignity and value'.[32]

To press home the case for a bill of rights in the UK the argument was made that every society needs a basic statement of its fundamental values that not only sets the boundaries between state and citizens but acts as an ethical code for how individuals should behave toward one another. Those in favour of the bill argued,

and continue to argue, that in diverse, democratic societies where there is no single dominant religion or moral code, it is the values of human rights, inspired by all the great religions and philosophies of east and west, that have a unique capacity to unite and heal. In the final analysis, the idea of human rights stem from what human beings have learnt are essential in making life liveable. That is why everyone needs them to be securely reflected in laws, for good times and for bad.

Endnotes

[1] *Constantine v Imperial Hotels Ltd* [1944] KB 693.

[2] See Francesca Klug, *Values for a Godless Age, The Story of the UK's Bill of Rights* (Penguin, 2000).

[3] Jack Straw & Paul Boateng, *Bringing Rights Home: Labour's Plan to Incorporate the ECHR into UK Law* (Labour Party, 1996). This was followed by a White Paper, *Rights Brought Home: The Human Rights Bill*, CMND 3782, 1997.

[4] Most notably, Anthony Lester QC et al, *A British Bill of Rights* (IPPR, 1990). For other examples see Michael Zander, *A Bill of Rights?* (Sweet & Maxwell, 1997).

[5] Margaret Thatcher, letter to Baroness Ewart-Biggs, May 1989.

[6] 'The Australian Reluctance about Rights' in Philip Alston (ed.), *Towards an Australian Bill of Rights* (Centre for International and Public Law and Human Rights and Equal Opportunity Commission, 1994).

[7] See Francesca Klug, 'The Role of a Bill of Rights in a Democratic Constitution' in Anthony Barnett et al (eds), *Debating the Constitution* (Polity, 1993).

[8] The only time the override clause has been used to overturn a judicial decision was in *AG (Quebec) v La Chaussure Brown's Inc* [1988] 2 SCR 712.

[9] *Moonen v Film & Literature Board of Review* (2002) 2 NZLR 9.

[10] Introducing the Human Rights Bill in the House of Lords, Lord Irvine, the Lord Chancellor, said 'Our courts will develop human rights throughout society. A culture of awareness of human rights will develop', *Hansard*, 582 HL (3 November 1977).

[11] Former Home Secretary, Jack Straw, explained the model for incorporation in these terms: 'Parliament and the judiciary must engage in a serious dialogue about the operation and developments of the rights in the Bill ... this dialogue is the way we can ensure the legislation is a living development that assists our citizens.' *Hansard*, 314 HC 1141 (24 June 1998).

[12] *R v Ministry of Defence ex p. Smith* [1996] 1 All ER 257.

[13] *R v A* [2001] 3 All ER 1.

[14] Subsequent cases which have borne out Lord Hope's approach include *Matthews v Ministry of Defence* [2002] 3 All ER 513; *R v Shayler* [2002] 2 WLR 754 and *Re W and B (Children) wh (Care Plan), Re W (Children) (Care Plan)* [2002] 2 WLR 720.

[15] Applying this reasoning, it is difficult to understand why s3 could not have been appropriately applied in H rather than s4. *Re (H) v MHRT London N & E Regional Mental Health Review Tribunal* [2001] EWCA, Civ. 415.

[16] *R v Offen* [2001] 1 WLR 253.

[17] *White Paper*, CMND 3782, 1997, para 2.11.

[18] See Francesca Klug, 'Judicial Deference under the HRA', *European Human Rights Law Review*, 2, 2003.

[19] *R (Pearson and Martinez) v Home Secretary and Others* [2001] HLRL 39 at paras 20 and 40.

[20] *Mendoza v Ghaiden* [2002] EWCA Civ 1533.

[21] Declarations issued in the following cases still stand: *R (on the application of H) v Mental Health Tribunal (North & East London Region)* [2002] QB1 in relation to Mental Health Act 1983, ss72-73; *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] 1 CMLR 52 in

relation to Immigration and Asylum Act 1999, Pt II; and, most recently, *R (Anderson v Taylor) v Secretary of State for the Home Department* [2002] UKHL 46, which made a declaration in respect of s29 Crime (Sentences) Act 1997, in effect withdrawing the power from the Home Secretary to set the tariff element of a mandatory life sentence for murder.

However, the declaration made in 'Alconbury' *(R v Secretary of State for the Environment, Transport & the Regions, ex p Holding & Barnes Plc* [2001] HRLR 2, QBD (Admin Ct) [2001] 2 WLR 1389, HL) was overturned on appeal; and declarations in *Wilson v First County Trust Ltd v Inland Revenue Commissioners* [2001] 3 WLR 42; *Matthews v Ministry of Defence* [2002] 3 All ER 513; *Hooper v Secretary of State for Work & Pensions* [2002] EWHC Admin 191, *and Wilkinson v Inland Revenue Commissioners* [2002] EWHC Admin 182 are the subjects of pending appeals.

At the time of writing information was not available as to whether the Court of Appeal's decision, overturning a declaration made by the Special Immigration Appeals Commission in *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502 would proceed on appeal to the House of Lords.

[22] *R (on the application of H) v Mental Health Tribunal (North & East London Region)* [2002] QB 1.

[23] *R (Anderson v Taylor) v Secretary of State for the Home Department* [2002] UKHL 46, *op cit.*

[24] *R (Amin) & R (Middleton) v Secretary of State for the Home Department* [2002] 3 WLR 505 CA. An appeal on this case is pending.

[25] For example, *R(SG) v Liverpool CC & Health Secretary*, determined by consent 21 October 2002.

[26] In one case the Court of Appeal read new provisions, via s3 HRA 1998's interpretative obligation, into Children Act 1989, allowing for the 'starring' of the essential milestones of a local authority care plan for children subject to full care orders, and for an ongoing role for the court in monitoring their achievement. The House of Lords took the view that this was 'judicial innovation' beyond the license of s3, and overturned the decision. (*Re W and Others (Second Appeal) Conjoined Appeals)* [2002] UKHL 10).

Nevertheless, in response to this judgment, the government amended the Children Act 1989 to provide for the introduction of Independent Reviewing Officers who will be under a duty to review a local authority's progress in implementing court-approved care plans.

[27] For example the *Care Standards Act 2000* which reformed and standardised the regulatory system for care services and the NHS National Service Framework aimed at reducing 'post code lotteries' in access to health care.

[28] Former Home Office Minister Lord Williams claimed that following the enactment of the HRA 'Every public authority will know that its behaviour, its structure, its conclusions and its executive actions will be subject to this culture. It is exactly the same ... following the introduction of, for example, race relations legislation and equal opportunities legislation.' *Hansard*, 582 HL 1227 (3 November 1997).

[29] Para 6.17.

[30] Julie Debeljak, 'Rights Protection without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights', *Melbourne University Law Review*, 26(2), 2002.

[31] Peter H. Bailey, *Bringing Human Rights to Life* (Federation Press, 1993), p. viii.

[32] Hilary Charlesworth, *Writing in Rights, Australia and the Protection of Human Rights* (UNSW Press, 2002), p. 41.