The Research Director
Legal Affairs and Community Safety Committee
Parliament House
Brisbane QLD 4000

18 April 2016

Dear Research Director,

Human Rights Inquiry

Submission by Professor Nicholas Aroney and Professor Richard Ekins

1. Thank you for the opportunity to make a submission to this inquiry. In our opinion, the Queensland Parliament should not enact a Human Rights Act. Our reasons are several. In our submission, respect for human rights does not require advocacy of a statutory charter of rights. Indeed, the 'rights' introduced into law by statutory charters of rights lack the form of good law. They encourage decision-making by the courts that is undisciplined. They distort the proper functioning of legislatures. Contrary to the claims of their proponents, statutory charters of rights do not produce dialogue. Charters of rights are a kind of constitutional statute that shapes the making and adjudication of law. They should not be introduced without bipartisan support. Human rights are better protected by a properly-functioning democratic system of government. More would be achieved if a democratically elected upper house were reintroduced into Queensland.

Introduction

2. Queensland enjoys a robustly democratic system of government. Policies of government are routinely subjected to scrutiny in the Parliament, in the media and, increasingly, through many diverse forms of electronic communication. Political parties propose alternative policies for consideration by the people of Queensland and the political contest is open and vigorous. On occasion, governments adopt policies or introduce legislation that, in the view of their opponents, unduly interferes with human rights. This is alleged to occur on all sides of politics. Much of the contestation is based on differing ideologies and values, although all sides in Queensland politics recognise the value of our democratic system of government and acknowledge the importance of certain basic human rights.
3. In this context, while Queensland governments of all persuasions have, in our opinion, occasionally introduced legislation that has unjustly interfered with human rights, the introduction of a Charter of Rights or Human Rights Act is not the best solution to the problem. In this submission we outline several reasons why this is the case.

4. Our submission draws on published research and our own work on the philosophical and practical difficulties created when Parliament attempts to protect human rights by introducing abstract rights principles into the law.

'Human rights' are not the same thing as 'human rights law'

5. The question of whether to enact a statutory bill of rights is not a question about whether human rights should be protected or respected. Whatever the law may say, people are entitled in justice to certain absolute rights that should never be violated. Every decent legal system recognises and secures those absolute rights in some way. However, the absolute rights that should be protected by law cannot simply be equated with the abstract descriptions of rights routinely contained in statutory bills of rights.

6. To understand this point, it is important to be clear about the meaning of 'rights'. The term can mean many different things. It can refer to what are commonly called 'human rights', meaning those rights to which every human being is entitled by virtue of their identity as a human being. It can also refer to 'legal rights', meaning those rights to which a person is legally entitled within a particular system of law. Human rights and legal rights are not the same thing. A society can have a statute called a 'Human Rights Act' and yet fail to protect human rights, and a society can adequately protect human rights without a Human Rights Act. For example, the United Kingdom did not fail to protect rights before the Human Rights Act 1998 came into force in October 2000. After that Act came into force British law contained a new measure concerning human rights, a measure that might be thought, in retrospect, helpful or unhelpful. But the Act was not a watershed marking out a community that suddenly decided to respect human rights.[1]

7. It is also important to distinguish between the particular lists of rights that are commonly contained in Human Rights Acts and the legal entitlements they create. The rights contained in such Acts are expressed in general and abstract terms, such as 'freedom of expression' and 'freedom of association'.[2] However, no viable and just legal system can affirm that such 'rights' are to be enjoyed without limitation. Freedom of expression, for example, must be limited to enable wrongs such as defamation, perjury and obscenity to be prohibited by law. Indeed, on many occasions the abstract rights referred to in Human Rights Acts will be in conflict with each other. For example, someone's 'right to freedom of expression' may conflict with another person's 'right not to have his or her reputation unlawfully attacked'.[3] Accordingly, all Human Rights Acts include provisions that allow the 'rights' referred to in the Act to be limited.[4]

[1] The Hon Dyson Heydon QC, a former Justice of the High Court of Australia, makes a related point in his article 'Are Bills of Rights Necessary in Common Law Systems?' (2014) 130 *Law Quarterly Review* 392, a copy of which is attached as Appendix A to this submission. See also his judgment in *Momcilovic v R* [2011] HCA 34, at [380-381], which explains that the rights affirmed in abstract form in bills of rights have been protected – in much more detailed, coherent, workable form – for hundreds of years by the common law and ordinary legislation.

[2] Charter of Human Rights and Responsibilities Act 2006 (Vic) ss 15(2) and 16(2).

[3] Ibid ss 15(2) and 13(b).

[4] Ibid s 7(2).

8. The practical application of a Human Rights Act almost always involves the consideration of legitimate limits on the abstract rights listed in the Act. The lists of rights contained in statutory bills of rights do not define, in themselves, the legal entitlements that citizens enjoy or should enjoy. Those legal entitlements depend upon the consideration of other, sometimes competing rights, as well as the possibility of legitimate limitations on such rights. This applies not only to Human Rights Acts, but also to the 'human rights' protected by international rights instruments. The International Covenant on Civil and Political Rights (1966), for example, includes the 'right to freedom of expression',[5] but also states that this right may be 'subject to certain restrictions'.[6] The internationally-recognised right to freedom of expression is therefore not absolute. The human right to which all persons are absolutely entitled is a more precisely and narrowly defined right that does not involve a breach of the rights or reputations of others and is limited by laws that are necessary for the protection of national security, public order or public health and morals.[7]

9. In short, the abstract rights affirmed in a statutory bill of rights do not state conclusively what justice truly requires. These abstract formulations require limitation and they invite argument about how best to apply them in light of other rights and other important considerations. Reasonable people disagree about what rights require in particular controversies – this is a persistent and unavoidable feature of politics.[8] It follows, as Professor John Griffith has argued, that abstract rights formulations are 'the statement of a political conflict pretending to be a resolution of it'.[9] Like many other scholarly critics of bills of rights we are not sceptical about human rights themselves. But respect for human rights is severable from advocacy of bills of rights. The question for decision is not whether one should respect human rights – that is an easy question. The question is whether bills of rights are a prudent or proper way of protecting human rights. In our submission, in places like Queensland, with reasonably good parliamentary arrangements and robust democratic politics, bills of rights are not a good way of protecting rights.[10]

How statutory bills of rights work

10. Statutory bills of rights share a common form. The New Zealand Bill of Rights Act 1990 was an early exemplar, influencing the design and operation of the Human Rights Act 1998 in the United Kingdom. The more recent Victorian and ACT legislation was expressly framed with these examples in mind. Statutory bills of rights introduce into law a set of generally worded rights, subject to limitations (either to a series of particular limitations or to one general limitation clause). These rights (suitably limited) can be relied on in court and their breach by the executive may be sanctioned by judicial action. However, the rights in question do not *bind* the legislature, and the executive acts

[5] Art 19(2).
[6] Art 19(3).
[7] Art 19(3)(a) and (b).
[8] Jeremy Waldron, *Law and Disagreement* (Oxford, Oxford University Press, 1999).
[9] JAG Griffith 'The Political Constitution' (1979) 42 *Modern Law Review* 1.
[10] See further Jeremy Waldron, 'A Rights-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 83 and Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346.

lawfully if its action is grounded in other legislation – even if the court thinks that this other legislation is itself inconsistent with the rights affirmed in the bill of rights.

11. Importantly, a statutory bill of rights does not authorise courts to invalidate other legislation. But it does require courts to strive to interpret other legislation consistently with the bill of rights. And it may require that if such an interpretation is not possible, the court is to declare the legislation inconsistent with rights thus placing political pressure on the government and legislature to change the law.

The rights introduced into law by statutory bills of rights lack the form of good law

12. Justice should be secured in a manner that is consistent with the rule of law. The way to give legal effect to human rights – the pattern of just relationships that should govern social life – is by way of clear, prospective, coherent legal rules, which settle authoritatively what should or should not be done. The abolition of slavery, the protection of unions from common law action, and the reform of laws governing domestic abuse, to mention only a few examples, all required clear *legislative* action to change the existing law in some specific, authoritative way. Legislatures are under a moral duty only to change the law in ways that conform to the demanding requirements of the rule of law ideal.

13. Statutory bills of rights fail to conform to the rule of law ideal. This is because the adoption of a statutory bill of rights does not change the law in clear, predictable ways. Indeed, the only predictable change that it makes is to undermine the clarity of *other* law. With rare exceptions, the rights affirmed in a bill of rights require further elaboration, especially by way of a general proportionality test. And, as Professor John Finnis and Professor Grégoire Webber, among many others, have demonstrated, the application of proportionality tests is not a technical, legal exercise but instead involves open-ended moral and political reasoning.[11] The problem with this is not just that it is an inappropriate function for a court to undertake – although it is – but that the content of the new legal rights is not settled until the court makes its moral choice. And whatever one court chooses a later court may unsettle. The legislature that enacts a statutory bill of rights is in one sense signing a blank cheque and authorising judges to fill in the blanks. Strictly, the legislature may retain authority to amend the bill of rights, but in practice this is a very difficult task. Thus, enacting a bill of rights introduces into the law an unclear, uncertain set of legal relationships.

14. The legal effect of a statutory bill of rights turns in large part on the application of the requirement, contained in most statutory bills of rights, that judges must strive to interpret

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[11] John Finnis, 'Human Rights and Their Enforcement', in John Finnis (ed), *Human Rights & Common Good: Collected Essays Volume III* (2011), 19 (originally published as 'A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence' (1985) 71 *Proceedings of the British Academy* 303; Grégoire Webber, *The Negotiable Constitution* (Cambridge, CUP, 2009); Grégoire Webber, 'Rights and the rule of law in the balance' (2013) 129 *Law Quarterly Review* 399; Timothy Endicott, Proportionality and Incommensurability', in Grant Huscroft, Brad Miller and Grégoire Webber (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014) 311.

other legislation consistently with the bill of rights. The effect of this requirement can be more or less radical. In New Zealand, for the most part the effect has not been radical,[12] although there are still many cases in which courts have relied on the provision to misinterpret statutes by departing from their intended meaning.[13] However, in the United Kingdom the courts have taken the requirement to authorise them to impose meanings on statutes that the enacting the legislature clearly did *not* intend.[14] For Victoria and the ACT, a more circumspect approach has been mandated by the High Court of Australia, at least for the time being.[15] However, over time, especially if more Australian jurisdictions were to adopt statutory bills of rights, there is every prospect that a more activist approach will emerge. The experience of legal systems worldwide is that when courts are given power to apply bills of rights to legislation, a kind of 'juristocracy' results.[16] There is no reason to be confident that Australian jurisdictions will remain outliers in this respect. Already many human rights lawyers – both practising and academic – are advocating for human rights activism in Australian law. One only has to peruse the various human rights law journals published in Australia to see the point. Statutory bills of rights encourage activist elements in the legal profession to press for judicial intervention in support of politically-contested moral and political positions. This is objectionable simply on the ground that it transforms the judiciary into a law-making, instead of a law-interpreting, institution. But our point here is that it also contributes to significant legal uncertainty. This is clear in the British experience,[17] and there is no reason to be confident that it will not happen, over the long run, in Australia as well.

Human rights law adjudication is often undisciplined

15. Judges are well-suited to upholding clear legal rights. They are much less well-suited to having to choose the content of legal rights, including choosing how best to limit some general right in order to protect other rights or important interests. These are essentially legislative responsibilities and they are best discharged by a legislative assembly, led by a government with advice and support from the civil service. These responsibilities should not be undertaken in the heat of adjudication, when the judge is, understandably, concerned with the parties before him or her and unable to take a responsible view of wider concerns. Judgments decide particular cases, rather than laying down general rules, and while a line of judgments *may* disclose a clear rule this is often very difficult to

[12] The leading case is now *R v Hansen* [2007] 3 NZLR 1.

[13] See, for example, *In the matter of application by A M M and K J O (Adoption)* HC Wellington, CIV-2010-485-328, 24 June 2010.

[14] The leading case is *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. The effect of the requirement can be seen in particularly glaring fashion in *R v A (No 2)* [2002] 1 AC 45 where the court undermined rape shield legislation. The legislation had limited the power of trial judges to permit cross-examination of complainants in sexual offence trials; the court relied on the Human Rights Act in effect to restore the trial judge's discretion to permit cross-examination whenever he thinks it justified.

[15] *Momcilovic v R* [2011] HCA 34

[16] Ran Hirschl, *Towards Juristocracy; The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004); Jeffrey Goldsworthy, 'Losing Faith in Democracy' *Quadrant*, 25 May 2015.

[17] Philip Sales, 'Three Challenges to the Rule of Law in the Modern English Legal System', in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis 2011) 189.

discern. Further, judgments in human rights law cases are particularly contentious and are vulnerable to being overturned by later courts simply on the grounds that they were wrongly decided: precedent has much less force here than in the ordinary common law. There is also a clear bias in human rights law adjudication in favour of particular judicial discretion and against general rules.[18] This impairs the judicial capacity to make law fit for the rule of law and is a powerful reason for judicial power to be kept within traditional bounds.

16. Statutory bills of rights impose on judges a novel responsibility to make the open-ended law-making choices that are properly for the legislature and to impose those choices on the executive by way of judicial review and on the legislature by (a) misinterpreting other legislation that the legislature enacts and (b) declaring other legislation to be incompatible with fundamental rights and hence to bring political pressure to bear on the political authorities to change the law. Many judges are, or will be, understandably uneasy about these new obligations and will have to determine how best to carry out these tasks in ways that do not undermine their traditional function. This tension (traced with care by Lord Justice Elias in the United Kingdom[19]) makes the temperament of the particular judge very important. The outcome of particular cases may turn on how confident judges are of their competence and of the legitimacy of their making legislative choices or in exercising substantive oversight of the merits of executive action.

17. The main way in which judges will mediate their new responsibilities to oversee the justice of legislation and executive action is by way of the doctrine of proportionality. This doctrine promises to structure rights adjudication, to make it predictable or principled and to avoid it collapsing into the judge's own moral and political reasoning. These promises are groundless.[20] Some judges will be relatively restrained in determining whether some official action breaches rights, but the extent of restraint will turn on the particular judge's wider moral and political views or on his or her temperament. Further, in any particular case, it is open to judges to calibrate the intensity of review, to find that the government has or has not breached rights. This calibration is quite likely to be politically driven. The proportionality analysis that is at the heart of modern rights adjudication makes that adjudication undisciplined. The judicial role under a statutory bill of rights is starkly different to the traditional task of upholding clear legal right.

18. One implication of this lack of discipline is that politically unpopular groups may well fail to be protected as they should be. In a recent British case, the Supreme Court failed to extend to pro-life midwives the protections for conscience that the Human Rights Act appears to guarantee.[21] The problem was not that the court considered the matter and

[18] Richard Ekins, 'Legislating Proportionately' in Grant Huscroft, Brad Miller and Grégoire Webber (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014) 343; Philip Sales and Ben Hooper, 'Proportionality and the Form of Law' (2003) 119 *Law Quarterly Review* 426.

[19] Lord Justice Elias, 'Are Judges Becoming too Political?' (2014) 3 *Cambridge Journal of International and Comparative Law* 1.

[20] Francisco Urbina, 'A Critique of Proportionality' (2012) 57 *American Journal of Jurisprudence* 49; Grant Huscroft, 'Proportionality and Pretence' (2014) 29 *Constitutional Commentary* 229.

[21] *Greater Glasgow Health Board v Doogan and Another* [2014] UKSC 68; [2015] A.C. 640.

decided against the midwives, who sought to rely on the protections in the Abortion Act against any duty to have to participate in abortion. Rather, the court avoided considering the matter at all, tacitly deciding against the claimants. The extent to which the courts conscientiously apply the protections that the bill of rights nominally introduces will vary from case to case and from claimant to claimant. The unclear, unsettled structure of the bill of rights provides excellent cover for such aberrant judging.[22]

Human rights charters license judicial law-making

19. Authorising judges to declare legislative and executive action incompatible with abstract human rights formulations (as opposed to clearly specified, concrete legal rights) distorts judicial decision-making. It does so in several ways.

20. Judges are appointed for their ability to apply the law impartially to the case at hand. Their expertise consists in being able to interpret and apply relevant common law and statutory law to the particular disputes that are brought before them by parties to litigation. The principal mode of reasoning in which they engage is abductive: it involves determination whether the particular case at hand falls into a particular legal category. For example, a judge may have to determine whether, on the evidence adduced before the court, a person has driven a motor vehicle without due care and attention.[23] To make such a determination, the judge has to form a view of the proper *meaning* of 'due care and attention', but not whether drivers *should* be required to drive with due care and attention, for this is something that has been determined by the legislature.

21. In such a context, however, a human rights charter requires judges do two further things: first, to determine whether a requirement that people drive motor vehicles with due care and attention is consistent with the abstract human rights and limiting principles contained in the charter and, second, to determine whether the meaning of 'due care and attention' needs to be interpreted, not according to its ordinary sense and meaning, but in a manner that makes it consistent with the judge's assessment of what the human rights charter requires.[24] Although this is perhaps a trivial example, and it may be unlikely that a charter of rights will make much of a difference to the adjudication of cases about driving without due care and attention, a charter of rights does this to the application of *every statute* enacted by the legislature.

22. Often the judgements made by Parliament when enacting laws involve sharply contested political debate. A charter of rights requires judges to participate in such debates. This undermines their ability to undertake their very important role of applying the law to

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[22] For more detail, see Richard Ekins, 'Human Rights and the Separation of Powers' (2015) 34(2) *University of Queensland Law Journal, The* 217, a copy of which is attached to this submission as Appendix B. See also John Finnis, 'Judicial Power: Past, Present and Future', Policy Exchange lecture at Gray's Inn, London, 20 October 2015 (http://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future/), introduced by the Lord Chancellor of England and Wales.

[23] Transport Operations (Road Use Management) Act 1995 (Qld) s 83.

[24] Aileen Kavanagh, *Constitutional Review under the Human Rights Act* (Cambridge University Press, 2009); Richard Ekins, 'Rights, Interpretation and the Rule of Law' in Richard Ekins (ed.) *Modern Challenges to the Rule of Law* (LexisNexis 2011) 165; Richard Ekins and Philip Sales 'Rights-Consistent Interpretation and the Human Rights Act 1998' (2011) 127 *Law Quarterly Review* 217.

particular cases in an impartial manner and in a manner that maintains the confidence of the community. When judges take sides in political debates it undermines public confidence in their ability to make decisions that are independent of the executive government and without prejudice or bias to the interests of the parties to the dispute. We do not mean to say that judges are able to decide cases without adopting morally-informed views about the meaning of legislation, but it does mean that if they are given an institutional role in commenting on the desirability of controversial legislation this will often embroil them in political debate and therefore undermine public confidence in their ability to perform their core functions of deciding cases in an impartial manner.

Human rights charters distort the proper functioning of legislatures

23. Authorising judges to declare legislation incompatible with human rights also distorts the proper functioning of legislatures.

24. First, it requires democratic deliberation to be reframed in legalistic terms. One main consequence of the introduction of a charter of rights is to present moral and political controversies as if they cannot be decided properly without legal learning – namely, interpretation of the text of the charter, classification of particular cases by reference to existing legal doctrines, application of the apparently technical idea of proportionality, and (especially) reading and digesting earlier judgments. Lawyers are trained to work with these materials and to think and talk in this way. Hence, lawyers are able to frame arguments in these terms, notwithstanding that, as we say, human rights law is in fact quite different to other fields of law in the extent to which it is undisciplined and unpredictable. But ordinary citizens and their representatives in parliament who lack legal training are not equipped to participate in this discourse or to frame their arguments in this way. They may tend to reason more directly, going straight to the practical consequences of proposed legislation and to the justice or fairness of those consequences.[25] Our point is emphatically not that non-lawyers do not think about rights or justice. Rather our point is that human rights law functions in large part as an exclusive language, which arbitrarily excludes and disarms non-lawyers. Introducing a charter of rights increases the rhetorical and tactical advantages that lawyers, and well-resourced groups with access to legal resources, have over other participants in political debate. This is inconsistent with basic democratic principle, which requires public deliberation about what should be done in which all citizens may participate equally.

25. Second, if politically-motivated litigants are able to secure a declaration of incompatibility from a court under a charter of rights, this gives them an unfair advantage in political debate. The case for a statutory bill of rights is that it will empower the relatively marginalised and dispossessed, making it harder for the majority to ignore them. Much more likely, however, is that the well-connected and well-resourced, whose prejudices and predispositions are often shared by judges, will be given a second way of

[25] This is quite likely a virtue of the political process. Courts may be poorly placed to determine what rights truly require in part because of their focus on legal materials. See Jeremy Waldron, 'Judges as moral reasoners' (2009) 7 *International Journal of Constitutional Law* 2.

influencing the political process. This is what has happened with assisted suicide. The question of whether to ban assisted suicide is a difficult moral and political issue about which society is often closely divided. In the United Kingdom and elsewhere judges have been invited to lend, and to some extent have lent, support to the campaign to overturn the ban. But the arguments for reforming the law have not been ignored or overlooked. The impact of the Human Rights Act has been to improperly support one side in the controversy, all because this is what chimes with the moral views of a majority of judges. In this way, statutory bills of rights give an unfair advantage to political groups whose moral or political views happen to coincide with those of judges.

Human rights charters do not produce dialogue

26. The Human Rights Act 2004 (ACT) and the Charter of Human Rights and Responsibilities Act 2006 (Vic) were meant to create a 'dialogue' between the three branches of government. A close examination of the case law and subsequent political debate in the State of Victoria suggests that the Charter of Rights has not contributed meaningfully to dialogue or deliberation. This is because, on most questions of public import, agreement on an abstract set of words contained in a statutory bill of rights does nothing to resolve debate. Differences of opinion in political and moral matters are caused by differences in underlying philosophy and values which inform the way in which the language of a statutory bill of rights is interpreted and applied.

27. This is borne out by a recent study into the practical effect of the Charter of Rights in relation to freedom of religion in Victoria undertaken by one of the authors of this submission, Professor Aroney, with Professor Paul Babie of Adelaide University and Dr Joel Harrison of Macquarie University. A copy of the study is attached to this submission as Appendix C.[26] Aroney, Babie and Harrison found that, rather than contribute to the protection of freedom of religion in Victoria, the Charter of Rights has contributed to an environment in which many people of religious faith felt that their freedom to practice their religion was increasingly under threat.

28. Several cases have been decided in Victoria under the influence of the Charter of Rights. In their study, Aroney, Babie and Harrison found that the Charter of Rights played virtually no substantive role in protecting freedom of religion in those cases. The real determinants of the decisions of the courts lay elsewhere. Indeed, in one particular case, *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*,[27] freedom of religion was better protected by those judges (of the Victorian Court of Appeal) who found that the Charter of Rights did *not* apply to the case at hand than the one judge (of the Victorian Civil and Administrative Tribunal) who found that it *did* apply. And even in relation to those judges who found that the Charter did not apply, two of them still

[26] The study is to be published as a chapter in a forthcoming book under the title: 'Religious Freedom under the Charters', in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (Federation Press, forthcoming 2016).

[27] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2010] VCAT 1613 (8 October 2010), affd (2014) 308 ALR 615, leave to appeal denied [2014] HCATrans 289 (12 December 2014).

adopted a very narrow and restrictive view of religious freedom. This was because, even though all of the judges recognised that competing human rights were at stake in the case, the real determinants of the decision had nothing to do with whether human rights were or were not taken into consideration. What really determined the outcome was the particular perspective from which each judge approached the case. The *Cobaw* case thus demonstrates that what really matters in the application of human rights laws, such as human rights charters and antidiscrimination laws, is not so much the language in which such rights are enshrined, but the attitudes and philosophies of the judges who apply the law. Human rights laws, much more so than other types of laws, call on judges to apply their own value judgements to the case at hand. It is better that these value judgements are made in a democratically accountable way in the Parliament.

29. Aroney, Babie and Harrison found that the main areas of contention in Victoria in relation to the protection of religious freedom concerned the interpretation of Victoria's antidiscrimination laws. With or without a Charter of Rights, it is widely recognised that this debate involves an unresolved clash between two competing ideals: equality of treatment and freedom of religion and freedom of association. The Victorian Charter of Rights is *meant* to protect all of these rights equally. However, in political deliberation about Victoria's antidiscrimination laws, no way has been found to interpret the laws or craft a set of reforms that does justice to all of the 'rights' concerned, particularly as these are assessed from the perspectives of those most affected by antidiscrimination laws. Aroney, Babie and Harrison found that submissions to the two reviews of the Victorian Charter of Human Rights that addressed the intersection of these competing rights demonstrated very little engagement of argument or meeting of issues. Proponents of the various views about the nature and scope of those rights made submissions that only very rarely addressed the concerns of those who took a different point of view. In this way, instead of facilitating dialogue, the Victorian Charter has presided over a context in which each side 'talks past the other', showing very little ability to understand or engage with the reasons being advanced by the other side.

30. Similar findings have been made in other countries. Professor Andrew Geddis has argued that there is no clear evidence that the New Zealand Bill of Rights Act has contributed to the development of a 'culture of justification' within public authorities.[28] Of all the Australian states, Queensland is especially analogous to New Zealand. Both have unicameral parliaments, and both have had, as a result, long-standing reputations for an executive-dominated system of government.[29] The real problem in New Zealand, as in Queensland, is the absence of a democratically-elected upper house, an issue to which we return below.

[28] Andrew Geddis, 'Inter-Institutional 'Rights Dialogue' under the New Zealand Bill of Rights Act' in Tom Campbell, K.D. Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 88, 100.

[29] See, further, Nicholas Aroney and Steve Thomas, 'A House Divided: Does MMP Make an Upper House Unnecessary for New Zealand?' [2012] *New Zealand Law Review* 403.

Human rights can and should be protected by Parliament

31. Statutory bills of rights are a very poor substitute for targeted legislation addressing particular social ills and introducing new legal regimes to put them right. At best, statutory bills of rights will do no harm. More likely, they will transform the constitutional position of the courts, will distort legal culture and public democratic deliberation, will undermine the rule of law, and will make it possible for courts to neglect or overlook persons whose legal rights may be in real danger.

32. Parliaments, and parliamentary committees, have several advantages over courts in testing the appropriateness and proportionality of laws. First, they are not restricted to making determinations in particular cases brought before them. They can initiate inquiries on their own motion, and can return to the same subject again and again if they regard it as necessary. Second, they are not restricted to considering evidence submitted by the parties to a case that must meet the formal requirements of legally admissibility. Unlike courts, they can have regard to all manner of factors and considerations, whatever their nature, weighing them in their deliberations as they think appropriate. Third, they can publicise their findings and stimulate public debate in ways and to an extent that is not possible for the courts. Judges are properly expected to be circumspect in their public utterances, whereas members of Parliament are entirely free to disseminate and promote their views as they wish. Fourth, especially in circumstances where the parliamentary system ensures that the government is not in a position to control them, parliamentary committees frequently demonstrate an independence of judgment and a willingness to scrutinise government policies, actions and proposed legislation that is not generally shared by the courts.

33. These characteristics of parliamentary scrutiny of government and government policies can be demonstrated by many particular examples. Professor Adam Tomkins has shown, in relation to the UK government's counterterrorism legislation for example, that the British Parliament, not the courts, has proven to be the most effective means of protecting human rights.[30] Courts, he observes, are prone to accepting a government's assessment of nature and extent of terrorist threats, but the parliamentary Joint Committee on Human Rights has challenged the government's assessment.[31] Indeed, parliamentary committees can show themselves willing to wage a war of attrition in the defence of human rights.[32] Professor Tomkins concludes that:

> even in an area as difficult and unpromising as national security and counter-terrorism, the evidence of recent years in the United Kingdom, at least, is that parliamentary committees such as the JCHR are more committed guardians of our human rights than are the appeal courts.[33]

34. Of course, this occurred in the context of the British Human Rights Act. However, as Professor Carolyn Evans and Professor Simon Evans have shown, with or without a

[30] Adam Tomkins, 'Parliament, Human Rights, and Counter-Terrorism' in Tom Campbell, K.D. Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 13, 13-15.

[31] Ibid, 26.

[32] Ibid, 27.

[33] Ibid 39.

charter of rights, human rights are taken into consideration by members of Parliament when debating policy and legislation.[34] Rather, the main effect of a charter of rights is a regrettable 'juridification' of political debate: participants are forced to present their arguments in legalistic terms and trained lawyers are given an artificial advantage in the clash of ideas and values that is the stuff of parliamentary politics. Indeed, analyses of how charters of rights affect bureaucratic and political behaviour suggest that even 'weak' bills of rights encourage cautious executives to avoid proposing legislation that might be considered inconsistent with judicial decisions. As Professor Janet Hiebert has argued, human rights laws induce parliamentarians to 'govern like judges' by producing 'legalistic legislation which distorts policy and political judgments regarding human rights concerns'.[35] This juridification of politics is inconsistent with good government, with democratic politics and with the rule of law, not least since it inevitably invites the politicisation of the judiciary and judicial appointments.

Queensland's Unicameral Parliament

35. While the existence of an upper house is no panacea, if the Queensland Parliament had a second chamber democratically elected on a proportionate basis, the Executive Government would not routinely be in a position to force its legislation through the Parliament by relying on the strict system of party discipline that operates in Queensland. Many statutes passed by the Queensland Parliament that have been objected to on human rights grounds would never have been enacted, or would have been enacted in vastly different form, if Queensland Governments had to secure the agreement of either the opposition or crossbench members of a second house of Parliament. As detailed work on the performance of upper houses in the other Australian states has demonstrated, the existence of a second chamber prevents Executive Governments from dominating the Parliament to the extent that routinely occurs in Queensland. In addition, a democratically elected second chamber of Parliament makes the committee system much more secure and facilitates a much better quality of deliberation and debate within the Parliament and across the community as a whole.[36]

36. In the United Kingdom, the House of Lords contributes substantially to the effective work done by Parliament in scrutinising government policy and in legislating effectively. This contribution includes the work of the Lords alone, as in the Constitution Committee, but also involves cooperation with the Commons, whether in the form of the Joint Committee on Human Rights and other joint committees or by less formal cooperation. Recent scholarship confirms that a bicameral Parliament such as the Westminster Parliament is

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[34] Carolyn Evans and Simon Evans, 'Messages from the Front Line: Parliamentarians' Perspectives on Rights Protection', in Tom Campbell, K D Ewing and Adam Tomkins (eds.), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 329.

[35] Janet Hiebert, 'Governing Like Judges?' in Tom Campbell, K.D. Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 41.

[36] See Nicholas Aroney, Scott Prasser and John Nethercote (eds), *Restraining Elective Dictatorship: The Upper House Solution?* (University of Western Australia Press, 2008); Nicholas Aroney, 'Four Reasons for an Upper House: Representative Democracy, Public Deliberation, Legislative Outputs and Executive Accountability' (2008) 29(2) *Adelaide Law Review* 205.

not a rubberstamp and does contribute effectively to the legislative process.[37] Sound parliamentary process makes provision for concerns about legislation proposed by the executive to be articulated and pressed. An upper house is often an important part of such a process.

Conclusions

37. A Human Rights Act, although not constitutionally entrenched, is constitutional in nature because it functions as a means by which political deliberation is regulated and controlled. Because a Human Rights Act is constitutional in nature it should only to be enacted with the support of all of the major segments of political opinion within the state. It should not be enacted solely with the support of the Executive Government of the day. As an essential component of the constitutional architecture of the state, a Human Rights Act should at the least also have the support of the opposition and crossbench parties in the Parliament.

38. In our submission, a statutory charter of rights is unnecessary, pointless and dangerous. It is unnecessary because human rights can and should be protected by the Parliament. It is pointless because charters of rights do not produce dialogue. It is dangerous because charters of rights encourage undisciplined law-making by the courts and distort the proper functioning of legislatures. Charters of rights undermine good government and responsible law-making and they imperil democracy and the rule of law.

39. By world standards, Queensland is a place where human rights are generally well respected. It is important to bear this in mind, as many countries that have bills of rights have much poorer human rights records. This is not an appeal for complacency. Rather, it demonstrates that charters of rights do not guarantee the protection of human rights. As Sir Harry Gibbs argued many years ago, 'If society is tolerant and rational, it does not need a bill of rights. If it is not, no bill of rights will preserve it.'[38]

Professor Nicholas Aroney[*]

Professor Richard Ekins[†]

[37] Susanna Kalitowski, 'Rubber Stamp or Cockpit? The Impact of Parliament on Government Legislation' (2008) 61 Parliamentary Affairs 694; Meg Russell and Philip Cowley, 'The Policy Power of the Westminster Parliament: The "Parliamentary State" and the Empirical Evidence' (2015) *Governance* (forthcoming).

[38] Sydney Morning Herald, 12 December 1984.

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ARE BILLS OF RIGHTS NECESSARY IN COMMON LAW SYSTEMS?

J D HEYDON[1]

This lecture deals largely with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The most devastating critique of the Convention ever made in English was made in a lecture delivered by Professor Finnis about 30 years ago.[2] That was well before the *Human Rights Act* 1998 (UK) made its key Articles directly relevant to United Kingdom law. Quite a number of the points to be made this evening were made with incomparably greater force and ability in that speech. The speech was recently republished in Professor Finnis's *Collected Essays*. I recommend the reading of it. Indeed, as an act of kindness bearing in mind the financial interests of an old friend, I recommend that you purchase a complete set of the *Collected Essays*.

The functions of bills of rights

Let me start with some truisms. The whole point of executive government is to govern. Modern societies depend heavily on executive governments which govern decisively, even forcefully. Executive

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1 This is a lecture delivered at the Oxford Law School on 23 January 2013. Similar lectures were delivered at Cambridge Law School and the Inner Temple on 21 January 2013.

2 "Human Rights and Their Enforcement" in *Human Rights and Common Good: Collected Essays*, (Oxford, Oxford University Press, 2011) at 42.

governments can, however, move too easily from forcefulness to tyranny. A primary protection against that movement was often thought to be the liberal dream of a democratically elected legislature to which the executive is responsible. But, as James Madison foresaw over two centuries ago,[3] and as de Tocqueville predicted nearly two centuries ago in *Democracy in America*, a majority of legislators, and a majority of the electorate which elected those legislators, can behave tyrannically. The great French thinker was a liberal aristocrat. But many who were not liberal aristocrats have since lamented the influence of the "vile multitude" or the "masses" on government. In England they were Robert Lowe and James Fitzjames Stephen. In France, after Napoleon III's displays of cleverness in the exploitation of plebiscites, there was Thiers. And there was the fiercest critic of all, the young Robert Cecil, who opposed any extension of the franchise. He ended up, paradoxically, as the most electorally successfully Conservative Prime Minister of all time on a franchise incomparably wider than that which was in place when he was born. The laments of these prophets of despair was not without reason. The wars of the peoples proved to be more terrible than the wars of the kings. So did the revenge of the peoples after their wars ended. And so did their treatment of minorities. For example, the Hapsburg Empire treated its polyglot citizens much more fairly than the successor states to that Empire treated their minorities after 1918.

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[3] Letter to Thomas Jefferson, 17 October 1788 in William T Hutchinson et al (eds) *The Papers of James Madison* (University of Chicago Press, London, 1962-1977) vol 1, ch 14, doc 47 and speech in the House of Representatives, 8 June 1789 in op cit, vol 1, ch 14, doc 50.

Many have therefore thought that the main function of a bill of rights is to protect minorities against both executive and legislative tyranny.

The categories of bills of rights

The modern instruments which answer to the description "bill of rights" fall into four groups. They have to be approached with respect. A J P Taylor said that the settlement at Munich "was a triumph for all that was best and most enlightened in British life".[4] So too, bills of rights reflect the noblest instincts of highly civilised and intelligent people. In rising order of strength the categories are as follows. The first comprises purely aspirational documents, like the Universal Declaration of Rights 1948. It has no binding effect on states or individuals. The second comprises treaties which bind the states which are parties to them in international law, but have no effect in local law until introduced by legislation, at least in countries following the dualist United Kingdom position. In this category is the European Convention. The third comprises statutes which give the courts power to decide what human rights exist and whether other legislation is compatible with those rights. The fourth comprises constitutional bills of rights giving the courts power to strike down legislation inconsistent with them. The oldest example of

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[4] A J P Taylor, *The Origins of the Second World War*, (Harmondsworth, Penguin, 1964) at 235.

the fourth category exists in the United States. More modern examples are India (1950), Canada (1982) and South Africa (1994). This lecture concerns the third category. The leading instance in it is the *Human Rights Act* 1988 (UK), to which there is attached a schedule of key articles of the European Convention.

Before an audience having the expertise of the present one, it would be invidious to debate any point of detail about the Act. The purpose of this lecture is rather to raise some general considerations about the background, structure, virtues and problems of the Act, and to question whether other methods for achieving its goals are not superior.

A preliminary point

There is, however, one preliminary point. It is that there has been a widespread adoption of bills of rights since 1945. This movement was a response to the atrocious behaviour of totalitarian states before and during the Second World War. Many countries have bills of rights which are, as a matter of mere words, impeccable. But the reality does not match the words. The number of countries which have observed even the most basic human rights in practice in the last 68 years is low to miniscule.

The United Kingdom background

Whether a bill of rights is necessary in a particular society depends on the nature of that society. In the United Kingdom life may not be an Arcadian idyll. But it does have the following features. The United Kingdom is ruled by a constitutional monarchy. It is a democracy based on the principles of responsible and representative government. That is, it is ruled by Ministers who are responsible to democratically elected parliaments representative of the electorate and who run the departments of a substantial civil service. Elections to those parliaments are free of corruption and preceded by vigorous campaigns. Those parliaments have enacted a great many statutes. In a practical sense the United Kingdom is or is becoming a federation in which both the component units and the central government have, despite doomsayers, considerable vitality. On most matters there is healthy rancour and asperity between political parties. The parliamentary wings of those parties are subject to considerable, though far from complete, discipline through the role of party whips. But the election of parliamentary representatives who are independent of the major organised parties is common. Thus the likeliest source of oppression – the legislature – is not a monolithic unity. It is fragmented between government and opposition, between front bench members and backbenchers on both sides, between big parties and small parties, between factions within parties whose views can overlap with the views of the factions of other parties, and between parties and independents. It is common now to disparage members of parliament. But they are in close touch not only with debates on national and regional issues, but with competing bodies of grassroots opinion. That is so because of their constituency work,

their desire to retain preselection, and their desire to be re-elected. Delegated legislation made by the executive pursuant to legislative grants of power to do so is massive in quantity but closely scrutinised by legislative committees. The professional civil service which serves the legislature and the Minister has been envied across the world over several generations for its outstanding ability and probity. There are differences and tensions between civil servants, Ministers, and other members of the legislature, and also between particular members of those three classes. And, though the powers of the House of Lords are less than they once were, it remains a house of review to be considered and handled carefully. Outside these formal structures, there is also a strong tradition of unpaid public service – a contribution by knowledgeable amateurs of great value.

Public affairs are under the scrutiny of critical media outlets, though they are perhaps over-aggressive, certainly tasteless and probably wanting in diversity of ownership. There is a substantial separation of governmental powers. Society is plural, in the sense that there are many political parties, trade unions, trade associations, universities, churches, clubs, pressure groups, social movements, charities, lobbies, campaigns and other bodies or schools interested in public affairs but independent of government. It is also plural in the sense that its peoples come from a great variety of different countries, ethnic backgrounds and traditions. They are diverse in culture and creed. And this variety is a source of energy and innovation. The numbers of minority groups are so great as to deter oppression of

minorities by those who may form an evanescent majority on one issue but not on others. British society is an open society. In particular, it offers careers open to talent. And both the residents and the governmental units of the United Kingdom are subject to the rule of law. A necessary element in the rule of law is an independent judiciary. The judiciaries of the United Kingdom have the reputation of being the finest in the world. Most informed people would, with respect, consider that reputation to be richly deserved. The courts administer complex bodies of substantive law, which confer many rights, including human rights, with great skill and fairness. For many years it has been a commonplace that the common law and its Scottish equivalent recognise and protect rights, including human rights. Sometimes they do so expressly: for example, the possessory and proprietary rights attaching to land and goods. Generally they do so not by expressly granting particular rights, but by abstaining from intervention in particular places. This is the so-called "negative theory of rights". Glanville Williams used the expression "gaps in the criminal law" to characterise it.[5] One can do whatever one likes unless it is specifically prohibited by non-retrospective laws which are clear and accessible to the governed.

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[5] A W Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford, Oxford University Press, 2001) at 35, n 132.

Professor Brian Simpson, the leading historian of the modern European human rights movement, whose loss one feels daily, summarised the English position in 1945 as follows:[6]

> "subject to certain limitations which, for most persons, were of not the least importance, individuals could worship as they pleased, hold whatever meetings they pleased, participate in political activities as they wished, enjoy a very extensive freedom of expression and communication, and be wholly unthreatened by the grosser forms of interference with personal liberty, such as officially sanctioned torture, or prolonged detention without trial."

To that list could be added the benefits to the public flowing from the gradual development of the welfare state from the late 19th century, and its acceleration after 1945 – relief for the unemployed, invalids and aged, workers compensation free health care. Trade unions were protected. Free education was available. Indeed, it was compulsory. There was universal suffrage with no restrictions on grounds of property, gender, religion or race. Slavery had long been abolished, if it had ever existed inside the United Kingdom itself. There were no religious tests for public office (save for the monarch and the monarch's spouse). More recently, since the 1960s, extensive protection against discrimination has been provided. All these achievements were the result of legislation or common law development, not of any bill of rights. Indeed, the imposition of religious tests on the monarchy was actually the result of a

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[6] A W Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, Oxford, 2001) at 51.

Bill of Rights – the famous Bill of Rights 1689. This is a reminder that the expression "bill of rights" does not necessarily mean that everything in a particular bill of rights reflects ideal values. The deeply held values of one generation may seen bigoted or wrong-headed to another.

The main flaw in the 1945 position which Professor Simpson saw was a practical one: "there was harassment and ill treatment of dissenters and outsiders and petty abuse of power in prisons, police cells, schools, and mental institutions, often condoned low in the hierarchy."[7] What happens low down in hierarchies can, of course, be very difficult to control however generous-seeming a bill of rights may be.

<u>The nature of the Act</u>

The Act, taken with the scheduled Articles, and with the benevolent complications of devolution legislation also enacted in 1998, is a non-constitutional bill of rights. Unlike legislation in the form of the bill of rights clauses of the United States Constitution, for example, primary legislation inconsistent with the Act is not invalid. The Act gives the courts no power to strike down legislation. The act is not entrenched as part of a Constitution. It is simply an Act of Parliament. The Act does not affect the legislative power of the Westminster Parliament to amend

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[7] Ibid.

or repeal it like any other Act of Parliament, though the aura of virtue which surrounds it might make this extremely difficult to do from the political point of view. Some criticise the Act by calling it the "Not-Very-Many-Human-Rights Act".[8] Another view is that the selection of Articles scheduled to the Act, at least in the meaning they had in 1950, appears to reveal a sensible lack of ambition in dealing not with a wide range of economic and social rights, or attempts at radical social transformation, but with a relatively restricted category of basic civil and political rights. It is true, however, that judicial decisions in Strasbourg in the last 30 years and in London since 2000 have tended to widen them substantially. The rights stated in the Convention already existed in United Kingdom law in 1950 and even in 1998, but it was necessary to state them in order to permit the main functions of the Act to be carried out.

First central function: statutory "construction"

The first of those functions relates to the courts' powers of statutory construction. The English courts and the Scottish courts, operating in their somewhat different tradition, have proved capable of identifying quite precise bodies of law. They have found the facts relating to the dispute between the parties which are relevant to those

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[8] Adam Tomkins, "Introduction: On Being Sceptical about Human Rights" to (eds) Tom Campbell, K D Ewing and Adam Tomkins, *Sceptical Essays on Human Rights* (Oxford University Press, Oxford, 2001) at 10.

bodies of law, fairly and accurately. And they have applied the law to those facts. Outside their achievements in the gradual development of the common law, the courts have not made new law. They have no power to amend legislation. They have concentrated on construing legislation, independently of their personal opinions about what the legislation should have said. They have generally not felt compelled to give statutes a meaning which they do not have on their face. Yet the authorities now hold, and the holding is not disputed, that s 3(1), which requires that "if possible" legislation be read compatibly with the Convention rights, gives the courts power to amend legislation by giving it a meaning different from its actual or intended meaning. The courts can only exercise that power by reference to their personal opinions on the practical, social and moral topics relevant to the Convention rights.

Although the Act lacks the dramatic impact of bills of rights which the judiciary can enforce by striking down legislation, this interpretative function has considerable significance. In part that significance is antidemocratic. The power to substitute a rights-compatible meaning for the statutory meaning constrains legislative power. As Professor Dworkin has said: "Any constraint on the power of a democratically elected legislature decreases the political power of the people who elected that legislature."[9] It will be necessary to return to that point.

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[9] R M Dworkin, *A Matter of* Principle, (Cambridge MA, Harvard University Press, 1985 at 62.

Second central function: declarations of incompatibility

Section 4(2) confers a second central function on the courts. It provides that the court may declare that a provision of primary legislation is incompatible with a Convention right. This does not affect the validity, continuing operation or enforcement of the provision: s 4(6)(a). But s 10 gives a Minister power to amend legislation speedily and retrospectively to remove the incompatibility. The legislative provision can also be repealed or amended in the ordinary way. Section 4(2) is thus said to reflect the "dialogue model" of a bill of rights. The court speaks to the government, and the government may or may not respond. But political pressure will usually cause the government to comply with the court's view. That makes the expression "dialogue" inapposite. In an ordinary dialogue it is not open to one participant to overrule the other – it is only open to them to keep talking.[10]

Third central function: statements of compatibility

A third central function springs from s 19. A Minister in charge of a Bill in either House of Parliament must make a written statement that in the Minister's opinion the Bill is compatible with the Convention rights: s 19(1)(a). A Minister who is unable to make a statement of

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[10] Tom Campbell, "Does Anyone Win Under a Bill of Rights? A Response to Hilary Charlesworth's 'Who Wins Under a Bill of Rights?'" (2006) 25 *University of Queensland Law Journal* 55 at 59.

compatibility must state this and also state that the government nevertheless wishes the House to proceed with the Bill: s 19(1)(b). Section 19 plays an important role in ensuring that close attention is paid to human rights consideration by the legislature. That role is also carried out by a special parliamentary committee composed of members of both Houses of Parliament – the Joint Committee on Human Rights.[11]

Fourth central function: relief against public authorities

A fourth central function is that the courts may grant relief against a public authority which acts in a way incompatible with a Convention right (ss 6-9).

A key characteristic: protection by law

A key characteristic of the Convention is its requirement that many of the rights be protected by law (eg Arts 2, 5, 6, 7, 8, 9, 10, 11 and 12). The Convention requirement of protection by *law* incorporates certain values associated with the name of Friedrich Hayek. They include the importance of government power being exercised in accordance with

[11] For its work, see D Feldman, "The Impact of Human Rights on the UK Legislative Process" (2004) 25 *Statute Law Review* 91; Bryan Horrigan, "Improving Legislative Scrutiny of Proposed Laws to Enhance Basic Rights, Parliamentary Democracy and the Quality of Law-Making" in (eds) Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone, *Protecting Rights Without a Bill of Rights* (Ashgate, Aldershot, 2006) at 80-81.

clear, coherent and comprehensible standards capable of being complied with, stipulated in advance and enforceable in courts.[12] The requirement prevents rights being tampered with as a matter of extra-legal executive discretion.[13] Of course, satisfaction of these criteria alone does not guarantee that human rights will be protected. A particular law can be highly damaging to human rights.

Further key characteristic: interest/necessity analysis

Another key characteristic of the Act is that in relation to the rights conferred by Arts 6.1, 8, 9, 10 and 11 a two-stage process is necessary. The first stage involves defining the rights in a preliminary or prima facie way. The second involves imposing limits on them which are necessary in a democratic society in the light of particular interests. Below that will be called "interest/necessity analysis" for short.

There is a tendency for the statement of rights, whether in those articles or in others, to receive very wide definition.[14] There is also a

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12 For cases stressing the need for Hayekian criteria to be complied with, see Steven Greer, *The exceptions to Articles 8-11 of the European Convention on Human Rights* (Council of Europe Publishing No 15, Strasbourg, 1997) at 9-14.

13 For cases stressing the need for Hayekian criteria to be complied with, see Steven Greer, *The exceptions to Articles 8-11 of the European Convention on Human Rights* (Council of Europe Publishing No 15, Strasbourg, 1997) at 9.

14 For example, *Marcx Belgium*, (1979) 2 EHRR (criticised by Sir Gerald Fitzmaurice at 366 [7]). See also *Golder v United Kingdom* (1975) 1 EHRR 524 (criticised by Sir Gerald Fitzmaurice at 562-567

Footnote continues

tendency for exceptions to the rights – whether they are explicitly stated in a particular Article or they are the result of interest/necessity analysis – to be construed narrowly.[15] This in turn means that the more exaggerated of the rights claimed tend to "trade on the higher prestige of properly defined rights, with the consequence that genuine rights … are put on the same level as exaggerated and unjustifiable claims of right"[16] Thus a core free speech right like the right of a citizen to criticise government may be compared with the alleged free speech right to commit perjury, to say fraudulent things in trade, to make statements with a view to fixing prices, to say misleading things about investments, to publish libels, or to incite or threaten violence. On the one hand, the language in which rights are claimed becomes devalued. On the other hand, the infringement or violation of rights becomes seen as normal and even necessary.[17]

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[32]-[39] and also in *National Union of Belgian Police v Belgium* (1975) 1 EHRR 578 at 601-606 [1]-[11] and *Ireland v United Kingdom* (1978) 2 EHRR 25 at 125-127 [12]-[18].)

15 (eds) Ben Emmerson, Andrew Ashworth and Alison Macdonald, *Human Rights and Criminal Justice*, (London, Sweet & Maxwell, 3rd ed, 2012) at 85-88 [2-13]-[2-17]. This is based on the view that "'necessary' … does not have the flexibility as such expressions as 'useful', 'reasonable' or 'desirable', but implies the existence of a 'pressing social need' for the interference in question": *Dudgeon v United Kingdom* (1981) 4 EHRR 149 at 164 [51].

16 Grégoire C N Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, Cambridge, 2009) at 5.

17 See generally "Justification and Rights Limitation" in (ed) Grant Huscroft, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, New York, 2008) 93 at 96-97.

The justification for the Act

So much for the key functions and characteristics of the Act. What are the justifications for it?

There are three which have significant force.

First, there is merit in setting out some human rights goals as explicit objectives for the legislature and the executive to bear in mind.

Secondly, it was valuable to create the Joint Committee on Human Rights at the time the Act was enacted in order to scrutinise draft legislation with those goals in mind, and to couple that with the Ministerial duty to make a statement of compatibility.

Thirdly, the Act compels the court to focus closely on a particular application of legislation to an individual case. The legislature may not have foreseen that the legislation would apply to that case. It may not have foreseen that in that application the legislation might have adverse human rights consequences.[18] One strength of the common law system of trial is that it permits a detailed measured consideration of the parties'

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[18] Jeremy Webber, "A Modest (but Robust) Defence of Statutory Bills of Rights" in (eds) Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone, *Protecting Rights Without a Bill of Rights* (Ashgate, Aldershot, 2006) at 275-284.

circumstances which may affect the application or development of particular rules. The Act takes that facility and uses it to permit judicial suggestions for improvements in legislation by issuing declarations of incompatibility or making criticisms.

It is now necessary to turn to seven potential problems in or questions about the Act.

Problem one: the direct and indirect expense of the Act

Financial expense is not necessarily a critical problem if what is gained by the expense is worthwhile. But it is the case that the clearest consequence of the Act, and bills of rights like it, is expense, and perhaps ill-incurred expense. The expense arising from uncertainty can be put on one side for the moment. There is the direct expense to government of funding the increased costs of the courts. There is the direct expense of supplying a human rights bureaucracy. There is the direct expense to public bodies of having to resist human rights challenges. Governments also often fund pro-human rights advocacy groups which stand behind bills of rights litigation. It has been said that in Canada the bulk of funding for equality programmes is absorbed by the salaries of the rights experts who staff them, and that a

disproportionate number of those experts are lawyers. Thus among "the primary economic beneficiaries of rights policies are rights experts."[19]

Then there is the opportunity cost to society of a human rights segment of the legal profession growing up. Lawyers do not belong to that class of humanity which can make two grains of wheat grow where only one grew before. They are a necessary class, but not a productive one. A critic has described the "motivation and the enthusiasm of legal firms for some types of human rights litigation".[20] Assembling and deploying evidence and arguments going to social and moral issues may increase the cost of litigation. So may the attempts by persons who are not parties to the litigation to intervene or act as amici curiae. Arguments about the Act involve analysis of quite abstract ideas as a means of deciding what human rights exist and what a particular enactment means, together with evidence about its impact. They encourage a trend to consume undue time in court flowing from the massive citation of authorities from many bills of rights jurisdictions, most of which have bills of rights in terms different, sometimes very different, from the Act and the Convention, and many of which have legal systems, social structures and customs which are radically different from

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[19] F L Morton, "The Charter Revolution and the Court Party" (1992) 30 *Osgoode Hall Law Journal* 627 at 643-644.

[20] Chris Himsworth, "Rights versus Devolution" in (eds) Tom Campbell, K D Ewing and Adam Tomkins, *Sceptical Essays on Human Rights* (Oxford University Press, Oxford 2001) 145 at 158.

those of the United Kingdom.[21] Many judges have denounced this, but impotently. Simultaneously there has grown up what has been described as a "veritable cottage industry" of books about the Act and Convention[22] leading to "metres of books about human rights on law library shelves".[23] Some human rights lawyers devote their energies to invoking rights on behalf of wealthy corporations which were contemplated as being primarily available to not very wealthy human beings.

Convention rights have fallen into the hands of a sort of "human rights club". The members of that club know each other's ways. The members compete in revealing to each other their superior ingenuity and human rights sensitivity. It is a contest of compassion and cleverness. The human rights club is now one of a group of clubs which cluster around the courts in the common law tradition. There are also the constitutional club, the defamation club, the industrial club, the criminal club, the intellectual property club, even the personal injuries club, though that club has come down in the world very sadly and its

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21 See James Allan and Grant Huscroft, "Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts" (2006) 43 *San Diego Law Review* 1.

22 Richard Rawlings, "Taking Wales Seriously" in (eds) Tom Campbell, K D Ewing and Adam Tomkins, *Sceptical Essays on Human Rights* (Oxford University Press, Oxford 2001) 177 at 187.

23 John McMillan, "The Ombudsman and the Rule of Law", paper delivered at the Public Law Weekend, 5-6 November 2004 at 15.

membership is now much attenuated. There are these seven. But the greatest of these is the human rights club.

An indirect cost of bills of rights may be that they channel the energy of government officials and private lawyers away from the direct enforcement of human rights into less productive activity. The greater the resources devoted to human rights litigation, the less that can be devoted to other forms of human rights protection.

Problem two: the creation of legislative tasks in defining human rights which are beyond judicial competence

It is to this issue that Professor Finnis's lecture 30 years ago is most central.[24]

Vagueness. Some of the Convention rights in their primary form, even before express exceptions are considered or interest/necessity analysis is undertaken, are very abstract, vague and unspecific. They are expressed in "vague, amorphous and emotively attractive terms".[25] But they do not have a meaning sufficiently concrete to permit a

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[24] "Human Rights and their Enforcement" in *Human Rights and Common Good: Collected Essays*, vol III (Oxford University Press, Oxford 2011) at 42.

[25] James Allan, "The Effect of a Statutory Bill of Rights where Parliament is Sovereign: the Lesson from New Zealand" in (eds) Tom Campbell, K D Ewing and Adam Tomkins, *Sceptical Essays on Human Rights* (Oxford University Press, Oxford, 2001) 375 at 376.

determination of whether some particular enactments or types of conduct violate them. It is therefore necessary for courts to decide what the rights actually are. Those supposedly judicial decisions are legislative in character.

Secondly, the application of interest/necessity analysis to the rights stated in Arts 6.1, 8, 9, 10 and 11 in their primary form to work out the actual, not merely prima facie, content of each right is even more nakedly legislative in character. The factors stated in the Articles as going to interest/necessity analysis are insufficiently specific to control or assist the courts. The results of that analysis are unpredictable. There is thus a sharp contrast between the reasoning of the courts in applying conventional rules of law and the reasoning of the courts in applying the Act.[26] The Convention is so vague that it invites judges to pour their views on controversial practical, social and moral questions into the empty vessels of the words. The meaning will thus vary from judge to judge.

European doctrines. The judicial task is not assisted by s 2(1) of the Act. That commands the United Kingdom courts to take account of decisions by the European Court of Human Rights. Those decisions are often reached by narrow margins. They conflict among themselves.

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[26] Kenneth Minogue, "What is Wrong with Rights" in (ed) Carol Harlow, *Public Law and Politics* (Sweet & Maxwell, London, 1986) 209 at 223.

The decisive reasoning in them is often sparse. They are full of dicta. The decisions have applied to the language complex qualifications undreamed of in 1950. The obscurity of doctrines like proportionality, balancing, the margin of appreciation and subsidiarity[27] encourages reasoning so uncontrolled as to put the courts in the position of a legislature. The things to be balanced or weighed or compared are not readily commensurable. The competing considerations cannot be expressed in common defined values.[28] The necessary inquiry into whether the challenged legislation is the least restrictive means of achieving the legislative object is a legislative task.

An ideal democratic society. The Convention directs attention to certain interests "in *a* democratic society". That is not any actual democratic European society. The European Court has held that three hallmarks of a democratic society are tolerance, broadmindedness and pluralism.[29] Many actual democratic societies lack these qualities. The search is for an ideal democratic society. The Convention propounds an aspiration. It does not point to an existing reality. The search is bound to encourage judges to examine their own hearts for what characteristics that ideal society might have.

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[27] See Sir Stephen Sedley, *Guardian*, 14 November 2012.

[28] John Finnis, "Commensuration and Public Reason", *Reason and Action, Collected Essays*: vol I (Oxford University Press, Oxford, 2011) 233 at 237-238.

[29] *Handyside v United* Kingdom (1976) 1 EHRR 737 at 754 [49]; Dudgeon *v United Kingdom* (1981) 4 EHRR 149 at 165 [53]; *Hirst v United Kingdom* (2005) 42 EHRR 41 at 867 [70]. .

Impermissible delegation. The Act has impermissibly delegated to the courts legislative decisions which the legislature itself has failed to make.[30] Professor J A G Griffith said that the language of the Convention frequently involves "the statement of a political conflict pretending to be a resolution of it".[31] Professor Finnis called this a "fundamental remission of responsibility".[32] It offends the separation of powers in a fundamental respect.

Superior capacity of legislature. The legislature's ability to define rights is superior to that of the courts. The Convention rights turn on matters of practical expediency, social interests and morality. A court may know nothing of the particular factors which are expedient in dealing with the problem in hand. A court may have to engage in dangerous speculation about social interests. Some of these issues may depend on expert opinions, or on aspects of human experience not necessarily shared by judges. Legislators have access to these things through public and private debate, pressure groups, commissions of inquiry, civil servants and staffers. Courts do not. They depend on

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30 Grégoire C N Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University of Press, Cambridge, 2009) at 7.

31 "The Political Constitution", (1979) 4 *Modern Law Review* 1 at 14.

32 "Human Rights and their Enforcement" in *Human Rights and Common Good: Collected Essays*, vol III (Oxford University Press, Oxford, 2011) at 40.

evidence. It may not suit either party to call the necessary evidence. By whom, then, is it to be called? If it is called, how is it to be evaluated efficiently? Legislators characteristically work towards compromises under the influence of different aspects of public opinion and practical pressures. Courts cannot work in that way.

Cost implications. Decisions under the Act may have cost implications. Legislators are accustomed to choose between courses of action after taking into account their cost and answering questions about how that cost is to be funded. Courts are not. If a court makes a declaration of incompatibility and a legislative response conforming to it would require heavy expenditure, what is the government to do? Does it defend its budget position by ignoring the declaration? Or does it respond, and seek to raise money, from disgruntled taxpayers to support a policy which both the government and the taxpayers oppose? If it responds, the response overlooks the fact that the executive and the legislature are each independent arms of government. They are not arms of the judicial branch of government.[33] Responsible government involves the executive being responsible to the legislature. It does not involve the executive and the legislature being responsible to the judiciary.

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[33] Conor Gearty, "Tort Law and the Human Rights Act" in (eds) Tom Campbell, K D Ewing and Adam Tomkins, *Sceptical Essays on Human Rights* (Oxford University Press, Oxford, 2001) 243 at 257.

The superior legitimacy of the legislature's role. Not only does the legislature have greater ability to define human rights than the judiciary; its role in doing so has greater legitimacy than the judiciary's.

On 10 February 1987 in Westminster Abbey, Sir Alec Douglas-Home, to use the name of his many names by which he is best known, delivered an address at the memorial service for Harold McMillan, his predecessor as Prime Minister. He said: "democracy is all about the relationship of the individual citizen with the law".[34] That is, the development of the law in legislation depends on democratic criteria. Democratically elected legislators keep a close eye on the electors and their opinions. Judges do not. Politicians are accountable to the legislature. Judges are not. Politicians are also accountable to the electors. Judges are not. It is inherent in judicial independence that these things should be so. Each individual elector has at least one human right – the right to be treated as an autonomous moral being whose opinion on human rights issues, and others, is taken into account.[35] Legislators are accountable to the individual electors who each have that right. It is more legitimate for legislators to decide human rights issues because they have that accountability than it is for courts, which do not.

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[34] D R Thorpe, *Alec Douglas-Home* (Politico's, London, 2007) 468.

[35] Tom Campbell, "Does anyone win under a bill of rights? A response to Hilary Charlesworth's 'Who wins under a bill of rights?'" (2006) 25 *University of Queensland Law Journal* 55 at 57.

Finally, decisions about what human rights exist and whether legislation is compatible with them may excite controversy. The role of the court is to still controversies, not exacerbate them. It is better that the storms of controversy be not only stirred up, but also weathered, by Parliament.

<u>Problem three: granting power to the courts to substitute for an impugned enactment a different enactment</u>

The second problem related to giving the courts power to legislate in deciding what human rights exist. The third problem concerns the power of the courts, granted by s 3(1), to legislate by moulding out of an enactment said to contravene human rights a better and purer enactment which does not. The trouble is that the better and purer enactment is not the enactment which the legislature enacted and does not reflect the legislative will. Indeed the new rights-compliant meaning which the courts select may be some distance from the legislative will. We know the cy-près doctrine in charities law – as near as possible. This is a sort of cy-loin doctrine, if there can be such an expression – as far away as necessary.

The remoulding function of s 3(1) has been prefigured in particular illegitimate approaches to statutory interpretation. There can be semi-conscious or unconscious abuse of the "mischief" rule of statutory interpretation. The wider the mischief identified, the more the

interpretation of the statute will change. And the easier it is for a judge to shift from a wide mischief to stating as the interpretation what is the best way, in the judge's opinion, of dealing with that wide mischief.

Similarly, there is a principle of statutory construction influencing a court against an interpretation producing irrational or very inconvenient results. This can lead to selecting a statutory model which produces reasonable and convenient results. And as Lord Sumption demonstrated in his F A Mann lecture for 2011,[36] that can lead the judges to an illegitimate invention of what are in their opinion the most meritorious policies and the best model which the legislature ought to have followed.

Section 3(1) legitimises a similar approach. But legislative legitimisation of dangerous practices is no anecdote to the bane.

The authorities have construed s 3(1) as meaning that even if there is no doubt about the enacted meaning, no ambiguity and no unreasonableness, the court may, within the loose bounds of "possibility", select a rights-compliant meaning. The court may "read words into" the enactment – words which "change [its] meaning". They may depart from "the intention of the Parliament". They may adopt "strained" meanings. They may engage in the "reading down" of

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[36] "Judicial and Political Decision-Making: The Uncertain Boundary" [2011] *JR* 301 at 305-307 [13]-[18].

express language. They may engage in the "implication" of provisions.[37] The process must admittedly not disturb the repeatedly expressed "settled will" of the legislature.[38] It may be less available on issues of social policy than on civil and political rights.[39] It may not permit change in "the substance of a provision completely".[40] It must comply with the "underlying thrust" of a statute.[41] And similar ideas are caught in statements about the need not to remove the pith and substance of the statute,[42] and not to violate one of its cardinal principles.[43] But despite these limitations the courts have large powers which are in substance legislative. The Act was piloted through Parliament by Lord Irvine of Lairg LC and Mr Jack Straw, the Home Secretary. They accepted these outcomes when they said in the debates that findings of incompatibility would be "rare … as in almost all cases, the courts will be able to

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[37] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 571 [29]-[30], 571-572 [32] and 574 [44]. The courts have adhered to the *Ghaidan* position even though the subsequent decision in *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718 at 1723 [17] appears to be inconsistent with it.

[38] *R v Lichniak* [2003] 1 AC 903 at 911 [14]. .

[39] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 568 [19].

[40] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 596 [110] per Lord Rodger of Earlsferry.

[41] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at at 572 [33] per Lord Nicholls of Birkenhead.

[42] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 597 [111].

[43] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 599 [116].

interpret legislation compatibly with the Convention."[44] These predictions were correct. Only 19 declarations of incompatibility have been made. Lord Irvine and Mr Straw were correct in their predictions because they expected the courts to strive, and strive successfully, to read legislation as rights-compliant. The courts have done this.

Yet from every point of view a change in the meaning of legislation to make it rights-compliant can be a more radical and important outcome than a finding of incompatibility.

In this respect the United Kingdom courts have been given greater power than courts administering constitutional bills of rights. The latter courts, unlike the United Kingdom courts, can strike down legislation. But they cannot avoid striking it down by remoulding it in the way s 3(1) allows. The United States Supreme Court cannot seek to avoid reaching the conclusion that a statute is constitutionally invalid by ignoring its actual meaning and substituting a meaning compatible with the bill of rights merely because it falls within the generous expanse of what is "possible". This suggests that the Act should not be placed in the third of the four categories listed at the outset, but in a new and more extreme fifth category.

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[44] *Commission on a Bill of Rights: A UK Bill of Rights? The Choice Before Us* (2012) vol 1 para 6.41.

Problem law: disabling judges from carrying out their conventional functions

According to one school of thought, there is a risk that the task of defining human rights and rewriting legislation to accord with them will excite some judges unduly. The diet provided by human rights work under the Act is unusual and rich. Its succulence can stimulate an appetite which grows on what it feeds on. But it is a diet which may jade the judicial appetite for conventional work. It may cause that work to be seen as having only a dreary banality.[45] Worse, it may encourage judges to transfer the practical-social-moral analysis commanded by the Act out of human rights fields into other fields.

As Lord Sumption pointed out in his F A Mann lecture for 2011, there are fields into which traditionally the courts have abstained from moving and which they have left to the executive or the legislature – foreign affairs, national security, issues with budgetary implications, moral questions, policy questions generally.[46] There is a danger that judicial work in applying the Convention may cause some judges to stray into fields not traditionally trodden whether there are human rights issues

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[45] Sir Gerard Brennan, "The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Perspective" in (ed) Philip Alston, *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, Oxford, 1999) 454 at 460.

[46] "Judicial and Political Decision-Making: The Uncertain Boundary" [2011] *JR* 301 at 313-314 [31]-[32].

in them or not. As with the American soldiers after the First World War, it may prove hard to get the judges back on the farm once they have seen Gay Paree.

Problem five: increasing uncertainty and retrospectivity

A decision about a rights-compatible meaning based on practical, social or moral criteria is inherently less predictable than a decision about the meaning of words independently of those criteria. This is particularly so where s 2(1) compels United Kingdom courts to apply European Court decisions, and those decisions search not for the original meaning of the Convention, but treated as a "living instrument which … must be interpreted in the light of present-day conditions."[47] Hence those decisions rest on an "evolutive", "dynamic" or "living tree" approach to interpretation.

Of all people, Mr Jack Straw, the Home Secretary who piloted the Act through the House of Commons, criticised this. He has recently repented of his work. He attacked the European Court in the House of Commons in 2011 for "judicial activism" and for "widening its role not only beyond anything anticipated in the founding treaties but beyond anything anticipated by the subsequent active consent of all the state

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[47] *Tyrer v United Kingdom* (1978) 2 EHHR 1 at 10 [31] (holding that corporal punishment of a juvenile was "degrading", contrary to Art 3). See also *Marckx v Belgium* (1979) 2 EHRR 330 at 346 [41].

parties, including the UK".[48] In his *Hamlyn Lectures*,[49] Mr Straw said that the European Court should "pull back from the jurisdictional expansion it has made in recent decades" – not just the last decade. He said that no-one realised in 1951 that the European Court would act on an "ever-widening mandate to determine what shall constitute human rights". Yet what it had done up to 1997 was widely known in 1997, when Mr Straw urged the House of Commons to approve the Bill.

However that may be, European Court developments have made it much harder for the intelligent citizen who is not a lawyer to find out the law. If there are authorities on the words, they must be read, with all their cross-references to arcane European Court cases, to discover whether or not a rights-compliant meaning exists which differs from the ordinary meaning. Even if authorities on the words do not exist, the citizen cannot safely act on the ordinary meaning, because a court may later make a surprising departure from that meaning in order to ensure rights-compliance. In the case of a statute enacted before 2000, the courts may have held before 2000 that it has its ordinary meaning. A citizen may embark on a course of conduct after 2000 in reliance on that meaning. The courts may then overrule the earlier authorities and

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[48] H C Deb, 10 February 2011, cols 501-502 quoted by Lord Faulks QC and Jonathan Fisher QC in "Unfinished Business", *Commission on a Bill of Rights, A UK Bill of Rights? The Choice Before Us* vol I (2012) 182 at 191.

[49] See Joshua Rozenberg, "Judicial dialogue? Straw and Bratza deliver choice words on Strasbourg, *The Guardian* 14 November 2012.

ascribe to the statute a rights-compliant meaning. The later decision may operate adversely to the citizen. In substance, the legislation involved operates retrospectively. All judicial changes in the law do, of course, subject to any possible doctrine of prospective overruling. That is why judicial development of the *judge-made common law* proceeds with caution. It is much harder to be cautious in complying with the duty created by s 3(1) when construing the enormous quantities of *legislation-made law*. Hence the Act greatly increases the chances that many retrospective judicial changes in the statute law will be made. These problems of uncertainty and retroactivity are compounded when one remembers the innumerable public officers, senior and junior, who are liable to judicial remedy for actions incompatible with a Convention right under ss 6-9. These factors undercut the rule of law values on which the Convention appears to rest.

Problem six: declarations of incompatibility are advisory in character

When a court makes a declaration of incompatibility it reaches a curious result. On the one hand, a declaration that legislation is incompatible with Convention rights is the most adverse outcome possible for the government. That is because as a practical matter it puts pressure on the government to do something about the legislation. On the other hand, a declaration of incompatibility creates no advantages for the plaintiff. That is because it does not affect the validity of the legislation, which continues in its full adverse operation on the plaintiff. Thus Geoffrey Marshall called a declaration of

incompatibility "not a legal remedy but a species of booby prize".[50] Normally there is a direct relationship between one side's failure and another side's success. Here there is not.

The courts normally abhor giving advisory opinions. The following conditions must be satisfied to prevent a judicial opinion being advisory. The plaintiff must claim a remedy to enforce a right, duty or liability. That remedy must be enforceable by the court. And the plaintiff must have a sufficient interest in enforcing the right, duty or liability to make the controversy justiciable.[51]

A declaration of incompatibility is not a "remedy" of that kind. It does not affect any right or obligation *in issue between the parties*. It neither reflects nor creates any duty on the government. The government is under no legal duty to state its attitude, to draw the declaration to the attention of Parliament, or to do anything else. Even if it were, it would not be a duty owed to the plaintiff. There are political pressures on it to do something, but they are not legal pressures. A declaration of incompatibility does no more than give advice on an abstract question. That question is not really even a question of law[52]

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[50] "Two kinds of compatibility: more about section 3 of the Human Rights Act 1998" [1999] *Public Law* 377 at 382.

[51] *Abebe v The Commonwealth* (1999) 197 CLR 510 at 528.

[52] Ryan Haddrick, "The Judicature, Bills of Rights, and Chapter III" in (ed) Julian Leeser and Ryan Haddrick, *Don't Live Us with the Bill: The Case Against an Australian Bill of Rights* (The Menzies Research Centre Limited, Barton, ACT, 2009) 145 at 168.

because the incompatibility of legislation with the Convention rights does not make the legislation unlawful.

There is another illustration of the difficulty. The best outcome for the government is that the legislation should be given the meaning for which it contends, and be enforced; but the plaintiff opposes that. The best outcome for the plaintiff is that the legislation be given a rights-compatible meaning which suits the plaintiff's interests; but the government opposes that. On those issues there is a lis between the parties. But neither party wants a declaration (or even a statement) of incompatibility. There is no lis between them about that.

Statute can authorise the giving of advisory opinions. But it is very rare for this to happen. That is because the courts and the legislature have seen the judicial development of the law as best taking place in consequence of a particular dispute between the parties. The advisory character of declarations of incompatibility is not simply a failure to reach some pure state of nice theoretical perfection. It goes to the heart of the judicial function. The task of a court in deciding a dispute is made easier where there is a concrete controversy between parties whose adverse material interests will be affected by the outcome. The sharpness of the controversy assists the court to clarify its thinking. That assistance is absent when the court decides, against the will of the parties, to consider making a declaration of incompatibility. It is assistance which cannot be supplied by the arguments of interveners or amici curiae, with their lofty

and non-material goals. I say that as someone who has heard enough interveners and amici curiae to fulfil the needs of a lifetime.

Problem seven: loss of national sovereignty

It is often said that in signing and ratifying the Convention, accepting the right of individual petition to the European Court, and enacting the Act, the United Kingdom did not give up any part of its national sovereignty.[53] Is that so? There are two reasons for doubting that it is so.

First, before the Convention, the House of Lords was the ultimate court of appeal for the United Kingdom in relation to human rights. No foreign court could make binding decisions about United Kingdom compliance with human rights principles. But now the ultimate Court of Appeal for the United Kingdom in relation to human rights is not the Supreme Court (as successor to the House of Lords). It is the European Court. That is a foreign court. Sir Nicolas Bratza, the former President of the European Court, has denied that his Court "is … a foreign court". He has contended that it is an international court in a structure of which

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[53] For example, Lord Hoffmann, "The Universality of Human Rights" (Judicial Studies Board Annual Lecture, Inner Temple, 19 March 2009) [38] and [42]; Lord Sumption, "Judicial and Political Decision-making: The Uncertain Boundary" [2011] *JR* 301 at 314 [33]. To the contrary is A W Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, Oxford, 2001) at 740.

the United Kingdom is part.[54] It is not a structure, however, in which the United Kingdom Supreme Court stands at the peak. Sir Nicholas also rebuked the United Kingdom for not carrying out its legal obligation to comply with the judgments of the European Court.[55] That legal obligation, however, marks a loss of sovereignty. It may be small. It may have countervailing advantages. But it is real.

Secondary, s 2(1) of the Act requires a United Kingdom court to take into account decisions of the European Court. On one view, which was and is Lord Irvine's view,[56] a duty to take those decisions into account does not entail a duty to be bound by them. There are certainly examples of the Supreme Court not following the European Court. However, although the position is unsettled, it may be that Lord Irvine's view is not the prevailing view on the authorities. The lamented Lord Rodger, for example, summed up the position in his aphorism: "Strasbourg has spoken, the case is closed."[57] Sir Nicolas Bratza

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54 See Joshua Rozenberg, "Judicial dialogue? Straw and Bratza deliver choice words on Strasbourg, *The Guardian,* 14 November 2012.

55 See also *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 at 357 [70].

56 *Committee Stage of a Bill in the House of Lords,* 583 HL Official Report, 18 November 1997, 5th Series, cols 514-515; *Commission on a Bill of Rights, A UK Bill of Rights? The Choice Before Us?* (2012) at 263, n 13.

57 *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 at 366 [1998]. See also Lord Carswell at 368-369 [108] and Lord Brown of Eaton-Under-Heywood at 370 [114].

denied that and said that was not the way the Strasbourg judges saw the respective roles of the European Court and the Supreme Court. But Sir Nicholas did say that where a clear principle was laid down by the Grand Chamber, it is "plainly important that it should be followed and applied by the" United Kingdom courts.[58] If it is plainly important that this be done, it should be done. And to say "it should be done" is to say that the United Kingdom courts are bound to follow the European Court decision, whether they think it is correct or not. If the highest United Kingdom court must submit to the opinion of a non-United Kingdom court, to that extent United Kingdom sovereignty is diminished.

Has this loss of sovereignty to the European Court brought any valuable countervailing advantage? The answer depends on whether the European Court is a satisfactory court when considered as a source of supposedly binding law. For a final court of appeal, it has far too many judges – 47 potentially. They do not all sit together, but Grand Chambers, to use what the late Lord Atlee would have called their "rather Ruritanian" name, can be large. The judges differ in training. The countries from which they come differ in size, history and society. They do not extend only from the Channel to the Urals or from Stettin in the Baltic to Trieste on the Adriatic. They extend from the Atlantic Ocean to the Bering Sea, and from the North Cape to the Southern Mediterranean. The Convention thus has to regulate the activities of

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[58] "The relationship between the United Kingdom courts and Strasbourg" [2011] EHRLR 505 at 512.

states responsible not only for cultivated Dubliners, but Lapps, those who live in Eastern Siberia, and Mafia gangsters. The judges who sit alone, or on one small panel, often reach conclusions which are different from those of other judges sitting alone, or on other panels. Particular panels are often closely divided. The same is true of the judges when sitting on the Grand Chamber. Inconsistency in reasoning and result is inevitable. Reasoning suitable for the conditions of some members is not suitable for those of others. The judges surrender perhaps too readily to the temptation to give "guidance" on matters which are outside the strict parameters of the dispute between the parties.[59] With respect, worst of all – and this is a large claim, which would take a long time to justify in detail – the judgments lack reasoning. The judgments are long and earnest, but there often seems to be a gap between the statement of issues and the conclusion. The cap can be seen most sharply by comparing the dissenting opinions of the United Kingdom judge four decades ago, Sir Gerald Fitzmaurice, with the opinions he was dissenting from. One may or may not agree with his dissenting opinions. But they did display tautness and rigour. They had content. The others did not.

Despite what has been said so far, the burden of the argument is not that the judiciary, or indeed the legislature, should abandon the enterprise of securing human rights protection. There are actual

[59] This is defended by Sir Nicolas Bratza, "The relationship between the UK courts and Strasbourg", [2011] EHRLR 505 at 508.

techniques for protection, some of which can be developed more intensely, which are likely to be more effective than the techniques employed by the Act and the Convention. One concerns the separation of powers and federalism. A second concerns the "principle of legality". And a third is the development by judges of coherent bodies of detailed non-legislated law, and the enactment by legislatures of appropriately detailed and targeted legislation.

First technique: the separation of powers and federalism

The separation of powers is an underrated safeguard for human rights. That is because it diffuses and weakens governmental power. One of the best-known Bills of Rights in history is to be found in the first 10 amendments to the United States Constitution. Yet those amendments were not part of the original Constitution as approved in the Philadelphia Convention in 1787 and operative from 1789. The bill of rights became operative only in 1791. The framers of the original Constitution did not see it as necessary. James Madison regarded the separation of powers and the existence of federalism as "a double security" to protect "the rights of the people".[60] In other words, human liberties are best protected by keeping the powers of government in check – the powers of the federal government so as not to trespass on

60 Quoted in (ed) Kevin A Ring, *Scalia Dissents: Writings of the Supreme Court's Wittiest, Most Outspoken Justice* (Washington DC, Regency Publishing Inc, 2004) at 43.

the field reserved to the other components in the federation, and the powers of the component parts of each level of government by division of them among the three branches of government. Federalism also promotes human rights by reducing uniformity: it permits each component unit to experiment. It is true that in theory governmental tyranny can flourish as much in a non-federal state as in a federation. But in practice the existence of beneficial institutions in one unit of a federation tends to be noticed by those who live in others, and pressure mounts for an imitation or at least adaptation of those beneficial institutions.

Before 1998, there were minor respects in which the United Kingdom offended the principle that the three powers of government be separated. Those respects concerned the role of the Lord Chancellor and the role of the Law Lords sitting as part of the legislature. Those difficulties, if they ever really were difficulties, have ceased. There is now a complete separation of powers, save that the executive is responsible to the legislature. It may be thought that that achieves more beneficial results than complete separation of the executive from the legislature.

Putting aside the small examples of the Isle of Man and the Channel Islands, before 1998 there were federal elements in the United Kingdom – notably in relation to Northern Ireland for eight decades. Since 1988, the course of devolution towards a federal goal has been marked and in considerable measure followed.

In short, James Madison's twin safeguards exist in the United Kingdom to a significant degree.

Second technique: the "principle of legality"

There are principles of statutory interpretation sometimes called "a common law 'Bill of Rights'".[61] One of them is the "principle of legality". In the absence of clear words or necessary implication the courts will not interpret legislation as abrogating or contracting fundamental rights or freedoms. This principle has been well-established for some time. It is a salutary principle for the reasons given by Lord Hoffmann:[62] "[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process." That last sentence makes a particularly powerful point. Many fundamental rights and freedoms are characterised as "human rights".[63] They include property-related rights – vested property interests and freedom from trespass by

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[61] J Willis, "Statutory Interpretation in a Nutshell" (1938) 16 *Canadian Bar Review* 1 at 17.

[62] *R v Secretary of State for the Home Department; ex parte Simms* [2004] 2 AC 115 at 131.

[63] See *Momcilovic v R* (2011) 245 CLR 1 at 177-178 [444].

police officers on private property. They include rights to do with access to courts and their remedies: the conferral of jurisdiction on a court, the writ of habeas corpus, the jurisdiction of superior courts to prevent acts by inferior courts and tribunals in excess of jurisdiction. They include aspects of court procedure: procedural fairness, the right to a fair trial, open justice, the criminal burden and standard of proof, legal professional privilege, the privilege against self-incrimination and the non-existence of a prosecution appeal from an acquittal. They include principles against retrospectivity: the non-retrospectivity of statutes extending the criminal law or changing civil rights or obligations. They include mens rea as an element of crimes. They include freedoms: freedom from arbitrary arrest or search, the freedom to depart from and re-enter the country, the freedom of individuals to trade as they wish, the freedom of individuals to use the highways, and freedom of speech.

One view is that s 3(1) is a statutory enactment of the principle of legality. Lord Hoffmann adhered to that view.[64] The justification for the principle of legality advanced by Lord Hoffmann – that without it there is too great a risk that in the course of the democratic legislative process fundamental rights may be ignored – is certainly consistent with s 19 of the Act, requiring responsible Ministers to state either that the provisions of Bills are or are not compatible with the Convention rights. It is also

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64 *R v Secretary of State for the Home Department; ex parte Simms* [2004] 2 AC 115 at 132; *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718 at 1723 [17]; [2006] 1 All ER 529 at 535.

consistent with the function of the Joint Committee on Human Rights. However, as we have seen, the main trend of authority holds that s 3(1) of the Act goes much further than the "principle of legality".[65] The principle of legality, though more limited than s 3(1), can achieve a similar purpose without entailing the drawback of involving the courts in creating new legislative rules.

Third technique: specific rules of the general law

The Convention stands in contrast with many rules of the general law. The Convention is not detailed. The Convention is not directly enforceable in relation to legislation (cf s 3(1)), as distinct from actions (ss 6-9). The Convention is not specifically adapted to particular problems. The Convention is not entirely coherent. In contrast, common law and statutory rules tend to be detailed. They are generally enforceable. They are specifically adapted to the resolution of particular problems. Their makers seek, with some success, to make them generally coherent with each other and with the wider legal system.

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65 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. See also *Vodafone 2 v Revenue and Customs Commissioners* [2010] Ch 77 at 90-92 [37]-[42]; *Ahmed v Her Majesty's Treasury* [2010] 2 AC 534 at 646 [112]; *Principal Reporter v K* [2011] 1 WLR 18 at 40-41 [60]-[61]. For examples of these principles in operation, see *R v Offen* [2001] 1 WLR 253 at 277; [2001] 2 All ER 154 at 175; *Sheldrake v DPP*]2005] 1 AC 264.

United Kingdom statutes are replete with examples of the type of legislation which vindicates human rights directly and specifically. That legislation does so better than the Convention techniques. One key example concerns the relationship of police officers and suspects. It is far from surprising that human rights considerations arise here, because the circumstances in which investigating officers deal with suspects are inevitably those in which there is a considerable imbalance of power in favour of the former. The Convention has very general provisions about the right to security and liberty in Art 5 and about the right to a fair trial in Art 6. Statutes like the *Police and Criminal Evidence Act* 1984 (UK) and the *Criminal Justice Act* 2003 (UK) have created detailed and precise rules. So has the common law. The rules to be found in these bodies of law are tough law. Infringement can lead to criminal punishment, damages in tort and evidentiary inadmissibility. Those possible outcomes have a strong deterrent effect against the infringement of human rights. They were worked out over a very long time by judges and legislators who thought deeply about the colliding interests and values involved in the light of practical experience of conditions in society to which the rules were applied. Abstract slogans and general aspirations about human rights played no useful role in their development. The great detail of this type of regime renders it superior to bills of rights. Among other things, it is likely to encourage a gradual change in culture and ethos, which may be stronger influences towards good conduct than the vague aspirations embodied in bills of rights.

The task of dealing with procedural and evidentiary questions, incidentally, is one in relation to which the European Court has underrated the ability of those administering local institutions. An example is Art 6.3(d). It gives a person charged with a criminal offence the right "to examine or have examined witnesses against him". There is no provision permitting interest/necessity analysis. What is now s 116(2) of the *Criminal Justice Act* 2003 permits hearsay evidence where the declarant is dead, unfit to testify, outside the United Kingdom, cannot be found or fears to give evidence. In *Al-Khawaja and Tahery v United Kingdom*[66] the European Court of Human Rights held that a trial in which the evidence of a dead declarant was received contravened Art 6.1 read with Art 6.3(d). Considered from the viewpoint of domestic law, there was no way of using even s 3(1) to read s 116 as meaning anything other than what it said. Considered from the point of view of international law, the European Court's error was not to apply a margin of appreciation. It did hold that Art 6.3(d) would not be contravened by the reception of a hearsay statement which was not the "sole or decisive" evidence against the accused, but that was to twist the meaning of what the Article said. Insufficient attention was given to the analyses of the hearsay rule by English and American judges and scholars over many decades. Insufficient attention was given to the activities of law reform committees in the field since the 1930s, particularly the 11th Report of the Criminal Law Revision Committee in

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[66] (2009) 43 EHRR 1.

1972. Its members included such distinguished criminal lawyers as Professor Glanville Williams, Professor Cross and Lord Justice Lawton. Insufficient attention was given to the long controversies that followed that report, and to the eventual legislative responses. One need not applaud every detail of the modern English statutory law of evidence to accept that it has been closely considered. It is scarcely surprising that in *Horncastle v R*[67] the Supreme Court, with admirable restraint and courtesy, declined to follow the Strasbourg authorities. The Grand Chamber of the European Court then executed a retreat, though only a limited one.[68]

The United Kingdom legislatures are capable of enacting specific legislation dealing with a particular field in a comprehensive way – as Lord Reid said in *Myers v Director of Public Prosecutions*, "following on a wide survey of the whole field", and avoiding a "policy of make do and mend".[69] The courts can apply the incremental approach of the common law, deal narrowly with particular problems, observe how the results of that decision develop in other courts, take into account debate about their decisions and consider the lessons of experience as they go along. In each instance the law is being developed by close reference to the particular conditions of the jurisdiction in question. That is not always so with bills of rights.

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[67] [2010] 2 AC 373.

[68] *Al-Khawaja and Tahery v United Kingdom*.

[69] [1965] AC 1001 at 1022.

Other techniques

To the three techniques just discussed for vindicating human rights may be added others. One is the role of ombudsmen in investigating complaints about government maladministration relating to human rights. That role may be particularly important in dealing with the problems Professor Simpson identified at the bottom of the governmental pyramid. Another is responsible government and its capacity for the elected representative of a citizen to seek redress of grievances by corresponding with Ministers and, if necessary, publicly questioning them in Parliament. Another is invoking media publicity with the assistance of pressure groups. A fourth is the rigorous examination of legislation before enactment. A fifth is powerfully expressed speeches in the legislature, even if the views are minority views. We may take as an example a politician, much-reviled but nonetheless admired by political opponents, the late Enoch Powell, whose Hola Camp speech on 27 July 1959 at 1.15am in the House of Commons was described by Denis Healey, at the end of his very long career, as "the greatest parliamentary speech I ever heard."[70] A sixth technique is encouraging among employers, the suppliers of services and the community generally a greater sensitivity to human rights.

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70 See (ed) Lord Howard of Rising, *Enoch at 100* (Biteback Publishing Ltd, London, 2012) at 54.

Conclusion

Sometimes it is said that to rely on the legislature and the judiciary alone to protect human rights is to risk their steady debasement. It is said that without the Act, the importance of human rights will be forgotten, or human rights will be readily destroyed by the arrival of a dictator, or there will be "a creeping erosion of freedom by a legislature willing to countenance infringement of liberty or simply blind to the effect of an otherwise well intentioned piece of law."[71] Of course the Act, being only an ordinary act of Parliament, is not immune from the attentions of a dictator whose "party" seizes control of the legislature. Now it is a principle of statutory construction, and of constitutional construction, that it is wrong to adopt a construction of the language in its ordinary operation which is controlled by the extraordinary possibility of some extreme but highly unlikely state of affairs – what Justice Scalia calls a "horrible". It is equally wrong to criticise the potential inefficiency of governmental institutions by postulating a failure in them which can only result from some cataclysmic social breakdown which it is almost impossible to prevent or control. It is probable that if a dictator takes power, or a party hostile to human rights in their present manifestations is elected, something will have gone so wrong in the body politic and in society generally that a bill of rights would have been incapable of

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[71] Lord Irvine of Lairg, "The Development of Human Rights in Britain Under an Incorporated Convbention on Human Rights" [1998] *Public Law* 221 at 229.

preventing the catastrophe. Some think that bills of rights are neither necessary nor sufficient means by which to achieve many human rights goals. Some contend that a tradition in the particular jurisdiction of adherence to the rule of law is much more important. Some even think that the protection of rights depends more often on factors other than legal rules. One is the social climate, moral traditions, and the ethical sense of the people. Another is the existence among them of a vibrant culture of tolerance and liberty. Another is their desire to maintain civilised standards and manners – what has been called "a framework in which all manner of delicate sensibilities may flower in human relations"[72] A force for public opinion reflecting these things may be more effective than formal guarantees, of whatever kind, in the law. It is customary to deride this point of view with the supposedly annihilating adjective "Diceyan". But Dicey is not its only supporter. Very different thinkers have agreed with it. John Stuart Mill thought liberty could be protected by "a strong barrier of moral conviction".[73] Alexander Hamilton said that the security of a right like press freedom, "whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the

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72 Kenneth Minogue, "What is Wrong with Rights" in (ed) Carol Harlow, *Public Law and Politics* (Sweet & Maxwell, London, 1986) 209 at 223.

73 *On Liberty*, Ch 1, para 15.

people and of the government. And here, after all … must we seek for the only solid basis of all our rights."[74]

It is easy to underrate the importance of public opinion. It can be very important where there are people with the will and ability to mobilise it. That has been done even in very adverse circumstances. In 1941, at the height of Hitler's apparent success and popularity, a Nazi programme of compulsory euthanasia for the incurably ill was under way. On 3 August 1941, the Catholic Cardinal Archbishop of Münster, Graf Clemens von Galen, delivered a sermon on the subject. He attacked the programme as "plain murder". He demanded the prosecution for murder of those responsible. He also pointed out that the programme would in due course involve all invalids, cripples and badly wounded soldiers. Copies of that sermon were distributed throughout Germany, and circulated among the soldiers at the front. The Cardinal Archbishop became an admired hero. What was the government reaction? Himmler wanted him to be arrested. Bormann wanted him to be hanged. Goebbels was an unlikely advocate of mercy. But he was the Minister for Propaganda. He did understand public opinion. He advised Hitler not to proceed against the Cardinal Archbishop because it would alienate the whole of Westphalia for the rest of the war. Goebbels's advice led Hitler, reluctantly, not to take vengeance on the Cardinal Archbishop until he was placed in a

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[74] James Madison et al, *The Federalist Papers*, (ed Isaac Krannick) (Penguin Books, Harmondsworth, 1987) No LXXXIV at 476-477.

concentration camp after the bomb plot on 20 July 1944. The euthanasia programme was terminated in 1941 and did not resume.[75]

It is worth noticing something which Sir Julian Elliston said. He was United Kingdom Parliamentary Counsel at a time when many British colonies were given bills of rights on achieving independence. He wrote on 16 January 1961 that in "any country where [a bill of rights] is likely to be respected it is probably not necessary while in any country in which it is really necessary it is not likely to be respected." He also said: "Except possibly in the most extreme totalitarian regimes, the ordinary law usually provides protective provisions for many aspects of basic rights."[76] In like vein, Charles Parkinson, the historian of colonial bills of rights, has observed:[77]

> "A bill of rights cannot guarantee the protection of rights or the continuation of a civil society. In fact, it has never seriously been argued that the presence or absence of a bill of rights in itself is the decisive factor in the maintenance of a civil society. A bill of rights is usually recognised as just one component in a complex matrix of factors that contribute to a stable civil society."

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[75] Guenter Lewy, *The Catholic Church and Nazi Germany* (Weidenfeld and Nicholson, London, 1968) 265-266; (ed) Robert S Wistrich, *Who's Who in Nazi Germany* (Rutledge, London, 2002) at 71.

[76] Charles O H Parkinson, *Bills of Rights and Decolonisation,* 239.

[77] *Bills of Rights and Decolonisation,* 273.

These modern lawyers were echoing James Madison's opinion that "experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed".[78]

Five questions now arise. Is a bill of rights even a particularly useful component in the complex matrix of factors that contribute to a stable civil society? Has the Act significantly improved human rights protection? Is there any fundamental right referred to in the Act which was not given reasonable protection in domestic law before 2000? Before 2000, were there any significant instances in which that right has been infringed in circumstances not permitting any recourse to the courts to remedy the infringement? Is there any respect in which the Act will lead to significantly greater protection for that right without raising the risk of limiting other rights? It might take a lot of work to answer those five questions. But if the answer to them is "Yes, and the prices to be paid are thought to be worth it", British citizens should be grateful for the Act and the Convention. If the answer is "No" or "Yes, but the prices to be paid are too high", they should not be. Those latter answers would reveal that it was not necessary either to enter the Convention or to enact the Act.

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[78] Letter to Thomas Jefferson, 17 October 1788 in William T Hutchinson et al (eds), *The Papers of James Madison* (University of Chicago Press, Chicago and London, 1962-1977), vol 1, ch 14, doc 47.

HUMAN RIGHTS AND THE SEPARATION OF POWERS

RICHARD EKINS*

I INTRODUCTION

Human rights are distinct from human rights *law*. Quite apart from the positive law of any community, each human person is entitled in justice to certain absolute rights that should never be violated. Every decent legal system recognises and secures absolute rights in some way, and also makes provision for the creation and enforcement of other particular legal rights which help members of the political community live well together. This recognition of the inviolability of absolute rights, and the importance of legal rights, is fully consistent with the traditional separation of powers in which judicial power is limited and in which political authorities are responsible for making the open-ended choices of lawmaking and policy that shape the community's future. This separation helps realise the rule of law and self-government, the denial or compromise of which, ordinarily at least, is itself an injustice. This article considers some aspects of the relationship between human rights and the separation of powers, questioning the aptness of human rights law to secure rights, including the right to be governed by way of the rule of law and to have a share in self-government.

Supreme bills of rights are entrenched against legislative change and clearly flout the traditional separation of powers. The promise of statutory bills of rights, such as the New Zealand Bill of Rights Act 1990, is that they avoid this critique, squaring self-government with an enhanced judicial role in rights protection. The main body of this article tests the promise by studying some main features of such bills, including the way they posit legal rights and the ways they authorise courts to act to help secure those rights against the executive and legislature. The article argues that statutory bills of rights depart from the main tenets of the separation of powers and thereby put self-government and the rule of law at risk. The rights thereby introduced into law lack the form of good law and human rights law adjudication is often undisciplined; rights-consistent interpretation often licenses or invites judicial lawmaking; and authorising judges to declare legislation incompatible with human rights risks distorting democratic deliberation. There are good reasons for legislators in Australia to refrain from enacting such bills. And legislators in the United Kingdom, and to a lesser extent in New Zealand, should repent of their handiwork, although the constitutional changes in question may not prove easy to unravel.

II RIGHTS AND CONSTITUTIONAL GOVERNMENT

Human rights include, first and foremost, those absolute rights that are fundamental to morality, which mark out actions that no person may ever reasonably choose and the infliction of which no person should ever have to suffer. Each person's rights not to be raped, tortured, enslaved or murdered by any other person are of this type. They are universal and inviolable, and do not turn on any particular set of empirical facts or social arrangements. Their foundation is the basic worth of each human person, whose well-being is the end of reasonable human action. Contrast other

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rights, other just arrangements between persons, which do turn in part on such particulars and so are not universal, inviolable demands of justice in the way that marks out absolute rights.

The recognition of human rights is fundamental to government. The fragility of human life, and of life well-lived, cries out for measures to be taken to secure persons – ourselves, our families, and our neighbours – against the evils of rape, torture, slavery, and murder, to secure and protect the absolute rights that are the restraint of such evils. The first duty of government, the discharge of which is fundamental to legitimate authority, is to act to protect those in its care against breach of such rights, by repelling marauders and keeping the peace. The responsibilities of government do not end with this first duty, especially in any community that has the common resources that make possible further joint action, and the complex conditions that make such further joint action a requirement of justice. In such a community, provision should be made for other legal rights. The detail of this legal provision quite reasonably varies by time and place.

The responsibility of government is to help secure the rights of the people. Thus, rights are not primarily restraints on government – although they are this in part – but rather are the set of just relationships amongst persons that government should aim to introduce and secure. So understood, rights are the objects of the exercise of public power, the ends for which officials should act, as well as limits on the means open to be adopted. The realisation of just relationships requires the creation of legal rights, which give legal form and force to what is morally required. What morality requires is often choice amongst rationally under-determined options. For example, while private property may be vital if people are to live well, no particular property regime is required by justice. The community should, by way of its law, introduce some particular set of property rights. The set of legal rights in force at some point in time may conform more or less closely to what morality requires and it follows that legal rights should always be open to evaluation and contestation, which might result in the making of some alternative or amended legal right or rights.

It is hardly novel to speak of government existing to secure our rights, but it is often obscured by the contrast sometimes drawn between rights and the public interest or common good.[1] Properly understood, there is no public interest in the violation of the rights of others. The common good is not some aggregate of the preferences of individuals, but rather is the set of conditions under which we may live well together, which consists in part in the securing of absolute human rights and in other rights required in some time and place.[2] The public interest is an oblique reference to the common good, including to states of affairs that may not correlate neatly with any particular person's rights but which are intelligibly related to them.[3] Thus, the public interest in reducing crime is shorthand both for the rights of all those who might otherwise be wronged and for the advantages that accrue to all from the reduction of the incidence of such wrongs. Likewise, the public interest in efficient road maintenance directs us to those who may be harmed by poorly maintained roads and to

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1 A contrast drawn repeatedly by Ronald Dworkin and traced with care in Paul Yowell, 'A Critical Examination of Dworkin's Theory of Rights' (2007) 52 *American Journal of Jurisprudence* 93.

2 Richard Ekins, 'Legislating Proportionately' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 343, 359-362.

3 Bradley W Miller, 'Justification and Rights Limitations' in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, 2008) 93, 101.

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all who benefit from a good road network and from an absence of waste in the use of public funds, which but for this waste could be put to other ends.

The first principle of constitutional order is that those with capacity to secure the common good should exercise authority.[4] The second principle is that this authority should be exercised to settle the subsequent location of authority.[5] How should recognition of the importance of rights frame this exercise of authority? The power of governing requires the maintenance of a continuing, forceful capacity to uphold rights and to restrain wrongs. But there are good reasons to differentiate the capacity to repel marauders or to incapacitate and otherwise restrain wrongdoers from the responsibility for adjudicating disputes about breaches of right. Hence, an otherwise unified governing power (say, the king) does well to make provision for impartial adjudication by officials who judge what some person has done and whether it falls afoul of some public proscription. Such adjudication, taken together with promulgation of clear duties in advance of action, is vital if the rule of law is to be realised. Government by law is a matter of right, of justice, and consists in part in a complex cluster of rights and duties, on subjects and on officials.

The strictures of the rule of law mark out a decent, respectful way for persons to treat one another,[6] a way that protects them from one another and from us jointly by way of our officials, each of whom is capable of error or abuse. This is true of judges too and it is fundamental to the rule of law that judges themselves are law-bound, even if there are rightly only limited means to discipline them, either for particular wrongs or more generally. Effective government and the rule of law require more than the separation of judicial power. One needs also to distinguish between the active capacity to restrain wrong (and to make such open-ended choices within the framework of law as are required to be made now for our common good) and the mode of governing that is legislating, viz. overseeing and deliberately changing the law. This separation of legislative power (even if exercised in part by some persons who also direct the executive power) helps make the rule of law possible. The separation of legislative power makes provision for the community jointly to control its law: special modes of constitution-making aside, the acts of a representative assembly are the highest mode of joint action. Other sources of law – custom and case law – are subject to the discipline of correction by legislative action.

Introducing and maintaining a legislature is a very important way to secure rights, viz. to introduce and to maintain just arrangements between persons. It is a requirement of justice that the existing set of legal rights be subject to revision – including expansion – by a body that is responsible for evaluating the merits of particular rights, for considering their relationship with other legal rights, and for reviewing their adequacy as time goes by and as conditions change. Importantly, the legislature is a body that is capable of doing this in advance of action, rather than in the midst of adjudication, and that is structured to promulgate clear law in canonical form.[7] The general lawmaking capacity of the legislature is well-suited to make law fit for the rule of law. Relatedly, this general capacity is the handmaiden of democracy, for it makes the precise content of legal rights the subject of public deliberation and choice within a representative body. Thus, the importance of the separation of powers follows from

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4 John Finnis, *Natural Law & Natural Rights* (Oxford University Press, 2nd ed, 2011) 246.

5 Ibid 249-50; Richard Ekins, 'Constitutional Principle in the Laws of the Commonwealth' in John Keown and Robert P George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (Oxford University Press, 2013) 396, 411.

6 Lon L Fuller, *The Morality of Law* (Yale University Press, 2nd ed, 1969).

7 Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) 125.

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reflection on how best rights should be secured and about how rights bear on the recognition and protection of rights.

The discussion above makes clear that it is wrong to think the protection of human rights or legal rights is an exclusively, or even primarily, judicial task. The executive should do likewise and must do so first, not least by apprehending or incapacitating wrongdoers. And the executive acts wrongly if it breaches legal rights or if it neglects the good of the persons for whom it acts. The courts are rightly empowered to settle legal disputes, including disputes with the executive, and are required to stand firm against the executive to protect legal rights. In a parliamentary democracy, the executive is answerable (in nearly all cases) to the courts for its conformity or otherwise to settled law and to the legislature for the wisdom, justice and prudence of its actions (including the legality of its actions, although this is not adjudicated as such in Parliament). The legislature's responsibility to protect human rights is a responsibility to oversee and change the content of the law (including the law that permits or forbids executive action). This legislative action frames the subsequent action of all subjects of the law, including the judges who have authority (including authority by virtue of statute, in the case of every appellate court) to adjudicate disputes about the resulting set of legal rights and to protect them by judicial order.

In short, nothing in the idea of rights, properly understood (as the objects of sound government action and as restrictions on the means reasonably adopted to other objects), entails a separation of powers in which judges alone, or primarily, have the task of protecting human rights. The traditional separation of powers is consistent with, indeed it helps realise, *constitutional* government, which is government framed and disciplined by a constitution (whether or not there is a Constitution), such that the exercise of public power is effective, limited, and responsible. The idea of constitutional government does involve recognition of legal rights (and human rights prior to law), such that persons are entitled to a certain standing in law against each other and against public officials (including judges), law which is subject to the discipline of the rule of law. Such concrete legal rights are vital and need to be made, applied and changed only in certain ways. Apart from particular specification in positive law, constitutional government may be framed in part by human rights discourse, with the invocation of some right serving to unify, in a loose sense, a series of actual or possible particular legal propositions and helping ground evaluation or contestation of any particular legal proposition. Rights reasonably feature in our constitutional thought, in addition to their concrete realisation in law, as principles that capture some general aspect of human well-being, which should be taken into account in deciding how public power is to be exercised. The rights in question are constitutional principles in that they mark out elements of the common good for which the constitution exists and they support other courses of action, generating reasons to choose further propositions.[8]

III Self-Government and Bills of Rights

In developed form, constitutional government is not at all antithetical to self-government, but rather makes provision for it: the exercise by a community of the capacity to deliberate about its legal arrangements and to change them in response to reason is a very valuable good and one that is well-placed to make possible intelligent,

[8] Ekins, above n 5, 396, 411.

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reasonable lawmaking that in fact protects human rights. No reasonable community thinks itself free to settle by unreasoning fiat what should be done, but each (complete) community should reserve the right to decide itself what reason demands.[9] In securing rights, there are crucial lawmaking choices to be made, both in response to rationally underdetermined options and in the face of reasonable disagreement about which courses of action are or are not reasonable.[10] These choices should be made by us and should be open to revision by us, subject to the demands of reason concerning when and how one should reasonably turn away from past mistakes.

Save when a people is clearly incapable of governing well, a reasonable constitutional order is one that makes provision for the community to govern itself, by making its own laws, principally by way of representative legislative assemblies. The authority of this assembly (or these assemblies, especially in a federal polity) may reasonably be restrained by some prior act of collective constitution-making if the restraints thus imposed are fit to be carried forward (including by judges) as past choices of the body politic, and if the choices are not such as to extinguish continuing space for self-government in response to matters as they arise. That is, no reasonable constitutional order attempts to settle too much in advance or to make impossible collective reflection on and revision of that order.[11] In this way, the Constitution may be the collective choice of the body politic and courts may act rightly in maintaining its terms even against decisions of subsequent assemblies.[12] There is no departure from reasonable self-government in that case. However, if the past choices go too far, and especially if they call for extensive elaboration on the part of institutions other than representative assemblies, effectively inviting and requiring further lawmaking choice, then this framework for government is, all else equal, unsound.

In view of these principles of constitutional government, there are good reasons to be sceptical about the merits of supreme law bills of rights, which entrench a vague set of standards and authorise the courts to evaluate the justice of legislative action by reference to that set of standards.[13] The enforcement of these standards inevitably requires judicial elaboration and expansion, such that the judicial choice determines how the polity is to be constituted. Strikingly, the logic of the supreme bill of rights is to present these open judicial choices about how a community is to live as mere relaying of past constitutive action. This is the insult to a free people that the practice of judicial review of legislation adds to the injury of the subversion of authentic self-government.[14]

The fact that supreme bills of rights are effectively impossible to amend or revise is central to the case against them. For, such bills license ongoing judicial lawmaking, superior to the choices of representative assemblies and responsible ministers, without themselves being subject, in practice, to the discipline of public contestation and evaluation that may result in legal change. The problem is not just self-government, I

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[9] Richard Ekins, 'How to Be a Free People' (2013) 58 *American Journal of Jurisprudence* 163.

[10] Jeremy Waldron, *Law and Disagreement* (Oxford University Press,1999); James Allan, *The Vantage of Law* (Ashgate, 2011).

[11] Unamendable provisions should be viewed with considerable suspicion.

[12] Ekins, above n 9, 176.

[13] Waldron, above n 10, Part III 'Rights and Judicial Review'; Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18.

[14] John Finnis, 'Human Rights and Their Enforcement', essay 1 in John Finnis (ed), *Human Rights & Common Good: Collected Essays Volume III* (Oxford University Press, 2011), 19 (originally published as 'A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence' (1985) 71 *Proceedings of the British Academy* 303); Ekins, above n 5, 411.

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hasten to add. The risk of statutes being invalidated, after enactment, on vague grounds, undermines the rule of law.[15]

My objection is not to the entrenchment of specific, concrete rights, although it is difficult to secure agreement about their proper scope, but rather to the types of rights standardly constitutionalised and to the typical mode of engagement with them, which sees them as starting points rather than as conclusions. There are many laws that a sovereign Parliament might enact that would be unjust, indeed so unjust as to warrant rebellion, but it does not follow that positive constitutional law should proscribe such. Again, the point is not whether human rights warrant protection, it is *how* they should be protected, and the worry with (supreme) bills of rights is that they are not limited, obvious distillations of moral truth but rather are devices to transfer decision-making power to courts, which must make the further choices necessary to frame public life. One might reasonably have the same concern with the implied rights jurisprudence in Australia (I say this without purporting to settle whether the implications were well made:[16] if they were, the usurpation risk subsides, but concern might remain about their vagueness and the judicial discretion this confers).[17]

Different considerations arise in relation to common law rights, which one sees in some discussions about the principle of legality in statutory interpretation. The common law, informed by statutory change over time, articulates legal rights that the executive must respect (say, property rights and the liberty of the person) and principles that the executive should consider in the course of exercising other powers. These concrete rights and general principles form part of the context in which the legislature acts, which the legislature is likely to respect or at least to consider in the course of changing the law. However, on this approach, judges should yield to the considered judgments of other institutions, especially the clear choice of the legislature (the executive is rightly bound by concrete legal rights), and should not presuppose that all such common law propositions are strongly grounded in the collective choice of the polity, although certainly some run deep in our tradition.

This account of how the common law contributes to the ways in which government secures rights has some considerable force if the traditional common law disciplines are observed. However, the view of the common law as simply judge-posited law, fully open to revision in accordance with changing judicial mores,[18] undercuts the ground of the approach, making its invocation simply an asserted basis for judicial expansionism and adventurism. And the account suffers from a risk similar in kind to the implied rights jurisprudence, viz. the rights in question may be inchoate, lacking any kind of textual formulation, with no foundation in collective action, and developed only by way of the vagaries of litigation.

A common law bill of rights, so to speak, is likely to be much less of a challenge to continuing legislative authority, and hence to robust self-government, than a

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[15] Richard Ekins, 'Judicial Supremacy and the Rule of Law' (2003) 119 *Law Quarterly Review* 127; Jeffrey Goldsworthy, 'Legislative sovereignty and the rule of law', chapter 3 in his *Parliamentary Sovereignty: Contemporary Debates* (2010) 57.

[16] Patrick Emerton, 'Political Freedoms and Entitlements in the Australian Constitution – An Example of Referential Intentions Yielding Unexpected Legal Consequences' (2010) 38 *Federal Law Review* 169; cf. Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30 *University of Queensland Law Journal* 9 and James Allan, 'Implied Rights and Federalism: Inventing Intentions While Ignoring Them' (2009) 34 *University of Western Australia Law Review* 228

[17] *Monis v The Queen* [2013] HCA 4 [242-251] (per Heydon J).

[18] EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005).

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supreme bill of rights. However, it is capable of constituting such a challenge, especially when paired with rhetoric about how such rights lie so deep they cannot be undercut, rhetoric which trades on the majesty of the common law tradition and on the truth about human rights to assert a radical superiority of judicial views about justice. Witness the absurd claim made by some English judges that the common law tradition licenses them to strike down a statute that is overly restrictive of judicial review:[19] this asserts a novel, and oddly self-regarding, theory of what is constitutionally fundamental. Worse still is TRS Allan's argument that the common law – in England, in Australia, everywhere – already replicates the content and force of a supreme bill of rights.[20] Indeed, this latter view would in many ways be worse than a supreme bill of rights, for it would not be open at all to amendment, would not have any canonical formulation, and would have no grounding in collective choice whatsoever.

These drawbacks help suggest the attraction of statutory bills of rights.[21] The promise of such bills is that they are superior to relying on the common law alone and that they avoid the damage that a supreme bill of rights does to self-government and to the rule of law. That is, a bill of rights enacted as an ordinary statute promises to be more legitimate, and more constrained or grounded, than a common law bill of rights, which might perhaps limit the judges in some ways, although of course this is all contingent on time and place and legal culture. It should also be less risky, partly by reason of not being entrenched, than a supreme bill of rights. It certainly looks as though it has a lower cost. For human rights law enthusiasts this may seem a tepid half measure. That is partly the point.

Stephen Gardbaum has argued that there is a new commonwealth model of rights protection, uniting Canada, New Zealand, the United Kingdom and, in part, Australia.[22] The model centres on the interplay between court and legislature, on greater judicial involvement in rights protection that does not displace, but rather enriches, legislative reasoning about rights. To my mind, the arrangements one finds in Canada differ sharply from those in New Zealand, for example. The Canadian Charter of Rights and Freedoms just is a supreme bill of rights, and a particularly objectionable and problematic one at that. The poorly framed and effectively abandoned Art 33 power of legislative override does not revive Canadian self-government, but instead arguably encourages greater judicial license.[23] Contrast the New Zealand Bill of Rights Act 1990 (NZBORA), which is an ordinary statute, fully open to repeal or amendment, and which does not limit the New Zealand Parliament's freedom to legislate as it sees fit.[24] Still, if one sets Canada aside, there is a family similarity amongst the Human Rights Act 1998 (UK) (HRA), the NZBORA, and the Charter of Human Rights and

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19 *Jackson v Attorney-General* [2006] 1 AC 262 at [102], per Lord Steyn and, more tentatively, [159], per Baroness Hale.

20 TRS Allan, *Constitutional Justice, A Liberal Theory of the Rule of Law* (Cambridge University Press, 2001); cf. Jeffrey Goldsworthy, 'Homogenizing constitutions' (2003) 23 *Oxford Journal of Legal Studies* 283

21 The White Paper, *Rights Brought Home: The Human Rights Bill* (HMSO, 1997) Cm.3782

22 Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013).

23 Grant Huscroft, 'Rationalizing Judicial Power: The Mischief of Dialogue Theory' in James Kelly and Christopher Manfredi (eds), *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (UBC Press, 2009) 50.

24 Janet McLean, 'The Impact of the Bill of Rights in Administrative Law Revisited: Rights, Utility and Administration' [2008] *New Zealand Law Review* 377

Responsibilities Act 2006 (Vic).[25] The bills are each ordinary statutes, open to repeal or amendment. (It is sometimes said that the HRA is a constitutional statute and hence is immune from implied repeal.[26] In fact, the question of implied repeal never arises because the HRA is structured not to come into outright conflicts with other statutes.) They give statutory force to some set of rights, which thus overrule contrary common law, and introduce various mechanisms to help ensure that other statutes are likely to conform to the rights in question. These mechanisms standardly include duties to certify whether proposed legislation is compatible with rights and to interpret other statutes consistently with rights, and, in the UK and Victoria (and arguably now also in New Zealand), a judicial power to declare legislation incompatible with rights. Statutes that remain inconsistent with the rights in question, as judicially elaborated, continue to be entirely valid and effective.

There are important differences between these statutory bills of rights. The NZBORA was enacted without any great public enthusiasm, or any great expectations about its constitutional significance, although has since come to enjoy a measure of public and elite support.[27] The enactment of the HRA was, and was recognised to be, much more significant and its point was to change the British constitution in response to the difficulties of the UK's membership of the European Convention on Human Rights (ECHR).[28] This rationale must not be overlooked in understanding the HRA, and it complicates the apparent similarity of the NZBORA, Victorian Charter and HRA. Still, as I say, there is a family resemblance here. The HRA was framed with the NZBORA in mind and the Victorian Charter with both the former in view. All three are plausibly thought to be aiming to introduce a type of rights-based judicial review of executive and legislative action without (fundamentally) compromising parliamentary democracy. The remainder of this paper examines the main features of statutory bills of rights, arguing that while less objectionable than supreme bills of rights such measures nonetheless depart sharply from the traditional separation of powers and place self-government and the rule of law in some danger.

IV Imperfectly Posited Legal Rights

A statutory bill of rights introduces into the law a new set of legal rights. The content of the rights may overlap in part with existing common law propositions, or other statutory propositions for that matter, or, especially in the case of the UK, propositions of some regional or international legal order (the ECHR). However, their adoption by statute gives them a different standing in the (domestic) legal system. In this section, I argue that the rights adopted in bills of rights represent a failure of lawmaking craft and fall short of the demands of the rule of law.

With rare exceptions, bills of rights do not affirm clear, specific, concrete rights, fit to be followed without further argument about how they should be understood. Instead, bills of rights affirm propositions that are often vague and incomplete, which

25 David Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (Oxford University Press, 2010); see also Janet Hiebert and James Kelly, *Parliamentary Bills of Rights: The New Zealand and United Kingdom Experiences (Cambridge University Press, 2015).*

26 Alison Young considers this possibility in her *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing, 2008).

27 Paul Rishworth, Grant Huscroft and Scott Optican (eds), *The New Zealand Bill of Rights* (2003).

28 Richard Ekins and Philip Sales, 'Rights-Consistent Interpretation and the Human Rights Act 1998' (2011) 127 *Law Quarterly Review* 217.

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require further moral argument about what should be done, argument that turns on provisional, contingent empirical findings. In other words, the positing of the canonical formulation of the rights in question is a stymied exercise in lawmaking. The adoption of this formulation (or set of formulations) begins but does not conclude the effective process of lawmaking, which culminates instead in some later judgment, itself subject to revision in subsequent judgments, whether by the same court or even inferior courts.[29]

The rights in question do not always, or even often, specify the particular legal propositions (the claim-rights, duties, liberties and legal powers) that will in fact frame what is to be, and may be, done. Rather, some vague general proposition is subject in turn to provision for limitation. This structure recognises in part at least the truth that what persons are entitled to in justice is not the abstract proposition but the specification of this interest in view of all other persons and all other relevant considerations. One sees this clearly in relation to free speech, the abstract formulation of which seems to extend to deceit, threats to kill, treason, hate speech, pornography, and so forth, some or all of which may nonetheless be reasonably proscribed by the government. There are differences here between the NZBORA, Victorian Charter and Canadian Charter, on one hand, and the HRA on the other. The former rely on a general limitation provision; the latter incorporates into British law 'Convention rights', which the ECHR affirms in a two-stage process, affirming a general right in one paragraph and specifying grounds for its limitation in a second paragraph. But the basic structure is very similar. The ambition is to do more than posit some narrow set of particular, concrete rights (of the type fit for ordinary legal reasoning and adjudication). And whatever the intention of the framers of these bills of rights, or in the case of the ECHR of the member states who signed it, the understanding of many judges, and most human rights lawyers, is that the rights guarantee whatever should be guaranteed, such that the legal rights are transparent to whatever it is thought justice demands.[30]

This conflation of human rights law with human rights – with whatever rights should be recognised and given effect in law – is an abandonment of legislative craft, of the demands of the rule of law, which require clear promulgation. It is no good to provide in law that persons now have in law whatever rights they should have. The responsibility of lawmakers is to specify what those rights are and should be – a specification that should settle what is done but should remain open to evaluation and contestation by later legislators.

The limitation provisions in bills of rights require courts, in adjudicating disputes about the rights in question, to determine whether some legislative or executive measure is a reasonable limitation on the abstract rights guarantee. In this way, it seems to me, the responsibility of the court is to decide – within bounds – what legal rights persons should in fact have, what specification of the abstract rights guarantee is reasonable in view of other relevant considerations. The technique judges have used to frame this evaluation of limitations is the doctrine of proportionality, which outlines a three or four stage test for determining if some executive or legislative act is a proportionate limitation on the right.

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[29] Grégoire Webber, 'Rights and the rule of law in the balance' (2013) 129 *Law Quarterly Review* 399.

[30] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007).

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While some judges and scholars attempt to present proportionality as a legal technique, particularly apt for adjudication,[31] it clearly calls for legislative reasoning. Consider the stages of proportionality analysis. Is this a justified legislative end? Is the chosen means to that legislative end a necessary, suitable, or rational means? (Viz. are there other means that the legislature should have chosen instead?) And finally, has the legislature struck a fair balance between the burden on the claimant and the end for which the legislation is enacted? These are questions that go directly to the merits of the legislation. Any legislator should think about the end for which the legislation aims and about the fitness of the means it adopts. There are reasons to think the structure of proportionality analysis may distort sound legislative reasoning,[32] but nonetheless the technique is quite obviously *not* a technical legal enquiry but robustly moral and political. (Note however that equivocation between the two possibilities continues, which is useful for judges to avoid responsibility, and for scholars to avoid critique, but does risk constant confusion.)

The ubiquity of proportionality gives rise to a familiar pattern, in which little attention is paid to the formulation of the right itself, with all turning instead on the limitation analysis. In consequence, the reach of the bill of rights expands inexorably, per the imprecision about the nature of the interests that warrant protection in the first place and about the limits of what is arguably protected. This dynamic further undercuts the extent to which the bill *posits* legal rights, for now even the canonical formulations themselves are dispensable, having been taken to be engaged. Thus, one advantage of statutory bills of rights over the common law dissolves.

Taken to extremes, as this approach is in the work of some scholars and the practice of some courts,[33] all rights collapse to a single generic autonomy interest – one's 'right' to do whatever one pleases – which is then subject to proportionality analysis. For these scholars, this rights inflation is a very good thing, for it requires that all exercises of public power, rather than merely some, be justified before a court.[34] The problem is that this judicial approach abandons even the half-hearted promulgation that one sees in the enactment of a bill of rights. The approach is, it seems to me, inconsistent with the authority of the legislature that enacted the bill of rights and it reduces all questions of rights conformity to a particular exercise of judicial discretion. Moreover, it is a moral disaster to collapse the multiplicity of rights, underspecified though they may be, to a single right not to have one's autonomy disproportionately curtailed.[35] This reduction flattens out the complex nature of human well-being, thus losing some of the main advantages of rights discourse, which do capture part of the irreducible nature of human good. And again, it turns everything into a judicial choice,

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[31] Robert Alexy, 'The Construction of Constitutional Rights' (2010) *Law & Ethics of Human Rights* 20 and David Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004).

[32] Ekins, above n 2.

[33] Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012).

[34] Ibid; see also Kai Möller, 'Proportionality and Rights Inflation', chapter 7 in Huscroft, Miller and Webber, above n 2, 155, and Mattias Kumm 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4(2) *Law and Ethics of Human Rights* 1

[35] See further: Guglielmo Verdirame, 'Rescuing Human Rights from Proportionality', chapter 18 in Rowan Cruft, S. Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press, 2015), 341 and Francisco Urbina, 'A Critique of Proportionality' (2012) 57 *American Journal of Jurisprudence* 49.

even if masked by quasi-technical language. Not for nothing does Grégoire Webber term the rights inflation that proportionality encourages 'the loss of rights'.[36]

The structure of bills of rights can distort moral analysis and public deliberation in other ways. For example, talk of legislation infringing or interfering with or, worst of all, violating someone's rights, when it cuts across the general guarantee risks placing an unnecessary burden on lawmaking. It is wrong to say that a child pornographer has his right to free speech curtailed – he has no such right, no entitlement in justice that has been qualified. This loose talk about rights matters in *Nicklinson*,[37] where Lord Kerr, following the Strasbourg Court's expansive reading of Art 8,[38] takes restrictions on respect for private life to require a certain robust empirical support.[39] In other words, he labels the overly broad initial formulation one's *right*, and relies on this classification to introduce a novel evidential burden to be cleared before any restriction is justified. Much better is Lord Hughes' analysis,[40] which sees clearly that one's right to carry out some action, properly understood, turns on whether the state is entitled to prohibit or restrict that action.

The imperfect positing of rights is made still worse by the standard disposition towards interpretation of the canonical rights formulations, viz. that they are to be updated by way of the living tree or living instrument approach.[41] Hence, judges often fail to consider the precise meaning of the term and the (somewhat) limited idea or concept it was intended to convey or introduce. This is not inevitable, and it may be easier to resist in a relatively contained jurisdiction where the bill of rights is statutory rather than supreme. Still, the trend is powerful. And it means that the idea that the rights in question have been chosen by the people through a legislative act – while not wholly unsound – may slip away in view of the techniques so often adopted to understand and elaborate said rights. It would be different if a bill were intended to, and recognised to, affirm and instantiate some limited existing set of particular (concrete) rights. This would fail the common aspiration for such measures. Disappointing the human rights law enthusiast in this way would be no bad thing, but my point is that whatever is intended the risk of drift is very real.

One related consequence of this set of considerations is that precedent does not hold. The elaboration of general rights guarantees taken together with general limitation provisions yields a body of case law that anchors the content of the rights in question. (Interestingly, the law and practice of statutory bills of rights never suggests that Parliament might, by its ongoing legislative choices, disclose a considered and reasonable judgment about what the rights require to which the court ought to yield by reason of its choice; this would be thought, not unreasonably perhaps, to be inconsistent with the point and structure of these measures. Contrast the common law, where a settled line of statutes might well inform the development of the tradition.) But the logic of human rights law, with its aspiration to be transparent to human rights (and hence its suspicion of positive law), and the technique of proportionality (with its ongoing judgment about the adequacy of the end, the means, and the balance of all relevant interests), are such as to destabilise the staying power of precedent. One

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[36] Grégoire Webber 'On the Loss of Rights' chapter 6 in Huscroft, Miller and Webber, above n 2 at 123.

[37] *Nicklinson v DPP* [2014] UKSC 38.

[38] *Pretty v UK* (2002) 35 EHRR 1.

[39] *Nicklinson v DPP* [2014] UKSC 38, [351] (per Lord Kerr).

[40] Ibid [263] (per Lord Hughes).

[41] See Nicholas Barber, Paul Yowell and Richard Ekins (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing, 2016, forthcoming).

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should always be able to persuade the next court – even the next inferior court – that the balance should be revisited, whether because the facts have changed, as is inevitable with matters related to legislative reasoning, or because this particular claimant deserves an answer tailored to him, not a general decision. This is what one sees in Canada,[42] which is the vanguard, and in the ECHR system too, with some attempt to limit matters in the UK's reception of Strasbourg jurisprudence (say, requiring lower courts to leave to the Supreme Court the task of responding to new Strasbourg decisions).[43]

V THE INSTABILITY OF RIGHTS-BASED JUDICIAL REVIEW

The imperfectly posited legal rights affirmed in statutory bills of rights are introduced into the law, partly by bearing on the interpretation of other statutes but more directly still by placing on public authorities a duty not to breach the rights as judicially elaborated.[44] This direct effect requires authorities to anticipate how a court might construe the proportionality of their interference with some general rights guarantee. The rule of law difficulties here are obvious. Public authorities are responsible for securing the common good in various ways. Yet the duties under which they now labour are imprecise and subject to judicial revision and change after the fact. With a stable court and a conservative disposition, one may know where one stands, but the fact remains that one has to predict judicial discretion, which is structured to remain open. The legal sources in question, namely the rights affirmed in the bill of rights, leave open such expansion and revision, which in turn encourages litigants to challenge past judicial rulings, which are brittle.

The impact of these new duties is particularly pronounced in fields otherwise unregulated by statute, for of course the bill of rights is a statute and trumps ordinary common law. Hence, police procedure and so forth is at risk of quite radical revision. Some such revision may be warranted, but better that it takes place by way of considered legislative change rather than judicial lawmaking that lacks the discipline of the ordinary common law.

The enactment of a statutory bill of rights makes justiciable many matters that the executive would otherwise be legally free to decide and for which it would only be accountable to Parliament. This extension of legal liability has the potential to transform judicial review of the actions of public authorities who are now required not to depart from human rights law as the court develops it. The judge must evaluate the proportionality of the public authority's action, and if the decision is wrong he or she must overrule it. This runs against the grain of judicial review more generally and it is questionable wisdom as a matter of institutional competence and democratic legitimacy (notwithstanding the enactment of the bill of rights). Conscious of such, judges have often attempted to limit the scope of rights-based review to a kind of oversight of the adequacy of the decisions of another, with due deference to empirical findings and so forth. But different judges part ways on this point. Consider *Carlile v Home Secretary*,[45] and Elias LJ's extra-judicial observation of the gulf between Lord Sumption's and Lord Kerr's understandings of their responsibility to second-guess

[42] *Bedford v Attorney General* [2013] SCC 72, *Carter v Canada* [2015] 1 SCR 331.
[43] *Kay v Lambeth London Borough Council [2006] 2 AC 465.*
[44] NZBORA, s 3; HRA, s 6, Victorian Charter, s 38.
[45] *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60.

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executive judgments about the national interest in foreign policy.[46] These differences are a question of temperament and philosophy rather than party politics. But they make rights-based review highly unstable. Whether judges will defer or overrule is up to them and may turn on how much they want a particular result (more charitably: how unjust they think the public authority's action is). Perhaps just such a quasi-administrative gloss on our constitutional law is the point of the statutory bill of rights, but it is a mess.

The outcome of a challenge to a public authority's action may turn on how confident the court is in its own capacities and how willing it is to permit the executive to make its own decisions. In *Quila*,[47] the court quashed delegated legislation that aimed to protect people from being forced into marriages by delaying the entry into the UK of persons below a certain age who had married overseas. The scale of the problem was difficult to determine and the likelihood of the policy succeeding was uncertain. The majority of the Supreme Court contrasted the certain impact on some applicants against the uncertain benefits of the scheme. In dissent,[48] Lord Brown pointed out that the court was ill-placed to contest the government's evaluation and that in such a context it should be for the government itself to decide how the public interest is best served. The court simply replaced the executive's considered choice about how best to act in the face of uncertainty with its own choice, while assuming that no choice was required because a definite cost outweighs an uncertain benefit.[49] In *Tigere*,[50] the Supreme Court quashed delegated legislation imposing conditions on eligibility for student loans. The majority held the conditions discriminatory but was itself divided. Lady Hale and Lord Kerr insisted that any new set of rules would have to make provision for individual assessment of applicants;[51] Lord Hughes argued otherwise.[52] The case leaves the public authority in an awfully difficult position. What new rules will pass judicial muster? The case confirms also a disposition on the part of some judges to equate the proportionality of a measure with the extent to which it eschews general rules and makes provision for judicial discretion.[53] This disposition is at odds with the rule of law.

There is another notable feature of *Tigere*, namely the divide amongst the British judges concerning the extent to which they were free, in applying the 'Convention rights' affirmed by the HRA, to go beyond clear Strasbourg jurisprudence. The question matters for part of the rationale of the HRA, as earlier mentioned, is precisely to help bring British law into line with that jurisprudence, thus making less likely a subsequent finding that the UK is in breach of its international obligations. This rationale helps one understand and evaluate the HRA, for quite apart from that Act the UK is, and has long been, subject to the jurisdiction (and hence jurisprudence) of Strasbourg, and the new powers of British judges were conferred to help manage the

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46 Lord Justice Elias, 'Are Judges Becoming too Political?' (2014) 3 *Cambridge Journal of International and Comparative Law* 1, 13-18.

47 *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45.

48 Ibid [81-97] (per Lord Brown).

49 For criticism, see: TAO Endicott, 'Proportionality and Incommensurability', chapter 14 in Huscroft, Miller and Webber, above n 2, 311, 320-323, and Christopher Forsyth, 'Judicial Review: The Handmaiden of Democracy' Inner Temple Lecture, 14 November 2011, 15-16.

50 *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57.

51 Ibid [36-38] (per Lady Hale, Lord Kerr agreeing).

52 Ibid [68] (per Lord Hughes).

53 Ekins, above n 2 at 343; see also Philip Sales and Ben Hooper, 'Proportionality and the Form of Law' (2003) 119 *Law Quarterly Review* 426.

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relationship between that body of international law and British law. The Strasbourg jurisprudence suffers from very many of the infirmities noted above. But it is a discrete body of case law and it can intelligibly serve as the focus of the mechanisms in the HRA. Indeed, that it serves as such a focus is an important discipline on British judges, which limits the extent to which the HRA authorises them to advance their own views about what should be done.[54] However, this discipline is now slipping: many British judges are increasingly willing to develop 'Convention rights' beyond Strasbourg jurisprudence, using the machinery of the HRA to require the executive to conform to their novel prescriptions and to interpret, or denounce, other legislation by reference to the rights thus understood. This departure complicates the position of public authorities, subjecting them to a wider range of possible duties, which await further judicial decision; it is also likely inconsistent with Parliament's choice in enacting the HRA and to that extent illicit.

The executive should be limited by clear, concrete legal rights and should be subject, in most cases, to judicial review for error of law and procedural fairness. However, requiring the executive as a matter of law to conform to imperfectly posited legal rights, save when a clear statute requires otherwise, is problematic. While some judges are aware of their institutional limits, the logic of a statutory bill of rights is to make justiciable matters that would otherwise be questions of policy, for which the executive answers to Parliament. The legal uncertainty about the executive's freedom to act, and the related instability of the judicial reluctance to quash executive action, are inconsistent with the rule of law and tend to undermine the capacity for decisive action that good government requires.

VI The Uncertain Bounds of Rights-Consistent Interpretation

The validity of delegated legislation and the precise scope of the duties of public authorities turn on the proper interpretation of empowering statutes. One main feature of statutory bills of rights is a provision requiring one to strive to interpret other statutes so as to avoid the conclusion that they are inconsistent with the rights affirmed by the bill of rights.[55] This type of provision presupposes that some interpretations are possible, and directs the interpreter to adopt that possible interpretation which is rights-consistent, in the sense of avoiding the conclusion that the statute cannot be reconciled with the rights affirmed therein. What is possible is not clearly made out and courts and scholars disagree about what rights-consistent interpretation should or does involve. Again, the understanding of the interpretive provision may be unstable over time.

The formulations all seem rather similar. The NZBORA and HRA are very similar; perhaps the Victorian equivalent is a little different, although precisely how is not clear. But they have not all been interpreted in the same way. The NZBORA has been used to ground some very surprising interpretations, but in *Hansen* the Supreme Court clearly rejects the direction taken in the UK and instead requires 'reasonable' interpretations.[56] It is still not quite clear how one reconciles the directive with ordinary practice and principle, including the priority of otherwise ascertained legislative

54 Contrast Lord Irvine, 'A British Interpretation of Convention Rights' [2012] *Public Law* 37 and Philip Sales, 'Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine' [2012] *Public Law* 253.
55 NZBORA, s6; HRA, s 3; Victorian Charter, s 32.
56 *R v Hansen* [2007] 3 NZLR 1.

intention. At least one can say that the directive grounds and supports the common law presumption of consistency with rights and gives it specific content. Still, there are some highly problematic interpretations by way of the NZBORA, even after *Hansen*. For example, the term 'spouses' in the Adoption Act 1955 was held to include de facto couples, notwithstanding the very clear evidence that Parliament intended the term to mean 'married couples' only.[57] The stress throughout the judgment was on mere grammatical possibility, rather than on what Parliament decided.

The HRA has been even more remarkable. It was assumed from the outset – plausibly I think – that s 3 was intended to be more far-reaching and significant than s 6 of the NZBORA. Some of the early applications of s 3 are striking in their inversion or abrogation of the relevant statutory rule.[58] No plausible theory was outlined for these interpretations at first, but in *R v A (No 2)*[59] Lord Steyn attempted such. He asserted that it would always be possible for statutes to be interpreted consistently with the Convention unless Parliament stated in terms that the statute was intended to be inconsistent with the ECHR. This reading is a wholly implausible account of the intended meaning of s 3. It also renders the declaratory power redundant, for on Lord Steyn's view the power would only apply to statutes that Parliament itself had already expressly deemed to be incompatible!

More significant is the later leading judgment of the House of Lords in *Ghaidan*,[60] in which Lord Nicholls maintains that Parliament's intention in enacting s 3 was to authorise the court to depart from Parliament's intention in enacting the other statute in question, but not where such departure (viz. the new rights-compatible meaning foisted on the statutory text) would go against the grain of the legislation or would require the court to consider matters for which it was unfit. Aileen Kavanagh takes *Ghaidan* to establish that anything is possible, but only some things are appropriate.[61] This is an awkward fit with the text and structure of s 3 but does seem to capture the central place of institutional reasoning in the court's judgment about when it is free to adopt a rights-consistent interpretation. Partly in consequence, it is difficult to predict when the courts will prefer such an interpretation and when they will conclude this is impossible. Interestingly, in *Wilkinson*,[62] the House of Lords outlined a much more plausible account, rationalising *Ghaidan* on quite a different basis by reasoning that in enacting s 3 Parliament required statutes to be read against the background of the ECHR, which should thereby inform the interpreter's inference about what was intended. However, *Ghaidan* continues to be cited as the leading case.

Section 3 applies to statutes whenever enacted and this has been taken to require interpretations that could not have been adopted but for s 3 and were not intended by the enacting legislature. In this way, s 3 seems to me to have amended the entire statute book in 1998 (or 2000, when the HRA came into force) in an uncertain way. On the radical view that one sees in *Ghaidan*, and in Kavanagh's explanation thereof,[63] s 3 is effectively a Henry VIII provision, which, remarkably, is only used retrospectively in

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57 *In the matter of application by A M M and K J O (Adoption)* HC Wellington, CIV-2010-485-328, 24 June 2010.

58 See Richard Ekins, 'Rights, Interpretation and the Rule of Law' in Richard Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis, 2011), 165, 168-169.

59 [2002] 1 AC 45.

60 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

61 Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge, CUP 2009), 88-90.

62 *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718.

63 See Kavanagh, above n 61.

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the context of adjudication.[64] On the view one sees in *Wilkinson*, and in my own work on point,[65] s 3 does not create a judicial power to amend the meaning of statutes, but instead changes the background against which statutes are to be read. In relation to statutes enacted after the HRA, this grounds a strong presumption concerning Parliament's intention; in relation to statutes enacted before the HRA, it requires one to read the statute as if that presumption had existed and the statute is amended to that extent. Thus, while s 3, and equivalent provisions, are apt to be misused, they need not be understood to license just anything. Still, Parliament has, in enacting s 3, deliberately changed the terms on which statutes are to be understood, complicating legal reasoning and making statutes less clear, in order to reduce the likelihood of the UK later being found to be in breach of the ECHR.[66]

It is worth asking how similar these provisions, requiring rights-consistent interpretation, are to the old principle of legality.[67] There is, it seems to me, an important difference between (a) inferring what Parliament intends by taking for granted the existing constitutional order and adopting sensible presumptions about what Parliament is likely to value, and (b) insisting that legislation must be read on the basis of a fiction about what was in fact intended in order to advance the judge's own view, however reasonable, about what the law should be. The former is consistent with the traditional separation of powers and avoids any suggestion that judges are armed with a special power to 'interpret' legislation to secure justice. Judges, like other subjects of the law, should be slow to conclude that Parliament has departed in surprising or problematic ways from the existing constitutional order. This chain of reasoning does require the interpreter to think about what good lawmaking would be, but plainly in the service of identifying the actual intention of another agent, not with a view to substituting for that intention some new and better intention. All too often, rights-consistent interpretation involves the latter, constitutionally problematic, mode of action. This may be the fault of the legislature that enacts the statutory bill of rights and/or of the courts that misconstrue a more narrowly cast interpretive provision.

VII DEMOCRACY AND DECLARATIONS

Statutes that cannot be interpreted consistently with the bill of rights remain valid. It is up to the legislature to amend or repeal them. This is consistent with the promise of statutory bills or rights, which aim to introduce a legal and political culture of human rights without compromising democratic principle and which involve no formal departure from parliamentary sovereignty (or continuing legislative authority). Thus, the legislature remains free to repeal or amend the bill of rights itself and the bill yields in the event of any irreconcilable clash with another statute. In the event of such a clash, the HRA and the Victorian Charter expressly authorise courts to declare the statute incompatible with rights.[68] Notwithstanding any such express provision, the High Court in New Zealand, building on dicta in previous cases, has recently asserted

[64] Ekins, above n 58 at 175-176.
[65] Ibid; Ekins and Sales, above n 28.
[66] Ekins and Sales, above n 28; see also Philip Sales, 'Three Challenges to the Rule of Law in the Modern English Legal System', chapter 10 in Ekins, above n 58, 189.
[67] Philip Sales, 'A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998' (2009) 125 *Law Quarterly Review* 598.
[68] HRA, s 4; Victorian Charter, s 36.

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just such a capacity;[69] it remains to be seen whether the approach will survive on appeal. The declaration in question does not invalidate the relevant Act, although in the UK it does trigger a Henry VIII clause.[70] Rather, the point is to highlight the inconsistency between statute and rights guarantees and to leave to Parliament the question of whether and how to amend the statute. This is no mere information provision. The making of a declaration is expected to, and in practice usually does, place very considerable pressure on the political authorities to conform.

The form of a declaration is a judicial finding that the statute in question is inconsistent with the rights guaranteed by the bill of rights in question. In the UK, this brings very much to the fore the question noted above as to whether what is guaranteed is the set of rights in the international legal order that is the ECHR, as authoritatively construed by the Strasbourg court, or some facsimile of that set, open to elaboration or variation by British courts. This has been a major question in British constitutional law, and one that bears on the question of reform, but has lacked clear discussion. In practice, the British courts have been sliding into a position whereby they willingly go beyond Strasbourg, using the machinery of the HRA to place pressure on public authorities, including Parliament, to conform not to the UK's relevant international obligations (as the point of the HRA may have been) but instead to the views of British judges about how best to develop those rights.

Consider three British examples. The first is the famous *Belmarsh* case,[71] in which the House of Lords declared incompatible with the right to liberty the statutory regime for detaining foreign terrorist suspects, who could not be deported at the present time. The court misrepresented the statute as a discriminatory scheme for indefinite detention and declared it inconsistent with convention rights, placing immense pressure on the Government and Parliament to abandon the scheme.[72] Confirming the risk of misunderstanding, the media reported that the detention of terrorist suspects had been held unlawful, but that the Government continued to detain them anyway – which would have been rather a different, and much more serious, constitutional crisis! Strikingly, the House of Lords failed to understand the clear point and rationale of the legislation, with its focus on non-British terrorist suspects who were hence amenable to deportation, and did not attempt, notwithstanding the obligation in s 3, to read the legislation consistently with the right to liberty.[73] Instead, the court defeated the government policy by declaration. Assumed to be the HRA's greatest victory,[74] the case is in fact thoroughly confused – but it is also a clear testament to the potential political significance of the declaratory power.

There have been relatively few declarations: it has usually been 'possible' for judges to avoid incompatibility by way of interpretation. (The reported cases on s 3 almost certainly give only a snapshot of the true impact of the section, for very many cases will simply never have been litigated and often the parties will simply agree that

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69 *Taylor v Attorney-General* [2015] NZHC 1706.

70 HRA, s 10.

71 *A v. Secretary of State for the Home Department* [2005] 2 AC 68.

72 John Finnis, 'Judicial Power: Past, Present, Future', lecture given for Policy Exchange at Gray's Inn, London on 20 October 2015; <http://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future/>

73 J Finnis, 'Nationality, Alienage and Constitutional Principle' (2007) 123 *Law Quarterly Review* 417

74 The group Rights Info describes *Belmarsh* as the single most important judgment under the HRA in their list of top fifty human rights cases: <http://rightsinfo.org/infographics/fifty-human-rights-cases/>.

because of s 3 the law has changed. This is as it should be if, as I say, s 3 is not a judicial power,[75] but it does mean that the true scope and significance of the section is hard to assess.) For good reasons and bad the courts have preferred to rely on s 3. The advantage in so doing, judges may reason, is that a rights-consistent interpretation achieves now the outcome they think justice requires, and avoids the risk (a) that Parliament may not act or may not agree with the courts and (b) that the judgment may attract unwelcome public attention and criticism.

For a time, it was argued that there was a convention emerging that Parliament should change the law in response to a declaration.[76] This might surprise those who see the HRA as instituting a democratic dialogue, but it is less jarring if one recalls that the main point of the HRA was to minimise findings of breach in Strasbourg. Still, the logic of the HRA is to reserve for Parliament the decision about whether to follow a declaration, a reservation which would simply disappear if the asserted convention were to hold. But there is no such convention and never was, and if there were it would have been unconstitutional, for no Parliament should recognise such a limit on its authority. Respect for other legislative assemblies – in the Dominions or in the devolved regions – is one thing. Abdication of responsibility for the content of the law, to judicial fiat, is quite another.

That this asserted convention was and is an illusion is made clear by the ongoing counter-example of the prisoner voting episode. Left with no alternative, more or less, by a series of particularly inept and inconsistent Strasbourg rulings,[77] the British courts found the UK's legislation, disenfranchising serving prisoners, to flout the ECHR.[78] (The breach was not of any universal right to vote, for none such exists, but rather of a right asserted to follow from the assurance in the ECHR that the member states would hold free elections.) The response of Britain's political authorities was striking: almost unanimous condemnation of the decision in the Commons and a flat refusal on the part of the authorities to comply.[79] The UK has come under, and continues to come under, much pressure to conform, but as at the time of writing seems unlikely to buckle. This was and is a strange point on which resistance should focus,[80] but it does prove that conformity is not guaranteed.

My third example is the *Nicklinson* judgment,[81] in which the Supreme Court toyed with declaring Britain's ban on assisted suicide in the Suicide Act 1961 incompatible with the right to respect for one's private life. Five of nine judges were willing in principle to make such a declaration, but only two of the five were willing to

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[75] Ekins, above n 58 and Richard Ekins, 'Abortion, Conscience and Interpretation, (2016) 132 *Law Quarterly Review* 6, 7.

[76] Jeff King, 'Rights and the Rule of Law in Third Way Constitutionalism' (2014) 30 *Constitutional Commentary* 101.

[77] *Hirst v United Kingdom (No. 2)* (2005) 42 EHRR 849, reinforced by *Scoppola v Italy (No 3)* (2012) 56 EHRR.

[78] The High Court had earlier rejected a claim for a declaration of incompatibility: *Hirst v HM Attorney General* [2001] EWHC Admin 239. After *Hirst (No 2)*, a declaration of incompatibility was made in *Smith v Scott* 2007 SC 345. The Supreme Court declined to exercise its discretion to make another declaration in *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, but understood itself to be bound by the position taken by Strasbourg in *Hirst (No 2)* and *Scoppola*.

[79] Alexander Horne and Isobel White, *Prisoners' voting rights* (House of Commons Library, Standard Note SN/PC/01764, 11 February 2015).

[80] Lord Hoffmann, 'Judges, Interpretation and Self-government', chapter 5 in NW Barber, Richard Ekins and Paul Yowell, *Lord Sumption and the Limits of the Law* (Hart Publishing, 2016, forthcoming).

[81] *Nicklinson v DPP* [2014] UKSC 38.

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do so in the particular case, in which the matter had barely been argued. The other three preferred instead to give Parliament an opportunity first to reconsider (and, by implication, to change) the law. This was, it seems to me, an attempt to make a declaration without making a declaration. The relevant judgments outlined for Parliament how it might choose to change the law, and practically invited further litigation in the event that the law was not changed. All this without concluding that the ban on assisted suicide is in fact inconsistent with rights and without exercising the statutory power to declare the Act incompatible.

In *Nicklinson* itself, Lord Neuberger noted that Parliament has considered the merits of the ban on assisted suicide again and again and each time has refused to relax it.[82] However, in a series of speeches since,[83] Lord Neuberger has rationalised the direction of travel in *Nicklinson*, in which a majority as I say toys with making a declaration, by asserting that the courts have a particular role to play in forcing Parliament to tackle difficult questions and take tough decisions. The assertion is, with respect, self-serving, not to mention inconsistent with the facts reported in his judgment. As it happens, the Commons thereafter did reconsider the ban, deciding by an overwhelming majority not to relax it. The Supreme Court judgment receives a mention but is not – rightly – taken by MPs to require a response as such and indeed the judgment provides little help to them. In fact, the contrast between the range, quality and transparency of the legislative debate and the limited and obscure moral reasoning on display in the Supreme Court (setting aside those judges who, to their credit, wanted to have no part in this) is striking.[84]

The mooted declaration in *Nicklinson* was in fact doubly problematic, for it intersected with the question noted above about going beyond Strasbourg. If the Supreme Court had made a declaration then it would have risked (or, worse, intended) wrongly suggesting to Parliament that a failure to repeal or amend the impugned law would place the UK in breach of the ECHR.[85] It is this dimension that makes the declaratory power in the HRA particularly weighty *and* open to misuse – as was contemplated in *Nicklinson* it seems to me. Inevitably, litigation will begin again, as disappointed campaigners for assisted suicide return to the courts to demand the declaration that the Supreme Court entertained making if Parliament did not first act. Whether the Supreme Court (or the relevant panel thereof) is bold enough to condemn legislation so recently and overwhelmingly affirmed by the Commons remains to be seen. If it were so to do, MPs should have no doubt that in this case the Supreme Court judges in question would be advancing their own view about the justice of assisted suicide, a view that is already powerfully represented in the public realm and should not be illicitly supported in this way. That is, MPs should resist in strong terms the attempt to overwhelm their deliberation and judgment in such a matter. And they should take steps to avoid the courts retaining such a capacity for judicial politicking in future cases.

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82 Ibid [51-52] (per Lord Neuberger).

83 See for example Lord Neuberger, 'Magna Carta: The Bible of the English Constitution or a disgrace to the English nation?' lecture at Guildford Cathedral, 18 June 2015, [61].

84 Finnis, Gray's Inn lecture, above n 72.

85 John Finnis, 'A British 'Convention Right' to Assistance in Suicide?' (2015) 113 *Law Quarterly Review* 1.

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VIII LEGISLATIVE AUTHORITY AND HUMAN RIGHTS LAW REFORM

Statutory bills of rights depart from the traditional separation of powers. They change the judicial role by requiring legislative reasoning in the course of evaluating the merits of legislation and in specifying overly general rights guarantees. They undercut the usual disciplines on judicial action, not least the doctrine of precedent, and privilege the political views of judges about how the polity should constitute itself. The extension of judicial oversight across the full range of public action, the remaking of statutes by way of interpretation, and the capacity to intervene in public deliberation by way of declarations of incompatibility all amount to a significant change in the judicial role. This weakens the rule of law, with statutes losing part of their capacity to ground clear legal expectations, and with adjudication rendered much more open-ended. It also threatens democratic principle, with a politically accountable executive and a representative legislature both hampered by judicial second-guessing, whether by way of judicial review of executive action, rights-consistent statutory interpretation, or declarations of incompatibility.

There is a case to be made that these are costs worth paying. In the UK, the HRA was not an irrational response to the UK's membership of the ECHR and to the continuing prospect of the UK being found in breach by Strasbourg. Importantly, the Westminster Parliament has and had authority to take such radical action as it thinks necessary to secure the common good, including by way of very far-reaching constitutional change of the kind that the European Communities Act 1972 realised (introducing EU law into British law) and, in a different way, the HRA realises. In a sense, the Westminster Parliament is a constituent assembly as well as a constituted power and it is open to Parliament to qualify the separation of powers, taking the view that the harm done to the rule of law and to democratic principle is necessary to secure continuing membership of the ECHR and, relatedly, to maintain the ECHR as an arm of foreign policy (binding others to a similar set of standards). Again, this is not irrational even if it is not obviously sound.

The position in Australia, it seems to me (as an outsider), is very different. There is no serious entanglement with a regional regime of human rights law and hence no pressing imperative of foreign policy or equivalent to warrant any departure from the basic principles of parliamentary democracy and the rule of law. And, no Australian legislature has the authority that the Westminster Parliament has (and should have) to refashion its governing arrangements in a way that is inconsistent, to some extent, with the separation of powers. The Australian constitution is understood (if perhaps not altogether soundly)[86] to involve a strong commitment to the separation of judicial power.[87] Authority to vary this schema is reserved to the Australian people in a referendum (led by Parliament). Hence, there seems to me nothing objectionable, pace Adrienne Stone,[88] in the Australian legislatures lacking the competence to introduce changes akin to the HRA.

How far does the Victorian Charter fall afoul of the separation of powers? The High Court considered this question in *Momcilovic* of course and while the Charter

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[86] John Finnis, 'Separation of Powers in the Australian Constitution' (1968) 3 *Adelaide Law Review* 159.

[87] Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia* (Cambridge University Press, 2015) 555-562.

[88] Adrienne Stone, 'Judicial Power – Past, Present and Future: A Comment on Professor Finnis', 10 November 2015, <http://judicialpowerproject.org.uk/judicial-power-past-present-and-future-a-comment-on-professor-finnis/>.

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survived the challenge, the divisions amongst the judges suggest that it remains vulnerable.[89] The constitutionality of the Charter seems to me to turn first on the extent to which it requires judges to engage in open-ended legislative reasoning about what rights are or should be. Rather surprisingly, to put it mildly, the Charter does not make clear whether the term 'human rights' (on which the duty of public bodies, the interpretive direction and the judicial declaratory power all centre) means (a) the rights set out in each of the provisions of the Act or (b) those rights subject to reasonable limits per the general limitation provision. The attraction of the former option in this context is that it does not seem so clearly to require judges to reason like legislators. But the former is inconsistent with the examples of the NZBORA and the HRA, which were before Parliament, and is liable to give rise to absurd outcomes. Hence, the latter is likely to be intended, but, by requiring legislative reasoning of judges should be held unconstitutional. Relatedly, the constitutionality of the Charter turns on the extent to which the interpretive direction goes beyond the principle of legality (which is itself open to abuse, if it departs from sound presuppositions about likely intentions and extends to remaking the statute) and on whether the power to declare incompatibility is capable of application without evaluating limitations on general rights and on whether it is consistent with the integrity of law to require judges to play such an overtly political role.

The Westminster Parliament is likely soon to consider Government proposals to repeal the HRA and to replace it with a British Bill of Rights. The proposals are not yet public but the prospect of change has already attracted considerable elite opposition (including from some Conservative Party MPs, whose support may be necessary if reform is to be possible).[90] I take there to be a good case for repealing the HRA and *not* replacing it. But this is not politically feasible. Is the replacement of the HRA with a British Bill of Rights a good second-best option? This Bill might reduce the harm that the HRA has done to the rule of law and self-government if it specifies legal rights with more care, if it limits the space for radical rights-consistent interpretation, and if it removes or recasts a judicial power to declare legislation incompatible.

The rationale for the Bill may be in large part to change how Strasbourg jurisprudence is received, encouraging British courts to depart from Strasbourg rulings. Importantly, the Government does not (yet) propose exit from the ECHR, which means that whatever measure replaces the HRA, if any, the UK will remain vulnerable to legal challenge before Strasbourg. Possibly a British Bill of Rights will arm British courts to articulate, or defend, a British alternative to Strasbourg's view of rights,[91] but it remains to be seen whether Strasbourg would defer to such. In any case, the UK could simply refuse to conform to Strasbourg's rulings (or at least some of them), relying on consistency instead with its own domestic rights instrument. However, the very real risk of any such reform is that encouraging domestic rights jurisprudence will (further) embolden British courts, such that the UK may then labour under over-mighty domestic courts while still remaining subject to an inconstant and irresponsible international court.

It is true and important that Parliament is able to repeal the HRA in the same way that it may repeal any other statute. But human rights law reform is not easy. The UK's continuing membership of the ECHR, the HRA's place in the new devolutionary arrangements in Scotland, Wales and Northern Ireland, and the way in which the HRA

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[89] *Momcilovic v R* [2011] HCA 34.

[90] Dominic Grieve, 'A Backward Step?' *Counsel*, September 2015.

[91] Erin Delaney, 'Judiciary Rising: Constitutional Change in the United Kingdom' (2014) 108 *Northwestern University Law Review* 543.

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has been received into legal and judicial culture all complicate efforts at reform, let alone repeal. And even if the HRA were repealed, there are strong reasons to think that the changes it has wrought in the separation of powers would not be wholly undone. In recent cases,[92] anticipating the prospect of the HRA's repeal, the Supreme Court has stressed that the common law has not stood still since 1998, suggesting that the Act's repeal would not change much.[93] That is to say, the executive might be required not to flout new common law rights that mirror the old 'Convention rights' and which judges would develop over time. The courts would also continue to strive to interpret legislation consistently with such rights, and also with the UK's continuing international obligation to conform to the ECHR. Presumably, no court would be bold enough to declare legislation incompatible with common law rights in the absence of any express statutory power so to do, although there would be nothing to stop a court from making clear its view that some valid statute tramples on common law rights. Courts in the past, while sometimes noting injustices warranting correction, have been careful to avoid publicly challenging the legislature. It is not clear that judges in the future would exercise similar restraint.

IX CONCLUSION

There is a fundamental difference between human rights and human rights law. The importance of human rights in moral thought and political deliberation does not necessarily entail any particular institutional arrangement. Still, the traditional separation of powers is an intelligent way to make provision for government that is capable of securing rights, is disciplined by law, and realises democratic self-rule. The rule of law and self-government are requirements of justice in constitutional design. Statutory bills of rights tend to fail to meet these requirements. They expand the scope and significance of judicial discretion and introduce considerable uncertainty into the law, which risks undermining executive action, the legal effect of statutes and the freedom of a representative assembly to decide what should be done. There are good reasons, consistent with constitutional self-government, for Australian legislatures to be denied – or to eschew – the capacity to enact such measures. There are good reasons why the Westminster Parliament does enjoy this capacity, which it should now exercise to repair the damage its prior act has done to the constitution. However, the constitution is more a tradition of government than a set of particular legal propositions and a statutory bill of rights may change that tradition in ways not easily undone by their repeal: all the more reason for caution before enacting such a measure.

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[92] *R (Osborn) v Parole Board* [2013] UKSC 61; *Kennedy v Information Commissioner* [2014] UKSC 20; see also Richard Clayton, 'The Empire Strikes Back: Common Law Rights and the Human Rights Act' [2015] *Public Law* 3.

[93] This is a point suggested also in various extra-judicial speeches. See for example Lady Hale, 'UK Constitutionalism on the March?' address to the Constitutional and Administrative Law Bar Association Conference, 12 July 2014.

RELIGIOUS FREEDOM UNDER THE CHARTERS[*]

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Forthcoming, Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (Federation Press, 2016)

I. INTRODUCTION

Religious freedom is the ultimate test of a society's willingness to recognise human rights. This is because religion has the potential to challenge the authority of the state like no other claim on human life.[1] Freedom of religion – a right manifested just as much in association with others and corporately as it is individually – is fundamental to a free and just social order.

The *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) were proclaimed to be enactments that would protect the rights of all persons, whatever their gender, age, disability, income, background or religion.[2] Among those rights, the Charters were meant to protect the right of each person to 'freedom of thought, conscience, religion and belief', including 'freedom to have or to adopt a religion or belief of his or her choice' and 'freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private'.[3] And yet, many people of religious faith in Australia – no less in Victoria and the ACT than elsewhere – feel that their freedom to practice their religion is under threat.[4]

Certainly, many issues of religious liberty arise between citizens and groups within Australian society. In Victoria and the ACT, for example, anti-Islam sentiment has been

[*] Our thanks is due to Constance Lee, Kirstie McKane, and Seb Tonkin for their research assistance.

[1] See, eg, the exchange between Chief Justice Beverley McLachlin and Professor Jean Bethke Elshtain, 'Freedom of Religion and the Rule of Law: A Canadian Perspective' and 'Response', in Douglas Farrow (ed), *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal & Kingston: McGill-Queen's University Press, 2004).

[2] Victoria, *Parliamentary Debates,* Legislative Assembly, 4 May 2006, 1289 (Rob Hulls, Attorney-General).

[3] *Human Rights Act 2004* (ACT) s 14; *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 14.

[4] Numerous submissions by religious individuals and organisations made to several inquiries in recent years, including statutory reviews of the Victorian Charter, support this contention. See Part IV below for more detail.

apparent in several (rejected) objections brought against decisions authorising mosque constructions.[5] However, the principal issue, reflected in the legal discourse and in concerns articulated by religious believers, is a sense that it is the state and its agencies, not other religious believers, that poses the greatest threat to freedom of religion. If it is one of the purposes of the liberal democratic state to ensure the peaceful coordination and flourishing of different groups, this is not a very promising state of affairs.

In this chapter, we interrogate this issue: the state of religious liberty under the Charters and the threats it faces, manifested and perceived. First, we sketch the various religious freedom protections in Australian law and note legislation, especially in Victoria, that has raised religious liberty concerns – antidiscrimination, antivilification and abortion law in particular.[6] Second, we survey the case-law under the Charters. Here we find that the Charters themselves have played virtually no substantive role in protecting freedom of religion.[7] Instead, antidiscrimination law is increasingly prioritised. Looking in particular at decisions of the Victorian Civil and Administrative Tribunal and Court of Appeal in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*,[8] we argue this prioritising poses questions for the autonomy of religious groups. Third, we offer an account of three recent reviews of the Victorian Charter and Victorian antidiscrimination law as they relate to religion. We focus on the on-going questions raised by the reviews – the scope of Charter-based duties when religious groups provide public services; the nature of exceptions and exemptions to antidiscrimination standards – and the concerns raised by religious groups in response.

A contest has occurred, primarily between religious believers and religious organisations on the one hand, and antidiscrimination agencies and human rights advocates on the other, over the exact boundaries to be laid down in state law between religious freedom and other interests of the state. And as this has continued, we argue that an underlying pattern is discernible, whereby a certain image of liberal citizenship is

[5] See *Concerned Citizens of Canberra v Chief Planning Executive (Planning and Local Authority)* [2014] ACTSC 165 (4 July 2014) [328]; *Rutherford v Hume City Council* [2014] VCAT (14 July 2014); and *Hoskin v Greater Bendigo City Council* [2015] VCAT 1124 (6 August 2015) [116]-[132].

[6] Counter-terrorism legislation is another notable example. See Joo-Cheong Tham and K D Ewing, 'Limitations of a Charter of Rights in the Age of Counter-Terrorism' (2007) 31 *Melbourne University Law Review* 463.

[7] We refer here to the charters in the plural, but most of the cases and debate has concerned the Victorian Charter, upon which we focus.

[8] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2010] VCAT 1613 (8 October 2010), affd (2014) 308 ALR 615, leave to appeal denied [2014] HCATrans 289 (12 December 2014) ('*Cobaw*').

progressively imposed upon persons, groups and organisations whose religious convictions, practices or identities are deemed to be recalcitrantly non-liberal.[9]

II. THE CONTEXT

Religious liberty under the Charters needs to be considered against a backdrop of domestic and international law.[10] Relevant domestic law includes constitutional law, statutory law and the common law. Two aspects of the Australian Constitution provide some protection for religious freedom: s 116 (free exercise and non-establishment of religion) and the implied freedom of political communication.[11] Consistent with the federal nature of the Constitution,[12] however, the former only limits the Commonwealth's legislative power.[13] The common law also has been said to exhibit a 'tolerant indulgence [for] cultural and religious diversity' in which courts 'pay every respect to religious belief'.[14] Indeed, freedom of religion has been described as 'the paradigm freedom of conscience' and 'the essence of a free society'.[15] It has also been suggested that the principle of legality – a principle of statutory construction requiring any legislation purporting to override fundamental rights and freedoms must do so in clear and unambiguous terms – applies to freedom of religion.[16] If a statute is ambiguous, there is authority for the proposition that the construction most in conformity with Australia's treaty obligations concerning freedom of religion should be favoured.[17] Of course, legislation is easily modified by a contrary statutory intention and so this avenue of protection does not provide a robust bulwark against any intended legislative

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[9] As Jürgen Habermas writes, '[T]he consciousness of the faithful' must be 'modernised' to accept 'the individualistic and egalitarian nature of the laws of the secular community': Jürgen Habermas, 'Intolerance and Discrimination' (2003) 1 *International Journal of Constitutional Law* 2, 6.

[10] See Paul Babie and Neville Rochow, 'Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom' (2010) 3 *Brigham Young University Law Review* 821; Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) 24–5.

[11] *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [141] (Hayne J).

[12] Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Melbourne: Cambridge University Press, 2015) 282-7.

[13] *Attorney-General (Vic) (Ex rel Black) v Commonwealth* (1981) 146 CLR 559 ('DOGS Case'), 579–81 (Barwick CJ); *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373, 378 (Jackson J). To the extent that executive decisions are based on legislation, the provision would also in effect limit executive power: *DOGS Case*, 580–1 (Barwick CJ).

[14] *R (E) v The Governing Body of JFS and the Admissions Panel of JFS* [2008] EWHC 1535 (QB), [107].

[15] *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130 (Mason ACJ, Brennan J).

[16] See Denise Meyerson, 'The Protection of Religious Rights under Australian Law' (2009) 3 *Brigham Young University Law Review* 529, 540. See also *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525, 544 (McHugh J).

[17] *Minister for Immigration and Ethnics Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

incursion into freedom of religion.[18] For these reasons, the scope of religious freedom in Australia depends substantially on legislative enactments of the Commonwealth and the states. In Victoria, several laws have been particularly noteworthy.

Section 8 of the *Racial and Religious Tolerance Act 2001* (Vic) provides 'a person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.' This provision was considered in *Catch the Fire Ministries Inc v Islamic Council of Victoria*.[19] The case concerned two Pentecostal Christian pastors making statements, it was claimed, vilifying Muslims. Although considered before the Victorian Charter was enacted, the case squarely points to an on-going tension: on the one hand the aims of antivilification laws and the harms of hate speech[20] and on the other hand free speech, freedom of religion and the wisdom of such laws in the contested terrain of religion.[21]

The *Abortion Law Reform Act 2008* (Vic) and the *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic) both aim to strengthen access to abortions. The former includes a requirement that medical practitioners who conscientiously object to performing abortions must refer patients to a non-objecting practitioner.[22] The *Safe Access Zones Act* prohibits: distributing material likely to cause distress or anxiety for those accessing premises where abortions take place; impeding access; and intentionally recording persons accessing and leaving the premises. Both Acts arguably limit religious liberty. They may do so proportionally. However, s 48 of the Charter specifically provides that nothing in the Charter affects the law relating to abortion. An entire area of deep conscientious difference is thus removed from possible Charter review. Both religious and secular groups have called for s 48's repeal.[23]

While these laws continue to provoke debate, antidiscrimination law has generated the most controversy. All Australian jurisdictions have enacted legislation prohibiting

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[18] *Aboriginal Legal Rights Movement Inc v South Australia [No 1]* (1995) 64 SASR 551, 552 (Doyle CJ, with whom Bollen J agreed), 554 (Debelle J).

[19] *Catch the Fire Ministries Inc v Islamic Council of Victoria* (2006) 206 FLR 56.

[20] Jeremy Waldron, *The Harm in Hate Speech* (Boston: Harvard University Press, 2012).

[21] Rex Tauati Ahdar, 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' (2007) 26 *University of Queensland Law Journal* 293.

[22] *Abortion Law Reform Act 2008* (Vic), s 8.

[23] Submission 32: Freedom 4 Faith, 5-6; Submission 78: Law Institute of Victoria, 6, 37 (as it had done in its submission to the 2011 review); Submission 104: Jamie Gardiner, 2.

discrimination on the basis of religion[24] and a lack of religious belief.[25] These legislative prohibitions provide only one kind of protection for religious freedom. They describe particular situations and contexts in which religion is required to be treated as *non-determinative* in decision-making, either directly or through the proxy of some criterion that impacts on religion.[26] However, by far the most significant form of such protection of religious freedom, and the most contested, comes in the specific exceptions from the prohibitions contained in antidiscrimination legislation for the benefit of religion.[27] These describe situations in which religion, or some criterion that impacts on religion, may nonetheless be treated as *determinative* in decision-making. Religious freedom means very little if the situations in which religious matters may be considered determinative by religious bodies are narrowly defined.[28]

Of Australia's international obligations, Article 18 of the International Covenant on Civil and Political Rights ('ICCPR') is most pertinent. Indeed, the Charters reflect the nearest Australian jurisdictions have come to incorporating its terms. The language of s 14 of the Victorian Charter is clearly drawn from Article 18 of the ICCPR. However, the Charter differs in several respects.[29] In particular, the Charter omits Articles 18(3) and 18(4). Article 18(3) provides the 'freedom to manifest one's religion or belief may only be subject to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.' Article 18(4) provides for the 'liberty of parents … to ensure the religious and moral education of their children in conformity with their own convictions.'

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[24] See, eg, *Equal Opportunity Act 2010* (Vic) s 6(1)(n). In Victoria, discrimination on the basis of a characteristic of a person's religion is also prohibited: ibid s 7(2)(b) and (c); *Kapoor v Monash University* (2001) 4 VR 483.

[25] See, eg, *Equal Opportunity Act 2010* (Vic) s 4(1).

[26] That is, when the decision involves unfavourable treatment (direct discrimination) or a disadvantaging effect (indirect discrimination): *Equal Opportunity Act 2010* (Vic) ss 8(1) and 9(1). A decision-maker may need to consider a person's religion when considering whether a 'requirement, condition or practice' that has, or is likely to have the effect of disadvantaging persons with an attribute, is nonetheless 'reasonable'. A 'reasonable adjustment' or 'reasonable accommodation' may be required to reduce the disadvantage caused by such a requirement, condition or practice: *Equal Opportunity Act 2010* (Vic) s 9(3)(e). In this way, religion remains non-determinative: decision-makers are tasked with cultivating an environment that accepts, as far as possible, persons of all religious faiths and traditions.

Aside from the exceptions for religious bodies, religion may also be determinative in decision-making if considered necessary for a 'special measure' realising substantive equality: ibid s 12.

[27] See, eg, *Anti-Discrimination Act 1977* (NSW) s 56; *Sex Discrimination Act 1984* (Cth) ss 37, 38; *Equal Opportunity Act 1984* (SA) ss 50, 85ZM; *Equal Opportunity Act 1984* (WA) ss 66(1), 72, 73; *Discrimination Act 1991* (ACT) ss 32, 33, 46; *Anti-Discrimination Act 1991* (Qld) ss 41(a), 90, 109; *Anti-Discrimination Act 1996* (NT) ss 30(2), 37A, 51; *Anti-Discrimination Act* 1998 (Tas) ss 51, 52; *Equal Opportunity Act 2010* (Vic) ss 81, 82, 83, 84.

[28] We discuss this further in Parts III and IV below.

[29] See Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, Final Report (2005) 32.

In 2005, the Victorian Human Rights Consultation Committee Chair, Professor George Williams, explained the Committee decided to omit Article 18(4) of the ICCPR because it was 'concerned that it may have the unintended consequence of leading to an enforceable right to education', bearing in mind that the Committee had already 'decided that economic, social and cultural rights should not be included in the Charter at this first stage'.[30] However, it is difficult to understand how the language of Art 18(4), which refers to the 'liberty' of parents and guardians, could give rise to a positive entitlement to economic support for the education of their children. This has proven to be an on-going point of contention in Victoria, at least amongst religious communities.[31] The Consultation Committee also argued that Art 18(3) need not be included because the Charter contained a general limitation clause.[32] However, as we discuss below, a number of religious groups have argued this difference of approach has contributed to diminished protection for religious liberty in Victoria.

III. THE CASES

Courts have had few opportunities to consider religious liberty under the Charters. Several cases contain limited *obiter*, are of limited authority, or else reject unsubstantiated references to religious liberty.[33] Nevertheless, there are indications courts may be increasingly called on to decide questions of religious and moral difference and tensions over the role of religion in society.[34]

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[30] Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (November 2005) 44. This was cited without comment in Parliament of Victoria Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (Melbourne: Government Printer for the State of Victoria, 2011) [114]. See, similarly, Victoria, *Parliamentary Debates,* Legislative Assembly, 4 May 2006, 1291 (Rob Hulls, Attorney-General): 'The bill focuses on civil and political rights. These are the rights which have a strong measure of acceptance in the community.'

[31] As explained below.

[32] Parliament of Victoria Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (Melbourne: Government Printer for the State of Victoria, 2011) [119].

[33] See *R v AM* [2010] ACTSC 149 (15 November 2010) [32]-[35], [54] (discussing conscience); *Valentine v Emergency Services Superannuation Board* [2010] VCAT 2130 (29 July 2010) [102] (raising differential treatment based on religion); *Hobson Bay City Council (Anti-Discrimination Exemption)* [2009] VCAT 1198 (17 July 2009 (accepting an application for exemption from the *Equal Opportunity Act 1995* (Vic) to provide a women-only swimming time targeting the Muslim community); and *Pocock v Psychology Board of Australia (Occupational Discipline)* [2014] ACAT 54 (13 August 2014) [2] (upholding disciplinary oversight of a registered psychiatrist who publicly stated views against 'destructive distortions of sexuality').

[34] Within Australia, recent prominent decisions considering religious liberty include *Iliafi v Church of Jesus Christ of Latter-Day Saints Australia* (2014) FCR 86 and *OV v Members of the Board of Wesley Mission Council* (2010) 79 NSWLR 606.

When religious liberty has been raised within Victorian cases, s 14 has not featured prominently. One reason is common to Charter adjudication – the constraint the High Court's decision in *Momcilovic* has placed on the Charter's role in interpreting legislation.[35] However, the dominant reason arguably lies elsewhere: the priority of antidiscrimination legislation. Following international developments, we might say antidiscrimination legislation has been constitutionalised – its norms elevated to constitutional status for rights adjudication.[36]

In some cases litigants have not been successful in claiming a breach of non-discrimination norms. In *Aitken v State of Victoria – Department of Education & Early Childhood Development*,[37] a group of parents, supported by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC),[38] unsuccessfully argued Victoria's Special Religious Instruction (SRI) in state schools discriminated against their children on the basis of religious belief.[39] On their view, their children were treated unfavourably: the children had to opt out; SRI was potentially provided during school hours;[40] and the class was not mirrored with alternative curriculum-based education.[41] Judge Ginnane rejected this. Importantly, he considered unfavourable treatment required evidence – for example, of coercion or ridicule or lack of meaningful alternatives.[42] He therefore dismissed any wider contentions that might focus on an impermissible endorsement of religion or else psychological or civic exclusion arising from merely nominating (non)attendance.[43]

Arguably the *Charter* did not add to this analysis.[44] While the claimants raised s 14 in argument, they did not appeal to any authority or develop what additional role it might play.[45] This is understandable. Although unsuccessful, the claimant parents' arguments in *Aitken*

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[35] *Momcilovic v The Queen* (2011) 245 CLR 1. See *Aitken v The State of Victoria – Department of Education & Early Childhood Development (Anti-Discrimination)* [2012] VCAT 1547 (18 October 2012) ('Aitken') [93], [121], [488], leave to appeal denied [2013] VSCA 28 (22 February 2013).

[36] See Nicholas Bamforth, 'Conceptions of Anti-Discrimination Law' (2004) 24 *Oxford Journal of Legal Studies* 693. Anti-discrimination law is explicitly incorporated into the *Charter*. 'Discrimination' is defined with reference to the *Equal Opportunity Act 2010* (Vic). See the *Charter* s 3.

[37] *Aitken* [2012] VCAT 1547 (18 October 2012).

[38] The VEOHRC found itself embroiled in the *Catch the Fire Case* when it emerged that an employee of the VEOHRC, who was also an officer of the complainant, had actively encouraged two of the complainant's witnesses to attend the seminar at which the Pentecostal pastors allegedly vilified Muslims: *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510, [63], [67], [73].

[39] See *Equal Opportunity Act 1995* (Vic) ss 6, 8 and *Equal Opportunity Act 2010* (Vic), ss 6, 8.

[40] The Victorian Government has now directed SRI can only be provided during lunchtime or else before or after school. See *Ministerial Direction No. 145* (9 November 2015) under the *Education and Training Reform Act 2006* (Vic) ss 2(3)(4)(d) and 5(2)(1)(d).

[41] *Aitken* [2012] VCAT 1547 (18 October 2012) [42], [108].

[42] Ibid [445], [461]-[463].

[43] Ibid [418].

[44] Ibid [518].

[45] Ibid [516], [520].

reflect a trend – the centrality of non-discrimination or equality legislation and, further, equality principles, in determining law and religion claims.

Christian Youth Camps Ltd v Cobaw Community Health Services Ltd (‘*Cobaw*’) reflects a similar elevation of antidiscrimination law. It also demonstrates the problems this can create for religious liberty.

Christian Youth Camps Ltd (‘CYC’), a Christian Brethren affiliated camp-site, failed to take a booking from an LGBTI support organisation, Cobaw Community Health Services Ltd (‘Cobaw’). The Victorian Court of Appeal confirmed this refusal was direct discrimination on the ground of sexual orientation under the *Equal Opportunity Act* 1995 (Vic).[46] In common with other jurisdictions, Victorian law provides a number of religion-based exceptions from many antidiscrimination duties,[47] designed to recognise the importance of religious liberty: first, exempting the appointment and training decisions of an organised religion (churches and analogous groups);[48] second, exempting the actions of a body established for a religious purpose done in order to conform with its doctrines, beliefs or principles of religion, or in order to avoid injury to the religious sensitivities of adherents;[49] third, exempting the decisions of religious schools, on the same basis of doctrine or sensitivities;[50] and fourth, exempting a person who discriminates against another person on various grounds where the act was reasonably necessary to comply with doctrines, beliefs or principles of their religion.[51]

For present purposes, the main point of controversy concerned whether CYC’s conduct fell under the exception for a ‘body established for religious purposes’.[52] Each judge concluded CYC was a commercial enterprise, in contrast to a religious body. Further, the Court, affirming the Tribunal, also considered Cobaw’s opposition to promoting the

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[46] *Equal Opportunity Act 1995* (Vic) ss 6(1), 7, 8. The Act extended to refusing to provide goods or services and refusing an application for accommodation. Ibid ss 42(1)(a) and 49(a).

[47] Exemption from the duties not to discriminate on the basis of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity: *Equal Opportunity Act 2010* (Vic) ss 82(2), 83(2), 84.

[48] Ibid s 82(1).

[49] Ibid ss 81, 82(2).

[50] Ibid s 83.

[51] Ibid s 84.

[52] *Equal Opportunity Act 1995* (Vic) s 75(2). Redlich JA did, however, consider CYC could appeal to the exception granted for conduct ‘necessary … to comply with the person's genuine religious beliefs or principles’. See *Equal Opportunity Act 1995* (Vic) s 77. This is open to criticism as a matter of statutory interpretation. If CYC could appeal to the much broader exception in s 77, the narrower exception for a ‘body established for a religious purpose’ would be redundant. Nevertheless, Redlich JA does offer appropriate criticism of the majority’s: (a) individualistic focus; (b) stark distinction between secular and religious conduct; and (c) narrow understanding of ‘necessary’.

acceptability of gay identity was not a matter of their religious *doctrine* and, in any event, was not *necessary* to conform with doctrine or avoid injury to religious sensitivities.

Again, the Charter's protection of religious liberty was largely irrelevant. In the Tribunal, Judge Hampel considered the *Equal Opportunity Act* must be interpreted in a way that realises the human rights listed in the Charter.[53] While this includes religious liberty, arguably equality and non-discrimination were elevated in importance, consistent with Bell J's description of the principles of equality and non-discrimination as 'the keystone in the protective arch of the *Charter*'.[54] While asserting no single right should be privileged, Judge Hampel considered any exceptions to antidiscrimination must be read narrowly because they impair the full enjoyment of s 8.[55]

In partial contrast, the Court of Appeal held the Charter did not retrospectively apply to CYC's conduct. Moreover, even if it had, it would not have made a difference according to the parties.[56] Like Judge Hampel, Maxwell P and Neave JA considered that the exceptions in the Act should not be given a broad interpretation. According to Maxwell P, the exception for religious bodies does not define the limits of antidiscrimination law in aid of liberty, but rather was an exception from the full scope of a law designed 'to eliminate, as far as possible, discrimination against people'.[57] He considered that a narrow reading of the exception was consistent with imposing limitations on religious liberty to 'protect … the fundamental rights and freedoms of others'.[58] In this way, whether the *Charter* applied or not, the principle of equality was privileged over the principle of religious freedom.

As a matter of statutory interpretation, such an outcome is debatable. Legislation may reflect multiple purposes, and thus be designed to protect multiple rights and interests.[59] Beginning with a presumption that religious liberty must be constrained because it impairs equality creates a hierarchy that belies talk of 'balance'.[60] Doing so arguably caused the majority of the Court to interpret the key terms of the religious freedom exception in a manner inattentive to religious liberty principles.

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[53] *Cobaw* [2010] VCAT 1613 (8 October 2010) [25].

[54] *Lifestyle Communities Ltd Case (No 3) (Anti-Discrimination)* [2009] VCAT 1869 (22 September 2009) [277].

[55] *Cobaw* [2010] VCAT 1613 (8 October 2010) [219]-[225].

[56] *Cobaw* (2014) 308 ALR 615, [178]-[179].

[57] Ibid [186]. *Equal Opportunity Act 1995* (Vic) s 3(b). The Court also emphasised the Act was 'beneficial' legislation to be given a liberal construction. *Cobaw* (2014) 308 ALR 615, [180] (citing *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J).

[58] *Cobaw* (2014) 308 ALR 615, [190], [193] (quoting Art 18(3) of the ICCPR).

[59] *Cobaw* (2014) 308 ALR 615, [514], [516] (Redlich JA). See also *Aitken* [2012] VCAT 1547 (18 October 2012) [539].

[60] See *Cobaw* [2010] VCAT 1613 (8 October 2010) [39], [221].

First, the exception only applies to a 'body established for religious purposes'.[61] CYC argued that its objectives as a company were 'suffused with religious purposes', and that it sought through its activities 'to establish campsites in a Christian milieu'.[62] For example, CYC's constitution focused on conducting camping, conferencing and similar facilities in accordance with the fundamental beliefs and doctrines of the Brethren.[63] The Court of Appeal, however, disagreed. CYC, the Court said, was undertaking a generic, commercial, and thus, 'secular' venture open to schools, corporations, and any party.[64] A body, to be considered 'established for religious purposes', must have an 'essentially religious character', the Court said, and engage in activity that is 'directly and immediately religious' or is 'solely religious'.[65]

As a method for determining the boundaries of permissible claims, creating a bright-line between 'religion' and 'commerciality' is a blunt instrument. Many organisations may undertake commercial work within a religious ethos.[66] A kosher or halal slaughterhouse or certifier, for example.[67] A religious publisher.[68] A wedding photographer.[69] A diocese's hall for rental.[70] A bed and breakfast.[71] Fundamentally, religious liberty has traditionally been understood as protecting against a coerced conscience, and as securing the capacity for groups to pursue an ethos and form a body of people in response to an understanding of the divine. On this view, an act like CYC's decision not to accept a booking does not necessarily cease to be an act of religious conscience simply because it takes place in a commercial setting.[72]

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[61] *Equal Opportunity Act 1995* (Vic) s 75(2).

[62] *Cobaw* (2014) 308 ALR 615 [244].

[63] Ibid [205]. See also ibid [203] (on CYC's establishment under Brethren trust) and [206] (CYC members required to subscribe to a statement of faith).

[64] Ibid [209], [247], [250].

[65] Ibid [230], [233], [239].

[66] See ibid [563] (Redlich JA). See also, comparably, *Burwell v Hobby Lobby Stores, Inc*, 134 S Ct 2751, 2770 n 23 (Alito J) (2014). Alito J further notes the contention that such organisations exist simply to pursue money 'flies in the face of modern corporate law'. Ibid 2770.

[67] See, eg, *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (European Court of Human Rights, Grand Chamber, Application No 27417/95, 27 June 2000).

[68] See Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 131.

[69] See, eg, *Elane Photography v Willock* (NM Sup Ct, No 33,687, 22 August 2013).

[70] *Smith and Chymyshyn v Knights of Columbus* 2005 BCHRT 544 (29 November 2005).

[71] *Hall v Bull* [2013] 1 WLR 3741 (United Kingdom Supreme Court).

[72] See *Commissioner of Taxation v Word Investments* (2008) 236 CLR 204, which recognised that commercial activities and charitable status on religious grounds are not necessarily inconsistent: Ian Murray, 'Charity Means Business – *Commissioner of Taxation v Word Investments Ltd*' (2009) 31 *Sydney Law Review* 309.

Second, under the first limb of the exception, the act must 'conform[] with the doctrines of the religion'.[73] Although *obiter*, the opinion of the Court on this point was perhaps the most alarming feature of the judgment, creating potentially serious consequences for the boundaries of religious liberty, and how religious groups organise their activities and present themselves to the public. For all members of the Court, affirming the Tribunal, CYC's conduct was not something done to conform with its doctrines. They offered two reasons. First, the Court considered 'doctrine' refers to creeds, declarations, or 'the core architectural statements of faith'.[74] On this view, the Brethren perspective on sexuality and marriage was not doctrine. Such beliefs did not appear in any creedal statements, nor were they the clear application of a doctrine.[75] Second, even if this were wrong, it was considered that CYC's decision was not 'necessary' to conform to its doctrine. According to Maxwell P, a demanding requirement of *necessity* was appropriate because the case involved discriminatory conduct.[76] Pointing to Brethren statements that they would welcome persons with different sexualities, and to instances where CYC had not inquired into the sexuality of different customers, Maxwell P considered that their belief in 'Christian marriage' was a 'rule of private morality' applying only to co-religionists.[77]

These are very problematic statements. In a strange juridification, doctrine was narrowly linked to explicit texts, such as formal creeds and declarations. However, religious creeds are typically limited to specific matters in response to particular controversies *internal* to the religion. Religious bodies themselves are more often likely to consider 'doctrine' to cover the entire teaching of the faith, not the particular matters that have been formulated as binding dogma.[78] The Brethren Church undoubtedly did not think its doctrine on sexuality or marriage needed to be written down expressly in CYC's trust deed, noting that it had been drafted in 1921.

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[73] *Equal Opportunity Act 1995* (Vic) s 75(2)(a).

[74] *Cobaw* [2010] VCAT 1613 (8 October 2010) [288].

[75] In this case, the plenary inspiration of scripture: ibid [277].

[76] *Cobaw* (2014) 308 ALR 615, [287]-[288]

[77] Ibid [280]-[285], [290], [330]. This was also the basis for rejecting the claim the conduct was 'necessary to avoid injury to the religious sensitivities of people of the religion' (*Equal Opportunity Act 1995* (Vic) s 75(2)(b)). See ibid [292]-[307] (Maxwell P) and [434]-[435] (Neave JA).

[78] See, eg, *Reaney and Hereford Diocesan Board of Finance* [2007] Employment Tribunal Case No 1602844/2006 (17 July 2007) (UK) (considering the Church of England's non-creedal doctrine on sexuality). See also Thomas Scannell, 'Christian Doctrine' in *The Catholic Encyclopedia* (Robert Appleton Company, 1909) vol 5 <http://www newadvent.org/cathen/05075b htm> (emphasising doctrine as teaching or catechism).

The Court's decision will undoubtedly lead religious organisations to anticipate litigation by creating more extensive doctrinal statements.[79] It will also encourage them not to permit internal differences of opinion, even when they may in fact be engaged in on-going debate about some issue, including questions of sexuality and gender roles.[80] This could have the perverse consequence of discouraging doctrinal debate, potentially resulting in doctrinal change within religious denominations.

This raises two general concerns that, in the future, a court mindful of religious liberty will need to give more attention. The first is what Christopher McCrudden calls the internal point of view in religious liberty adjudication.[81] Claimants are entitled to expect judges will be willing and able to appreciate and understand the group, its ways and its practices, in terms of the group's own standards. This takes imagination and religious literacy, rather than, as in *Cobaw*, imposing an external view. The second is a commitment to the group's autonomy as central to religious liberty.[82] One reason why courts avoid theological inquiry is because of a commitment to the group's authority to determine questions of religion, morality, and practice for itself. If, for example, in a time of significant cultural change, the Brethren draw a line between welcoming all persons *qua* persons and rejecting groups with purposes seen as conflicting with their understanding of the good life, that is not inconsistency, but the outworking of group autonomy.[83]

IV. THE REVIEWS

The Victorian Charter required reviews of its operation to be undertaken four and eight years after its enactment.[84] Those reviews have occurred, in 2011 and 2015, and the reports have been tabled in the Victorian Parliament.[85] The reviews encouraged a large number of

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[79] The *Equal Opportunity Act 2010* (Vic) s 82(2)(a), referring to 'doctrines, beliefs, or principles of that religion', may alleviate the problem to some extent.

[80] For example, some churches and religious bodies might leave questions of relationship recognition to local groups, consistent with a more capacious doctrinal position.

[81] Christopher McCrudden, 'Multiculturalism, Freedom of Religion, Equality, and the British Constitution: the *JFS* Case Considered' (2011) 9 *International Journal of Constitutional Law* 200, 220 (drawing from Neil MacCormack's discussion of HLA Hart: see Neil MacCormack, *Legal Reasoning and Legal Theory* (Oxford University Press, 1978) 292).

[82] See *Iliafi v Church of Jesus Christ of Latter-Day Saints Australia* (2014) FCR 86, [76]-[78] and Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33 *University of Queensland Law Journal* 153. See also *Cobaw* (2014) 308 ALR 615, [480] (Redlich JA).

[83] See also ibid [497], [525], [567] Redlich JA (stating the Tribunal was 'not equipped nor required to evaluate the applicants' moral calculus').

[84] *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 44-45.

[85] Parliament of Victoria Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (Melbourne: Government Printer for the State of Victoria, 2011); Brett

submissions from many different groups, secular and religious. In making submissions, religious organisations did not limit themselves to issues of religious freedom. Concerns were frequently expressed, for example, about economic and social rights and the rights of children, refugees and indigenous peoples.[86] Nevertheless, religious freedom was one of the important matters that emerged at both reviews.

Religious communities repeatedly pointed to concerns about the Charter's failure to implement fully Article 18 of the ICCPR. The Victorian Council of Churches (VCC), the Catholic Archdiocese of Melbourne, the Synod of Victorian and Tasmania Uniting Church in Australia, and the Ad Hoc Interfaith Committee (AHIC) all argued that Art 4(2) of the ICCPR declares freedom of religion to be a non-derogable right and that Art 18(3) applies a test of 'necessity' to any proposed limitation on freedom of religion, rather than the 'balancing' test that is imposed by s 7(2) of the Charter.[87] In other words, the ICCPR, they contended, imposes a stricter standard of scrutiny when governments limit religious liberty. In their view, failure to adhere to this has contributed to the vulnerability of religious liberty under Victorian law as demonstrated by the narrow interpretation advanced by the VEOHRC and adopted, at least at first instance, by Judge Hempel in *Cobaw*.[88]

Submitters also expressed a concern that the more communal orientation found in Art 18 is not reflected in the Charter. While the ICCPR protects the manifestation of religion or belief 'in community' with others (Art 18(2)), the Charter stipulates that only individual 'persons' have human rights (s 6(1)) and refers to the 'demonstration' of a person's religion or belief 'as part of a community' (s 14(1)(b)). The point is subtle, but it reflects a concern about the individualism of contemporary human rights thinking.[89] For example, Neave JA in *Cobaw* considered religious beliefs are 'personal matters, involving individual judgment' that cannot be attributed to a corporate body.[90] However, as Redlich JA argued, such a position is at odds with a long history of religious activity through corporate association.[91] Moreover, the

Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Victorian Government Printer, 2015). The 2015 review has recommended (at 234) that a third review be undertaken four years after the commencement of a new complaints and remedies provision that it proposed.

[86] Eg, Submission 292: Catholic Social Services Victoria, July 2011; Submission 256: Synod of Victorian and Tasmania Uniting Church in Australia [no date].

[87] Submission 77: Victorian Council of Churches, 8 June 2011. The VCC submission was in this respect endorsed by Submission 256: Synod of Victorian and Tasmania Uniting Church in Australia [no date] 6-7.

[88] Submission 217: Ad Hoc Interfaith Committee, 17 June 2011, 21-24, citing *Cobaw* [2010] VCAT 1613, [221]-[225]. The submission was made prior to the Court of Appeal decision in this case. [and 2015: Submission 107: Catholic Archdiocese of Melbourne, 4-5]

[89] See, eg, John Milbank, 'Against Human Rights: Liberty in the Western Tradition' (2012) 1 *Oxford Journal of Law and Religion* 1.

[90] *Cobaw* (2014) 308 ALR 615, [414]-[417].

[91] Ibid [480].

narrow focus on the individual raises the possibility of diminishing the authority of the group in favour of individual claims,[92] or at least neglecting the communal embeddedness of the human condition. On this basis, religious groups further submitted that the Charter should include Art 18(4), which protects the liberty of parents to ensure religious and moral education of their children, citing observations of the UN Human Rights Committee that Art 18(4) is related to the protection in Art 18(1) of the freedom to teach a religion or belief.[93]

While religious groups expressed concerns during the reviews regarding a number of laws said to implicate religious liberty, antidiscrimination featured heavily. This entailed arguments over exception and exemption clauses, but it also extended to the role of the VEOHRC. For example, the AHIC, a group of Christian, Muslim and Jewish religious leaders and organisations, expressed concern about the 'exclusive focus' of the VEOHRC on antidiscrimination to the 'virtual exclusion' of human rights more generally, referring to an 'unspoken belief that non-discrimination is the right that trumps all others'.[94] Moreover, it was partly for this reason that numerous religious groups seemed to express more confidence in parliamentary processes than judicial and administrative bodies to protect their rights.[95]

In relation to religious liberty under the Victorian Charter, two closely related issues further emerged. The first concerned the existence and nature of exceptions or exemptions under the *Equal Opportunity Act 2010* (Vic) for religious organisations. The second concerned the application of the Charter to non-state entities, including religious schools and organisations, when they provide state-funded services. Both raised issues of religious group autonomy.

Exceptions and exemptions were a focus of discussion in the 2011 and 2015 Reviews, and also squarely at issue in the Scrutiny of Acts and Regulations Committee of the Victorian Parliament (SARC)'s inquiry, *Exceptions and Exemptions to the Equal Opportunity Act 1995* (2008-9). In each case, the 'guiding principle' was said to be whether the exceptions and exemptions in the Act provide an appropriate 'balance' between religious liberty and non-

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[92] See Joel Harrison, ' "A Communion in Good Living": Human Dignity and Religious Liberty beyond the Overlapping Consensus' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013) 451, 462-464 (discussing individual rights claims applied internally against religious groups).

[93] Human Rights Committee, General Comment 22, [6] and [8].

[94] Submission 217: Ad Hoc Interfaith Committee, 17 June 2011, 14.

[95] Eg, Submission 35: Australian Association of Christian Schools, Adventist Schools Australia and Christian Schools Australia, 3. For a review of some of these reasons, see Patrick Parkinson, 'Christian Concerns About an Australian Charter of Rights' (2010) 15(2) *Australian Journal of Human Rights* 83.

discrimination, in a manner consistent with s 7(2) of the Charter.[96] There are different kinds of exceptions. The current exceptions under Victorian law mark the boundary between equal treatment and religious freedom by designating a particular set of circumstances in which antidiscrimination prohibitions do not apply. This differs from an individual case-by-case balancing exercise in that its terms are satisfied by establishing the group's own doctrinal commitments. This appears to avoid a judicial assessment of competing rights except that, as *Cobaw* demonstrates, the key terms of an exception can be interpreted more or less narrowly with a view to striking a particular 'balance' between freedom and equality norms. However, some groups have argued that the sphere of religious freedom should be constructed even more narrowly through the introduction of proportionality tests that require competing rights to be balanced in each particular case.[97] In Victoria, other groups have argued even further that *all* standing exceptions for religious groups should be eliminated and replaced by a system of temporary exemptions granted upon application to the VEOHRC.[98]

Much of this debate has crystallised around significant pressure to introduce an inherent requirement test, particularly in the field of employment. This would require an employer to demonstrate that any discriminatory condition on employment is an inherent requirement of the particular position. For example, is being a Roman Catholic an inherent requirement of teaching maths at a Roman Catholic school? Against SARC's recommendations, an inherent requirement test was introduced by the *Equal Opportunity Act 2010* under the then Labor Government, to apply as an additional requirement for the employment decisions of religious bodies and schools.[99] However, before the new provisions came into operation, under a new Liberal government, the Act was amended to remove the inherent requirement test, so that a religious body or school would only need to show that its employment decision conformed with the doctrines, beliefs or principles of the religion or was reasonably necessary to avoid

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[96] Parliament of Victoria Scrutiny of Acts and Regulations Committee, *Exceptions and Exemptions to the Equal Opportunity Act 1995: Final Report* (Melbourne: Government Printer for the State of Victoria, 2009) 4-6, 8-9.

[97] See the arguments discussed in Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' (2015) 40 *Monash University Law Review* 413, 431-432.

[98] Eg, Human Rights Law Centre, *Briefing Paper on Religious Exemptions under the Equal Opportunity Act 1995 (Vic)* (2009); John Tobin, 'Should Discrimination in Victoria's Religious Schools Be Protected? Using the Victorian Charter of Human Rights and Responsibilities Act to Achieve the Right Balance' (2010) 36 *Monash University Law Review* 16.

[99] *Equal Opportunity Act 2010* (Vic) ss 82(3)-(4), 83(3)-(4)).

injury to the religious sensitivities of adherents of the religion.[100] The current Labor government has undertaken to reinstate the inherent requirement test.[101]

Religious organisations have typically defended the importance of exceptions, without inherent requirement tests. The supporting reasons for this have been developed more fully elsewhere.[102] In short, such exception clauses better realise the purposes of religious liberty: they acknowledge the alternative authority, communal ethos and integrity of a religious community,[103] and they protect courts from having to engage in theologically-loaded inquiries. Consider the question posed above: is being a Roman Catholic an inherent requirement of teaching maths at a Roman Catholic school? Or, similarly, is maintaining a particular sexual ethic an inherent requirement? From a functional perspective, focused on simply teaching what is required for maths, arguably not. However, if a school's concern is maintaining a particular social setting that cultivates a way of life for all its members, then it may be a different matter. Moreover, asking this question potentially leads the court into second-guessing the doctrinal boundaries presented by a religious community: must teachers really espouse and manifest *x* doctrine for the purposes of this educational community? In contrast, under current exceptions, a religious school must show conformity to its doctrines or the religious sensitivities of its members. The exception thus strikes a *legislative* balance that 'reduce[s] the issues that would have to be determined by courts or tribunals in such a sensitive field'.[104]

Similar concerns have been raised in relation to suggested changes to the Charter itself. Unlike its predecessor, the 2015 Review asked whether the effectiveness of the Charter might be enhanced through its application to non-state entities when they provide state-funded services.[105] This raised the prospect of changes to the Charter in two ways which potentially affected religious freedom: first, the clarification in s 4(1)(c) that non-government schools, while they may exercise functions of a public nature, do not do so on behalf of the

[100] *Equal Opportunity Amendment Act 2011* (Vic) ss 18, 19.

[101] See, eg, Bianca Hall, 'Government Urged to Remove LGBTI Discrimination in Schools', *The Age* (online) 2 September 2015 <http://www.theage.com.au/victoria/government-urged-to-remove-lgbti-discrimination-in-schools-20150902-gjd5c0.html>.

[102] Harrison and Parkinson, above n 97. See also the discussion in Greg Walsh, 'The Merits of the Inherent Requirement Test for Regulating the Employment Decisions of Religious Schools under Anti-Discrimination Legislation' (2015) 6 *The Western Australian Jurist* 34.

[103] See, eg, Rivers, above n 68, 295; Aroney, above n 82; and Steven D Smith, 'Discourse in the Dark: The Twilight of Religious Freedom?' (2009) 122 *Harvard Law Review* 1869, 1881-2.

[104] *R (Amicus) v Secretary of State for Trade and Industry* [2007] 1 ICR 1176, [123].

[105] Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Melbourne: Victorian Government Printer, 2015), iv. The terms of reference of the 2015 review included consideration of 'the application of the Charter to non-State entities when they provide State-funded services'

state, and are therefore not deemed to be public authorities under the Charter; and second, the exception for religious bodies in s 38(4).[106] Public authorities are under a general duty to act compatibly with human rights and give proper consideration to human rights.[107] However, under s 38(4), this does not extend to a duty to impede or prevent a religious body from acting in conformity with its doctrines beliefs, or principles.[108] Some human rights organisations and lawyers' associations have advocated removing or limiting the special exception for religious bodies when such bodies are undertaking government-funded functions. This would potentially apply to religious schools, for example.

Several religious groups expressed concern about such a development. First, they pointed again to Article 18's strong focus on the communal integrity of religious groups, and their autonomy in decision-making as against imposing Charter-based duties.[109] Second, they argued that introducing Charter-based duties that potentially would limit the scope of religious freedom where activities are undertaken with government funding could have the effect of introducing a strict conception of 'non-establishment' principles.[110] However, even under s 116 of the Australian Constitution government funding of religious schools is not a breach of non-establishment.[111] Finally, religious groups raised an argument from societal pluralism. Where the government provides funding to a variety of bodies committed to different conceptions of the good life, allowing potential recipients to choose among service providers reflects a principled way of meeting Article 18 commitments and supporting a diverse religious and multicultural environment.[112]

In his report, Michael Brett Young recommended that the Charter should continue to make clear that non-government schools are not public authorities.[113] However, he also considered that s 38(4) could safely be repealed as freedom of religion would remain a protected right under s 14 and a religious body could only be obliged to act contrary to its doctrines, beliefs or principles if that could be shown to be reasonable and justified pursuant

[106] Public funding is only one factor among many that may be considered in determining whether a function is of a public nature: Victorian Charter, s 4(2)(d) and (5).

[107] Charter, s 38(1).

[108] Charter, s 38(4)-(5).

[109] Submission 256: Synod of Victorian and Tasmania Uniting Church in Australia, 8, citing Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994) [4].

[110] Submission 87: Australian Christian Lobby.

[111] *Attorney-General (Vic) (Ex rel Black) v Commonwealth* (1981) 146 CLR 559.

[112] Submission 32: Freedom 4 Faith, 8, citing Harrison and Parkinson, above n 97, 446.

[113] Young, above n , 62.

to s 7(2) of the Charter.[114] However, this neglects the general purpose of s 38(4), which is a legislative commitment to the proposition that when public authorities deal with religious organisations, even when publicly funded, the latter may maintain their religious doctrines, beliefs or principles.

V. CONCLUSION

Rhetorical considerations are important in contemporary debates over human rights. The religious organisations that made submissions to the reviews of the Victorian Charter affirmed their respect for human rights and often emphasised the leading roles their welfare agencies had taken in defending the rights and interests of the most vulnerable in society. However, in the framing of many contemporary laws religious freedom has been pushed to the periphery of social policy. Australia's antidiscrimination laws and equal opportunity agencies focus on eliminating certain kinds of discrimination. Religious freedom is at times accommodated in the form of exceptions or exemptions in order to assuage the 'sensitivities' and 'susceptibilities' of religious believers. There is pressure to remove broad exceptions for religious organisations, in favour of more limited and judicially-assessed exceptions or else temporary exemptions. And judges, as *Cobaw* displayed, tend to believe any departure from antidiscrimination norms must be read narrowly. The effect of all this is to suggest, as the Archdiocese of Melbourne put it, that many religious practices are 'contrary to human rights', giving rise to a 'misleading and prejudicial inference which works powerfully to devalue respect for freedom of religion'.[115]

Framed in this way, religious freedom becomes, at best, a second-class right. Lip-service is given to the need to 'balance' all rights, including freedom of religion, but religious organisations do not appear to have much confidence in administrative agencies, tribunals and courts to strike such balances in a way that treats religious freedom as a fundamental and non-derogable right. And this should be concerning. To borrow from another Victorian Tribunal decision, Australia is a 'society where people of different faiths can live, work and worship side-by-side'.[116] Managing serious and growing pluralism, whether in fields of

[114] Young, above n , 73.
[115] Submission 107: Catholic Archdiocese of Melbourne, 11.
[116] *Rutherford* [2014] VCAT (14 July 2014) [22].

charitable care, education, or commercial settings, requires deeper attention to fundamental principles of religious liberty.