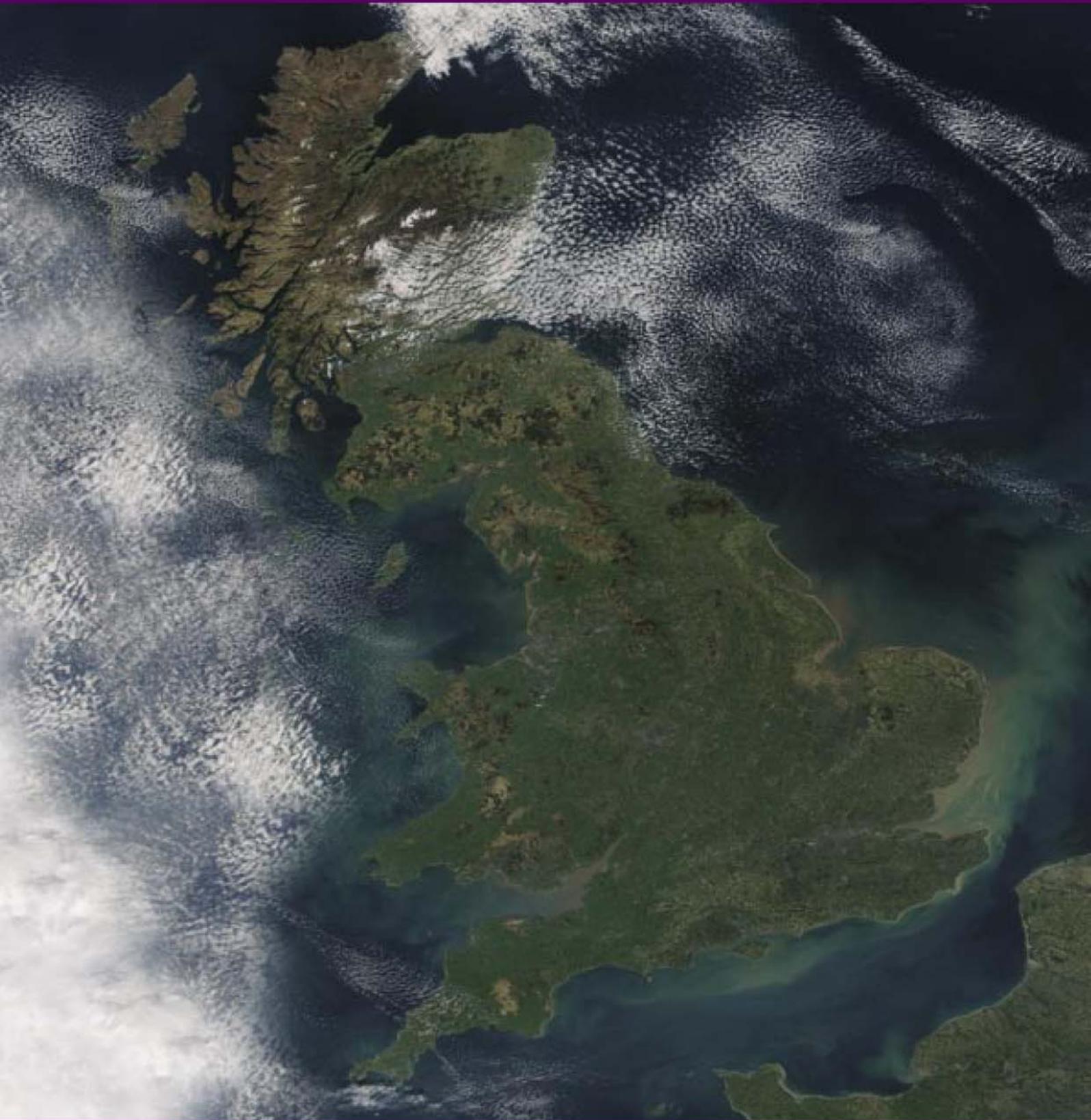


A British Bill of Rights

Informing the debate



The report of the JUSTICE constitution committee



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JUSTICE – 50 years of defending the rule of law

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Foreword

When the JUSTICE committee which produced this report began its work in 2006, the question of whether Britain needed a bill of rights was simmering on the back burner. During the 18 months of our deliberations the subject rapidly moved up the political agenda as the three main political parties each turned their attention to the question of what changes, if any, were needed to the arrangements for protecting human rights in Britain in the 21st century. The announcement by the government in July 2007 that it had decided to undertake a national consultation process on the topic coincided with the final drafting of the committee's report. The timing of this project therefore shows great foresight or good fortune or both on the part of JUSTICE's director, Roger Smith, whose commitment to this project has been a driving force both in its inception and successful completion.

The timely nature of the report is particularly apt, given the aims behind it. From a relatively early stage of the committee's work its members were agreed that little purpose would be served by adding to the growing pile of position papers on whether Britain did or did not need a bill of rights (even if consensus on this contentious question could have been achieved amongst the committee members). Instead, the relatively poorly informed nature of many of the arguments in the public domain confirmed our view that the committee's goal should be to produce a clear and accessible review of the key issues in order to promote a better informed debate on the subject. This presented a challenge given the complexity of many of the central problems which needed to be addressed. Questions such as the possible form, scope, interpretative approaches and implementation processes of a bill of rights are not easy to determine without considerable background knowledge of the subject matter, nor are the answers easily reducible to political sound-bites.

In grappling with these difficult issues, we were very fortunate in the range of experience which the committee members brought to the project. Each contributed her or his particular area of expertise, whether legal, political, academic or comparative. The successful translation of these inputs into the final report was the result of a great deal of hard work on the part of the project's full-time researcher, Emma Douglas, who managed to synthesise, organise, deepen and clarify the wide range of material and views which the committee members produced. The length of the report which she has constructed, and the depth in which she has analysed the various issues is a reflection of the fact that this is perhaps one of the most complex areas which JUSTICE has tackled. Particularly problematic was the potentially technical legal issues which an in-depth analysis of the subject of bills of rights needs to address. Since our aim was that this report would provide a tool which can be used by policy-makers and Parliamentarians as well as being accessible to a broader lay readership, we have tried to tackle these various issues in a way which avoids, as far as possible, legal terminology or requires specialist background knowledge while at the same time is not overly simplistic. Our hope is that if we have achieved this balance the report will make a useful contribution to the development of a more rigorous debate on the vital and topical question of whether Britain now needs a new bill of rights.

Kate Malleson

Chair of JUSTICE constitution committee

September 2007



Chapter one

Introduction

1. JUSTICE is an all party law reform and human rights organisation dedicated to advancing access to justice, human rights and the rule of law.
2. This report aims to encourage debate on the question: 'should there be a bill of rights for Britain?' It is intended to focus and inform public discussion on whether our rights are best protected under the current Human Rights Act 1998, or whether it is time to build on that Act by creating a home-grown bill of rights which seeks to entrench specifically British values and articulate the balance of constitutional powers appropriate for a modern British democracy.
3. The report identifies a number of approaches to creating a British bill of rights, but consciously avoids making concrete proposals for a particular model. The need for, and content of, a bill of rights must be the product of community discussion. Neither can be deduced from (though each can be informed by) law books, policy reports or the experience of other countries.
4. The report aims to be of particular use to Parliamentarians, policy researchers and government officials. More generally, it seeks to inform members of the public who are concerned with the protection of human rights and civil liberties in Britain and the task of developing appropriate mechanisms to protect those rights in the 21st century. The report has been overseen by a JUSTICE committee whose members are listed at the front of this publication and who represent a wide cross-section of academic and political experience. The content of the report represents a shared understanding of the issues to be resolved through discussion rather than the views of each member of the committee on the right course of action.

The political context

5. Discussions over a British bill of rights have a long history, but have recently intensified. The issue is now openly debated, having filtered from research bodies and non-governmental organisations into mainstream politics. The major political parties have seized the idea and 'a British bill of rights and duties' now forms part of a detailed constitutional reform proposal in a green paper announced by the new Prime Minister in July 2007.¹

¹ *The Governance of Britain*, Cm 7170, July 2007, <http://www.justice.gov.uk/publications/governanceofbritain.htm>.

6. This is an exciting time for constitutional reform. Britain's constitutional arrangements are, in many respects, inherently flexible and can accommodate change relatively easily. Significant change is, therefore, possible. Many consider that it is long overdue. The stability of parliamentary democracy, the rule of law and a real sense of liberty have become the core features of a system of historically very stable constitutional government. These core features aside, a constitution drawn up in the 21st century is likely, in some respects, to be significantly different from those arrangements within which the British legal and political system has hitherto been seen to function. It will need to adapt to a changing world. The government's green paper presents a long list of constitutional measures designed to re-invigorate our system of governance. This report focuses on whether a British bill of rights should be a priority for government and on the wider set of constitutional issues which a bill of rights raises.

7. One reason why constitutional reform is a matter of current political debate may arise from a fear that the British public feels increasingly apathetic towards formal politics.² Conscious of this, the major political parties are taking the opportunity to spearhead debate on what it means to enjoy traditional British freedoms and uphold British values. The Conservative opposition leader proposed a British bill of rights and responsibilities in 2006.³ The Liberal Democrats continue their campaign for a written constitution, which would incorporate a new British bill of rights in order to 'entrench the rights presently enshrined in the European Convention [on Human Rights] in the British constitutional framework'.⁴ The Labour government under Prime Minister Gordon Brown has emphasised the importance of national identity and a home-grown bill of rights as a way of re-engaging the public and shaping our system of rights protection to the national culture.⁵ It is encouraging that all parties have taken a keen interest in the matter. The debate on a bill of rights must not, however, become a purely party political matter. If the government decides to proceed with the initiative, it must be on the basis of a co-operative, rather than competitive, approach from all parties.

8. Party politics aside, it is clear that social and political factors more generally will play a role in determining the success of any move to a British bill of rights. Difficult but central issues include religion and immigration, and the fact that the demographic of the UK has changed markedly over the decades since the signing of the European Convention on Human Rights in 1950.⁶ Britain has a great number of integrated yet splintered communities. Traditional cohesion around social norms has been eroded. All this signals a need to renew the idea of 'social contract' with government and our system of governance more generally; a need to affirm that, irrespective of people's different lifestyles and beliefs, we can agree on certain core values.

2 *Power to the People*, Power Inquiry report, July 2006.

3 David Cameron, 'Balancing freedom and security: A modern British Bill of Rights', speech to the Centre for Policy Studies, 26 June 2006. Cameron called for 'a modern British Bill of Rights to define the core values which give us our identity as a free nation'. He proposed at the same time the repeal of the Human Rights Act 1998.

4 *For the People, By the People*, Liberal Democrat Policy Paper 83, August 2007, para 4.2.4, <http://www.libdems.org.uk/party/policy/paperlist.html>.

5 See n1 above; see also 'Brown seeks out "British values"', 14 March 2005, at <http://news.bbc.co.uk/1/hi/programmes/newsnight/4347369.stm>.

6 Recent data on migration in the UK from the Economic and Social Research Council (ESRC) available at www.esrcsocietytoday.ac.uk; see also the ongoing joint ESRC / Arts and Humanities Research Council (AHRC) research project 'Religion and Society' at http://www.ahrc.ac.uk/images/4_98631.pdf.

The historical context

9. The concept of a British bill of rights can be traced from Magna Carta in 1215, which was a solemn pledge, recorded in writing (by numerous hands and in numerous versions), to limit the power of the monarch; the Petition of Right in 1628, which set out civil liberties to be honoured by the monarch; and the Bill of Rights in 1689, which set out the rights and liberties of the subject and certain constitutional requirements where the actions of the Crown required the consent of the governed as represented in Parliament. All these followed defining constitutional 'moments', characterised by pressure for explicit recognition of certain constitutional principles, guarantees and interests. The UK's signature to the European Convention on Human Rights (ECHR) in 1950 marked a further progression in its system of rights protection, as did the relatively recent enactment of the Human Rights Act 1998 (HRA). The question now is whether the HRA is sufficiently embedded in British constitutional arrangements and sufficiently comprehensive to constitute a bill of rights for Britain.
10. Following the ECHR's ratification by founding member states of the Council of Europe in the early 1950s, the principal basis for incorporation of the ECHR into domestic legal systems tended to be international in nature. The argument was based on recognition of international obligations rather than alteration of countries' constitutional structures and systems of checks and balances. This was especially so for European states with their own constitutional bills of rights.
11. A strong practical consideration in the UK's decision to incorporate the ECHR was that only by internalising human rights law treaty obligations could the British legal system redress the growing number of inconsistencies with European human rights law. Incorporation of the ECHR under the HRA has substantially improved the UK's position before the European Court of Human Rights (ECtHR) at Strasbourg. Fewer people need to take their cases to Strasbourg, since many legal questions that have arisen concerning the principles of the ECHR are dealt with and resolved satisfactorily by our own domestic courts.⁷ The ECtHR has also acknowledged the value of the HRA and paid close attention to the jurisprudence developed under it by the House of Lords.⁸
12. The movement for incorporation of the ECHR in UK law was also presented by the incoming Labour government of 1997 as focusing on the domestic context. Incorporation was aimed at improving our public law system, strengthening representative and democratic government and improving the relationship between government and the people.⁹
13. While there is little evidence of a 'constitutional moment' overwhelmingly requiring us to reform our constitutional rights system, there is widespread agreement on the need for greater democratic accountability of a strong executive; a concern in some quarters that the guarantees explicit in the HRA are insufficiently concrete;¹⁰ and a sense that British people wish to play a participative role in determining the contents of their constitutional guarantees.
14. This is not the first time that a home-grown British bill of rights has been debated. The issue gained publicity in the 1970s, when a senior judge, the late Lord Scarman, delivered widely publicised lectures in which he set out the case for a bill of rights.¹¹ The Conservative party was elected in

⁷ *Review of the Implementation of the Human Rights Act*, Department for Constitutional Affairs, July 2006 – the number of cases where at least one violation of the ECHR was found has fallen from 30 in 2002 when pre-HRA cases were still being heard, to 15 in 2005.

⁸ Anthony Lester, 'The Utility of the Human Rights Act: a reply to Keith Ewing', [2005] *Public Law* 249, at p255.

⁹ Secretary for the Home Department (Jack Straw), HC Debates vol 307, col 769, 16 February 1998.

¹⁰ Particularly after calls for its repeal by the leader of the Conservative opposition (see n3 above).

1979 on a manifesto committing Margaret Thatcher's government to holding all-party discussions on a bill of rights.¹² The issue arose again in the early 1990s in the context of renewed interest in the constitution. In 1991, Liberty published a draft bill of rights for consultation; the same year the Institute for Public Policy Research produced its own draft bill.¹³ In 1993, the Labour party produced a statement supporting the incorporation of the ECHR as the first stage in a constitutional reform process which would lead to a full-blown domestic model.¹⁴ It is clear that past debate and proposals provide much to draw on.

The constitutional context

15. Discussions on a British bill of rights should be seen against the backdrop of a broader process of constitutional change in Britain. The last decade has seen a number of major constitutional reforms, including the Human Rights Act 1998 (HRA); devolution; the abolition of the traditional role of the Lord Chancellor; the judicial-executive 'concordat' which led to the Constitutional Reform Act 2005; the creation of a new Supreme Court; and, most recently the creation of a Ministry of Justice which came into being on 9 May 2007.
16. The effective maintenance of the constitution and the rule of law depend on constructive relationships between the three branches of government: the executive, legislature and judiciary. The nature of relations between these branches has changed in recent years, partly as a result of changes in the system of governance and partly because of changing attitudes and perceptions.¹⁵ Judges have been more open in speaking to the news media. Some ministers have felt able to break with previously understood conventions and make robust and public comments critical of judges and judgments. Moreover, the news media play an increasingly important role in reporting and commenting on the judiciary, and – as in other contexts – there has been a decline in the culture of deference, with individual judges and the judiciary as a whole being seen as 'fair game' by press commentators.
17. The role of the judiciary has become more prominent since the HRA, with judges being required to decide issues with highly sensitive and often political implications. Under the HRA, the higher courts are required to interpret legislation so far as possible to be in conformity with human rights¹⁶ and, where it is not, to issue declarations of incompatibility.¹⁷ The question has arisen whether judicial practice in Britain might move closer to that in civil law jurisdictions. The House of Lords Constitution Committee has recently considered whether the judiciary should be able to evaluate the general compliance of bills or recently enacted statutes for their compatibility with Convention rights in a process of 'abstract review', a procedure that is common in many jurisdictions throughout Europe. It has also considered whether there might be a greater role for 'advisory declarations', in which the courts could be called upon to give guidance to the government on Convention rights, or whether a 'committee of distinguished lawyers' could be of use.¹⁸

11 Lord Scarman, *English Law – The New Dimension*, Hamlyn Lectures, 1974.

12 Conservative Party General Election Manifesto, 1979.

13 *The Constitution of the United Kingdom*, IPPR, 1991; *A People's Charter*, Liberty, 1991.

14 As Labour's 'second stage bill of rights commitment' receded, there was a push to draft the HRA 'in lieu' of a bill of rights. Francesca Klug, *A Bill of Rights: do we need one or do we already have one?*, Irvine Human Rights Lecture, Durham University, 2 March 2007.

15 *Relations between the Executive, the Judiciary and Parliament*, House of Lords Constitution Committee, Sixth report of session 2006-2007, HL 151.

16 S3 HRA.

17 S4 HRA.

18 See n15, chapter 2.

18. Just as the judiciary has gained a higher profile since the HRA, so there have been moves to establish a more explicit separation of powers, most notably between the executive and the judiciary. The Constitutional Reform Act 2005 (CRA) redefined formal powers and duties. It made the Lord Chief Justice rather than the Lord Chancellor head of the judiciary.¹⁹ Thus, any pressure for change that comes from the head of the judiciary now comes from the profession and not from the politicians. The CRA simultaneously established the idea of the Lord Chief Justice and the Lord Chancellor as partners in the administration of justice, with the Lord Chief Justice as the 'senior partner'. However, it would be unrealistic to expect it to be a partnership without tensions. The consequence of a more active judiciary with greater autonomy has already proved to create a more dynamic relationship between the branches of government in which the judiciary have a more structured and active role in defending themselves from criticism and ensuring that the proper resources and support for the courts are in place. The tensions were clear only recently with the creation of the Ministry of Justice which threw up issues of profound disagreement between the government and the judiciary.²⁰
19. A key feature of constitutional reform and the changing relationships between the judiciary, the executive and Parliament has been the re-focusing on core constitutional principles; principles which are equally relevant to discussions on a bill of rights. The principle of the rule of law,²¹ for example, has long been recognised as part of the British constitution. At its core is the notion that government must be held accountable according to law (ie all government action must find its authority in law) as well as the principle of equality before the law for all.²² Likewise, the principle of the independence of the judiciary,²³ linked to the doctrine of the separation of powers between the executive, legislative and judicial branches of government, ensures fair adjudication of fundamental rights where claims are brought before the courts for breach of these rights.

The current system for protecting rights

20. Rights are currently protected by the common law tradition of civil liberties; by certain specific items of legislation (for example on equality); and, more recently, by the landmark Human Rights Act 1998 (HRA). The point is often made that the HRA itself constitutes our bill of rights. It is a remarkable piece of legislation, giving domestic effect to the core provisions of the ECHR. It enables UK judges to declare legislation to be incompatible with the ECHR where it cannot be interpreted in accordance with it. In so doing, it leaves to Parliament and the executive the choice of whether to accept the court's finding by re-legislating or to reject it. While setting out those ECHR rights which have domestic application and which bind all public authorities, the particular balance of responsibility and participation reflects the traditional emphasis on the sovereignty of Parliament in the UK.
21. The HRA also addresses the 'democratic deficit' resulting from bills of rights which allow judges to strike down legislation (as in the US, Germany and South Africa). Debates leading up to the HRA ruled out establishing a system whereby the meaning of broad principles such as 'liberty' or

19 S7 CRA.

20 See n15, chapter 1, at para [3].

21 S1(a) CRA acknowledges 'the existing constitutional principle of the rule of law'.

22 The rule of law remains a source of dispute between academics. See, for example, Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', [1997] PL 467.

23 S3(1) CRA obliges the 'Lord Chancellor and other Ministers of the Crown ... [to] uphold the continued independence of the judiciary.'

'privacy' (and the power to repeal laws incompatible with that meaning) should be handed from elected politicians to unelected judges.

22. The HRA has enabled much progress in domestic rights protection. Building on this progress, our focus can now turn to whether rights traditional to Britain and new rights which have emerged since the drafting of the ECHR in 1950 can be sufficiently protected under the current model. This report asks what steps beyond the HRA can be taken to ensure the maximum protection for those principles and liberties which British people value most highly.
23. It also asks how a national debate might help our framework of rights protection to gain greater cultural entrenchment. One of the aims of the HRA was to help cultivate a 'human rights culture' which would reach beyond the courts, impacting on public authorities and society in general. This aim, while partly realised,²⁴ has come up against much negative response, largely based on myths and misunderstandings of the operation of the HRA. Such misunderstanding has often been fuelled by inaccurate press coverage. After a thorough review of its implementation, the then Department for Constitutional Affairs reported that the HRA has not hampered the fight against terrorism, as claimed, and has not become a 'charter for criminals and terrorists'.²⁵ Contrary to claims – even at the highest political levels – prisoners have not received pornography nor have criminal suspects received special treatment as a result of the HRA.²⁶
24. Outside the courts, political and cultural entrenchment of rights has been slow. Newspaper headlines have encouraged scaremongering over the rights of particular groups in society.²⁷ Prominent politicians have attacked, as an abuse of common sense, judicial decisions in relation to the operation of the HRA.²⁸ The Conservative party has pledged to repeal the HRA if elected to government.²⁹ One real conflict exposed by the HRA, but for which it is wrongly blamed, is that between national security and the right against torture in relation to deportation to a country where there is a real risk that it will be practised against the deportee.³⁰ This is a difficult issue, but the case-law of the ECtHR confirms that a state should not be complicit in the operation of torture against anyone, whoever they may be and whatever they may have done.³¹ Moreover, the reality of politics requires continuing membership of the Council of Europe and adherence to its ECHR. It is important to note that the debate about a British bill of rights is irrelevant to this issue. Unless the UK leaves the Council of Europe, which would probably require departure from the European Union too, then the jurisprudence of the European Court of Human Rights, and the UK's legal obligation in international law to abide by it, will be unaffected by the implementation of any new bill of rights.

24 *The Human Rights Act – Changing Lives*, British Institute of Human Rights, June 2007.

25 See n7 above, p4.

26 David Cameron, speech to the Police Federation, 17 May 2007: 'Over the last few years, we've seen a series of disgraceful incidents. Prisons given access to pornography. Burglars given Kentucky Fried Chicken ...'. Subsequently amplified in a letter dated 4 June 2007 to Roger Smith, JUSTICE's director: 'my view is that these were cases which had been affected in some way by the [Human Rights] Act. This does not necessarily mean that they arose as a result of judgements under the Act. Rather they are examples of the culture that has arisen as a direct result of the Act'. Both are given as examples of common and repeated media errors in the DCA report above at n7.

27 It may well be that elements of the press are concerned that any extension of the right to privacy will affect certain types of journalism, as decisions of the ECtHR suggest it might. See *von Hannover v Germany* (ECtHR application no. 59320/00).

28 'Blair dismay over hijacking Afghans', BBC website, 10 May 2006, <http://news.bbc.co.uk/1/hi/uk/4757523.stm>.

29 'Conservatives would abolish the Human Rights Act', Conservative Party website, 21 August 2007, http://www.conservatives.com/tile.do?def=news.story.page&obj_id=138115.

30 See n3 above.

31 *Chahal v UK* [1996] ECHR 54. The UK government is intervening in later cases to seek to reverse this. Bodies like Migration Watch call for the UK meanwhile to repudiate the ECHR, see *Revision of the Human Rights Act*, Briefing Paper 8.17, July 2007, at <http://www.migrationwatch.co.uk/publications.asp>; David Cameron has notably been more cautious, acknowledging that signature to the ECHR is crucial in terms of British interests in Europe and internationally in general.

Building a culture of human rights

25. Public opinion polls continue to suggest that the British people – while not fluent in the rights language of lawyers – are very much in favour of protecting their rights.³²
26. A key consideration in drawing up a British bill of rights will be to raise awareness of the rights of minority groups, including unpopular minorities. The power of the executive, in recent times, has expanded to cope with increasing pressures in the areas of crime, asylum and immigration, and the threat from terrorism. All these require governmental response, not least in the name of human rights and the protection of life and liberty. Yet there remains good reason to be vigilant against the increase in the executive's power. This applies particularly in relation to those minorities which struggle to obtain a democratic voice with which to protect themselves. These people include asylum seekers, other foreign nationals who are outside the electoral system, and those accused of a crime. Members of the so-called 'law-abiding majority' might one day find themselves in need of protection and will benefit from clearly articulated constitutional rights. The opportunity to debate a British bill of rights must not present the opportunity to regress from the standards set down in the HRA, based on the ECHR. Any move to alter the HRA model must be to *increase* rights protection, in particular for vulnerable and often unpopular minorities.
27. It is vital that while discussions continue on a British bill of rights, the ECHR and the basic rights and freedoms it protects are clearly recognised as the principal means of securing rights. There is a need to build public confidence in, and ownership of, the post World War II consensus on human rights generally. A British bill of rights may be an unrealistic prospect until the existing legal protection of human rights across the UK is acknowledged and respected. It would be an undesirable effect if a new British bill of rights were distorted according to populist notions of, for example, the balance of freedom and security in an age of terrorism. It would also reduce the likelihood that such a bill would provide the enhanced rights protection that could benefit British citizens.
28. The HRA has enabled significant progress 'on the ground' in terms of improving the lot of certain groups in society. The British Institute for Human Rights has carried out extensive research demonstrating the positive impact of the HRA on the lives of disabled people, elderly people, children and the poor.³³ These developments must be recognised and publicised to bring home the significance of a domestic rights instrument and its huge potential to tackle discrimination and improve living conditions for vulnerable groups.

What is a bill of rights?

29. Bills of rights are unusual in that they are a combination of law, symbolism and aspiration. The task of finding a precise definition can therefore be difficult. For the purpose of this report, a bill of rights is defined as:³⁴

32 ICM / Joseph Rowntree Reform Trust State of the Nation poll, 2006 – 77 per cent believe the UK needs a bill of rights to protect the liberty of the individual; Disability Rights Commission poll, 2003 – 64 per cent support legislation to protect human rights in the UK.

33 See n24 above.

34 Philip Alston, *Promoting Human Rights through Bills of Rights*, Oxford University Press, 1999, p10.

a formal commitment to the protection of those human rights which are considered, at [a given] moment in history, to be of particular importance. It is, in principle, binding upon the government and can be overridden, if at all, only with significant difficulty. Some form of redress is provided in the event that violations occur.

30. A bill of rights thus serves several functions. It sets out the fundamental rights of individuals which are legally protected. It expresses the fundamental principles of a democracy and the values of the state in question. As a highly symbolic instrument, a bill of rights also serves as a mechanism for unifying the population. It may remain the symbol of a nation's aspirations, even when the reality of rights protection falls short of its legal provisions.
31. Bills of rights in different countries share a number of characteristics. They may be presented as a set of broad and purposive statements of fundamental rights. There is almost always a need for judicial interpretation, since courts scrutinise the meaning of each provision. All legislation requires authoritative interpretation by a court before disputes as to its meaning and application can be settled. The need for such interpretation is particularly acute in the case of bills of rights, since they will frequently give rise to situations involving a clash between the individual's rights and the public interest, or a potential conflict between the rights of two private individuals (for instance, where the freedom of the press is limited by the rights of an individual to privacy or by the need not to prejudice an individual's right to a fair trial).
32. Rights holders tend to be individuals, though some bills of rights make special provision for minority groups.³⁵ Those against whom the rights are held tend to be governmental bodies and public authorities or private bodies carrying out public functions. Furthermore, bills of rights are often part of a codified constitution which establishes procedures for good governance and sets out the institutional framework designed to protect rights, thereby signalling which branch of government has the final say on matters of fundamental rights.
33. Today, Britain is anomalous in not having a domestic bill of rights which forms part of a written constitution. Even before a great number of constitutions were created post World War II and during the subsequent process of decolonisation, bills of rights (including dedicated chapters in constitutions) were commonplace. Their enforcement provisions have become increasingly interwoven with the international human rights regime, giving them a coherence and impact not previously enjoyed.

What is a 'British bill of rights'?

34. The meaning of a bill of rights in a British context is determined by what it aims to achieve. Our starting point must be the ECHR, incorporated into UK domestic law by the HRA. We should ask whether rights which are not incorporated (either under the ECHR or the HRA) are now ripe for inclusion. We should enquire whether a different model of procedural entrenchment would be preferable and whether we are satisfied with its mode of enforcement. We should also look at the issue of public support for the current HRA: we should ask how any new bill of rights could use a

³⁵ See, for eg, the Canadian Charter of Fundamental Freedoms, which specifically provides for the protection of the rights of the aboriginal peoples of Canada (defined as including Indian, Inuit and Metis). These provisions recognise and protect the aboriginal and treaty rights of aboriginal peoples and help preserve their cultures, identities, traditions and languages. For eg, no Charter provision can be used to take rights that aboriginal peoples have from the settlement of land claims.

genuine public consultation process to achieve social and cultural acceptance of its provisions and give it a fresh source of legitimacy.

35. This report deliberately addresses the question of a bill of rights for Britain, as opposed to the United Kingdom of Great Britain and Northern Ireland. The HRA applies to the whole of the UK (and with modification to the Channel Islands and Isle of Mann). However, Northern Ireland has its own ongoing process to enact a bill of rights for Northern Ireland, established by the Good Friday Agreement in 1998. Consultations have been extensive and the particular political circumstances in Northern Ireland have presented obstacles in the way of public consensus. By the same token, it is the unique circumstances of the region that justify a separate document, designed to unify a traditionally fractious society around a set of principles which have a particular resonance in the post-conflict era.³⁶
36. A British bill of rights should be characterised by its underlying purposes. It must:
- be progressive, aiming to enhance the human rights culture facilitated by the HRA;
 - aim to increase constitutional protection of human rights;
 - aim to enliven interest in the rights and duties of British citizenship and underpin public understanding of the constitution as a whole, including the obligations of the state in relation to every individual under its jurisdiction;
 - provide a unifying set of values in a modern and diverse British society.
37. One particular point must be dealt with at the outset. There has been a tendency to refer to a new bill of rights as protecting not *human* rights but *citizens'* rights. Rights would thus be defined as something one has by virtue of carrying a British passport rather than by virtue of being human. There are, of course, political rights which are dependent on citizenship. However, talk of 'citizens' rights' must not undermine the principle of universality in core rights – that everyone is entitled to human rights protection regardless of race, religion, nationality or other status. British citizens who live and travel abroad rightly object if they are not treated according to internationally recognised standards. A British bill of rights must make clear that it protects all those within British jurisdiction.

Rights and responsibilities

38. The relationship between rights and responsibilities needs to be understood. Most rights are qualified and, in practical terms, depend on the responsibility of everyone in society to respect one another's freedoms (so that one party's right to free expression, for example, does not impinge too far on another's right to a private and family life). Even the right to life is not absolute. It may, for example, be limited by the use of proportionate force in various circumstances, such as effecting a lawful arrest.³⁷ Very few rights are unconditional – these are the right against torture and inhuman treatment (Article 3 ECHR) and against slavery (Article 4 ECHR).

36 For further information on the Northern Ireland process, consult the Northern Ireland Human Rights Commission website at <http://www.nihrc.org>.

37 Art 2(2) ECHR.

39. These rights cannot be subjected to any all-encompassing limitation, such as that they are legally contingent on performance of set of duties and responsibilities. Their application regardless of such considerations is precisely the point of their existence.
40. Human beings have important social duties with which they are morally bound to comply so that society functions harmoniously. Such duties depend on the integrity of each individual and are not legally enforceable through the machinery of human rights. Of course, citizens in a democracy will have specific voting rights that are not shared by foreign nationals, as well as legal duties, for example to pay tax. These do not affect the universal application of the core human rights, regardless of citizenship. In terms of a bill of rights, the importance of social responsibilities and community relations is sometimes articulated in a preamble. A preamble, stating the purpose of the instrument, can emphasise that responsibilities are the (moral) counterpart to rights, even though the rights themselves are legally inalienable, and thus make a political point.

Constitutional implications of a new bill of rights

41. The effects of a British bill of rights are likely to reverberate through all branches of government. While most visibly affecting the role of the courts in interpreting its provisions, the potential change in relations between the executive, Parliament and the judiciary must be anticipated and planned for.
42. Protecting rights is already the joint responsibility of all branches of government. Inevitable tensions exist between the different institutions, but this does not preclude a co-operative approach to ensuring that the rights guaranteed to people in Britain are respected and upheld. At present, this joint responsibility is re-enforced by the activity of the Joint Committee on Human Rights (JCHR) at Westminster, whose remit now includes evaluating government responses to declarations of incompatibility under the HRA.³⁸
43. A new bill of rights must hold the government and its legislative agenda to account for its policies on rights. First and foremost, Parliament and its scrutiny committees must be thorough in their examination of the compliance of proposed legislation with international law standards and those under any new bill of rights; subsequently, it is for the courts to assess Parliamentary legislation and executive action in a human rights framework. As at present, the courts must be bold in defending human rights principles but also aware of when their institutional competence precludes them from entering in to certain areas.³⁹
44. The Prime Minister has expressed his intention to bring power back to Parliament. Increased focus on the Parliamentary process will complement any British bill of rights in the mould of the HRA, given that scrutiny of bills passing through the legislative process is one of its key features. An increased focus on bills in the Parliamentary arena at the legislative stage should help reduce the need for subsequent judicial intervention in relation to incompatible legislation. In 1993 when Labour leader John Smith committed his party to support a British bill of rights, it was as part of a

38 *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*, Joint Committee on Human Rights, Sixteenth report of session 2006-2007, HL 128/HC 728.

39 See, for eg, *Pretty v Director of Public Prosecutions* [2001] UKHL 61 – the courts recognised that it was not their role even to deem which rights had been engaged; the matter of euthanasia was one for the democratically elected legislature. See further Conor Gearty, *Principles of Human Rights Adjudication*, Oxford University Press, 2003, chapter six.

package designed to restore democracy to the people and counter the phenomenon of the 'elective dictatorship'.⁴⁰ With regard to judicial review of executive action also, the more that fundamental rights principles are ingrained in government bureaucracy and public authority decision-making, the more the need for court action can be minimised through conscientious policy-making.

45. How should these institutional relations be regulated in the context of a new British bill of rights? One suggestion is to open up more formal communication channels between the branches of government, enabling dialogue to reconcile the legislative, executive and judicial perspectives on fundamental rights issues. More generally, this report highlights the importance of framing discussions in terms of good governance. The pragmatic nature of the British constitution has encouraged incremental change over the years. Debate over such a central feature to a constitution as a bill of rights might now prompt a more comprehensive analysis of how our legal and political arrangements can be improved to ensure accountability, democratic participation and – at the most basic level – public awareness and appreciation of our constitutional system.

The structure of the report

46. The report is divided into four parts:
47. Chapter two examines the content of a British bill of rights. This controversial issue will be the first challenge to address. How will a British bill of rights differ from the ECHR, with its long established catalogue of guarantees? This chapter considers a number of categories of rights which might be included and explores why their inclusion merits consideration in a new bill of rights.
48. Chapter three addresses models of amendment procedure for a bill of rights. It proposes a number of methods to help entrench a bill of rights in our constitutional arrangements, thereby setting it apart from ordinary legislation and making it more difficult to alter or derogate from its provisions. Comparative experience is instructive, but Britain has particular constitutional arrangements which may require specific procedures to suit our system.
49. Chapter four considers the role of the courts in adjudicating a bill of rights. It discusses the appropriate scope of judicial powers as compared to those of the democratically elected branches of government in determining the parameters of fundamental rights.
50. Chapter five explores the crucial issue of the process by which a bill of rights is developed, subjected to public scrutiny and debate, and adopted into law. It considers how process can be just as important as the contents of any constitutional document.⁴¹ There are many different ways in which a bill of rights can be enacted and this chapter outlines and assesses a number of these, drawing on comparative research as well as previous experience in Britain.
51. Chapter six draws together a summary of the report and offers some conclusions on where to go from here in the debate over a British bill of rights.

40 John Smith, 'A New Way Forward', speech as leader of the Labour party, Bournemouth, 7 February 1993. The term 'elective dictatorship' was famously coined by Conservative Lord Chancellor, Lord Hailsham, in his critique of the former Labour government.

41 *Democratic Constitution Making*, US Institute for Peace, 2003.

52. Appendix one reviews the major features of a number of bills of rights instruments from comparative jurisdictions.
53. Appendix two presents a comparative table of constitutional rights systems.

Concluding remarks

54. A committee of the Society of Conservative Lawyers acknowledged in 1976:⁴²

A Bill of Rights can only operate as an effective safeguard if it commands the respect and confidence of those whom it seeks to protect. This it cannot do unless the public can reasonably expect it to be a permanent feature of our constitution, at least for the foreseeable future.

46. This statement reflects the emphasis placed in this report on democratic, political and public involvement and its importance if we are to seek to re-shape Britain's system of rights protection.
47. JUSTICE's report has drawn on the expertise of a committee of constitutional specialists, an interim consultation to which interested parties responded, and domestic and comparative research. It sets in context the discussions for what may prove to be a highly significant constitutional reform. Its effect is designed to be educative, bringing human rights protection into mainstream public debate. Above all, JUSTICE's contribution should assist in a positive and constructive process towards consensus on a system of rights protection in Britain which, while operating successfully in the courts and amongst all branches of government, also carries the support of the British public.

⁴² *Another Bill of Rights for Britain?*, A report by a committee of the Society of Conservative Lawyers, 1976, p10.



Chapter two

Content

1. The purpose of a British bill of rights, as addressed in chapter one, is to recognise, promote and protect a set of fundamental rights derived from international obligations and domestic traditions in a way that confirms them as part of our constitutional framework. It is to set out principles which, building on rule of law traditions in Britain, guide public bodies and can be interpreted by British judges. A British bill of rights might also represent the first plank in a new codified constitution.
2. The rights contained in the European Convention on Human Rights (ECHR) and incorporated into domestic law through the Human Rights Act 1998 (HRA) have enabled major progress in the protection of fundamental rights in Britain. This progress must be acknowledged in the debate over a British bill of rights. Discussions over a new constitutional document must establish that its content does not fall short of the rights guaranteed under the HRA. Moreover, the HRA must remain intact while any proposed bill of rights is debated and (with approval) enacted. It is possible, although a potential source for confusion in the courts, that a British bill of rights could be supplementary to the HRA. It may be that the HRA would fall into disuse with a new bill of rights in operation. However, in order to ensure there is no gap in protection, any decision that the HRA will be repealed should be made – if at all – only *after* the new bill of rights is firmly on the statute book.
3. The ECHR rights included in the HRA are the logical and necessary starting point for the content of a new British bill of rights. A domestic rights instrument would allow these rights to adapt to reflect changing times and traditional British practice. Opinion surveys continue to show strong support in favour of trial by jury and access to free healthcare.¹ Meanwhile, social and moral attitudes on issues such as sexual orientation; technological advances in areas such as surveillance and storage of personal data by companies and government departments; and the growing awareness of environmental issues all engage rights in a way which could not have been foreseen by the framers of the ECHR in 1950.
4. Given the potential to expand the rights contained in the ECHR, what should be the scope of the provisions in a new British bill of rights?

¹ For eg see ICM / Joseph Rowntree Reform Trust State of the Nation poll 2006. 89 per cent thought that a British bill of rights should include the right to a fair trial by jury; 88 per cent favoured inclusion of a right to hospital treatment on the NHS within a reasonable time.

5. The architects of the bill of rights must select and articulate in appropriate terms the individual rights to be guaranteed. A substantial level of party political and public support will facilitate this difficult process.
6. Bills of rights vary in terms of the particular rights they guarantee, though some rights (for example, the right to life and the right to be free from torture and inhuman or degrading treatment) are clearly minimum provisions in any such document. Most countries have adopted broadly framed provisions, imported wholesale from international human rights instruments. Some – most famously South Africa – provide a lengthy and detailed set of justiciable guarantees.²
7. In Britain, a major point of tension will be how far and in what way to build upon the provisions of the ECHR. The ECHR rights guaranteed by the HRA represent the closest Britain currently has to its own bill of rights. If political and popular opinion indicates that domestic rights protection should go ‘thus far and no further’, the case for change may be rejected. However, if agreement can be reached on a tailor-made British model, there is potential to advance the protection of rights in Britain.
8. Any drafting commission will be able to refer to a number of overseas models. In addition, it will be able to refer to British versions which have been proposed during debates on the subject over the last three decades. The most significant of the latter include those drafted by IPPR and by Liberty in 1991.³ The former is largely based on the ECHR and International Covenant on Civil and Political Rights (ICCPR). The latter draws more widely from a range of international and comparative documents, and includes additional rights such as the right to public information and freedom from medical experimentation without informed consent.
9. The ECHR and ICCPR form the core of most bills of rights, not only in countries within the Council of Europe (all of which have also incorporated the ECHR), but beyond. However, a charter of rights for the 21st century, free of the constraints of the international political climate which existed after World War II (within which the ECHR was drafted), allows scope for innovation. As a document of legal and political significance, its provisions must be effective in the courts and inspiring in public and political life. This requires a progressive approach that fills gaps left by the ECHR and takes advantage of developments over half a century of human rights protection at both international and national levels.
10. The respective roles of the elected branches and of the judiciary in relation to the provisions of a new bill of rights are discussed in later chapters. This chapter considers the content of a new British bill of rights. It addresses specific categories of rights, drawing on comparative experience to assess their viability. Finally, it explores other common features of bills of rights and assesses the options open to drafters.

2 Full text of the Constitution of the Republic of South Africa available at <http://www.info.gov.za/documents/constitution/index.htm>.

3 *The Constitution of the United Kingdom*, IPPR, 1991; *A People's Charter*, Liberty, 1991.

The legal and political status of the European Convention on Human Rights (ECHR)

11. One point of clarification must be made at the outset. The UK's relationship with the Council of Europe and its ECHR is now woven into our legal and political fabric.⁴ As a matter of political reality, any move to alter our model of rights protection must build on the foundations laid by the ECHR. Those who object to the ECHR itself and, with it, the UK's membership of the Council of Europe, must engage in a different debate. This applies also to our continuing membership of the European Union, which in practice is conditional on compliance with the ECHR.⁵ Britain cannot risk accusations of hypocrisy by distancing itself from the very standards it sets for others in its political and diplomatic relations.
12. Any proposed model for a British bill of rights must therefore be 'ECHR-plus'. A British bill of rights must not detract from any of the rights in the ECHR. The argument is sometimes made that a domestic bill of rights would encourage the European Court of Human Rights (ECtHR) to allow the UK greater flexibility under its doctrine of the 'margin of appreciation'.⁶ However, the crucial factor remains the *substance* of legal protection, not the fact that a bill of rights is presented as being specific to a particular country. The provisions of a British bill of rights will not affect the ECtHR's power to rule that a member state has breached the ECHR. States with their own constitutional bills of rights such as Germany (whose constitution gives even greater protection than the ECHR in some respects) continue to be subject to close adjudication by the ECtHR.⁷ Meanwhile, the ECtHR is increasingly receptive to case law developed under our current HRA, the quality of which has had significant influence on European human rights jurisprudence⁸ and is central to a proper understanding of how human rights work in the British context.
13. Much of the support for a British bill of rights stems from the wish to 'domesticate' human rights jurisprudence. British judges, adjudicating within the domestic context, would become more authoritative on the domestic constitutional text. It might be argued that this could stand the courts in good stead in terms of defending against potentially less well-informed decisions from the ECtHR, which lacks the insight of British judges in relation to the British system. The domestication

4 The Council of Europe, of which the UK was a founding state in 1949, has 47 member countries. Its stated aim, under Art 1(a) Statute of the Council of Europe, is to 'achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress'. Membership is open to all European democracies which accept the principle of the rule of law and are able and willing to guarantee fundamental human rights and freedoms. The Council of Europe's most significant contribution to European integration is the European Convention on Human Rights (ECHR). Adopted in 1950, the ECHR created the European Court of Human Rights (ECtHR) in Strasbourg, the highest European authority on fundamental rights and freedoms. The separate European Union (to which the UK acceded in 1973, as a member of what was then the European Economic Community) is the supranational organisation of 27 member states which cede authority to the EU for the mutual social and economic benefit of their people. The EU operates under the first and only supranational legal system, headed by the European Court of Justice in Luxembourg. Much EU legislation takes direct effect in domestic law and UK courts are obliged to work within the rulings of the European Court (s3(1) European Communities Act 1972). By contrast, the UK government must comply with terms of the ECHR, but UK courts are merely obliged to 'take into account' human rights decisions of the ECtHR at Strasbourg (s2(1) HRA).

5 A 'Memorandum of Understanding between the Council of Europe and the European Union', signed 10 May 2007 [CM(2007)74], shows the growing cooperation on enforcement of justice and human rights. The EU is expected to accede to the ECHR and Protocol 14 ECHR is designed to allow for this. An important factor is consistent case-law. The ECJ (the EU's supreme court) already treats the ECHR as if it were part of the EU's legal system to prevent conflict between its judgments and those of the ECtHR at Strasbourg. It is not certain that the ECHR would have developed as it has done if the EU (and before it the EEC and EC) had not existed. In July 2007, the Reform Treaty, the proposed replacement for the Treaty establishing a Constitution for Europe (European Constitution), contained a protocol binding the EU to joining. The EU would not be subordinate to the Council of Europe, but would be subject to its human rights law and external monitoring as its member states are currently.

6 David Cameron, 'Balancing freedom and security – A modern British Bill of Rights', speech to the Centre for Policy Studies, 26 June 2006.

7 The ECtHR recently ruled that Germany had violated Art 3 where there was forcible administration of emetics to a drug-trafficker in order to recover a plastic bag he had swallowed containing drugs (*Jalloh v Germany* 54810/00 [2006] ECHR 721).

8 Sir Nicolas Bratza, 'The Future of the European Court of Human Rights', Lincoln's Inn Lectures on European Human Rights Law, July 2003, p20, cited by Anthony Lester, 'The Utility of the Human Rights Act: a reply to Keith Ewing', PL 2005 249-258, at p255.

of rights would proceed on the basis that the ECHR rights already incorporated into British law constitute the minimum level of protection.

14. Inevitably, any proposal for a bill of rights which goes beyond the terms of the ECHR will prove contentious. The ECHR has existed since 1950 and its provisions are relatively well understood. The UK government was particularly sceptical of the EU's attempt to go beyond the relative clarity of the ECHR when it drafted its proposed EU Charter of Fundamental Rights in 2000.
15. Nevertheless, while any British bill of rights must ensure an ECHR-minimum, it is worth exploring options for a model which strengthens or expands the ECHR. If agreement were possible, it would constitute a significant advance in safeguarding rights, not to mention an educative process to encourage understanding of the nature of rights in the British constitution.

The ECHR – a floor, not a ceiling, of rights protection

16. The ECHR was ratified and later implemented by the UK on the basis that it provided a minimum level of protection for human rights. The Council of Europe and its European Court of Human Rights (ECtHR) see the ECHR standards as a minimum level of rights protection: 'There is no imperative that the parties to the Convention adopt a uniform approach, only that they should not fall below an irreducible minimum, which will be maintained by the Strasbourg institutions.'⁹
17. Ministerial statements made during the debates on the Human Rights Bill seem to endorse this approach – for example the then Home Secretary stated that the legislation 'will guarantee to everyone the means to enforce a set of basic civil and political rights, establishing a floor below which standards will not be allowed to fall'.¹⁰ The then Lord Chancellor also referred to the ECHR as 'a floor of rights', adding that: 'The [Human Rights] Bill would of course permit United Kingdom courts to depart from existing Strasbourg decisions and upon occasion it might well be appropriate to do so and it is possible they might give a successful lead to Strasbourg.'¹¹

Torture

18. One specific source of controversy must be addressed. This is the ECtHR decision in *Chahal*.¹² The ECtHR decided that, even where a non-British individual is considered to pose a threat to national security, under no circumstances can such a person be deported to another country where the courts assess that he or she may face a real risk of torture contrary to Article 3 ECHR.
19. The *Chahal* decision illustrates the admittedly difficult balance that the UK must strike as a signatory to the ECHR and subject to the jurisdiction of the ECtHR.¹³ Some argue that the decision imposes undesirable restrictions on the ability of the government to deal with threats to national security.

9 Stephen Grosz, Jack Beatson and Peter Duffy, *Human Rights: the 1998 Act and the European Convention*, Sweet & Maxwell, 2000, p20.

10 HC Debates col 769, 16 February 1998 (Second Reading).

11 HL Debates vol 1711, col 514, 18 November 1997.

12 *Chahal v United Kingdom* (1996) 23 EHRR 413.

13 The UK has currently joined litigation designed to reverse or limit the effect of *Chahal*. (*Ramzy v UK and Netherlands* (2006) No.25424/05). JUSTICE agrees with the Parliamentary Joint Committee on Human Rights (nineteenth report of session 2005-06, HL 185 I/HC 701-I) that such a move is not only worrying for the status of basic human rights in the UK but also potentially ineffective given our other international obligations.

However, in our view it signals the compromise with which we must live in a civilised society where even (especially) unpopular individuals share equal human rights.

20. The decision pre-dates the HRA and, provided that the ECtHR does not overturn it, will continue to have the same impact on any system of rights protection in Britain which post-dates the HRA. The UK cannot seek to use the adoption of a British bill of rights unilaterally to reverse a ECtHR decision. Furthermore, such an attempt would go against the UK's other international obligations, such as those under the UN Convention Against Torture.

Building on the ECHR: what are the options?

a) Modernising and strengthening the ECHR

21. The ECHR, drafted in 1950, understandably reflects the fact that it was drafted in difficult circumstances in the aftermath of World War II. Viewed through the lens of the 21st century, there is scope for improvement. Any amendments to the ECHR itself must be undertaken at European level and such an exercise may present insurmountable difficulties in terms of gaining agreement. Also, since the UK will remain bound by the ECHR, the drafting of a domestic bill of rights must increase rather than diminish its protection. Even before the HRA, some had highlighted the deficiencies of the ECHR, and had argued for expansion of its scope in a new home-grown document.¹⁴ There are several ways in which the scope of the ECHR could be enhanced in the provisions of a British bill of rights.

i) Reduction of specific limitations

22. Existing limitations and exceptions to rights in the ECHR could be reduced in the drafting of a British bill of rights. ECHR rights are currently limited by:
- specific limitations to individual rights which are set out in the ECHR itself (excluding the 'absolute rights' contained in Article 3 on torture and inhuman and degrading treatment, and Article 4 on slavery);
 - the general doctrine of a requirement of proportionality in the exercise of rights as developed by the ECtHR; and
 - the possibility for states to derogate from the ECHR in an emergency.
23. Several existing limitations to ECHR rights show potential for amendment. In some instances, the problem is one of language. For example, the right to liberty (Article 5) appears to set controversial parameters in its current form. Article 5(1)(e) allows the detention of 'alcoholics or drug addicts or vagrants'. It is doubtful that a modern bill of rights would include a right to imprison 'vagrants and alcoholics' merely for what they are rather than for what they have done.
24. The provision under Article 16 concerning restrictions on the political activities of aliens in the host country also seems inappropriate in a modern setting. While certain privileges such as the right to vote mark a distinction between citizens and non-citizens, the provision is also consistent with the aim of precluding a discrimination challenge where foreign nationals receive less favourable

¹⁴ For eg, see John Wadham, 'Why Incorporation of the European Convention on Human Rights is Not Enough' in Gordon & Wilmot-Smith (eds), *Human rights in the United Kingdom*, Oxford University Press, 1996, pp59-77.

treatment than others after admission into the UK. It therefore goes against the principle that fundamental rights – with the exception of voting rights – belong equally to both citizens and non-citizens (who have no voice in the domestic political process). Indeed, the Court of Appeal has stated that Article 16 ‘appears something of an anachronism half a century after the agreement of the Convention’.¹⁵

25. The right of privacy (Article 8) and the freedoms of religion (Article 9), expression (Article 10) and assembly (Article 11) are all subject to broad limitations which are contained in the second part of each article. Each right is qualified by a list of slightly varying provisions, but most have in common limitations which are:

... in accordance with the law and [are] necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

26. While ‘national security’ may be considered to be somewhat vague and challengeable, it is doubtful that any more satisfactory drafting could be achieved. As for the limitation based on the ‘prevention of disorder or crime’, it is reasonable to ask whether such an aim is not better covered by the provision on the ‘protection of the rights and freedoms of others’ (which makes clear that one person’s rights are not, in general, absolute, but are contingent on their not interfering with the rights of others). Exceptions based on the ‘prevention of disorder’ or the ‘protection of health or morals’ are not only vague but may be conducive to over-broad interpretation by government and public authorities. They are particularly problematic as limitations on the rights of privacy and the freedoms of religion, expression and assembly. They do not have a strong case for inclusion in a British bill of rights.

ii) Limitation clauses

27. It is possible that a British bill of rights can simplify the rather complex framework of limitations in the ECHR, streamlining them into a single, general limitations clause. Apart from the ‘absolute’ rights admitting of no qualification,¹⁶ most rights require balancing with other rights. The ECHR qualifies each such right separately with a clause which clearly articulates community values and interests that weigh against individual rights. By contrast, the South African, Canadian and New Zealand bill of rights models provide a single limitation clause applicable to all qualified rights. For example, Article 36 of South Africa’s Bill of Rights provides that:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- a) the nature of the right;*
- b) the importance of the purpose of the limitation;*
- c) the nature and extent of the limitation;*
- d) the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.*

¹⁵ *Farrakhan v Secretary of State for the Home Department* (2002) 4 All ER 289, at para [70].

¹⁶ Art 3 ECHR on torture and inhuman and degrading treatment and Art 4 ECHR on slavery.

Except as provided in subsection 1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

28. S5 of New Zealand's Bill of Rights Act 1990 provides that:

... the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

29. S1 of Canada's Charter of Rights and Freedoms is equally succinct, providing that:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

30. These examples may be more fitting for a modern bill of rights, emphasising a culture of rights rather than the uncertainties and safeguards in the ECHR which owe much to the political climate of 1950.

31. However, the general nature of the above clauses effectively allows so-called 'absolute' rights to be weighed against other considerations. This is clearly problematic. Indeed, a well known example from Canada saw a ruling from the Supreme Court that foreign nationals could, in certain circumstances, be sent back to their country of origin where they may face torture.¹⁷ This illustration shows the importance of defining exactly which rights may be limited if a general clause is to apply.

32. A general limitations clause could also make explicit provision for the doctrine of proportionality in relation to the exercise of rights. The doctrine has been developed by the ECtHR and adopted in domestic judicial review proceedings.¹⁸ It indicates the qualifications inherent in most rights and the balancing exercise that public authorities, including courts, must carry out in relation to their enforcement.

iii) Unratified Protocols

33. The UK has not yet ratified some of the protocols to the ECHR which contain substantive rights. While it has pledged to ratify Protocol 7¹⁹ after domestic legislative amendments, Protocols 4 (free movement) and 12 (equality) are yet to be ratified. Importantly, this has not prevented the UK courts affording protection to the rights contained in these provisions. The right to equality and non-discrimination in particular has been ensured in many cases by the courts, which have developed creative methods to fill apparent gaps. At the same time, it is worth reviewing these

¹⁷ *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3.

¹⁸ As confirmed by Lord Steyn in *R v Home Secretary, ex p Daly* [2001] UKHL 26; 2 WLR 1622.

¹⁹ Protocol 7 covers the prohibition of expulsion of lawfully resident aliens in certain circumstances (Art 1); right to review of sentence after criminal conviction (Art 2); right to compensation following miscarriage of justice (Art 3); prohibition on double jeopardy in criminal cases (Art 4) and right to equality between spouses (Art 5).

Protocols and the question of ratification if the UK is to adopt a more comprehensive and explicit approach to rights adjudication under a new British bill of rights.²⁰

34. Protocol 4 serves to:

- protect the right of everyone in the state to liberty of movement and freedom to choose their residence (Article 2);
- protect the right not to be expelled from, or to be refused entry to, the country of one's nationality (Article 3);
- prohibit the collective expulsion of aliens (Article 4).

35. The rights in Article 2, Protocol 4 are qualified rights which may be subject to restrictions in accordance with law and which are necessary in a democratic society. The rights in Articles 3 and 4 are not subject to any qualification. Protocol 4 has been ratified by 38 of the 46 Council of Europe member states.²¹ The UK government has continuing concerns over Articles 2 and 3 of Protocol 4 which could be taken, respectively, to confer rights in relation to passports and a right of abode on categories of British nationals who do not currently have that right. However, the terms of Article 2 of the Protocol are substantially similar to an equivalent provision in the International Covenant on Civil and Political Rights, which the UK has already ratified (though subject to reservations regarding disciplinary procedures for members of the armed forces and regarding nationals of dependent territories in relation to the right to enter and remain in the UK and other dependent territories).²² Consideration should be given to ratification with appropriate reservations – if the UK government can justify these – to overcome specific issues of concern.

36. Protocol 12 to the ECHR guarantees a free-standing right to equality. It states:

- The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

37. Protocol 12 is designed to advance the ECHR's protection of equality beyond the limited guarantee in Article 14 ECHR, which provides a right to non-discrimination only in the enjoyment of other rights under the ECHR. For Article 14 to apply, it must be established that the difference in treatment falls within the scope of one of the other ECHR rights. If it does not, regardless of how bad the discrimination is, the claim will be dismissed. This means that for those areas outside the scope of the ECHR, it will be impossible to rely upon the ECHR for protection from discrimination. Protocol 12 came into force for those states that ratified it on 1 April 2005.²³

20 For a more detailed examination, see *Review of International Human Rights Instruments*, Joint Committee on Human Rights, seventeenth report of session 2004-2005, HL 99/HC 264. The report also reviews the reservation entered by the UK to the Optional Protocol to the Convention on the Rights of the Child on Children in Armed Conflict. The Protocol, ratified by the UK on 24 June 2003, commits states to taking all feasible measures to ensure that members of national armed forces under the age of 18 do not take a direct part in hostilities. The UK made an 'interpretative declaration' of the Protocol, qualifying its provisions in certain circumstances. The JCHR criticises the declaration for being 'overly broad' and 'undermin[ing] the UK's commitments ... not to deploy under-18s in conflict zones' (at para [41]).

21 All member states except Andorra, Greece, Liechtenstein, Monaco, Spain, Switzerland, Turkey, and the UK.

22 Art 12 ICCPR states that '1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence; 2. Everyone shall be free to leave any country, including his own; 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant; 4. No one shall be arbitrarily deprived of the right to enter his own country'.

38. The UK government has stated that whilst it agrees in principle that the ECHR should contain a free-standing guarantee of non-discrimination, the text of Protocol 12 contains ‘unacceptable uncertainties’. In particular, it claims that:
- the potential application of the Protocol is too wide, since it covers any difference in treatment, applies to all ‘rights set forth by law’ in both statute and common law and could therefore lead to an ‘explosion of litigation’;
 - ‘rights set forth by law’ may extend to obligations under other international human rights instruments to which the UK is a party;
 - it is unclear, pending decisions by the ECtHR, whether the Protocol permits a defence of objective and reasonable justification of a difference in treatment, as applies under Article 14 ECHR.
39. Constitutions with explicit equality provisions include those of South Africa, Canada and India.²⁴ At the time of enactment, these countries faced particular cultural and ethnic divides. More recently, the state of Victoria, Australia enacted a charter of rights containing provisions on equality.²⁵ While there is existing protection for equality in Britain, it is somewhat disparate. The most recent legislation is the Equality Act (Sexual Orientation) Regulations 2007, making it unlawful to discriminate in the provision of goods, facilities and services on grounds of sexual orientation. This marks significant progress in combatting discrimination on a case by case basis, but a more coherent approach is desirable. The principle of equality is a fundamental and essential human right and is recognised as such in all the main international human rights treaties. Over the past decade there has been increasing recognition that access to equality and to protection from discrimination under UK law is piecemeal and, at times, ineffective. The ‘constitutionalisation’ of the fundamentally important issue of equality would establish a framework for future legislation. A constitutional statement of equality rights would also go beyond considerations of legal protection. It would present a statement of national identity and unity, serving to create an official point of reference and a set of principles to permeate the work of government and public life more generally.
40. Ratification of Protocol 12 would provide protection in domestic law equivalent to the equality rights which bind the UK internationally under the ICCPR, UN Convention on the Elimination of Racial Discrimination (CERD), and the International Covenant on Economic and Social Rights (ICESCR). The government has accepted the rights enshrined in Protocol 12 in its international commitments to human rights instruments.
41. In the absence of a free standing right to equality, other means have been found of working around opposition to incorporation of an explicit equality right under Protocol 12. Article 14 ECHR, in conjunction with the right to a private and family life (Article 8), has led to significant advances, for example in relation to discrimination for age, disability and transgender issues. This is in spite of there being no specific reference to these areas in terms in the ECHR or HRA. British courts have gone beyond Strasbourg in interpreting rights in relation to gay couples. In turn, such bold reasoning led to the government embracing civil partnerships.

23 Albania, Armenia, Bosnia and Herzegovina; Croatia; Cyprus; Finland; Georgia; the Netherlands; San Marino; Serbia and Montenegro; and Macedonia.

24 The South African constitution gives explicit protection to equality, subject to a ‘reasonableness’ requirement in its ‘progressive realisation’. In Canada, equality is protected through an equality provision. In India Directive Principles are employed to deal with matters of equality.

25 The Victoria Charter of Human Rights and Responsibilities 2006.

iv) 'Updating' rights

42. The provisions of the ECHR have provided progressive rights protection and, to a large extent, have moved with the times through judicial interpretation. However, there are certain areas in which social attitudes and technological advances have progressed so significantly that the framers of the ECHR could not have foreseen such developments. This section suggests a number of areas which should be examined for inclusion in a modern bill of rights. Their inclusion would require a degree of public and political consensus on their desirability.

Children's rights

43. Children's rights are recognised internationally in the United Nations Convention on the Rights of the Child (CRC). The CRC grants children (aged 17 and under) a comprehensive set of economic, social, cultural and civil and political rights. Adopted by the UN in November 1989, many of the rights in the CRC are transposed from other human rights instruments, but the treaty introduces specific human rights necessary to ensure a childhood characterised by dignity, respect and maximum fulfilment. Considered further below from the international perspective,²⁶ children's rights are prominent among categories of rights which so far have been left out of the UK's jurisdiction.

Surveillance and data protection

44. In terms of technological advancement, the issue of surveillance – the gathering of personal data by both public and private sectors in Britain – has sparked much public debate. Principally engaging the right to privacy, it is an issue of particular relevance in discussions on a British bill of rights, since current legal and practical protections of the right to privacy are severely lacking in Britain.²⁷ Britain overtakes other countries with its DNA databases, CCTV cameras per capita, and the adoption of biometrics in passports and drivers' licenses.²⁸
45. The way in which privacy is protected under UK law differs significantly from continental legal systems, notwithstanding the overarching protection provided by the right to respect for private life under Article 8 ECHR. The conventional approach of the common law is one of 'negative liberty' – privacy was traditionally protected by the absence of legislation rather than a specific set of legal principles. The under-developed common-law on privacy could benefit from clarification in a British bill of rights. The rights to private life and family (Article 8) and the obligation on public authorities (including the courts) from acting incompatibly with the HRA (s6 HRA) provide an important check against arbitrary and intrusive measures, but judicial supervision cannot maintain a sufficient guarantee of privacy in Britain. Nor can Parliament leave to the courts its responsibility for good governance, in particular by restraining the executive's enthusiasm for the administrative benefits of surveillance and data-gathering. However, a constitutional document guaranteeing safeguards against increasingly intrusive surveillance measures by government should send strong signals to all three branches as to the importance of this right and the need for institutional cooperation in protecting it.

26 See paras 112-126.

27 For a more detailed consideration of the issues see *A Surveillance Society?* JUSTICE submission to the House of Commons Home Affairs Committee (April 2007), at <http://www.justice.org.uk/images/pdfs/surveillancesocietyHACsubmissionapril07.pdf>.

28 For a full analysis, see *A Report on the Surveillance Society*, Surveillance Studies Network, September 2006; report presented to the 28th International Data Protection and Privacy Commissioners' Conference in London, hosted by the Information Commissioner's Office.

46. The last few years have seen the creation of a national DNA database (NDNAD) that is in part dependent on retaining the DNA of persons who are arrested but not convicted or charged. This may contribute to creation of a two-tier society of the 'monitored' and 'free'.²⁹ The UK may soon have identity cards and a national database on children containing highly sensitive information, such as medical records, accessible to a wide range of police, social workers and bureaucrats.
47. Article 8 ECHR (right to privacy) requires 'necessity' and 'proportionality' on the part of government in relation to intrusions on privacy. Yet, arguably a prime example of the government's failure to take these to heart is the increasing scope of the NDNAD, to include the retention of DNA samples of those persons arrested but either not charged or subsequently acquitted.³⁰ The genetic information contained in DNA constitutes the most intimate medical data belonging to individuals. The retention and use of an individual's DNA sample without their informed consent surely represents a serious infringement of personal privacy. This infringement is compounded by the fact that an unspecified number of people may be able to access this information via the database over an indefinite period of time.
48. If Article 8 ECHR by itself is insufficient to provide wholesale protection of privacy under UK law, it is equally unlikely that existing privacy safeguards, such as the Data Protection Act 1998 (DPA) or the Regulation of Investigatory Powers Act 2000 (RIPA), are capable of providing comprehensive protection. This is particularly evident in relation to the regulation of CCTV cameras. In 2003, for instance, the European Court of Human Rights found that the lack of any legal remedy for a person whose failed suicide attempt was captured on CCTV and then distributed to the media by the local authority meant that the UK was in breach of Article 8 ECHR.³¹ Although the facts of the case show a measure of support for the use of CCTV (the CCTV operator contacted the police), they also highlight the manifest lack of effective regulation for how CCTV is used.³² All these considerations indicate that the time may be right seriously to debate inclusion of a right to privacy specifically in relation to surveillance and data protection.

Equality on the basis of sexual orientation

49. In terms of changing social attitudes, one area of rights protection which has experienced limited legal advancement but far greater social advancement is the issue of gay rights. UK courts have made significant progress in affording protection to gay people under the HRA. However, it is worth considering explicit provision for gay rights in a British bill of rights. As for the ECHR, Article 12 includes a right to marry and found a family, but only for men and women. The Article makes no provision for partnership between lesbians or between gay men. Nor does it apply to transsexuals. Moral perspectives on such matters have certainly shifted since 1950. While there exists no consensus among signatories to the ECHR, this should not matter in the context of drawing up a British bill of rights.

²⁹ Dominic Grieve, 'Liberty and Community in Britain', speech to Conservative Liberty Forum, 2 October 2006.

³⁰ See ss63 and 64(1A) Police and Criminal Evidence Act 1984, as amended by s82 Criminal Justice and Police Act 2001 and s10 Criminal Justice Act 2003.

³¹ *Peck v United Kingdom* (2003) 36 EHRR 41.

³² Although the DPA governs certain aspects of CCTV usage (specifically the handling of sensitive personal data), it does not provide – and was never intended to provide – a comprehensive legal framework governing CCTV placement and usage. Indeed, it is unclear whether the DPA safeguards even extends to CCTV used for undirected or passive surveillance, since the Court of Appeal has held that 'personal data' within the DPA applies only to 'information relating to an identified or identifiable individual', *Durant v Financial Services Authority* [2003] EWCA Civ 1746.

50. UK case law has shown the judiciary ready to use its interpretative role to achieve justice where, on the face of the statute, there is none.³³ Moreover, given the recent domestic legislation in the UK allowing for civil partnerships, the time may have come to debate inclusion of equal rights in a more concrete sense. Such a move may be highly contentious and for the moment such issues may remain in the political domain and subject to democratic debate rather than through development by the courts. Yet if public and political consensus is gained on this matter then there is no reason why gay rights should not be explicitly incorporated in a British bill of rights. At the least, a free standing equality provision could list 'sexual orientation' as one of the grounds on which there is to be no discrimination. Such explicit provision is found, for example, in South Africa's Bill of Rights.

The environment

51. Finally, a major cause of public and political debate – with potentially far-reaching legal consequences – is the impact of environmental degradation. The right to a clean environment looks set to grow in prominence, with increased awareness of the health dangers associated with unclean work and living environments and the issue of environmental protection against global warming becoming a worldwide focus of attention. Certain countries, such as India and South Africa, have become forerunners on the justiciability of the right to a clean environment. This warrants consideration for a forward-looking British bill of rights.
52. The many linkages between protection of human rights and protection of the environment have long been recognised. The 1972 United Nations Conference on the Human Environment declared that 'man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself'. Included in the South African constitution, and developed as a fundamental right in some jurisdictions (often under the heading of the right to life) as well as in the EU Charter of Fundamental Rights,³⁴ the right to a clean environment has the advantage of being not only universally relevant but also increasingly central to the UK's domestic concerns.
53. The South Asian experience illustrates the potential for a justiciable right. India, Pakistan and Bangladesh use various constitutional rights to protect the environment. In India, the right to life has been extended to include the right to a healthy environment and this right has been incorporated, directly or indirectly, into the Supreme Court's judgments. Here the state has a duty to protect and preserve the ecosystem as part of the Directive Principles of State Policy. In the same way, Article 37 EU Charter of Fundamental Rights gives the right 'to a high level of environmental protection' in the policies of the European Union. On the other hand, the constitutions of Bangladesh and Pakistan do not provide any direct protection of the environment. However, other constitutional rights in these jurisdictions, such as the right to equality and right to property, have also been applied in protection of the environment.
54. Article 24 of South Africa's constitution guarantees that everyone has the right:

1) *to an environment that is not harmful to their health or well-being; and*

³³ For eg see *Ghaidan v Godin Mendoza* [2004] UKHL 30.

³⁴ Art 37 EU Charter of Fundamental Rights provides that 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'.

- 2) *to have the environment protected, for the benefit of present and future generations, reasonable legislative and other measures that –*
 - a) *prevent pollution and ecological degradation*
 - b) *promote conservation*
 - c) *secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.*

55. Under the South African constitution, the state has a duty to protect, promote, respect and fulfil socio-economic rights. Article 24 demonstrates that the right to a healthy environment is part of the socio-economic rights of South Africa and that the government must act reasonably to protect the environment in a number of ways while building the economy and society. As in South Asian jurisdictions, the right is often applied by the court to give a meaningful interpretation of right to life.
56. The right to a clean environment is protected elsewhere in Africa. S20 of the 1999 Constitution of Nigeria outlines provision for the state to protect and improve the environment and safeguard the water, air and land, forest and wildlife in Nigeria. An environmental right has been defined as ‘the right of individuals and peoples to an ecologically sound environment and sustainable management of natural resources conducive to sustainable development.’ Being part of state policy, this section is not, however, justiciable. S33(1) states that ‘every person has a right to life and no one shall be deprived intentionally of his life.’ This right could stretch to protect the right of citizens against environmental degradation and many argue that this right to life along with s20 confirm a right to a healthy environment.
57. Cases related to human rights and environmental degradation are common in Nigeria, particularly in the area of oil exploration. The provision in the constitution presupposes that the government of Nigeria should always take necessary precautions to protect the rights of the people in all policies formulated to exploit natural and human resources of the state. The provision has therefore provided a legal basis for defending against the environmental degradation of parties of Nigeria while protecting those in whose interest it is to live in a healthy environment.
58. The application of rights to the environment attracts similar criticisms to those raised in relation to socio-economic rights. For such provisions to work, there must be coordination between government branches and awareness that, as in India, courts may enter uncertain territory through decisions which, for example, protect the environment (eg closure of polluting tanneries) at the expense of loss of employment in already poor areas.
59. The most recent example of constitutional protection for environmental rights, and the example which is most relevant to the UK in terms of country profile, is found in the French Charter on the Environment 2004.³⁵ This Convention now forms part of the core Constitutional ‘bloc’. The text acknowledges the basic principles of an ecology that focuses on the future of mankind, with rights and accompanying duties. It sets the right to live in a balanced environment which shows due respect for health at the same level of importance as the human rights of 1789 and the welfare rights of 1946. France is the first nation to devote an entire constitutional declaration to environmental protection. It has shown a progressive approach in this field, though it is notable that the declaration was not passed by popular vote.³⁶

35 Full text of the Charter at <http://www.assemblee-nationale.fr/english/8ab.asp>.

60. The case for including such a right as that to a clean environment goes against the approach taken by many pressure groups in Northern Ireland's bill of rights process, who argue that the focus should be on rights particular to the region. By this it is meant rights which are relevant and apply within the administrative and legal system and which tie in with regional variations in culture and language, for example. The task is to find a sufficiently agreed balance of values, however, and there is a case to be made for Britain including certain environmental provisions in a new bill of rights.

b) Traditional and common law domestic rights

61. The principle of protecting liberty in the domestic context can be traced through the formal Bill of Rights 1688, described as 'An Act for declaring the Rights and Liberties of the Subject', the Petition of Right 1628, providing for 'divers[e] Rights and Liberties of the subject' and, before these, Magna Carta, the 'Great Charter of the Liberties of England'. These constitutional documents are now largely of historical interest. As Lord Donaldson, then Master of the Rolls, said in the *Spycatcher* case:³⁷

The starting point in our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law or by statute.

62. While this point encapsulates the traditional British approach, it is an approach which may founder if there are no limits to what may be done by statute to remove liberty.
63. Safeguards for the individual have, in keeping with common law traditions, been shaped by ad hoc development of specific remedies to meet particular problems. The most famous is habeas corpus, securing the right of personal liberty from unlawful or arbitrary detention. Since the 1970s the courts have seen a rapid elaboration of these common law principles through the growth of judicial review of administrative action. Indeed, the government's report to the UN Human Rights Committee in 1989 confidently asserted that the reason for the absence of a written constitution or comprehensive bill of rights in the UK was that:

the rights and freedoms recognised in other countries' constitutions [are] inherent in the British legal system and protected by it and Parliament unless they [are] removed or restricted by statute.

64. Certainly the common law, independently of the HRA and the ECHR, has increasingly come to recognise certain existing fundamental rights to which all citizens are entitled. Some argue that such rights are capable of being characterised as 'constitutional rights'.³⁸ One of these rights is that of access to the courts.

36 It was attached to a special vote in the National Assembly which would open the way for a referendum on the EU constitution. This undermined resistance from the political right, which was willing to go along with the add-on to ensure support for the EU. While the EU referendum was later defeated by a popular vote, the environmental charter (which was not put to the popular vote) had already prevailed by a margin of 531 to 23 in a special joint session of the French Parliament.

37 *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109.

38 See eg *R v Lord Chancellor, ex p Lightfoot* [2000] QB 597, 609B, a concept traced back to *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198, 210A, though there are much earlier illustrations, such as in *Re Boaler* [1915] 1 KB 21, 36 (CA): 'One of the valuable rights of every subject of the King is to appeal to the King in his Courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him, or has been committed by another subject of the King' (Scrutton J)). As was said in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) [2003] QB 151 at [62]: 'In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional ...'.

i) Access to courts

65. The right of access to the courts is dealt with in the ECHR under Article 6(1), which provides:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

66. Given the differences between the various legal systems of Council of Europe countries, a British bill of rights could make this provision more robust and give it specific meaning in the domestic context. Access to the courts is at the forefront of those rights recognised as ‘common law constitutional rights’. As confirmed by Lord Steyn:³⁹

the right of access to justice ... is a fundamental and constitutional principle of our legal system.

67. The right of access to the courts is repeated in numerous human rights instruments⁴⁰ and in other domestic bills of rights. Article 34 of South Africa’s Bill of Rights provides that:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

68. There is a strong case for inclusion of access to the courts (including access to tribunals) in a British bill of rights, not least because it is the right through which all other rights may be protected. The fundamental nature of the right was again recognised in the challenge to the Hunting Act 2004 in a House of Lords judgment:⁴¹

In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.

69. As asserted extra-judicially by Lord Bingham:⁴²

the right of unimpeded access to a court as a basic right, [is] protected by our ... domestic law, and in my view ... comprised within the principle of the rule of law.

70. These sentiments were argued forthrightly when, in its Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, the government attempted to remove judicial review in certain immigration cases. Its attempts were widely recognised to violate rule of law principles and a crucial ruling established several decades ago in *Anisminic Ltd v Foreign Compensation Commission*,⁴³ illustrating the courts’ reluctance to give effect to any legislative provision that aimed to exclude their jurisdiction in judicial review. Ultimately, courts are a coexisting sovereignty with Parliament.

39 *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2003] 3 WLR 252 at [26].

40 Most recently in Art 47 EU Charter of Fundamental Rights.

41 *Jackson and others v Her Majesty’s Attorney General* [2005] HL 56, per Lord Steyn at para [102].

42 Lord Bingham, ‘The Rule of Law’, speech given at Cambridge Centre for Public Law, 27 November 2006.

43 [1969] AC 147, [1969] WLR 163.

The most effective way for governments to infringe rights is to remove the jurisdiction of the courts to protect rights, but *Anisminic* showed that even when such an exclusion is relatively clearly worded, the courts will hold that it does not preclude them from scrutinising the decision on an error of law and quashing it when such an error occurs.

71. The right carries resource implications and the issue of legal aid has been the subject of national debate in recent years. Problematically, only the wealthy or very poor (who qualify for legal aid) tend to be able to afford to bring a case. Legal aid issues feed into the right of access to the courts, though the principle of access to justice as a fundamental right remains important in itself, independently of legal aid.
72. Article 47 EU Charter on Fundamental Rights provides an example of a broad right of access to justice:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

73. The third provision is wider than the equivalent provision in Article 6 ECHR which is limited, for example in civil cases to cases involving civil rights and obligations. The right does not require legal aid in every case. For example, proceeding relating to asylum claims would not be covered. The right is carefully worded: it allows means testing and the development of alternative dispute resolution. The original civil legal aid scheme was explained to Parliament as having the purpose:⁴⁴

to provide legal advice for those of slender means and resources so that no one will be financially unable to prosecute a just and reasonable claim or defend a legal right ...

74. This example provides a well-drafted statement of purpose which might be used as a blueprint for a British bill of rights.
75. Access to justice is crucial for non-British nationals who are outside the political process and so do not have a vote. Refugees and asylum seekers, therefore, have a special need of access to judicial review owing to the gravity of their cases. The most fundamental of all human rights is the individual's right to life and an asylum decision may put the individual's life at risk.⁴⁵ While this is recognised in existing legal aid arrangements, it is also worthy of constitutional protection.

⁴⁴ *Encouraging early resolution; discouraging unnecessary litigation*, Legal Action Group response to Legal Services Commission consultation paper, 2004.

⁴⁵ *R v Secretary of State for the Home Department*, ex p Bugdaycay [1987] AC 514, 531E-G per Lord Bridge.

ii) *Trial by jury*

76. There is scope for putting a particularly 'British' interpretation on certain rights provided for in broad terms by the ECHR. Most often cited in the domestic context is the archetypal British 'right' – trial by jury. While British judges can shape to UK specifications the entitlement of a 'fair trial' under Article 6 ECHR, trial by jury is not, as such, a protected right. Indeed, over 95 per cent of criminal cases in the UK are heard by magistrates without juries. The remainder tried by jury in the Crown Court number about 15,000 per year.⁴⁶ The right to jury trial is limited to more important cases, yet the government has sought to remove the right in certain types of serious case. This goes against public and Parliamentary opinion, which tends to give overwhelming support to the inclusion of protected trial by jury in a British bill of rights.⁴⁷
77. In March 2007 the House of Lords voted against implementing s43 Criminal Justice Act 2003, designed to do away with jury trial in serious fraud cases. The arguments for its retention go to the heart of the case for its inclusion in a British bill of rights. In an adversarial system of justice like that of England and Wales, trial by jury for all but minor crimes is seen as a fundamental right. If judge-alone trials take place, public confidence in the criminal justice system may decline, though admittedly some argue that judge-alone trials deliver better justice because the duty to give reasons renders them more transparent. Much of the argument for inserting jury trial into a British bill of rights is driven by a strong cultural attachment, stemming back to its inclusion in Magna Carta. However, a stronger argument rests with the democratic nature of jury trial. When Parliament legislates, it is doing so for the benefit of the people as a whole and by their authority – it is therefore fitting that citizens should sit in judgment of their peers under these laws. British people feel that very strongly.
78. The constitutions or bills of rights in other common law jurisdictions all recognise the importance of the right to jury trial. Canada's Charter, at Article 11(f) – 'Proceedings in criminal and penal matters', provides that:
- Any person charged with an offence has the right ...*
- ... except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.*
79. Similar provisions are guaranteed in the United States, New Zealand and the Commonwealth of Australia.⁴⁸ Likewise, there is a strong argument that in England and Wales jury trial has acquired constitutional importance.
80. While the guarantee of a fair trial under Article 6 ECHR has been interpreted domestically as protecting jury trials, inquisitorial systems such as those of many European states traditionally provide entirely different safeguards against unfair trials. Judges, for example, are involved at

⁴⁶ *Guide to Jury Trials and Juries*, General Council of the Bar of England and Wales, 30 April 2007.

⁴⁷ The ICM / Joseph Rowntree Reform Trust State of the Nation poll 2006 found that 89 per cent of people would include right to fair trial by jury in a bill of rights. However, difficulties are immediately apparent over how, and by whom, this issue would be negotiated and decided.

⁴⁸ See the 6th amendment to the US Constitution, s24(e) New Zealand Bill of Rights Act 1990, and s80 Commonwealth of Australia Constitution Act 1900 [which provides a guarantee in relation to trials on indictment for federal crimes].

the investigation stage, and have a duty to ascertain the truth rather than merely to act as an arbiter between prosecution and defence. Thus, the difference between the British legal custom and provisions of the ECHR must be recognised and serious thought given to concretising a fundamental entitlement in our system which, in one poll, 89 per cent of the population considered to be a first priority in a bill of rights.⁴⁹ The need for this appears more pressing in the light of recent steps taken by the government to restrict jury trial in some circumstances.

81. To complement any provision on trial by jury in a British bill of rights, a number of procedural and defence rights in the criminal justice system might be ripe for inclusion. In addition to recent threats posed to jury trial, there has been the conversion of what many view as criminal offences into civil offences, effectively lightening the standard of proof on the prosecution. Concerns have been voiced in particular over developments in our criminal law in terms of changes to the admissibility of previous convictions before a court or compromises to the right to silence. It has been argued that these long established common-law rules should not have been challenged, even though legislation which does so has been deemed compatible with the ECHR. Debate on a British bill of rights will give an opportunity to reconsider these provisions.

iii) Good administration

82. Given the relatively recent and major expansion of the field of administrative justice, the right of access to good administration is increasingly a priority. Article 6 ECHR provides for a 'fair and public hearing within a reasonable time by an independent and impartial tribunal' in the determination of one's 'civil rights and obligations'. However, it is time to question whether these rights and obligations – construed relatively narrowly – should carry a broader meaning than in the ECHR. The guarantees in Article 6 could apply in relation to cases involving tax disputes, welfare benefits and the right to housing, for example.
83. Inclusion in a bill of rights of provisions on access to independent and impartial administrative tribunals could underline Britain's commitment to due process as part of the rule of law. The major trend over the last thirty years has been the development of judicial review and principles of just administration, for example by the ombudsman. These are now established features of the legal and political landscape. Their growth has been organic, without constitutional protection, and it may be fitting that they continue to develop in the same fashion. However, their inclusion in a British bill of rights merits consideration.
84. The administrative sphere of justice has also grown due to a revolution in various forms of alternative dispute resolution, such as mediation and 'proportionate dispute resolution'. Procedural rights and core due process requirements may benefit from protection as they are developed.
85. Bringing administrative justice provisions in line with those already set out in the ECHR might also involve the provision of a legal duty to give reasons for administrative decisions. Comparative examples are instructive. In particular, Article 33 of the South African Bill of Rights makes exemplary provision for administration of justice:

1. *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*

⁴⁹ The ICM / Joseph Rowntree Reform Trust State of the Nation poll 2006.

2. *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*
3. *National legislation must be enacted to give effect to these rights and must*
 - a) *provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
 - b) *impose a duty on the state to give effect to the rights in subsections (1) and (2); and*
 - c) *promote an efficient administration.*

86. These issues of administrative justice and tribunals are pertinent in Britain particularly given that discussions for the establishment of a common tribunal system with a common administration are underway.

87. Again, the EU Charter of Fundamental Rights is helpful in this context. Article 41 on the right to good administration provides that:

1. *Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the Institutions, bodies and agencies of the Union.*
2. *This right includes:*
 - *the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*
 - *the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
 - *the obligation of the administration to give reasons for its decision*
3. *Every person has the right to have the Union make good any damage caused by its Institutions or by its servants in the performance of their duties, in accordance with the general principle common to the laws of the Member States.*
4. *Every person may write to the Institutions of the Union in one of the languages of the Constitution and must have an answer in the same language.*

88. Also coming under the umbrella of ‘good administration’ are provisions (in both criminal and civil areas of law) on due process. Such provisions are strong in other common law jurisdictions and in the EU Charter. Canada’s Charter is notable in providing for a lengthy category of ‘Legal Rights’ (Articles 7-14), which cover the liberty of the person, search or seizure, detention or imprisonment, arrest, proceedings in criminal and penal matters, treatment or punishment, self-crimination and the provision of interpreters. Such provisions are covered to an adequate extent in the ECHR under Articles 5 and 6, though again the disparities between the European legal systems to which they refer suggest that important due process rights in the British legal system could – and should – be made explicit in a document drafted in the domestic context.

89. A final point should be made in relation to ‘homegrown’ traditional and common law rights. The case for their explicit incorporation in a new bill of rights is particularly strong given that the level of protection afforded to these rights should be the same as that afforded to ECHR rights. At present, there is an extra level of appeal above the House of Lords – the ECtHR – for rights contained in the ECHR. It would be highly undesirable were a ‘two-tier’ system of rights to develop. Creating a new document which included a more comprehensive set of rights would give equal status to rights deriving from different sources of law and could be a point of reference also for the Strasbourg court in the event that common law and tradition rights came into play in a case before it.

c) Economic, social and cultural rights

90. Economic, social and cultural rights (ESC rights) are found in several international human rights instruments and in varying forms in certain domestic bills of rights. Supporters of incorporating these rights argue that they fit with civil and political rights (CP rights) as two parts of an interdependent whole.⁵⁰ They also facilitate the advancement of a rights culture by protecting the most basic day-to-day needs such as food, clothing, housing and health. Opponents argue that they are merely aspirational rights and place an obligation on government to expend resources in accordance with judicial rulings, which undermines the separation of powers and the legislature's expertise in allocating funds.
91. The Universal Declaration on Human Rights, from which all other human rights instruments ultimately flow, treats all rights as inseparable in terms of their nature. The UK government's position, in least in foreign affairs, is that: 'all human rights are universal, indivisible, interdependent and interrelated. Economic, social and cultural rights therefore have equal status with civil and political rights'.⁵¹ However, it qualifies this in that 'whereas the latter do not depend on significant resources, the former can only be realised progressively, within the limitations imposed by the availability of public resources'.
92. The existing legal protection for economic, social and cultural rights reveals a disparate collection of international obligations and domestic legal provisions. Some have argued for their inclusion in a British bill of rights and opinion polls indicate the popularity of this idea. The issue remains controversial, however, with its wide-ranging and potentially problematic practical effects.
93. At present, ESC rights are guaranteed most obviously by EU laws and directives, with the European Court of Justice (ECJ) as the final arbiter on their effect in Britain. Other international obligations are contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR), European Social Charter, International Labour Organisation Conventions and the EU Charter on Fundamental Rights (the EU Charter), though these have only a marginal impact in practice and require enacting legislation to render their provisions legally binding in domestic law. An extensive range of domestic legislation also affords protection to the substance of ESC rights under duties imposed on public bodies, for example in relation to housing, education, healthcare, employment relations and discrimination.⁵² Finally, s6 HRA binds courts themselves to act compatibly with ECHR rights (as when developing the common law) and s2 HRA requires them to take account of decisions of the European Court of Human Rights (ECtHR), which may itself have referred to international treaties guaranteeing ESC rights.
94. A British bill of rights could adopt ESC rights in a number of ways. Those provided for in international treaties (the ILO Conventions, Revised European Social Charter 1996, the EU Charter, or the ICESCR) could be partly or wholly incorporated, as with the ECHR in relation to civil and political rights. Alternatively, a 'home-grown' list of rights could be drawn up. Different models show varying levels of justiciability. Under the ICESCR, for example, the obligation is for states to

50 The view is that the philosophical division between CP rights and ESC rights derives from the competing ideologies of the West and the Soviet Union post WWII when the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) were created.

51 *Human Rights Annual Report 2006*, Foreign and Commonwealth Office, p233.

52 Thus, the level to which ESC rights are protected is established by government and Parliament and overseen by public bodies responsible for social provision. Anyone falling outside the scope of legislation has no overriding ESC right on which to rely, apart from whatever protection may be found under the HRA.

take steps to facilitate the ‘progressive realisation’ of ESC rights. While it is important not to depart dramatically from the British legal culture, which has traditionally viewed these rights as belonging to the political arena, there are arguments to support the introduction of at least some judicial involvement.⁵³

95. The distinction between CP rights on one hand and ESC rights on other is rooted in history rather than any intellectual coherence. If it is correct that ESC rights have the same importance as the CP rights contained in the ECHR, there is a logical case for their incorporation. Second, the argument that the vague nature of ESC rights renders them unsuitable for adjudication may not be decisive. Vaguely framed rights such as the right to ‘respect for family life’ under Article 8 ECHR seem no more readily justiciable than the ‘right to education’ under Article 13 ICESCR, which guarantees available and accessible secondary education for all. Third, Britain is a relatively wealthy country and does not have the same resource limitations as other less developed countries. At the same time, the country faces serious problems of poverty and homelessness. In the absence of other effective means of ensuring basic entitlements, a rights-based judicial process might facilitate their enforcement.⁵⁴ Fourth, while some overseas courts have broad powers of review in relation to ESC rights, and have occasionally run into logistical problems in the exercise of these powers, there are a variety of ways in which British courts might protect ESC rights effectively but to a lesser extent.⁵⁵ Finally, the engagement of CP rights can become distorted to accommodate socio-economic values where their legal recognition is lacking.⁵⁶ It is debatable whether positive obligations under Article 3 ECHR should be the only safeguard against such ill-treatment.⁵⁷ Beyond these considerations, there is also public support for some ESC rights, particularly, for example, in relation to medical care on the National Health Service.⁵⁸
96. There are three major models of adjudication, adopted by South Africa, India and Canada respectively which demonstrate how ESC rights may be protected in an appropriate way. Beyond these, it is relevant to highlight further experience from Europe and Latin America.

i) Progressive realisation

97. South Africa’s constitution explicitly provides for a range of economic, social and cultural rights. For example, Article 26(1) guarantees that ‘Everyone has the right to have access to adequate housing’ and Article 27(1) guarantees that ‘Everyone has the right to have access to a) health care services,

53 These reasons are largely drawn from JUSTICE’s report *Inquiry into the Concluding Observations of the UN Committee on Economic Social and Cultural rights – Joint Committee on Human Rights*, June 2003.

54 As recognised by the Parliamentary Joint Committee on Human Rights (JCHR), commitment to ESC rights requires ‘government, Parliament and the courts to make efforts to ensure the fullest possible compliance with the terms of the Covenant’. This assertion of joint responsibility confirms that courts have a role to play, in conjunction with the other branches of government, in protecting ESC rights. Moreover, a rights-based approach in the courts can be crucial to combating these problems and ESC rights standards provide an appropriate yardstick by which such exclusion can be measured and addressed.

55 Justiciability of rights may even be a matter to be determined on a case by case basis. Problematically, UK law currently does not (in any meaningful sense) even acknowledge ESC rights as human rights, let alone provide for their protection in the same way that the HRA protects ECHR rights. It may be that not all ESC rights are suitable for incorporation as justiciable provisions, but it does not follow that none of them are.

56 Nor is asylum the only area which illustrates the existing gaps. A rights-based approach to the adequacy of housing provides a useful illustration for justiciability of ESC rights. While courts are ill-placed to adjudicate general policy decisions as to allocation of resources for housing, they are well-placed to determine factual questions such as whether particular accommodation is unfit for human habitation. Given their experience of balancing relevant considerations in other rights based areas, eg qualified ECHR rights under the HRA, it is unlikely that UK courts would not be competent to carry out a similar balancing exercise in relation to a right to adequate housing. See also *Republic of South Africa and others v Grootboom and others* [2000] (11) BCLR 1169.

57 Despite confirmation of the state’s positive obligations under Article 3 ECHR, the right to be free from inhuman and degrading treatment is clearly not the only right engaged, for example, regarding destitute asylum seekers. The refusal of the Secretary of State to provide support would surely engage Arts 9 (social security), 11 (standard of living), and 12 (physical and mental health) ICESCR.

58 The ICM / Joseph Rowntree Reform Trust State of the Nation poll 2006. 89 per cent would support this right in a British bill of rights.

including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'. Both are identically qualified in that '(2) The state must take reasonable legislative and other measures, *within its available resources* [emphasis added], to achieve the progressive realisation of each of these rights'.

98. The South African Constitutional Court has adopted the standard of 'reasonableness' as its primary adjudicative tool in relation to these rights. This goes beyond bare 'rationality' review and has substantive content.⁵⁹ The reasonableness standard originates from a case⁶⁰ which concerned access to adequate housing for the homeless. The presence of ESC rights in a bill of rights can fundamentally alter the ways in which judicial rights discourse is articulated, both concerning the interpretation and understanding of these rights themselves and the ways in which they influence the interpretation and content of other rights. The impact of the case itself should not be overestimated, however. The court can still adopt a narrow and deferential approach to interpreting 'available resources' and will be slow to interfere with policy choices made for their allocation.⁶¹

ii) Directive Principles of State Policy

99. India has used the Directive Principles of State Policy (DPSP) in Part IV of its constitution as powerful interpretative devices.⁶² Originally non-justiciable, the Indian Supreme Court has used them to redefine fundamental rights in the constitution to impose positive duties on the state. The principal means by which the court has amalgamated CP rights and ESC rights has been Article 21 (guaranteeing the right to life) which, deriving its force from the DPSP, has produced a stream of positive duties.⁶³ The guiding principle is that fundamental rights cannot be enjoyed without basic ESC rights. Indeed, the court sees rights as including active empowerment, specifically through education, which itself has been held to be an enforceable right.⁶⁴ The approach is progressive, but the court has been highly controversial, particularly where its activism has taken it into areas usually viewed as the preserve of the executive. Detailed court orders have not always met with co-operation from state officials and have been criticised for inconsistency with existing statutes, despite the court's insistence that their implementation to safeguard rights should override statutory provisions.⁶⁵

59 As confirmed in *Khosa and Mahlaule v Minister for Social Development* [2004] (6) S.A. 505 (CC).

60 *Republic of South Africa and others v Grootboom and others* [2000] (11) BCLR 1169.

61 *Soobramoney v Minister of Health KwaZulu Natal* [1997] (12) BCLR 1696.

62 Article 37 states that: 'Application of the principles contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws'. Around 15 principles are listed including, for example, the duty of the state '(47) ... to raise the level of nutrition and the standard of living and to improve public health'. More specific provisions include the principle '38(d) that there is equal pay for equal work for both men and women'.

63 Thus, it entails the right to livelihood, 'since no one can live without the means of living'. Similarly, a worker's right to health is an 'integral facet of meaningful right to life'.

64 *Mohini Jain v State of Karnataka* AIR 1992 SC 1858.

65 *Mehta v Union of India* (1999) 6 SCC 9. The inclusion of ESC rights in the DPSP framework in India was influenced by a similar format in the Irish constitution, and has since been emulated in other jurisdictions, including the African jurisdictions of Namibia and Uganda. It has had particular impact in the South Asian region, for example in Bangladesh, where the Supreme Court recognised that artificial divisions between 'fundamental rights' and DPSP should not prevent it acting to safeguard public health (linked to the right to life) in a case concerning contaminated imports of powdered milk. *Dr Mohiuddin Farooque v Bangladesh and others* (No 1) 48 DLR (1996) HCD 438.

iii) Equality

100. In the absence of express provision protecting ESC rights, further creative judicial approaches have been adopted. In Canada the Supreme Court has used the equality provision under s15 of the Charter ('Equality before and under law and equal protection and benefit of law') to protect ESC rights on the basis that similar treatment may not always guarantee substantive equality. What has been sought, according to former Supreme Court Justice L'Heureux Dube, is a 'contextual and empathetic approach to ensuring each person's human dignity'.⁶⁶ The approach the courts have taken is that whilst s15 does not impose upon governments the obligation to act to remedy the symptoms of systematic inequality, it does require that the government should not create further inequality. Thus, in the context of healthcare, a group of deaf individuals succeeded in challenging the failure of a provincial government to provide sign-language interpreters as part of its publicly funded healthcare system.⁶⁷ This was discriminatory on the basis that government should ensure, in providing general benefits to the population, that disadvantaged members of society are able to take full advantage of these benefits. Here, effective communication was integral to the delivery of medical services and the court's interpretation thus avoided a 'thin and impoverished view ... of equality'.⁶⁸

iv) Other approaches ensuring a 'minimum core' guarantee

101. Other jurisdictions outside those three most cited have shown a willingness to engage with ESC rights. In Europe, the Swiss Federal Court has determined an implied constitutional right to basic necessities, which can be invoked by both Swiss citizens and foreigners. The Court held that it lacked the competence to determine resource allocation but said it would set aside legislation if the outcome failed to meet the minimum claim required by constitutional rights.⁶⁹ In South America, the Constitutional Court of Colombia, in a series of cases since 1992 covering unemployment subsidies or water supply for those living in refuges, has recognised a fundamental right to what it is called the 'minimo vital'. According to this jurisprudence, the government is obliged to take all those positive and negative measures in order to prevent individuals from being deprived of the most basic conditions that allow her or him to carry on a decorous existence.⁷⁰

102. Judicial enforcement of social and economic rights that is confined to enforcing minimums, however, may risk encouraging governments to meet only minimal standards when resources are available for fuller enjoyment of social and economic rights. In situations of greater resources, courts have been comfortable enforcing social and economic rights 'at the higher end', in light of the standard of 'available resources'. Again, practice elsewhere in Europe is instructive. For example, in Finland, where social and economic rights are largely justiciable, decisions have been made faulting local authorities for failing to take sufficient steps to secure employment for a job seeker, speedily find a child-care placement for a family and provide suitable shoes for a woman with a physical disability.⁷¹

66 See for example decisions such as *Corbiere v Canada* [1999] 2 SCR 203 and *M v H* [1999] 2 SCR 203. However, this approach has been noted for its potential to cause confusion to claimants (Peter Hogg, *Constitutional Law of Canada*, Carswell, 2002, p1059).

67 *Eldridge v British Columbia* [1997] 3 SCR 624.

68 *Ibid*, para 73. Taken from Iain Byrne, 'Making the Right to Health a Reality: Legal Strategies for Effective Implementation', Commonwealth Law Conference, London, September 2005.

69 *V v Einwohnergemeine X und Regierungsrat des Kantons Bern* (BGE/ATF 121 I 367, Federal Court of Switzerland, of 27 October 1995). See also Constitutional Court of Hungary, *Case No. 42/2000 (XI.8)*; *BverfGE 40, 121 (133)* (Federal Constitutional Court of Germany).

70 *Sentencia T 426* of 24 June 1992, Sala Segunda de Revisión de la Corte Constitucional.

v) *Judicial competence in socio-economic issues*

103. Traditionally, ESC rights have been regarded as belonging to the realm of political rather than judicial assessment, owing to the need for accountability to the electorate for the way in which competing claims on resources are administered. There are exceptions however, such as where those affected by decisions do not have a voice in the political process. Asylum seekers are the paradigm case and judicial intervention to ensure state responsibility can further, rather than hinder democracy. Moreover, even those who formally have a vote may not be able to participate fully in citizenship without state action to further social rights to education and health, for example. The optimum balance might be to have constitutional protection for the enforcement of basic rights so that they could not be denied by executive action. However, decisions on priorities and resources should be left to democratic political decision-making.
104. Judges may be thought to lack the relevant expertise and subtlety to make decisions on duties with complex polycentric implications requiring a more policy-based approach.⁷² This does not mean that judges can have no role at all in supervising positive duties of public authorities in relation to ESC rights.⁷³ A prudent approach might be for the drafting of a bill of rights to find some way in which these rights could be provided for in a general sense but preserve ultimate political responsibility for their fulfilment.

vi) *Recent UK cases of interest*

105. Recent British case law has signalled some judicial willingness to engage with rights which may be regarded as socio-economic. One case concerned the refusal to support asylum seekers on the ground that asylum had not been claimed 'as soon as reasonably practicable' after arrival in the UK. Asylum seekers were consequently left destitute, forbidden both from seeking employment or claiming state support.⁷⁴ The court subjected UK legislation to review according to standards set out by the ECtHR, despite the considerable resource implications. It found that the UK government had breached its positive obligations under Article 3 ECHR not to subject individuals to inhuman or degrading treatment.
106. Explicit recognition of a duty for progressive realisation of (at least certain) economic and social rights might be viewed as a logical extension of the acknowledged positive obligations under Article 3 ECHR. For example, the refusal of the Secretary of State to provide support to asylum seekers might engage Articles 9 (social security), 11 (standard of living), and 12 (physical and mental health) ICESCR.

71 See respectively *KKO 1997: 141 (Employment Act Case)* Yearbook of the Supreme Court 1997 No. 141 (Supreme Court of Finland); *Case No. 5 98/225 (Child-Care Services Case)* Helsinki Court of Appeals 28 October 1999; *Case. No. 3118 (Medical Aids Case)* Supreme Administrative Court, 27 November 2000, No 3118. The European Committee on Social Rights, after acknowledging the difficulties of the French government providing education to persons with autism, held that: [N]otwithstanding a national debate going back more than twenty years about the number of persons concerned and the relevant strategies required, and even after the enactment of the Disabled Persons Policy Act of 30 June 1975, France has failed to achieve sufficient progress in advancing the provision of education of persons with autism.

72 Though for a different view on judicial competence, which sees judges as no less legitimate than elected representatives as decision makers on matters of national security in relation to terrorism suspects, see David Feldman, 'Human Rights, Terrorism and Risk: The Roles of Politicians and Judges', PL 2006, 364.

73 In the *Gosselin v Quebec (Attorney General)* case in Canada the court concluded that there was a right to welfare sufficient to meet one's basic needs, without addressing how much expenditure by the state was necessary in order to secure that right. Indeed, in advanced welfare states there will frequently be express statutory guidance, as there was in this case. Moreover, as the UN Committee on Economic, Social and Cultural Rights has noted, '[w]hile the respective competences of the different branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications'.

74 *Limbuella v Secretary of State for the Home Department* [2005] UKHL 66.

107. Other domestic case law has shown signs that the courts may be willing to use a wider proportionality test to review policies of government and public bodies in relation to ESC rights.⁷⁵
108. The asylum seeker case referred to above did not require recourse to explicit arguments of economic and social guarantees. However, other cases continue to illustrate the harsh consequences for claimants of not being able to argue ESC rights which have either been incorporated into domestic law or constitutionally entrenched. For example, the UK was ruled not to have breached Article 3 ECHR by deporting a failed asylum seeker with terminal HIV/AIDS back to Uganda, where effective treatment would cease.⁷⁶ If this claimant did not reach the threshold for Article 3 protection, it is clear that the threshold has been set high. The scope of the protection offered to seriously ill people who have no legal right to remain but face illness and death on expulsion appears narrow indeed. It is possible that the decision could have differed if the claimant had been able to argue a right to receive treatment as part of a right to health under domestic law and that, given her serious condition, it was unreasonable to deport her.
109. These indicators, however, do not make the case for an entire 'package' of ESC to be imported and any notion that judges will decide political prioritisation on policy issues may present insurmountable obstacles to their incorporation.
110. In terms of the standard of judicial review, the judiciary would have to adjust their processes to adjudicate upon cases where ESC rights were engaged. Courts would have to modify their reluctance to enquire into the facts of cases when having to rule on the broad question of whether government was bringing about 'progressive realisation' of ESC rights. More generally, they would be required to approach the processes of evaluation in a more wide-ranging fashion. Building on developments in public law over recent decades, the HRA has shifted judicial attitudes further from traditional and narrow statutory construction and deference to the executive. Courts are still cautious about venturing beyond the reach of statute but increasingly they are required to look to the spirit rather than the letter of the law, engaging in an assessment of 'proportionality' with regard to executive action and legislative provisions.
111. A rights based approach to economic and social guarantees may present an appealing option to those who wish not to rely on the uncertainties of political decision making for their enforcement. Incorporation of ESC rights in any proposed British bill of rights might be seen as an exercise in progressive, yet pragmatic development of human rights protection. However, the pathway is strewn with obstacles, particularly the need for public consensus on an expanded role for the judiciary. The ongoing Northern Ireland bill of rights process demonstrates the difficulties of

⁷⁵ *R v East Sussex County Council, ex p Tandy* [1998] 2 All ER 769 (in which the House of Lords refused to downgrade mandatory duties to provide a sick child with a suitable education to discretionary obligations) and *Coughlan v North and East Devon Health Authority* [2000] 3 All ER 850 (in which the Court of Appeal decided the closure of a nursing home breached the disabled residents' legitimate expectations that this would be their 'home for life' and their rights under Article 8 ECHR). Notably, however, these cases did not involve large resource allocations. In the context of medical treatment, Mr Justice Laws in the Child B case (*R v Cambridge HA, ex parte B* [1995] 2 All ER 129) said that public authorities must do 'more than toll the bell of tight resources' when a life was at stake. The Court of Appeal overruled his decision, stating that 'difficult and agonising judgements have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients'. However, this reticence to intervene might fade if people were given socio-economic rights, since the courts could begin to review policies within the wider perspective of the principle of 'progressive realisation', a principle which, argue Stuart Weir (ed) and Ellie Palmer in *Unequal Britain*, Politico's Publishing, 2006, 'offers an escape from the rigidities of the current impasse'. In the context of destitution through non-provision of asylum support, it is clear that human rights include a right to a minimum standard of living. Lord Hoffman has stated that human rights are rights: 'essential to life and dignity of an individual in a democratic society. The exact limits of such rights are debatable and although there is not much trace of economic rights in [the ECHR], it is well arguable that human rights include the right to a minimum standard of living, without which many of the other rights would be a mockery', *Matthews v Ministry of Defence* [2003] 1 AC 1163 at para [21].

⁷⁶ *N v Secretary of State for the Home Department* (2005) 2 AC 296.

securing agreement on more adventurous rights provisions. Moreover, incorporation of ESC rights in a bill of rights and a newly defined role for the courts cannot alone bring about social justice. Human rights are the joint responsibility of all branches of government, which necessitates a comprehensive and joint approach ensuring that economic and social entitlements penetrate executive policy decisions and the Parliamentary process, as well as any judicial deliberation.

d) Rights contained in international and other bills of rights

Children's rights

112. One particular area where the UK trails behind compared to overseas and international rights instruments is children's rights, outlined above.
113. The starting point for discussion of children's rights is the UN Convention on the Rights of the Child (CRC). The CRC is the second most widely ratified international treaty⁷⁷ and the most far-reaching and comprehensive of all human rights treaties. It is broadly agreed that the CRC has brought about a qualitative transformation of the status of children as the holders of rights. Just after the UN voted to adopt the Convention in 1989 the then head of UNICEF said at a press conference in New York:⁷⁸

For children, [the CRC] is the Magna Carta. To get one common doctrine is a near miracle in its own right ... It creates a new international norm.

114. The UNICEF Innocenti Research Centre examined the legal status of the UNCRC in nearly 30 states in Europe and central Asia and found that:⁷⁹

... the CRC has been incorporated directly into the national law of most of the countries whose legislation was reviewed. In some, it was incorporated automatically by existing constitutional principles; other countries adopted legislation for this purpose. Many of the new constitutions adopted by countries in Central and Eastern Europe over the last 15 years contain relatively generous provisions concerning the rights of the child. In contrast, only two of the Western European countries covered by this study [Belgium and Iceland] have amended their constitutions to enhance the rights of the child ... All of the countries studied have made substantial changes in their legislation to better protect the rights of children.

115. Children's rights have evolved in a number of distinct phases at the international level since the beginning of the 20th century.⁸⁰ The most recent phase, from around 2001, has seen a process of consolidation for previous achievements in this area, accompanied by a degree of reaction against the entrenchment of children's rights in some respects. This is partly due to the 'post September 11 syndrome' in many countries, which focused attention on security concerns, often at the expense of human rights generally. Nevertheless, a positive endorsement of progress has come from the

77 There are now 192 States Parties to the CRC. Only Somalia and the US have yet to sign the Convention for it to achieve universality. The CRC is surpassed by only the Geneva (1949) Conventions, which achieved universality in August 2006.

78 'Assembly adopts new Convention ... for the children of the world... - international Convention on the Rights of the Child', *UN Chronicle*, March 1990.

79 *The General Measures of the Convention on the Rights of the Child, The process in Europe and Central Asia*, UNICEF Innocenti Research Centre, 2006.

Inter-American Court of Human Rights, which said that the CRC has wrought a fundamental transformation of the law governing children. They have now become 'subjects entitled to rights, [and] not only objects of protection'.⁸¹

116. The ECHR contains no provision specifically addressing children. Not until 1984 were children explicitly mentioned in one of the Protocols to the Convention. It is sometimes sought to justify the non-inclusion of children's rights in the Convention on a number of grounds. For example, civil and political rights protected by the ECHR are fully applicable to children; children's rights are also dealt with in the European Social Charter; moreover, the Council of Europe has adopted a range of specialist treaties some of which are entirely devoted to the rights of children, such as the European Convention on the Exercise of Children's Rights 1996 and other conventions dealing with adoption, the legal status of children born out of wedlock, the recognition and enforcement of custody decisions and on nationality. To date, however, these measures in relation to children's rights have achieved little in concrete terms.
117. The ECtHR has made only infrequent reference to the CRC in its judgments.⁸² Further, while the Court has at least been prepared occasionally to refer to the CRC, it has not consistently had regard to the jurisprudence of the United Nations Committee on the Rights of the Child. In general the CRC is more likely to be used either marginally to reinforce an already strong case, or in concurring or dissenting opinions.
118. In relation to the European Union, the Charter of Fundamental Rights contains several provisions relating to children. Two relate to education and child labour respectively and are formulated in classical pre-CRC welfare rights terms. Yet overall the Charter provisions relating to children do not present the most progressive model for Britain.
119. The CRC has brought about a strong impetus to efforts to include children's rights provisions in national constitutions, even though such measures are not necessarily required by the CRC.⁸³ Many states have a constitution which either accords constitutional status to ratified international human rights treaties or provides that they shall be considered to take precedence over inconsistent domestic law. Where such a provision exists, it will extend to the CRC, assuming the state in question is a party to it.⁸⁴ Otherwise, national constitutions can essentially be grouped into three types in this context – those which contain no express provisions relating to children;⁸⁵ those which promote special protection by calling for certain privileges to be accorded to ensure that

80 The first (1901 – 1947) ended the relative invisibility of children on the international agenda by drawing attention to issues such as child labour, hazardous work, trafficking and sexual exploitation. This phase saw the emergence of international children's rights NGOs, the adoption of key child-related ILO Conventions, and the proclamation of the 1924 Declaration of the Rights of the Child by the League of Nations. Phase two (1948 – 1977) saw the adoption of the four Geneva Conventions of 1949 which recognised children as a specific category of protected persons, the proclamation of the UN Declaration of the Rights of the Child of 1959 and the adoption of provisions relating to children in the Universal Declaration and the two International Human Rights Covenants. Phase three (1978 – 1989) focused on the International Year of the Child and the lengthy process of drafting and adopting the UNCRC. Phase four (1989 – 2000) saw the continuation of the international standard setting for children, including the landmark ILO Convention on the Worst Forms of Child Labour, the Landmines Convention and the two Optional Protocols to the UNCRC. During this period, the Commission on Human Rights also developed a major focus on children. Phase five, which began in 2001 has involved necessary consolidation of (and a degree of reaction against) previous gains as governments, as governments, NGOs and international agencies all began to realise the true enormity of the task they had set themselves. Philip Alston, John Tobin and Mac Darrow, *Laying the Foundations for Children's Rights*, UNICEF Innocenti Research Centre, 2005.

81 'Legal Status and Human Rights of the Child', Inter-American Court of Human Rights, Advisory Opinion QC-17/2002 of 28 August 2002, para 137(1).

82 Between 1992 and 2004, there were references in 28 judgments and the frequency of references has not increased significantly since that period. Philip Alston, John Tobin and Mac Darrow, *Laying the Foundations for Children's Rights*, UNICEF Innocenti Research Centre, 2005.

83 Art 4 CRC requires any state that becomes a party to it to 'undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised'. The constitutional practice of a country will be important in determining what is appropriate in the circumstances.

children are protected from threats to their well-being;⁸⁶ and the constitutions which reflect at least some of the principles recognised in the CRC.⁸⁷ South Africa is noteworthy as example of this last model. However, there is not necessarily a positive correlation between the extent of constitutional recognition and respect for the rights in practice.⁸⁸

120. The UK has not yet incorporated the CRC. It is not justiciable in its own right though it can inform judicial decision-making. There are good examples of UK courts applying the CRC.⁸⁹ When the courts apply the CRC there can be significant gains for affected children, though few cases concerning children make use of it. Nor have public bodies taken children's rights seriously, in line with their general failure to adopt a human rights framework since the HRA.⁹⁰
121. As seen in the experience of other countries who have incorporated the CRC, incorporation is workable. There is ample evidence that at least some explicit provision for children's rights is not only highly desirable but also necessary. The Children's Rights Alliance for England, in its preparations for the next UK examination by the UN Committee on the Rights of the Child, has identified at least 40 examples of outright breaches of the CRC.⁹¹ Introducing his first annual report, Professor Sir Al Aynsley-Green, Children's Commissioner for England, said: 'It is incredible that in one of the world's richest economies children and young continue to live in poverty, suffer abuse and be denied their human rights.'⁹²
122. The UK Parliamentary Joint Committee on Human Rights (JCHR) has inquired into the issue of incorporating the CRC.⁹³ Its inquiry followed concern expressed by the UN Committee on the Rights of the Child that the provisions and principles of the UNCRC, which are much broader than those contained in the ECHR, had not yet been incorporated into domestic law.⁹⁴ The then Minister for Children and Young People stated that the government was not looking to incorporate

84 Countries in this category include: Belgium, Bulgaria, Chile, France, Italy, Japan, Libya, Mexico, Netherlands, Portugal, Russia, Tunisia and Togo.

85 For example, Australia, Austria, Israel, Norway, Sri Lanka, Sweden, Tanzania, and United States. For those constitutions adopted after the completion of the CRC in 1989, although a significant number do include references to children's rights, a number maintained the old approach of not taking any specific account of children or of the concept of children's rights, despite the fact the governments concerned have undertaken a wide range of obligations by virtue of having ratified the UNCRC.

86 Constitutional provisions focused on special protection for children include the themes of 'general obligation to protect children or childhood' (as in Poland, Portugal, Spain, Turkey, Argentina, Brazil); 'equal status of illegitimate or abandoned children' (as in Brazil, Ghana, Ecuador, Germany, Italy, Spain, Uganda); and 'general obligation to protect children from exploitation, abuse and violence' (as in Albania, Brazil, Ghana, Portugal, Philippines, Uganda).

87 Well over 20 national constitutions possess this characteristic and have provisions or special sections dedicated to the protection of children's rights, for example, on juvenile justice (Malawi, South Africa, Namibia, Uganda); sexual exploitation (Brazil, Colombia, Ecuador); and participation (Angola, Colombia, Ecuador, Finland, Paraguay, Poland, Romania and Switzerland).

88 Lauren Spitz, 'Implementing the UN Convention on the Rights of the Child: Children's Rights Under the 1996 South African Constitution', 38 *Vanderbilt Journal of Transnational Law*, 854 (2005).

89 See, for example, *Mabon and Mabon* [2005] EWCA Civ 634, which concerned the rights of three brothers to have separate representation in proceedings relating to their parents' separation and who the boys should live with. Lord Justice Thorpe considered the obligations under Art 8 ECHR and Art 12 CRC. He ruled that the boys should have separate representation, stressing: 'Unless we in this jurisdiction are to fall out of step with similar societies as they safeguard Article 12 [of the CRC] rights, we must, in the case of articulate teenagers, accept that the right to freedom of expression and participation outweighs the paternalistic judgment of welfare.' (at para [28]). See also *R (Axon) v Secretary of State for Health* [2006] EWHC 372 (Admin), in which a mother of five children claimed that Department of Health guidance for doctors and other health professionals on advice and treatment to young people under 16 on contraception, sexual and reproductive health was unlawful. Mr Justice Silber referred to Arts 12, 16 and 18 CRC and stated: 'It is appropriate to bear in mind that the ECHR attaches great value to the rights of children ... Furthermore the ratification by the United Kingdom of the United Nations Convention on the Rights of the Child (UNC) in November 1989 was significant as showing a desire to give children greater rights. The ECHR and the UNC show why the duty of confidence owed by a medical professional to a competent young person is a high one, and which therefore should not be overridden except for a very powerful reason. In my view, although family factors are significant and cogent, they should not override the duty of confidentiality owed to the child.'

90 The Audit Commission found that 58 per cent of public bodies had 'not adopted a strategy for human rights' and had 'no clear corporate approach' and concluded, 'in many local authorities the Act has not left the desk of the lawyers'. *Human rights: improving public service delivery*, Audit Commission, 2003.

91 'What happened to childhood? How we are failing the young', *Independent on Sunday*, 10 June 2007.

92 <http://www.childrenscommissioner.org/annualreport.htm>.

the CRC or, indeed, individual elements of it. This was because CRC was framed in aspirational language and not in the sort of language that was easy to put into primary legislation. He pointed to areas where, he claimed, legislation was helping to enact the spirit of the CRC, for example the statutory guidance on listening to young people in schools which forms part of the Education Act 2001.

123. The JCHR did not accept that the goal of incorporation of the CRC into UK law was unrealisable. It said that the government should be careful not to dismiss all the provisions of the CRC as purely 'aspirational' and, despite the ways it listed in which the CRC is able to exert influence, it firmly believed that children would be better protected by incorporation of at least some of the rights, principles and provisions into UK law.
124. The JCHR thus voiced its support for incorporation.⁹⁵ Less than six months later, the all-party Parliamentary group for primary care and public health issued a report on children's policy that advocated full incorporation of the CRC. The influential group of MPs and peers argued that incorporation 'would provide a means for children, young people and their advocates to challenge any failures to consider their needs or respect their rights within the British courts'.⁹⁶
125. The government's response to the JCHR's inquiry also indicated a willingness to consider the merits of incorporation, saying that it looked forward to 'seeing practical suggestions for how [incorporation] might be achieved'.⁹⁷
126. The assent of Parliament to these rights and principles, which could be secured by incorporation, would be a positive step towards enlarging and reinforcing a 'culture of respect for human rights' in relation to children's rights in Britain. Children make up a section of society to which every individual at some point belongs. The current legal framework in Britain reveals inadequate and outdated levels of protection for children's rights, which should be a priority in discussions on reforming guarantees in a British bill of rights.

e) Tales of caution

127. Importantly, comparative experience sounds a warning as to ambitious inclusiveness of bills of rights. In particular, the Northern Ireland bill of rights consultation process has attempted to secure support for women's and children's rights as well as cultural (language) rights, but repeatedly failed to gain consensus. Indeed, the advice of the chair of the recent consultation process in Victoria, Australia is that it is crucial to maintain an appropriate and achievable objective for the particular society in question.⁹⁸ The European Charter of Fundamental Rights also illustrates that consensus on terms may come at the expense of a weak and unenforceable document. The Charter includes a wealth of valuable rights, yet the very condition of agreement by states parties in 2000 was that

⁹³ *UN Convention on the Rights of the Child*, tenth report of session 2002-2003, HL 117/HC 81.

⁹⁴ It encouraged government to 'incorporate into domestic law the rights, principles and provisions of the Convention to ensure compliance of all legislation with the Convention [and] a more widespread application of the provisions and principles of the Convention in legal and administrative proceedings...'

⁹⁵ 'We believe the Government should be careful not to dismiss all the provisions of the Convention on the Rights of the Child as purely 'aspirational' and, despite the ways we have listed above in which the CRC is currently able to exert influence, we firmly believe that children will be better protected by incorporation of at least some of the rights, principles and provisions of the Convention into UK law'. *UN Convention on the Rights of the Child*, JCHR tenth report of session 2002-2003, HL 117/HC 81, June 2003.

⁹⁶ *Do we need a more conventional nanny? Report of an inquiry into effective cross-departmental policy on children's issues*, All Party Parliamentary Group for Primary Care and Public Health, November 2003.

⁹⁷ *Government's Response to the Committee's Tenth Report of Session 2002-03 on the UN Convention on the Rights of the Child*, JCHR eighteenth report of session 2002-2003, HL187/HC 1279, November 2003.

its provisions, with their social and economic (and thus extensive financial) implications would not be justiciable.

Back to the beginning – a ‘people’s preamble’?

128. Many bills of rights begin with a preamble. A preamble to a British bill of rights is worth considering, not least because of its political value. While the provisions of a bill of rights are analysed and interpreted in the courts, such a document should aim also to be influential outside the courts. Though it was ruled out in debates preceding the HRA, a preamble presents the opportunity to state the purposes and values underpinning a bill of rights and to articulate the constitutional principles it seeks to enforce.
129. A preamble might also go some way to meeting the concerns of those who wish to emphasise social responsibility in addition to protection of rights in Britain. Historically, the aim of a bill of rights was to complement the duties already extensively laid down in statutory legislation. The point was to ensure that certain human rights, that need not be ‘earned’, were guaranteed and protected against the state’s legislative omnipotence.
130. The approach to this issue has differed across jurisdictions. The Victoria Charter of Human Rights and Responsibilities 2006 stipulates that ‘human rights come with responsibilities and must be exercised in a way that respects the human rights of others’. This provision was a direct result of community consultation,⁹⁹ which revealed positive support for the idea of a document recognising (at least in symbolic terms) the inter-related nature of human rights and responsibilities.
131. This example follows on from international treaties which include the notion of responsibility. The preambles to the two international covenants – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – refer to social responsibility and the consequent need to ensure all individuals can benefit from their provisions. Drawing from the Universal Declaration of Human Rights, they provide that:

... the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.

132. Crucially, it would be unthinkable to express rights as *conditional* upon the exercise of responsibilities.¹⁰⁰ Already, many rights, such as freedom of expression, are expressly limited by the rights of others, and this is built into the provisions of the ECHR. While inclusion of responsibilities may gain public and political support, they should not be used to appease those who are sceptical of bills of rights, or those who do not accept that basic rights are given without pre-conditions.

98 George Williams, ‘Victoria’s Charter of Human Rights and Responsibilities: lessons for the national debate’, Senate Occasional Lecture, Parliament House, 7 July 2006; at <http://www.humanrightsact.com.au>.

99 People perceived this as a way of addressing community problems beyond more ‘individualistic’ conceptions of human rights. Some argued in favour of both a right and a responsibility to vote, as recognised in Australia’s system of compulsory voting.

133. In discussions for the Northern Ireland bill of rights, the issue has been contentious. The Commission for the Administration of Justice (CAJ), an active NGO participant, has strongly resisted any suggestion that a theory of 'rights and responsibilities' could mean that people lose their inalienable rights if they act irresponsibly. Sir Nigel Rodley, UN Special Rapporteur on Torture and UK Expert on the UN Human Rights Committee has asserted that:¹⁰¹

it is self-evident that people have a whole range of responsibilities and obligations that they must conform to. The whole legal system and the whole political system of society import responsibilities on them, and ignorance of the law is no excuse. But that law itself must be consistent with international human rights standards for it to be worthy of respect.

134. The Northern Ireland Human Rights Commission in fact lent credibility to the idea of a bill of rights and responsibilities during debates. The latest draft proposals draw on international human rights texts to note that people have duties to other individuals and to the community in general and a responsibility to strive for the promotion and observance of the rights of all. The rights, however, are inalienable and are not forfeited on account of irresponsible behaviour.
135. Other considerations in terms of the content of a preamble include reference to those whom the bill of rights protects. The CAJ has argued against use of the phrase 'people of Northern Ireland', if only to avoid any suggestion that the rights that follow only apply to these people. Indeed, no British bill of rights can realistically seek to exclude asylum seekers, tourists, temporary residents etc from benefiting from the fundamental protections offered by such a document whilst in Britain.
136. Finally, a strong and succinct statement is likely to convey more successfully the essence of the document and achieve the aim of being widely understood, by the legal and political community as well as the general population, including children of school age.

Conclusion

137. It is clear that Britain has much to learn about alternative approaches to the drafting of bills of rights from comparative jurisdictions, both in terms of successful application of rights going outside the purview of the ECHR, and of the problems incumbent on courts and the other branches of government where the judiciary adjudicate an expansive range of entitlements. The ECHR has left gaps which, nearly 60 years on from its coming into force, could be rectified by way of a home-grown document. The increased focus on international obligations in all jurisdictions indicates the potential for embedding international standards in a new British constitutional document.
138. The decision might have to be made whether alignment with international standards or a focus on domestic needs is the priority, or whether an ambitious programme to ensure both can realistically

100 Art 18 of the German Constitution (the 'forfeiture' provision) has been cited as an example of the 'balance' to be struck between rights and duties, with negation of the latter impacting on entitlement to the former (see Jonathan Fisher, 'A British Bill of Rights and Obligations?' Conservative Liberty Forum, 2006). Yet Art 18 gives a misleading comparison. No applications for forfeiture of a right before the Federal Court have ever succeeded. The German constitution knows only one genuinely justiciable duty/obligation: national service for men (Article 12a). Other 'duties' are merely declaratory.

101 Sir Nigel Rodley, KBE, UN Special Rapporteur on Torture, and UK Expert on the UN Human Rights Committee, speaking at a CAJ event in May 2001.

be achieved. Any bill of rights will face charges that it fails to protect certain rights. The key to achieving a workable model for Britain will be to enhance already existing protections through provisions which the judiciary will be comfortable engaging and which the public agree to put into the hands of judicial arbiters. In addition to a robust legal framework, there must be room for political debate and engagement.

139. A final and important point relates to language. There is a decision to be made on whether the drafting of a bill of rights should be precise and therefore sometimes unavoidably complicated, or simple, in which case it probably needs a more detailed set of guidelines (as was provided for in the EU Charter of Fundamental Rights). The political value of a bill of rights makes it crucial that the resulting text should not be aimed at lawyers but at all those protected by its provisions, as well as those in the business of interpreting and enforcing those provisions. The balance is difficult yet workable.
140. A British bill of rights presents an opportunity to articulate the values of our society in a constitutional document. It demands a clear and complete set of provisions which define the relationship between the state and the citizen, empowering the latter to hold the former to account under constitutional guarantees which reflect the value of freedom in modern Britain. A significant challenge lies in making the content of the rights understandable to the general population, while giving sufficient detail to guide the elected branches and the judiciary on principles and practices specific to British legal and political culture, beyond those protected in the provisions of the ECHR. If such a document can be achieved – with broad consensus – it may be possible for Britain to move to a new constitutional settlement, with a British bill of rights appropriate for a 21st century democracy.



Chapter three

Amendment and derogation

1. Determining the legal and constitutional status of a British bill of rights is a contentious matter. Should a British bill of rights be entrenched? How easy should it be to amend? What should be its standing in domestic law? This chapter examines a range of options which draw on examples from overseas constitutions and from proposals put forward in the run up to the Human Rights Act 1998 (HRA).
2. This chapter identifies four options for amendment procedures:
 - a) Amending the Parliament Acts;
 - b) Special voting procedures;
 - c) Referendum;
 - d) Simple declaration against amendment.

It then considers the possibility of amending the HRA itself, in addition to the option of enacting a purely declaratory code of rights for Britain. Finally, it explores current derogation procedures under the HRA and how the process might be made more robust under a new British bill of rights.

3. It is important to bear in mind that, regardless of the legal status and model of amendment chosen for a British bill of rights, those rights deriving from the European Convention on Human Rights (ECHR) remain enforceable through the mechanism of the European Court of Human rights (ECtHR).
4. The challenge in prescribing a model for a British bill of rights is to allow for entrenchment of certain principles and values which Parliament cannot alter, while simultaneously affording the democratically elected legislature a key role in the determination of rights.
5. The term 'entrenchment' refers to two related but separate ideas in the context of a bill of rights. First, it can describe 'judicial entrenchment' – the fact that a bill of rights has some superior legal status and priority of enforcement over ordinary legislation. This is directly relevant to the role of the judiciary in relation to a bill of rights and the issue of justiciability. Justiciability concerns the role of the judiciary in adjudicating and enforcing fundamental rights provisions and the extent of the judiciary's powers, as against those of Parliament, to determine the meaning and scope of fundamental rights. These matters are dealt with in the next chapter.

6. This chapter deals with 'legislative' or 'procedural' entrenchment, which describes the fact that a special legislative process exists to govern future amendments to a bill of rights or measures which may temporarily to suspend the operation of the bill of rights.
7. Both 'judicial' and 'procedural' entrenchment serve in different ways to ensure that the rights guaranteed in a bill of rights remain unaltered. The legal status and enforcement model of a bill of rights prevents future 'indirect' amendment taking place via subsequent legislation which conflicts with its provisions. By contrast, the existence of special legislative processes for amendment and suspension control 'direct' amendment to the provisions of a bill of rights.
8. The effect of providing for special amendment procedures is to modify the doctrine of Parliamentary sovereignty. Parliament would seek to bind its successors in relation to specific legislative practices. There is a view that the consequence of this, in relation to justiciability, is to limit the extent of Parliament's authority (as against that of the judges) to define the scope of rights guaranteed in a constitutional document. In our view this is a logical, but not necessary, conclusion in relation to Parliament's powers.
9. There are several models of amendment which merit consideration. It should be noted that the most usual situation for a bill of rights, as observed from the practice of other countries, is that it is distinguished in some way from ordinary legislation. More often than not, it is accompanied by special procedures which make amendment politically difficult and even the cause for nation-wide debate.

Procedures for direct amendment to a bill of rights

10. The architects of a British bill of rights must consider matters of constitutional procedure in prescribing the circumstances in which the bill of rights or any of its articles might be made subject to some permanent amendment (be it through modification, subtraction or addition). The devices employed may thus help to achieve 'procedural entrenchment' of the bill of rights.
11. Procedural entrenchment of legislation is problematic. There is some doubt about how Parliament might bind its successors in order to restrict subsequent repeal or amendment. This section examines mechanisms that might be used, alone or in combination, in order to control direct amendment of the provisions of a bill of rights.
12. Amendments to any bill of rights may become desirable from time to time in order to meet changing social circumstances. Had the British government adopted the same human rights articles in a domestic UK bill of rights in the 1950s and 1960s as those which it helped draft for the rest of the Council of Europe in 1950 and for other members of the Commonwealth such as Jamaica in 1962, serious consideration would be given today to amending those articles. For example, amendments to non-discrimination articles would now need to include grounds of sexual orientation, age and disability. Similarly amendments to articles on freedom of the person would be needed to add a prohibition on medical or scientific experimentation on individuals without informed consent. In determining the ease with which permanent amendments might be made under the terms of the bill of rights, the drafters must bear in mind the negative possibility of a government taking office which sets about increasing the number of restrictions and qualification

of human rights and freedoms for the bureaucratic convenience of its own administrative powers or for ideological reasons.

13. If the bill of rights is to be entrenched in some way as a form of higher law, the framers of a British bill of rights must consider some special legislative process for amending its articles. Precise methods for amending constitutional documents such as bills of rights vary widely, but there are three broad types of procedure which are commonly adopted.
- First, in bi-cameral parliamentary systems, there is usually a requirement for both legislative chambers to agree to the proposed change. In the British context, this would involve amending the Parliament Acts of 1911-1949.
 - Second, there is often a requirement for special voting majorities in either or both chambers. For example in the US a two-thirds majority is required in both the House of Representatives and the Senate; and in Germany, amendments affecting the Basic Law require a two-thirds majority in both the Bundestag and the Bundesrat.
 - Third, a referendum of the electorate is sometimes required.

a) Amending the Parliament Acts

14. Under present UK constitutional arrangements, by far the most effective of these procedures would be to establish a requirement that the second chamber (House of Lords) gives its approval to all proposed amendments to the bill of rights. This is because the Parliament Acts allow the House of Commons, in certain circumstances, to overrule the House of Lords.¹ A requirement that both Houses of Parliament must approve all proposed amendments to a bill of rights might represent the closest to constitutional entrenchment possible under current British constitutional arrangements.
15. Such a move would enhance the constitutional authority of the House of Lords, which under the terms of the Parliament Acts only possesses a maximum power of one year's delay over legislation (with the exception of bills to suspend general elections and the approval of statutory instruments). The implementation of this amendment procedure would probably form part of a wider programme of parliamentary reform involving working out the basis for the future composition of a revised second chamber. This wider reform would also need to involve some modernising redefinition of the functions and powers of the UK second chamber generally. These might include, among others, the scrutiny and approval of emergency derogating measures from the bill of rights and the consideration of administrative and legislative compliance with human rights generally. Drafting the provision in the bill of rights that future amendments will require the consent of both Houses of Parliament should be straightforward. All that is needed is a reference to the 1911 Parliament Act, excepting amendments to the bill of rights from the terms of its provisions.

b) Requirement of special voting majorities

16. Special majority voting is more problematic. This is principally because it is not an established part of existing UK constitutional and political practice. In addition there is the problem of a sovereign Parliament which, in theory, can amend or repeal any legislative provision. There is no precedent for special majority voting in Parliament, though standing orders regulate voting practice by

¹ Exceptions are made for the life of a Parliament and money bills. The House of Lords may delay other primary legislation for up to one year. If the same bill is blocked by the Lords in the second session, it can be submitted for royal consent without the consent of the House of Lords.

laying down various requirements, for example that no fewer than 100 MPs must vote in support of a motion to end a debate in the House of Commons. The British government has included special majority voting in the amendment process of many of the Commonwealth constitutions it has drafted or helped draft for its former colonies and dominions, including Australia and South Africa.

17. An appropriate requirement for amending a UK bill of rights might be that the votes in favour must exceed one half of the total membership of the House concerned, or a two-thirds majority among those present and voting. Different or similar voting requirements might apply in each House. A two-thirds majority in both legislative chambers is the option most usually found abroad. This is the case in Canada, Germany and South Africa (in addition to support in six out of nine of the provinces). The same was supported by IPPR and Liberty in their draft bills of rights in the 1990s. By contrast, a Parliamentary majority suffices in New Zealand and Australian jurisdictions, where the bills of rights are ordinary statutes. The recent enactment process in the state of Victoria for its Charter of Rights and Responsibilities explicitly envisages amendment by providing that there be a review of the Act four years from its enactment and again in eight years.
18. A form of restriction was included in the UK context in a notable provision in the Northern Ireland Constitution Act 1973. This stated that 'in no event will Northern Ireland ... cease to be part of the United Kingdom without the consent of the majority of the people of Northern Ireland voting in a poll held for the purposes of this section'. This constitutional guarantee was repeated in s1 Northern Ireland Act 1998, which established the devolved legislative body for Northern Ireland.

c) Referendum

19. There is an argument that such entrenchment procedures would be inoperative because a sovereign Parliament cannot bind its own future actions. Consequently a later Act passed under ordinary legislative procedures (for simple majority voting) amending or repealing the bill of rights would be enforced by the courts. Apart from the fact that such logic would be misplaced in the political context of enacting a constitutional bill of rights, there is support for the view that Parliament can bind itself as to the 'manner and form' of future legislation. After all, there is no logical reason why the United Kingdom Parliament should be incompetent to redefine itself (or redefine the procedure for enacting legislation on any given matter): 'if Parliament can make it easier to legislate by passing the Parliament Acts or abolishing the House of Lords, it can also make it harder to legislate'.²
20. There is likely to be little support for making a referendum part of the amendment process. No major blueprint drawn up in the UK has proposed one. A permanent referendum machinery would represent a far more novel development in the UK legislative process from the perspective of parliamentary sovereignty. In effect, it would be introducing a new entity into the definition of Parliament along with the House of Commons, the House of Lords, and the Head of State (the 'Queen-in-Parliament'). Relatively few referendums have ever taken place in the UK. The Northern Ireland border poll in 1973, the referendum on UK membership of the European Community in 1975, the Scottish and Welsh devolution referendums in 1979 and 1997, and the Northern Ireland referendum on the Belfast Agreement in 1998 provide the notable examples. Each was held upon an ad hoc basis and was essentially advisory in effect, as opposed to the mandatory requirement that would need to be laid down in any bill of rights entrenchment procedure. British opinion on

² Stanley De Smith and Rodney Brazier, *Constitutional and Administrative Law*, 7th edn, Penguin, 1997, p79.

the desirability of referenda is hard to gauge. However, future referenda have been promised by political parties on any change to the electoral system for the House of Commons, on entry into the European single currency, on the EU draft constitutional Treaty and before the introduction of full powers of primary legislation for the Welsh Assembly under the Government of Wales Act 2006.

21. Historically, when politicians in the UK have advocated a referendum they have often done so less out of a genuine conviction in its virtue as a sound constitutional mechanism, rather than for reasons of subjective political advantage (for example, because what they propose is otherwise unlikely to be accepted through the normal parliamentary process, or else to reach a decision on some controversial subject upon which the party in government is divided). Although a referendum is exemplary in terms of majoritarian democratic principle, it is the politicians who are elected to Westminster to govern the country who should be clearly responsible for deciding major issues of state, particularly if they are of a complex nature. However even if, under present circumstances, a British bill of rights is unlikely to include a mandatory referendum as part of its amendment process, this does not rule out the possibility of a range of consultancy referenda to seek support for the establishment of some new constitutional reforms affecting the fundamentals of the state. There will be good reason to give moral sanction to the entrenchment of a constitutional bill of rights in Britain by calling a special referendum to endorse its implementation.

d) A simple declaration against amendment

22. Examples of simple declarations against amendment are found in Magna Carta, which guaranteed rights 'in perpetuity'; in the Acts of Union 1707 (which merged the Scottish Parliament with the already conjoined parliament of England and Wales) and the Act of Union 1800 (which united the kingdoms of Great Britain and Ireland) the latter two purporting to be in effect 'for ever after'. Writing on what might be termed 'soft' entrenchment, Professor Dicey took the view that the Acts of Union may not be strictly legally entrenched but, for practical purposes, they could be described as such.³ The nature of this entrenchment can be put in terms of the supremacy of fundamental constitutional values: in relation to the Acts and Treaty of Union of 1707. On this basis, certain core values of the union agreement are effectively constitutional values entrenched within a modern-day constitution.
23. Since the object of introducing a British bill of rights would be, in part, to give greater constitutional protection to fundamental rights, it follows that some form of robust entrenchment would be preferable. This would prevent, as has happened with the HRA, threats of amendment or even repeal by a simple majority in Parliament. Arguably, the more layers of entrenchment the better, though concerns may arise over the resulting inflexibility, which may reduce the capacity of government to respond to emergencies that might require the temporary suspension of specific human rights.
24. As outlined above, procedural entrenchment through the rules for amendment can be achieved in a number of ways, including a combination of: special majority voting in both Houses of Parliament; a referendum in order to bring the bill into force; and other provisions contained in the bill regarding amendments. All would ensure not only symbolic strength, but also significant democratic endorsement of a bill of rights. However, the issue of how Parliamentary sovereignty could be modified so that the doctrine of implied repeal would no longer apply and the bill of rights could be amended only by special majority (or other requirement) remains problematic.

³ Elizabeth Wicks, *Evolution of the Constitution*, Hart Publishing, 2006, pp49-51.

Its resolution presents a difficult, though not insurmountable challenge. Judicial and academic opinion has shifted on the nature and constraints of our constitutional arrangements and the framers of a new British bill of rights should not hold back in developing a progressive and robust model of rights protection.

Emergency derogations

25. Most bills of rights, including international human rights treaties, confer powers upon the executive to suspend certain human rights obligations in times of national crisis or emergency. This presents a potential gap in the judicial guarantee of human rights against oppressive acts of government, especially since times of crisis are precisely when civil liberties are most at risk. Indeed, it is notable that the UK is the only member of the Council of Europe to have derogated from the right to liberty under Article 5 ECHR since 9/11. However, the legal construction of any bill of rights has to accept that there may be extraordinary occasions when the executive, as a matter of overriding practical necessity, must subordinate normal human rights principles to the abnormal exigencies of what the national interest requires in order to combat some profound crisis or emergency.
26. A British bill of rights should therefore seek to define the conditions in which a derogation is permissible. It should control the range of human rights and freedoms that may be suspended (making it clear which, if any, principles may never be overridden), and it should lay down a parliamentary mechanism for approving or rejecting proposed derogations and extensions thereof. A drafting precedent exists in the ECHR at Article 15, providing that member states may take measures suspending its human rights obligations 'in time of war or other public emergency threatening the life of the nation ... to the extent strictly required by the exigencies of the situation'. There can be no derogation from the right to life, except in respect of deaths resulting from lawful acts of war, and from its prohibitions on retrospective criminal liability, torture and slavery.
27. For a British bill of rights, the statutory wording that derogations are only permissible 'in time of war or other public emergency threatening the life of the nation ... to the extent strictly required by the exigencies of the situation' might be adopted from the ECHR, but otherwise substantial modifications and additional provision will be necessary. The argument has been made that there are other human rights which should never be subject to derogation. As suggested by IPPR's draft bill of rights in 1991, these might include freedom of thought and the right to recognition as a person before the law. The conditions of a derogation should be no less stringent than provided for in the ECHR. However, there may be suggestions for alternative language. The IPPR Constitution for the United Kingdom (1991) gives a good example, providing that:⁴

Where, in the opinion of the Prime Minister, in the United Kingdom or any part of the United Kingdom

- 1) *a grave threat to national security or public order has arisen or is likely to arise; or*
- 2) *a grave civil emergency has arisen or is likely to arise, the Head of State may, by Order in Council, make provision, to the extent strictly required by the exigencies of the situation and reasonably justified in a democratic society, suspending, in whole or in part, absolutely or subject to conditions, [a specified group of] provisions of this constitution...*

⁴ Clause 128 (Suspension of the Constitution), *The Constitution of the United Kingdom*, IPPR, 1991, p120.

28. In the same vein, it is useful to look to the approach to derogation in Article 37 of the South African Bill of Rights, which protects certain core rights even in times of emergency. For example, the right to human dignity and the right to life cannot be derogated under any circumstances.
29. An example of how to preserve core human rights standards can be found in the Civil Contingencies Act 2004, which Parliament amended during its legislative passage to enable emergency regulations to be challenged under the HRA. This demonstrated the importance of legality even – indeed especially – in times of crisis.⁵
30. Acts of derogation by the UK government from its obligations under the ECHR can be effected without any form of Parliamentary control, consistent with the conduct of international affairs and treaty-making generally, which takes place under royal prerogative powers (now widely viewed as an anachronism and the subject of calls for reform – especially with regard to the power to take military action abroad).⁶ For the constitutional purposes of Britain, however, it may be viewed as essential for the bill of rights to lay down democratic procedures under which Parliament is vested with the power to approve or reject government proposals with respect to the suspension of human rights. It would be natural for any such derogation normally to take place by way of a draft order in council, being prepared and presented to Parliament for its prior scrutiny and debate. If the House of Lords as the second chamber is reconstructed in its membership and given a watchdog role over constitutional affairs and civil liberties, then a similar parliamentary voting procedure to that laid down for amendments to a new bill of rights, such as that requiring a special majority of both houses, could be followed in order to provide a further safeguard against excessive use of executive power. Such a procedure would further entrench the rule of law in the legislative process and ensure the role of a bill of rights as a permanent check on constitutionality as well as a long-stop in the judicial sphere in the event of breaches.
31. The derogation clause in the bill of rights might provide that if the urgency of the situation made it impracticable for Parliament to convene (because, for example, there was a special need for speed of action to combat the emergency) the order might come into effect immediately but would lapse as soon as it was possible for Parliament to meet and vote on the matter. It would be desirable for the bill of rights to state that the precise duration for each derogation should be specified, for example up to a maximum of one year, with any extension of times requiring the agreement of both Houses. Finally, there should be express clarification about the possibility of judicial review proceedings to deal with any questions or challenges concerning the validity of the order or the procedures under which it had come into effect.

Amending the current HRA

32. The special status accorded to the HRA itself means that direct amendment of its provisions (as opposed to indirect amendment through subsequent incompatible legislation) may prove politically difficult. However, there may be an argument for amending the HRA instead of introducing a completely new bill of rights. Amendments to the HRA could serve to expand the content and

⁵ For eg, see s23 Civil Contingencies Act, which sets out 'limitations of emergency regulations', including the principle of proportionality to the emergency (s23(1)(b)) and the prohibition against emergency regulations amending either s23 or the HRA 1998 (s23(5)(a) and (b)).

⁶ *Waging War, Parliament's role and responsibility*, House of Lords Select Committee on the Constitution, fifteenth report of session 2005-2006, HL 236.

scope of the rights incorporated from the ECHR, or could relate to future amendments and other procedures.

33. It is crucial to emphasise that any amendment to the HRA must be to enhance the protection it affords. The HRA represents the minimum level of guarantees in relation to fundamental rights. Proposals for amendments must not be aimed at creating loopholes or dropping below the international human rights standards which Parliament chose to incorporate in 1998.
34. The HRA's flexibility has some merit in comparison to an entrenched bill of rights. New rights can easily be added by statutory amendment. Even more importantly, the flexibility in the mechanism of declarations of incompatibility enables Parliament legitimately to express its own interpretation of human rights. This is in keeping with the aim of allowing what has been interpreted as a 'dialogue' between the judiciary and Parliament to take place and ensuring a broader range of perspectives on the appropriate interpretation of rights. The HRA structure facilitates this, even though Parliament has so far accepted all judicial declarations of incompatibility.
35. There are some amendments worth considering in the event that Britain decides to keep its current regime under the HRA rather than expand it through a new bill of rights.
36. One option is to amend the HRA to expand the definition of a 'public authority'. For the purposes of bringing a claim under the HRA, statements by the then Home Secretary and Lord Chancellor during debates on the bill made clear that persons or bodies delivering privatised or contracted-out public services were intended to be within the scope of the Act under the 'public function' provision.⁷ However, the UK courts have adopted a restrictive interpretation of public authority in relation to delivery of public services by private suppliers.⁸ This potentially deprives vulnerable people (eg those placed by local authorities in long term care in private care homes) of the protection afforded by the HRA. It has been argued that a broader meaning of public authority may drive private providers out of the market. However, this risk should be subordinate to the goal of ensuring respect for human rights in the provision of public services. Moreover, while contractual agreements have been made to encourage best practice between public authorities and private providers, such provisions are not necessarily enough to close the current 'protection gap'.⁹
37. Widening the definition could be achieved through a number of legislative solutions, including direct amendment to the HRA itself. However, given its special constitutional status, the better solution may be a separate, supplementary and interpretative statute, specifically directed to clarifying the interpretation of 'functions of a public nature' in s6(3)(b) HRA.¹⁰
38. Another option is to expand the criteria for pre-legislative scrutiny, during which proposed legislation is examined for compatibility with human rights standards. The current regime requires the relevant minister to certify that proposed legislation is compatible with the ECHR.¹¹ Beyond

7 HL Debates vol 582, col 1310, 3 November 1997 (Second Reading).

8 Most recently *YL v Birmingham City Council* [2007] UKHL 27; see also *R (Heather and others) v Leonard Cheshire Foundation and another* [2002] EWCA Civ 366, 2 All ER 936.

9 It is also questionable why, if private providers fear public liability, it is reasonable to believe that they will be more prepared to assume the same obligations towards individuals by way of private agreement.

10 The JCHR report, *The Meaning of a Public Authority*, suggested the following provision: 'For the purposes of s. 6(3)(b) of the Human Rights Act 1998, a function of a public nature includes a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform the function'. JCHR ninth report of session 2006-2007, HL 77 / HC 410, para 150.

11 S19 HRA.

this, it is worth considering a requirement that bills are examined for compatibility with other international human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights, in line with the UK's international obligation to ensure progressive realisation of these rights.

39. A further amendment which could bolster the protection afforded by the HRA to individual litigants would be to incorporate in the HRA the ECHR provision which guarantees an effective remedy for breaches of Convention rights.¹² This subject is considered in the next chapter.
40. The fact that there is ongoing argument over how the HRA might be improved highlights the potential benefits of maintaining a more flexible constitutional model of rights instrument. The decision to make any new model more difficult to amend must not be taken lightly.
41. One of the deft effects of the HRA follows from the inclusion of the procedure for making declarations of incompatibility.¹³ Since the declarations lack direct legal effect, Parliamentary sovereignty remains intact. The procedure neatly mirrors the work of the ECtHR, whose judgements at Strasbourg also lack direct legal effect, though are politically binding on the UK as a member of the Council of Europe. In both cases, the government is relied upon to honour a political obligation to introduce legislation to change domestic law so as to bring it into conformity with the ruling of the Court.
42. It is precisely in this area that a comprehensive British bill of rights, employing a similar mechanism of declarations of incompatibility, could ensure a more coherent approach to rights protection. With the courts able to issue declarations of incompatibility in relation to the ECHR rights contained in the HRA, the government is sent a warning signal as to the state of its legislation and the likelihood of failure if the matter goes to Strasbourg. The same practice and warning system does not exist in respect of rights not incorporated in the HRA. Consequently, there may be a risk that a two-tier system of rights will develop in the absence of a uniform approach in relation to rights within and outside the provisions of the HRA. It will also be important to consider the options in relation to remedies for breaches and any disparities which may arise.¹⁴
43. The use of declarations of incompatibility has significantly smoothed the path towards the adoption of any bill of rights with equal, if not more, entrenched status. Such adjudication and pronouncements upon primary statutes may be precisely what is involved under an entrenched or semi-entrenched British bill of rights.

Introducing a 'declaration' or 'code' of rights

44. Instead of amending the HRA and short of introducing a new British bill of rights, a further option would be to establish a declaration of principles. Such a model would act as a guide only in terms of judicial enforcement. In terms of procedural entrenchment, the model may not even be an Act

12 Art 13 ECHR.

13 S4 HRA.

14 While disparities may arise as between rights in a British bill of rights and those guaranteed in the ECHR, it is clear that disparities may continue from lack of explicit recognition of rights. See the case of *Bellinger v Bellinger* [2003] UKHL 21, in which a post-operative female transsexual failed to secure recognition of her 'marriage' ceremony. Ms Bellinger was found to have prospective rights after the Gender Reassignment Act 2004, but did not have them retrospectively.

of Parliament and thus would only carry the status and permanency of a government-issued 'code' of conduct, as have been established for the civil service and ministers of the Crown.

45. The most famous example of this model on the international stage is the Universal Declaration of Human Rights, though this instrument became the foundation for many subsequent and enforceable human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the ECHR.
46. In the domestic context, a declaratory code for Britain would have a symbolic role and would aim to influence all three branches of government. However, with a merely declaratory status, it would not perform any major role in the legal and political control of government or one that could not be easily overridden. Its value might be limited to extending the grounds upon which administrative discretion might be reviewed by the courts, and to serve as a point of reference in parliamentary and public affairs.
47. A useful comparison might be made with those codes of conduct put in place in the executive branch, such as the Ministerial Code, the Civil Service Code and the Code of Conduct for Special Advisers. Though provisions contained in such codes are not justiciable, their existence is influential. Such a model must be included in the debate on a British bill of rights, not least because it may be the model most likely to gain consensus. It would present aspirational standards of conduct in public life and act as a symbolic and state-building instrument. It could reinforce those values considered to be specifically 'British' and serve as a point of reference for policy makers, law-enforcers and the judiciary alike.
48. Clearly, however, one purpose of a British bill of rights is to give greater constitutional protection to fundamental rights in Britain. Such an aspirational document would not achieve this. The decision must be made whether consensus on content and symbolic value carries equal political importance to legal protection. If so, this final option presents a real alternative. If not, however, the architects of a British bill of rights must work towards a model which guarantees more concrete protection of rights, procedurally entrenched in Britain's constitutional arrangements.

Conclusion

49. It is clear that the legal status and model of amendment will play a key role in defining the character of a British bill of rights. Its status and ease of amendment will impact on the relationship between rights-holders and the state and between the various branches of government as they exercise their responsibilities for regulation, enforcement and adjudication of fundamental rights under the bill of rights. The flexibility of the HRA can be seen as a virtue. Yet recent calls for its repeal and the negative rhetoric emanating from some political quarters and sections of the media has fuelled resentment of the notion of human rights itself. This sends a signal that our current rights instrument in the form of the HRA might fare better as a more permanent and concrete feature of our constitutional landscape.
50. Above all, the strength of any new constitutional instrument will depend on its popular and political support. In the case of a new bill of rights, the most effective form of anchorage may be the achievement of a genuine 'human rights culture'. This was the aim of the Labour government

when it introduced the HRA, as made clear in its white paper preceding the Act.¹⁵ However, a degree of permanency and embedded status, along with special procedures for amendment, in a similar fashion to other modern democracies with written constitutions, may engender greater respect for a document of fundamental importance. A new bill of rights will present the opportunity democratically to decide not only what goes in it, but also what goes on around it in terms of procedure. Procedure is part and parcel of the character of a bill of rights and, at a time of constitutional reform and innovation, its framers should not feel bound by common law traditions in forging a new and lasting model of rights protection for Britain.

15 *Rights Brought Home: The Human Rights Bill*, Cm 3782, October 1997.



Chapter four

Adjudication and enforcement

1. This chapter considers the powers the courts should have in relation to the provisions of a new British bill of rights. It examines a range of possible models that are open to its architects. They are described as follows:
 - a) Judicial enforcement with Supreme Court strike-down power;
 - b) Judicial enforcement subject to Parliamentary override;
 - c) Judicial declaration of incompatibility with opportunity for legislative response;
 - d) Interpretative statute.

In addressing each of the above, this chapter considers the roles of the different constitutional branches in interpreting the meaning, scope and applicability of fundamental rights. The issue of how the provisions in a British bill of rights are to be enforced goes to the heart of the inevitable tension between the branches of the constitution – executive, legislative and judicial – and the respective role that each plays in protecting fundamental rights.

2. In the context of a new bill of rights which aims to increase constitutional protection of fundamental rights, some are open to the idea of a stronger judicial role than currently provided for under the Human Rights Act 1998 (HRA).¹ This is controversial, especially given the culture of the British constitution and its emphasis on the importance of the doctrine of Parliamentary sovereignty.
3. The role and powers of the judiciary vary widely across constitutional democracies. In some legal systems the judiciary has become accustomed to using its power to strike down legislative provisions which lack constitutional authority. In others, judges have a more limited role in relation to a sovereign Parliament. In the UK, the passing of the HRA has introduced a modified mechanism whereby the higher courts may issue non-binding ‘declarations of incompatibility’. Where the legislative branch engages with the court’s findings and takes steps to acknowledge the incompatibility, usually through re-legislation, this is increasingly seen as a form of ‘dialogue’ about fundamental rights between Parliament and the courts.²

1 For eg, see the Liberal Democrats’ Federal Policy Consultation Paper No 85, *Better Governance*, January 2007, which questions whether the new Supreme Court should have the power to strike down legislation which is incompatible with human rights as contained in a written constitution or bill of rights. For advocates of judicial review of legislation more generally, see Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution*, Harvard University Press, 1996; Christopher Eisgruber, *Constitutional Self-Government*, Harvard University Press, 2000; Lawrence Sager, *Justice in Plainclothes: a theory of American constitutional practice*, Yale University Press, 2004.

2 Dialogic constitutionalism can refer to a variation of analyses, however. See Tom Hickman, ‘Constitutional Dialogue, Constitutional Theories and the HRA 1998’ [2005] PL 306.

4. Importantly, and regardless of the model of enforceability adopted in relation to a British bill of rights, the European Court of Human Rights (ECtHR) will retain its supervisory jurisdiction in respect of rights under the ECHR.³ Member states remain bound to implement the ECtHR's judgments. The mechanism of the HRA which allows the higher UK courts to make a declaration of incompatibility but not to strike down legislation, is particularly appropriate in this context, giving a warning sign that there is incompatibility but leaving it to government to initiate reform where it wishes to avoid an appeal to the ECtHR.

Models of enforcement

5. Four models of enforcement are set out here. Each has advantages and disadvantages in practice and in principle. The first represents the original 'judicial' model of rights enforcement. The others are versions of a newer Parliamentary or 'statutory' model of rights enforcement.⁴ Of course, each system continues to evolve. In relation to the more recently established systems, more time may be needed for their effects to be appreciated.⁵

a) Judicial enforcement with Supreme Court strike-down power

i) The American model

6. This model is a codified (fixed) constitutional bill of rights, which creates a higher law than ordinary legislation. It is the model based on the American style of judicial review, emulated in Western Europe after World War II and in central and Eastern Europe after 1989.⁶ What is common to this approach is that the bill of rights forms part of a written constitution which is the country's supreme law. The US Bill of Rights, the original and most famous of its type, is entrenched in the federal constitution, which takes precedence over ordinary Acts of Congress. It is this supreme status of the constitution which has given rise to the judiciary's ultimate power over statutory interpretation and its capacity to nullify legislative provisions which it deems inconsistent with protected rights. This is an activity which many national courts (for example in France, Germany and Italy) now readily engage in.⁷ The courts also grant remedies for the infringement of rights. In short, under this model judicial review equates with judicial supremacy.
7. Such arrangements operate most effectively in the context of a written constitution. The legislature faces the prospect that the only way to reverse a judicial strike-down decision is via the mechanism of amending the constitution – this is usually through special political procedures which are designed to ensure national consensus on any changes to the country's fundamental document setting out its system of government and catalogue of rights.

3 This presents the possibility of a two-track system of rights enforcement developing. Matters concerning rights which are exclusive to a British bill of rights will be subject to appeal up to the House of Lords, while matters concerning rights in the ECHR may be appealed beyond the House of Lords to the European Court of Human Rights.

4 See further Janet Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?', MLR 69 (1), 7–28.

5 The Conseil Constitutionnel, established in 1958, took until 1971 to declare proposed legislation unconstitutional on account of its infringement of personal freedoms under the French Declaration of the Rights of Man 1789 (*Decision 71-44DC*). In comparison, the HRA has developed relatively swiftly.

6 Wojciech Sadurski, 'Rights-Based Constitutional Review in Central and Eastern Europe', in Tom Campbell, Keith Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights*, Oxford University Press, 2001, chapter six.

7 Alec Stone Sweet, 'Why Europe Rejected American Judicial Review. And Why It May Not Matter' (2003) 101 Mich L Rev 2744, at 2780.

Judicial interpretation and judicial supremacy – the US experience

8. No explicit reference is made in the US constitution to the power of the judiciary to review legislation and strike down unconstitutional provisions. The practice, which dates back to 1803, was established by the Supreme Court itself in the decision of *Marbury v Madison*.⁸ The US system – with its entrenched constitutional rights and life-term appointments for judges by a process which blends professional concerns with attention to the political leanings of individual judges – is unique. Other systems of judicially entrenched rights vary widely in their method of adjudication. In many Council of Europe countries, for example, constitutional judges are appointed for relatively short, fixed term tenures of nine or twelve years.⁹ The judgments they give are concise and unanimous, in contrast to the more individualistic and lengthy style of US justices. This difference highlights the contrast between common law and continental civil law jurisdictions.
9. The US experience illustrates one factor that cannot readily be dissociated from a model of entrenched human rights. The precise content of a particular entrenched right – and whether a specific policy is consistent with that right – will frequently be subject to reasonable disagreement among people, all of whom agree with the right as such and its entrenchment. If entrenchment means that one institution, ie the judiciary, has the last word on the content of entrenched rights, that institution's choice among reasonable alternative interpretations will prevail, unless or until constitutional amendment. This will be despite the democratic process selecting a policy which, on some other reasonable interpretation, is also consistent with the entrenched right.
10. Some observations on the case law illustrate the controversy which can accompany Supreme Court decisions. The celebrated right to freedom of speech, for example, has prevented efforts to imprison political dissidents,¹⁰ and contributed to a culture in which arguments against speech suppression carry a great deal of weight. However, the Court has also interpreted the First Amendment to provide substantial protection to the commercial activities of large media enterprises, to the point where credible doctrinal arguments can be made that restrictions on the advertising of tobacco products are unconstitutional.¹¹ Similarly ambiguous practice has been seen in the enforcement of equality rights. The Supreme Court has gone from denying gay rights by upholding the constitutionality of laws making homosexual sodomy a crime,¹² to protecting gay people against the enactment of rules impairing their ability to secure anti-discrimination legislation,¹³ and back to finding that a large private association, the Boy Scouts, could discriminate against gay people in selecting leaders.¹⁴
11. Supporters of this model of rights protection argue that it benefits from the impartiality and reliability of judges, who are constantly exposed to the full range of opinions on the question of the rightness of one or another interpretation, from the broadest range of sources. In practice, the reality of the judicial institution can differ. The Supreme Court also holds an uncompromising view as to its role in having the last say on what the constitution means for all the people. This

8 *Marbury v Madison* 5 US (1 Cranch) 137 (1803).

9 This is the case in France, Spain and Germany. See John Bell, 'Judicial Appointments: some European experiences', 4 October 2003, at <http://www.law.cam.ac.uk/docs/view.php?doc=865>.

10 *Brandenberg v Ohio* 395 US 444 (1969) held that a person can be convicted of sedition only if the evidence shows that the person incited imminent lawless conduct.

11 *44 Liquormart Inc v Rhode Island* 517 US 484 (1996).

12 *Bowers v Hardwick* 478 US 186 (1986).

13 *Romer v Evans* 517 US 620 (1996).

14 *Boy Scouts of America v Dale* 120 S Ct 2446 (2000).

is problematic for those who wish to ensure judicial deference to the elected and democratically representative branches of government.

12. Two examples help to illustrate this. The first is a case from the 1970s involving election campaign expenditure.¹⁵ Congress had passed significant amendments to the Federal Election Campaign Act 1971, creating the first comprehensive effort by the federal government to regulate campaign contributions and spending. In a lengthy decision the Court sustained the Act's limits on individual contributions, as well as the disclosure and reporting provisions and the public financing scheme, but ruled that limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from his personal funds were constitutionally infirm. This was because they placed severe restrictions on protected expression and association, yet lacked any compelling countervailing government interest necessary to sustain them. The Court's decision ran the risk of supporting the view that fair representation meant representation according to the amount of influence effectively exerted'. On a different note, Justice Byron White, dissenting, argued that the entire law should have been upheld, in deference to Congress's greater knowledge and expertise on the issue. The case illustrates how, in the Court's view, the Court's interpretation is what the constitution means. Essentially, anything else seeks to change not what the Court has said the constitution means, but the constitution itself.
13. More recently, the Supreme Court invalidated a provision of the national Violence against Women Act 1994.¹⁶ Congress had the power to enact the statute if violence against women was impacting on interstate commerce. Writing for the dissenters, Justice David Souter emphasised the 'mountain of data' prepared by Congress demonstrating that such violence did affect interstate commerce by deterring women from travelling and taking or keeping particular jobs.¹⁷ The majority responded that the evidence was well and good, but irrelevant because Congress used the evidence in the service of 'a method of reasoning that we have already rejected as unworkable'.¹⁸
14. Such decisions offer an insight into the relationship between the Court, the people and the constitution, in relation to which the Court will call for the contending sides in a national controversy to end their division by accepting a common mandate 'rooted in the constitution'. In short, it appears that exposure to a broad range of views does not necessarily affect the judiciary's reasoning.

ii) The European constitutional court model

15. There are broadly two types of European constitutional court model. The first model can be loosely identified with the French Republican tradition. It assumes a sovereign constituent people who are the source of legitimacy and rights. In this account, a sovereign parliament can act as a constituent power, and so is not bound by any constitution. Judges are simply the voice of the law and there is no room for any independent authority, such as a central bank or a supreme court. The second model can be loosely identified with the German tradition of legal philosopher Hans Kelsen, which assumes a sovereign 'basic norm' consisting of fundamental human rights. This account claims to replace the rule of men with the rule of law. In this model (based on Kelsen's drafting of the Austrian

¹⁵ *Buckley v Valeo* 424 U.S. 1 (1976).

¹⁶ *United States v Morrison* 120 S.Ct 1740 (2000).

¹⁷ *Ibid* 1760-2.

¹⁸ *Ibid* n14.

Constitution enacted in 1920), a supreme court is the guardian of the constitution of a relatively inflexible kind.

16. In both models, the constitutional court undertakes the practice of ‘abstract review’,¹⁹ whereby it reviews proposed legislation, not yet on the statute book, to assess whether it complies with the principles and provisions of the national constitution. There is also the practice of ‘concrete review’ after legislation has been passed and implemented, which does not apply to the French model.

Judicial interpretation and judicial supremacy – the continental European experience

17. The power of European constitutional courts to conduct constitutional review constitutes a crucial stage in the wider lawmaking processes. Constitutional courts have become increasingly comfortable with ordering the legislator to produce specific kinds of law, in specific ways.²⁰
18. The impact of constitutional lawmaking on the work of the legislator can be both direct and indirect. When a court declares a bill or statute unconstitutional, it vetoes the bill. The court intervenes directly in the legislative process. Such annulments are infrequent but often spectacular political events. Important legislation vetoed by constitutional courts include the liberalisation of abortion in Germany (1975, 1992) and Spain (1985), the nationalisation of industry and financial institutions in France (1981), the reform of German university governance (1973), the bid to introduce affirmative action in France (1982), and, in all countries, important revisions of the penal codes and various legislative moves to privatise industry or to establish antitrust regimes for the press and television sectors.
19. Yet constitutional judges have also come to exercise substantial indirect authority over the legislature, to the extent that case-law, in any given policy domain, meaningfully guides legislative choice and process. There are two forms of indirect impact, both of which result when legislators anticipate the preferences of the constitutional court, as revealed through constitutional lawmaking.
20. The first is the exercise of self-restraint on the part of the government and its parliamentary majority in anticipation of an annulment by the constitutional court, such as when the government and its parliamentary majority take decisions during the legislative process that sacrifice previously held policy objectives in order to reduce the probability that a bill will be either referred to the court or judged unconstitutional. Hundreds of bills have been altered, even gutted, by such decisions.²¹ The second takes place after a bill has been annulled. Corrective revision refers to the revision of a censured text to conform to the court’s decision and ensure it is promulgated. These legislative processes are highly structured by case-law, given that the judges have already made their legislative choices explicit and that oppositions work, predictably, to monitor the majority’s compliance with the ruling.

19 For a consideration of this type of review in the UK context, see *Relations between the Executive, Legislature and Judiciary*, House of Lords Constitution Committee, sixth report of session 2006-2007, HL 151, at para 98-106. The committee concluded: ‘Whilst a system of “abstract review” of legislation might seem attractive in some respects, we believe that it could compromise the impartiality of the senior judiciary and that it would not in any case prevent successful challenges under the Human Rights Act to ministerial exercise of statutory powers’ (para 106). This issue is relevant in the UK context following the public frustration of the then Home Secretary in 2006 about legislation being challenged on HRA grounds several years after enactment. Though abstract review does not deal with questions of how ministers choose to implement their powers, it does have advantages. Notably, abstract review is on the statute book in relation to the devolution Acts, under which law officers can refer a question of a Scottish bill’s compliance with the Scotland Act to the Judicial Committee of the Privy Council (s33 Scotland Act 1998).

20 Alec Stone Sweet, ‘The politics of constitutional review in France and Europe’, *IJCL* (2007) 5.

21 Including the French decentralisation and press laws (in 1982 and 1984 respectively) and in Germany, the industrial codetermination bill (1976).

21. The extent to which constitutional courts intervene in legislative processes and shape outcomes varies across jurisdictions as a result of a number of factors.²² Among these is the existence of abstract review jurisdiction. Where abstract review does not exist (in Italy, for example), the court's capacity to shape outcomes may be reduced. Another is the number of 'veto points' in the legislative process (the extent of centralised, executive control over the policy process as a whole). Where there are relatively more veto points, oppositions will make use of opportunities to block or water down the majority's bills before turning to the court, and the parliament will adopt fewer ostensibly radical reforms. The case of France lies at one end of the spectrum (the court is usually the only veto point available to the political minority), the cases of Germany and Italy at the other. Finally, the development of constitutional law through constitutional lawmaking tends to feed back onto the legislature, reproducing the same behaviour and reinforcing the same logic that provoked constitutional review in the first place. The court's authority over the legislative activity grows, and the legislator's discretion decreases.
22. Although judicial annulment of legislative acts remains precluded, most new European constitutions provide for 'concrete review', which organises the interactions between the judiciary and the constitutional court. Concrete review processes permit ordinary judges to participate in the scrutiny of legislation, which has weakened the dominance of statute over the decision making process of the ordinary courts. Ordinary judges have an interest in activating constitutional review to the extent that they wish firstly to participate in the construction of the constitutional law, and secondly to remove unconstitutional (and perhaps unwanted) laws. Both are new powers for them. The constitutional court also benefits from the system. Concrete review enlists potential litigants and the judiciary in a general, relatively decentralised effort to detect violations of the constitution; judicial officials provide the constitutional court with a caseload; and the rules governing the process generally favour the constitutional court's control over outcomes.
23. Judicial supremacy over a codified constitution is thus established as the prevailing constitutional practice in many Council of Europe countries. In relation to the ECHR, countries undertake to ensure at the national level that there are appropriate and effective mechanisms for ensuring the compatibility of legislation and administrative practice with it. National legislation (including the constitution if there is one in the domestic legal system concerned) must be interpreted in accordance with the ECHR. In turn, the ECHR is interpreted by national courts in accordance with the jurisprudence of the ECtHR. The legal status of the ECHR in domestic law also varies from state to state, which accordingly influences its interpretation by the national courts.²³
24. The argument is increasingly made that the interpretation of constitutional rights in conformity with the ECHR – a matter of national judges' will and the 'dialogue' of judges for the most part – should be grounded on the legal basis that since constitutional and ECHR rights are expressed in the same way, they should have the same interpretation. Nevertheless, national courts can go further to establish what is the correct manner of interpretation of the ECHR. They can also

²² See n19 above.

²³ For example, in Austria the ECHR is a part of the Federal Constitution. Article 10(2) of the Spanish Constitution imposes an interpretative obligation on the courts, so that constitutional rights are interpreted in accordance with international agreements on the matter. In other countries the situation is more complicated and interpreting constitutional rights in conformity with the ECHR requires specific justification. Thus in Germany, where the ECHR is an ordinary federal law, the Federal Constitutional Court has held that in interpreting the Basic Law, the content and state of development of the ECHR are also to be taken into consideration insofar as this does not lead to a restriction or derogation of basic rights protection under the Basic Law, an effect that even the ECHR itself seeks to rule out. In France the ECHR has a place above ordinary laws but below the constitution in the domestic hierarchy of norms. Consequently the Constitutional Council has held that it is not bound by the ECHR and will not verify the conformity of laws with it. However, on several occasions it has read the Declaration of the Rights of Man 1789 (a French constitutional instrument) in the same terms as the Strasbourg Court reads the relevant ECHR articles.

consider whether to go further than the ECtHR in human rights protection relying on the doctrine of the ECtHR that the ECHR is a ‘living instrument’.

An alternative model – Parliamentary bills of rights

25. The other models presented here depart from the American or European style of review of legislation in that they prioritise (in varying degrees) legislative over judicial determination of rights. They are based on the Westminster parliamentary system. They therefore reject the idea that political debates can be construed as legal conflicts requiring judicial resolution. Traditionally, rights in these systems have been protected through the rule of law and interpretations of the common law. The only country where this now remains the unamended practice is Australia, at the federal level and in some states and territories.²⁴ This model, developed in Commonwealth countries such as Canada, New Zealand, the UK and Australia, is designed to facilitate parliamentary disagreement with judicial interpretations of rights. It also emphasises parliamentary review of legislation at the pre-legislative stage to ensure compatibility with the bill of rights instrument. The principal idea is to ensure democratic participation in the determination of rights.

b) Judicial enforcement subject to Parliamentary override

The Canadian model

i) How does it work?

26. Canada’s Charter of Rights and Freedoms 1982 (the Charter) is a written constitutional document. The Canadian Charter departs from the US approach in that it is a model of ‘qualified’ constitutional entrenchment. As a supreme law the Charter prevails over all existing and future legislation that may conflict with it. Parliamentary sovereignty is limited as the validity of laws passed through Parliament can be tested before the courts to assess compliance and the courts may declare legislation invalid. Parliamentary sovereignty is retained, however, in a provision which allows the legislature to override the application of a right to particular legislation in specified circumstances, using the ‘notwithstanding clause’ in s33.
27. S33 of the Charter states that:

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in [the fundamental rights and freedoms contained in the Charter].

28. Under this provision, provincial and federal legislatures can give temporary effect to legislation that has been ruled by courts as inconsistent with protected rights (with some exceptions).²⁵ In the long term, the provision has not really constrained the scope of judicial review. The ability to disagree with a judicial ruling has provided more of a delaying tactic, since a ‘notwithstanding’

²⁴ The Australian Capital Territory (ACT) and State of Victoria have now adopted their own bills of rights. The Tasmanian government has now commissioned an inquiry into whether such a bill or charter should be implemented in Tasmania. Similar discussions and debates are also occurring in New South Wales.

²⁵ The ‘notwithstanding’ clause of s33 applies to ss2 and 7-15 of the Charter.

clause is implemented on the basis of a (renewable) five year period. Short of amending the constitution, the judiciary is the ultimate authority when determining the constitutional validity of legislation. Moreover, the notwithstanding clause is extremely unpopular (although less so in Quebec) and governments generally believe that its use will be politically costly.²⁶ For this reason, the power is used infrequently. At federal level it has never been used.

ii) How have the courts interpreted it?

29. A good example to illustrate the judicial strength in the Canadian model is the debate about same-sex marriage. Despite serious differences amongst parliamentarians over whether same-sex unions should be labelled 'marriage' (reflecting the contentious nature of the issue amongst the general public), the issue has been portrayed politically as one that is not open to reasonable disagreement where political opinions contradict judicial interpretations.²⁷ The federal government position noticeably evolved following provincial appeal courts' rejection of an exclusively heterosexual definition of marriage. Federal legislation was proposed and subsequently passed into law in July 2005 to recognise same-sex marriage.²⁸ Whether this reflected a philosophical reassessment by government of its previous position or political reluctance to disagree with judicial interpretations of marriage, no party leader was willing to continue supporting a position that, almost certainly, would have required invoking the notwithstanding clause to give primacy to Parliament's earlier preferred definition.
30. The idea of dialogue between the legislature and judiciary is a familiar notion among Canadian academics. Ten years ago a well known version of the theory was put forward, comprising four major features:²⁹
- S33 of the Charter gives legislatures the ultimate power to reverse judicial interpretations of the Charter;
 - S1 allows legislatures to implement and defend alternative means of achieving important objectives following judicial nullification;
 - Some rights are internally qualified and therefore do not constitute an absolute prohibition on certain actions;
 - Finally, the Charter contemplates a variety of remedial measures short of nullification.
31. Taken as a whole, these features mean that the Charter should 'act as a catalyst for a two-way exchange between the judiciary and the legislature on the topic of human rights and freedoms, but rarely [raise] an absolute barrier to the wishes of the democratic institutions.'³⁰ Dialogue is characterised by the legislature responding, usually through re-legislation, to judicial strike-downs.
32. Research in 1997 established that in the 15 years following the enactment of the Charter, there were 66 cases in which a law was held to be invalid for breach of the Charter. All but 13 elicited some response from the competent legislative body. In seven cases, the response was simply to

26 See n3.

27 See Rainer Knopff, Andrew Banfield, Conference Paper, Canadian Political Science Association, 2 June 2005, at <http://www.cpsa-acsp.ca/papers-2005/Banfield.pdf>.

28 Gay marriage was already legal in eight of Canada's ten provinces and one of three territories.

29 Peter W Hogg and Allison A Bushell, 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)' (1997) OHLJ 35, 75-124.

30 Ibid, p45.

repeal the offending law. In the remaining 46 cases (more than two-thirds of the total), a new law was substituted for the old. In only two cases the decisions were overruled and the new law essentially re-enacted the law that had been held to be invalid: once through the use of s33 and once through the use of s1.³¹

33. Further data has been compiled since 1997 to show that during the last ten years, there have been 23 cases in which a law was held to be invalid for breach of the Charter.³² Of those 23 cases, 14 (approximately 61 per cent) elicited some response from the competent legislative body. In one case, the response was simply to repeal the offending law. In the remaining 13 cases, a new law was substitute for the offending law. In no case did the legislative sequel amount to the decision being overruled, but most of the decisions since 1997 in which the Supreme Court has struck down a law on Charter grounds have been followed by a legislative response. Each decision left room for a legislative response, and most decisions received one. These statistics seem to suggest that constitutional dialogue in Canada is alive and well.
34. However, appearances can be misleading. There are case examples which show that the 'dialogue' can die out. In 2002 a sharply divided Canadian Supreme Court nullified the prisoner disenfranchisement provision of the Canada Elections Act 2000.³³ The case involved the regulation of the electoral process and the exercise of criminal law power – both areas in which the judiciary normally accords Parliament a relatively high level of deference. In this case, the Chief Justice refused to let the concept of dialogue take her down the path of judicial deference to the legislature. The Court struck down the provisions restricting prisoner voting rights. Two features of the case meant that any meaningful Parliamentary response was prevented. First, the relevant Charter provision on the right to vote is not subject to 'reasonable qualification' – it either has or has not been infringed. Added to this, s33 is not available to use in relation to this particular right, which prevents direct legislative reversal of judicial nullification with a notwithstanding clause. The Charter model is not always enough to prevent the Court having the last word on a politically sensitive issue and effectively closing the door to different legislative interpretations of rights. Depending on one's viewpoint, this may or may not be desirable.

iii) How does it impact on policy and legislation?

35. The idea behind the Canadian Charter (and Canada's first Bill of Rights in 1960) is that protecting rights is not exclusively dependent on judicial review, but should involve the (elected) executive and legislative branches at the pre-legislative stage. Rather than correcting rights abuses retrospectively, such abuses should be prevented from occurring in the first place.
36. The reality under the Charter is that Parliament, as the legislature, remains on the periphery of pre-legislative review. This is despite the rigorous process of review at the Department of Justice. Government tends to look to the courts as the institution to whom legislation must be defended in terms of its implications for rights. In addition, a political culture has emerged in cabinet decision making which forbids the introduction of any bill that would require the Minister of Justice to report an inconsistency to Parliament. Of course, if government were to pass a bill that prompted the Minister of Justice to alert Parliament that rights were violated in a manner that is not consistent with a 'free and democratic society' (the standard for determining Charter consistency once a

31 Ibid, p56.

32 Peter Hogg, Allison Bushell Thornton, 2007 OHLJ 45(1) at p51.

33 *Sauve v Canada (Chief Electoral Officer); McCorrister v A-G of Canada and others* 2002 SCC 68.

prima facie rights violation has been established), such legislation would be highly susceptible to litigation and judicial invalidation.

37. Under the Canadian model, Parliament and the provincial legislatures have to act assertively to disagree with judicial rulings, to ensure that their legislative objective can be realised despite a judicial finding of unconstitutionality. One way to do this is to amend the legislation in an attempt to satisfy judicial concerns. Legislation is rarely ruled inconsistent with protected rights because of an inappropriate objective. More often, the reason is that it fails criteria set out by the judicially-developed doctrine of proportionality.³⁴
38. If, however, the intent is to protect a legislative objective that the judiciary has ruled invalid, or to ignore the judiciary's proportionality concerns because to comply would significantly undermine or distort the legislative objective, Parliament can give temporary effect to its impugned legislation by enacting the notwithstanding clause; a decision that can be renewed.³⁵
39. There has been a profound change to political culture since adoption of the Canadian Charter. The Charter is evolving in a manner consistent with a highly juridical orientation to constitutionalism. A robust rights culture has arisen, but it is one that privileges courts as interpreters and defenders of rights. This cultural change is significant because the Charter is designed to be central to policy evaluation and the setting of political agendas.
40. The willingness of a government to question judicial judgment is often temporary. Political decisions tend to be revised or abandoned when legislation is nullified.³⁶ An example which would confirm sceptics' concerns about a bill of rights was the federal government's response to the invalidation of legislation that restricted tobacco advertising, passed to discourage young people from taking up smoking. The government's response to the judicial invalidation of its legislation was timid. It ruled out invoking the notwithstanding clause, despite the suggestion from its Health Minister that this would represent an appropriate action, and passed legislation that was far less robust or comprehensive than many believed necessary to achieve its purpose. Policy officers virtually transposed court 'suggestions' in the judicial reasons on proportionality, even though marketing strategies and knowledge of addictive behaviour were far more relevant than any particular expertise judges could possibly have drawn upon.

c) Judicial declaration of incompatibility with opportunity for legislative response

The UK Model

i) How does it work?

41. The UK model under the Human Rights Act 1998 (HRA) is a bill of rights in the form of an ordinary Act of Parliament, which empowers the judiciary to declare provisions of primary legislation

³⁴ See n3.

³⁵ The assertive requirement for political disagreement contrasts with the other jurisdictions, where Parliament can disagree by simply maintaining the status quo. In New Zealand, the UK and the ACT, Parliament generally must legislate only if it wishes to give effect to a judicial decision and pass remedial measures. The exception to this is if the judiciary has altered the intention or effects of legislation, in an attempt to render legislation compatible with judicial interpretations of rights. Such judicial action would require an affirmative parliamentary response to restore the original intention or scope of legislation.

³⁶ This does not mean there has been no political will to challenge the primacy of judicial interpretations of the Charter. A good example occurred in the legislative response to a series of Supreme Court decisions that altered the rules of evidence or what comprises a relevant defence, in the context of sexual assault trials.

'incompatible' with human rights standards, though not to disapply it.³⁷ The effect of the HRA is that it creates a judicial presumption that Parliament intends all its statutes to operate within its limits and not to have any meaning which contradicts its principles. However, where the meaning of any statutory wording or rule of the common law is quite clear, it would still operate and be enforced by the courts regardless of whether it conflicts with human rights.³⁸ In relation to secondary legislation, the courts may strike this down, unless the terms of the parent statute make this impossible. Before the HRA the courts could already strike down or set aside secondary legislation when they considered it to be outside the powers conferred by the statute under which it was made. Accordingly they were given the power to do so when provisions are incompatible with the ECHR rights and could have been framed differently.

42. Some variants of this model in other countries provide an interpretive role for later statutes, while possessing an elevated legal status with respect to all pre-existing laws. An example of drafting which distinguishes between past and future law can be found in the Hong Kong Bill of Rights 1991. The Hong Kong document, drafted by British government officials in preparation for Hong Kong's handover to China, distinguishes between earlier and later Acts of Parliament by declaring pre-existing legislation that conflicts with the Bill of Rights to be 'repealed' and all subsequent legislation:

to be construed so as to be consistent with [the human rights principles] ... to the extent that it admits of such a construction.

43. There is a strong argument in the UK that the HRA is accorded (de facto) constitutional 'status', reflective of the status of the European Communities Act 1972 (ECA). The effect is that indirect amendment by subsequent incompatible legislation would prove politically extremely difficult.³⁹ The HRA contains no express provision preventing 'implied repeal' by subsequent incompatible legislation. However, during parliamentary debates an amendment to ensure that implied repeal was retained was specifically rejected.⁴⁰ Judges have required express words to repeal its provision in the case of later, inconsistent legislation.⁴¹ The fact that the HRA has come to acquire a special status, at least in the courts, shows that a regular Act of Parliament can constitute far more than the sum of its parts.

37 S4 HRA.

38 The principle of statutory construction is succinctly stated in a quotation from the speech of Lord Hoffmann in *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115, at p131:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. ... The constraints upon its exercise by Parliament are ultimately political, not legal. But the 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... In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

39 While amendment of the HRA could technically be achieved as easily as for any statute, a comparison can be made with the case of *Thoburn v Sunderland City Council* [2002] EWHC 195 which ruled in relation to the European Communities Act 1972 that an exception to the doctrine of implied repeal had been created.

40 During the Parliamentary debates preceding enactment of the HRA, Lord Simon of Glaisdale attempted to amend the bill to preserve the doctrine of implied repeal. The Lord Chancellor opposed the amendment on the ground that s3 involves a wholly different scheme which rejects the route of the doctrine of implied repeal. The significance of the deliberate omission of the doctrine of implied repeal is that it makes it more likely that the courts will require express provision in a later statute before deciding that a Convention right has been abridged. Anthony Lester, 'Developing Constitutional Principles of Public Law', [2001] *Public Law* 684 at 689, fn9.

41 This is clear from the framework of the HRA itself, which requires a statement of compatibility for each new bill (s19), requires judges to construe legislation, so far as possible, to be compatible with the HRA (s3) and, where this is not possible, allows for a judicial declaration of incompatibility (s4); and from discussion in case law, eg *Ghaidan v Godin-Mendoza* [2004] UKHL 30. Comparison can also be drawn with the effect of the ECA – the case of *Thoburn* (see n39 above) ruled that the common law had created exception to the doctrine of implied repeal; there were certain circumstances in which the legislature could only enact what it desired if it did so by specific provision. There was a difference between ordinary statutes which could be impliedly repealed and constitutional statutes such as the ECA, which could not.

ii) *How have the courts interpreted it?*

44. The idea embodied by the Canadian notwithstanding clause – authorising judicial review and yet allowing for political disagreement – is an important element of the HRA. UK judges are obliged to interpret legislation ‘so far as possible so as to be compatible with Convention rights’.⁴² Where such interpretations are not possible, the HRA empowers a superior court to make a ‘declaration of incompatibility’ if primary legislation cannot be interpreted in a manner that is consistent with Convention rights.⁴³ UK judges cannot invalidate inconsistent legislation, as can judges in Canada. Should a minister inform Parliament that a bill is not compatible with protected rights, this will be roughly the political equivalent to a Canadian government relying on a pre-emptive use of the notwithstanding clause (as in New Zealand). The political impact of a judicial ruling that legislation is not compatible with rights approximates the political influence of a judicial ruling of unconstitutionality in Canada. The expectation, as indicated during the HRA’s legislative passage, is that Parliament will and should pass remedial legislation when courts make a declaration of incompatibility.⁴⁴ Accordingly, the HRA incorporates an expedited procedure for passing remedial legislation.
45. The relationship that exists between the constitutional branches following the HRA has been highlighted by the government’s anti-terrorism legislation and its treatment by the courts. Soon after 9/11, the government claimed new coercive powers were necessary to ‘counter the threat from international terrorism’ and passed legislation authorising the indefinite detention of terrorist suspects.⁴⁵ Having been overruled by the Law Lords in the *Belmarsh* case⁴⁶ which decided that the indefinite detention scheme was incompatible with Article 5 ECHR, it introduced a new range of coercive measures that raised many issues of compatibility with human rights.⁴⁷ However, experience has shown that Parliament is relatively receptive to the requirements of the HRA, as manifested by activity in the House of Lords and in the work of the Parliamentary Joint Committee on Human Rights (JCHR). Awareness of the human rights framework has also been enhanced by remedial action, including re-legislation, following all declarations of incompatibility.
46. It is worth acknowledging the risk that if political compliance with the judicial rulings becomes the accepted norm, there may be potential for judicial rulings to alter policy choices even without judicial declarations of incompatibility or remedial legislation. This is because of the considerable variation in how the judiciary approaches its interpretative obligations under s3 HRA.⁴⁸ How the judiciary generally approaches the issue of statutory construction under the HRA and specifically the relationship between its s3 interpretative obligation and its s4 power to grant a declaration of incompatibility will have important consequences for Parliament’s ability to get its way. The case of *Ghaidan v Godin Mendoza*⁴⁹ in particular, determining equal property rights for same sex-couples, illustrates the judiciary’s willingness to interpret legislation in a highly creative manner. If the judiciary does not feel constrained by the language or intention of legislation, and the political

42 S3 HRA.

43 S4 HRA.

44 Lord Irvine, then Lord Chancellor, indicated that in the event of a judicial declaration of incompatibility, ‘Parliament may, not must, and generally will, legislate. If a Minister’s prior assessment of compatibility.. is subsequently found ... by the courts to have been mistaken, it is hard to see how a Minister could withhold remedial action’. HL Debates vol 582, col 1227-1228, 3 November 1997.

45 Part IV Anti-terrorism, Crime and Security Act 2001.

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

47 Prevention of Terrorism Act 2005; in particular, this introduced the ‘control order’ regime which has been subject to much litigation – see *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140; *Secretary of State for the Home Department v JJ and others* [2006] EWCA Civ 1141.

48 S3(1) HRA ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’.

49 [2004] UKHL 30.

culture is one of compliance, some are concerned that this combination could result in distortion of legislative intentions under s3(1) HRA.⁵⁰ However, so far judicial participation in this dialogue has had other beneficial effects – for example, the decision in *Ghaidan* was influential in Parliament's move to enact the Civil Partnership Act 2004.

iii) How does it impact on policy and legislation?

47. A key aim of the HRA was to encourage widespread assessments of rights throughout government and public sectors. The HRA drew on the Canadian innovation of pre-legislative political rights review, going further with its requirement that ministers must alert Parliament about whether bills are consistent with protected rights. Moreover, the UK has a specific parliamentary committee, the Joint Committee on Human Rights (JCHR) with an explicit mandate to examine the rights-dimension of legislative bills.
48. During the legislative process, a minister presenting a bill in Parliament must state in writing that a bill is compatible with the ECHR.⁵¹ If, however, the courts find the subsequent legislation to be incompatible, they can make a 'declaration of incompatibility', which leaves to Parliament the task of considering its position. The Ministry of Justice reports⁵² that between the HRA coming into force on 2 October 2000 and 23 May 2007 a total of 24 declarations of incompatibility have been made by domestic courts under the HRA. Of these, six were overturned on appeal; one remains subject to appeal; ten have been addressed by new primary legislation; one is being addressed by a bill currently before Parliament; one was addressed by remedial order; leaving a total of five in which the government is considering how to remedy the incompatibility.
49. Parliament sovereignty is retained under the HRA in that Parliament can decide to ignore a s4 declaration. In the case of ECHR rights, an individual could take his/her case from the House of Lords to the ECtHR. This, no doubt, is why the government has been open to re-legislation. However, the government could choose to take its chances before the ECtHR. In relation to non-ECHR rights in a bill of rights, by contrast, there would be no further appeal to another court.
50. The HRA model also utilises the interactive 'dialogue' analysis of rights protection. Rights protection is seen as a joint responsibility of all constitutional branches. The judicial process is used as a mechanism for establishing the best possible interpretation of rights, but with Parliamentary sovereignty ultimately remaining intact.
51. In recent years the UK model has been adopted in two Australian states: the Australian Capital Territory (ACT) and Victoria. In both cases, political rights review under the bill of rights instrument arises from the requirement that for all bills the Attorney General makes a statement as to whether the proposed legislation is consistent with protected rights and, where unable to declare consistency, to inform Parliament how legislation is inconsistent. The Australian Capital Territory Human Rights Act 2004 (ACT HRA) also stipulates that a relevant standing committee is required to report human rights issues that arise in legislative bills to the legislative assembly. The idea represented by the notwithstanding clause is also replicated in the ACT HRA.

50 Danny Nicol, 'Law and Politics after the Human Rights Act', [2006] *Public Law* 697.

51 S19 HRA.

52 See <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf>.

52. The ACT HRA envisages an even stronger tension between Parliament and the judiciary than represented by the UK's process for remedial legislation. The judiciary is instructed that an interpretation of legislation that is consistent with rights is preferred but if the High Court concludes that a law is not consistent with rights, it may declare this inconsistency. When such judicial declarations of inconsistency are made, the Attorney General must immediately notify the legislative assembly of this declaration (within six sitting days of receiving the declaration) and, within six months, prepare and present the legislative assembly a written response to the declaration of incompatibility. This requirement clearly puts pressure on the Attorney General to explain what the government intends to do with legislation that has been interpreted in this manner.

d) Interpretative statute

The New Zealand model

i) How does it work?

53. The New Zealand Bill of Rights Act 1990 (BORA) fits the model of an ordinary Act of Parliament. As an interpretative statute – a statute to guide judicial interpretation – it has the effect that, where the meaning or application of any statutory wording or rule of the common law is unclear or capable of more than one interpretation, the courts give preference to whatever interpretation of the law is most consistent with the principles in the bill of rights. However, where the meaning of any statutory wording or rule of the common law is quite clear, it still operates and is enforced by the courts regardless of whether it conflicts with human rights. An interpretative bill of rights is not a codified or 'entrenched' document and does not (at least explicitly) possess any legal priority over later ordinary Acts of Parliament.

54. The interpretative status of the BORA is laid down in s6:

Wherever an enactment can be give a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

55. But the New Zealand approach expressly excludes the possibility of legislation being overridden by the BORA. S4 provides:

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of rights) hold any provision of the enactment to be impliedly repealed or invoked, or to be in any way invalid or ineffective; or decline to apply any provision of the enactment – by reason only that the provision is inconsistent with any provision of this Bill of rights.

56. BORA does not challenge the principle of parliamentary sovereignty. The courts are prohibited from treating the BORA in any way which might develop into a theory or jurisprudence of 'higher' law. However, judges have required express intention to override its provisions in the case of later, inconsistent legislation. The issue has been the subject of interesting discussion in the case law.

Two cases in particular,⁵³ concerning the retrospective effect of criminal sanctions in legislation enacted after BORA, split the Court of Appeal judges as to the effect of the doctrine of implied repeal. The judgments are controversial because the Court assumed that Parliament could not have wanted fundamentally to breach human rights, holding that either the earlier provision prevailed over the later or that legislation was to be interpreted in a particular way (which gave the 'correct' result, but was otherwise strained).⁵⁴

ii) How have the courts interpreted it?

57. As stated above, s6 BORA requires that an enactment be given a meaning which is consistent with BORA wherever such a meaning can be given. How far have the courts used this provision to shape legislation as they see fit?
58. Two notable examples are reassuring to those who favour Parliament as the chief determinant of rights. The first is same-sex marriage and the case of *Quilter*.⁵⁵ From 1993, s19 BORA prohibited discrimination on the grounds of sexual orientation. In *Quilter*, the Court of Appeal had to decide whether the Marriage Act 1955 could and should be interpreted to embrace same-sex couples as result of s19. The Court was clear that it could not rewrite the law contrary to Parliament's wish.⁵⁶
59. A second example is child pornography and the case of *Moonen*.⁵⁷ The issue was whether the censorship board had correctly interpreted and applied the words 'promotes or supports' in relevant legislation banning child pornography. The Court held that in considering the correct meaning of those words, any interpretation should impinge as little as possible on freedom of expression (s14 BORA).⁵⁸
60. It was in this same case that the Court of Appeal stated that it had the power (and 'on occasions the duty') to make a declaration of inconsistency if it found that a statutory provision constituted an unreasonable limitation on a right 'guaranteed' in BORA (it did not need to in this case).⁵⁹ The Court's idea of issuing declarations of inconsistency was taken up by Parliament when amending

53 *R v Poumako* (2000) 5 HRNZ; *R v Pora* (2000) 6 HRNZ 129.

54 *R v Poumako* dealt with the interpretation of 'home invasion' legislation imposing a minimum of 13 years where murder was committed in the course of a home invasion; the Court did not have to rule on the applicability of the new provision but stated its displeasure for the retrospective element. Obiter dictum, three of the five judges said it could not have been Parliament's intent to afford retrospective effect to the home invasion provisions bearing in mind their inconsistency with fundamental human rights. The dissenting judges found that the section was unambiguous and certain in its retrospective effect and therefore s6 BORA could not be invoked to support an interpretation which was not Parliament's intent; in *R v Pora*, a seven judge bench had to decide whether the 1999 amendment of the Criminal Justice Act (providing that no court could impose a retrospective penalty) would prevail over the Criminal Justice Act 1985. The provisions were irreconcilable and one had to yield over the other. The six judges who dealt with the issue whether a fundamental right can be impliedly repealed by later legislation were evenly divided. Three took the view that despite the breach of fundamental rights, the later statute, whose meaning was clear, must prevail. The other three held that the predominant intention of Parliament may be found in the earlier statute, except where there is an express statement that the later Parliament intended to cease protecting the fundamental rights in question. The matter of which provision came later was of little consequence.

55 *Quilter v Attorney-General* CA 200/96 (1997).

56 It saw the legislation passed after the enactment of BORA as still supporting the meaning attributed to 'marriage' in the Marriage Act 1955. It was also highly unlikely that Parliament would have intended to make such a substantial change to one of society's fundamental institutions by the indirect route of ss19 and 6 BORA. Though the neutral language in the Marriage Act would not have prevented the Court from finding that the Act covered same-sex couples, and though Parliament's intention when enacting s6 BORA was that legislation should be read in a way compliant with BORA, the Court felt this was a decision for Parliament. In so holding, it placed great emphasis on the limits of judicial decision-making.

57 *Moonen v Film Board of Review* [2000] 2 NZLR 9.

58 It held that the concepts of promotion and support are concerned with the effect of the publication, not the purpose or intent of the person who creates or possesses it (ie an objective rather than subjective definition). The subsequent inquiry of the Government Administration Committee into the Operation of the Films, Videos, and Publications Classification Act 1993 and related issues found that the Court of Appeal's interpretation of 'promotes and supports' adequately carried out the intent of Parliament in that it took account of s14 BORA.

59 See n57.

the Human Rights Act 1993. The Human Rights Amendment Act 2001 allows the Human Rights Review Tribunal and on appeal, courts, to issue declarations of inconsistency in regard to s19 BORA (discrimination). If the judiciary takes the above route, this could increase the pressure on government to remedy perceived deficiencies. Some commentators have even predicted that sometime in the future ‘the courts will get the power to strike down statutes incompatible with the Bill of Rights Act’.⁶⁰

61. Thus far no declaration of inconsistency has actually been issued. However, the mechanism for dialogue between the Parliament and the judiciary is there. BORA debates are not dictated by the courts – Parliament can disagree and has disagreed with BORA based court decisions and has reacted by a range of measures. On other occasions, the political arms have accepted judicial outcomes, even if only after a ‘robust debate’. Importantly, it is not that Parliament must accept the expression of a judicial view. Rather, it chooses to accept the judicial view.⁶¹
62. The idea of allowing for political disagreements with judicial interpretations is not as central to New Zealand because of the limited scope of judicial review. But the idea still has resonance. Bill of rights jurisprudence provides the content for evaluation by the executive of proposed legislation. Any statement by the Attorney General that a bill is being introduced that is not consistent with protected rights is similar in intent to using the notwithstanding clause in Canada in a pre-emptive fashion. As in Canada, the extent to which these intentions are controversial and therefore constrain political actions will depend on how the bill of rights influences political culture. The Supreme Court has made a recent and interesting observation about dialogue, highlighting the potential for the judicial role, but emphasising the parameters of the New Zealand model as distinct from the UK model.⁶²

[253] ... a New Zealand court must never shirk its responsibility to indicate, in any case where it concludes that the measure being considered is inconsistent with protected rights, that it has inquired into the possibility of there being an available rights consistent interpretation, that none could be found, and that it has been necessary for the court to revert to s 4 of the Bill of Rights Act and uphold the ordinary meaning of the other statute ...

[259] The role of the courts is, however, limited to ascertaining meaning of legislation in accordance with the statutory directions and does not extend to the responsibility that courts assume in jurisdictions where human rights are protected by a supreme law. Nor does the role allow the courts to apply common law powers to effect the implied repeal of legislation or otherwise to disapply or render its provisions ineffective. As a result, it is to be expected that New Zealand courts from time to time will be constitutionally bound,

60 Geoffrey Palmer and Matthew Palmer, *Bridled Power: New Zealand’s Constitution and Government*, 4th edn, Oxford University Press, 2004, at p318.

61 There are past examples of dialogue as well as recent case law also supporting the idea in the New Zealand context. One example is a Court of Appeal decision from 1994 concerning the suing of the police for breaches of BORA (*Baigent’s Case* (1994) 1 HRNZ 42) which resulted in the establishment of remedies for such breaches. The courts then started to make regular award of damages, including awards to unpopular minorities such as prisoners who had had their rights under BORA breached. Parliament reacted to this by introducing legislation to give victims priority (in terms of sharing awards) where prisoners were awarded compensation as a result of BORA breaches whilst in detention. This legislation came into force before a Court of Appeal decision on prisoner compensation – the decision subsequently made no adjustment to consider the relevant victim. The treatment of this issue illustrates dialogue at work, though not all would be impressed with the nature of the dialogue(!). Further examples of legislative reaction to judicial rulings are illustrated in the area of trial delay, where one Court of Appeal ruling led to the case management system undergoing an overhaul; and in the area of same-sex couples’ rights. The *Quilter* case led to Ministry of Justice discussion papers on the treatment of same-sex couples under the law, and eventually to legislation, following national consultation, affording same-sex couples the same rights as heterosexual couples.

62 *Hansen v the Queen* [2007] NZSC 7.

applying s 4 of the Bill of Rights Act, to give effect to legislation which they have concluded is not capable of being read consistently with the Bill of Rights... Other branches of government are under no obligation to change the law to remedy the inconsistency, but it may be expected that there will be a reconsideration by them of the inconsistent legislation.

iii) How does it impact on policy and legislation?

63. The more limited model of judicial review in the BORA resulted in the decision to ensure political participation at the pre-legislative stage. This is embodied in s7 BORA, which requires the Attorney General to advise Parliament when bills are not consistent with its provisions. The Attorney General's reporting process bolsters the law-making process, necessitating a careful examination of all government bills before introduction. The white paper preceding the enactment of BORA, stated that it would provide 'a set of navigation lights for the whole process of government to observe'.⁶³
64. The question must be asked whether BORA has succeeded in providing 'navigation lights' for the government in a substantive sense. In the last 15 years some 36 s7 reports have been made to Parliament in respect of bills said to be inconsistent with BORA. 18 of those were government bills. This is a significant number and might show that governments have not been that successful in abiding by their own human rights commitments. Though the Attorney General frequently concludes that government bills violate rights in a manner that is not consistent with a free and democratic society, neither the prospect of such a report nor its eventual release appears to be a serious disincentive for ministers to introduce and defend the impugned bill. However, in defence of the position of successive governments, in a good number of cases, the s7 report was perhaps a marginal call and the government was conservative in preferring to make a s7 report. Furthermore, a number of bills focused on sexual orientation discrimination, an area where the government had decided to pursue reform based upon a systematic review of existing discriminatory legislation rather than dealing with the issue in a piecemeal fashion. Lastly, BORA is equal in status to other statutes. It was always accepted that governments might introduce – and Parliament approve – subsequent bills that might be BORA inconsistent.

Choosing an enforcement model to suit British constitutionalism

65. The debate over a British bill of rights inevitably addresses the issue of Britain's unwritten constitution and the place of a British bill of rights within it. It is possible that a bill of rights could start a process of codification of our domestic constitutional arrangements. If so, the framers of a British bill of rights face the challenging task of navigating Britain's unwritten constitutional traditions to secure a special legal status for the new constitutional document.
66. Full entrenchment of a bill of rights in Britain poses particular difficulties. This is because under our unwritten constitution there is no technical distinction between constitutional law and ordinary legislation. A taxation statute has the same legal status as habeas corpus. This is the doctrine of Parliamentary sovereignty, as articulated by the nineteenth century Professor A V Dicey.⁶⁴ The key features of the doctrine are, first, that the legislature may alter any law, fundamental or otherwise,

⁶³ Geoffrey Palmer, 'A Bill of Rights for New Zealand – A White Paper', 1985 [1984-85] 1 AJHR A 6 6.

⁶⁴ A V Dicey, *Introduction to the Study of the Law of the Constitution*, 1885.

as freely and in the same manner as other laws; second, there is no legal distinction between constitutional and other laws; finally, no judicial or other authority has the right to nullify an Act of Parliament, or to treat it as void or unconstitutional.

67. Thus, the constitutional context in Britain presents particular challenges in relation to codification. If a bill of rights is enacted as a normal Act of Parliament, its provisions can in theory be overridden by later legislative developments, including those which clearly infringe its terms, whether deliberately or inadvertently. The traditional principle in common law is that where two statutes conflict, the later provisions should be held to prevail.
68. However, these arguments overlook the fact that implementation of a fully-entrenched bill of rights would be a political reform, introducing a new legal settlement within the structure of government. The determining factor in the enactment of any constitutional reform which alters the fundamentals of government is the political will of the nation rather than questions of legal technicality. If Parliament, through democratic process and consultation, adopted a new constitutional and legal settlement (as would be the case with the implementation of a fully entrenched bill of rights) it is unlikely that the judiciary would refuse to accept it. The question is not what the judges could do but what they *would* do. With the acceptance of the purpose of the bill of rights, the development of judicial principle would follow.
69. Achieving the purposes of a British bill of rights – for example, securing greater protection for fundamental rights, increasing the scope of rights currently provided for in the ECHR, achieving popular acceptance of their importance – does not necessarily entail such a shift in constitutional arrangements. Many see the eventual codification of the British constitution as advantageous and a British bill of rights might signify the first step in this direction. However, its framers must examine the full range of alternative models.
70. There is much literature on the relative merits of the traditional ‘judicial’ bill of rights model, influenced by US-style judicial review and adopted in many Western European countries since 1945, and the newer ‘parliamentary’ or ‘statutory’ model, as found in the HRA.⁶⁵ The HRA model has formed the basis for recent models such as those bill of rights instruments newly enacted in Australia. The appeal is largely in the ‘dialogue’ process between the judiciary and Parliament by which judges apply legal principles and propose that the elected branches re-think their legislation where it appears not to comply with rights standards. Parliamentary sovereignty remains intact, if slightly modified due to the elevated responsibility conferred on judges under the HRA to set the parameters of rights compliance, and the modification of the doctrine of implied repeal. In this way, the ultimate decision lies with a democratic body of representatives rather than unelected judges who, in spite of their judicial expertise, may be no better placed than elected representatives to determine the boundaries of human rights.
71. The defining features of the newer ‘Parliamentary’ bill of rights model are well suited to the British constitution in its current form. It is designed to enhance pre-legislative review in Parliament, aiming to correct rights abuses from actually occurring, rather than correct them after the

65 For eg, see Julie Debeljak ‘Rights protection without judicial supremacy: a review of the Canadian and British models of Bills of Rights’, (2002) 26 Melb U L Rev 285; Jeremy Webber, ‘Institutional Dialogue between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and elsewhere)’, (2003) 9 AJHR 135; Janet L Hiebert, ‘Parliamentary Bills of Rights: An Alternative Model?’, (2006) MLR 69 (1), pp7-28.

fact.⁶⁶ This process is enhanced by the Parliamentary Joint Committee on Human Rights, which examines every bill that passes through the legislative process, aiming to ensure that the rule of law is adhered to from the outset. An important role is also played in this regard by two other committees: the House of Lords Constitution Committee, which both examines public bills for matters of constitutional significance and carries out inquiries into wider constitutional issues; and the House of Commons Constitutional Affairs Committee which has a similar mandate. The HRA model facilitates legitimate political dissent from judicial interpretations, allowing for a broader range of perspectives on the appropriate interpretation of rights. These features mean that the model is readily accommodated by British constitutional traditions and workable within our current arrangements.

Enforcing British rights: going beyond Strasbourg?

72. How far should judges be prepared to go in enforcing rights under a British bill of rights? Already under the HRA, courts have a duty to take account of ECtHR case law.⁶⁷ But in being guided by Strasbourg, should the courts also be constrained by Strasbourg? Recent case law points to interesting developments on this subject.
73. In two recent cases with major implications for human rights, *R (Ullah) v Secretary of State for the Home Department*⁶⁸ and *Al Skeini and others v Secretary of State for Defence*,⁶⁹ Lord Bingham has emphasised that the duty of national courts is to keep pace with the Strasbourg jurisprudence over time as it evolves: no more, but certainly no less. The implication is that domestic cultural traditions should not determine the scope of Convention rights. He also expressed reservations about the value of examining Commonwealth case law in HRA cases since the United Kingdom must take its lead from Strasbourg. This is despite natural links with juridical systems and jurisprudence more similar to our own.
74. Problems may arise in that Strasbourg jurisprudence may not always present clear guidance. In a case concerning an AIDS sufferer due to be deported,⁷⁰ the House of Lords had to address the difficulty that the reasoning in some ECtHR decisions is sometimes unconvincing. The problem was that the ECtHR had previously held that deporting AIDS sufferers who would not receive proper treatment where the facts of the case were very exceptional breached Article 3. However, as Lord Nicholls pointed out, the prevalence of AIDS worldwide is a present day tragedy on an immense scale, and it is a common feature in all immigration cases that the would-be immigrant would have a significantly shortened life expectancy if deported. He went on to describe the Strasbourg case law as 'in a not altogether satisfactory state' and 'lack[ing] its customary clarity'.
75. At the heart of the problem is the view that the House of Lords has taken concerning the importance to be attached to the Strasbourg jurisprudence. Lord Hope in the AIDS deportation case expressed the view that:

66 Indeed, following the UK's example, the Victoria Charter of Rights and Responsibilities has been designed not so much to transfer power to judges but to try to ensure inconsistencies can be dealt with early in the process.

67 S2(1) HRA.

68 *R (Ullah) v Special Adjudicator* [2004] UKHL 26.

69 *R (Al-Skeini and others) v Secretary of State for Defence (Aire Centre and 10 others intervening)* [2007] UKHL 26.

70 *N v Secretary of State for the Home Department* [2003] EWCA Civ 1369.

It is not for us to search for a solution to [the appellant's] problem which is not to be found in the Strasbourg case law. It is for the Strasbourg court, not for us, to decide whether its case law is out of touch with modern conditions and to determine what extensions, if any, are needed to the rights guaranteed by the Convention. We must take its case law as we find it, not as we would like it to be.

76. And in another case, the rationale for Lord Bingham's views was further explained:⁷¹ the purpose of the HRA was not to enlarge the rights or remedies of those in the United Kingdom whose ECHR rights have been violated, but to enable ECHR rights and remedies to be asserted and enforced by the domestic courts, and not only by recourse to Strasbourg. He took the view that this focus on 'bringing rights back home' was clearly established by previous cases.⁷²
77. The approach of the House of Lords should perhaps now be opened up.⁷³ S2(1) HRA requires that a court or tribunal determining a question which has arisen in connection with a Convention right must take into account any ECtHR judgment whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen. Thus, s2(1) does not enjoin the court to place any particular weight on Strasbourg cases, still less oblige the English courts to apply those cases strictly as precedent, unlike the position under European Community law. It is of course a well established principle that when treaty obligations are incorporated into domestic law, the obligation will be construed by reference to the principles of international law governing its interpretation rather than any domestic principle of construction. Although the white paper prior to the enactment of the HRA provides limited support for asserting that the purpose of enacting the HRA was to bring rights home, the paper itself does not expressly seek to define the government's objectives in such a specific or restrictive way.
78. However, the principles involved go beyond raising a question of statutory construction. For example, the ECtHR does not develop its principles in the same analytical style of the common law. That said, Strasbourg principles are sometimes extended even if the reasoning for doing so is rather creative. The principle from *Z v Finland*,⁷⁴ that Article 8 ECHR interferences with confidential medical information must be subject to important limitations and accompanied by effective and adequate safeguards against abuse, has been applied in rather different contexts. These have included the broadcast of a CCTV film showing the claimant's suicide attempt.⁷⁵ The ECtHR has not provided detailed reasoning for that extension. The current approach taken by the domestic courts means that there is a risk that the HRA will develop in a significantly more restrictive way than the ECtHR itself.
79. In addition, the principle that the English courts must apply the Convention strictly in line with Strasbourg case law is not the approach used in other Council of Europe countries such as France or Germany.⁷⁶
80. Furthermore, it is possible that the focus on Strasbourg can distract us from benefiting from the views expressed in cases from other jurisdictions when dealing with universal human rights problems.

71 *R (on the application of Begum) v Denbigh High School* [2006] UKHL 15.

72 *Aston Cantlow PCC v Wallbank* (2004) 1 AC 546; *R (on the application of Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673; and *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57.

73 Discussed in Richard Clayton, 'The Human Rights Act Six Years?', (2007) EHRLR (1).

74 *Z v Finland* (1997) 25 EHRR 371.

75 *Peck v United Kingdom* (2003) 36 EHRR 41.

76 E Orucu (ed), *Judicial Comparativism in Human Rights Cases*, (UK National Committee of Comparative Law, 2003).

The South African Constitutional Court, for example, has shaped its decisions by reference to the wisdom to be derived from all jurisdictions.⁷⁷ The concentration on Strasbourg decisions should not prevent the English courts from developing indigenous human rights jurisprudence. The question is whether a British bill of rights could encourage a more 'indigenous' approach, while retaining Strasbourg jurisprudence as a 'floor' in terms of guidance.

Enforcing rights through remedies

81. It is a common principle in constitutional interpretation that there is 'no right without a remedy'. This raises the question whether judges should be empowered under a British bill of rights to grant specific remedies for infringement of rights. Opinions vary on this question and the matter must be raised for debate.
82. Many international human rights instruments do not recognise the right to a remedy as a substantive right. This is no great surprise, since remedies are more usually viewed as a question for domestic legal orders.
83. The ECHR, however, does take the further step of providing for a substantive right to a remedy. The ECHR can be distinguished from some other international instruments in that it was always intended to have binding effect on the member states of the Council of Europe. The legal rights contained within it were therefore framed in order to have real effect.
84. Article 13 ECHR states that:

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

a) The UK approach to remedies

85. For the fifty years during which the UK declined to incorporate the ECHR, Article 13 had only an attenuated effect.⁷⁸ The Article was also a notable exclusion in the drafting of the HRA. The government's reason for excluding the right to an effective remedy was that the passage of the Human Rights Bill itself gave effect to the UK's obligation under Article 13.⁷⁹ The government's view was that specific reference to these Articles was unnecessary, because the Act:⁸⁰

gives effect to Article 1 by securing to people in the United Kingdom the rights and freedoms of the convention. It gives effect to Article 13 by establishing a scheme under which Convention rights can be raised before our domestic courts ... [it] provides an exhaustive code of remedies for those whose Convention rights have been violated ... nothing more is needed.

⁷⁷ Art 34 South African Constitution. The Court must take into account international law and may take into account foreign national law.

⁷⁸ In the case of *Chahal v UK* (1996) 23 EHRR 413, the appellant relied on the right to a remedy. The Court held that he had been denied an effective remedy in the courts because of the national security aspects, and found violations of Art 13 and Art 5(4). However, the detention as such was not held (by a majority) to be unlawful under Art 5(1). Accordingly, his claim for compensation for non-pecuniary loss suffered during his detention was rejected, and in respect of the violations found, the Court held that the judgment itself constituted sufficient just satisfaction.

⁷⁹ Parliamentary Under Secretary of State, Home Office (Lord Williams of Mostyn), HL Debates vol 582, col 1308, 3 November 1997.

⁸⁰ Lord Irvine of Lairg (then Lord Chancellor), HL Debates vol 583, col 475, 18 November 1997.

The intention was that courts would take account of Article 13 in determining remedies, though evidence of this intention must be traced back to parliamentary debates leading up to enactment of the HRA.⁸¹

86. S8(1) HRA provides that, in relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. More broadly, the idea of remedies has been thought to include s4 declarations of incompatibility. The government has put the argument that s4 constitutes a remedy before the ECtHR, but Strasbourg has ruled that a s4 declaration cannot constitute a remedy.⁸²
87. British courts, frustrated at the scope of the remedy provisions in the HRA, have themselves begun to develop remedies incrementally. These remedies have included awards of monetary damages in a small number of cases. S8(3) HRA states that damages may only be awarded where the court is satisfied that such an award is necessary to afford just satisfaction to the person in whose favour it is made. The award of damages is therefore discretionary, the discretion being exercised by reference to specific criteria. S8(3)HRA states that in determining whether to award damages, or the amount of an award, the court must take into account the principles applied by the ECHR in relation to the award of compensation under Article 41 ECHR. The courts have, as a result, been able to develop a distinct approach. In *Anufrijeva v London Borough of Southwark*⁸³ the Court of Appeal made it clear that, unlike private law actions where the only remedy claimed was damages, the primary concern in human rights cases is to end the relevant infringement. In such cases, there was a balance to be struck between the interests of the victim and those of the public as a whole; damages are a remedy of 'last resort'. The narrow approach adopted by the courts⁸⁴ helps to explain why there are only three reported cases where HRA damages have been made.⁸⁵
88. The courts' conservative approach to awarding damages may be questioned. While there will be concerns about the possible financial implications, in some circumstances the award of damages may be the only effective remedy for a breach of human rights. A possible way to allay concerns about the financial implications could be to confine the award of damages to such circumstances in which damages are the only effective remedy.
89. The overarching question is of the benefit to be gained by including a right to an effective remedy (ie Article 13 ECHR) in a British bill of rights. A survey of Article 13 cases before the ECtHR does

81 Lord Lester of Herne Hill, HL Debates vol 583, col 480, 18 November 1997.

82 *Burden and Burden v UK* ECtHR (2004) (App no 13378/05).

83 [2003] EWCA Civ 1406.

84 In *R (Greenfield) v Secretary of State for Home Department* [2005] UKHL 14 Lord Bingham held that the primary aim of the ECHR was to promote certain fundamental human rights among member states of the Council of Europe and that the routine treatment of a finding of a violation was, in itself, just satisfaction for the violation found, reflecting the fact that focus of the ECHR was the protection of human rights rather than the award of compensation. Lord Bingham went on to point out that the ECtHR therefore treats a finding that Art 6 is breached as, in itself, affording just satisfaction, and does not speculate on what the outcome of the particular proceedings would have been if the violation had not occurred. He emphasised that the ECtHR awarded monetary compensation only where it was satisfied that a breach actually caused loss or damage, although the Court occasionally made awards if the applicant had been deprived of a real chance of a better outcome.

85 *Review of the Implementation of the Human Rights Act*, Department for Constitutional Affairs, 2006, p18. The decisions are: *R (Bernard) v Enfield LBC* [2002] EWHC 2282 (Admin), where £10,000 was awarded to two claimants to reflect the impact of the profoundly disabled wife living in unsuitable accommodation; *R (KB) v Mental Health Review Tribunal* [2004] QB 936 (Administrative Court), where damages of £750 to £4,000 were awarded for delays in tribunal hearings; and *Van Colle v Chief Constable of Hertfordshire* [2006] EWHC 360 (QB), where substantial HRA damages were awarded for breaches of Arts 2 and 8. The claimants sought damages and a declaration that the Chief Constable was vicariously liable for the acts and omissions of police officers, claiming that the police had failed to discharge their positive obligation to protect the life of their son who was murdered several days before he was due to give evidence for the prosecution at the trial of a criminal defendant. Mr Justice Cox found breaches of the positive obligations under Art 2 and awarded HRA damages of £15,000 for the son's distress in the weeks leading up to his death and £35,000 for the claimants' own grief and suffering.

not necessary reveal a consistent body of case law as guidance.⁸⁶ However, there are examples of cases where Article 13 has made a material difference.⁸⁷ This substantive right should certainly be considered for a new bill of rights, in order to emphasise the principle that rights are meaningless without effective remedies.

b) Comparative approaches to remedies

90. International and national bills of rights vary in their treatment of remedies. In the context of the International Covenant on Civil and Political Rights, the United Nations Human Rights Committee (UNHRC) has stated that an 'effective remedy requires reparation to individuals whose Covenant rights have been violated'. The UNHRC considers that 'reparations can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition'. It is worth giving a brief overview of the approaches in various overseas jurisdictions.

i) Canada

91. S24 Canadian Charter of Rights and Freedoms provides for remedies to those whose Charter rights are shown to be violated. It states that:

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

92. S24(1) has broader implications than the supremacy clause of the Constitution Act 1982 (s52(1)) which allows the courts to invalidate laws or parts of laws for breaches of the Charter. Among other things, s24 has enabled judges to place positive obligations upon a government, as well as to enforce more imaginative remedies. In a landmark case in 2003, the Supreme Court upheld a remedy which entailed the Nova Scotia government making progress reports to a judge. The majority of the Court emphasised the need to tailor remedies according to the case and that remedies enabled the judges to carry out their role in enforcing rights.⁸⁸

86 *Damages Under the HRA 1998*, Law Commission Report, 2000, Section B: Just Satisfaction under individual articles of the Convention, p112.

87 These are mostly Turkish cases. See, for example, *Güleç v Turkey* 1998-IV p 1698, 28 EHRR 121; *Salman v Turkey* 21986/93, 27 June 2000.

88 An example of an imaginative remedy can be found in the landmark case *Doucet-Boudreau* (2003) 3 S.C.R. 3. The claimants challenged the Nova Scotia government's delay in building French language schools as a breach of their s23 rights. A lower-court judge had ruled in the claimants' favour, and then demanded the government report to him as construction progressed. Despite the Supreme Court minority's objections that this use of s24 violated 'fundamental justice' and the 'functus officio' rule, in which a judge makes a ruling and afterwards has no role to play, the majority upheld the earlier decision. As the majority argued, s24 is 'responsive to the needs of a given case,' and as such 'novel remedies' may not only be permissible, but also required. The 'appropriate and just' limit was defined in this case as giving the courts themselves the right to determine what is appropriate and just (although they should keep in mind traditional common law limits on judicial power; in this case it was denied that 'functus officio' was violated), and also as requiring courts to remember that s24 is itself a part of the constitution and allows judges to carry out their function of enforcing rights.

ii) New Zealand

93. The New Zealand Bill of Rights Act (BORA) makes no provision for remedies should the court find an infringement of its terms. The Court of Appeal early on in its BORA jurisprudence found that it had the mandate to develop remedies such as the inadmissibility of evidence and the stay of proceedings where infringements were found to have occurred. In fact remedies of these types were available before the BORA – their extension since has been pragmatic rather than radical.
94. Four years after the enactment of BORA the Court of Appeal created a new public law remedy against intrusive police actions.⁸⁹ A remedies clause had specifically been left out of the draft white paper in 1985 and Parliament did not intend to allow the Crown to be held liable in such situations. But the majority of the Court held that the immunities provided for did not apply in a public law action based on BORA. The creation of a new public law remedy was also in line with the envisaged role for the judiciary in Article 2(3)(b) ICCPR. Moreover, it would be strange that Parliament should contemplate that New Zealand citizens could go to the UN Human Rights Committee under the Optional Protocol to the ICCPR, but not obtain redress against rights abuse under the domestic law which implemented the covenant.
95. This case prompted the question whether the subject of monetary remedies under BORA should be left to be further developed judicially or whether legislative clarification or reform might be desirable. The government consulted the New Zealand Law Commission, which endorsed the Court's approach, concluding that no legislation should be introduced to remove the general remedy for breach of BORA. The government has therefore left it to the courts to develop public law compensation further.

iii) Australia

96. Both the ACT HRA and the Victorian Charter expressly excludes the Court from awarding damages for a breach of Charter rights unless a right to damages was already available under an existing law. This reflects the approach of the Victorian Human Rights Consultation Committee who argued that 'removing damages from the Charter represents a balance between the need for a remedy and not imposing potentially significant additional costs upon government'.⁹⁰ In relation to Victoria, however, the Charter is to be reviewed in 2010 and one of the issues already marked for discussion is that of remedies.⁹¹

Enforcement of rights in relation to international law

97. Given the proliferation of international human rights law and the increasing convergence of international human rights standards, an important aspect to consider is the relationship of a British bill of rights to international law. While 'monist' systems typically apply international treaties automatically in domestic law, in 'dualist' systems like the UK the state is usually bound to comply with ratified international treaties but the courts are not bound to apply them in the absence of

89 The landmark case was the aforementioned *Baigent's Case* (1994) 3 N.Z.L.R. 667 in which the plaintiffs sought damages arising out of the obtaining and execution of a search warrant by police on false information.

90 *Rights, Responsibilities and Respect: Report of the Human Rights Consultation Committee*, Human Rights Consultation Committee, (2005).

91 Pamela Tate S C, 'The Charter of Human Rights and Responsibilities: A Practical Introduction', talk by the Solicitor General to the Continuing Legal Education programme of the Victorian Bar, 7 March 2007.

incorporating legislation. Notably, the South African constitution provides that, in interpreting its bill of rights, courts ‘must’ consider international law and ‘may’ consider foreign law.⁹²

98. Given the UK’s broad network of international obligations, and their increasing importance in domestic law, the debate over a British bill of rights presents an opportunity to consider some form of explicit judicial duty to take international law into account in judicial decision making.⁹³ This could build on and complement the established common law duty to interpret legislation compatibly with international obligations.
99. At the pre-legislative stage, too, there is room for a more wide-ranging approach. One example might be the inclusion of a duty on the relevant minister to take into account other international law treaties in addition to the ECHR when determining the rights compatibility of proposed legislation under the current s19 HRA.

Conclusion

100. Increasing protection for fundamental rights in Britain through a British bill of rights does not necessarily entail constitutional entrenchment. British courts can, like those in systems where the constitution (and judicial power) is supreme, reason and declare that legislation is inconsistent with human rights in a way that cannot be interpreted away. The substantial difference is what they can do in respect of such inconsistencies.
101. The ‘parliamentary’ bills of rights models operate in a particular political environment. This environment assumes that politicians’ disagreements with judicial perspectives will be significantly profound, and their commitment sufficiently robust, before Parliament is prepared to act contrary to judicial judgments.
102. The significance of this structure may lie not in broadening the perspectives brought to bear on political questions involving rights claims, but merely in changing the manner by which judicial perspectives shape political decisions. Instead of waiting for litigation, and judicially-imposed remedies associated with more traditional bills of rights, judicial perspectives are incorporated in the development and evaluation of legislation.
103. Given the joint responsibility of protecting rights which is shared between the branches of the constitution, this approach may remain particularly appropriate for a British bill of rights. Enforcement of rights should involve the greatest degree of parliamentary participation possible. At the judicial stage of rights determination, there is a strong case for including the right to an effective remedy. However, more important is the development of a parliamentary culture of rights, which encourages Parliament to enter whole-heartedly into the rights debate, anticipating judicial standards to define the parameters of legislation, yet knowing the value of the parliamentary ‘take’

92 Art 39(1)(b) and (c). See also the following: Art 231(4), which provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament; Art 232, which provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament; and Art 233, which states that every court must, when interpreting any legislation, prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

93 See *A & ors v Secretary of State for the Home Department* [2005] UKHL 71, in which there was discussion as to whether the prohibition of torture has become a customary rule of international law and thereby become part of UK law.

on human rights in a constitutional dialogue. The courts can be bolder in their approach too, going beyond the rights protection accorded by Strasbourg where and when appropriate in the British context. At the same time, both Parliament and the courts have good reason to adopt a more international perspective in forging a body of British jurisprudence and political debate that ensures a dynamic and integrated approach to securing rights in Britain.



Chapter five

Process

1. A new bill of rights will significantly change the British constitution. It will affect the relationship between Parliament, the government and the courts. Most importantly, it will affect the relationship between the individual and the branches of government. Any move to introduce a British bill of rights in Parliament must therefore be accompanied by a comprehensive public education campaign and a major consultation process.
2. Constitutional stability depends partly on social acceptance of constitutional arrangements. Since the effect of giving constitutional protection to certain rights is to make them less susceptible to changing political agendas, such a step requires broad and enduring social agreement.
3. Comparative experience of constitutional consultation is highly informative. Major consultation exercises undertaken in both Australia and New Zealand in recent years have reported broadly similar patterns regarding public knowledge of constitutional arrangements and public opinion on constitutional reform procedures. Committees of inquiry have tended to find a concerning lack of public knowledge about constitutional arrangements. However, informed debate during the consultation process has led to clear majorities in favour of extensive consultation prior to major reform and the use of referendums following independent and impartial information campaigns.¹
4. Procedurally, our unwritten constitution makes constitutional reform no more difficult to achieve than any other policy initiative. Politically, it can make it harder. This is because there is no settled procedure for constitutional change – unlike under written constitutions, which prescribe procedures for their own amendment. There is no agreement, for example, about when a referendum might be required. Nor is there agreement on the appropriate parliamentary procedure for constitutional bills.²

1 The Australian Constitutional Centenary Foundation assisted public debate on the constitution during the 1990s and included in its findings: a worrying lack of public knowledge and understanding of constitutional issues; overwhelming public support for referendums as part of the process for constitutional change; the importance of establishing public trust through reliable, independent and readily available information; and the importance of any body overseeing discussion process to be connected with wide range of population and be linked to parliamentary and political process and have good funding base to maintain independence. In New Zealand, the House of Representatives' Constitutional Arrangements Committee undertook extensive public consultation in 2005 and reported that major change should not be made hastily and without broad public support; further, most people believed major changes should be made only if supported at referendum and much of the population favoured a super-majority of 75 per cent in referendum or Parliamentary vote or both. See *'Inquiry to review New Zealand's existing constitutional arrangements'*, Constitutional Arrangements Committee Committee (I.24A), 10 August 2005, available at <http://www.parliament.nz/en-NZ/SC/Reports>.

2 The debate has recently been re-ignited – see Dawn Oliver, 'Improving the Scrutiny of Bills: The Case for Standards and Checklists', PL (2006) 219; Robert Hazell, 'Time for a New Convention: Parliamentary Scrutiny of Constitutional Bills 1997 – 2005', PL (2006) 247.

5. Ideally, constitutional reform should be based on broad public and cross-party consultation. The use of commissions and consultation processes to develop policy is not exclusive to constitutional issues. But constitutional issues are different, because of the perceived need for reforms to be built on political consensus rather than derived from partisan policies. Special procedures reflect awareness that constitutional reform is different from other policy changes. It affects the rules of the political game. It should therefore be agreed by interested parties besides the government to ensure that it lasts well beyond the lifetime of a particular administration.
6. This chapter explores the typical elements of a constitutional reform process in commonwealth jurisdictions like the UK. It outlines the possible features of a consultation and enactment process. It then considers specific consultation processes which have been employed overseas and draws lessons from these for the consultation to be launched by government concerning a British bill of rights.

Elements of the constitutional reform process

a) Initiation of reform proposals

7. Constitutional reform tends to be put on the political agenda via a number of methods: party election manifestos; cross-party Parliamentary consensus leading to some form of Parliamentary inquiry; through public demands or popular activism; or through government initiative.
8. On 3 July 2007, the Prime Minister published a green paper, proposing a 'route map' for major constitutional reform.³ Discussion of a British bill of rights forms a key part of this route map to a new constitutional settlement. Announcing his plans to the House of Commons, the Prime Minister stated:⁴

What constitutes citizens rights – beyond voting – and citizens responsibilities – like jury service – should itself be a matter for public deliberation. And as we focus on the challenges we face and what unites us and integrates our country, our starting point should be to discuss together and then – as other countries do – agree and set down the values, founded in liberty, which define our citizenship and help define our country.

And there is a case that we should go further still than this statement of values to codify either in concordats or in a single document both the duties and rights of citizens and the balance of power between Government, Parliament and the people.

In Britain we have a largely unwritten constitution. To change that would represent a fundamental and historic shift in our constitutional arrangements. So it is right to involve the public in a sustained debate whether there is a case for the United Kingdom developing a full British Bill of Rights and Duties, or for moving towards a written constitution.

And because such fundamental changes should happen only where there is a settled consensus on whether to proceed, I have asked my Right Honourable Friend the Secretary for Justice to lead a dialogue within Parliament and with people across the United Kingdom by holding a series of

³ *The Governance of Britain*, CM 7170, July 2007.

⁴ HC Debates vol 462, col 819, 3 July 2007.

hearings, starting in the autumn, in all regions and nations of this country --- and he will consult with the other parties on this process.

9. The issue of a British bill of rights had already been thrust into the public arena a year earlier, when the Leader of the Conservative Opposition made a speech in which he proposed to replace the Human Rights Act 1998 (HRA) with a British bill of rights and responsibilities.⁵ While analysis of his speech suggests rather differing motives from those of the new Prime Minister (and, from a rights point of view, concerning motives),⁶ the Leader of the Opposition nevertheless highlighted the importance of the debate. Showing commitment to consider the matter further, he set up a bill of rights commission to investigate and report.
10. The Liberal Democrats, too, recently announced proposals for major constitutional reform. A key part of these proposals is to involve the British people in drawing up a written constitution which sets out individual rights and limits the power of the state. The project would aim to 'reinvigorate the democratic process' and 'guarantee the sovereignty of the people'.⁷
11. The process of establishing a bill of rights is already in its preliminary stages in Parliament. The Joint Committee on Human Rights (JCHR) issued a call for evidence in May 2007 as part of their inquiry into the merits of a British bill of rights.⁸
12. The idea of a British bill of rights clearly attracts significant cross-party attention. The prospects for cross-party consensus on initiating such reform in the near future could therefore be promising. For all parties, a bill of rights appears to be a potential tool for re-enforcing a sense of 'Britishness' and re-defining the relationship between the state and its citizens (and non-citizens) within its borders.

b) Public consultation and consensus

13. It is important to decide on an effective strategy to ensure public participation in a debate on a British bill of rights.
14. Most codified constitutions provide for amendment procedures that in practice are enhanced by public consultation. Recent developments in international law are helping to move the debate over public participation in constitutional reform from whether it is desirable to whether it is a 'right'. The UN Committee on Human Rights has interpreted the right granted in the International Covenant of Civil and Political Rights (ICCPR) of public participation in public affairs as extending to constitution-making.⁹
15. New techniques for constitutional consultation are emerging: establishment of prior agreement on principles as a first phase of constitution-making; civic education and media campaigns; creation and guarantee of channels of communication; local discussion forums; and open drafting committees. Efforts to consult with the public differ in their degrees of formality and the extent

⁵ David Cameron, *'Balancing freedom and security: A modern British Bill of Rights'*, speech to the Centre for Policy Studies, 26 June 2006.

⁶ Ibid – David Cameron claimed that the HRA had hindered fight against terrorism and crime (a claim denied by the then Department of Constitutional Affairs in its Review on the Implementation of the Human Rights Act 2006) with the implication that only by undermining current human rights guarantees can the fight against terrorism and crime be 'won'.

⁷ *For the People, By the People*, Liberal Democrat Policy Paper 83, August 2007, <http://www.libdems.org.uk/party/policy/paperlist.html>.

⁸ JCHR, Session 2006-2007, Press Notice No 38, 10 May 2007.

⁹ General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25); 12/07/96; CCPR/C/21/Rev.1/Add.7, para 6(b).

of their engagement, from a format which requires deliberation to one which merely seeks public response to specific proposals (such processes are implemented by bodies including royal commissions, commissions of inquiry or constitutional assemblies).

16. The implementation of a bill of rights, as with any major item of constitutional change, will be substantially strengthened by clear evidence of popular support. A US study in 2003 declared that '[p]rocess has become equally as important as the content of the final document for the legitimacy of a new constitution'.¹⁰ Popular support will provide a powerful endorsement for the government when preparing and enacting the legislation for a bill of rights. It will mean that minority dissent of an obstructive nature is easier to overcome, particularly in the Parliamentary passage of the measure.
17. Lessons can be drawn from various recent public consultation processes, which are explored further below. The process in Victoria, Australia, in the run up to its Charter of Rights and Responsibilities is a good example of a thorough consultation which aimed at and succeeded in including all sections of society and generating a feeling of public ownership. Northern Ireland's bill of rights process is ongoing. Much progress has been made but consultation has been continuing for seven years now, raising the possibility that process can be a hindrance as well as a help, though societal circumstances are clearly different from those in Britain.
18. Public attitudes towards reform of the constitution and political system of the UK generally have undergone a marked shift over the past few decades. This is clear from the number of constitutional lobby groups and their activities, and the results of opinion polls.¹¹
19. The newly created Commission for Equality and Human Rights¹² should play a significant role in the public consultation element of the process. Its advisory and other public work should promote a greater awareness and understanding of fundamental rights and how they interrelate with people's ordinary lives. It should acclimatise the country towards human rights reform legislation generally and could convince a wider body of persons of the relevance and usefulness of a bill of rights.

c) Government and legislative process

20. Some institution or body needs to be established in order to consider the range of options relating to the contents of the document, and to prepare a report with recommendations for the government and Parliament. In most countries, this has been some form of commission.
21. Whereas many countries make constitutional provision for reform processes, typically in the UK (as in New Zealand), constitutional reform is enacted through the normal executive and legislative process. Indeed, significant constitutional changes in the UK have been made without public debate. The infamous 'press release' reforms concerning the creation of the Supreme Court and abolition of the office of Lord Chancellor in June 2003 serve as a good example.¹³
22. While current arrangements give considerable latitude for transforming rights and powers relatively imperceptibly, top-down enforcement is likely to have limits and public engagement remains

10 Vivien Hart, *Democratic Constitution Making*, Special Report 107, US Institute of Peace, July 2003, p1.

11 Disability Rights Commission poll 2004 / ICM / Joseph Rowntree Reform Trust State of the Nation poll 2006.

12 Established by the Equality Act 2006.

13 See for eg 'Controversy over historic changes', BBC News website, 13 June 2003, at http://news.bbc.co.uk/1/hi/uk_politics/2986914.stm.

crucial. Ideally, the consultation and legislative processes for a bill of rights will be linked, with any special advisory body created collecting evidence and consulting widely before using its recommendations to prepare the way for a government-sponsored Parliamentary bill.

23. Politically, much will depend on the resolve of the current Prime Minister and his senior colleagues, especially the Secretary of State for Justice, who has responsibility for constitutional affairs. Observing international experience in the implementation of bills of rights elsewhere, the UCL Constitution Unit has stated that:¹⁴

The development of a Bill of Rights will not come to fruition without (ideally) government sponsorship at the outset and (certainly) government support for a specific course of action. Most important is the personal commitment and authoritative leadership of a senior government figure both during the development process and in 'selling' the outcome to Parliament.

24. Apart from the political leadership necessary from the Prime Minister and cabinet, the most pivotal work in implementing a British bill of rights will come from the commission or other similar body set up by the government to bring forward recommendations on the details of the reform bill. There are several different kinds of commission which might be considered for this task.
25. Such a body could take the form of a royal commission, the traditional forum for independent experts (in this case legal and constitutional affairs) together with a cross-section of people from relevant professions and disciplines. Some have advocated the establishment of a permanent royal commission on the constitution – a constitutional commission – which would keep the state of UK constitutional law under constant review, and consider and report on any matter of reform referred to it by the government.¹⁵
26. Another possible form of commission for the task of drafting a bill of rights would be an ad hoc government or departmental committee of inquiry, akin in composition and operation to a royal commission. A government committee would similarly be appointed by the Crown at the formal instigation of the Prime Minister. If the Prime Minister deemed that responsibility for the reform should rest solely with a single ministry – most probably the Ministry of Justice – then the commission could be appointed as a departmental committee. All these forms of commissions mentioned may be appointed under the prerogative, though government and departmental committees can also be created by Act of Parliament. Statutory commissions require parliamentary discussion and approval of their terms of reference, composition and manner of operation, whereas prerogative bodies are established and constructed by the government without recourse to Parliament.
27. A different model would be a Parliamentary select committee established for the purpose. This would mean that the membership of the commission was composed entirely of politicians. The committee might be of one House alone, either the Commons or in Lords (similar to the Lords' Select Committee on a Bill of Rights 1976-1977). If it were a joint committee of both Houses of Parliament, the committee would be able to combine the political representativeness of members of the Commons with the more detached political qualities and source of legal expertise to be found in the Lords. A more ambitious suggestion, more appropriate to full-scale reform of the

¹⁴ 'Human Rights Legislation', UCL Constitution Unit, 1996, p114f.

¹⁵ Professor Rodney Brazier, *Constitutional Practice* (3rd edn), OUP, 1999.

constitution, perhaps is a constituent assembly, which would involve the House of Commons convening itself in a special capacity to consider and legislate a bill of rights.

28. Another possibility – recently highlighted by the Liberal Democrats in their constitutional reform consultation¹⁶ – is to convene a constitutional convention. Using the model that successfully led to broad consensus on Scottish devolution, such a set-up would involve a convention made up of ‘members of the public and parliamentarians of all parties and none’.
29. A final option might depend on how the operation of the Commission for Equality and Human Rights (CEHR) develops. As an expert source for producing an authoritative draft document, or offering key advice on the bill’s contents, the CEHR would be widely regarded as well qualified.
30. The most appropriate form of commission selected from these possible options will be determined by the government’s own views concerning the commission’s most important purposes at the time it is created. Two factors will be of particular relevance.
31. First, the commission should comprise a body of interdisciplinary expertise, particularly in constitutional and legal affairs. Though members will in any event take extensive evidence from others who are expert or interested in a bill of rights and its various aspects, the commission itself must clearly possess a level of expertise of its own, so as not only to be in a position to assess the range of options presented to it, but in order to be approaching the various problems and asking the most pertinent questions in the first place. Such expertise need not necessarily be drawn upon from political outsiders, and there is a pool of MPs and other politicians who are knowledgeable in the relevant subject matter.
32. Second, apart from serving as an authoritative source from which recommendations are forthcoming, the commission will need to approach its task in a way that maximises chances of reaching public consensus and the highest level of political support behind the measure. This will involve not simply public consultation but (to a greater or lesser extent depending on the prevailing state of parliamentary opinion on the reform) negotiation between the political parties or factions within and across them. This function will almost certainly require political representation that a body exclusively comprising independent experts would lack.
33. These factors point to the desirability of senior politicians being directly involved on the bill of rights commission which prepares the draft bill of rights. It is membership of the commission, rather than any particular title or form given to whatever type of body is appointed, that will be most crucial to its success.
34. A final determinant in the precise nature of the commission, however, is likely to be whether the government believes it most appropriate to be a government or parliamentary body. The differing consequences between the two are less marked than one might suppose. For while formally a commission that is a government committee reports to the Prime Minister (or departmental minister) and one that is a Parliamentary committee reports to Parliament, the response that matters in the enactment of the commission’s recommendations for a draft bill of rights would in both cases lie with the government which possesses the initiation and control of legislative business. While a government committee would certainly allow the mixed political-expert membership suggested

¹⁶ See n7 above.

above as being desirable, a joint Parliamentary committee might also be constituted along virtually identical lines, with party representatives being drawn from the Commons and legal and other experts being drawn from the Lords.

35. Following the report of the bill of rights commission, with its accompanying detailed draft legislation, the final stage in the implementation of the reform will be the government's sponsorship of the measures in Parliament. If the commission has successfully negotiated an acceptable consensus around its recommendations, it will be unlikely that the government will wish to make modifications in the form of the bill which is presented to Parliament. Parliamentarians, particularly backbenchers and minority opponents of part or all of the legislation, will wish to scrutinise the proposed bill of rights closely. As a constitutional bill, the normal parliamentary procedures for its passage would be the usual debates and approval at second and third readings, with the committee stage examining the measure clause by clause being taken in the chamber of each House, rather than being remitted in the Commons to a standing committee. To avoid delaying tactics by opponents in the Commons, partial referral of suitable clauses to a committee might be the subject of a government resolution for approval by the Commons, together with a schedule or timetable of the various parliamentary stages being agreed upon in advance between the parties.

d) Referendum process

36. A referendum on a British bill of rights needs to be considered, particularly concerning the precise content of a bill of rights. However, as a prior consultation on principle, a referendum seems unnecessary. The idea of a charter of human rights has already been implanted in our legal and political system through incorporation of the European Convention on Human Rights (ECHR) under the HRA.
37. Although referendums are a common mechanism under written constitutions for effecting fundamental changes, they have not been conventional practice in the UK. However, the process is now formalised by the Political Parties, Elections and Referendums Act 2000. While in the UK, the decision whether to hold a referendum remains largely one of political expediency rather than any constitutional principle, it would be of great benefit in ensuring popular support for rights protection.
38. Arguments in favour of referendums include: their reinforcement of the democratic process; the stamp of legitimacy given to the most important political questions of the day; their educative value; and the modern day benefit of participants who are much better informed and able to gain access to unmediated and authoritative information. Conversely, arguments against referendums include: their simplification of complex and interrelated constitutional questions; their dilution of the role of representative government whereby decision makers weigh conflicting priorities and negotiate compromises on behalf of the people; the disproportionate power ceded to contemporary majorities; the divisiveness generated in setting (necessarily opposing) terms of constitutional debate; the influence of relative resources on outcomes; and the risk of the referendum being influenced by extraneous considerations such as the unpopularity of the government at the time. Countries have had mixed experiences with referendums. In the seventeen major democracies of Western Europe only three (Belgium, the Netherlands, and Norway) make no provision for referendums in their constitution and only five advanced democracies, the US, Japan, India, Israel and Germany

(where referendums are unconstitutional) have never held a nationwide referendum.¹⁷ High profile rejections of referendum proposals include those in the Netherlands and France, which rejected the EU constitution after years of negotiation.¹⁸

39. Referendums have rarely been used in the adoption or approval of any bill of rights enacted abroad. The strongest argument for a referendum on a bill of rights is limited not so much to its content as to the narrower issue of political entrenchment. If the bill of rights commission or government recommended that the bill of rights be entrenched in a way which substantially qualified the principle of parliamentary sovereignty, then it might well be desirable to secure the moral backing of a democratic vote of the electorate. This would serve to bind the government and Parliament politically as to their future courses of action, and it would also be recognised in the reality of the constitutional framework of the country by the British courts.
40. The details of the referendum should be tailored towards its purpose. Acceptance of the principle of a bill of rights could be assumed – it would be the specific form of legislation enacting the bill of rights for which electoral approval would need to be sought. In other words, the referendum should be post-legislative. The statute creating the bill of rights could contain a section stating that its commencement was subject to a positive vote being carried in a referendum. A simple majority in favour would seem adequate, although higher requirements commonly operate in other countries' referendum arrangements (stipulating for example that a certain proportion of registered electors must vote in support). Clearly, the higher the actual vote in favour the greater the moral endorsement of the bill of rights there would be. The government should declare in advance that the effect of the referendum is to be regarded as mandatory. So, for example, if the bill of rights is approved, a commencement order will be laid before Parliament for an affirmative vote; if it fails to pass the necessary threshold of required support, an order for the repeal of the bill of rights would be put before Parliament.
41. The holding of a referendum would entail a prior campaign in which politicians and interested organisations could participate. The government would need to make arrangements for explanatory information to be published and made available to the public, with the question in the referendum asking 'Do you want the provisions of the Bill of Rights Act to be put into effect?'
42. One particular lesson for Britain includes that noted by the New Zealand Constitutional Arrangements Committee in 2005: to hold a referendum in a timely fashion, within six months to a year of the consultation process, while public consensus still holds.

Comparative processes

43. This section outlines the processes undertaken in other jurisdictions in the run-up to their bills of rights. Consultation processes have steadily grown in their breadth, inclusiveness, sophistication and general effectiveness. It is useful to consider Commonwealth experience, starting with Canada's Charter of Fundamental Rights and Freedoms 1982; New Zealand's Bill of Rights Act 1990; Israel's Basic Laws 1992; South Africa's Constitution in 1996; the more recent Australian bills of rights legislation (Australian Capital Territory Human Rights Act 2004 and Victoria's Charter

17 The People's Voice, *The Economist* (US), vol 353, issue 8132, 14 August 1999, p45.

18 'French say firm 'No' to EU Treaty', BBC News website, 30 May 2005, <https://news.bbc.co.uk/1/hi/world/europe/4592243.stm>; 'Dutch say 'No' to EU treaty', BBC News website, 2 June 2005, <http://news.bbc.co.uk/1/hi/world/europe/4601439.stm>.

of Rights and Responsibilities 2006), and finally the ongoing process in Northern Ireland. The processes in Australia and Northern Ireland receive particular attention, given their current nature and the breadth of their implementation.

a) Canada

44. The inclusion of a charter of rights in the patriation of the Canadian Constitution (Constitution Act 1982) was a much-debated issue.¹⁹ In the preparation of the 1982 Canadian Charter of Rights and Freedoms, a Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada was created, with resources provided by the federal government. The committee spent 90 hours on the bill of rights alone, all filmed for television. Civil rights experts and interest groups put forward their perceptions on the charter's flaws and omissions and how to remedy them. As the process continued, more features were added to the charter, including equality rights for people with disabilities, more sex equality guarantees and recognition of Canada's multiculturalism.²⁰
45. Prime minister Pierre Trudeau agreed to the committee of Senators and MPs which examined the bill of rights, but the committee was not strictly speaking a body set up to initiate a draft bill. It was formally acting as a special committee to consider a draft charter of rights drawn up by Pierre Trudeau's Liberal government. However, in practice the Joint Committee served a largely similar purpose to that which will be required of a preparatory British bill of rights commission, in that its role was to take expert evidence, undertake the wide public consultation exercise required and serve as the broker between the differing political view points in the draft (which eventually led to 70 changes being made to the original proposal presented to it). A joint Parliamentary committee of this kind, acting as an ad hoc instrument of inquiry could well prove effective in the British context.
46. The Canadian Charter was intended to be a source for national values and national unity. The initial federal government premise was on developing a pan-Canadian identity. Then Prime Minister Pierre Trudeau, the driving force behind the legislation, wrote in his memoirs that 'Canada itself' could now be defined as a 'society where all people are equal and where they share some fundamental values based upon freedom and that all Canadians could identify with the values of liberty and equality'.²¹
47. The Canadian process was dominated by Quebec, which did not support the Charter (or the Canada Act 1982). Its leadership prioritised achieving sovereignty for Quebec, and was eventually excluded from the Patriation negotiations which it viewed as too centralist. The Charter is still applicable in Quebec because all provinces are bound by the Constitution. However, Quebec's opposition to the 1982 patriation package has contributed to two failed attempts to amend the Constitution, which were designed primarily to obtain Quebec's political approval of the Canadian constitutional order.

19 The majority of the provinces had other priorities in the patriation process, particularly the enlargement of some of their powers; see 'Canadian Charter of Rights and Freedoms', Canadian Encyclopedia, <http://www.thecanadianencyclopedia.com>, (© Historica Foundation).

20 The committee listened to over 300 presentations from women, Aboriginal people, people with disabilities, ethnic and cultural minorities, and others. The committee also considered over 1200 written submissions about the Charter. From this, it made 123 recommendations to improve the Charter – of which 70 are in the final document; see <http://www.charterofrights.ca>. See further Mary Eberts, 'Canadian Charter: A Feminist Perspective', in Philip Alston, *Promoting Rights through Bills of Rights*, Oxford University Press, 1999, at p244.

21 Pierre Elliott Trudeau, *Memoirs*, McClelland & Stewart, 1993, p322.

48. Despite such obvious historical tension, opinion polls in 2002 (the 20th anniversary of the Charter) showed Canadians felt the Charter significantly represented Canada, although many were unaware of the document's actual contents.²²

b) New Zealand

49. By contrast, the New Zealand Bill of Rights Act 1990 (BORA) was a partisan measure promoted by the Labour government in its pre-election manifesto.²³ It lacked the support of the (then) national opposition and many members of the Labour government itself. Nor did the issue receive much public interest. The opposition dismissed it as a futile reform. Its pre-enactment period was markedly different from that of the Canadian Charter. There was a relatively muted period of public debate and a clear majority of public submissions against the proposal. However, there was considerable debate in Parliament following the proposals in the white paper in 1985.²⁴
50. The white paper pointed out how the New Zealand system of government could ride roughshod over minority interests and that discrimination and oppression could easily result from majority views on such matters. The idea that New Zealand should have a bill of rights limiting the power of government and guaranteeing protection of fundamental values and freedoms was set out in Labour's 1984 manifesto. It was a policy that had been well advertised even if it was not well understood. The journey between that announcement and the enactment of BORA was a 'long and tortuous' one.²⁵ For many years, the notion of an entrenched bill of rights that gave the courts the power to strike down legislation inconsistent with it was stoutly resisted.
51. The white paper was referred on publication to the Justice and Law Reform Select Committee of Parliament, which began extensive hearings that took two years. The committee published an interim report which analysed the 431 submissions received and the policy arguments made in front of the committee.²⁶ It was clear from that report that the central idea of a bill of rights was unacceptable to many respondents, who objected to judicial review of acts of Parliament and court declarations as unconstitutional acts that did not comply with the provisions of BORA.²⁷ The committee's final paper recommended against an entrenched constitutional bill of rights due to the (misconceived) public concern over transfer to the judiciary.²⁸ It advocated instead a statutory version, emphasising its potential to have 'great educational and moral value'.²⁹
52. The bill of rights debate stimulated interest in the way New Zealand is governed, but exposed considerable ignorance of the existing process.
53. The National Opposition party decided that it was opposed not only to an entrenched bill of rights but also, in the House of Representatives, opposed the statutory version introduced by the Labour party. That opposition in itself made the conduct of the enterprise more difficult but not impossible. As a government bill, the Bill of Rights bill was assured of passage and was enacted after a vote in the House that divided along party lines.

22 'The Right to be Ignorant', Joanne Byfield, *News magazine*, 16 December 2002.

23 'Open Government Policy 1984', discussed in Geoffrey Palmer, *Unbridled Power*, Oxford University Press, 1987.

24 *A Bill of Rights for New Zealand*, (1985) AJHR A6.

25 Matthew Palmer, Geoffrey Palmer, *Bridled Power*, Oxford University Press, 1997, chapter eight.

26 Interim Report (1987) AJHR I.8A.

27 Other responses included twenty-five religious submissions arguing that the bill should acknowledge God as the source of rights, as well as a large number of submissions from right to life supporters focusing on the right to life in Article 14 in relation to the foetus.

28 *Final Report of the Justice and Law Reform Select Committee on a White Paper on a Bill of Rights for New Zealand* (1988) AJHR I.8C.

29 *Ibid*, p3.

54. There have been no moves to repeal the legislation and it has not proved to be as weak and inconsequential as anticipated. While public objections clearly influenced the eventual form the 1990 Act took, this has not prevented New Zealand judges from being prepared to give it teeth.
55. If the New Zealand public are relatively ambivalent about the Act, it has nevertheless survived a challenging inception and continues to influence policy making to a significant extent.³⁰

c) South Africa

56. South Africa's post-apartheid interim constitution and bill of rights were the result of initial discussions at the Convention for a Democratic South Africa (CODESA) and, after its collapse, the negotiations of the Multi-party Negotiating Forum which were completed at the end of 1993. The interim constitution was finally agreed upon and passed by the old Parliament as the Constitution of the Republic of South Africa 200 of 1993 with a Bill of Rights enshrined in chapter three. The interim constitution provided that an elected constitutional Assembly must, within two years and after wide consultation, draft a final constitution and bill of rights within the guidelines set out in the constitutional principles agreed upon during the negotiations.³¹
57. The constitutional assembly drafting the new constitution was made up of the parliament's 400 members and the 90-member Senate.³² It immediately engaged in a massive publicity campaign to encourage ordinary members of the public to submit ideas on the new constitution. More than two million submissions were received. The drafting process involved many South Africans in a large public participation program. Some parties registered reservations and gave notice of their intention to file amendments in respect of various clauses. The main challenges of the drafting process were issues such as: federalism versus unitarianism; property guarantee versus right to carry out land reform; right to life versus death penalty; and freedom of speech versus prohibition of racial hate speech.
58. After a two year process the text was finally adopted and then had to be certified by the Constitutional Court to ensure that it complied with the constitutional principles before it was passed as law by Parliament. Certain sections of the proposed new constitution were referred back to the constitutional assembly by the Court for re-drafting, but by and large the provisions of the draft bill of rights remained intact.
59. The bill of rights is held up as the most progressive in the world, given its relatively late arrival and the fact that it draws so heavily on international law and the experiences of other countries and the various moves to constitutionalisation.³³
60. In the context of drawing up a bill of rights for Britain, it should be remembered how different were the circumstances in which a rights instrument was drafted for South Africa. South Africa's constitution was dominated by the end of apartheid and was an exercise in state building. The constitution was to perform a transformative function and the technicalities of consultation might

30 For analysis of BORA's influence on policy due to s7, which obliges the Attorney General to report on BORA compliance of legislation, see Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, *The New Zealand Bill of Rights*, pp 195-216.

31 For detailed review of political narratives which contributed to the debates, see Martin Chanock in Philip Alston (ed), *Promoting Human Rights through Bills of Rights*, Oxford University Press, 1999, chapter 7.

32 See further Jeremy Sarkin, 'The Drafting of South Africa's Final Constitution from a Human-Rights Perspective', (1999) *AJCL* Vol 47 (1).

33 See n31.

be described as particular to South Africa's needs and comparable to the process now in motion in the post-conflict society of Northern Ireland.³⁴

d) Israel

61. The closest Israel has to a bill of rights is contained in a number of Basic Laws. The consultation process preceding the Basic Laws was minimal. The Basic Laws were introduced by the government and passed on a bare majority in the Knesset. There was little sense of public ownership of the documents and religious tensions were high over the content and any risks of embracing individualistic and ideological rights at the expense of religious values.³⁵ Two of the Basic Laws, Freedom of Occupation and Human Dignity and Freedom, were to have been part of a Basic Law on Civil Rights, but they were passed separately when other parts of that proposed law became bogged down in controversies over security concerns and religious opposition.
62. The rapid evolution in Israeli constitutional and human rights law has had both positive and negative ramifications.³⁶ Israel's system of law and basic principles are now stabilised by a constitution, but the text remains incomplete and unknown to the public. It is therefore lacking in relation to the educational, civic and political functions a constitution should and would fill if it grew out of an inclusive process of public deliberation.
63. The bill of rights in the basic laws is unfinished, and the issue of Israel as the state of the Jewish people is almost ignored. A further source of concern is that the court's interpretation and application of some of the Basic Laws has alienated Members of Knesset (particularly the Orthodox) who originally supported the Basic Laws themselves in plenum.

e) Australia

64. It is worth considering in detail the process undertaken in the state of Victoria, Australia.³⁷ This is the most recent and arguably most successful consultation process in terms of its breadth and intensity, as well as being well documented. It followed on from the process for the Australian Capital Territory Human Rights Act 2004 and preceded those in Tasmania and New South Wales, where consultations are ongoing in relation to further regional bills of rights.
65. The Victorian government, through its Attorney General, launched a six-month process to consult with the Victorian community about whether the state's law should better protect human rights.³⁸ A Human Rights Consultation Committee was appointed and a statement of intent was issued by the government. This statement outlined the government's preferred human rights model (including as to the role of the courts, the need to focus on dispute prevention and the rights to be protected) and the process by which the committee was to undertake the community consultation. The committee was asked to report to the Attorney General within six months.

34 See at <http://www.billofrightsforum.org>.

35 Steven V Mazie, *Israel's Higher Law: Religion and Liberal Democracy in the Jewish State*, Lexington Books, 2006.

36 For in depth analysis, see David Kretzmer, in Philip Alston (n31 above) at pp75-88.

37 For a detailed critique and comment, see George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origin and Scope', (2006) MULR, vol 30, 2006, pp880-905. See also *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee*, Department of Justice, Victoria, 2005, at <http://www.justice.vic.gov.au>.

38 See committee report, n37.

66. The community consultation commenced on 1 June 2005, when the committee released its community discussion paper and called for submissions. The committee employed a range of innovative strategies to ensure that information about the process was distributed as widely as possible, particularly to marginalised and disadvantaged people in the community. The consultation engaged with a significant number and diversity of groups in giving people a real say on the question of Victoria's future. The responses received proved it to be the most citizen-involved consultation on the issue of a bill or charter of rights so far undertaken in Australia.³⁹
67. The committee also participated in 55 community consultation meetings, information sessions and public forums and 75 consultations with government and other bodies. These events provided opportunities to engage directly with the community, including with marginalised and disadvantaged people and people from regional and rural areas across the state. The committee also undertook specific consultations with groups such as the judiciary, indigenous peoples, religious organisations, police, business, victims of crime and academics with expertise in the law.
68. The committee released a community discussion paper⁴⁰ and invited people to make a submission. The community discussion paper sought to provide accessible background information on the main issues around developing a framework to increase protection and promotion of human rights in Victoria. The aim was to get people thinking about human rights and what the government and the community might do to encourage a culture of respect for human rights in Victoria. The paper asked ten key questions, phrased openly to encourage debate. The ten questions were:
- *Is change needed in Victoria to better protect human rights?*
 - *If change is needed, how should the law be changed to achieve this?*
 - *If Victoria had a Charter of Human Rights, what rights should it protect?*
 - *What should be the role of our institutions of government in protecting human rights?*
 - *What should happen if a person's rights are breached?*
 - *What wider changes would be needed if Victoria brought about a Charter of Human Rights?*
 - *What role could the wider community play in protecting and promoting human rights?*
 - *What other strategies are needed to better protect human rights?*
 - *If Victoria introduced a Charter of Human Rights, what should happen next?*
 - *Is there anything else you would like to tell us about how human rights should be protected in Victoria?*
69. The Victorian Department of Justice established a website for the consultation.⁴¹ There was wide distribution of the education literature.⁴² Information on how to access the discussion paper was distributed by email to tens of thousands of people. This included information contained in email alerts and bulletins from many community and non-government organisations. This assistance ensured that many thousands of people received information about the process and were given the opportunity to participate. Importantly, this also included people who often find it difficult to access this sort of information.

39 A total of 2524 people and organisations submitted responses to the committee on what they thought about whether human rights could be better protected in Victoria (population an estimated 5,037,700).

40 *Have your say about human rights in Victoria*, Human Rights Community Discussion Paper, June 2005, at <http://www.justice.vic.gov.au/>.

41 In the six month consultation period the website had 51,208 hits and 8,099 visits or sessions of activity.

42 Over 4,000 printed copies of the full discussion paper were distributed; 2,160 copies of the discussion paper were downloaded from the website; 15,000 printed copies of the summary document were distributed in hard copy and 581 copies were downloaded from the website.

70. The summary document was produced in ten community languages and distributed to over 600 organisations from culturally and linguistically diverse communities. Electronic versions were made available on the website, including in audio format and in large print for people with sight impairments.⁴³ Specific materials were also developed for schools⁴⁴ and particular groups in the community.⁴⁵
71. The committee reported that the large number of responses it received, together with the diversity of the groups responding to the consultation project, demonstrated the importance of conducting specific consultation strategies for particular groups in the community. It also illustrated the value of using innovative tools for citizen engagement, such as interactive online submission forms and seeking to consult disadvantaged communities.⁴⁶
72. During the consultation project, the committee undertook 55 community consultation meetings. The aim was to: provide information about the project and how to participate; provide an additional avenue through which people could contribute their views; seek the views of people or groups who may be otherwise marginalised from the submission process; and seek the views of particular people or groups who may have a particular interest.
73. A large number of people from a diverse range of backgrounds attended the meetings and consultations.⁴⁷ Many of the meetings took place in rural and regional Victoria. In addition to the 55 community meetings, the committee also undertook 75 focused consultations with specific stakeholders.⁴⁸
74. The process in Victoria appears to have compared favourably with similar initiatives. In 2000-2001, the New South Wales Parliamentary Standing Committee on Law and Justice undertook an inquiry on whether it was appropriate for New South Wales to enact a statutory bill of rights.⁴⁹ The standing committee received 141 submissions and written responses.⁵⁰ It conducted 12 public hearings from April 2000 to March 2001, with a total of 30 witnesses. The committee tabled its final report in October 2001, which concluded against a bill of rights.

43 Overall, 22,719 copies of the full discussion paper and summary were made available in hard copy, by email or downloaded from the web.

44 Materials were developed for secondary school teachers to assist in preparing teaching lesson plans to help students to contribute to the consultation. These materials were made available on the human rights project website, with over 50 schools and teachers' associations specifically requesting copies of the materials. The charter was also the topic for debate at the Victorian Schools Constitutional Convention. Specific material was also developed for indigenous communities that provided a background to the issues, as well as specific information on human rights issues for indigenous Victorians.

45 These groups included people with disabilities, faith based groups, people who were homeless, older people, women, young people and people from the gay/lesbian/transgender community. Radio announcements for emerging communities were produced and broadcast on community language programs on community radio. Radio announcements about the consultation were also made on community radio programs for specific groups, including older people, young people, prisoners and the gay/lesbian/transgender community.

46 Statistical analysis of the submissions from individuals and organisations revealed that 84 per cent of formal submissions supported change to better protect human rights in Victoria. The consultation was not random or weighted to reflect the characteristics of the population, but was a call for submissions. Nonetheless, the outcome was not markedly different from other public opinion polls on the subject showing roughly the same level of support.

47 They included people from faith based networks, family groups, artists, people representing business interests, welfare groups, young people, people with disabilities, older people, people from culturally and linguistically diverse backgrounds, indigenous people, people from the gay/lesbian/bisexual/transgender community, women's groups, academics, and people in contact with the criminal justice system.

48 This included meetings with members of the judiciary (from the Supreme, County and Federal Courts, the Children's Court, the Magistrate's Court and the Victorian Civil and Administrative Tribunal). Other public figures from the police, public administrators, welfare groups, legal reform groups, victims of crime groups. Meetings were held with leading academics from Victorian universities and experts from New Zealand. The chair of the committee travelled abroad for consultation, mostly with representatives of government, including senior officials from a wide range of government departments.

49 Report at <http://www.parliament.nsw.gov.au/lawandjustice>.

50 New South Wales has an estimated population of 6.83 million.

75. In the Australian Capital Territory (ACT), the community consultation on a bill of rights commenced in April 2002 with the appointment of an independent consultative committee. It published a discussion paper and facilitated a series of six town meetings. It also undertook targeted consultation meetings with community groups. In total, the committee conducted 49 consultations or meetings with various community groups or individuals.⁵¹ The committee also conducted a deliberative poll, in which 200 representative ACT residents participated over two days, and presented its final report in May 2003. When compared to the level of response to similar inquiries in Victoria, New South Wales and the ACT, the high interest expressed by Victorians in this consultation process was notable.
76. It was Victoria's Solicitor General who prepared the drafting instructions for the bill, which was then drafted by the Victorian Chief Parliamentary Counsel and his staff. The process was notable for inter-institutional support and in particular support from Victoria's Department of Justice.

f) Northern Ireland

77. While currently operating under the UK Human Rights Act model of a bill of rights, various pressure groups in Northern Ireland have launched major efforts in recent years to bring about a bill of rights specific to the region.
78. Under the Good Friday (Belfast) Agreement 1998, the Northern Ireland Human Rights Commission (NIHRC) was asked to consult with the people of Northern Ireland and advise the Secretary of State on the scope for defining rights supplementary to the European Convention of Human Rights (ECHR). Such rights were to reflect the particular circumstances of Northern Ireland, and, taken together with the ECHR, would constitute a bill of rights for Northern Ireland. In particular, the NIHRC was mandated:

... to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland.

79. Among the issues for consideration by the Commission are:
- the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and
 - a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.
80. The NIHRC launched its consultation process in April 2000. Since then there have been working groups; publications; seminars; conferences; training sessions; international visits; meetings with political parties and others; as well as a number of consultation documents outlining progress. The

⁵¹ It received 145 submissions (ACT has a population of 333,400).

debate has been extensive and of a high standard. As expected there is much disagreement; given the significance of the debate this is unsurprising.

81. The NIHRC works cooperatively with the Human Rights Consortium – a coalition of over 100 community groups, non-governmental organisations and trade unions which campaigns for a strong and inclusive bill of rights for Northern Ireland. The consortium has been in operation for over three years, lobbying government meeting with political parties and other governments, attending party political conferences and canvassing the public's views.
82. Following meetings with ministers of the British and Irish governments, a new Bill of Rights Forum has now been set up to redouble efforts to find consensus.⁵² The forum brings together political parties and civil society, including faith group representatives, to discuss the rights the consortium would like to see protected in a bill of rights. The idea is that the forum will encourage debate in wider society. It continues to meet and is due to report before the end of 2007. The Northern Ireland experience illustrates both the importance and the potential difficulties of a thorough process.

Reflections on process

83. The processes detailed above reflect a variety of approaches which resulted in different degrees of parliamentary and public involvement and consensus in relation to the relevant human rights instrument. Notably, constitutional provisions can take many years to 'bed down' and a lack of thoughtful process may not preclude a more successful implementation process. Twenty-five years after its enactment the Canadian Charter enjoys a high level of public support,⁵³ in spite of substantial political, public and academic disagreement at the time of its drafting and in the intervening years. The state of Victoria, Australia, engaged in a thorough consultation process, but the real test of public opinion may come from the case law as it develops in the future.
84. The consultation and approval process is part symbolic, part informative for policy makers and drafters, and part educative. This educative element is key since citizens are most likely to be inclined to engage in a process and bring about democratic entrenchment if they have knowledge on the subject. The US and South African bills of rights are celebrated national symbols; adoption of these particular instruments followed defining constitutional 'moments' in the life of the nation. Though the UK seems not to have such a constitutional moment looming, the best way forward may be to frame the debate in terms of accountability of government, good governance, and values, in order to highlight its relevance to all those within the UK jurisdiction.

Conclusion

85. The process element of a British bill of rights poses challenges, yet is aided by the fact that a bill of rights is not an entirely novel project. The implementation of the Human Rights Act 1998 (HRA) has been a necessary and preliminary act to a home-grown British bill of rights. It has prepared the way by implanting the general idea of positive rights in our law for the first time. It has provided experience and practical lessons for the further, including matters to be taken account of

⁵² For the latest updates, see <http://www.billofrightsforum.org>; <http://www.nihrc.org>.

⁵³ The Centre for Research and Information on Canada, found 88 per cent support for the Charter, 16 March 2005.

in determining the precise form of the later British bill of rights. The HRA experience tells us that a rights-based charter can be successfully accommodated into the legal systems of the UK. Even if the reception of the HRA by the public and the press has not always been positive, negative attitudes have often been fuelled more by misinformation and misunderstanding than the reality.⁵⁴ Studies suggest that the HRA has been helpful 'on the ground' in beginning to help people, particularly those who are vulnerable, in terms of the quality and form of the public services that they receive.⁵⁵ This aspect of the Act has not been controversial and should be built upon.

86. The question arises whether Britain can work towards adopting a stronger version of a bill of rights without at the same time making a decisive step towards a written constitution. While there is a logical connection here, there is no necessary tie between a bill of rights and a written constitution, since several jurisdictions have a bill of rights instrument without a written constitution (such as Israel and New Zealand) and vice-versa (Australia, at the national level). That said, a bill of rights would clearly be one of the centrepieces of any written constitution and could undoubtedly be a major step towards one. In the context of rights protection, an important value of a written constitution is that it enables citizens to understand the rights and duties of citizenship and serves important aims in terms of national identity and understanding of basic constitutional rights. The debate on a written constitution will therefore merit scrutiny as ideas on a bill of rights are developed.

⁵⁴ *Review of the Implementation of the HRA*, Department for Constitutional Affairs, July 2006.

⁵⁵ *The Human Rights Act - Changing Lives*, British Institute of Human Rights, 2007.



Chapter six

Summary and conclusions

1. This final chapter summarises and reflects on the findings in this report. It highlights key considerations in deciding whether Britain should have a new bill of rights. It makes a number of recommendations on how to move the debate forward.
2. This report has focused on what JUSTICE considers to be the four main areas in the bill of rights debate: content, amendability, adjudication and enforcement, and process. Each of these elements has an important role to play, both symbolically and practically, in shaping a new system of rights protection.

Content

3. The provisions of a new bill of rights must not fall short of the rights guaranteed under the Human Rights Act 1998 (HRA). Any new model must build on the European Convention on Human Rights so that it is 'ECHR-plus'. The ECHR rights included in the HRA and adopted in such instruments as the International Covenant on Civil and Political Rights are the necessary and logical starting point for the architects of a British bill of rights. A domestic rights instrument could allow these rights to adapt to reflect changing times and traditional British ways of doing things.
4. There are a number of options that would allow a new bill of rights to build on the ECHR:

a) Modernising and strengthening ECHR rights by:

i) Reducing current limitations

Some of the specific provisions limiting individual ECHR rights now present a problem of language or appear inappropriate in a modern setting.¹

ii) Simplifying limitation clauses

Rather than continuing the ECHR's style of limiting some individual rights, a general limitations clause applying to the qualified rights (ie not the absolute right to be free from torture and

¹ See Art 5 (right to liberty) which allows detention of 'alcoholics, drug addicts or vagrants' and Art 16 which allows restriction on political activities of foreigners.

inhuman treatment) could emphasise a culture of rights rather than the uncertainties and safeguards in the ECHR which are reflective of its era. A general limitations clause could also make provision for the doctrine of proportionality to indicate the balancing exercise inherent in relation to the enforcement of rights.

iii) Updating rights

Social and moral attitudes on issues such as sexual orientation, technological advances in areas such as surveillance, together with the growing awareness of environmental issues all engage rights in a way which could not have been foreseen by the framers of the ECHR in 1950. Nearly sixty years on, there is a case for adapting to a new century and a new political climate.

b) Guaranteeing traditional and common law rights

These might include access to justice – a right firmly embedded in the common law and crucial for non-British nationals who are outside the political process; trial by jury – there is a debate to be had over whether this archetypal ‘British’ right should be explicitly protected; good administration – this broad category reflects the relatively recent and major expansion of the field of administrative justice and encompasses vital due process rights which are guaranteed in many jurisdictions.

c) Protecting certain economic, social and cultural rights

Such protection would be a major step and is likely to prove controversial, though proposals for a right to free healthcare remain popular and workable practices are found in comparative bills of rights. Their inclusion would not necessarily entail justiciable rights but could be framed in terms of ‘progressive realisation’ bearing in mind the resource implications for such rights.

d) Rights contained in international and overseas domestic bills of rights

Examples of progressive bills of rights include those which contain ‘third generation’ rights such as the rights to a clean environment. Another major category of rights currently omitted from the ECHR is children’s rights. Such rights merit debate for inclusion in a modern bill of rights which aims to entrench values and principles as well as ensure legally enforceable rights.

5. The draft content of a bill of rights should not be over-inclusive. It is crucial to maintain an appropriate and achievable objective for British culture and society. Disagreement on the ‘extra’ rights to be included on top of those in the ECHR could be detrimental to the process in general. There is scope for innovation but drafters must be realistic.
6. A preamble presents the opportunity to state the purposes and values underpinning a bill of rights and to articulate the constitutional principles it seeks to enforce. It might also meet the concerns of those who wish to emphasise social responsibility in addition to protection of rights in Britain. However, ‘responsibilities’ which correspond to the core rights must be confined to a preamble. Their force is moral rather than legal.
7. A significant challenge lies in making the content of the rights understandable to the general population, while giving sufficient detail to guide the elected branches and the judiciary. Language is crucial. The drafting of a bill of rights should be precise (which may result in unavoidably

complicated provisions), but the resulting text should not be aimed at lawyers – it should address all those protected by its provisions.

Amendment

8. Any British bill of rights will go through a careful drafting process. However, even the most carefully drafted rights instrument may have to be amended at some point in the future. The special amendment procedures discussed in chapter three control direct amendment to the provisions of a bill of rights. The difficulty in initiating the procedures helps the bill of rights to be ‘procedurally entrenched’, ensuring that amendment is discouraged except where there is an overriding need to alter any provision. The effect of providing for special amendment procedures is to refine the doctrine of parliamentary sovereignty, since Parliament binds its successors in relation to specific legislative practices.
9. Precise methods for amending constitutional documents such as bills of rights vary widely but there are four options which can be identified in the British context:

a) Amending the Parliament Acts

A requirement that both Houses of Parliament must approve all proposed amendments to a bill of rights might represent the closest to constitutional entrenchment that is possible under current British constitutional arrangements. It would enhance the constitutional authority of the House of Lords and might therefore form part of a wider programme of parliamentary reform involving working out the basis for the future composition of the second chamber.

b) Special majority voting

There is no existing precedent for special majority voting in the UK Parliament, though it is often the practice in other constitutional democracies to require a two-thirds majority in both legislative chambers. Some maintain that such entrenchment procedures would be inoperative because a sovereign Parliament cannot bind its own future actions, but there is no logical reason why the UK Parliament should be incompetent to redefine its procedures.

c) Referendum

A permanent referendum machinery would be a novel development in the UK legislative process. A major objection would be that the principle of a representative democracy is that elected politicians make informed decisions for the majority. Under present circumstances, a British bill of rights is unlikely to include a mandatory referendum as part of its amendments process but this does not rule out referendums at the pre-legislative stage (to gauge public opinion on the initiative) or at the post-legislative stage (to bring the bills of rights into force after its enactment).

d) Declaration against amendment

This weaker form of entrenching a constitutional document has been employed in the past but since the object of introducing a British bill of rights would be in part to give greater constitutional

protection to fundamental rights, it follows that some form of robust entrenchment would be preferable.

10. The legal construction of any bill of rights has to accept that there may be extraordinary occasions when the executive, as a matter of overriding practical necessity, must subordinate normal human rights principles to the abnormal exigencies of what the national interest requires, in order to combat some profound emergency. Current law and procedures leave a deficit in both procedural judicial checks and parliamentary accountability for derogations from human rights guarantees. Acts of derogation by the UK government from its obligations under the ECHR can be effected under its prerogative powers without any form of parliamentary control. This is in contrast to the practice in other jurisdictions which employ strict parliamentary procedures to approve such derogations and protect certain core rights even in times of emergency.

Adjudication and enforcement

11. The issue of how the provisions of a British bill of rights are to be enforced goes to the heart of the inevitable tension between the branches of the constitution and the role that each plays in protecting fundamental rights.
12. A number of enforcement models have been set out, each with its advantages and disadvantages. Rights protected by the ECHR will continue to be subject to the jurisdiction of the ECHR. Each model continues to evolve, but broadly there are four options:

a) Judicial enforcement with Supreme Court strike down power

This includes the American Supreme Court model and the rather different continental European constitutional court model. Judicial review equates with judicial supremacy. Opportunity for political response to judicial rulings is limited, usually involving the process of constitutional amendment.

b) Judicial enforcement subject to Parliamentary override

This is the Canadian model which emulates the American style of review, with the (rarely used) option for Parliament to override judicial rulings.

c) Judicial declaration of incompatibility with legislative response

This is the UK model which aims to balance parliamentary with judicial input on setting the limits of fundamental rights. Practice thus far indicates that the government and Parliament will generally re-legislate following such declarations but they are not bound to do so.

d) Interpretative statute

This is the New Zealand model – an ordinary Act of Parliament with no formal judicial power to make declarations of inconsistency.

13. It is important to choose an enforcement model suited to British constitutionalism. The defining features of the newer 'parliamentary' style bill of rights are well suited to the British constitution in its current form. It is designed to enhance pre-legislative review in Parliament, aiming to prevent rights abuses from actually occurring, rather than correct them after the fact.
14. There is a debate as to whether British judges are confined – by the HRA itself - to adjudicating rights within the standards set by the European Court of Human Rights in Strasbourg. The Law Lords tend to regard themselves as confined in this way. However, there is a strong argument that British judges are free to develop a sound body of jurisprudence which goes beyond Strasbourg. After all, other European countries have afforded higher protection to fundamental rights in their own bills of rights than provided for in the ECHR. It is already the case that UK judges can interpret more creatively in areas which are important in the domestic context but where there is no European wide consensus.
15. There is also a debate as to whether a British bill of rights should reflect the legal principle that there is 'no right without a remedy'. The right to an effective remedy under the ECHR was deliberately excluded from the HRA. There is an argument that current measures under the HRA should be expanded to underline the UK's international obligations to ensure individuals gain meaningful remedies for breaches of their rights.
16. The proliferation of international human rights law and convergence of international human rights standards suggests that a British bill of rights might be the time to adopt an explicitly international aspect to rights adjudication in the UK. There is scope for requiring Parliament (in its scrutiny of bills) and the judiciary (in its decision making) to have regard to international treaties and overseas jurisprudence in their determinations of fundamental rights.

Process

17. The process adopted in establishing any British bill of rights will impact directly on its reception by the public and operation as part of Britain's constitutional machinery. Constitutional stability owes much to social acceptance of constitutional arrangements.
18. Unlike under written constitutions, which prescribe procedures for their own amendment, Britain has no settled procedure for constitutional change. However, Britain has the advantage that Parliament can legislate to give its authority to a process that could be decided upon after taking full account of the experience of other countries which have enacted bills of rights in modern times.
19. There are common elements to the process of constitutional reform. These tend to break down into:
 - a) Initiation of reform proposals – to an extent this has already been achieved with Prime Minister Brown's green paper in July 2007² and the launch by the JCHR of an inquiry into the merits of a British bill of rights.³ Moreover, there appears to be a sufficient degree of cross-party consensus on the issue for it to be carried forward as a serious proposal.

² *The Governance of Britain*, Cm 7170, July 2007.

³ Joint Committee on Human Rights, Session 2006-2007 Press Notice No 38, 10 May 2007.

- b) Public consultation and consensus – new techniques have been developed and the advantages of modern media and computer technology can be used to reach a wide audience. Public attitudes towards reform of the constitutional and political system of the UK generally have undergone a marked shift in past decades, as evident from the number of constitutional lobby groups and their activities and the results of public opinion polls.
 - c) Government and legislative process – there is a range of different models to choose from in terms of selecting a body of Parliamentary figures and / or constitutional experts to oversee the process and drafting of a bill of rights. These include a royal commission, a specially appointed select committee, constitutional assembly of both Houses of Parliament, or even a specially convened assembly of citizens and interest groups.
 - d) Referendum – referendums can be employed at various stages of the process. No country has used a referendum solely to approve a bill of rights. However, there is a strong argument for doing so in Britain, whether to initiate the legislative stage, or after its enactment to bring it into force, so that it achieves moral backing and an element of democratic entrenchment.
20. Particular lessons can be drawn from observing overseas processes, which vary considerably from those which have been confined to a Parliamentary process only, to those which have involved the wider human rights community and interest groups, and those which have ensured widespread public participation and genuine debate among ordinary citizens. This report has focused in particular on the recent and current processes in Australia and Northern Ireland, both of which have employed strategic and comprehensive methods of public consultation which set important precedents.

The importance of developing - and sustaining - a human rights culture

- 21. The Human Rights Act 1998 (HRA) aimed to cultivate a human rights culture in the UK. Many constitutional reformists are supportive of the agenda to strengthen the legal framework for human rights in Britain. However, there is an argument that now is not an optimum time to be exploring ideas for building upon the rights protected by the HRA when this legislation is relatively new, and has yet to become widely understood or indeed used in its fullest sense. Awareness of the Act and its underpinning principles is generally low.
- 22. The implementation of the HRA has been a necessary and preliminary act to a home-grown British bill of rights. It has prepared the way by implanting the general idea of positive rights in our law for the first time. It has proved that a rights-based charter can be successfully accommodated in domestic courts.
- 23. Given the right conditions, a public debate on a new model should not unpick the progress that has already been made. It will be through this very process that people gain knowledge and become educated in human rights principles. Their engagement should motivate higher participation in any referendum employed to implement the bill of rights.
- 24. Human rights are too fundamental to be sacrificed in a mismanaged consultation exercise. Careful planning and maximum publicity are required to ensure widespread participation in debating the various features of a potential bill of rights, including amongst those minority sections of

society which are often hard to reach and yet who are likely to be affected by its provisions (younger people, older people, asylum seekers, and others facing discrimination, disadvantage and exclusion). Overall, however, this is a debate for everyone. The process itself has the potential to encourage ownership of our constitutional arrangements and consensus on how best to protect fundamental rights in a modern democracy.

Some lessons on establishing a bill of rights from other jurisdictions

- Start with a community-based process in which people have a real say and which ensures that the public can feel a sense of ownership over the eventual outcome. This may require an independent panel as well as a parliamentary inquiry in order to dispel concerns about the motivation for change being a self-serving one on the part of politicians. Such reform cannot and should not be imposed on the community. It must gain wide support before moving forward.
- Ensure commitment to the project from all major political parties. Creating a British bill of rights must be a common endeavour rather than an issue which becomes subject to political wrangling. It is in the interest of all parties to agree on a model which will endure as a feature of a new constitutional settlement in Britain.
- Keep the process within a time limit. Momentum is crucial and support can dissipate quickly. A timeframe will maximise the chances of maintaining energy, commitment and discipline around the issue. A reason that the Victorian process in Australia worked was that it took place over six months with then another six or so months leading to the introduction of the law. The unlimited timeframe that has been established in Northern Ireland, for example, may have been less successful – even allowing for particular political circumstances – in encouraging crucial consensus.
- Give a central role to the Commission for Equality and Human Rights (CEHR), the statutory body charged with promoting awareness, understanding and compliance of public bodies with human rights. The CEHR can represent a turning point in the protection of human rights in Britain, remedying the institutional vacuum at the statutory level that has existed since the HRA entered into force.
- Commit to a process with a sound and achievable model in mind. It is highly unlikely, for example, that Britain will seek to emulate the US bill of rights at this point in time. Though there should be awareness of a range of models, focus should remain on those more suited to Britain's constitutional arrangements and the values identified as particular to British culture.
- Develop a progressive and robust model of rights protection. In terms of amendment procedures, judicial and academic opinion now tends to take a less orthodox view on the doctrine of Parliamentary sovereignty and the constraints of our constitutional arrangements, so the framers of a new bill of rights can take advantage of this in structuring a model which gives special status to human rights guarantees.
- Seek to achieve the purposes of a British bill of rights, for example securing greater protection for fundamental rights and increasing the scope of rights currently provided for in the ECHR without necessitating a major shift in constitutional arrangements, especially with regard to judicial powers. The HRA has provided a model which not only fits with our current political system but which has been emulated in other countries.
- Locate the debate in values and good governance. Human rights works well as a concept for the converted and the well-educated, but a broader set of tools needs to be deployed

in talking to the community at large. Many people care about human rights and civil liberties not for their own sake but because they form part of broader debates, for example on responsibilities and issues of government accountability. In this way, the debate on a British bill of rights will feed into a broader debate on British constitutionalism and the comprehensive plan for reform which the current government has set in motion.

What are the advantages of adopting a British bill of rights?

25. A number of potential advantages of adopting a British bill of rights can be drawn from JUSTICE's research. While we have some reservations about such a project, stemming from a concern to ensure that a new constitutional document does not present any opportunity to afford less, rather than more, protection for fundamental rights in Britain, we are sympathetic to a number of supporting arguments for a British bill of rights. These do not present a conclusive case, but indicate how the move to adopt a British bill of rights could be a hugely positive one:
- **Values:** the process of drafting a British bill of rights opens the way for participative debate on the legal and moral standards which govern our society. Fundamental rights are part of a bigger picture, which includes social responsibility and the accountability of government according to the rule of law. The bill of rights debate can deploy broader tools in relation to the general public, focusing on values such as respect, dignity, responsibility and fairness to demonstrate the relevance and purpose of rights.
 - **Democratic engagement:** the British bill of rights can perform a valuable task in re-engaging people with our constitutional and political arrangements and. It can help to re-new the 'social contract' between citizen and citizen and between citizen and state.
 - **Education:** crucially, a British bill of rights can educate the general public about the legal, political and moral framework on which our democracy functions. Civic and constitutional education must start early, aiming to equip people with the tools they need to become informed and participative citizens.
 - **Britishness:** a concrete legal and symbolic document shaping the fundamental values according to which British people live will achieve more than flag days or national bank holidays to help reaffirm our national identity in modern Britain.
 - **Increase and update rights:** the ECHR has stood the test of time well, but after 60 years and a shift in Britain's demographic, there are new circumstances to meet and new vulnerable (as well as unpopular) groups to protect.
 - **International:** in re-shaping our rights and the obligations on government, there is the opportunity to recognise our international obligations and look to other systems for inspiration on the model we select for Britain.
 - **Constitutional evolution:** rather than continuing to live under the remains of an aging constitution, a bill of rights can form a central plank of a new constitutional settlement which reflects modern understandings of the rule of law, the separation of powers and fundamental rights
26. The risk of drawing-up a constitutional document now, is that it would unduly reflect the short-term concerns for security which continue to dominate the political agenda and affect the lives of members of society at large. Constitutions should embody society's long-held principles, and point towards its aspirations. Given that we have lived and continue to live under laws not normally tolerated in times of peace (indefinite preventative detention; control orders; police powers to stop and search without reasonable suspicion; restrictions of freedom of expression) we must ensure

that the standards we set have longevity, bearing in mind the freedoms of future generations which will live by them and the kind of society we wish to define.

Concluding remarks

35. This is potentially a very important moment in the development of the British constitution. Resolving the issues relating to a bill of rights may prove a decisive step towards a full blown written constitution. It will involve addressing the relationships and tensions between the different branches of the constitution as well as the relationship between the individual and the state. We welcome the apparent willingness of all three major political parties in the UK Parliament to agree that the time is right for national debate. We hope that our report will be seen as an important contribution to this debate.

Appendix one

Comparative review of bills of rights

Appendix one presents a review of a range of different bills of rights. A similar set of questions is asked of each bill of rights in order to draw out the main features of each model. The paper aims to summarise the workings of various models across different jurisdictions, including bills of rights in common law and civil law jurisdictions and in written and non-written constitutions.

Canada

What is the country's bill of rights?

1. The **Canadian Charter of Rights and Freedoms (1982)** (the Charter) is the bill of rights entrenched in the Constitution of Canada. It is the first part of the Constitution Act, 1982 which marked the 'patriation' of the Canadian Constitution.¹ It protects certain civil and political rights of people in Canada from the policies and actions of all levels of government.

What is the history behind its establishment?

2. The Charter was preceded by the Canadian Bill of Rights 1960. The Bill of Rights was no more than a federal statute, in the sense that it was not constitutionally entrenched. It was limited in scope and easily amendable. It applied only to the federal jurisdiction, as opposed to the provinces. Protection for civil liberties under this system was disappointing.² As a consequence, many writers and politicians – led by Prime Minister Pierre Trudeau – advocated adoption of a constitutionally entrenched Charter of Rights. The move towards entrenching a Charter of Rights was tied to other constitutional issues concerning attempts to patriate the constitution and the ultimate scope of the Charter. The Charter was affected in that rights were designed not only to establish an effective civil liberties system but also accommodate the demands of the provinces.³

What is its scope in terms of specific rights?

3. Persons physically present in Canada have numerous civil and political rights, most of which can be exercised by any legal person, including a corporation. A few of the rights belong exclusively to natural persons or to citizens or permanent residents of Canada.⁴ The rights are enforceable by

1 The process which transferred the power to amend the Canadian constitution from the United Kingdom Parliament to Canada.

2 See for eg, Mary Eberts, 'The Canadian Charter of Rights and Freedoms: A Feminist Perspective', in Philip Alston (ed), *Promoting Human Rights through Bills of Rights*, Oxford University Press, 1999, chapter seven, p243; Robert J Sharpe, 'The Impact of a Bill of Rights on the Role of the Judiciary: A Canadian Perspective', *ibid*, pp433-435. Note, however, that despite these shortcomings, there are two rights in the Bill of Rights that are not found in the Charter. First, there is a section in the Bill of Rights that protects property (s1(a)). The Charter does not include the protection of property. Secondly, the Bill of Rights states that Canadians have the right to a fair hearing to determine their rights and obligations under the law (s2(a)). These two sections in the Bill of Rights can still be used today to push forward economic rights and promote human rights in Canada.

3 Prime Minister Trudeau accepted the Alberta-Vancouver formula of amendment endorsed by eight provinces, and the provinces accepted the Charter, but not without imposing the exercise at will of a derogatory clause ('notwithstanding' clause of s33) for certain sectors of the Charter: fundamental rights, legal rights and equality rights.

4 For eg, 'mobility rights' under s6 of the Charter.

the courts, which have the discretion to award remedies to those whose rights have been denied (s24). The Charter is binding on the federal government, the territories under its authority and the provincial governments (s32).

Civil and political rights

4. 'Fundamental freedoms' (s2) include freedom of conscience, freedom of religion, freedom of thought, freedom of belief, freedom of expression and freedom of the press, freedom of peaceful assembly and freedom of association.
5. 'Democratic rights' (ss3-5) encompass the right to participate in political activities and the right to a democratic form of government, such as the right to vote and be eligible to serve as a member of a legislature and the requirement of an annual sitting of legislatures.
6. 'Mobility rights' (s6) include the right to enter and leave Canada and to move to and take up residence in any province or to reside outside Canada.
7. 'Legal rights' (ss7-14) concern rights of people in relation to the justice and law enforcement system and include life, liberty and security of the person, freedom from unreasonable search and seizure, freedom from arbitrary detention, rights on arrest or detention, including the right to retain a lawyer and to be informed of that right, rights in criminal and penal matters such as the right to be presumed innocent until proven guilty, freedom from cruel and unusual punishment, rights not to incriminate oneself, rights to an interpreter in a court proceeding.

Economic, cultural and social rights

8. 'Equality rights' (s15) denote equal treatment before and under the law, and equal protection and benefit of the law without discrimination.
9. 'Language rights' (ss16–22) signify, in general, the right to use either the English or French language in communications with Canada's federal government and certain provincial governments. In addition, there are minority language education rights – rights for certain citizens belonging to French or English-speaking minority communities to be educated in their own language.
10. The scope of the Charter is broadly similar to that of the International Covenant on Civil and Political Rights (ICCPR), but in some cases the ICCPR goes further.⁵ The Charter says little about economic and social rights, standing in contrast with the Quebec Charter of Human Rights and Freedoms and the International Covenant of Economic, Social and Cultural Rights.⁶ Canadian courts have remained hesitant in this area, though the s15 equality provision has been used to protect ESC rights on the basis that similar treatment may not always guarantee substantive equality to achieve '*contextual and empathetic approach to ensuring each person's human dignity*'.⁷ While s15 does not

5 For example, a right to legal aid has been read into s10 of the Charter (right to counsel) but the ICCPR explicitly guarantees that the accused need not pay if he or she does not have sufficient means.

6 The courts have remained hesitant in the area of economic, social and cultural rights, but the s15 equality provision has been used in a way comparable to systems where these rights are justiciable. See for eg, analysis of *Eldridge v British Columbia (Attorney General)* [1997] 3 S.C.R. 624 in Sandra Fredman, 'Human Rights Transformed: Positive Duties and Positive Rights', *Public Law* 2006 498-520.

7 See *Corbiere v Canada* [1999] 2 SCR 203 and *M v H* [1999] 2 SCR 203, per Justice L'Heureux Dube. Leading Canadian constitutional commentator Peter Hogg has criticised this approach as 'vague, confusing and burdensome to claimants' (Hogg, *Constitutional Law of Canada*, Carswell, 2002, p1059).

impose upon governments the obligation to take positive actions to remedy the symptoms of systematic inequality, government must not be a further source of inequality.⁸

How are the rights limited?

11. The rights contained in the Charter are generally subject to the 'limitations clause' (s1). This allows the government to justify certain infringements of Charter rights. Every case in which a court discovers a violation of the Charter therefore requires a s1 analysis to determine if the law can still be upheld. Infringements are upheld if the purpose for the government action is to achieve what would be recognised as an urgent or important objective in a free society, and if the infringement can be 'demonstrably justified'. S1 has thus been used to uphold laws against objectionable conduct such as hate speech⁹ and obscenity.¹⁰

Is derogation from the protected rights permitted?

12. Derogation is provided for in the 'notwithstanding clause' (s33) which authorises governments temporarily to override the rights and freedoms in s2 and ss7-15 for up to five years, subject to renewal. The Canadian federal government has never invoked the notwithstanding clause. Its use would be costly in political terms.¹¹ Immediately following the signing of the Charter, the province of Quebec (which opposed the Charter, despite being bound by it) passed a law making a blanket notwithstanding declaration, so that all past and future legislation would be immune from judicial review. The declaration elapsed following the election of the more federalist Liberal Party of Quebec in 1985. Since then Quebec has applied s33 much more rarely, for example to protect legislation on French language signs, though the Supreme Court¹² deemed this to infringe the (non-derogable) freedom of expression and the law was amended to allow bi-lingual signs.¹³

Can the bill of rights be amended and, if so, how?

13. The Charter (and the Constitution generally) is amendable where amendments are passed by majorities in the Canadian House of Commons, the Senate, and a two-thirds majority of the provincial legislatures representing at least 50 per cent of the national population (the 7/50 formula) (see ss37-49). A popular referendum in every province may also be necessary, following an early precedent where a package of reforms under the Charlottetown Accord was rejected in a national referendum.
14. The Charter has been amended since its enactment – s25 was amended in 1983 to recognise explicitly more rights regarding Aboriginal land claims and s16(1) (establishing equal status of French and English language) was added in 1993. A proposed 'Rights of the Unborn' Amendment in 1986-1987, which would have enshrined foetal rights, failed in the federal Parliament.

8 *Eldridge v British Columbia* [1997] 3 SCR 624.

9 *R v Keegstra* [1990] 3 S.C.R. 697.

10 *R v Butler* [1992] 1 SCR 452.

11 Janet Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?', (2006) MLR 69 (1) 7-28.

12 *Ford v Quebec (Attorney General)* [1988] 2 SCR 712.

13 The provinces of Saskatchewan and Alberta have also invoked the notwithstanding clause, to end a strike and to protect an exclusively heterosexual definition of marriage respectively. However, the courts later ruled however (*Reference Re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313) that the Charter did not include the right to strike. As a result, the notwithstanding declaration by the Saskatchewan government turned out to be unnecessary. Moreover, Alberta's use of the notwithstanding clause was deemed (*Reference re Same-Sex Marriage* [2004] 3 SCR) to have no effect, since the definition of marriage is federal not provincial jurisdiction. The territory of Yukon also passed legislation that invoked the notwithstanding clause, but the legislation was never brought into force.

Does the Supreme Court or equivalent have a strike down power with regard to Parliamentary legislation on the basis of incompatibility with human rights?

15. The Supreme Court of Canada is able to strike down legislation, including primary legislation, where it is deemed to be incompatible with the rights entrenched in the Charter. In interpreting the Charter, the courts have generally embraced a purposive approach to Charter rights. Since early cases¹⁴ they have concentrated not on the traditional, limited understanding of what each rights meant when the Charter was adopted in 1982, but rather on changing the scope of rights as appropriate to fit their broader purpose. This is tied to the generous interpretation of rights, as the purpose of the Charter provisions is assumed to be to increase rights and freedoms of people in a variety of circumstances, at the expense of government powers.
16. In the first decade of the Charter, the Court struck down many legislative measures; the tendency now is to take the less confrontational step of issuing suspended declarations of unconstitutionality, with the understanding that Parliament will amend the legislation in question.¹⁵

What is the status of the bill of rights compared to other national legislation and in relation to other international rights instruments (eg ECHR / ICCPR)?

17. The Canadian Charter has superior constitutional status over other national legislation and the courts are the assigned guardians of the Charter. Given that the scope of the Charter is not as broad as some of the major international human rights instruments, the courts in their rulings tend to draw on various aspects of these international instruments. However, as a dualist system, international instruments which Canada's executive has signed must be incorporated into national law through specific legislation.

What was the process by which the bill of rights came to be decided?

18. The inclusion of a charter of rights in the Constitution Act was a much debated issue. Prime Minister Trudeau agreed to a committee of Senators and MPs to examine the bill of rights as well as the patriation plan. During this time, 90 hours were spent on the bill of rights alone, all filmed for television, while civil rights experts and interest groups put forward their perceptions on the Charter's flaws and omissions and how to remedy them. The Canadian Charter of Rights and Freedoms was not adopted by the House of Commons and the Senate in its original form. More than one amendment was brought to the October 1980 version. As the process continued, more features were added to the Charter, including equality rights for people with disabilities, more sex equality guarantees and recognition of Canada's multiculturalism. Several individuals and pressure groups appeared before the Special Joint Committee of the Senate and of the House of Commons

¹⁴ See *Hunter Southam Inc* [1984] 2 S.C.R. 145 (concerning search and seizure under Art 8) and *R v Big M Drug Mart* [1985] 1 S.C.R. 295 (concerning freedom of religion under Art 2(a)).

¹⁵ For a recent example, see *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9. The Immigration and Refugee Protection Act (IRPA) allowed relevant Ministers to issue a certificate declaring foreign nationals or permanent residents inadmissible to Canada on grounds of security and leading to the detention of that person. The certificate and the detention were both subject to review by a judge of the Federal Court, in a process that could deprive the person of the information on the basis of which the certificate was issued or the detention ordered. The judge's determination on the reasonableness of the certificate could not be appealed or judicially reviewed. The Supreme Court ruled the IRPA's procedure for the judicial approval of certificates to be inconsistent with the Charter, and hence of no force or effect. The declaration was suspended for one year, during which time the existing process under the IRPA would apply. After that period, certificates would lose their 'reasonable' status and could be quashed. Any certificates or detention reviews occurring after the one-year delay would be subject to the new process devised by Parliament. The Supreme Court also struck down the provision denying a prompt hearing to foreign nationals by imposing a 120-day embargo on applications for release after confirmation of a certificate, and modified a further provision to allow for review of the detention of a foreign national both before and after a certificate had been deemed reasonable (see paras [139-141]).

on the Constitution of Canada. The 1208 submissions and the hearing of 104 witnesses resulted in the April 1981 version, which in the form of a Resolution was passed by both Houses. The April version, after the decision of the Supreme Court on patriation in September 1981, was further amended as a result of the 5 November 1981 agreement between the federal authority and nine provinces.

How has the system of rights protection been received by the branches of government, the public and the academic community in the country?

19. The Charter was intended to be a source for national values and national unity. The initial federal government premise was on developing a pan-Canadian identity.¹⁶ Trudeau wrote in his memoirs that ‘Canada itself’ could now be defined as a ‘society where all people are equal and where they share some fundamental values based upon freedom and that all Canadians could identify with the values of liberty and equality’.¹⁷ Opinion polls in 2002 showed Canadians felt the Charter significantly represented Canada, although many were unaware of the document’s actual contents.¹⁸ Canadian academics are split in their assessments of the Charter regime of rights protection and criticism has come from both sides of the political spectrum. The first wave of criticism came principally from the left, was largely confined to academic circles and focused on the concern that notwithstanding the exclusion of rights of property and contract from the Charter, the courts would erect constitutional obstacles to the interventionist regulatory state.¹⁹ In recent years the political right has objected to an activist judiciary which, under the guise of constitutional judicial review, imposes a particular political agenda upon Canadians, including gay rights, feminism, and under the aboriginal rights provisions of the Constitution, rights for indigenous peoples.²⁰
20. It is from the Canadian Charter system that the concept of ‘constitutional dialogue’ originated, attempting to analyse the relationship between, and respective contributions from, the courts and the elected branches in the protection of Charter rights. Debate on this topic is still current and divisive among academics.²¹

What are the principal advantages of the system of rights protection as compared to the other countries under examination and list its major criticisms?

21. The Charter has proved a popular unifying instrument. While the record of the Supreme Court prior to the Charter in applying the statutory Bill of Rights was poor, the entrenched Charter has enhanced the ‘culture of liberty’, as reflected in many activities of federal and provincial government (notably in amending statutes to ensure Charter compliance), as well as in academic writings, widespread publicity through the popular journals and mass electronic media (and commensurate widespread public receptiveness), affirmative action programmes, pay equity legislation, and the expansion of judicial education programmes to embrace issues of systemic discrimination, equality rights and judicial bias with respect to minority and disadvantaged groups.

16 Professor Alan Cairns, quoted at <http://www.cbc.ca/news/features/constitution/>.

17 Pierre Trudeau, *Memoirs*, McClelland & Stewart, 1995.

18 Joanne Byfield, ‘The Right to be Ignorant’, *News magazine*, 16 December 2002.

19 See for eg, Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, Thompson Educational Publishing, rev edn, 1994; Andrew Petter, ‘The Politics of the Charter’, 8 *Sup Ct Rev* 473 (1986).

20 See for eg, Frederick L Morton and Rainer Knopff, *The Charter Revolution and the Court Party*, Broadview Press, 2000.

21 For the most recent exposition of the theory, along with critiques, see Special Issue: Charter Dialogue Revisited, *Osgoode Hall Law Journal*, 2007, Vol 45 (1).

22. Academic debate continues – some argue that judges do not have to be as sensitive to the will of the electorate, nor do they have to make sure their decisions are easily understandable to the average Canadian citizen, which limits democracy. Further, the over-emphasis on individual over community and cultural rights leads to the Americanisation of Canadian politics. Others have raised concerns such as the use of the Charter by the federal government to limit provincial powers by allying with various rights claimants and interest groups.

New Zealand

What is the country's bill of rights?

1. The **New Zealand Bill of Rights Act 1990** (BORA), introduced as an ordinary statute, is the closest New Zealand has to a bill of rights. It affirms New Zealand's commitment to the International Covenant on Civil and Political Rights (ICCPR). It establishes a set of minimum standards to be met by the three branches of the New Zealand government in their dealings with all persons within the jurisdiction. In its current form, BORA does not have the status of superior or entrenched law. In this sense, it is similar to the Canadian Bill of Rights passed in 1960.

What is the history behind the establishment of the bill of rights?

2. BORA was enacted as an ordinary Act of Parliament, in lieu of a more ambitious reform under a government white paper,²² which proposed a constitutionalised (entrenched) bill of rights modelled on the Canadian Charter of Rights and Freedoms 1982.²³ The white paper proposed some controversial features – these included legislative entrenchment, so that the bill of rights could not be amended or repealed without a 75 per cent majority vote in the House of Representatives or a simple majority in a public referendum; status as a supreme law, so that the doctrine of Parliamentary sovereignty would be partly eroded; the incorporation of the Treaty of Waitangi,²⁴ thus elevating the Treaty's status to that of supreme law; and a judicial power of invalidation in regard to any Act of Parliament, common law rule or official action which was contrary to the bill of rights. After considering the bill, the Justice and Law Reform Select Committee recommended that New Zealand was 'not yet ready' for a bill of rights in the form proposed by the white paper. The committee recommended that the bill of rights be introduced as an ordinary piece of legislation. The bill was enacted following lengthy and heated parliamentary debate and sparse support from the Opposition party.

What is the scope of the bill of rights?

3. BORA applies to acts done by the legislature, executive and judiciary of New Zealand, or any body in the 'performance of any public function, power, or duty' created by the law (s3).

Civil and political rights

4. Part II of the Act covers a broad range of civil and political rights:

22 *A Bill of Rights for New Zealand* (1985) AJHR A6.

23 The white paper was tabled in Parliament by the then Minister of Justice, Hon Geoffrey Palmer.

24 The Treaty of Waitangi is a treaty signed on 6 February 1840 by representatives of the British Crown, and Māori chiefs from the North Island of New Zealand. From the British point of view, the treaty justified making New Zealand a British colony; it also gave the Māori the rights of British citizens and the right to ownership of their lands and other properties.

5. The rights to 'life and the security of the person' (ss8-11) include the right not to be deprived of life except in accordance with fundamental justice, not to be subjected to torture or cruel, degrading or disproportionately severe treatment or punishment, not to be subject to medical or scientific experimentation without consent, and the right to refuse to undergo any medical treatment;
6. 'Democratic and civil rights' (ss12-18) include electoral rights, freedom of expression, religion and belief, assembly, association, movement;
7. 'Non-discrimination and minority rights' (s19) guarantees freedom from discrimination on the grounds of discrimination set out in the HRA 1993;
8. 'Search, arrest and detention' provisions (ss21-26) include provisions relating to criminal justice, the rights of criminal suspects and provisions on fair trial and double jeopardy.

Economic, social and cultural rights

9. BORA does not cover these rights (beyond non-discrimination and minority rights provisions).

Is the bill of rights amendable and, if so, how?

10. BORA is amendable like any other statute in the legislative process. The process requires only a majority of MPs to amend it. There has been debate about the special constitutional status of the Act, but in theory there is no bar to the government of the day repealing the Act should it wish to.

What are the provisions for limitation and derogation?

11. BORA makes no explicit provision for 'derogation' – ie total suspension of rights in an emergency situation. However, as a party to the ICCPR, New Zealand may derogate from its international human rights obligations in a time of emergency by way of special procedure.²⁵
12. S5 BORA, which was based directly upon the equivalent provision in s1 Canadian Charter of Fundamental Rights and Freedoms, provides that:

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

²⁵ Article 4 ICCPR provides that:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6 [right to life], 7 [freedom from torture], 8 (paragraphs 1 and 2), 11 [imprisonment merely on the ground of inability to fulfil a contractual obligation], 15 [no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed], 16 [right to recognition everywhere as a person before the law] and 18 [freedom of thought, conscience and religion] may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

13. Under its Canadian equivalent, not all intruding legislation is struck down but only those provisions which cannot be 'demonstrably justified' as 'reasonable and 'prescribed by law'.

Does the Supreme Court or equivalent have a strike down power for legislation it deems incompatible with human rights standards?

14. The New Zealand Supreme Court has no strike down power. S4 provides that:

... no court shall, in relation to any enactment (whether passed or made before or after the commencement of the Bill of Rights)

- a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective or
- b) Decline to apply any provision of the enactment – by reason only that the provision is inconsistent with any provision of this Bill of Rights.

15. Notably, there has been discussion in the case law indicating that judges would be ready (and even be under a 'duty' on occasions) to make a 'declaration of inconsistency' where legislative provisions constituted an unreasonable limitation on a right 'guaranteed' in BORA.²⁶ The Court's idea of issuing declarations of inconsistency was taken up by Parliament when amending the Human Rights Act 1993. The Human Rights Amendment Act 2001 allows the Human Rights Review Tribunal and on appeal, courts, to issue declarations of inconsistency in regard to s19 BORA (discrimination). The Court of Appeal in 2002 affirmed the general susceptibility of all subordinate legislation to invalidation for inconsistency with BORA, on the basis that an empowering provision in a statute cannot be interpreted to authorise any inconsistency.²⁷ If the judiciary takes this route, this could increase the pressure on government to remedy perceived deficiencies. Some commentators have even predicted that sometime in the future 'the courts will get the power to strike down statutes incompatible with the Bill of Rights Act'.²⁸

What is the status of the country's bill of rights / rights instrument in relation to other national legislation and international rights instruments (eg ECHR / ICCPR)?

16. The BORA is an ordinary statute, having no superior status to other laws. The judiciary has regard to international instruments but, given the dualist system, any such international instruments must, on the whole, have been incorporated through national law in order to have a binding effect. As in Canada, significant regard is had in the case-law to the jurisprudence emanating from ECHR-based decisions.
17. A series of New Zealand cases in the mid-1990s stands for the proposition that even unincorporated treaty obligations may (sometimes must) be taken into account by persons exercising statutory powers of decision. This is premised on the proposition that Parliament must have intended such recourse when enacting the statutory power. Thus, even unincorporated treaties may be brought into domestic legal argument.²⁹

²⁶ *Moonen v Film Board of Review* [2000] 2 NZLR 9 (CA).

²⁷ *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).

²⁸ Geoffrey Palmer and Matthew Palmer, *Bridled Power: New Zealand's Constitution and Government*, 4th edn, Oxford University Press, 2004, p318.

What was the process by which the country's bill of rights came to be decided?

18. The Justice and Law Reform Select Committee received submissions and held hearings throughout 1986 following the white paper. Its final report in 1988³⁰ reflected the strong opposition felt at the perceived transfer of political power to judges. The Committee believed that concern to be misconceived but one that had to be taken into account. It recommended that the bill of rights should be an ordinary statute. Although not expressed as such by the Committee, it would be similar to the Canadian Bill of Rights of 1960.³¹ After its introduction as a Bill in the House of Representatives, further submissions were received and changes made to it, notably the provision whereby later inconsistent legislation would not be impliedly repealed by BORA (s4). The Opposition continued to object to the bill, dismissing it as a futile reform. The pre-enactment period was markedly different from, for example, that of the Canadian Charter, with a relatively muted period of debate and a clear majority of public submissions against the proposal. Nevertheless, as a government bill, the Bill of Rights was assured passage and was duly enacted after a vote in the House that divided along party lines.

How has the system of rights protection been received by the branches of government, the public and the academic community in the country?

19. When BORA was enacted in late 1990, the general perception of it among the public and the legal profession was that it was a measure of no significance.³² The public may remain relatively ambivalent about the Act and much academic opinion focuses on the relative weakness of the model. However, it has not proved to be as weak and inconsequential as anticipated. Even within the first few years of its operation, BORA came to be seen as a significant constitutional development.³³ While public objections clearly influenced the eventual form which BORA took, this has not prevented New Zealand judges from being prepared to give it teeth and the Act has influenced policy making to a significant extent, particularly due to the Attorney General's obligation (under s7) to report on inconsistencies between BORA and bills introduced in the House, with lawyers and lobbyists contributing to the debate. Notably, the enactment of BORA in 1990 came at the beginning of a resurgence in international concern for human rights, a trend from which it undoubtedly benefited.³⁴

What are the principal advantages of the system of rights protection as compared to the other countries under examination and what are the principal difficulties encountered?

20. The Parliamentary bill of rights model is advantageous firstly in that it incorporates the notion of legitimate political dissent from judicial interpretations of rights; secondly, it challenges the court-centred model by incorporating the systematic evaluation of proposed legislation from a rights perspective. Both of these features allow for the possibility of a broader range of perspectives on the appropriate interpretation of rights or the resolution of disagreements involving claims of rights than those arising from more judicial-centric bills of rights.

29 See Philip Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd edn, Brooker's, 2001 pp782-4.

30 *Final Report of the Justice and Law Reform Select Committee on a White Paper on a Bill of Rights for New Zealand* (1988) AJHR I.8C.

31 Paul Rishworth, Grant Huscroft, Scott Optican, Richard Mahoney, *The New Zealand Bill of Rights*, Oxford University Press, 2003, p8.

32 Paul Rishworth, 'The Birth and Rebirth of the Bill of Rights' in Grant Huscroft & Paul Rishworth (eds), *Rights and Freedoms*, Brookers, 1995, p25.

33 Paul Rishworth, 'Human Rights', [1996] NZ Law Review 298 - 299.

34 See n32, p10.

21. In the main, the Act has worked well, with the courts called upon to consult more explicitly on the values of the liberal democracy. But they have also encountered difficulties with its operational provisions (ss4-6). The courts have had to reconcile three guiding principles: that the BORA has 'ordinary Act' status, and does not control Acts of Parliament; that the courts must, wherever possible, construe and apply statutes consistently with the rights affirmed; and that the scope of the rights is circumscribed by the 'justified limits' clause (s5) (adopted from the Canadian Charter).

Australia

1. Australia is the only democratic nation which does not have a national bill of rights, even though it has had a written constitution since 1901. Nevertheless, the Australian Capital Territory (ACT) enacted the **ACT Human Rights Act 2004** and the state of Victoria has enacted its **Charter of Human Rights and Responsibilities 2006** which took effect in part from 1 January 2007 (with some parts delayed to 1 January 2008).
2. Discussions are underway elsewhere too. Tasmania is undergoing a process to consider options for protecting human rights, including legislating a human rights act.³⁵ In May 2007, the Western Australian Attorney General announced a community consultation on whether Western Australia needs a human rights act. In April 2007, the new New South Wales (NSW) Attorney General rejected the idea of a bill of rights for NSW.³⁶ The previous Attorney General had wanted a community consultation process on the issue of a bill of rights for NSW and a new group (the NSW Charter Group)³⁷ committed to seeing a bill of rights for NSW has been launched.

Australian Capital Territory (ACT)

What is the bill of rights model?

3. The **Australian Capital Territory Human Rights Act 2004 (ACT HRA)** was the first bill of rights legislation in any Australian jurisdiction. It was the product of extensive community consultations. The purpose of the ACT HRA was to ensure that human rights are taken into account, to the maximum extent possible, when developing and interpreting Territory statutes and statutory instruments. The long-term aim of the ACT HRA is 'to promote cultural change in the ACT public service by ensuring that public decision makers are working within the internationally agreed framework of human rights standards'.³⁸ It is designed also to contribute to a better understanding of human rights principles in the wider community.

35 Tasmania Law Reform Institute website, at <http://www.law.utas.edu.au/reform/index.html>.

36 Western Australia Human Rights Act website, at <http://www.humanrights.wa.gov.au/>.

37 NSW Council for Civil Liberties website, at <http://www.nswccl.org.au/index.php>.

38 *Overview of the Human Rights Act 2004*, ACT Department of Justice and Community Safety, October 2004, at www.jcs.act.gov.au.

What is the history behind its establishment?

4. Concerns had grown that compared to all other democratic state, Australia had no rights instrument and certain minority groups might be at risk of rights violations. Parliamentary debate spread to public debate. But the ACT had previously debated whether to adopt a bill of rights. In 1993, the then ACT Attorney General released an issues paper on an ACT bill of rights. 48 written submissions were received, with a majority (58 per cent) in favour of some form of bill of rights and 42 per cent against. A public seminar was held on the topic in May 1994. In early 1995 an exposure draft of a proposed ACT bill of rights was circulated. The bill lapsed after the Labor party lost government at the March 1995 ACT election. More generally, there have been a number of proposals for bills of rights at both the federal and state level since the 1970s, though none had been successful.

What is the scope of the bill of rights?

5. The scope of the ACT HRA is fairly traditional, providing only for civil and political rights with no inclusion of economic, social or cultural rights (though minority rights are guaranteed and also given special mention in the preamble). However, the government has expressed its commitment to economic, social and cultural rights and examination of how they can be legislatively protected. The ACT HRA requires that a review of the legislation after the first year of operation must include consideration of whether economic, social and cultural rights should be included in the ACT HRA.³⁹

Civil and political rights

6. The ACT HRA is wide ranging in terms of civil and political rights, drawing heavily on the International Covenant on Civil and Political Rights (ICCPR) to guarantee (in ss3-27) rights: to equality before the law; the right to life; to protection from torture and inhuman and degrading treatment; protection of family and children; privacy and reputation; freedom of movement, of thought, conscience, religion and belief; peaceful assembly and freedom of association; freedom of expression; taking part in public life; right to liberty and security of person; human treatment when deprived of liberty; children's rights in the criminal process; fair trial rights in criminal proceedings; compensation for wrongful conviction; right not to be tried or punished more than once; retrospective criminal laws; freedom from forced work, and rights of minorities.

Is the bill of rights amendable and, if so, how?

7. The ACT HRA is amendable in the same way as any ordinary statute – ie a proposed amendment must receive a majority vote in the ACT legislative assembly.

What provisions are there for limitation and derogation?

8. S38 ACT HRA provides that:

Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

³⁹ S43 ACT HRA.

9. There is no provision for derogation as such but, as is the case for New Zealand, any derogation applies in relation to the ICCPR to which Australia is a party and whose provisions ACT HRA confirms. As a party to the ICCPR, Australia may derogate from its international human rights obligations in a time of emergency by way of special procedure.⁴⁰

Does the Supreme Court or equivalent have a strike down power for legislation it deems incompatible with human rights standards?

10. The Supreme Court of the ACT does not have a strike down power. It is instructed that an interpretation of legislation that is consistent with rights is preferred (s30). However, s38 ACT HRA provides that, where an issue arises in a proceeding about whether a Territory law is consistent with a human right, the Supreme Court may declare that the law is not consistent with the human right by issuing a 'declaration of incompatibility'. This declaration does not affect the continuing operation of the relevant law.
11. The Act reflects the expectation that Parliament will and should revisit the merits of legislation in the face of such a judicial finding of incompatibility. When such judicial declarations of inconsistency are made, the Attorney General must immediately notify the legislative assembly of this (within six sitting days) and within six months, prepare and present the legislative assembly a written response to the declaration of incompatibility (under s33). This requirement clearly puts political pressure on the Attorney General to explain what the government intends to do with legislation that has been interpreted in this manner.

What is the status of the bill of rights in relation to other national legislation and international rights instruments?

12. ACT HRA is an ordinary statute, though clearly of constitutional importance. With regard to interpretation of other international law and human rights instruments, s31 ACT HRA provides that international law and the judgments of foreign and international courts and tribunals relevant to a human right may be considered in interpreting a human right.

What was the process by which the country's bill of rights came to be decided?

13. In April 2002, the Australian Capital Territory's (ACT) Chief Minister and Attorney General appointed the ACT Bill of Rights Consultative Committee to inquire into a possible bill of rights for the ACT. The establishment of the Bill of Rights Consultative Committee implemented a promise of the then Labor Opposition made during the ACT election campaign in October 2001. The committee consisted of a variety of experts, including legal and non legal academics, lawyers and journalists.
14. The committee devised a program of community consultation to ensure broad discussion of the issues set out in its terms of reference. A web page was created to publicise the committee's work and to provide extensive background information on the issues facing the inquiry.⁴¹ An email address and a dedicated phone line were established.

⁴⁰ Art 4 ICCPR, see n24 above.

⁴¹ See www.jcs.act.gov.au/prd/rights/index.html

15. In April 2002 the committee published an issues paper. Copies were sent to over 1500 groups and individuals and copies were made available at ACT government shop-front centres. The issues paper was also available on the committee's web page. The issues paper included a call for public submissions that resulted in 145 written responses, showing the public to be marginally in favour of a bill of rights instrument.⁴² The percentage in favour tended to increase after a process of information and education.

How has the system of rights protection been received by the branches of government, the public (opinion polls) and the academic community in the country?

16. ACT HRA has been in operation for only two years and there is little literature so far to enable assessment. It is due to be reviewed in 2008.

What are the principal advantages of the system of rights protection as compared to the other countries under examination and what are the principal difficulties encountered?

17. As with New Zealand, a principle advantage in terms of constitutional 'fit' to Australia's system of governance is the maintenance of Parliamentary sovereignty, along with provision for pre-legislative political rights review (ministerial justifications). A greater pressure appears to exist than in the UK model regarding Parliamentary amendment of incompatible legislation, but concerns remain with some over the weakness of the model given its lack of judicial enforcement mechanisms and it remains to be seen how the courts will deal with their power to issue declarations of incompatibility.

State of Victoria

What is the system of rights protection?

18. The Victoria Charter of Human Rights and Responsibilities 2006 (VCHRR) is an ordinary Act of Parliament like the human rights laws operating in the ACT, New Zealand and the United Kingdom.

What is the history behind the establishment of the country's system of rights protection?

19. The aim of the VCHRR was to create a new dialogue on human rights between community and government and to ensure that rights and responsibilities were taken into account from the earliest stages of government decision-making to help prevent human rights problems emerging. In April 2005, Victoria's Attorney General announced the establishment of the Human Rights Consultation Committee to report back to government by 30 November 2005. Following the public consultation process in which views of Victorians were sought, the committee released its report and recommendations on the enactment of a Victorian Charter of Human Rights and Responsibilities in December 2005. A broad range of organisations and individuals made

⁴² *Towards an ACT Human Rights Act, Report of the ACT Bill of Rights Consultative Committee*, May 2003, at <http://www.jcs.act.gov.au/prd/rights/documents/report/BORreport.pdf>.

submissions to the committee in support of a Human Rights Charter for Victoria and the Act (in part) came into force on 1 January 2007.

What is the scope of the terms of specific rights?

20. The rights in the VCHRR are wide-ranging. There is also a preamble stressing the cultural aspects of its drafting and also emphasises responsibilities as well as rights.

Civil and political rights

21. The VCHRR protects the classic civil and political rights, drawing its substance from the International Covenant on Civil and Political Rights (ICCPR). This include protection from discrimination, right to life; protection from torture and cruel, inhuman or degrading treatment; freedom from forced work; privacy and reputation; freedom of thought; conscience, religion and belief; freedom of expression; peaceful assembly and freedom of association; protection of families and children; property rights; right to liberty and security of person; humane treatment when deprived of liberty; fair hearing and rights in criminal proceedings, and right not to be tried or punished more than once.

Social, cultural and economic rights

22. Article 19 [Cultural Rights] provides that
- (1) *All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.*
 - (2) *Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—*
 - (a) *to enjoy their identity and culture; and*
 - (b) *to maintain and use their language; and*
 - (c) *to maintain their kinship ties; and*
 - (d) *to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.*

Other rights

23. The VCHRR is notable for featuring children’s rights, particularly in regard to criminal proceedings.

Is the bill of rights amendable and, if so, what is the procedure?

24. The VCHRR will be amendable as a regular statute is, though it is commonly believed to have encapsulated a set of common values and principles.

Is there provision for limitation and derogation?

25. In terms of limitations, under s7(2):

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including:

- (a) the nature of the right; and*
- (b) the importance of the purpose of the limitation; and*
- (c) the nature and extent of the limitation; and*
- (d) the relationship between the limitation and its purpose; and*
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*

S7(3) provides that:

Nothing in the Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

26. The VCHRR further recognises the power of the Victorian Parliament not just to balance human rights and other interests but to override the rights listed therein.⁴³ S31(1) states that Parliament may expressly declare that an Act or provision ‘has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.’ The declaration lasts for five years, and can be renewed. Its effect is recognised in s31(6) as being that ‘to the extent of the declaration this Charter has no application to that provision’ (for example, a court might be excluded from making a declaration of inconsistent interpretation with regard to the provision).⁴⁴

Does the Supreme Court or equivalent have a strike down power for legislation it deems incompatible with human rights standards?

27. Under s36, where legislation cannot be interpreted in a way that is consistent with a human right, the Supreme Court of Victoria may make a ‘declaration of inconsistent interpretation’. The use of this title for the declaration rather than ‘declaration of incompatibility’, as used in the ACT HRA and UK Human Rights Act 1998, indicates that the Court is not so much holding that Parliament has enacted legislation that is incompatible with human rights as that the Court has taken a contrary view to Parliament on interpretative issues, such as the content of the relevant right or

⁴³ This is similar to s33 Canadian Charter of Rights and Freedoms, which allows for a renewable five year means by which Parliament can indicate that a law ‘shall operate notwithstanding’ a provision in specified sections of that instrument.

⁴⁴ As a matter of law, the override clause in the VCHRR is unnecessary. The Victorian law, unlike the Canadian Charter of Rights and Freedoms, is an ordinary Act of Parliament that, by the application of the traditional principles of parliamentary sovereignty, can be amended or repealed by a future Act. It is thus possible to override any of the rights in the VCHRR without recourse to a special mechanism. However, it is this very possibility that justifies its inclusion. S31 provides a means within the VCHRR whereby political imperatives can be met without the need to amend the VCHRR itself. In addition, the mechanism has a limited lifespan (though, significantly, it does extend beyond the life of a Parliament), meaning that the decision must be reassessed again in five years. Overall, use of s31 is preferable to a permanent amendment of the VCHRR enacted at a time of crisis that might damage the legitimacy of the instrument. It can be argued that the inclusion of the override mechanism is dangerous because it allows the VCHRR to be overridden where a law could not be justified under the s7 limitation clause. This is a real risk, but it is a low one because of the high political cost involved in using s31. It is intended for exceptional circumstances and requires a level of transparency and compelling political justification that sets a major hurdle to using the override.

the application of the limitations clause in s7. This may make it less difficult for Parliament, after reviewing the declaration, to maintain its own interpretation.⁴⁵

What is the status of the bill of rights in relation to other national legislation and international rights instruments?

28. The intention is that international law will be a principal source of interpretation of the Charter rights. S5 VCHRR provides that:

A right or freedom not included in the Charter that arises or is recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

What was the process by which the country's bill of rights came to be decided?

29. The origins of the VCHRR lie in a justice statement issued by the Victorian Attorney General in May 2004. This proposed new directions for the Victorian justice system over the following decade. The statement did not say that a charter was needed, but that there should be a public discussion to address the issue. One year later, the Attorney General announced the appointment of a four person committee to consult with the community. The time-frame was tight, with only six months given to consult with the community across the state and to report back to the Attorney General.
30. The government indicated its support for the protection in any law of only a limited set of human rights, rights taken from the ICCPR, and not for the protection of other rights taken from other international conventions, such as women's rights, indigenous rights or economic, social and cultural rights more generally (such as the rights to education, housing and health). The government also said that it was interested in a model in which the courts would have a role to play, but which retained Parliamentary sovereignty – a model like that in the UK and New Zealand, as adapted recently to the ACT; it did not favour anything like the 1791 US Bill of Rights. Intensive consultation was carried out with the public and 2524 written submissions from across the community received (the highest number of submissions ever received for a process in Australia that has looked at this issue). The committee recommended that the Victorian Parliament enact a Charter of Human Rights and Responsibilities. The government introduced the Charter into Parliament in May 2006.

How has the system of rights protection been received by the branches of government, the public (opinion polls) and the academic community in the country?

31. The VCHRR is still in its very early stages, with several provisions yet to come into force until 1 January 2008. It is rather too early to assess clearly its impact thus far.

45 George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope', [2006] MULR 2.

What are the principal advantages of the system of rights protection as compared to the other countries under examination and what are the principal difficulties encountered?

32. The retention of parliamentary sovereignty will be seen as advantageous by those opposed to judicial-centric models of review. There are noteworthy provisions – eg when a bill is introduced into the Victorian Parliament, it will be accompanied by a statement of compatibility made by the person introducing the bill setting out, with reasons, whether the bill complies with the VCHRR. However, the lack of enforcement provisions following declarations of inconsistency arguably poses problems – it is questionable how any such charter can have teeth if the Parliament (as in New Zealand) is perfectly able to ignore judicial input and thus slow the ‘dialogue’ which could be facilitated by a new bill of rights model.

Ways in which the VCHRR is different (and improved) from ACT HRA:⁴⁶

33. The VCHRR differs from ACT HRA in several respects. For example, at the parliamentary stage, the VCHRR requires reasoned statements of compatibility rather than ministerial assertions of compatibility;⁴⁷ it explicitly provides that government and those discharging public functions act unlawfully if they fail to give effect to human rights;⁴⁸ it also explicitly provides for the remedies that are available if they do not.⁴⁹
34. There are other specific improvements in the detail of the VCHRR. For example, it has a more expansive provision defining the circumstances in which rights can be limited;⁵⁰ it has broader rights to assistance with communication in criminal legal proceedings, not limited to a right to an interpreter;⁵¹ it specifically recognises Aboriginal cultural rights⁵² as well as protection of property rights.⁵³

South Africa

What is the country’s bill of rights?

1. The **South African Bill of Rights (SA BOR)** is contained in chapter two of the 1996 Constitution of South Africa. It protects positive and negative rights of all people against the executive, legislative and judicial branches of the government of South Africa. Some provisions (such as the equality rights) provide rights against the actions of other persons. The SA BOR is regarded as one of the most progressive constitutional documents in the world. Not only does it guarantee the traditional civil rights such as the right to vote, free expression, the rights of association and assembly, but also important socio-economic rights such as the right to clean water, health and non-discrimination on grounds of sexual orientation.

46 Simon Evans, ‘The Victorian Charter of Rights and Responsibilities and the ACT Human Rights Act: Four Key Differences and their Implications for Victoria’, paper presented at the Australian Bills of Rights: The ACT and Beyond Conference Australian National University, 21 June 2006.

47 S28 VCHRR.

48 Ibid, s38 read with ss4 and 6; cf s6 ACT HRA.

49 Ibid, s39.

50 Ibid, s7; cf s28 ACT HRA.

51 Ibid, s25(2)(i), (j); cf s22(2)(h) ACT HRA.

52 Ibid, s19(2); cf s27 ACT HRA.

53 S20 VCHRR.

What is the history behind the establishment of the bill of rights?

2. Following the 1994 elections, South Africa was governed under an interim constitution establishing a government of national unity (GNU). This constitution required the Constitutional Assembly to draft and approve a permanent constitution by 9 May 1996. After review by the Constitutional Court and intensive negotiations within the Constitutional Assembly, the Constitutional Court certified a revised draft. President Mandela signed the new constitution into law on 10 December 1996 and it entered into force on 3 February 1997. The enactment of a bill of rights was thus directly linked to the new wave of constitutionalism in South Africa after the end of apartheid. According to the explanatory memorandum to the Constitution, the objective in the process of constitution-making was to ensure that the final Constitution was 'legitimate, credible and accepted by all South Africans'; to that extent, 'the process of drafting the Constitution involved many South Africans in the largest public participation programme ever carried out in South Africa'.⁵⁴
3. After nearly two years of intensive consultations, political parties represented in the Constitutional Assembly negotiated the formulations contained in the text, which are an integration of ideas from ordinary citizens, civil society and political parties represented in and outside of the Constitutional Assembly. The preamble therefore states that the Constitution represents the collective wisdom of the South African people and has been arrived at by general agreement.

What is the scope of the bill of rights?

4. The SA BOR contains detailed provisions concerning civil, political, social, cultural and economic rights.
5. The fundamental civil and political rights (ss9-21) and include the right to equality; human dignity; life, freedom and security of the person⁵⁵, freedom from slavery, servitude and forced labour, privacy, religion, belief and opinion⁵⁶, expression, assembly demonstration picket and petition, association, political rights, citizenship and freedom of movement and residence.
6. Economic, social and cultural rights and other rights additional to the more typical civil and political rights (ss22-35) and include freedom of occupation, labour relations, healthy environment, property provisions, housing rights, healthcare, food and social security, children, education, language rights, rights of cultural religious and linguistic communities, access to information, just administrative action, access to courts and rights for those arrested, detained and accused.

Is the bill of rights amendable and, if so, how?

7. The SA BOR is amendable according to a special procedure (s74(2)). Bills amending the Constitution require a two-thirds majority in the National Assembly as well as a supporting vote of six of the nine provinces represented in the National Council of Provinces – these being the two houses that comprise South Africa's Parliament. A bill to amend s1 of the Constitution, which sets out the state's founding values, requires a 75 per cent majority in the National Assembly.

⁵⁴ Explanatory Memorandum, Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

⁵⁵ Security of the person and a 'right to freedom' in s12 are defined broadly as including rights to trial, freedom from cruel and unusual punishment, psychological security, reproductive control and rights against forced scientific experiments.

⁵⁶ Freedom of religion in s15 includes a right to government-provided places of worship, as long as those places are run in such a way that membership is equal.

What are the provisions for limitation and derogations?

8. S37 SA BOR provides lengthy and detailed provisions concerning derogations in states of emergency.⁵⁷ Even during states of emergency, certain rights remain non-derogable. These are listed in the table below:

Section number	Section title	Extent to which the right is protected
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex religion or language
10	Human Dignity	Entirely
11	Life	Entirely
12	Freedom and Security of the person	With respect to subsections (1)(d) and (e) and (2)(c)
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to: - subsection (1)(d) and (e); - the rights in subparagraphs (i) and (ii) of subsection (1)(g); and - subsection 1(i) in respect of children of 15 years and younger
35	Arrested, detained and accused persons	With respect to: - subsections (1)(a), (b) and (c) and (2)(d); - the rights in paragraphs (a) to (o) of subsection (3), excluding paragraph (d) - subsection (4); and - subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.

57 S37. States of emergency:

1. A state of emergency may be declared only in terms of an Act of Parliament, and only when
 - a. the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and
 - b. the declaration is necessary to restore peace and order.
2. A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only
 - a. prospectively; and
 - b. for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly ... Importantly, whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, there are strict conditions of due process to be observed. It is also notable that these conditions of due process do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.

9. Aside from states of emergency, the rights in the SA BOR are subject to the limitations contained or referred to in s36, or elsewhere in the bill.⁵⁸

Does the Supreme Court or equivalent have a strike down power for legislation it deems incompatible with human rights standards?

10. The Constitutional Court of South Africa (the highest authority on issues involving the interpretation, protection or enforcement of the Constitution) may decide on the constitutionality of any parliamentary or provincial bill, where the matter is referred from the President or National Assembly. It may also decide on the constitutionality of any amendment to the Constitution. Further, the Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or the conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.

What is the status of the country's bill of rights / rights instrument in relation to other national legislation and international rights instruments?

11. The South African Constitution and, within this, the Bill of Rights, is supreme law and takes precedence over other national legislation. The SA BOR was particularly influenced by comparative and international law both of which it continues to emphasise. In relation to the interpretation of the rights instrument itself, s39(1) provides:

When interpreting the Bill of Rights, a court, tribunal or forum

- a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
- b. must consider international law; and*
- c. may consider foreign law.*

12. In addition, s231(4) provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self executing provision of an agreement that has been approached by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. The importance of the international is further underlined in s232, stating that customary international law is 'law in the Republic unless is it inconsistent with the Constitution or an Act of Parliament'. S233 provides that every court must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. In addition, s115 of the Constitution established a Human Rights Commission which monitors, amongst other matters, whether proposed laws are in breach of the SA BOR or of 'norms of international law'.

⁵⁸ S36 provides:

1. *The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking Account of all relevant factors, including:*
 - a. the nature of the right; b. the importance of the purpose of the limitation; c. the nature and extent of the limitation; d. the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.*
2. *Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights...*

What was the process by which the country's bill of rights came to be decided?

13. South Africa's first interim Constitution and Bill of Rights was the result of initial discussions at the Convention for a Democratic South Africa (CODESA) and, after its collapse, the negotiations of the Multi-party Negotiating Forum, completed at the end of 1993. The interim Constitution was finally agreed upon and passed by the old Parliament as the Constitution of the Republic of South Africa 200 of 1993 with a Bill of Rights enshrined in chapter three. The interim Constitution provided that an elected constitutional Assembly had to, within two years and after wide consultation, draft a final constitution and bill of rights within the guidelines set out in the constitutional principles agreed upon during the negotiations. The Constitutional Assembly engaged in a massive publicity campaign to encourage ordinary members of the public to submit ideas on the new constitution. More than two million submissions were received. Once the new constitution was drafted it had to be certified by the Constitutional Court to ensure that it complied with the constitutional principles, before it could be passed as law by Parliament. Certain sections of the proposed new constitution were referred back to the Constitutional Assembly by the Court for re-drafting, but by and large the provisions of the draft bill of rights remained intact.

How has the system of rights protection been received by the branches of government, the public and the academic community in the country?

14. The SA BOR is held up as the most progressive in the world, given its relatively late arrival and the fact that it draws so heavily on international law and the experiences of other countries and the various moves to constitutionalisation. While the SA BOR has attracted huge public support and encouraged unification of South Africa's divided populations, academic opinion remains split.⁵⁹
15. In particular, the judicial-centric model of review, with the Supreme Court's ability to strike down legislation, brings to the fore the debate over the role of the judiciary and whether it is in accordance with democracy for judges to be making certain types of decisions. Particularly famous is the *Makwanyana* case,⁶⁰ in which the Court ruled the death penalty to be unconstitutional, despite public opinion at that time being in favour of the death penalty.⁶¹

What are the principal advantages of the system of rights protection and what are the principal difficulties encountered?

16. The principle advantage of the SA BOR entrenched in its ground breaking constitution has arguably been the culture change – the engendering of a 'culture of liberty' with a highly symbolic and ambitious document at its apex. Post-apartheid South Africa has made great strides to respect, protect and fulfil human through the new legal and political framework of its constitutional democracy. Despite these efforts there remain serious problems concerning resources and the fact that many South Africans continue to experience widespread human rights violations. Barriers to access to justice are particularly pronounced for those living in poverty, and/or living with HIV or AIDS, and/or women, all of whom are doubly victimised when they do not have access to legal and non-legal support to contest these violations.

59 See Karl Klare, 'Legal Culture and Transformative Constitutionalism', (1998) 14 SAJHR 146; cf Saras Jagwanth 'The South African Experience of Judicial Rights Discourse: A Critical Appraisal', in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights*, Oxford University Press, 2003.

60 1995 (3) SALR 391 (CC).

61 *Ibid* at para [87]. See discussion in Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, Cambridge University Press, 2000, chapter 3.

Israel

What is the country's bill of rights?

1. Israel's Basic Laws (BLs), in particular the Basic Law – Human Dignity and Freedom (1992) and the Basic Law – Freedom of Occupation (1994) provide constitutional protection of fundamental rights. These laws operate in the absence of a written constitution for Israel,⁶² laying down the order of government and the rights of citizens.

What is the history behind the establishment of the country's bill of rights?

2. Following the 1948 Declaration of Independence, the new Israeli state's constitution was to be drawn up by an elected constituents' assembly. After its election, the Assembly transformed itself into the Knesset, Israel's Parliament, and adoption of the constitution was delayed. Under a Knesset resolution of 1950 it was decided that the state's formal constitution would be drawn up on the basis of a series of basic laws which were thus enacted, covering virtually all aspects of Israel's system of government. Only in 1992 was a BL on civil liberties or human rights included among them. Attempts by members of the Knesset, the Knesset Constitution and Law Committee and Ministers of Justice to facilitate passage of such a BL repeatedly met with political opposition, mainly from the religious parties who feared that a BL would open the way to judicial review of legislation enforcing religious norms at the expense of individual freedoms and rights.⁶³
3. In the final session of the Knesset prior to the 1992 elections, two basic laws concerning human rights were finally adopted: the Basic Law – Freedom of Occupation, and the Basic Law – Human Dignity and Liberty. It was more feasible to pass a bill covering those rights not considered controversial than to pass a general bill of rights. Shortly after enactment of the original Basic Law – Freedom of Occupation, the Supreme Court ruled that import restrictions on meat owing to dietary laws of the Jewish religion violated freedom of occupation.⁶⁴ Religious parties demanding remedy through ordinary legislation were blocked by the BL. The political solution was to re-enact it including a provision allowing for a parliamentary override of its restrictions. Additional amendments were also introduced to the Basic Law – Human Dignity and Liberty.

What is the scope of the bill of rights?

4. The two BLs do not purport to cover all the fundamental rights protected under the International Covenant on Civil and Political Rights (ICCPR) (ratified six months earlier by the Israeli government) or by modern bills of rights, such as freedom of expression, freedom of association, and the right to fair trial. Thus, those rights included in the ICCPR but which remain outside the scope of the two BLs, will only be able to command the weaker protection of judge-made case law, leaving them vulnerable to restriction by Knesset legislation.
5. Basic Law – Human Dignity and Liberty encompasses (ss2-7) the right to preservation of life, body and dignity; protection of property; protection of life, body and dignity; personal liberty; freedom to leave and enter Israel, and privacy.

⁶² Though there is an ongoing process to adopt a written constitution. See website for campaign group 'Constitution for Israel' at <http://www.cfisrael.org/home.html>.

⁶³ David Kretzmer, in Philip Alston, *Promoting Human Rights through Bills of Rights*, Oxford University Press, 1999, chapter 3.

⁶⁴ H.C. 5871/92, *Mitral Ltd. v. Minister of Commerce and Industry*, 47(i) P.D. 521.

6. Basic Law – Freedom of Occupation encompasses (ss3) the right of every Israel national or resident to engage in any occupation, profession or trade.

Is the bill of rights amendable and, if so, what is the procedure?

7. While amendments to the Basic Law – Freedom of Occupation require an absolute majority in the Knesset, the Basic Law – Human Dignity and Liberty may be altered by simple majority. No super majority or referendum is required, which has been a source of contention, since the protected rights have relatively weak protection compared to other systems.

What provision is there for limitations to, and derogations from, the bill of rights?

8. The provisions for limiting and derogating from the BLs are broad. In terms of limitations, the BLs essentially follow the Canadian model – the individual rights themselves are cast in absolute terms but there is a general balancing test that must be applied in all cases.
9. S8 Basic Law – Human Dignity and Liberty states:

There shall be no violation of rights under this Basic Law except by a Law fitting the values of the State of Israel, designed for a proper purpose, and to an extent no greater than required or by such a law enacted with explicit authorisation therein.

10. Basic Law – Freedom of Occupation, enacts a similar provision at s4, but then states at s8 that:

The provisions of any law which are inconsistent with the freedom of occupation shall remain in effect, even if it does not conform with s4 ('Violation of freedom') if it is included in a law adopted by a majority of the Knesset with the explicit comment that it is valid despite the provisions of this Basic Law; such a law shall remain in effect for four years from the date of its commencement, unless an earlier date is fixed.

11. In terms of derogations, s12 Basic Law – Human Dignity and Liberty states:

This Basic Law cannot be varied, suspended or made subject to conditions by emergency regulations; notwithstanding, when a state of emergency exists, by virtue of a declaration under s9 of the Law and Administration Ordinance [...] emergency regulations may be enacted by virtue of said section to deny or restrict rights under this Basic Law, the voided the denial or restriction shall be for a proper purpose and for a period and extent no greater than required.

12. Basic Law – Freedom of Occupation, however, provides simply that (s6):

This Basic Law cannot be varied, suspended or made subject to conditions by emergency regulations.

Does the Supreme Court or equivalent have a strike down power for legislation it deems incompatible with human rights standards?

13. When in 1992, the Knesset adopted the two new BLs (Freedom of Occupation, and Human Dignity and Freedom), the freedom of occupation law explicitly included a provision preventing other laws from infringing on it; but a proposal to also entrench the more important Basic Law – Human Dignity and Liberty failed by one vote. Perhaps more importantly, both laws had a limitation clause stating that,

There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.

14. A minimalist interpretation would simply have added the two new BLs to the short list of entrenched laws. Chief Justice Aharon Barak, however, led a more activist interpretation of the new laws, declaring⁶⁵ that their enactment – particularly the new limitation clause concept – signified the elevation of all BLs to supremacy over ordinary legislation.
15. This historic decision – the equivalent of the United States’s famous *Marbury v Madison*⁶⁶ – put BLs on the top and established the practice of judicial review of statutes. The Supreme Court declared the 11 BLs drafted over some 45 years to be a constitution, and granted itself the power to strike down new legislation that contradicted any basic law. With this interpretative manoeuvre, the Court thus established a constitution, though its own coordinated ‘constitutional revolution’.
16. The BLs lay down a general balancing test for examining the legitimacy of restrictions on protected rights. As in most systems which provide for judicial review of the constitutionality of legislation, the scope of the rights protected under the BLs will largely depend on the way the Supreme Court interprets both the rights themselves and the balancing test. There continues to be significant resistance in the political arena to judicial review of parliamentary legislation especially when the legislation in question is to give effect to religious norms. This reflects the oft-cited tension that underpins the legal system in a ‘Jewish and democratic’ state.⁶⁷

What is the status of the bill of rights in relation to other national legislation and international rights instruments?

17. The BLs are designed to have constitutional status but their relatively weak entrenchment (repeal or amendment on a simple Knesset majority) has been a contributing factor to current efforts to draw up a written constitution and bring about a coalescence of Israeli constitutional principles and instruments for codification.
18. Under the rule of British law followed in Israel, specific enacting legislation is required to incorporate international treaties such as the ICCPR, which Israel ratified in 1992. However, none were brought forward for implementation and the BLs evidently fall short of the ICCPR. Judicial recourse is made

⁶⁵ *Bank Mizrahi v The Minister of Finance* [1995], 49 (iv) PD 221.

⁶⁶ 5 US 137 (1803).

⁶⁷ See David Kretzmer, n59 above, p82-84; Shimon Shetreet, ‘Reflections on Israel as A Jewish and Democratic State’, (1997) 2 *Israel Studies* 190-197.

in the Supreme Court to international law and the Court is renowned for its high standard of jurisprudence in fundamental rights issues.

What was the process by which the country's bill of rights / rights instrument came to be decided?

19. In 1950, the Knesset adopted a resolution known as 'the Harari proposal', concerning the manner in which the Israeli constitution would be enacted. According to this resolution, the Knesset would gradually pass BLs, which would deal with a range of constitutional issues. Joined together, these would eventually form a constitution.
20. The consultation process was in fact minimal and the BLs were passed on a bare majority in the Knesset. There was no sense of public ownership of the document and religious tensions were high over the content and any risks of embracing individualistic and ideological rights at the expense of religious values.

How has the system of rights protection been received by the branches of government, the public (opinion polls) and the academic community in the country?

21. The rapid evolution in Israeli constitutional and human rights law has had its positive and negative implications. Israel's system of law and basic principles are now stabilised by a constitution. The argument is made, however, that text is incomplete and unknown to the public, failing in the educational, civic, and political functions a constitution would fulfil if it grew out of an inclusive process of public deliberation. There are religious objections too, in that issue of Israel as the state of the Jewish people is not addressed fully. Finally, the Supreme Court's interpretation and application of some of the BLs has alienated Members of Knesset (particularly the Orthodox) who originally supported the BLs themselves in full.⁶⁸

What appear to be the principal advantages of the system of rights protection as compared to the other countries under examination and what are the principal difficulties encountered?

22. Adoption of the BLs brought about a major shift in Israel's constitutional system. Judicial review of legislation has reduced the vulnerability of fundamental rights. Nevertheless, the system itself continues to suffer a number of deficiencies that limit the impact of this constitutional revolution. First, the BLs themselves are subject to modification by the Knesset. While amendments to the Basic Law – Freedom of Occupation require an absolute majority, the Basic Law – Human Dignity and Liberty may be altered by simple majority. Second, the BLs do not give specific mention to several fundamental rights, including freedom of religion and conscience, the right to equality and freedom of expression. The Supreme Court will most likely interpret the principle of human dignity so as to take in violations of rights not explicitly referred to, but will refrain from extending full protection to rights that were intentionally omitted from the BLs. Finally the BLs do not allow for judicial review of primary legislation that was in force at the time of enactment. Under Basic Law – Freedom of Occupation, prior legislation was to be subject to judicial review after a period of grace that was to have elapsed in 1994, but that period has been twice extended. To date, judicial review under both BLs has been limited to legislation introduced after their coming into force.⁶⁹

⁶⁸ See n58 above, 'Constitution for Israel' at <http://www.cfisrael.org//history.html>.

⁶⁹ David Kretzmer, n63 above, p87-88.

United States of America

What is the country's bill of rights?

1. Rights are protected through **Constitutional Amendments** to the **United States Constitution**, the first ten of which are referred to as the **Bill of Rights** (US BOR). Not all of the amendments are concerned specifically with individual rights.

What is the history behind its establishment?

2. The United States Constitution was adopted in 1789. It contained few references to rights, on the assumption that existing state's bills of rights would be adequate protection. Long before the War for Independence, states had protected rights through their state constitutions. After the war, having gained independence from a nation with a strong, central government, they were reluctant to adopt a similar system. The Articles of Confederation established a federal body consistent with state wishes, but it lacked adequate powers to govern the nation properly. In 1786, state delegates convened to discuss the creation of a stronger, federal government. Opponents were concerned the new central government would be too strong. They wanted a bill of rights to limit the federal body's powers. In the Massachusetts Compromise, the delegates agreed the new Congress should decide whether to add the bill of rights. Thus, states ratified the Constitution without explicit rights protection but placed political pressure on the new Congress to act.
3. A campaign led by the anti-Federalists to insert a bill of rights in the Constitution in order to curb federal power over individuals was eventually successful in 1791. The Bill of Rights was drafted by James Madison, who modelled it mainly on George Mason's Virginia Declaration of Rights, written in 1776, and tailored it to state recommendations and rights protection common to several of the states.
4. Notably, Amendment 9 declares that the people have rights beyond those enumerated in the US BOR. In addition to specific rights provisions in their constitutions, states protected rights through common law. The provision was added to alleviate concerns over whether the US BOR would truncate rights by restricting them to those explicitly mentioned.

What is the scope of the bill of rights?

5. The core civil rights protected include: freedom of speech (Article 1); freedom of the press (Article 1); freedom of religion (Article 1); non-establishment/separation of church and state (Article 1); freedom of assembly (Article 1); freedom to petition the government (Article 1); right to bear arms (Article 2); prohibition against quartering troops in civilian homes (Article 3); power of states and people (Article 10); powers not delegated to the federal government nor prohibited by the states are reserved to the states and to the people; abolition of slavery (Article 13); equal protection (Article 14); jurisprudence: mainly race and gender; citizenship (Article 14); prohibition against poll taxes (taxes levied on voting) (Article 24).
6. Criminal law guarantees include: right to security in person and property (Article 4); prohibition against warrantless search and seizure (Article 4); prohibition against double jeopardy (Article 5); prohibition against forced testimony against oneself (Article 5); due process – required for

deprivations of life, liberty, or property (Article 5); grand jury indictment for capital offences (Article 5); criminal offences (Article 6); right to speedy and public trial (Article 6); right to jury (Article 6); right to jury of peers (Article 6); habeus corpus (Article 6); right to counsel (Article 6); right to confront witnesses (Article 6); right to obtain witnesses in his favour (Article 6).

7. In the field of civil offences, guarantees include; right to trial by jury (Article 7); prohibition against excessive bails or fines (Article 8); prohibition against cruel and unusual punishment (Article 8).
8. Also included is the right to property, with just compensation when appropriated for public use (Article 5).⁷⁰

What are the provisions for limitations and derogations?

9. The rights contained in the amendments to the United States Constitution are expressed in absolute terms. There is no reference to limitations on rights nor to the need to balance competing claims of rights. The Constitution does not expressly permit any branch of the federal government to derogate from the US BOR even in a national emergency.⁷¹

Is the bill of rights amendable, and if so, how?

10. Article 5 of the Constitution addresses the procedure for constitutional amendment.
11. There are two paths for proposing amendments: by a two-thirds majority vote in both congressional houses, and by two-thirds of state legislatures calling for a convention on constitutional amendment. Amendments are then adopted when three-quarters of states ratify the proposed change through their legislatures or by conventions within the state.

Does the Supreme Court have a judicial strike down power?

12. Not long after adoption of the Constitution, in the 1803 case of *Marbury v Madison*, the Supreme Court established the doctrine of judicial review, empowering the Court to examine legislation and other acts of Congress and to decide their constitutionality.⁷² The doctrine also embraces the power of the Court to explain the meaning of various sections of the Constitution as they apply to particular cases brought before the Court. The United States model thus accords final say on the interpretation of generally-expressed rights to the judiciary. This has led to a highly politicised judicial appointment process and the judiciary is regularly criticised for usurping legislative functions in the area of rights protection.

⁷⁰ The right to property, though classically classed as a civil right, is also referred to as an economic right. Notably, it refers to respect for something which one already has, as opposed to other economic rights which typically refer to entitlement to what one does not yet have, such as housing or social security.

⁷¹ However, the Supreme Court jurisprudence has been deferential to Congress and the President during times of war. Generally, the Court may declare such matters to be political questions which are non-justiciable.

⁷² *Marbury v Madison* (1803) 5 US 137. The US system of judicial nullification is both diffused and centralised. Any federal court has the competence to strike down legislation incompatible with the Constitution, but the action will bind courts only within its jurisdiction. Thus, federal district courts set precedents only for themselves, Circuit Courts of Appeal bind all federal district courts in their circuits (usually a collection of five to eight states, depending on size), and the Supreme Court binds all Circuit Courts and federal district courts.

What is the status of the bill of rights compared to national legislation and in relation to other international rights instruments?

13. The US BOR is superior to national legislation, and any federal court may strike down national law that contravenes the Constitution.
14. In relation to international law, Article 6 of the US Constitution declares treaties to which the US is a party to be the 'supreme law of the land'. Ratification of a treaty in the US requires that the treaty be signed under the authority of the President, then receive a two-thirds vote in the Senate, and then be proclaimed law by the President. This process can take years or even decades. On ratification, the treaty becomes part of US federal law. As a result, Congress can modify or repeal treaties by subsequent legislative action, even if this amounts to a violation of the treaty under international law. Additionally, an international agreement that is inconsistent with the US Constitution is void under domestic US law, the same as any other federal law in conflict with the Constitution. The Supreme Court could rule a treaty provision to be unconstitutional and void under domestic law, although it has never done so.
15. In 1992, the US Senate ratified the International Covenant on Civil and Political Rights (ICCPR) with a number of reservations, understandings, and declarations. It stated the provisions would not be self-executing, thereby ensuring that the ICCPR would not create private causes of actions in US courts. As Congress has not acted further, the ICCPR does not form part of the domestic law.

What was the process by which the bill of rights came to be decided?

16. Following negotiation, the US BOR was adopted according to Article 5 of the Constitution, which addresses amendment procedures. Three-quarters of states ratified the amendments through their legislatures pursuant to individual state procedure.

What have been the government, public and academic responses to the system of rights protection?

17. The system of rights protection is itself universally accepted by government, and the public. Without doubt it is a popular national symbol, even despite omissions in its drafting or lack of knowledge of its precise provisions. In a Public Agenda national opinion poll in 2002, 67 per cent said it is 'absolutely essential' for ordinary Americans to have a detailed knowledge of their constitutional rights and freedoms.⁷³ 90 per cent of respondents agreed that since the terrorist attacks of September 2001, 'it's more important than ever to know what our Constitution stands for.' The study showed that 'if the text of the Constitution is captured imprecisely in people's heads, its principles and values are alive and well in their hearts', said Joseph M Torsella, president and CEO of the National Constitution Center.
18. Although the United States has a codified document, judicial decisions determine the actual scope of rights via legal interpretation. In practice, constitutional law is the jurisprudence of the Supreme Court, and to a lesser extent, the Circuit Courts of Appeal. It could arguably be called the common

⁷³ *Knowing it by Heart: Americans Consider the Constitution and its Meaning, A Report by Public Agenda for the NCC, 17 September 2002, at www.constitutioncenter.org.*

law of the Supreme Court. Nevertheless, the text does provide a hierarchical system of norms and a framework on which Justices are compelled to base their positions.

19. Academic debate focuses on the interpretation of constitutional provisions. There are two main theories. One deems the Constitution a 'living' document whose meaning changes in accordance with contemporary concerns, and the other asserts that the text must be interpreted as the Founding Fathers originally intended. The first has been criticised for being too subjective and enabling judges to substitute their own policies for those of the legislature (ie 'judicial activism'). The latter has been criticised for hampering the law from responding adequately to current issues, and the methods employed have also been vulnerable to charges of activist behaviour.

What are the advantages and disadvantages of this model compared to other systems?

20. Due to the diffused system of judiciary strike-down power, a fair amount of inconsistency between national courts occurs and remains in force until the Supreme Court resolves the point of law. The Supreme Court usually does not address certain issues unless the Circuit Courts are split over the issue and unless the matter is 'ripe'. Regarding the latter, matters may be deemed ripe when they have been sitting in the public eye for some time and extended public debate has supposedly developed the strongest arguments for both sides.
21. Over the past 200 years, there have been many controversial decisions made under the US BOR. One issue has been the appropriate modern interpretation of rights guarantees adopted two centuries ago and the Supreme Court has been attacked from all sides as either too conservative or too progressive in its decisions. The most famous cases include the *Dred Scott* case in 1857, where the Supreme Court held that slave-owning was protected by the US BOR.⁷⁴ In *Brown v Board of Education* almost a hundred years later, the Supreme Court interpreted the US BOR to require strong measures for the desegregation of schools.⁷⁵ Another controversial decision in *Rode v Wade*⁷⁶ which ruled that most laws against abortion violated a constitutional right to privacy under the Due Process Clause of the Fourteenth Amendment. There is much debate about how well the US BOR has protected human rights in practice. One study in the last ten years challenges the popular image of the Supreme Court as the champion of the oppressed. It points out that, in the United States context, judicial attitudes to rights often lag behind those of the legislature.⁷⁷

Republic of Ireland

What is the country's bill of rights?

1. The 1937 Constitution of Ireland titles the provisions of Articles 40-44 as the 'fundamental rights' of the Irish people. A few important rights are scattered throughout the other Aarticles, and although they are not styled as 'fundamental', their status as constitutional law affords them the same heightened level of protection.

⁷⁴ *Dred Scott v Sanford* 60 US (19 Howard) 393 (1857).

⁷⁵ 347 US 483 (1954).

⁷⁶ 410 US 113 (1973).

⁷⁷ Mark Tushnet, *Taking the Constitution away from the Courts*, Princeton University Press, 1999.

2. Article 40(3) references 'personal rights'. This Article has become the judicial basis for recognising rights not explicitly contained in the constitution.
3. Article 45 outlines 'directive principles' which are policy goals. As these provisions are non-binding, they cannot be construed as rights strictly so called.

What is the history behind its establishment?

4. From 1801-1922, the Republic of Ireland belonged to the United Kingdom and functioned according to the British legal system. After the Anglo-Irish War, the committee in charge of drafting the new nation's constitution studied the constitutions of European nations and the United States for insights into creating their own code.⁷⁸ Most notably, after belonging to a state that operated without a written, codified constitution, the Irish Free State consciously decided to base their legal system on a written constitution. The British conception of liberty was 'negative', in that the legal system defined liberty not in terms of what people *could* do, but in terms of what they *could not*, according to legislation. Under such a system, it was parliamentary majorities which determined the level of encroachment upon personal liberties, in contrast to the codified systems of what were seen as more 'civilized' nations.⁷⁹ Given the animosity between Ireland and Britain at the same, it is unsurprising the Irish distrusted the common law's ability to guarantee fundamental rights and turned towards a codified legal system.

What is the scope of rights protection?

5. The fundamental rights of Articles 40-44 are classified into personal rights, family rights, education, private property, and religion. The language under 'family rights' indicates policy rather than enforceable right. The subject matter of these and other articles may be categorised as follows.

Civil rights and political rights

6. These include the right to self-determination as a nation (Article 1); equality of all people before the law (Article 40(1)); prohibitions against the state forcibly entering a person's home unless permitted to do so by law (Article 40(5)); freedom of speech, assembly, and association Article 40(6); freedom of worship (Article 44(2)(1)); prohibition against state establishment (Article 44(2)(2)); prohibition against discrimination based on religion (Article 44(2)(3)) - Article 44(2)(4) extends this prohibition in regard to school funding.

Due process rights

7. These include prohibition of retrospective (ex post facto) criminal laws (Article 15(5)); right to trial by jury for serious offences (Article 38); right to habeas corpus (Article 40(4)); and Articles 34-38 concerning good administration.

⁷⁸ J M Kelly, *Fundamental Rights in the Irish Law and Constitution*, Allen Figgis & Co Ltd, 1967, p14.

⁷⁹ *Ibid*, p13.

Economic, social, and cultural rights

8. ESC rights include the right for parents to educate their own children as they see fit (Article 42(2)), including home schooling; the commitment from the state to provide free primary education (Article 42(4)).

Other notable rights

9. The constitution also includes the prohibition on the death penalty (Article 15); right to life for the unborn, with 'due regard to the equal right to life of the mother' (Article 42(4)); and the right to private property (Article 43).
10. Article 40(3) references the 'personal rights' of its citizens. From 1937-1963, the Article was perceived to cover only enumerated constitutional rights. In 1965, in *Ryan v Attorney General*,⁸⁰ the Supreme Court of Ireland held for the first time that a right was implicit under Article 40(3).⁸¹ Since then, the provision has been used to recognise the right to bodily integrity, the right not to be tortured or ill-treated,⁸² right to marital privacy,⁸³ right to individual privacy,⁸⁴ right to legal representation in certain criminal cases,⁸⁵ right to fair procedures,⁸⁶ and the right to earn a livelihood.⁸⁷ Strictly speaking, these rights are legal but not 'constitutional' as such.
11. Article 46, titled 'Directive Principles of Social Policy', sets out principles to guide the national Parliament. It explicitly prohibits the courts from interpreting the measures in a binding manner. The Article frequently refers to the 'common good' and focuses primarily on economic matters, notably resource distribution, concentration of power, and the potential unjust exploitation of the public flowing from the two. Its goals also include adequate means of livelihood for all, establishing as many families as possible on the land in economic security, supplementing private industry and commerce when necessary, and safeguarding weaker members of the community such as the infirm, widowed, orphaned, and the aged.

What are the provisions for limitations and derogations?

12. The provisions for limitations are specific to different rights.
13. For example, the right to trial by jury is limited in two situations; it is not required in special courts established to try offences for which ordinary courts have been deemed inadequate (Article 38(3)); nor is it required in military tribunals trying alleged violators of military law or dealing with a state or war or armed rebellion (Article 38(4)).
14. The rights to freedom of expression, assembly, association, conscience, and practice of religion are limited by considerations of public order and morality.

80 [1965] IR 294

81 Byrne & McCutcheon, *The Irish Legal System*, Butterworth Ireland Ltd, 1996, p580.

82 *The State (C) v Frawley* [1976] IR 365.

83 *McGee v Attorney General* [1974] IR 284.

84 *Kennedy v Ireland* [1987] IR 587.

85 *The State (Healy) v Donoghue* [1976] IR 325.

86 *In re Haughey* [1971] IR 217.

87 *Murphy v Stewart* [1973] IR 97.

15. The right to private property is subject to state regulation in accordance with 'principles of social justice' and in light of exigencies concerning the common good.⁸⁸
16. The Constitution permits deprivations of private liberty and forceful entry into the home by the state 'in accordance with law'. During the mid-1900s, a number of Supreme Court decisions construed 'law' to mean no more than 'ordinary legislation'. In more recent times, academics have advocated a more limited interpretation of 'law' to that of some higher law, ie constitutional or natural law.⁸⁹
17. As for derogations in a time of emergency, the constitution (Article 28) grants the state sweeping powers during a 'time of war or armed rebellion', which may include an armed conflict in which the state is not a direct participant. In such circumstances a 'national emergency' may be declared to exist by both Houses of the Oireachtas (Parliament). During such a period the Oireachtas may pass laws that would otherwise be unconstitutional and the actions of the executive cannot be found to be ultra vires or unconstitutional provided they at least 'purport' to be in pursuance of such a law. However, the constitutional prohibition on the death penalty, introduced by an amendment made in 2001, is absolute and applies even during a 'time of war'.⁹⁰

Is the bill of rights amendable and, if so, how?

18. Article 46 describes the procedure for constitutional amendment. Both Houses of the Oireachtas must pass the bill, and the measure must be approved by a referendum of registered voters. The amendment becomes effective only when the President signs the bill into law. Proposals must deal exclusively with the constitutional matter being changed and be explicitly styled as constitutional amendments.⁹¹
19. The requirements have been attributed to concerns about clarity and procedure under the 1922 Constitution, as well as Irish legal culture. Previous Parliamentary Acts had sometimes contained provisions stating that any incompatibility between the legislation and constitution would function as an implicit amendment to the constitution. This merely served to obscure the law. Also, the 1922 Constitution empowered the Oireachtas to make amendments through ordinary legislation until 1930, after which such amendments needed to be approved by referendum. Although numerous changes occurred even after 1930, no referendums were ever held.⁹² Furthermore, the Constitution's language promoted itself as the people's instrument, and the document itself had been adopted through referendum. Thus, some scholars believed amendments should be adopted through the same means.⁹³

Does the Supreme Court have the power to strike down legislation for incompatibility with human rights?

20. Article 34 of the Constitution grants the High Court and Supreme Court power to nullify legislation that contravenes the Constitution. Ireland's other courts, with local and limited jurisdiction, do not

⁸⁸ The limitations were intended to align the law with Catholic teaching, rather than promote a socialist agenda.

⁸⁹ Francis X Beytagh, *Constitutionalism in Contemporary Ireland: An American Perspective*, Round Hall Sweet & Maxwell, 1997, p155.

⁹⁰ There have been two national emergencies since 1937: an emergency declared in 1940 to cover the threat to national security posed by World War II, and an emergency declared in 1976 to deal with the threat to the security of the state posed by the Provisional IRA.

⁹¹ Article 46(3)-(4).

⁹² See n81 above, p549.

⁹³ Brian Doolan, *Constitutional Law and Constitutional Rights in Ireland*, Gill and Macmillan Ltd, 1984, p6.

have this strike-down power.⁹⁴ Although these courts have the negative power to declare law invalid, they do not have the positive power to declare what might be enacted to replace the law.⁹⁵

What is the status of the bill of rights in relation to national legislation and other international rights instruments?

21. As the fundamental rights form part of the Constitution, they are superior to national legislation. Acts of the Oireachtas incompatible with the Constitution can be judicially nullified. Presumably, this means an aggrieved party receives effective judicial and compensatory relief at the same time.
22. Thus, the constitutional fundamental rights have higher status and more efficient enforcement than the rights flowing from international instruments. Ireland has a dualist legal system; international agreements do not affect the domestic legal system until its contents are incorporated by national legislation. In 2003, the Oireachtas passed the European Convention on Human Rights Act. It required courts, if possible, to interpret and apply domestic legislation in a manner consistent with the European Convention on Human Rights (ECHR). If this was not possible and all other legal remedies had been exhausted, the High Court or Supreme Court could issue a declaration of incompatibility. The Taoiseach (Prime Minister) then would have 21 days to present the matter to both Houses of the Oireachtas, who would revise the offending legislation.^{96 97}

What was the process by which the bill of rights came to be decided?

23. The Constitution was passed by Dáil Éireann (then the sole House of Parliament) on 14 June and then approved narrowly in a plebiscite of voters on 1 July 1937. It came into force on 29 December 1937. Among the groups who opposed the Constitution were supporters of the Fine Gael and Labour opposition parties, Unionists, supporters of the Commonwealth and women. Its main support came from Fianna Fáil supporters and republicans. The question put to voters was simply 'Do you approve of the Draft Constitution which is the subject of this plebiscite?'
24. The popularly elected House of the Oireachtas, the Dail Eireann, approved the draft Constitution, and it was then narrowly approved by a plebiscite of voters.

What has been the reception of the bill of rights by government, public, and academics?

25. The arrangement and definition of fundamental rights has been criticised as unmethodical and in great need of updating given the social and cultural changes of the last 60 years.⁹⁸ By contemporary standards, there are few enumerated rights. Courts have resorted to Article 40(3) (personal rights, unenumerated rights) to recognise other rights, and there is concern that this ad hoc judicial creation of doctrinal rights leaves the Oireachtas uncertain about what legislation it may pass.⁹⁹

94 See n81 above, p557.

95 Ibid, p583.

96 Ursula Kilkelly (General Editor), *ECHR and Irish Law*, Jordan Publishing, 2004, pglvii.

97 The aggrieved party was also entitled to petition the Attorney General for compensation for loss, injury, or damage resulting from the legislative incompatibility with the ECHR. As the Attorney General's office followed the European Court on Human Rights' awards in accordance with Article 41 of the Convention, damages have generally been low (Ibid).

98 See n79, p37.

99 Ibid, p47.

26. The extensive qualifying language narrows the effective protection of the rights. Courts have been criticised for interpreting provisions narrowly, and suggestions have been made to redraft the constitution (for example Article 40(1), explicitly to prohibit discrimination on the basis of an enumerated category, rather than the present general wording regarding 'equality before the law.'

What are the advantages and disadvantages of this model, compared with other systems?

27. The Irish Constitution and the rights embedded in it are directed to the specific culture of Ireland and its provisions carry some strong patriotic messages and assurances. There is emphasis on language traditions, religion and family life. However, were a new constitution to be drawn up, doubtless many of the provisions could now seem not only outdated but discriminatory. For example, the Constitution guarantees women the right to vote and to nationality and citizenship. However it also contains a provision that was objected to by women's organisations at the time of the its enactment in 1937. Article 41(2) states:

ss 1: In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

ss 2: The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

28. This highlights the consideration that, while tailoring a rights instrument to the particular needs of a culture is beneficial in terms of contemporary consensus and feeling of public ownership, a constitutional bill of rights must not be drafted for short-term goals. It must be drafted with a degree of permanency in mind and to appeal to a modern and diverse society which embraces a range of life style choices while adhering to traditional principles.

Germany

What is the country's bill of rights?

1. The **Basic Law for the Federal Republic of Germany** (Basic Law) is the de facto constitution of Germany, which came into effect in 1949. Chapter one of the Basic Law lists the Basic Rights.

What is the history behind the establishment of the country's system of rights protection?

2. The Basic Law was intended as an interim document, as a prelude to a constitution for a future united Germany. However, it remained in force even after reunification in 1990, having proved itself as a stable foundation for the thriving democracy in West Germany that had emerged from the aftermath of World War II. Some changes were made to the law in 1990, including to the preamble, which mainly related to reunification. Additional amendments to the Basic Law were made (to include environmental protection and animal protection (Article 20)) in 1994 and 2002.

What is the scope of the bills of rights?

3. The Basic Rights in chapter one covers (in Articles 1-17) the classical fundamental rights, including those of dignity and equality, which themselves are drawn from the Universal Declaration of Human Rights (UDHR). The constitution guarantees all rights from the UDHR (which itself is not legally binding), with the exception of an unlimited right for asylum.¹⁰⁰

Civil and political rights

4. Those listed (Articles 1-17) include human dignity, personal freedoms (faith, conscience, creed), equality, expression, marriage and family, assembly, association, private communications, freedom of movement occupational freedom, inviolability of the home, property and citizenship ('socialisation').

Economic, social and cultural rights

5. School education is stipulated, though this appears to be the only social / cultural right.
6. Alongside the civil liberties there is a free standing right to equality (Article 3). The Basic Law expresses the general principle that all persons are equal before the law, providing that no one may be discriminated against or given preferential treatment on the grounds of his or her sex, birth, race, language, national or social origins, faith, religious persuasion or political opinions. Nor may anybody be discriminated against because of disability. Equal rights for men and women are also expressly stipulated. Finally, the constitution guarantees all Germans equal eligibility for public office. As part of these basic rights, marriage and the family are placed under the especial protection of the national order.

Is the bill of rights amendable and, if so, how?

7. Parts of the Basic Law can be amended. The fundamentals of the constitution (Article 1, human dignity and Article 20, defence of the constitutional order), as well as elements of the federalist state, cannot be removed. Especially important is the protection of the division of state powers in the three branches, legislative, executive and jurisdiction (Article 20). A clear separation of powers was considered imperative to prevent measures like an enabling act as happened in 1933. Amendment requires a two-thirds majority in each house.

What provision is there for limitations to and derogations from the bill of rights?

8. Article 19 [Restriction of basic rights] provides:

- (1) *Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.*
- (2) *In no case may the essence of a basic right be affected.*

¹⁰⁰ It is worth noting a recent insertion. Article 20(a) of the German basic law now says that animals, like humans, have the right to be respected by the state and to have their dignity protected.

(3) *The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits.*

(4) *Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts...*

9. Article 18 [Forfeiture of basic rights] provides:

Whoever abuses the freedom of expression, in particular the freedom of the press (paragraph (1) of Article 5), the freedom of teaching (paragraph (3) of Article 5), the freedom of assembly (Article 8), the freedom of association (Article 9), the privacy of correspondence, posts and telecommunications (Article 10), the rights of property (Article 14), or the right of asylum (Article 16a) in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court.

10. However, the German Constitution Article 18 'forfeiture' provision gives a misleading comparison. While the German federal government made four applications to the Federal Constitutional Court to have declared forfeiture of the right to freedom of expression of four individuals between 1952 and 1992, all applications were unanimously rejected by the Court. Essentially, it was held that for such an application to succeed, the government would have to show that the concerned individual's actions would present a serious and immediate threat to the democratic order in the future. In none of the four cases (brought against the chairman of a prohibited neo-Nazi party, a rightwing publisher and two notorious neo-Nazis) was the Court prepared to find, on the basis of the government's application, that these individuals posed such a threat.¹⁰¹

Does the Supreme Court or equivalent have a strike down power for legislation it deems incompatible with human rights standards?

11. The Federal Constitutional Court is the guardian of the Basic Law. It can declare acts and decrees of the parliament as null and void if they are in violation of the Basic Law. However, the Court cannot itself take the initiative against any given act.
12. The procedure is highly formalised. It usually acts on suits brought forward by members of Parliament or other constitutional bodies, as well as on suits brought forward by individuals when fundamental rights are concerned and all other judicial means have been exhausted.

What is the status of the country's bill of rights in relation to other national legislation and international rights instruments?

13. The Basic Law is at the apex of federal law and of the hierarchy of domestic rules of law. As the constitution of Germany, it is the instrument on which all the German national and legal systems depend and which can only be amended by a two-thirds majority of the members of the Bundestag (Parliament) and two thirds of the votes of the Bundesrat (legislative chamber of the Länder) (Article 79(2)). Certain key components of the Basic Law may not be amended at all (Article 79(3)). Each legal provision must be constitutional both in form and substance. Legislation, executive power

¹⁰¹ Decision by the Federal Constitutional Court of 25 July 1960, BVerfGE 11, 282 (application to declare the rights to freedom of expression and demonstration of the deputy chairman of the Socialist Reichs Party to be forfeited rejected); decision by the Federal Constitutional Court of 2 July 1974, BVerfGE 38, 23 (application to declare the right to freedom of expression and of the press and the right to vote of the editor-in-chief of the Deutsche National-Zeitung to be forfeited rejected); decisions by the Federal Constitutional Court of 18 July 1996, 2 BvA 1/92 and 2 BvA 2/92 (application to declare certain fundamental rights of two neo-Nazi criminals to be forfeited rejected).

and case law are particularly bound by fundamental human rights, which have a direct application in law (Article 1(3)). This principle of fundamental rights can be invoked by the persons affected before the courts, ultimately by lodging a constitutional appeal before the Federal Constitutional Court.

14. The general rules of international law occupy the space between the constitution and the laws. The Basic Law explicitly states that these are a component of federal law, that they take precedence over such laws and that they directly create rights and duties for residents of federal territory (Article 25). These general rules of international law with significance for individuals (ie not just rules relevant to the state) include, for example, the guarantee of an appropriate form of legal protection for foreigners or the specification principle, whereby criminal proceedings are subject to the terms of the extradition authorisation of the extraditing foreign state.

What was the process by which the country's bill of rights came to be decided?

15. The constitution was drawn up by the Parliamentary Council, whose members had been delegated by the existing freely-elected parliaments of the individual federal states. There were 27 delegates each from the Social Democratic Party (SPD) and the Christian Democratic Union/Christian Socialist Union (CDU/CSU), five from the Free Democratic Party (FDP) and two each from the German Party, the Center Party and the Communists. At many points in the constitution it is clear that its authors were at pains to avoid the shortcomings of the Weimar Republic constitution, creating instead a state with clearly demarcated responsibilities. After extensive deliberations in committees and at general assemblies of all members, the Parliamentary Council, under the chairmanship of Konrad Adenauer, passed the Basic Law, which was proclaimed on 23 May 1949 after being accepted by the local state governments. At this point it came into effect. The Basic Law's call for reunification was implemented in 1990. On the basis of the unification treaty of 31 August 1990, which regulated the German Democratic Republics (GDR) accession to the territory of the Federal Republic of Germany governed by the Basic Law, the preamble to and the concluding article of the Basic Law were rewritten. The new text now documents that upon the GDR's accession, on 3 October 1990, Germany achieved unity.

How has the system of rights protection been received by the branches of government, the public (opinion polls) and the academic community in the country?

16. With regard to the general public, the Basic Law is a source of national identity and simultaneously affords a high level of protection to human rights as against of government. In recent years however, debate has arisen over the scope of citizenship and political rights of immigrants to Germany.¹⁰²
17. Some academics still focus on the problems which have arisen in relation to the supreme nature of Germany's Constitutional Court and its occasional contentious relationship with the European Court of Human Rights at Strasbourg over the scope of various rights.¹⁰³

102 'Immigration and Citizenship in Germany: Contemporary Dilemmas' (1997) *Political Studies* 45 (2), 260–274.

103 See Matthias Hartwig, 'Much ado about human rights: the Federal Constitutional Court confronts the European Court of Human Rights', (2005) *German Law Journal* 5.

What appear to be the principal advantages and disadvantages of the system?

18. The main tide of academic opinion seems to agree that the judicial-centric model of review gives a high level of protection to fundamental rights.
19. However, problems have been encountered since a Constitutional Court decision in 2005¹⁰⁴ highlighting the tension between Germany's constitutional order and the European Convention on Human Rights (ECHR). Technically, the ECHR is subordinate to the German Basic Law, but informs its interpretation to a great extent. The court is said to weaken the protection of the fundamental rights guaranteed in the ECHR and the meaning of European Court of Human Rights (ECtHR) decisions in Germany. The Constitutional Court itself, on the other hand, seems to evaluate its decision as strengthening the status of the convention and the decisions of the ECtHR in the German legal order.¹⁰⁵ Nevertheless, the President makes it perfectly clear that, once a decision is delivered by the ECtHR, it will entail the described consequences. Especially *because* the court sometimes wishes for more judicial self-restraint of the ECtHR, it makes sense to participate more in applying the ECHR. That the court keeps its eyes on the limits for international law stipulated in the German constitution does not alter the fact that it is ready to intensify the control on the observance of the ECHR and oblige all German state bodies to take the ECHR into account. The case-law of the court will have to show whether this changes legal practice in Germany and the ECHR and the case-law of the ECtHR will gain – or lose – in weight. In the end, this depends on an interpretation of the conditions and limits to the obligation of German bodies to take into account the ECHR.

France

What is the country's bill of rights?

1. Rights with fundamental, constitutional status in France are contained in documents collectively referred to as the 'Constitutional bloc', which comprises the Declaration of the Rights of Man (1789), the Preamble of the 1946 Constitution, the 1958 Constitution, 'fundamental principles' recognised by laws of the Republic, and the Charter for the Environment of 2004.¹⁰⁶

What is the history behind its establishment?

The Declaration of the Rights of Man (1789)

2. The Declaration was published by the National Constituent Assembly, the then-governing body of France, during the French Revolution. Originally a statement of principle, it has gained constitutional status over time. The Preamble to the 1958 Constitution of the Fifth Republic refers to the Declaration and the French people's dedication to principles contained therein. In 1971, the

¹⁰⁴ *Bundesverfassungsgericht on the Status of the European Convention of Human Rights and ECHR Decisions in the German Legal Order*, Decision of 14 October 2004.

¹⁰⁵ This follows from an interview in which the President of the Court stresses in particular that the Constitutional Court, with its decision, has recognised for the first time the general possibility of claiming violations of the Convention, including rulings of the European Court of Human Rights, by constitutional complaints. However, the interview can be interpreted the other way around, just like the decision itself, because the President also criticises the European Court, for instance, for its lack of self-restraint. See Saša Beljin, 'Germany: Bundesverfassungsgericht on the status of the European Convention of Human Rights and ECHR decisions in the German legal order. Decision of 14 October 2004', *ECLR (EuConst)* (2005) 1 pp553-568.

¹⁰⁶ Catherine Elliott, Eric Jeanpierre, Catherine Vernon, *French Legal System*, 2nd edn, Pearson Ltd, 2006, p53.

Conseil Constitutionnel used the Preamble and its reference to the Declaration for rejecting proposed legislation as unconstitutional.¹⁰⁷ Since then, the Conseil has continued giving the Declaration legal effect. The Declaration's contents were influenced by contemporary Enlightenment ideas, general dissatisfaction with France's social structure, and specific dissatisfaction with King Louis XVI's reign.

3. The Enlightenment endorsed ideals of democracy, citizenship, and inalienable rights. By contrast, during the ancien regime, French society consisted of an absolute monarch, and nobility and clergy who enjoyed feudal privileges. Feudal and canonical law, non-representative by nature, determined social orderings and operations. These circumstances paved the way for the French to adopt 'liberty' and 'equality' as two of their three foundational principles (Declaration, Articles 1 and 4), and to promulgate the philosophy that all powers emanate from the democratically determined state (hence, the repeated emphasis in the Declaration that measures be taken 'in accordance with law').¹⁰⁸

The Preamble of the 1946 Constitution

4. The Preamble of the 1946 Constitution was essentially drafted because a referendum to draft a new Declaration of Rights failed.¹⁰⁹

Fundamental principles recognised by laws of the Republic

5. The Preamble of the 1946 Constitution refers to 'fundamental principles acknowledged in the laws of the Republic'. The provision has been interpreted to mean that fundamental rights exist apart from those specified in the Constitution's text. In practice, the Conseil examines pre-1946 legislation and purports to extract 'fundamental principles' from them. Although technically constitutional, these rights are judicially 'created' rather than formally entrenched.

The 1958 Constitution

6. Drafters of the 1958 Constitution were concerned more with structuring governmental powers than with defining fundamental rights.¹¹⁰ Hence, the Constitution of the Fifth French Republic does not enumerate rights so much as refer to sources presumably addressing them. The Preamble mentions the Declaration, the Preamble of the 1946 Constitution, and the Environmental Charter of 2004.

Charter for the Environment of 2004¹¹¹

7. On 1 March 2005, France adopted the Charter for the Environment, and gave it constitutional value.¹¹²

107 Liberté d'association, décision n° 71-44 DC du 16 juillet 1971.

108 See n106 above, p5.

109 John Bell, *French Constitutional Law*, Clarendon Press, 1992, p67.

110 Ibid, p64.

111 See text at <http://www.assemblee-nationale.fr/english/8ab.asp>.

112 The preamble of the 1958 Constitution, the founding text of the 5th Republic, now states:

The French people solemnly proclaim their attachment to Human Rights and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004.

8. The text acknowledges the basic principles of an ecology that focuses on the future of mankind, with rights and accompanying duties. It sets the right to live in a balanced environment which shows due respect for health at the same level of importance as the human rights of 1789 and the welfare rights of 1946.
9. France is the first nation to devote an entire constitutional declaration to environmental protection. The declaration was not passed by popular vote but 'piggy-backed' onto a special vote in the National Assembly which would open the way for a referendum on the EU constitution. This undermined resistance from the political right, which was willing to go along with the add-on to ensure support for the EU.¹¹³

What is the scope of the rights protection?

10. General rights include those of liberty, property, security, and resistance to oppression (Declaration, Article 2). The civil rights of freedom of speech and publication are also guaranteed (Declaration, Articles 10 and 11).
11. Due process rights are relatively generously provided for, to include: prohibition against accusation, arrest, or imprisonment except in accordance with law (Declaration, Article 7); prohibition against ex post facto laws (Declaration, Article 8); prohibition against punishments not set by law (Declaration, Article 8); prohibition against punishment beyond what is strictly and obviously necessary (Declaration, Article 8); presumption of innocence (Declaration, Article 9); prohibition against excessive harshness in securing persons (Declaration, Article 9).
12. Economic, social and cultural rights are also well provided for, guaranteeing the right to employment (Preamble, 1946); right to union membership and activity (Preamble, 1946); collective determination of work conditions, work place management; right to strike (Preamble, 1946); guarantee of protection for material security (Preamble, 1946); right to receive means of existence from society (i.e. the state) for incapable of working due to age, physical or mental condition, or economic situation ; right to gender equality (Preamble, 1946); right to education (Preamble, 1946); state duty to provide free, public, and secular education at all levels; right to property (Declaration, Article 17); right to individual or representative say in taxation (Declaration, Article 14).
13. Other notable rights include a right to asylum for those persecuted for advocating liberty (Preamble, 1946); equal access to public office (Preamble, 1946); equal access to public positions/occupations and dignities (Declaration, Article 6); equal access to instruction, vocational training and culture (Preamble, 1946);
14. There is, in addition, a duty to work (Preamble, 1946); general rights and duties of citizens (Declaration); guaranteed protection of health, rest, and leisure (Preamble, 1946); notably to children, mothers and elderly workers.
15. The era of republicanism is well reflected in the Constitution of the Vth Republic in that the state shall provide each individual and family with the conditions necessary for their development (Preamble, 1946); property and enterprises that acquire character of public service or de facto

¹¹³ While the EU referendum was later defeated by a popular vote, the environmental charter (which was not put to the popular vote) had already prevailed by a margin of 531 to 23 in a special joint session of the French Parliament.

monopoly shall become the property of society (Preamble, 1946); and all public agents must provide accounts of their administration (Declaration, Article 15).

16. Finally, the Charter for the Environment is an important and a progressive document in that it requires payment of damages for harming the environment. Article 5 enshrines the precautionary principle into the constitution. In the case of potentially serious and irreversible environmental damage, the article states, officials should implement measures to minimize the risks. Now the principle trumps other legislation, and on routine government business that pits the environment ministry against, say, the energy ministry, the former will have enhanced influence.¹¹⁴

What are the provisions for limitations and derogations?

17. Article 16 of the Constitution permits the President to suspend the general operation of the government during states of emergency and run the country.¹¹⁵ The President is permitted to ‘take such measures as are required in the circumstances’. He is required to consult with a number of bodies, including the Conseil Constitutionnel, though he is not obligated to follow their advice.¹¹⁶ The Conseil’s advisory opinion must be published, and must address whether a threat endangering the French Republic’s institutions actually exists and whether the constitutional public powers should be interrupted.¹¹⁷ The President is not allowed to dissolve Parliament, and he must limit the period to the shortest possible time to resolve the crisis.¹¹⁸
18. Because the provision grants wide discretion if invoked, it has been criticised as conferring a potential temporary dictatorship upon the President.¹¹⁹

Is the bill of rights amendable and, if so, how?

19. Article 89 of the Constitution sets forth the procedure for amendment. A constitutional amendment is proposed either by the Members of Parliament or by the President at the Prime Minister’s suggestion. Both Houses of Parliament (Senate, National Assembly) must then approve the exact terms of the amendment. The amendment is then approved by referendum, or by a three-fifths vote at a special meeting of both Parliamentary Houses, convened by the President.¹²⁰

Can the Supreme Court strike down legislation for incompatibility with human rights?

Incompatibility with constitutional fundamental rights

20. The Conseil Constitutionnel alone may assess legislation’s constitutionality, but only before the law is promulgated and implemented. Afterwards, the law is immune from challenge on constitutional grounds. The Conseil functions as an administrative body; technically, it is not a court and therefore not part of the judiciary.

114 Environmental groups can also conduct their business with the gravitas of a constitutionally guaranteed right behind them. This principle could be used, for example, to restrict genetically modified foods, until scientists can show that they are safe. And it will likely come into play in the near future as the country debates whether to replace or simply decommission nuclear power plants, which supply about three-quarters of France’s electricity.

115 See n106 above, p29.

116 Ibid, p134.

117 Ibid, p29.

118 Ibid.

119 Ibid.

120 Ibid, p17.

21. Article 62 of the Constitution states that laws deemed unconstitutional by the Conseil cannot be promulgated or implemented. Generally, the Conseil prefers to find legislation constitutional. It may release 'reservations of interpretation' that condition a piece of legislation's constitutionality upon it being interpreted in a designated manner.
22. Although the Conseil sometimes releases negative opinions after rules have been passed, such documents are legally non-binding. At best, they pressure Parliament to amend the law.¹²¹
23. Constitutional statutes and parliamentary standing orders (rules governing the operation of Parliament) alone are automatically referred to the Conseil. Only certain authorized parties may refer ordinary legislation, namely, the President of the Republic, Prime Minister, President of the National Assembly, President of the Senate, and 60 Members of the National Assembly or Senate. In practice, roughly 90 per cent of legislation is referred, typically as a means for opposition party members to challenge laws.¹²² Notably, private parties do not have any powers to challenge the law's constitutionality on the basis of fundamental rights or otherwise.¹²³

Incompatibility with fundamental rights, via international agreements

24. The Conseil uses a formalistic approach in this matter. In theory, treaties are superior to non-constitutional laws (Article 55 of the Constitution). However, the principle of reciprocity precludes the Conseil from examining legislation's compatibility with international agreements. Under this principle, treaties are valid only if all signatories comply; they are thus conditionally superior to ordinary national legislation. As legality thus turns on whether nations are complying in fact with international obligations, the Conseil declines to render its binding, absolute decisions concerning these matters.

What is the status of the bill of rights in relation to national legislation and other international instruments?

25. Constitutional rights have superior status to national legislation. Practically, the limited opportunity for challenging legislation on constitutional grounds suggests that unconstitutional law may continue to be enforced until the Parliament chooses to re-legislate. The French monist system designates international obligations as superior to national legislation.

What was the process by which the bill of rights came to be decided?

26. The National Constituent Assembly, pre-cursor to the Legislative Assembly, adopted the Declaration of the Rights of Man. The 1958 Constitution was adopted by national referendum. To determine the 'fundamental principles recognised by the law of the Republic', the Conseil Constitutionnel essentially examines pre-1946 legislation and derives fundamental principles therein. The Declaration on the Environment was adopted by majority vote in the Legislative Assembly.

¹²¹ See n106 above, p33.

¹²² Ibid, p138.

¹²³ Ibid, p22.

How has the bill of rights been received by government, public and academics?

27. Because the Conseil purports to extract fundamental principles from legislation, there is concern that the body creates rights ad hoc. This concern is heightened because the Conseil does not always cite sources in parts of its decisions.
28. The Declaration contains aspirational language and is arguably indefinite and vague to convey legal rights. Furthermore, the Preamble of the 1946 has more concrete language that can sometimes be at odds with the Declaration. There is continual academic debate over how these documents should be interpreted in light of one another.¹²⁴

What are the advantages of this model, compared to countries?

29. The French system of rights protection guarantees a high degree of legal certainty owing to the fact that a law cannot be challenged once it is implemented and promulgated. The Conseil declares legislation constitutional and there is no going back. The French Declaration is high in principal and the culture it generated was one which, years later, had no problem in adapting to the statement of rights in the ECHR. As always, however, the corollary to certainty is a certain inflexibility and the potential disadvantage of lack of foresight in relation to human rights concerns which raise themselves subsequently to the promulgation of a law. Certainly, this system is completely at odds with the new innovation in the UK for ongoing 'post-legislative scrutiny'¹²⁵ and monitoring of the operation of statutes to ensure human rights compliance and to combat the problem of unintended consequences of legislation.

124 See n106, p54-55.

125 *Post-legislative Scrutiny*, Law Commission, Consultation Paper No 178; *House of Commons Scrutiny Unit Briefing Note* at <http://www.parliament.uk/documents/upload/CSUpostLegScrutiny.doc>.

Appendix two

Table of comparative bills of rights

	Bill of Rights	Scope	Limitations and Derogations	Amendment	Judicial strike-down power	Legal status	Process
Canada	Canadian Charter of Rights and Freedoms 1982	Civil and political rights (ss2-14) Economic, social and cultural rights (ss15-22), eg equality / language rights	General limitations clause (s1) Notwithstanding clause (s33) allows derogation for up to 5 years	Majorities in the House of Commons and Senate, and two-thirds majority of the provincial legislatures representing at least 50 per cent of the national population	Supreme Court may strike down primary legislation for inconsistency with Charter Tendency now is to make suspended declaration of unconstitutionality	The Charter is superior to national legislation International instruments must be specially incorporated for binding effect, though the courts draw from them	The Charter was widely debated and amended; interest groups were active; a Special Joint Committee of the Senate and of the House of Commons took evidence and directed proceedings
New Zealand	Bill of Rights Act 1990	Civil and political rights (Part II) reflecting ICCPR No ESC rights beyond non-discrimination and minority rights	General limitations clause (s4) No provision for derogation in national law, but may still derogate from some international obligations under ICCPR (s4 procedure)	Simple majority of MPs in the House of Representatives	New Zealand Supreme Court has no official strike-down power Human Rights Amendment Act 2002 allows declarations of inconsistency regarding discrimination	The Act is an ordinary statute International instruments require special enactment to achieve binding effect	Debate preceding enactment was relatively muted and did not hold the support of the opposition National Party

Bill of Rights		Scope	Limitations and Derogations	Amendment	Judicial strike-down power	Legal status	Process
Australia	Human Rights Act 2004 (Australian Capital Territory) Charter of Human Rights and Responsibilities 2006 (Victoria)	Civil and Political rights reflecting ICCPR Victoria's Charter also includes cultural rights (Art 19) and certain children's rights	General limitations provisions in both the ACT HRA (s38) and Victorian Charter (Part 2(2)) Victoria's Charter provides for derogation in an 'override' clause (s31)	Amendment is by the regular procedure for legislation, requiring a simple majority in both Houses of Parliament.	The Supreme Court of the ACT can make a 'declaration of incompatibility' (s33) The Supreme Court of Victoria can make a 'declaration of inconsistent interpretation' (s36)	The ACT HRA and Victorian Charter have the same legal status as ordinary legislation Neither incorporates international law but s31 ACT HRA provides that international law and the judgments of foreign and international courts and tribunals may be considered in interpreting human rights	Both the ACT HRA and Victorian Charter were enacted following well-publicised information campaigns and public consultation exercises initiated by the Attorneys General of both governments and overseen by expert committees which heard submissions and reported back to Parliament
South Africa	Constitution of the Republic of South Africa, Chapter II	Civil and political rights (ss9-21) Economic, social and cultural rights (ss22-35) for 'progressive realisation'	General limitations clause (s36) Detailed provisions (s37) for derogation from some rights in emergency	Two thirds majority in National Assembly with supporting vote of six out of nine provinces	Constitutional Court has power to strike down primary legislation as unconstitutional	Constitution is supreme over other national legislation Courts must have regard to international law in interpreting constitutional rights (s39(1))	Constitution drafted on negotiated principles by constitutional assembly with two year time limit; two million public submissions received

Bill of Rights		Scope	Limitations and Derogations	Amendment	Judicial strike-down power	Legal status	Process
Israel	Basic Laws Human Dignity and Liberty, (1992) and Freedom of Occupation, (1994)	Selected civil and political rights (ss2-7 BL Human Dignity and Liberty; s3 BL Freedom of Occupation)	General limitations clauses (s8 BL Human Dignity etc; s4 BL Freedom of Occupation, but see override clause in s8) Derogation permitted by BL Human Dignity etc (s12) but no derogation from BL Freedom of Occupation (s6)	Simple majority (BL Human Dignity) Absolute majority (BL Freedom of Occupation)	Supreme Court established its own power (in <i>Mizrachi Bank v Migdal Co-operative Village</i> , 49 P.D. (iv) 221) to strike down legislation contradicting any Basic Law	Basic Laws designed to have constitutional status though common law system does not distinguish them from ordinary legislation Specific enacting legislation required for international instruments	Essentially a Parliamentary (Knesset) process, marked by tension with religious groups; Basic Laws passed with bare Knesset majority; Parliamentary override clause and other amendments followed enactment
United States	US Bill of Rights (Amendments I-X)	Civil and political rights (Amendment IX declares that individuals also have rights beyond those enumerated in the Bill of Rights)	Rights are expressed in absolute terms; no reference to limitations; the Constitution does not expressly permit any branch of the federal government to derogate from the Bill of Rights even in national emergency	Amendments proposed by two thirds majority in both congressional houses or two thirds of state legislatures; amendments adopted on ratification by three quarters of states through legislatures or by conventions within the state	Supreme Court has power to declare invalid any federal or state law that is inconsistent with the Bill of Rights (since <i>Marbury v Madison</i> , 5 U.S. 137 (1803))	The US Constitution is supreme over national law International instruments have no effect on internal affairs until legislative incorporation	Following negotiations the US Bill of Rights was adopted according to Art 5 of the Constitution which addresses amendment procedures; three quarters of states ratified the amendments through their legislatures pursuant to individual state procedure

	Bill of Rights	Scope	Limitations and Derogations	Amendment	Judicial strike-down power	Legal status	Process
Ireland	Constitution of Ireland 1937, (in particular, Arts 40-44, 'fundamental rights')	Civil and political rights (Art 1; Arts 40-44) Some economic, social and cultural rights, eg on education (Art 42) Directive Principles of Social Policy (Art 46)	Limitation provisions specific to individual rights Derogation provided for (Art 28) whereby Oireachtas may pass laws during national emergency / time of war which would otherwise be unconstitutional	Both Houses of the Oireachtas must pass amending bill; measure must then be approved by referendum of registered voters; amendment effective only when President signs bill into law	Supreme Court and High Court may nullify legislation that contravenes the Constitution (Art 34) Under the European Convention on Human Rights Act 2003, they can issue declarations of incompatibility to the Oireactas	Constitution superior to national legislation International law must be incorporated to be binding on the courts	Constitution passed by legislature and approved narrowly in national plebiscite, coming into force six months later, 29 December 1937
Germany	Federal Basic Law	Civil and political rights (Arts 1-17) The Basic Law includes the right to education as well as a free-standing equality right	Restriction of basic rights is permitted in some instances (Art 19) Forfeiture of basic rights is provided for (Art 18) but is a redundant provision	Parts of the Basic Law are amendable on a two thirds majority in each House of Parliament	The Federal Constitutional Court can declare acts and decrees of Parliament unconstitutional for violation of the Basic Law	The Basic Law is at superior to national legislation The Basic Law states that international laws are a component of Federal Law and take precedence over such laws (Art 25)	The Constitution was drawn up and passed by a Parliamentary Council of delegates from federal states, following deliberations in committees and general assemblies of all members; it was proclaimed on acceptance by local state governments

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France	'Constitutional bloc' comprising the Declaration of the Rights of Man (1789); the Preamble of the 1946 Constitution; the 1958 Constitution; the Charter for the Environment 2004	Civil and political rights Economic, social and cultural rights (particularly in the 1946 Preamble) Environmental rights	No general or specific limitations clauses The President may suspend the general operation of the government during states of emergency (Art 16)	Constitutional amendments (Art 89) are proposed by MPs or the President at the Prime minister's suggestion; both the Senate and National assembly must then approve the terms; amendments are passed by referendum or three fifths vote by both Houses of Parliament on the request of the President	The Conseil Constitutionnel assesses legislation for constitutionality, before being promulgated; constitutional legislation is automatically referred, while ordinary legislation is referred only by authorised parties (President, Prime minister, Presidents of the Senate and National assembly or 60 members of either House)	Constitutional rights have superior status to national legislation Ratified treaties and agreements have an authority superior to that of parliamentary statute (Art 55, 1958 Constitution)	A National Constituent Assembly adopted the Declaration of the Rights of Man; 1958 Constitution was adopted by national referendum; Charter on the Environment was adopted by majority vote in the National assembly
UK	Human Rights Act 1998	Civil and political rights incorporated directly from European Convention on Human Rights 1950	ECHR sets out limitations specific to each right, apart from Art 3 (freedom from torture, inhuman and degrading treatment) and Art 4 (freedom from slavery), which are absolute rights ECHR provides for derogation in a time of national emergency (Art 15)	Amendment procedures would follow those for ordinary legislation, requiring a simple majority in both Houses of Parliament	High Courts may issue declaration of incompatibility (s4 HRA) where legislation cannot be interpreted in conformity with ECHR (s3 HRA)	HRA has no official constitutional status ranking it above ordinary statute law International law requires enacting legislation but courts have regard to it where relevant; courts must 'take into account' jurisprudence of the ECtHR (s2 HRA)	Government white paper 'Bringing Rights Home' introduced by new Labour administration in 1997; much debate amongst Parliamentarians, academics and pressure groups; enacted with much publicity emphasising 'human rights culture'

'... it is right to involve the public in a sustained debate whether there is a case for the United Kingdom developing a full British Bill of Rights and Duties ...'

Gordon Brown, 3 July 2007

'I ... believe that a well-drafted and enduring Bill of Rights can make it easier to achieve the acceptance by every citizen in Britain of the rights of every other inhabitant of these islands.'

David Cameron, 26 June 2006

'The Liberal Democrats and many others have campaigned for years for a British Bill of Rights and a written British constitution.'

Simon Hughes, 26 June 2006

In recent months all three major political parties have come to agree on one thing – that it is time for a major national debate on the desirability of a British bill of rights.

A bill of rights would be a momentous constitutional development. It would shape our legal and political culture for years to come. The issues are complex and contentious. Only with thorough analysis and debate can we decide if a bill of rights is good for Britain.

A British Bill of Rights: Informing the debate deliberately avoids setting out a particular vision. Instead, it clearly lays out the issues that will need to be addressed in a proper public consideration of the subject:

Content – *what should be in a bill of rights?*

Amendment – *should a bill of rights have special protection from amendment or repeal?*

Adjudication and enforcement – *what powers should the courts have to uphold protected values?*

Process – *how should we debate and decide on these matters?*

A British Bill of Rights: Informing the debate is the final report of the JUSTICE constitution committee – a group of eminent experts on constitutional issues. The report draws on a wealth of experience of countries that have already enacted bills of rights – from Europe, North America, Australasia and Africa.

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