JUDGING RIGHTS IN THE UNITED KINGDOM: THE *HUMAN RIGHTS ACT* AND THE NEW RELATIONSHIP BETWEEN PARLIAMENT AND THE COURTS

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This article considers the impact of the United Kingdom's Human Rights Act 1998 upon the respective functions of the UK legislature and judiciary. It argues that, notwithstanding the UK's Diceyean heritage and the overarching commitment to a traditional understanding of parliamentary sovereignty, the Human Rights Act is best understood as 'constitutional statute' which has propelled the courts into a more dynamic role in which a degree of judicial creativity or law-making on rights questions is now evident. The discussion explores debates around the form and constitutional propriety of the enhanced judicial role by reference to models of dialogic constitutionalism before assessing which model best characterises case law developments since 2000.

Cet article examine l'effet de la loi sur les droits de la personne du Royaume-Uni, adoptée en 1998, sur les fonctions respectives des appareils législatif et judiciaire du R.-U. Il fait valoir que, malgré les traditions de Dicey et l'engagement obligatoire à l'égard de la connaissance traditionnelle de la souveraineté parlementaire, la loi sur les droits de la personne est mieux comprise en tant que « loi constitutionnelle » ayant projeté les tribunaux dans un rôle plus dynamique où la créativité judiciaire ou la confection de lois est maintenant évidente. La discussion porte sur le débat autour de la forme et la propriété constitutionnelle d'un rôle judiciaire amélioré en se référant aux modèles de constitutionalisme dialogique avant de déterminer le modèle qui caractérise le mieux le développement de la jurisprudence depuis 2000.

I. INTRODUCTION

The purpose of this article is to describe and account for the limited form of increased input into rights disputes involving public authorities that the United Kingdom's *Human Rights Act 1998*[1] has accorded to the courts. Specific attention is paid to the *Act's* central provisions namely, the "interpretative duty" set out in section 3 to render domestic statutes compliant with the *European Convention on Human Rights*[2] and the declaration of incompatibility in section 4. The discussion asks whether, notwithstanding its ostensible commitment

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1 *Human Rights Act 1998* (U.K.), 1998, c. 2 [*Human Rights Act 1998*]

2 *Convention for the Protection of Human Rights and Fundamental Freedoms,* 4 November 1950, 213 U.N.T.S. 222 (entered into force 3 September 1953).

to parliamentary sovereignty, the *Act* is best understood as a constitutional statute as a consequence of which the courts are required to apply a generous or non-literal interpretation to rights guarantees. The heightened judicial involvement in rights questions that constitutional statutes entail is highly controversial, and this article evaluates some majoritarian objections that have been voiced by U.K. scholars. Drawing on theoretical accounts of dialogic constitutionalism, the discussion then analyzes key case law developments since October 2000 and seeks to locate the pattern of judicial rulings and legislative responses within existing constructs of constitutional dialogue in the U.K. Specifically, I contend that a settled understanding of the relationship between sections 3 and 4 of the *Act* has now emerged in the jurisprudence. It reflects an appropriately nuanced approach to determining how much judicial creativity there should be in any given case in pursuit of achieving a *European Convention*-compliant reading of domestic statute law. To begin with, however, the political background to, and main features of, the *Human Rights Act 1998* are outlined.

II. THE *EUROPEAN CONVENTION ON HUMAN RIGHTS* AND THE *HUMAN RIGHTS ACT 1998*

Drafted under the auspices of the newly formed Council of Europe, the *European Convention on Human Rights* emerged in 1950 out of the totalitarian atrocities committed in Europe during the Second World War. The drafters were concerned to assert the fundamental principle of human dignity and, more broadly, democratic values.[3] To this end, the *Convention* is concerned in the main, but not exclusively, with negative, civil and political rights. These include the right to life; freedom from inhuman or degrading treatment, slavery, or arbitrary arrest; the right to a fair trial; and rights to freedom of

3 See thus the remarks of Pierre-Henri Teitgen during proceedings of the Consultative Assembly:

> Who does not appreciate that these rights are fundamental, essential rights, and that there is no State which can, if it abuses them, claim to respect natural law and the fundamental principle of human dignity? Is there any State which can, by violating these rights and fundamental freedoms, claim that its country enjoys a democratic regime.

Cited in Clare Ovey & Robin White, *Jacobs & White: The European Convention on Human Rights*, 4th ed. (Oxford: Oxford University Press, 2006) at 2. On the general background to the *Convention* and the Council of Europe, see *inter alia* Arthur Henry Robertson & John G. Merrills, *Human Rights in Europe: A Study of the European Convention on Human Rights*, 3d ed. (Manchester: Manchester University Press, 1993); and David John Harris, Michael O'Boyle & Colin Warbrick, *The Law of the European Convention on Human Rights* (London: Butterworths, 1995).

expression, religion and association.[4] It has frequently been described by the European Court of Human Rights as a "living instrument" that calls for continuous re-interpretation in the light of changing conditions.[5]

Uniquely among international human rights instruments at the time, the *Convention* created its own interpretation and enforcement mechanisms to protect individuals against human rights violations committed by States Parties. At the same time, however, it is clear from the text of the *Convention* as well as resulting jurisprudence that domestic authorities are expected to take the primary responsibility for ensuring compliance with the *Convention*.[6]

As is well known, the United Kingdom took a leading part in drafting the *Convention* and, in 1951, became one of the first Contracting States to ratify it.[7] Nevertheless, senior figures in the post-war Atlee Government including the Lord Chancellor Lord Jowitt and the Chancellor of the Exchequer Sir Stafford Cripps were wary about the *Convention*'s potential to undermine core features of domestic legal and political culture such as the doctrine of parliamentary sovereignty, the "unwritten" Constitution, and the centrally planned economy.[8] In their view, the *Convention* existed primarily to shield the citizens of other European countries from the abuses of state power. At home, the common law was considered to provide an effective mechanism for the protection of individual rights. Accordingly, the United Kingdom opposed (successfully, as it turned out) a proposal to create a mandatory right of individual petition to the European Court of Human Rights. Ratifying states were allowed to decide whether to grant individuals the right to petition the Strasbourg authorities. The U.K. government's initial refusal to allow

4 Less commonly, positive social/economic rights can also be found, including the right to education as recognized in Article 2 of the First Protocol.

5 *Tyrer v. United Kingdom* (1978), 2 EHRR 1; and see further Roger Masterman, "Taking the Strasbourg Jurisprudence into Account: Developing a (Municipal Law of Human Rights) under the Human Rights Act" (2005) 54 International and Comparative Law Quarterly 907 [Masterman].

6 Article 1 states: The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this *Convention*. See further the Court's remarks in *Handyside v. U.K.* (1979-80), 1 EHRR 737 (European Court of Human Rights) at para. 48: "The *Convention* leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines."

7 The role of the U.K. in the drafting process is discussed in Geoffrey Marston, "The United Kingdom's Part in the Preparation of the European *Convention* on Human Rights" (1993) 42 International and Comparative Law Quarterly 796.

8 Lord Jowitt famously remarked that the *Convention* was "a half-baked scheme to be administered by some unknown court" and would cause those with knowledge of the U.K. Constitution to "recoil with a feeling of horror." Cited in Anthony Lester, "Fundamental Rights: The U.K. Isolated" (1984) Public Law 50 at 52. The Colonial Secretary separately feared that the right to individual petition would be used to undermine the stability of the colonies.

individual petitions was reversed in January 1966. Nine years later, legal history was made in *Golder v. United Kingdom.*[9] In a complaint brought by a prisoner alleging interference with the confidentiality of legal correspondence, the Strasbourg Court ruled for the first time in proceedings brought by an individual that the United Kingdom had violated the *Convention.*

At the time of *Golder*, support for some version of a domestic bill of rights was growing across the British political spectrum.[10] From the right, Conservative Party politicians expressed the hope that such a bill might protect the right to private property and other personal freedoms from state interference.[11] The Labour Party's sceptical stance (derived from a long-held perception that any transfer of power from the political to the judicial sphere was likely to impede rather than advance the cause of democratic socialism)[12] subsequently softened in the early 1990's after pressure groups and civil liberties organizations such as Liberty began to advocate the adoption of a bill of rights.[13] Labour's changing attitudes may also be explained by its repeated failures in General Elections in the period 1979-97 and the consequent inability of the parliamentary party to halt the Thatcher Administration's radical reforms of local government[14] and granting of more extensive powers to the police and security services.[15] In 1993, the party conference voted to incorporate and entrench the *Convention* into domestic law by means of a Canadian-style "notwithstanding clause," a commitment reiterated by Tony Blair in 1994.[16] Finally, before Labour's victory at the 1997 General Election,

9 (1975), 1 EHRR 524 [*Golder*] concerning breaches of Article 6(1) (right to a fair trial) and Article 8 (right to respect for privacy, family life, home and correspondence).

10 A good account of this period is to be found in John Wadham, Helen Mountfield, & Anna Edmundson, *Blackstone's Guide to the Human Rights Act 1998*, 3d ed. (Oxford: Oxford University Press, 2003) at 4-9 [*Blackstone's Guide*].

11 See also The Society of Conservative Lawyers, *Another Bill of Rights?: A Report by a Committee of the Society of Conservative Lawyers* (London: Conservative Political Centre, 1976). Leading figures in the Liberal Party such as Lord Wade and Anthony Lester argued respectively for incorporation of the *Convention* into domestic law to secure individual rights from unwarranted curtailment by the state. Lord Wade moved a number of bills successfully through the House of Lords, only to be rejected on each occasion by the House of Commons.

12 For a classic statement of left-of-centre hostility to greater judicial determination on rights questions at the time, see John Aneurin Grey Griffith, *The Politics of the Judiciary*, 2d ed. (London: Fontana Press, 1981). See also Keith D. Ewing & Conor Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-45* (Oxford: Oxford University Press, 2000).

13 National Council for Civil Liberties, *A People's Charter: Liberty's Bill of Rights* (London: Liberty, 1991).

14 Martin Loughlin, *Local Government in the Modern State* (London: Sweet & Maxwell, 1986).

15 For detail, see Keith D. Ewing & Conor Gearty, *Freedom under Thatcher: Civil Liberties in Modern Britain* (Oxford: Clarendon Press, 1990).

16 Cited by J. Wadham, H. Mountfield & A. Edmundson, *Blackstone's Guide to the Human Rights Act 1998* (Oxford: Oxford University Press, 2003) at 7. After incorporation and entrenchment

Shadow Home Secretary Jack Straw MP and Shadow Minister for the Lord Chancellor's Department Paul Boateng MP published *Bringing Rights Home* – a consultation paper that argued in favour of incorporation of the *Convention* largely on account of the practical reason that it would allow "more cases to be dealt with at a much earlier stage in the legal process . . . and so reduce the degree of recourse to Strasbourg."[17] Significantly, however, the same paper dropped the commitment to protect *Convention* rights against implied repeal. Subsequently, the White Paper *Rights Brought Home* affirmed the Blair Government's view that incorporation could not extend to entrenchment for the reason that judicial review of primary legislation was "alien" to the U.K. constitutional traditions:

> The government has reached the conclusion that the courts should not have the power to set aside primary legislation past or future, on the ground of incompatibility with the *Convention*. This conclusion arises from the importance which the Government attaches to Parliamentary sovereignty.[18]

Labour in Power – The *Human Rights Act 1998*

The passage into law of the *Human Rights Act 1998* and its commencement in October 2000 is rightly seen as a major element of the first Blair Government's constitutional reforms. Insofar as the *Act* enshrines a set of rights which require U.K. judges to balance statements of individual freedoms against competing individual and state interests, it represents a fundamental shift away from the piecemeal and residual approach to individual liberty that previously characterized the relationship between the citizen and the state.[19] The *Preamble* to the *Human Rights Act 1998* declares that the measure is intended to "give further effect to rights and freedoms guaranteed under the European *Convention* on Human Rights."[20] Section 2(1) of the *Act*

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of the *Convention*, a second phase of constitutional reform was envisaged in which an all-party commission was to be set up to produce a domestic version of the Convention.

17 Jack Straw MP & Paul Boateng MP, *Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into United Kingdom Law* – A Consultation Paper (Labour Party, 1996).

18 Home Office, *Rights Brought Home: The Human Rights Bill* (1997) Cm 3782 para. 2.13.

19 It should be remembered, however, that the rights incorporated fall short of a comprehensive set of entitlements. The *European Convention on Human Rights* does not, for example, contain rights to fair trial in respect of the extradition process or prohibit expressly discrimination on grounds of disability or sexual orientation. The *Convention* also omits to refer specifically to the rights of children.

20 Prior to the Act, ordinary canons of statutory interpretation had conventionally been understood to allow for reference to be made to international legal instruments such as the *Convention* only in those cases where domestic law could be said to be ambiguous. See *R. v. Secretary of State for the Home Department ex parte Brind*, [1991] 1 AC 696, [1991] 2 WLR 588 (H.L.) [*Ex parte Brind*]. For a

interweaves *Convention* rights into domestic law by requiring that courts and tribunals "must take account" of relevant judgments, decisions, declarations, or advisory opinions of the European Court of Human Rights. It should be noted, however, that this provision stops short of requiring a court to *follow Convention* jurisprudence, a feature of incorporation that is significant in circumstances where Strasbourg rulings are considered to set a minimum threshold of rights protection. An amendment to make Strasbourg rulings binding on domestic courts was rejected during the *Human Rights Act's* passage in the House of Lords on the basis that this would unduly hamper U.K. courts' flexibility to adapt European jurisprudence to domestic circumstances.[21]

Today, section 6 of the 1998 *Act* offers protection against decisions/acts of "public authorities"[22] in the United Kingdom that violate core civil and political freedoms,[23] albeit via mechanisms that do not ostensibly challenge the notion of parliamentary sovereignty.[24] The preferred mechanism for achieving this protection is the interpretative duty placed on the courts by section 3(1) of the 1998 *Act* to read and give effect to primary and subordinate legislation (whether enacted before or after the commencement of the *Human Rights Act*) in a way that is consistent with the *Convention* in "so far as it is possible to do so." The significance of this formulation is that the courts will be required to prefer a possible, though strained interpretation of legislation that is consistent

different view, see Andrew Drzemczewski, "The Applicability of Customary International Human Rights Law in the English Legal System" (1975) 8 Human Rights J. 71; Andrew Drzemczewski, "European Human Rights Law in the United Kingdom: Some Observations" (1976) 9 Human Rights J. 123; and, judicially, *Trendtex v. Central Bank of Nigeria*, [1977] QB 329, [1976] 3 All ER 437 (C.A.). For a separate argument that ratification of an international treaty by itself is capable of giving rise to an enforceable legitimate expectatic · that the domestic authorities will conduct themselves in accordance with the treaty's substantive principles, see *Minister for Immigration and Ethnic Affairs v. Teoh* (1995), 128 ALR 353, 183 CLR 273 (Aus. H.C.).

21 Masterman, *supra* note 5. The Lord Chancellor Lord Irvine argued that the U.K. courts had to be given the liberty to lead the development of European rights jurisprudence as well as being led by it, (1997-8) House of Lord Debates Vol. 583, col. 515.

22 Section 6. I do not discuss here the issue of the "horizontal" impact of the Act on non-state bodies. For judicial analysis of this important topic, see *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v. Wallbank & Anur*, [2004] 1 AC 546, [2003] U.K.HL 37.

23 Section 1 of the 1998 *Act* incorporates Articles 2-12 of the *European Convention on Human Rights* together with Articles 1-3 of the First Protocol and Articles 1 & 2 of the Sixth Protocol. There is a vast and growing body of work on the 1998 Act. See, *inter alia*, *Blackstone's Guide*, *supra* note 10; Richard Clayton & Hugh Tomlinson, *The Law of Human Rights* (Oxford: Oxford University Press, 2000).

24 As Lord Lester QC and Lydia Clapinska have put it, "The Act reconciles formal adherence to the doctrine of parliamentary sovereignty with the need to enable the courts to provide effective legal remedies for breaches of *Convention* rights." "Human Rights and the British Constitution" in Jeffrey Jowell & Dawn Oliver, eds. *The Changing Constitution*, 5th ed. (Oxford: Oxford University Press, 2004) at 73.

with *Convention* rights to any alternative, inconsistent interpretation. In ascertaining the purpose of new legislation, judges will doubtless look to the statement of compatibility made to Parliament under section 19 of the 1998 *Act*, which requires ministers prior to the Second Reading stage of a bill to state whether, in the view of the minister, the bill's provisions are compatible with *Convention* rights.[25] Under the rule of interpretation from *Pepper v. Hart*,[26] section 19 statements may be used by the courts in order to construe a statute consistently with *Convention* rights.

In those cases where a conflict between *Convention* rights and a statutory provision has been identified — a strained, *Convention*-compliant interpretation of the provision having been ruled out — a declaration of incompatibility may be granted by the higher courts.[27] Consistent with the notion of parliamentary sovereignty, a declaration does not affect the continuing validity of an incompatible statutory provision,[28] although a minister may make a remedial order to remove this incompatibility.[29]

III. A CONSTITUTIONAL STATUTE? THE CHALLENGE TO DICEYEAN SOVEREIGNTY AND SOME MAJORITARIAN OBJECTIONS

In the preceding section, I claimed that the *Act* demonstrated an ostensible rather than fully fledged commitment to the doctrine of parliamentary sovereignty. Notwithstanding the words of subsection 3(2) that the *Act* "does not affect the validity, continuing operation or enforcement of any incompatible primary legislation," there are several features of the legislation to suggest that it is not merely another legislative enactment on a par with

25 The Government anticipated that a positive statement would be forthcoming "whenever possible." See the speech of Home Secretary Jack Straw MP at (1997-98) House of Commons Debates Vol 306 col 780.

26 *Pepper v. Hart*, [1993] AC 59, [1993] 1 All ER 42 (H.L.).

27 Section 4(5). These comprise the High Court, Court of Appeal, Judicial Committee of the Privy Council and House of Lords. In Scotland, the High Court of Justiciary (when sitting other than as a trial court) and the Court of Session may also grant declarations of incompatibility. The Crown has to be informed when a court is contemplating making such a declaration.

28 Section 4(6). One leading commentator characterized the declaration's lack of legal impact as a booby prize," Geoffrey Marshall, "Two Kinds of Compatibility: More about Section 3 of the Human Rights Act 1998" (1999) Public Law 377 at 382. See also David Bonner, Helen Fenwick & Sonia Harris-Short, "Judicial Approaches to the Human Rights Act" (2003) 52 International and Comparative Law Quarterly 549 at 562, where it is argued that s. 4 declarations are "merely a more formal, dramatic and public call for something to be done."

29 Section 10.

the *Dangerous Dogs Act 1991*[30] or the *Shops Act, 1950.*[31] Before elaborating upon the reasons behind this claim, however, it is instructive to set out in more detail the notion of a "constitutional statute." The suggestion that U.K. constitutional law acknowledges a distinction between constitutional and nonconstitutional statutes was articulated by Lord Justice Laws in *Thoburn v. Sunderland City Council.* There, a constitutional statute was defined as a legislative measure that either: (a) conditions the legal relationship between the citizen and the state in some general, overarching manner or (b) enlarges or diminishes the scope of what we now regard as fundamental constitutional rights.[32]

Constitutional statutes were, Lord Justice Laws argued, not subject to the doctrine of implied repeal in the way that ordinary, nonconstitutional statutes were.[33] Moreover, dicta elsewhere indicated that constitutional statutes ought to be interpreted more generously (*i.e.*, not according to the literal or strict approach to statutory interpretation) than their nonconstitutional counterparts in order to confer fuller rights protection on citizens.[34] Lord Wilberforce, in *Minister of Home Affairs v. Fisher,* famously remarked that a constitution was a document: "*sui generis*, calling for principles of interpretation of its own, suitable to its character . . . (requiring a) generous interpretation avoiding what has been called the 'austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."[35]

Support for the idea that the *Human Rights Act 1998* is a "constitutional" statute and thus entitled to benefit from a generous approach to interpretation may be derived from Lord Justice Laws judgment in *Thoburn,* as well as extra-judicial remarks made by Lord Steyn that the *Act* plainly "enlarges . . . . the scope of fundamental rights" in the sense of extending the circumstances in which they may be invoked before domestic courts. As such, the *Act* also "conditions the legal relationship between the citizen and the state in some general, overarching manner." Accordingly, Lord Steyn has spoken of the need for statutory interpretation in *Human Rights Act* cases "to be approached generously in order to afford the citizens the full measure of the protections of

30 *Dangerous Dogs Act 1991* (U.K.), 1991, c. 65.

31 *Shops Act, 1950* (U.K.), 14 & 15 Geo. 6, c. 28.

32 *Thoburn v. Sunderland City Council,* [2003] QB 151, [2002] EWHC 195 (QB Div. Ct.) at para. 62 [*Thoburn*]. Laws did say that (a) and (b) were closely related and that it was "difficult" to conceive an instance of (a) that was not also an instance of (b).

33 Thoburn, *ibid.*

34 Masterman, *supra* note 5 at 913-15.

35 *Minister of Home Affairs v. Fisher,* [1979] 2 WLR 889, [1980] AC 319 (P.C.) at 329.

a Bill of Rights."[36] Of course, on one view, this stance risks taking the judges beyond their constitutionally proper function of interpreting legislation into the constitutionally impermissible realms of judicial legislation.[37] An analysis of judicial activism under the 1998 *Act* is offered at a later stage of this discussion.

In considering precisely *how* the Act enlarges the scope of fundamental rights in domestic proceedings, it is worth recalling some innovative features of the legislation – namely, (i) the interpretative duty placed on courts, (ii) the declaration of incompatibility, and (iii) ministerial statements of compatibility. Each will now be explored in more detail.

Judges are obliged under subsection 3(1) of the 1998 *Act* to give interpretations of domestic law that are *Convention*-compliant. This goes beyond the previously acknowledged status of norms of international law in *ex parte Brind,*[38] since there is now no prior need for ambiguity in domestic law before the duty to give a *Convention*-compliant reading of the law arises. Importantly, this interpretative duty applies to domestic statutes "whenever enacted," so that even in respect of legislation passed after 1998 judges remain under a subsection 3(1) duty to read the later statute "so far as it is possible" in a *Convention*-compliant way. The second feature of the legislative scheme that points up the *Act*'s non-ordinary credentials is the provision in section 10 that facilitates a swift legislative response to a judicial declaration of incompatibility under subsection 4(2) of the *Act.*[39] In a formal sense this provision is entirely consistent with the principle of parliamentary sovereignty, leaving as it does to the executive acting through Parliament the decision whether or not to bring into effect amending legislation.[40] Outside the realms of formal constitutional theory, however, the uniqueness in English law of the declaration of incompatibility mechanism and the accompanying possibility of fast-track amending legislation has created the potential in practice for governments

36 Lord Steyn "The New Legal Landscape" (2000) European Human Rights Law Rev. 549 at 550.

37 The point is made in Richard Clayton, "Judicial Deference and 'Democratic Dialogue': The Legitimacy of Judicial Intervention under the Human Rights Act 1998" (2004) Public Law 33 at 34.

38 *Supra* note 20.

39 Any remedial order takes the form of a statutory instrument and may be made via either the positive resolution procedure whereby the order does not pass into law until approved by both Houses of Parliament within sixty days of being laid before Parliament or, alternatively, under an emergency procedure without prior Parliamentary authority. In the latter case, the order lapses after 120 days if has not been approved by both Houses of Parliament. See further *Human Rights Act 1998*, *supra* note 1, Sch. 2 paras. 2(a) & (b).

40 See to this effect Lord Hutton's remarks in *R. v. Secretary of State for the Home Department* [2003] 1 AC 837, [2002] U.K.HL 46 at para. 63.

to come under a degree of political pressure to reform *Convention*-violative laws.[41] The augmented powers of the courts in this area have been succinctly expressed by Anthony Bradley:

> While . . . the Act does not entrust to the courts the power to strike down an Act of Parliament, the courts are empowered to deliver a wound to Parliament's handiwork that will often prove mortal, even though life support for the legislation must be switched off by the government or by Parliament, not the courts.[42]

A third reason why the *Human Rights Act 1998* may not be an ordinary Act of Parliament lies in the fact that under subsection 19(1), ministers in charge of a bill in either House of Parliament must make a statement at the bill's Second Reading to the effect that either: (a) the measure before the House is compatible with *Convention* rights or, alternatively, (b) though the Minister is unable to make such a statement, the Government nevertheless wishes the House to proceed with the bill. Such formal statements of compatibility are not encountered in Parliamentary procedure outside the context of laws dealing with human rights matters.

The proposition that the *Human Rights Act* might not be an ordinary statute has alarmed a number of public law scholars in the U.K. who remain committed to the notion of unlimited parliamentary sovereignty and object as a matter of *constitutional principle* to the vesting of increased powers in the judiciary to determine human rights matters. For majoritarians, rights questions involve hard choices that are best settled by the political sphere through debate and majority voting in representative assemblies which are accountable at regular intervals to the electorate. Keith Ewing, for example, has defended unlimited parliamentary sovereignty as the "most democratic of principles" arguing that it is:

> the legal and constitutional device which best gives effect to the principle of popular sovereignty, whereby the people in a self-governing community are empowered – without restraint – to make the rules by which they are to be governed through the medium of elected, representative and accountable officials.[43]

The judicialization of rights (such as freedom of expression, religion, and association, and the right to respect for private life), on the other hand, inevitably confers upon unrepresentative and unaccountable courts the task of

41 This point is also recognized by the opponents of the *Human Rights Act 1998*. See Keith D. Ewing, "The Human Rights Act and Parliamentary Democracy" (1999) 62 Modern Law Rev. 79.

42 Anthony Bradley, "The Sovereignty of Parliament" in Jeffrey Jowell & Dawn Oliver, eds., *The Changing Constitution*, 5th ed. (Oxford: Oxford University Press, 2004) at 58 [Bradley].

43 Keith D. Ewing, "Just Words and Social Justice" (1999) 5 Rev. of Constitutional Studies 53 at 55.

resolving essentially political disputes in which they have no greater expertise than the elected representatives of the people. Moreover, in the hands of lawyers, the broad ethical and political questions prompted by rights claims are reduced to much narrower, technical questions of statutory interpretation in a forum where access is both tightly controlled and expensive. This state of affairs is undesirable.[44] Majoritarians point more positively to the potential of the political sphere and democratic politics to provide a forum for an informed, responsive and public discussion of key rights issues. This view draws on Jeremy Waldron's writings to claim that legislatures offer the most respectful set of procedures for resolving difficult ethical questions. In *Law and Disagreement,* for example, Waldron asserts of both England and the United States that there are:

> robust and established traditions of political liberty (which have flourished often despite the best efforts of the judiciary); and in both countries there are vigorous debates about political structures that seem able to proceed without threatening minority freedoms.[45]

While there is undeniably some force in aspects of these criticisms, particularly as regards the unrepresentative and unaccountable nature of the judicial sphere, this account tends to overlook the downsides of rule-making by simple majority. The American legal theorist Alexander Bickel noted that, despite being called upon to articulate and defend enduring constitutional values, the executive and the legislature (in the United States) had too often in the past acted out of expediency, rather than principle.[46] The fact that these spheres of the constitution had been purposely designed to respond to the clash of interests that occurs in democratic politics inclined each to act with a short term perspective. Bickel believed that the insulation of the judicial sphere from these forces was valuable because it helped the courts resist popular pressure. Individual liberty became at risk when elected politicians felt under intense pressure to "respond" to the disquiet of vocal and powerful interests by enacting appeasing measures that curtail freedoms of unpopular minorities in ways that are considered to assist retention of political power.[47] In the United

44 For a recent restatement of these objections to judicial review, see Adam Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005) at 10-31.

45 Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) at 290.

46 Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, CT: Yale University Press, 1986). For criticism of this view as historically shaky, see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980).

47 Jesse Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 2003) at 67-70.

Kingdom, examples of such conduct during both main parties' tenure of office are not difficult to find. The Conservative Party's determination when in office to appear "tough" on criminals was such that it led to a series of successful legal challenges in the field of prison administration.[48] In the case of Labour, the tightening of asylum rules in response to media-led claims of large-scale migration from Eastern Europe and elsewhere offers a more recent example of "responsive" policy-making. With an embarrassing frequency, it has fallen to the courts, within the confines of the doctrine of parliamentary sovereignty and, more recently, the *Human Rights Act 1998*, to strike down a number of executive policies and decisions that disfavoured the interests of prisoners[49] and asylum-seekers.[50] The declaration by the House of Lords in *A. v. Secretary of State for the Home Department* that the indefinite detention provisions of the Labour Government's anti-terrorism laws were discriminatory and contrary to the *European Convention* offers a recent example of judicial defence of a core individual liberty.[51] The circumstances of the ruling will be considered in more detail at a later stage of this article. In the meantime, it is sufficient to note that, once more in the face of a powerful executive authority using its parliamentary position to pass controversial legislation in an era of heightened public anxiety, it fell to the judicial sphere, not the political sphere, to act as the bulwark of individual liberty.

Waldron's other claim that law-making by popularly elected assemblies reflects the ideal of a careful and informed weighing of policy alternatives in which affected parties have had ample and equal opportunity to make representations to the government and elected representatives is also open to criticism. It is well established that differences in resources, expertise, and insider contacts among pressure groups, for example, create unequal access to the policy-making process. As Rush has commented in the case of the U.K.:

48 Stephen Livingstone, Tim Owen & Alison McDonald, *Prison Law*, 3d ed. (Oxford: Oxford University Press, 2003) at c. 16. And note Livingstone's comment elsewhere that "Politicians find votes in being tough on prisoners even if they never visit a prison: displaying more progressive views on prisons is rarely a vote-winner." Stephen Livingstone, "Prisoners' Rights" in David Harris & Sarah Joseph, eds., *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford: Clarendon Press, 1995) at 295.

49 See, infamously, *R. v. Secretary of State for the Home Department ex parte Venables*, [1997] 3 All ER 97, [1997] U.K.HL 25; and *Pierson v. Secretary of State for the Home Department*, [1997] 3 All ER 577, [1997] U.K.HL 37.

50 For instance, *Regina (Salih) v. Secretary of State for the Home Department*, [2003] The Times Law Reports October 13 (Q.B.); *Regina (Q) and others v. Secretary of State for the Home Department*, [2004] QB 36, [2001] EWCA Civ 1151; and *R (on the application of Adam) v. Secretary of State For Home Department*, [2004] QB 1440, [2004] EWCA Civ 540.

51 *A. v. Secretary of State for the Home Department*, [2005] 2 AC 68, [2004] U.K.HL 56 [*A v. Secretary of State*].

> Inevitably, advantages will accrue to the organizations which have regular or frequent contact with Parliament, because they are likely to be familiar with the system and have established contacts upon whose services they can call.[52]

Moreover, few observers would recognize Waldron's view of "respectful" legislative debate set out in *Law and Disagreement*. In the United Kingdom and elsewhere, the reality of heavy legislative programmes and active party "whipping" ensure that individual conscience plays for the most part a minor role in either a member's contributions to legislative discussion or voting patterns.[53] The sanctions available to the Whips office to threaten recalcitrant MPs have been well documented in British politics.[54] Ironically, it is in the unelected upper chamber — the House of Lords — where principled, less heavily whipped debate is to be found.[55]

IV. WHAT KIND OF ENLARGED ROLE FOR THE JUDICIARY UNDER THE *HUMAN RIGHTS ACT*? MODELS OF CONSTITUTIONAL DIALOGUE AND EMERGENT CASE LAW PATTERNS

Whatever force is attributed to the foregoing majoritarian objections, Parliament itself has authorized in section 3 of the *Human Rights Act 1998* an enlarged judicial role on rights questions and attention has subsequently turned to how the courts have used their new powers. At the time of the parliamentary debates on the *Act*, the Lord Chancellor Lord Irvine claimed that the new law would promote a dynamic and cooperative endeavour between the executive, judiciary, and Parliament. He anticipated that the new interpretative duty in section 3 would mean that resort to subsection 4(2) declarations would be "rare."[56] An expansive approach on the part of

52 Michael Rush, *Parliament and Pressure Politics* (Oxford: Clarendon Press, 1990) at 263.

53 See Anthony Harold Birch, *The British System of Government*, 10th ed. (London: Routledge, 1998) at 122: "Individual MPs are expected to conform to the party line in parliamentary votes and they rarely depart from it unless they have strong beliefs or convictions regarding the issue in question."

54 Consider, for example, the treatment by Government Whips of Labour MPs opposed to the Iraq war, which has been described as bullying and abusive by seasoned political observers. See David Beetham, Pauline Ngan & Stuart Weir, "Democratic Audit: An Inauspicious Year for Democracy" (2002) 55 Parliamentary Affairs 400.

55 "In recent years, the House of Lords has been more prepared to amend Bills against the government's wishes, often on issues of principle and policy." Anthony Wilfred Bradley & Keith D. Ewing, *Constitutional and Administrative Law*, 13th ed. (Harlow, U.K.: Longmans, 2003) at 194.

56 (1997-8) House of Lords Debates. 3 November 1997, Vol. 582 col. 1231.

the judges would have seen a preparedness to engage in heavy straining of statutory language to achieve *Convention*-compliant readings of domestic law. Conversely, a more cautious stance would have been characterized by a disinclination to use the subsection 3(1) interpretative power and a preference instead to grant declarations of incompatibility. A third, more nuanced position can also be imagined in which the courts would be more prepared to render a statute *Convention*-compliant when its subject matter touches upon fundamental rights under the *Convention* and where an incremental reform is all that is needed to render the law *Convention* complaint — and stepping back from reform when this is evidently a more complex task and where it is anticipated that the executive is minded to bring forth its own proposals for reform. So which account best fits judicial practice in the period October 2000 – December 2005? Before this question can be addressed, it is necessary to explore some deeper-level theoretical issues of constitutional design that the 1998 *Act* provokes. Specifically, we can inquire about the particular model of dialogic constitutionalism that best describes the overall scheme of rights protection set out in the *Human Rights Act 1998*.

Two Models of Dialogue and the *HRA*'s Constitutionalism

Though qualifying as a constitutional or non-ordinary statute, it was noted earlier that the *Act* does not go so far as to place judicial determinations on rights questions completely beyond the reach of the legislature and political interference.[57] In seeking to elucidate the theoretical basis that underpins the new relationship among the courts, executive, and legislature in human rights matters, Hickman has recently sought to distinguish between two possible forms of "constitutional dialogue," and it is to these that we can now turn to ascertain whether either offers a persuasive model of constitutionalism embodied in the *Human Rights Act 1998*.[58]

The first model of dialogue identified by Hickman is "principle-proposing

57 Such a position is found in non-dialogic or incorporationist theories of constitutionalism such as those of Robert Bork and Ronald Dworkin. What unites these diverse scholars is a commitment to a substantive conception of legality in which certain fundamental matters (in Bork's case, defined considerably more narrowly than for Dworkin) are placed beyond the competence of legislative majorities and ordinary political processes. See further Robert Bork, *The Tempting of America: The Political Seduction of The Law* (New York: Free Press, 1990); Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) at c. 2; and Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996).

58 Tom Hickman, "Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998" (2005) Public Law 306 [Hickman].

dialogue."[59] In this model, the courts participate as a sort of privileged pressure group in a debate that occurs within the political sphere about where lines in rights disputes ought to be drawn. The driving mechanism for much, if not all, of principle-proposing dialogue is the section 4 declaration of incompatibility. That is to say, judges put forward their principled perspectives on substantive matters of justice by issuing such declarations. At this point, however, judicial participation in the dialogue ceases and the debate carries on in the political realm where other interested parties, including pressure groups, have their input. Finally, elected politicians in the legislature deliberate over what remedial course of action, if any, is required. In approving this weak version of dialogue, Campbell has accurately characterized section 4 as conferring on the courts a power to make: "provisional determinations of what it is that human rights asserted in the ECHR require us to do. These determinations may, with perfect propriety, be challenged and overturned by elected governments after public debate."[60] In truth, however, it may be objected that the reference to "dialogue" in Hickman's label is apt to mislead. This is because, in any "conversation" about rights that the courts initiate via section 4, the executive, using its dominant position in the legislature, can plainly turn a deaf ear to the principled concerns of the judges. There is certainly nothing constitutionally improper where the executive either dismisses or pointedly fails to respond occurs to judicial declarations of principle. In short, there need not be any "dialogue" at all. As Campbell notes, this leaves the "democratic political process at the centre of the articulation of the controversial specific content of fundamental rights."[61]

The second and alternative model of constitutional dialogue that Hickman sets out is termed "strong-form dialogue."[62] He argues that this model best encapsulates the form of constitutionalism that underpins the 1998 *Act*. Claiming a pedigree for this model that may be traced back to the works of Bickel[63] and, yet further, to Dicey's account of the common law's role in the protection of fundamental rights and values,[64] Hickman states that strong-

59 *Ibid* at 309.

60 Tom Campbell, "Incorporation through Interpretation" in Tom Campbell, Keith D. Ewing & Adam Tomkins, eds., *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001) at 99.

61 *Ibid.*, at 100.

62 See *supra* note 58 at 317.

63 *Supra* note 46.

64 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959). Dicey noted that the common law recognized fundamental rights such as the right to personal liberty and public meetings. Hickman argues that Dicey's rule of law construct allowed the courts to develop and protect these principles in partnership with the legislature. See further Albert Venn Dicey, *Lectures on the Relation between Law and Public Opinion in England during the*

form dialogue in the *Human Rights Act* era is characterized by:

> a belief that the courts have a vital constitutional role in protecting fundamental principles from the sway of popular sentiment. They do not simply have a subordinate or formal task, but must capture and insulate the enduring long-term values and principles of the community. However, their function is not simply to exert these principles on the community, but rather to work in collaboration with the other branches in evolving them and fostering their acceptance.[65]

Strong-form dialogue posits an ongoing role for the courts in defending values and principles that carries greater influence in shaping their final content than can occur under principle-proposing dialogue. This model rejects the notion that the courts are confined to deciding matters of principle while leaving policy issues to the executive and legislature. Certainly, the collapsing of this distinction appears to make sense in respect of proportionality challenges under the 1998 *Act* to administrative discretion. There, courts are regularly called to assess the balance struck by the executive between rights and countervailing societal interests and to look at the weight given to factors considered relevant to the exercise of statutory powers. For Hickman, strong-form dialogue is exemplified in the judgment of Lord Hoffman in *Simms*,[66] where the common law constitutional principle of legality meant that fundamental rights could not be overridden by general or ambiguous words in statutes. If Parliament was to legislate contrary to the basic rights and freedoms of the individual, this would have to be done expressly or by necessary implication. According to Hickman, Lord Hoffman's assertion of the common law principle of legality would "force Parliament to appreciate the unprincipled implications of its projects, while ultimately allowing for the rights to be compromised by sufficiently clear and unambiguous legislative replies."[67] Hickman cogently argues that section 3 of the *Human Rights Act* fits neatly into the scheme of strong-form dialogue since it permits the determination of rights questions by the courts subject to a legislative override by the peoples' democratically elected representatives. However, the precise manner by which (and in which circumstances) section 3 "fosters" the *acceptance* of judicially determined principles in a collaborative venture is not really explained, and it is tempting to conclude any such collaboration can only occur where the executive/legislature are so minded.

Nineteenth Century, 2d ed. (London: Macmillan, 1914); and T.R.S. Allan, "The Rule of Law as the Rule of Reason: Consent and Constitutionalism" (1999) 115 Law Quarterly Rev. 221.

65 Hickman, *supra* note 58 at 317.

66 *Regina v. Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115.

67 Hickman, *supra* note 58 at 326.

Even more problematically, Hickman further asserts that section 4 declarations might also be made to fit within the strong-form dialogue model. This is, we are told, because section 4 allows the courts to "vent their scorn on a piece of rights defying legislation, thus excluding it from the integrity of the law."[68] This claim is hard to uphold, however, for a number of reasons. Apart from it not being clear what it means to exclude a legislative provision from the "integrity of law," section 4 remains at best a political tool, a device to embarrass the executive that, unlike section 3, has, in formal legal terms, a subordinate role in rights protection. As has already been noted, a section 4 declaration is entirely at the mercy of legislative and executive concurrence, no matter how much judicial scorn is vented. It cannot "insulate" values against parliamentary encroachment. Neither can it "force" Parliament to consider the deleterious impact of policy choices upon human rights claims.[69] As Hickman himself notes, a section 4 declaration marks the end point of judicial input to a debate about rights, rather than the start of an ongoing conversation. This is hardly consistent with the notion of strong form dialogue. For these reasons, it is suggested that section 4 declarations are best seen as being accommodated within the notion of principle-proposing dialogue.

Notwithstanding this conclusion, it would wrong to deny that, on occasions, external political realities can make it difficult for a government or Parliament to ignore a section 4 declaration, capable as it is of delivering a "wound to Parliament's handiwork that will often prove mortal."[70] It follows then that any assessment of the role played by declarations in constitutional dialogue must be grounded in empirical reality. Specifically, we need to inquire about the circumstances in which the courts have opted for section 3 strained interpretations and where, alternatively, they have issued section 4 declarations. We further need to ascertain what sorts of responses such declarations have elicited from the executive/legislature? Having answers to the foregoing will enable us to talk with more precision about the nature of any dialogue that 1998 *Act* has prompted.

68 *Ibid.* at 327.

69 See, however, in this regard the work of the parliamentary Joint Committee on Human Rights. This body is comprised of members of both Houses of Parliament as well as experienced legal advisers and enjoys a broad remit to consider matters relating to human rights in the United Kingdom. The Joint Committee monitors executive and legislative responses to s. 4 declarations and, as such, can be seen as adding to the political pressures on the executive to respond positively. For commentary on the Joint Committee's impact, see *inter alia* Anthony Lester, "The Human Rights Act – Five Years On" (2004) European Human Rights Law Rev. 258; Robert Hazell, "Who Is the Guardian of Legal Values in the Legislative Process: Parliament or the Executive?" (2004) Public Law 495; and Kier Starmer & Francesca Klug, "Standing Back from the Human Rights Act: How Effective Is It Five Years On?" (2005) Public Law 716 [Starmer & Klug].

70 Bradley, *supra* note 42 at 58.

Human Rights Act Jurisprudence

In the commentaries and discussion of *Human Rights Act* jurisprudence, a dominant theme emerging from the literature is that while the judges in the early days (or some of them) were prone to overstating their new found powers in section 3 of the 1998 Act to render statutes *Convention*-compliant — even engaging in acts of "judicial vandalism"[71] — they have of late seen the error of their ways and opted for a more deferential approach to legislative enactment, preferring to issue section 4 declarations, thereby placing the onus firmly upon the executive (and ultimately Parliament) to amend the law.[72] That is, they have applied albeit belatedly the "brakes" inherent in the notion of "possible interpretation" to curb an earlier tendency to stray into the field of judicial law-making. Authority for this view is said to be found in the sequence of cases starting with Lord Steyn in *R. v. A.*[73], the subsequent retreat in *R. v. Lambert*[74] and *Re S; Re W*[75] and culminating with confirmation of the deferential stance in cases such *R. v. Anderson*[76] and *Bellinger v. Bellinger.*[77] This claim will now be examined more closely.

Judicial creativity in R. v. A. and its critics

R. v. A. concerned the rape shield provisions of *Youth Justice and Criminal Evidence Act 1999.*[78] Section 41 prohibits the giving of evidence or cross-examination about the sexual behaviour of the complainant except with the leave of the court. The law was amended because it was felt that hitherto the judges had enjoyed too much discretion to allow evidence or permit questioning about a woman's sexual history. There was evidence to support the claim that this discretion allowed inappropriate and irrelevant material about the complainant's sexual history to feature as evidence in rape trials. Section 41 of the 1999 *Act* sought to amend this state of affairs by restricting the judges' discretion to admit irrelevant and prejudicial sexual history evidence.

If section 41 had been interpreted under the ordinary rules of statutory interpretation, it could not have been given a meaning that was compatible with the defendant's fair trial rights under Article 6. Specifically, it would

71 The phrase is used by Lord Bingham in *on the application of Anderson, supra* note 40 at para. 30.

72 See *inter alia* Starmer & Klug, *supra* note 69.

73 *R. v. A.* (No. 2), [2002] 1 AC 45, [2001] U.K.HL 25 [*R. v. A.*].

74 *R. v. Lambert*, [2002] 2 A.C. 545, [2001] U.K.HL 37 [*Lambert*].

75 *In re S; re W* (2002), 926—14/03/02 Daily Cases (H.L.) [*Re S; Re W*].

76 *Supra* note 40.

77 *Bellinger v. Bellinger*, [2003] 2 A.C. 467, [2003] 1 FLR 1043 (H.L.) [*Bellinger*].

78 *Youth Justice and Criminal Evidence Act 1999* (U.K.), 1999, c. 23 [*Youth Justice and Criminal Evidence Act 1999*].

have meant on the facts of the case that, in respect of the defendant's allegation that the complainant had in fact consented to sexual intercourse — the court would not have been to admit evidence relating to an alleged sexual relationship between the complainant and the defendant said to have occurred in the previous few weeks before the alleged rape.

Approaching the issue of the extent of judicial interpretation under section 3 of *the Human Rights Act 1998*, Lord Steyn noted that section 3 did not require a "reasonable" interpretation; instead, it appeared to permit a "linguistically strained" approach to the interpretation of domestic statutes in order to bring about compatibility. This could involve not merely reading down of express language in an act (a pre-1998 *Act* technique for rendering statutes compliant with international treaties) but also implying additional provisions. Given the broad width of this interpretative duty, Lord Steyn reasoned that section 4 declarations of incompatibility would then be avoided unless it was plainly impossible to read a provision compatibly. Adopting Lord Steyn's method, a unanimous House of Lords was then able to read into section 41 an implied provision that evidence or questioning which is required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible.[79]

Critics viewed the reading in of a residual judicial discretion to admit evidence relating to a complainant's sexual history to make the *Youth Justice and Criminal Evidence Act 1999* compatible with Article 6 fair trial rights as crossing the boundaries between interpretation (which is the judges' proper role) and re-writing of an Act of Parliament (which is not permissible).[80] Academic commentators were especially critical. Nicol for example described the reasoning in the case as "judicial overkill."[81] He was particularly troubled by the fact that Lord Steyn's implication flew in the face of the express intention of Parliament to reduce the scope for judicial discretion to admit evidence or questioning about the complainant's sexual history. A valid response to this concern is to note that, notwithstanding the undoubted legislative wish to tighten up this area, Parliament did so fully cognizant of the constraining demands of Article 6. Moreover, the sponsoring Minister did not opt to

79 *R. v. A., supra* note 73 at 68.

80 For detailed analysis of the distinction between interpretation and legislation, see Aileen Kavanagh, "The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998" (2004) 24 Oxford J. of Legal Studies 259 [Kavanagh, "The Elusive Divide"]; and Aileen Kavanagh, "The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998" (2006) 26 Oxford J. of Legal Studies 179.

81 Danny Nicol, "Statutory Interpretation and Human Rights after *Anderson*" (2004) Public Law 274 at 276 [Nicol, "Statutory Interpretation"]. There is little reason, however, to believe that Lord Steyn intended his "robust" approach to s. 3 would always be appropriate.

invoke section 19(1)(b) of *the Human Rights Act 1998*, whereby, though unable to make a statement of compatibility, the Government nevertheless indicates that it wishes the House to proceed with the measure. In these circumstances, Parliament can be taken to have accepted that the new rules would be read by the courts against the background of the fair trial jurisprudence emanating under Article 6.

After R. v. A.: The brake on "strained interpretation"

A more cautious-sounding note was soon struck, however, by the same House of Lords in *Lambert*.[82] Lord Hope remarked that the courts needed to be mindful of the boundaries between interpreting and legislating. The brake on section 3 interpretation comes from the plain intention of Parliament (as expressed in the words of the domestic legislation). If the legislation contains provisions which expressly or impliedly contradict the meaning which the legislation would have to be given to make it compatible — then section 3 does not permit a *Convention*-compliant interpretation — instead, Courts ought to issue a section 4 declaration of incompatibility. The cautiousness of *Lambert* was subsequently echoed in *Re S; Re W,* when the House of Lords rejected the Court of Appeal's use of section 3 to read in to the *Children Act 1989* [83] a new system for judicial supervision of care orders. This reading in of new powers and procedures was justified by the lower court as being necessary to protect the Article 8 rights of children in care. On appeal, the new, judicially implied system was declared by the House of Lords to be beyond the court's interpretative duty in section 3. Lord Nicholls pointed out that subsection 3(2) presupposed that not all legislation would be rendered *Convention*-complaint. Under the scheme of the *Human Rights Act 1998*, the amendment of statutes remained a task for Parliament. Interpretation of statutes was the task of the courts. As for the difficult question of identifying the moment when judicial construction of a statute crossed over the boundary from interpretation to amendment, Lord Nicholls suggested that this occurred when a meaning was given that "depart(ed) substantially from a fundamental feature of an Act . . . ."[84] and would be especially apparent when the departure had important practical repercussions which the courts were not equipped to assess. A fundamental feature of the *Children Act 1989* was that courts were precluded from reviewing the exercise of local authorities' child care functions.[85] Accordingly, the Court of Appeal had crossed over the boundary

82 Lambert, *supra* note 74.

83 *Children Act 1989* (U.K.), 1989, c. 41 [*Children Act 1989*].

84 Re S; Re W [2002] 2 WLR 720 at 731.

85 Compare Lady Justice Hale in the Court of Appeal, who saw nothing in *Children Act 1989* to

between interpretation and amendment. Lord Nicholls was additionally (and justifiably) worried by the fact that a departure might have practical repercussions that the court was not equipped to evaluate.

For the critics of *R. v. A.*, the subsequent rulings in *Lambert* and *Re S; Re W* represent the welcome moment when the retreat from improper judicial forays into legislative activity got under way. Nicol, for example, refers approvingly to the "emphatic rejection of over-zealous interpretation" that occurred post-*R. v. A.*[86] Logically, it would seem that the approach of Lords Hope and Nicholls does have the effect of making subsection 4(2) declarations of incompatibility from the higher courts more likely than under Lord Steyn's more robust alternative. The legislature ought to find itself being invited more regularly to consider the introduction of amending legislation, although if it declined to do so, this would be constitutionally proper as Parliament retains the final say in legislative matters. These critics cite the subsequent resort to section 4 declarations of incompatibility in cases such as *R. v. Anderson* and *Bellinger* as evidence for this rejection of overzealous interpretation.

There is, however, an alternative explanation of the pattern of section 3 and section 4 adjudications post-*Lambert* and *Re S; Re W* that plausibly denies the argument that *R. v. A.* may be consigned to history books as a misconceived adventure in judicial activism. Kavanagh, for example, has claimed that Lord Steyn's strained interpretation method has not been abandoned entirely.[87] She argues, for reasons that are developed below, that *Bellinger* and *R. v. Anderson* were simply the wrong sorts of cases in which to engage in strained interpretation. On this view, the key to understanding the subsequent set of rulings is to recognize that nothing in *Re S; Re W* precluded resort to strained interpretation under the appropriate circumstances. In *R. v. A.*, it was possible to identify a single statutory provision (section 41 of the *Youth Justice and Criminal Evidence Act 1999*) that fell to be interpreted in a *Convention*-compliant way. In *Re S* there was no particular statutory provision that fell to be given the subsection 3(1) robust *Convention*-complaint interpretation. Rather, it was the scheme of the *Act* in general that precluded judicial supervision. Although the ruling in *R. v. A.* increased judicial discretion to admit certain evidence in rape cases, it did not require the court to devise

prevent the implication of a system of judicial supervision.

86 *Supra* note 80 at 281. See further his reference to "an immature stage in the HRA's development" in Danny Nicol, "Gender Reassignment and the Transformation of the Human Rights Act" (2004) 120 Law Quarterly Rev. 194 at 196 [Nicol, "Gender Reassignment"].

87 Aileen Kavanagh, "Statutory Interpretation and Human Rights after *Anderson*: A More Contextual Approach" (2004) Public Law 537 [Kavanagh, "A More Contextual Approach"].

whole new procedures and insert them into a statute (with ramifications that might not be fully understood by the courts) in order to achieve conformity with the *Convention*. This was the error that the Court of Appeal had fallen into in *Re S*. Moreover, unlike care orders, the subject matter of the ruling in *R. v. A.* involved something which the courts have a recognized expertise on — specifically, the admissibility of evidence to trial proceedings.

The reluctance of judges to use subsection 3(1) of the *Human Rights Act 1998* to reform the law when something other than piecemeal and incremental reform is at issue is well illustrated by the House of Lords' ruling in *Bellinger*. Their lordships refused to interpret "male" and "female" in subsection 11(c) of the *Matrimonial Causes Act 1973*[88] to include a transsexual female. Lord Nicholls' leading judgment declared that gender reassignment was part of a "wider problem that should be considered as a whole and not dealt with in a piecemeal fashion."[89] After all, gender reassignment impacted more broadly upon education, child care, employment, and gender specific criminal offences, among other matters. Lord Nicholls was presumably aware, following the European Court of Human Rights' ruling in *Goodwin* v. *U.K.*,[90] that the matter was under discussion in government and that primary legislation would in all likelihood be forthcoming. Likewise in *R. v. Anderson*, the House of Lords issued a declaration of incompatibility on the grounds that Home Secretary's powers under section 29 of the *Crime (Sentences) Act 1997*[91] to control release of mandatory life prisoners was inconsistent with the right to have sentence imposed by an independent authority. The court refused to invoke subsection 3(1) of the 1998 Act to render section 29 *Convention*-compatible. Once again, the context of the ruling provides the key to understanding judicial reticence. Not only had the European Court of Human Rights given two decisions indicating that the section 29 power violated the *Convention*,[92] the government had in addition acknowledged in Parliament that the release of mandatory life prisoners needed reform. In conclusion then, the preference in *Bellinger* and *Anderson* for section 4 declarations must be seen as highly context-dependent. Neither offered an appropriate setting for the application of Lord Steyn's strained interpretation method.

88 *Matrimonial Causes Act 1973* (U.K.), 1973 c. 18.

89 *Bellinger, supra* note 77 at para 45.

90 *Goodwin v. United Kingdom* (2002), 35 EHRR 447 (European Court of Human Rights) [*Goodwin*], where the U.K.'s failure to confer legal recognition on transsexuals was found breached the right to respect for private life under Article 8 of the *Convention*.

91 *Crime (Sentences) Act 1997* (U.K.), 1997, c. 43 [*Crime (Sentences) Act 1997*].

92 *Stafford v. U.K.* (2002), 35 EHRR 1121 (European Court of Human Rights); *V&T v. United Kingdom* (2000), 30 EHRR 121 (European Court of Human Rights).

The continuing vitality of *R. v. A.* was soon demonstrated, however, by the House of Lords in *Ghaidan v. Godin-Mendoza*.[93] There the deceased person had enjoyed a protected tenancy of a flat where he lived in a stable and monogamous relationship with the defendant. On the tenant's death, the landlord claimed possession of the flat. The defendant claimed a statutory tenancy by succession under the *Rent Act 1977*[94] on basis that he had been living with the deceased "as his or her wife or husband."[95] This claim was rejected by trial judge, but, on appeal, first in the Court of Appeal and then the House of Lords in a majority 4-1 ruling, the defendant's arguments were successful. In the House of Lords, it was observed that if the *Rent Act 1977* was interpreted without regard to the *Human Rights Act 1998*, English law would violate Articles 8 and 14 of *European Convention on Human Rights*. Instead, living with the original tenant "as his or her wife or husband" had to be read in the light of the interpretative obligation under subsection 3(1) to render it *Convention* compliant "so far as it was possible to do so." Here the *Act* could be read and given effect as enabling the survivor of a homosexual couple in a close and stable relationship to succeed to the statutory tenancy.[96]

V. WHAT TYPE OF CONSTITUTIONAL DIALOGUE HAS THE 1998 *ACT* PRODUCED?

In this section of the article, I return to the models of dialogic constitutionalism outlined previously and consider the extent to which, if at all, the nuanced pattern of strained interpretation and declarations of incompatibility to emerge in the case law may be accommodated within these models. In contrast to Hickman, I argue that it is wrong to conceive of the 1998 *Act* as authorizing exclusively the strong-form dialogue model with its emphasis on section 3 strained interpretations. Instead, as will have been apparent from the materials in the foregoing pages, my contention is that the form of dialogic constitutionalism advanced in the 1998 *Act* is properly seen as context-dependent. In certain circumstances it will be perfectly defensible for the courts to opt for principle-proposing dialogue, just as on other occasions a preference for the less deferential strong-form alternative will be appropriate.

93 *Ghaidan v. Godin-Mendoza*, [2004] 2 AC 557, [2004] U.K.HL 30 [*Ghaidan*]. See also *Sheldrake v. Director of Public Prosecutions, Attorney Generals Reference* (No 4 of 2002), [2005] 1 A.C. 264, [2004] U.K.HL 43.

94 *Rent Act 1977* (U.K.), 1977, c. 42 [*Rent Act 1977*].

95 As required under para 2(2) of Schedule 1 of the *Rent Act 1977*, *ibid.*

96 For a comment on this case, see Elizabeth Tomlinson, "Same-Sex Relationships: Going with the Grain or Judicial Vandalism" (2004) 63 Cambridge Law J. 577.

Hickman has criticized the House of Lords in *Bellinger* for preferring to issue a declaration of incompatibility rather than engage in section 3 strained interpretation. He argues that the deferential posture adopted by the court amounted to a form of principle-proposing dialogue when what was required was a more robust approach in which the courts should have identified a core of principle, ascertained whether the legislation impacted upon the core area, and then applied section 3 to produce a *Convention*-compliant reading. Instead, he claims that the court acted more as a privileged pressure group and then "disclaimed any future input into the question."[97] The court's stance therefore ran the risk that a change of government, or less dramatically, a change of policy within government, would leave unremedied the violation of transsexuals' human rights.

By way of comment, it may be thought that this criticism pays insufficient attention to the context in which the House of Lords made their ruling. The preference for a section 4 declaration indicates that the court understood all too clearly the circumstances in which it was asked to intervene. The government was committed to legislative reform after the European Court of Human Rights' ruling in *Goodwin*. There had been no change of government and nothing to suggest a change of government policy in the intervening period. Had any of these background facts been different, the arguments for going down the section 3 route may have been stronger. Even so, the sheer range of discrete policy areas affected by changes to laws of gender assignment and the potential for unforeseen consequences of judicial law-making might still have cautioned against a robust, principle-protecting approach from the court. As it was, the decision to opt for a declaration of incompatibility constituted, in the consensual climate that existed between the courts and the executive on this matter, an effective, though nonconfrontational means of securing the objective of transsexual equality in marriage law.

Legislative Sequels in Cases Where a Subsection 4(2) Declaration of Incompatibility Has Been Issued

Contrary to the Lord Chancellor's expectations and, indeed, the structure of the 1998 Act, subsection 3(1) has not assumed in practice the function of the Act's principal remedial mechanism (with section 4 fulfilling the default role to be invoked in those "rare" cases where subsection 3(1) could not be invoked). This much is evident from the fact that, according to Lord Steyn, by June 2004 there were only ten instances of a subsection 3(1) strained

97 Hickman, *supra* note 58 at 332.

interpretation.[98] In the period June 2004 to May 2006, subsection 3(1) had been invoked five further times to bring about compatibility with the Convention. By comparison, up to May 2006, some eighteen subsection 4(2) declarations had been made. Of these, four have been overturned on appeal, while in three further cases, the relevant declaration is subject to appeal.

In respect of those section 4 declarations whose legality has not been challenged (or, if so, have survived appeal), the parliamentary and executive reaction has nonetheless tended to be constructive.[99] For example, in *R. v. Mental Health Review Tribunal (North and East London),* the reverse onus of proof in mental health review tribunal procedure — requiring detained persons to show why continued detention is not justified — was deemed by the Court of Appeal to violate Articles 5(1) and (4) of the *Convention.*[100] In response to the subsection 4(2) declaration, not only was a Remedial Order brought into force putting the onus of proof on the state,[101] but the Secretary of State set up an *ex gratia* compensation scheme for those who had been adversely affected under the previous rule. Likewise, the automatic penalty scheme created under the *Immigration and Asylum Act 1999*[102] and imposed on persons transporting clandestine entrants to the U.K. was found in *International Transport Roth GmbH* v. *Secretary of State for the Home Department* to be incompatible with Article 6(2) of the *Convention.*[103] Parliament's response to the incompatibility is to be found in the *Nationality, Immigration and Asylum Act 2002.*[104] As was mentioned previously, the decisions to grant declarations of incompatibility in *Bellinger*[105] and *on the application of Anderson* were influenced by the imminence of legislative reform.[106] As a result of *Bellinger*, the *Gender Recognition Act 2004*[107] was passed to give legal status to persons with an acquired gender. In *on the application of Anderson* the Home Secretary's power to control the release of mandatory life prisoners was removed by the *Criminal Justice Act 2003.*[108]

98 *Ghaidan, supra* note 93 at para. 39.

99 Full details of the legislative sequels are published in Joint Committee on Human Rights 19th Report HL 112/HC 552 (2004-5) Appendix 8 *Memorandum from the Department of Constitutional Affairs: Table of declarations of incompatibility made under s. 4 of the Human Rights Act 1998.*

100 *R (H) v. London North and East Mental Health Review Tribunal* [2002] QB 1, [2001] EWCA Civ 415. The infringing provisions were ss. 72-3, *Mental Health Act 1983* (U.K.), 1983, c. 20.

101 *Mental Health Act* 1983 Remedial Order 2001/3712, Art. 3.

102 *Immigration and Asylum Act 1999* (U.K.), 1999 c. 33.

103 [2003] QB 728.

104 *Nationality, Immigration and Asylum Act 2002* (U.K.), 2002, c. 41 Schedule 8.

105 *Bellinger, supra* note 77 and see Nicol, "Gender Reassignment," *supra* note 86.

106 Kavanagh, "A More Contextual Approach," *supra* note 87; and Kavanagh, "The Elusive Divide," *supra* note 80.

107 *Gender Recognition Act 2004* (U.K.), 2004, c. 7.

108 *Criminal Justice Act 2003* (U.K.), 2003, c. 44. Sections 303(b), 332 and Schedule 37(8) para 1,

Among the category of incompatibility declarations to date, the House of Lords decision in *A. v. Secretary of State for the Home Department* and its legislative sequel is worthy of particularly close attention.[109] The forceful rejection in *A.* of a central aspect of the Blair Government's antiterrorist measures prompted a principled discussion in both Houses of Parliament about the deprivation of liberty at times of public emergency. The legislative sequel to *A.* offers an example of how dialogue between the courts and the legislature can prompt closer and informed legislative scrutiny of executive proposals.

In the aftermath of the terrorist attack in New York on September 11, 2001, the U.K. Parliament enacted the *Anti-Terrorism, Crime and Security Act 2001* (*ATCSA*).[110] Within Part IV of *ATCSA*, section 23 provided for the indefinite detention of foreign nationals reasonably suspected of being international terrorists (or being linked to international terrorist groups) who could not be deported to another country because of a risk that they would be subject to torture in contravention of Article 3 of the *European Convention on Human Rights*.[111] The same detention powers did not exist in respect of U.K. nationals suspected of involvement in terrorist activities. In December 2001, the U.K. Government formally notified the Secretary General of the Council of Europe that the U.K. sought in respect of Part IV of *ATSCA* to enter a derogation to Article 5(1)(f) of the *European Convention*.[112] Article 15 of the *Convention* allows a derogation from some *Convention* guarantees "in time of war or other public emergency threatening the life of the nation." To be lawful, Article 15 further states that a derogation must, however, be "strictly required

repealing s. 29 of the *Crime (Sentences) Act 1997, supra* note 91.

109 *A v. Secretary of State, supra* note 51. For comment and analysis, see *inter alia* David Feldman, "Human Rights, Terrorism and Risk: The Roles of Politicians and Judges" (2006) Public Law 364; David Feldman, "Proportionality and Discrimination in Anti Terrorism Legislation" (2005) 64 Cambridge Law J. 271; Brice Dickson, "Law versus Terrorism: Can Law Win?" (2005) European Human Rights Law Rev. 11; and Clive Walker, "Prisoners of 'War All the Time'" (2005) European Human Rights Law Rev. 50.

110 *Anti-Terrorism, Crime and Security Act 2001* (U.K.), 2001, c. 24.

111 Section 23(1) of the *Anti-Terrorism, Crime and Security Act 2001* states:

> A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by (a) a point of law which wholly or partly relates to an international agreement, or (b) a practical consideration.

112 Article 5(1) of the *European Convention on Human Rights* provides:

> No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

by the exigencies of the situation" and not be "inconsistent with [a state's] other obligations under international law."[113] The phrase "strictly required" is understood to mean that any derogating measures ought not to be more extensive, or endure for longer, than is absolutely necessary. The derogation was given effect in domestic law by an order made by the Home Secretary, using powers conferred on him under section 14 of the *Human Rights Act 1998*.[114] The appellants now challenged the validity of the derogation order, arguing that U.K. had failed to meet each of the requirements of Article 15 of the *Convention* and that, accordingly, the derogation was invalid.

In *A. v. Secretary of State for the Home Department*, the House of Lords accepted that the U.K. Government was entitled to conclude that there was a public emergency. Nonetheless, it found for the appellants on the grounds that indefinite detention was not a proportionate restriction of liberty (Article 5) and, further, that the provision discriminated in an unjustified way between U.K. and foreign nationals (Article 14) since the risk to U.K. security from suspected foreign terrorists was not qualitatively different from that posed by suspected U.K. terrorists.[115] The 2001 derogation order was quashed and the court issued a declaration that section 23 was incompatible with Articles 5 and 14 of the *Convention*.[116]

The response of the Government was to let the offending temporary emergency provisions lapse. In its place, the Government proposed the introduction of "control orders" in the *Prevention of Terrorism Bill 2005*,[117] which, in turn, met with considerable parliamentary opposition. Successive amended versions of the bill were sent back and forth between the House of Commons and the House of Lords. The Lords wanted greater judicial input in the making of control orders, a higher burden of proof before an order could be made and a "sunset" clause to apply after a year of the act's operation, with a review by Privy Councillors. On 10 and 11 March 2005, the upper

113 For European jurisprudence on the existence of a "public emergency" and the European Court's role in reviewing public emergency derogations, see *Lawless v. Ireland* (No.3) (1961), 1 EHRR 15 (European Court of Human Rights); *The Greek Case* (1969), 12 YB 1 (European Commission on Human Rights); *Ireland v. United Kingdom* (1978), 2 EHRR 25 (European Court of Human Rights); and *Brannigan & McBride v. United Kingdom* (1993), 17 EHRR 539 (European Court of Human Rights).

114 *The Human Rights Act 1998* (Designated Derogation) Order 2001 (SI 2001/3644).

115 It followed that the derogating measures failed to meet the requirement in Article 15 of not being inconsistent with the U.K.'s other international law obligations.

116 The ruling was by a panel of nine Lords Ordinary of Appeal, of whom Lord Walker of Gestingthorpe was the sole dissenter.

117 The bill received Royal Assent and is now the *Prevention of Terrorism Act 2005* (U.K.), 2005, c. 2.

chamber sat for some thirty hours debating the bill.[118] Finally, the deadlock was ended when the Government made concessions on the sunset clause and accepted arguments for a review of the act after its first year of operation.

A. v. Secretary of State for the Home Department provides a useful example of the courts making appropriate resort to principled-proposing dialogue via section 4. The court made clear its view on the violation of foreign nationals' human rights, and it was against this background that a more principled and detailed review by the legislature occurred in which the Government's initial proposals were watered down. The appropriateness of section 4 in this context is pointed up by the fact that an act that so blatantly discriminated against foreign nationals in a disproportionate manner could not have been given a subsection 3(1) "robust interpretation" to bring in it into line with *Convention* norms. To have rendered the offending provision non-discriminatory would have given it a meaning that "departed substantially form a fundamental feature of the Act."

VI. CONCLUSION

Commitment to the concept of human rights is a defining characteristic of western democracies' constitutionalism in the post Second World War era. The ideals of individual freedom and the equal worth and dignity of all persons enjoy a hitherto unimagined level of endorsement in national legal systems as well as in the international legal system. Of course, it is a matter for each state to decide how best to protect these ideals, bearing mind the distinct historical traditions and practices that are to be found at home.[119] Nonetheless, the assertion by Lorraine Weinrib in an article about the *Canadian Charter of Rights and Freedoms*[120] that "democracy in the multicultural, constitutional state can no longer amount to the election of a temporary, all powerful government, sustained by and sustaining the cultural preferences of the historical majority,"[121] may also be thought to capture a key feature of the new constitutional settlement in the United Kingdom. The argument in this article

118 For a flavour of these exchanges, see (2004-5) House of Lords Debates, Vol 4670, col 848, 999, 1019; and see D. Hoffman, "Prevention of Terrorism Act 2005 c. 2" *Current Law Statutes Annotated* (London: Butterworths, 2005).

119 See Jürgen Habermas, "The European Nation State. Its Achievements and its Limitations. On the Past and Future of Sovereignty" (1996) 9 Ratio Juris 125.

120 *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1989 (U.K.), 1982, c. 11.

121 Lorraine Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada's Constitution" (2001) 80 Canadian Bar Rev. 699 at 702.

has been that, although technically repealable, the *Human Rights Act* is best understood as stating a new constitutional relationship between Parliament and the courts in which each is able to make a distinctive contribution to the furtherance of rights protection. In this new constitutional order, democratic decision-making does not simply mean securing the approval in legislatures of temporary political majorities.[122] Instead, there now exists a more rounded understanding of constitutionalism in which the courts share in the task of policing the boundaries of a rights-based democracy with the legislature and executive. The evidence presented in this article points to a rather sophisticated understanding on the part of the courts of the possibilities and limits of judicial contributions to rights protection. The first six years of the *Act*'s operation reveal a nuanced, flexible jurisprudence that allows for robust judicial protection of rights through strained interpretation in certain cases, while opting for declarations of incompatibility in others. In the case of the latter, a review of legislative aftermaths indicates that this weaker form of dialogue has proved capable not only of forcing both the executive and legislature to take matters of principle seriously, but, on a number of occasions, of prompting the amendment of the offending statutory provisions. Talk of "judicial overkill" has thus been shown to be wide of the mark. By contrast, the Lord Chancellor's prediction in 1997 of a new era of dynamic cooperation between the courts, executive, and Parliament has been proved right, even if, at that time, he understated the role that would be played by section 4 of the 1998 *Act*.

Nonetheless, future judicial defences of individual liberties, whether via section 3 or section 4, in the face of countervailing public interests such as national security are likely to test the commitment of politicians and the wider electorate to the scheme of rights protections laid down in the *Human Rights Act 1998*. Indeed, the very success of principled judicial determinations in cases such as *A. v. Secretary of State for the Home Department* has already begun to generate populist pressures to modify the *Human Rights Act 1998* or even abandon the legislation in its entirety. Thus, after a High Court ruling that blocked the deportation of nine Afghan refugees who had hijacked a plane and landed in the United Kingdom,[123] Prime Minister Blair described the decision as "an abuse of common sense"[124] and was reported by Downing Street "to be determined to find a way round such "barmy" rulings." The

122 Jeffrey Jowell, "Judicial Deference: Servility, Civility or Institutional Capacity" (2003) Public Law 592 at 596-99.

123 *The Queen on the applications of S and others v. Secretary of State of Home Secretary*, [2006] EWHC 1111.

124 David Pannick, "An excuse for the incompetent, a diversion for the ill-informed" The *Times* (23 May 2006) [Pannick].

same source was also quoted as saying that, although judges were supposed to balance the rights of the individual and the interests of the community, "it is clear that sometimes they don't."[125] Options said to be under consideration included amending the *Human Rights Act 1998* to facilitate the deportation of terrorist suspects on the basis of "memorandums of understanding" that deportees would not face torture upon return. For his part, the new leader of Her Majesty's Opposition David Cameron MP has gone on record as stating that an incoming Conservative administration might "reform, replace or scrap the Human Rights Act."[126] At much the same time, *The Sun* newspaper — a tabloid with daily sales in excess of 3 million copies[127] — announced a campaign to "'expose human rights madness wherever we see it.'"[128] While it is difficult to know exactly how these coalescing political forces will play out, it is clear, in the short term at least, that defenders of the new constitutional landscape have their work cut out.

125 Ned Temko & Jamie Doward, "Revealed: Blair attack on human rights law" *The Observer* (14 May 2006).

126 See Pannick *supra* note 124.

127 Independently produced figures for May 2006 indicate an average daily sales of 3,149,029 copies, online, *Newspaper Marketing Agency* <http://www.nmauk.co.uk>.

128 Quoted in Pannick, *supra* note 124.