Tom Hickman

The New Zealand Bill of Rights Act going beyond declarations

The process of capturing and entrenching fundamental rights remains very much a live one in both New Zealand and the United Kingdom. In both countries there is pressure to move on from the current bill of rights legislation: the UK Human Rights Act 1998 (HRA) and the New Zealand Bill of Rights Act 1990 (NZBORA). While the two jurisdictions are subject to quite different political and cultural pressures, there remains a great deal of scope for exchange of ideas and experiences.

The Constitutional Advisory Panel report has recommended that the New Zealand government set up a process with public consultation and participation to examine options for, among other things, improving compliance by the executive and Parliament with standards contained in the NZBORA (or, by implication, any future bill of rights) and giving the judiciary powers to review legislation for consistency with the NZBORA. My argument is that New Zealand should not be persuaded to adopt the approach to judicial review of legislation found in the HRA, what I will call for ease the 'declaration of incompatibility model'. To meet the objectives identified by the Constitutional Advisory Panel, New Zealand should go a step further than the UK in protecting human rights against legislative encroachment. The declaration of incompatibility model is unprincipled and unfair, and, moreover, is not a particularly effective mechanism for securing compliance of the legislature with protected rights through the courts. It serves as a useful constitutional fall-back or placeholder, which is the function it performs in the UK; it should not be viewed as a principled destination for constitutional reform.

These arguments challenge the views of many that the declaration of incompatibility model is both principled and effective, including the views of a number of scholars whose writings portray it as inculcating a form of debate or 'dialogue' with political branches. In challenging this view I want not only to draw attention to the theoretical problems with such a view, but also to descend from the ivory towers of constitutional and political theorists to consider how the model operates in practice and its

Tom Hickman is a reader in public law at University College London and a barrister at Blackstone Chambers.

practical deficiencies as a mechanism of ensuring that legislation is human rights compliant.

The declaration of incompatibility model

Two features of the HRA are relevant to present discussions. The first relates to the *nature* of the rights to which it gives effect. These are the rights set out in the European Convention on Human Rights. Most of 'the Convention rights', as the act describes them – albeit not quite all of them – are scheduled to the HRA and given effect by section 2.

The second feature of the HRA that I wish to highlight is the *manner* in which it gives effect to the convention rights. It does so in three ways. Section 6 of the HRA makes it unlawful for any public authority to act incompatibly with the convention rights. Section 3 of the HRA requires all legislation to be read as far as it is possible to do so in a manner that is compatible with the convention rights. Finally, section 4 of the HRA allows higher courts in the UK to make a formal declaration that primary legislation does not comply with a convention right. The way this was reconciled with parliamentary sovereignty was by the stipulation that such a declaration does not affect the 'validity, continuing operation or enforcement' of that legislation (s.4(6)(a)) and 'is not binding on the parties to the proceedings in which it is made' (s.4(6)(b)). It is this final 'declaratory' feature of the HRA that I wish to focus on most directly.

Legislative compatibility with protected rights

Let me turn then to New Zealand. In its report the Constitutional Advisory Panel registered support in New Zealand for 'exploring increased judicial powers that preserve parliamentary sovereignty … to ensure legislation is consistent' with the NZBORA (Constitutional Advisory Panel, 2013, p.56). The NZBORA does not contain any express mechanism for scrutinising legislation and this is an obvious area for considering enhancement. Such a power would also tie in with another of the panel's recommendations, which is to improve compliance by Parliament with the standards set out in the NZBORA.

In these comments the Constitutional Advisory Panel has, I suggest, nodded in the direction of the HRA and the power provided by section 4 for courts to declare primary legislation incompatible with the convention rights. While there is no such power in the NZBORA, the New Zealand courts have nonetheless taken a significant step in this direction, holding that the courts will indicate whether a particular legislative provision constitutes a justified limitation on a protected right in circumstances in which it is unable give the legislation a rights-consistent reading under section 6 of the NZBORA. The courts have said that they will give such an indication for the benefit of the New Zealand Parliament, society as a whole and the United Nations Human Rights Committee.[1] In *R v Hansen*, Justice McGrath stated that '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 … there is a measure on the statute book which infringes protective rights and freedoms'. He also went as far as to say that there is a 'reasonable constitutional expectation that there will be a reappraisal' of the measure by the government and the executive.[2] It has even been suggested that in an appropriate case the court might make a more formal declaration recording the fact that the legislation has been found to be inconsistent with the NZBORA, although the jurisdiction to do so has not yet been determined.[3]

There is thus no mechanism under the NZBORA to bring a challenge on the ground that legislation is *not* compatible with protected rights, as opposed to a challenge claiming that it *can be made* compatible.

This nonetheless falls short of a declaration of incompatibility in two important respects. First, the courts' responsibility to provide an advisory indication was expressed by Justice McGrath as arising in any case in which it is considering whether legislation can be read compatibly with protected rights under section 6 but concludes that it cannot be. On this approach, a claim cannot be brought squarely challenging legislation as contrary to protected rights. In an excellent article, Claudia Geiringer has suggested that the advisory indication might be sufficiently elastic to provide courts with a freestanding jurisdiction to make declarations of inconsistency (Geiringer, 2009). But that is not presently the law, as Geiringer herself accepts. In *R v Manawatu* the Supreme Court refused permission to challenge legislation concerned with criminal appeals, noting: 'It is not suggested that it is open to the Court to interpret the legislation in a way that would be more consistent with rights protected by the Bill of Rights', and therefore the court had no jurisdiction.[4] There is thus no mechanism under the NZBORA to bring a challenge on the ground that legislation is *not* compatible with protected rights, as opposed to a challenge claiming that it *can be made* compatible.

From my admittedly distant perspective as an English lawyer, it would seem very difficult for the courts to create such a right of action – which is really what it would amount to – that the New Zealand Parliament has not seen fit to include in the NZBORA. The fact that bill of rights reform continues to be a live issue, and the fact that such declaratory powers have been expressly included in the HRA and the two subsequent Australian bills of rights, makes such a judicial innovation even more unlikely because it underscores the fact that it is a matter for legislative and not judicial innovation.

There is also an important practical issue here. Unless a rights-consistent interpretation has substantial merit, litigants are unlikely to bring proceedings if all they are likely to end up with is an advisory indication in a judgment dismissing their case. All they will have to take away with them is a judgment of the court that records their lack of success and the fact that the legislation itself authorises a violation of protected rights.

Furthermore, since the costs rule in New Zealand is the same as in England, namely that costs follow the event, this holds the consequence that if a litigant fails to obtain a favourable reading of legislation under section 6 they will be liable not only for their costs but for the costs of the other side, since they will have lost the case. A litigant who obtains a judgment that contains an advisory indication that legislation is contrary to protected rights will not only come away empty-handed; they will come away empty-pocketed as well. If declarations of incompatibility under the HRA are, as they have been aptly described by one commentator, a constitutional 'booby prize' (Leigh, 2002, p.324), an advisory indication under the NZBORA – at least in their current form – is little more than a constitutional custard pie.

Any present jurisdiction of the New Zealand courts to give advisory indications is therefore necessarily far more circumscribed in law and in its practical availability than a declaration of incompatibility under the HRA. Indeed, I suggest that in reality it is no different from the ability of courts in *any* case to state that a statute that falls to be applied in that case causes unjust or unintended effects. Judicial statements of this kind are not uncommon, they are not by any means exclusively a public law phenomenon, and they often provoke legislative reform. But no well-advised litigant would bring a claim in the hope of getting such a helpful comment from a judge in the course of losing a case.

The second reason that the position in New Zealand is substantially different to the declaration of incompatibility model is that declarations of incompatibility in the UK are not entirely devoid of legal effect. When made, they trigger a power, contained in section 10 of the HRA, for the executive to make amendments to offending legislation by way of statutory instrument if there are compelling reasons for doing so. This is a significant feature of the HRA and one that has been under-analysed. It has much in common with section 2(2) of the European Communities Act 1972, which permits amendments to primary legislation by way of statutory instrument to give effect to European Union law. Section 2(2) of that act provides a mechanism for making necessary changes required by EU law; section 4 of the HRA provides a mechanism to give effect to the European Convention on Human Rights as declared domestically or in Strasbourg, at least in cases where Parliament cannot be expected to act.

I have previously argued that section 10 supports the view that the HRA is best understood as expressing a form of constitutionalism in which the government and Parliament should accept the findings of courts as to the meaning of the convention rights, rather than providing, as some have argued, a means for engaging in a debate about their scope and content (Hickman, 2010, p.83). This is because it suggests that declarations of incompatibility should lead to a change in the law, but since judges are not terribly good at writing law, section 10 enables this to be done by delegated legislation. In relation to New Zealand, the key point is that any advisory declarations under the NZBORA do not trigger any such implementing power.

Given the current position under the NZBORA, it is unsurprising that New Zealand would consider following the UK in enacting a declaration of incompatibility power. Consultation of the various UK reports on bills of rights would provide support for such a move. One 2007 report praised the way that the HRA scheme, like other recent Commonwealth bills of rights, promotes dialogue between the courts and political branches, and was favourable to the declaration of incompatibility model (JUSTICE, 2007). The UK Parliament's Joint Committee on Human Rights stated in its 2008 report that going further and conferring on the courts a power to strike down legislation would be 'fundamentally at odds' with the tradition of parliamentary sovereignty, and it said the declaration of incompatibility was 'innovative and widely admired'. It also recommended the adoption of the additional reporting requirement found in the Australian Capital Territories Human Rights Act 2004 and the Victoria Charter, 2006, which adopted the declaration of incompatibility model but with some modifications, including a requirement for the government to report to Parliament when such a declaration is made (Joint Committee on Human Rights, 2008, para. 218).

One 2007 report praised the way that the HRA scheme, like other recent Commonwealth bills of rights, promotes dialogue between the courts and political branches, and was favourable to the declaration of incompatibility model ...

Equally, a recent commission looking at a bill of rights for the UK found this to be one of the few issues on which its members could agree. They reported that the declaration of incompatibility has been 'widely seen as striking a sophisticated and sensible balance between Parliament and the courts'. The commission concurred with this view.[5]

I, however, do not. I do not consider that the declaration of incompatibility is sophisticated, fair or consistent with the constitutional traditions of the UK, or, for that matter, New Zealand. Nor do I think it is particularly effective. It is a fudge. I do not suggest that it is without

any merit. It has considerable merit. But its merit derives from the fact that it is a fudge. In my view it is useful as a constitutional fall-back solution or – the function it currently occupies in the UK – as a constitutional placeholder.

What is wrong with the declaration of incompatibility model? The vices are principally three.

Decoupling rights and remedies

The declaration of incompatibility is unfair and unprincipled because it denies individuals whose rights have been infringed any remedy in domestic law, even though the law has been found to be contrary to a basic, constitutional right. It decouples an individual's so-called fundamental right from the ability to obtain an effective remedy. Perhaps the most stark example of the unprincipled nature of this decoupling arises in the context of criminal convictions. Without a power of invalidation or disapplication of legislation which has been found to violate a protected right, a defendant whose conviction is found to be unfair and unsafe because of the necessary effect of primary legislation would nonetheless stand convicted.

It might be objected that while it might be the case in strict legal terms that a declaration of incompatibility does not provide a remedy, the *substance* of the position is quite different. It might be said that of the 20 declarations of incompatibility that had been made in the UK by May 2013, all but one (prisoner voting rights) had been the subject of either secondary or primary legislation removing the violation, or were already covered by legislative programmes current at the time the declaration was made.

There are four reasons why a focus on the political response does not provide an answer. The first is that it does not meet the point that as a matter of principle it is constitutionally unsatisfactory for the courts to be given a power to declare whether a fundamental right has been violated but to deny the courts the power to provide a remedy for a violation they identify. Section 4 is clear: legislation remains in force and effect and the declaration is not binding, even on the parties.

King has shown that there have been substantial periods of delay after declarations of incompatibility have been made, ... this ... raises serious questions about the compatibility of the declaration of incompatibility model with our constitutional traditions.

It has been suggested that this arrangement is in the best traditions of the British constitution. I would argue that actually it is *contrary* to our most basic constitutional traditions. It is hard to find areas of agreement between Dicey and Bentham, but one thing they did agree on was an opposition to abstract declarations of rights that were not legally enforceable. Bentham famously described them as 'nonsense upon stilts' (Bentham, 1843, p.501). Likewise, Dicey emphasised that such declarations were objectionable unless the 'rights of individuals are really secure' through the provision of legal remedies. He wrote:

> any knowledge of history suffices to show that foreign constitutionalists have, while occupied in defining rights, given insufficient attention to the absolute necessity for the provision of adequate remedies by which the rights they have proclaimed might be enforced. … On the other hand, there runs through the English constitution that inseparable connection between the means of enforcing a right and the right to be enforced … . (Dicey, 1920, pp.193-4)

Dicey's censure of foreign proclamations of rights applies equally to section 4 of the HRA. Lord Bingham more recently expressed this idea in terms of a rule of public policy. He said: 'the rule of public policy which has first claim on the loyalty of the law' is 'that wrongs should be remedied'.[6]

Much more could be made of this point, but reference to these authorities grounds my submission that the correlativity of right and remedy is at the heart of our constitutional traditions, and that it is associated with an aversion to abstract declarations of rights which fail to provide concrete benefits to individuals. Indeed, it is the essence of the rule of law as it has been secured and understood under the British constitution that individuals can obtain relief from the courts where the law is infringed; for as long as the courts do not have any power to provide a remedy for a breach of a right, they are therefore placed in a constitutionally unprincipled and unsatisfactory situation.

The second reason why it is no answer to look at the legislative and executive responses to declarations of incompatibility to identify an effective remedy is that it remains open to the government and Parliament to do nothing at all in response to such a declaration. It is difficult to regard the mere power to provide a remedy as even an effective *political* remedy. This has been recognised by the Grand Chamber of the European Court of Human Rights, which has held that unless and until individuals can be completely confident of receiving a satisfactory political response following a declaration of incompatibility, section 4 of the HRA does not provide an effective domestic remedy that individuals must exhaust before applying to the Strasbourg court.[7]

The third reason why it is no answer to look at the political postscript to declarations of incompatibility is that the political responses to declarations of incompatibility are rarely retrospective,

and therefore they fall short of providing a remedy even where they are forthcoming. Recent research by Jeff King at University College London has shown that of the 20 declarations of incompatibility then made, there is only one instance in which remedial legislation following a section 4 declaration has been retrospective (King, 2014).

The fourth point relates to delay. Even if a political remedy *is* forthcoming, it may not be forthcoming for a considerable period of time. Again, we have the benefit of recent empirical work by Jeff King to highlight this point. King has shown that there have been substantial periods of delay after declarations of incompatibility have been made, with most cases taking over a year to result in remedial measures (ibid., pp.7-8). This is not a marginal issue, but also raises serious questions about the compatibility of the declaration of incompatibility model with our constitutional traditions. Chapter 29 of the Magna Carta, which is still on the statute book, provides: 'we will not deny or defer to any man either Justice or Right'.

Incentives to bring claims

Connected to the fact that there is no effective remedy for people who obtain declarations of incompatibility is the fact that there is often a very weak incentive for people to bring claims, particularly where it is the only remedy they can realistically expect to obtain. Therefore, the problem is not just that individuals do not get an effective remedy if they manage to obtain a declaration of incompatibility, but that an unknown number of cases never get brought before the courts at all because of the lack of incentives to litigate. In designing a bill of rights which, in the words of the Constitutional Advisory Panel, is intended to be a tool to 'assess legislation for consistency with the [NZBORA]' and improve 'compliance by … Parliament with the standards in the Act', it is important that potentially rights-defying legislation is actually brought before the courts and that there is an appropriate balance of incentives to ensure this.

To be sure, the availability of a declaration of incompatibility does provide *something* of an incentive; more, certainly, than the prospect of an advisory indication from the New Zealand courts. There are contexts, particularly where there are wider interests at stake, where claims will be brought merely for a declaration of incompatibility in the hope of a favourable change in the law. Such cases are more likely, certainly in England and Wales, where the claimant can obtain public funding. Where legal aid is available individuals do not have to pay their lawyers, and the claimants also have costs protection against the costs of the other side's lawyers if the case is lost.[8] Legal aid will sometimes be available, particularly in cases where there is a wider public interest in the claim because of the potential benefits to other people if the primary legislation is amended, and in such cases there is perhaps more prospect of claims being pursued.

However, take the case of an ordinary private litigant or company. Ordinarily, the costs and risks of public law litigation are high for such litigants; they only bring claims if faced with little alternative (a separate problem which I will reluctantly leave aside). But then add to the mix the fact that even if such potential litigants succeed they will not obtain any remedy from the court that will affect their rights one jot. Can it really be expected that they would bring a claim to the courts for a declaration of incompatibility?

To conclude on this point about incentives, I suggest that while the declaration of incompatibility model might look like a neat way of reconciling sovereignty with human rights from a distance, or from the ivory towers of the academy, one has a different picture if you adopt the perspective of a lawyer advising his or her clients on whether they should litigate in circumstances in which primary legislation violates their human rights. Looked at from this perspective, the declaration of incompatibility does look decidedly unappealing; and if that is so, then the declaration of incompatibility model, although providing better incentives for better human rights scrutiny of legislation than is found under the NZBORA, still fails to provide an effective means of ensuring that legislation is human rights compliant.

Enhancing democratic legitimacy

We have seen that it has been suggested that declarations of incompatibility are sophisticated. It is said that they locate the responsibility for infringements of individual rights with Parliament, and it is also said that they inculcate a dialogue with the political branches. Again, I disagree. I will take first the point that the declaration of incompatibility model locates responsibility for legislative infringements of protected rights with Parliament.

… a democratic principle does tell strongly in favour of allowing Parliament … to have the last word on what the law should be, and that Parliament if it sees fit should be able to enact law knowing that it is contrary to fundamental rights.

Let us assume, as I happen to believe, that a democratic principle does tell strongly in favour of allowing Parliament (although not necessarily acting by simple majority) to have the last word on what the law should be, and that Parliament if it sees fit should be able to enact law knowing that it is contrary to fundamental rights. The problem with declarations of incompatibility is that they do not put the ball into Parliament's court. They trigger no more than a power in the government to amend the infringing provision. There is no mechanism at all for Parliament to express the view that it wishes the law to remain in its rights-infringing state. Although one might assume this from its inaction, it would be a dubious assumption to make, as in all likelihood Parliament would not have considered

the court's judgment. Moreover, the legislation will very likely have been enacted together with a declaration under section 19(1)(a) of the HRA that it is believed to be compatible with the European Convention on Human Rights. That belief is to be attributed to Parliament. If, therefore, it is desirable for responsibility for rights-defying laws to be located clearly with Parliament, the declaration of incompatibility model is not fit for purpose because Parliament has expressed no such intention, let alone done so unequivocally. Parliament instead should be required to make clear by an affirmative act that it does intend the legislation to continue in force, notwithstanding that it has been found to be incompatible with a protected right. This would ensure that Parliament clearly endorses and takes responsibility for laws that violate basic rights.

Indeed, the declaration of incompatibility is actually *less effective* at enhancing democratic responsibility for rights violations than the interpretation provision contained in section 3 of the HRA and section 6 of the NZBORA. Where the courts invoke these provisions to give legislation a rights-compliant interpretation, it remains open to Parliament to overrule the decision and make clear that the rights-violating effect is intended. This involves Parliament taking responsibility for the law by unequivocal positive action. And that will require a Parliamentary debate.

For this reason, to suggest that a section 4 declaration of incompatibility (which results in Parliament taking responsibility for rights violations, if it does intend them to continue, only by omission) is *more* effective at ensuring that Parliament considers and takes responsibility for legislation that infringes rights than a section 3 read-down seems to me to get things the wrong way around.

To my mind, a better system for ensuring that rights-defying laws remain law only if Parliament so intends, and which locates responsibility for rights-defying laws with Parliament, is a variant of the system under the Canadian Charter of Rights and Freedoms, 1982. That allows courts to invalidate laws, but permits legislatures to re-enact them, expressly stating that it is being done 'notwithstanding' that they are not compatible with convention rights.[9] This seems to me to better achieve the objective of ensuring Parliament addresses and takes responsibility for rights violations, and also preserves the ability of Parliament to have the last word. It also ensures that courts can provide remedies in a manner much more consistent with our constitutional traditions.

The purpose of bill of rights reform is not to give effect to international law, but to develop the constitutional evolution of New Zealand (of course this must be consistent with New Zealand's international obligations, but that is rather different).

It is also said that section 4 has the happy consequence of enabling a *debate* to take place between Parliament and the political branches as to what the scope of our rights should be. Stephen Gardbaum argues, for instance, that following a court pronouncement on legislation, the legislature should 'engage in a serious and principled reconsideration of the rights issue' (Gardbaum, 2013, p.89). Gardbaum is the latest and one of the most sophisticated proponents of this view, but this notion of dialogue under the HRA has been a common theme in academic writing on the HRA since its inception. Francesca Klug, for instance, has argued that section 4 of the HRA enables the courts to generate public debate about the scope of human rights (Klug, 2001, p.370). Tom Campbell has written that under the HRA the courts should be 'regarded as having the right to make only provisional determinations' which can 'be challenged and overturned' by Parliament (Campbell, 2001, p.82).

I have elsewhere explained why I regard this view as misguided and as resting on an inaccurate and undesirable conception of the separation of powers (Hickman, 2010, ch.3; Hickman, 2008). There is no difficulty in principle with Parliament having a residual power to enact legislation in the face of court judgments – precisely the power it has in respect of common law rights – but I do not think court judgments should be regarded as mere *provisional* determinations as to the scope or content of individual rights. That does not fit with what courts do or how they see their role, which is to determine what rights are. It would also undermine the legitimacy of judicial pronouncements if they were taken to be mere arguments for others – politicians – to accept or reject.

We must therefore conclude that the declaration of incompatibility model neither provides a good way of locating responsibility for legislation that violates fundamental rights with Parliament and the political branches, nor has the advantage of promoting a beneficial dialogue between courts and politicians.

The New Zealand situation

Now let us turn to New Zealand. I hope it can now be seen that New Zealand should be very cautious before going down the declaration of incompatibility model route. There are a number of reasons why it would be more problematic and less effective even than it is in the UK.

First, the context is quite different. New Zealand is not facing the problem that was addressed by the HRA of numerous applications being made each year to an international court, the judgments of which the government there is required to implement. The purpose of bill of rights reform is not to give effect to international law, but to develop the constitutional evolution of New Zealand (of course this must be consistent with New Zealand's international obligations, but that is rather different).

Second, there is also not the same safety net in New Zealand of an international court able to provide an individual remedy where the continuing effect of primary legislation denies an individual a remedy in the case brought before the New Zealand courts. In New Zealand a declaration of incompatibility would be the end of the road: consideration by the UN Human Rights Committee (which is not a court, which is not binding and which confers remedies) is not equivalent to an application to the European Court of Human Rights. The absence of a remedy issue is therefore more acute in New Zealand.

Third, the absence of an incentive for claims to be brought to test legislation would also be more pronounced in New Zealand. Two incentives that have played a part in litigation in the UK – the ability to disapply legislation within the scope of EU law; and the need to exhaust remedies under article 34 of the European Convention on Human Rights – do not arise in New Zealand. While there would be some cases brought and there would be more of an incentive for claims to test legislation than there is currently under the NZBORA, it is still likely to provide a very patchy approach to human rights protection.

I emphasise that these three points do not exhaust the reasons for not adopting a declaration of incompatibility; they *compound* the problems and deficiencies that are to be found in the declaration of incompatibility as it operates in the UK which I have set out above.

Tested against the objectives identified by the Constitutional Advisory Panel of an enhanced judicial power to ensure legislation complies with protected rights and that there are effective means of ensuring that Parliament complies with standards in the bill of rights, the declaration of incompatibility does not, I suggest, make the grade.

Conclusion

I hope I have said enough to suggest at least that New Zealand should be very cautious before adopting the mechanism for protecting human rights against legislative curtailment found in the HRA as a means of meeting the objectives identified in the Constitutional Advisory Panel report. The declaration of incompatibility model was developed in the context of the system of individual petition to the European Court of Human Rights, which does not pertain in New Zealand. As a system of giving effect to constitutionally protected rights, the declaration of incompatibility model, I have argued, is unfair, unprincipled and not particularly effective as a means of ensuring legislation is rights-compliant. The benefit of the declaration of incompatibility model is that it forms a reasonably workable placeholder in an ongoing process of constitutionalising human rights. But New Zealand should have higher ambitions. The Constitutional Advisory Panel report has higher ambitions for New Zealand. New Zealand already has a non-entrenched, non-supreme bill of rights. I doubt that it needs another one.

To contend that New Zealand, or the UK, should give fundamental rights entrenched and higher-order protection is not radical. Far from it: of the 53 members of the Commonwealth, almost every one gives fundamental rights such status in their law; a number still have final appeals in the UK before the very judges that decide the cases under the HRA (Leckey, 2015, ch.3). New Zealand and the UK, together with Australia, are outliers. New Zealand set the pace for the UK and Australia back in 1990. In this article I have set out the case for it doing so again.

1 *Moonen v Film and Literature Board of Review* [1999] NZCA 329; [2000] 2 NZLR 9.

2 *Hansen v R* [2007] NZSC 7; [2007] 3 NZLR 1 at [253]–[254].

3 *Hansen* at [153] (McGrath J); *McDonnell v Chief Executive of the Department of Corrections* [2009] NZCA 252, at [123(b)]; *Belcher v The Chief Executive of the Department of Corrections* [2007] NZCA 174 at [16]–[17]; *Miller v The New Zealand Parole Board* [2010] NZCA 600 at [75]; *Boscawen v Attorney-General* (No 2) [2008] 8 HRNZ 520 at [58]; [2009] NZCA 12 at [55]–[56]. It is also the case that the courts have suggested that they will not make a declaration where the rights infringement does not require section 5 to be considered: *McDonnell* at [123(C)]. However, in such cases the reason for not reading the legislation consistently with the protected right will be equally apparent from the judgment.

4 *Manawatu v R* [2007] NZSC 13 at [6]. And see also *R v Exley* [2007] NZCA 393 holding that no legitimate question of statutory interpretation arose in that case because the legislation was clear.

5 Commission on a Bill of Rights, *A Bill of Rights for the UK?: the choice before us* (Dec. 2012), <https://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf> at [69]; [96]. It was said consultees had had no appetite for a strike-down power; my consultation response was evidently not read.

6 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 663.

7 *Burden & Burden v UK* (2008) 47 EHRR 38, at [41]; see also Malik v UK App. No.32968/11 28 May 2013.

8 It is worth emphasising that this may be the costs not only of the government's lawyers but private parties or other organisations who have an interest in the legislation or who benefit from it.

9 It would be preferable if the notwithstanding clause only applied after a court judgment, whereas under the Canadian Charter it can be used pre-emptively. The 'override' is also adopted by the Victorian Charter, s.31.

References

Bentham, J. (1843) 'Anarchical fallacies', in *The Works of Jeremy Bentham*, vol. 2, Oxford: Clarendon Press

Campbell, T. (2001) 'Incorporation through interpretation', in T. Campbell, K.D. Ewing and A. Tomkins (eds), *Skeptical Essays on Human Rights*, Oxford: Oxford University Press

Constitutional Advisory Panel (2013) *New Zealand's Constitution: a report on a conversation*, Wellington: New Zealand Government, http://www.ourconstitution.org.nz/The-Report

Dicey, A.V. (1920) *Introduction to Study of the Law of the Constitution* (8th edn), London: MacMillan

Gardbaum, S. (2013) *The New Commonwealth Model of Constitutionalism: theory and practice*, Cambridge: Cambridge University Press

Geiringer, C. (2009) 'On a road to nowhere: implied declarations of inconsistency and the New Zealand Bill of Rights Act', *Victoria University of Wellington Law Review*, 40, pp.613-45

Hickman, T. (2008) 'Judges and politicians after the Human Rights Act 1998: a comment', *Public Law*, 84

Hickman, T. (2010) *Public Law After the Human Rights Act*, Oxford: Hart Publishing

Joint Committee on Human Rights (2008) 'A Bill of Rights for the UK?', HC 150-1

JUSTICE (2007) *A British Bill of Rights: informing the debate*, http://www.justice.org.uk/data/files/resources/11/A-British-Bill-of-Rights.pdf

King, J. (2014) 'Parliament's role following s.4 declarations of incompatibility', in M. Hunt, H. Hooper and P. Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit*, Oxford: Hart Publishing

Klug, F. (2001) 'The Human Rights Act – a "third way" or a "third wave" Bill of Rights', *European Human Rights Law Review*, 4, pp.362-90

Leckey, R. (2015) *Bills of Rights in the Common Law*, Oxford: Oxford University Press

Leigh, I. (2002) 'The UK's Human Rights Act 1998: an early assessment', in G. Huscroft and P. Rishworth (eds), *Litigating Rights: perspectives from domestic and international law*, Oxford: Hart Publishing