

## *Bill of Rights Reform and the Case for Going Beyond the Declaration of Incompatibility Model*

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*Taking as its impetus the recommendation of the New Zealand Constitutional Advisory Panel that consideration should be given to a greater judicial role in ensuring that Parliament complies with protected rights, the article contrasts the approach taken by the United Kingdom Human Rights Act 1998 to review of primary legislation with that taken by the New Zealand Bill of Rights Act 1990. Examining the power of the United Kingdom courts to declare legislation incompatible with protected rights — which has been widely praised in the United Kingdom and followed in two Australian jurisdictions — the article argues that it is unfair, unprincipled and not a particularly effective method of protecting rights against parliamentary encroachment. This is for three connected reasons: (1) it fails to afford an effective remedy to litigants who establish a violation of their rights; (2) it will often provide an inadequate incentive to potential litigants to commence proceedings testing legislation; and (3) it is neither well-suited to locating responsibility*

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*for legislative infringements of rights with Parliament nor should it be supported as a means of inculcating a “dialogue” between courts and politicians. The article goes on to identify several reasons why the declaration of incompatibility model is particularly unsuitable to the New Zealand context. It concludes that New Zealand should afford judges greater powers than they possess in the United Kingdom and move closer to a supreme law bill of rights, such as exist in most Commonwealth jurisdictions.*

## **I Introduction**

The process of capturing and entrenching fundamental rights remains very much a live issue 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 (BORA). Whilst both jurisdictions are subject to quite different political and cultural pressures, there remains a great deal of scope for exchange of ideas and experiences.

The impetus for the thoughts contained in this article is the recent report of the New Zealand Constitutional Advisory Panel published in November 2013 (CAP Report). The CAP Report provides an eloquent “snapshot of a developing conversation” in New Zealand about constitutional reform.<sup>1</sup> The report is intended to provide a platform for debate rather than making reform proposals. It is extremely broad in scope, ranging across a spectrum of constitutional issues. Unlike reports published in the UK on bill of rights reform, and much to its credit, the CAP Report does not seek to locate the debate within existing frameworks for thinking about bills of rights and it is not — again, unlike those in the UK — bogged down in comparative learning on bills of rights. It provides a fresh and open-minded basis for developing unique solutions to the issues raised.

The CAP Report has recommended that the New Zealand government set up a process with public consultation and participation to examine options for (amongst other things) improving compliance with the executive and Parliament with standards contained in the BORA or any future bill of rights and for “giving the Judiciary powers to review legislation for consistency with [the BORA]”.<sup>2</sup> This is the article’s focus. My argument is that New Zealand should not be persuaded to adopt the approach to judicial

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1 Constitutional Advisory Panel *New Zealand’s Constitution: A Report on a Conversation* (Ministry of Justice, November 2013) at 3 [CAP Report].

2 At 48.

review of legislation found in the HRA, what I will term the “declaration of incompatibility model”. I suggest that to meet the objectives identified by the CAP, New Zealand should go a step further than the UK in protecting human rights against legislative encroachment. I will argue that the declaration of incompatibility model is unprincipled and unfair and, moreover, that it is not a particularly effective mechanism for securing legislative compliance with rights through the courts. The declaration of incompatibility model, I will suggest, serves as a useful constitutional fallback or placeholder, which is the function it performs in the UK. But it should not be viewed as a principled destination for constitutional reform.

In advancing these arguments I am challenging 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 practical deficiencies as a mechanism of ensuring legislation is human rights compliant.

My main arguments in this article serve equally as arguments for constitutional reform in the UK, that is, for the UK going beyond the HRA and adopting a more robust constitutional bill of rights. But I also go further in relation to New Zealand by suggesting that there are additional reasons for not adopting the declaration of incompatibility model here. To put this another way, the declaration of incompatibility model is *more unsuitable* to New Zealand than it is to the UK.

I must accept that some of my arguments, by exposing the defects in the declaration of incompatibility model, would also support a position of “no change” in New Zealand (or a backward step in the UK). The problems I identify result from the fact that the declaration of incompatibility model occupies a middle ground between a form of supreme law bill of rights and a bill of rights, such as the BORA, which is only interpretive in its effect. However, a position of “no change” would not meet the objectives identified by the CAP.

In making this case, I am also aware of the preference that is shared by New Zealand and the UK for gradual constitutional evolution over radical overhaul. To this I offer two responses. The first is that both countries are also accustomed to taking significant constitutional steps from time to time. This is shown by the enactment of the BORA and the HRA themselves. The second response is that the approach that I outline here as a preferred approach is not *radical*. It falls short of giving courts the same power as they enjoy in almost every other Commonwealth country. It also falls short of giving the courts the same power as UK courts currently enjoy in

relation to primary legislation in Scotland, Northern Ireland and Wales and in respect of European Union law. In each of these cases, the courts have power to invalidate or disapply primary legislation including for breach of the European Convention on Human Rights (ECHR)<sup>3</sup> and there is no possibility in these contexts of subsequent legislative overrule.

So with these preliminaries in mind, let me turn to my argument.

## II The HRA

There are three features of the HRA which I need to identify in order to set the scene. The first relates to the *nature* of the rights that it gives effect to. These are the rights set out in the ECHR. Most — but not quite all — of “the Convention rights”, as the HRA describes them, are scheduled to the HRA and given effect by s 2. The HRA thus gives domestic effect to international treaty obligations.

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 possible to do so in a manner that is compatible with the Convention rights. Finally, s 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<sup>4</sup> and “is not binding on the parties to the proceedings in which it is made”.<sup>5</sup>

The third feature of the HRA relevant for our purposes relates to its *status*. The HRA was not intended to be a final constitutional settlement. It was intended to be a first stage in a process of more thoroughgoing constitutional reform, including the potential for a written constitution for the UK and a bill of rights. In the parliamentary debates, the Bill was described as a first step in a constitutional journey and bill of rights reform has never been far from the political agenda.

Following the 2010 general election, which resulted in a coalition government between the Conservative Party and Liberal Democrats, the coalition agreement committed the government to investigate the possibility of a new bill of rights to replace the HRA but, in a concession to the Liberal

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3 European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (opened 4 November 1950, entered into force 3 September 1953) [ECHR].

4 Section 4(6)(a).

5 Section 4(6)(b).

Democrats, on the basis that it would ensure that the ECHR “continue[s] to be enshrined in British law”.<sup>6</sup> With the parties now positioning themselves for the 2015 general election, the Conservative Party has made clear that if it wins a majority it will repeal the HRA and replace it with a British Bill of Rights.<sup>7</sup> Labour, which has previously also been committed to further constitutional reform, including in relation to fundamental rights,<sup>8</sup> appears to be rallying in support of the HRA, which, of course, it was responsible for enacting in 1998. The consequence is that the issue of human rights protection and bill of rights reform has become highly politicised in the UK.

The HRA was thus conceived as a staging post and has, for the most part, been treated as such since its enactment. One consequence of this is that it has led to what feels like a revolving door of committees, reports and papers on bill of rights reform in the past few years. The most significant publications have been a report of JUSTICE, the British section of the International Commission of Jurists, in 2007, a report of the Joint Committee on Human Rights (JCHR) in 2008, and a bespoke Commission on a Bill of Rights established pursuant to the coalition agreement reported in 2012.<sup>9</sup> The latter

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6 HM Government *The Coalition: Our Programme for Government* (London, Cabinet Office, May 2010) at 11.

7 Conservative Party *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (3 October 2014). See also David Cameron “Balancing freedom and security — a modern British Bill of Rights” (speech to the Centre for Policy Studies, London, 26 June 2006). For the Liberal Democrats' support for a Bill of Rights see *For the People, By the People* (Liberal Democrats, Policy Paper 83, August 2007).

8 See, for proposals made by the Labour government for further constitutional reform, *Governance of Britain* (Cm 7170, July 2007) especially at [205]–[210]; Ministry of Justice *Rights and Responsibilities: Developing Our Constitutional Framework* (CM 7577, March 2009). In the run-up to the 2010 general election the Labour Party committed itself to keeping the HRA whilst expressing itself as being open to exploring the possibility of a written constitution: *Labour Party Manifesto 2010: A future fair for all* (2010).

9 JUSTICE Constitution Committee *A British Bill of Rights: Informing the Debate* (19 November 2007); Joint Committee on Human Rights *A Bill of Rights for the UK? Twenty-ninth Report of Session 2007–08* (HL Paper 165-I, HC150-I, 10 August 2008) [JCHR]; Commission on a Bill of Rights *A UK Bill of Rights? The Choice Before Us* vols 1 and 2 (December 2012); the Conservative Party previously established a committee of experts to look into bill of rights reform which appears to have sunk without trace; also see Liora Lazarus and others *The relationship between rights and responsibilities* (Ministry of Justice Research Series No 18/09, 1 December 2009); Richard Gordon *Repairing British Politics: A Blueprint for Constitutional Change* (Hart Publishing, Oxford, 2010); and the recent report of the House of Commons Political and Constitutional Reform Committee *Constitutional role of the judiciary if there were a codified constitution: Fourteenth Report of Session 2013–14* (HC802, 14 May 2014).

was not a success. It was dogged by criticism of its membership, its methods and the questions it asked. It failed to reach agreement even on whether there should be a bill of rights — a majority said “yes”, but for different reasons — let alone on other associated issues such as the relationship with the European Court of Human Rights (ECtHR).<sup>10</sup>

### III Assessing Legislation for Compatibility With Protected Rights in New Zealand

Let me turn then to New Zealand. In its report, the CAP registered support in New Zealand for “exploring increased judicial powers that preserve parliamentary sovereignty ... to ensure legislation is consistent” with the BORA.<sup>11</sup> The BORA 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 CAP’s suggestions, which is to improve compliance by Parliament with the standards set out in the BORA.

In these comments the CAP has, I suggest, nodded in the direction of the HRA and the power provided by s 4 for courts to declare primary legislation incompatible with the Convention rights. Whilst there is no such power in the BORA, 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 to give the legislation a rights-consistent reading under s 6 of the BORA. 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 UN Human Rights Committee.<sup>12</sup> In *R v Hansen*, McGrath J 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

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10 For (excoriating) criticism of the report see M Elliott “A Damp Squib in the Long Grass: The Report of the Commission on a Bill of Rights” [2013] EHRLR 137. For earlier criticism of the questions asked see Tom Hickman “The Bill of Rights Commission and the How Question” (18 October 2011) UK Constitutional Law Association <[www.ukconstitutionallaw.org](http://www.ukconstitutionallaw.org)>, and of the composition, Liora Lazarus “The Composition of the UK Bill of Rights Commission” (24 April 2011) UK Constitutional Law Association <[www.ukconstitutionallaw.org](http://www.ukconstitutionallaw.org)>.

11 CAP Report, above n 1, at 56.

12 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA). This approach was expressly premised on the idea that it gave s 5 some purpose, but s 5 operates, as later cases made clear, (1) in determining whether legislation is or is not incompatible with protected rights, and (2) it applies in contexts other than primary legislation.

book which infringes protected rights and freedoms”.<sup>13</sup> 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.<sup>14</sup> 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 BORA, although the jurisdiction to do so has not yet been determined.<sup>15</sup>

This nonetheless falls short of a declaration of incompatibility in two important respects. First, the court’s responsibility to provide an advisory indication was expressed by McGrath J as arising in any case in which it is considering whether legislation can be read compatibly with protected rights under s 6 but where it 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. But that is not presently the law, as Geiringer herself accepts.<sup>16</sup> In *Manawatu v R* 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.<sup>17</sup> There is thus no mechanism under the BORA to bring a challenge on the ground that legislation is *not* compatible with protected rights as opposed to a challenge claiming that it *is* 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

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

14 At [254].

15 *McDonnell v Chief Executive of the Department of Corrections* [2009] NZCA 352 at [123]; *Belcher v The Chief Executive of the Department of Corrections* [2007] NZCA 174 at [16]–[17]; *Miller v New Zealand Parole Board* [2010] NZCA 600 at [75]; *Boscawen v Attorney-General* [2009] NZCA 12, [2009] 2 NZLR 229 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 s 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.

16 Claudia Geiringer “On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act” (2009) 40 VUWLR 613 at 633–634, 637 and 644.

17 *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 (unreported but cited in *Taylor v Attorney-General* [2014] NZHC 1630).

not seen fit to include in the BORA.<sup>18</sup> 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,<sup>19</sup> makes such a judicial innovation even more unlikely because it underscores the fact that it is a matter for legislative and not judicial innovation.

Yet, as unlikely as it may seem, in the case of *Taylor v Attorney-General of New Zealand*, the New Zealand courts are being invited to innovate in precisely this way.<sup>20</sup> The claim squarely challenges primary legislation which disqualifies prisoners from voting<sup>21</sup> and the only relief sought is a declaration of the legislation's incompatibility with the BORA. It is an important feature of the case that the Attorney-General's report under s 7 of the BORA had concluded that the legislation was incompatible, but Parliament had chosen to enact it anyway. In a recent judgment, Brown J rejected several points of jurisdiction that had been argued in an attempt to have the claim struck out, although it was not argued that the applicant had failed to identify any cause of action, issue, or *lis* which fell to the court to determine under its statutory jurisdiction under the BORA.<sup>22</sup>

The issue is of great constitutional significance. The absence of any statutory mechanism to challenge legislation directly under the terms of the

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18 In *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) at 676 Cooke P said that the BORA had not excluded "the ordinary range of remedies" available at common law. But allowing claims to be brought for a declaration that primary legislation is contrary to protected rights would go beyond the ordinary range of remedies. I do not think this can be avoided by simply describing the remedy as declaratory relief.

19 Human Rights Act 2004 (ACT), s 32 [ACTHRA 2004]; Charter of Human Rights and Responsibilities Act 2006 (Vic), s 36 [Victorian Charter 2006].

20 *Taylor*, above n 17.

21 Section 80(1)(d) of the Electoral Act 1993.

22 *Taylor*, above n 17. Judgment in this case was given after the Wellington symposium for this paper was prepared, on 11 July 2014, but given its significance reference has been included. The unsuccessful points taken on the strike-out application included: (1) the argument that the Respondents were not responsible for the legislation; (2) interference with the privilege of Parliament; (3) that the court had no jurisdiction to make a formal declaration of inconsistency at all; and (4) abuse of process. In the course of dismissing these grounds, Brown J made some comments to the effect that it would be difficult to see why a court should lack jurisdiction to make an advisory declaration if the Crown accepted legislation is inconsistent with the BORA, if it could do so when engaged in an analysis under ss 5 and 6 of the BORA (at [92]). Caution is however warranted in respect of these comments because the Judge was invoking a more substantive notion of "jurisdiction" here, relating to judicial comity, rather than the question of whether any common law or statutory basis exists for the court to be seised of the matter. Furthermore, the Judge was not addressing a case in which the incompatibility is disputed, as of course it usually will be.



BORA is the reason why the CAP recommended enhanced powers for the judiciary to be able to scrutinise legislation.

The absence of a declaration of incompatibility power also raises an important practical issue. If the position in New Zealand is that an indication of incompatibility is available only if a claim is brought seeking — on a reasonably arguable basis — a rights-consistent interpretation of legislation pursuant to s 6 of BORA, and if such a rights-consistent reading is not available, then individuals are unlikely to bring claims unless the rights-consistent interpretation has substantial merit. An advisory indication is not a statutory remedy but a means of formally recording why a claim has been lost. People do not bring cases with the objective of losing them or where there are substantial chances of failure. This is even more so given that, applying the normal costs rule (applicable in New Zealand as well as the UK), a litigant who fails to obtain a favourable reading of legislation under s 6 would presumably be liable not only for their costs but also for the costs of the other side. 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 aptly been described by one commentator, a constitutional “booby prize”,<sup>23</sup> an advisory indication under the BORA — at least in their current form — is little more than a constitutional custard pie.

The jurisdiction of the New Zealand courts to give advisory indications is therefore considerably more circumscribed in law and in its practical availability than a declaration of incompatibility under the HRA. Indeed, in reality, I suggest that it is little different from the ability of courts in any case to state that a statute which 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 public law phenomenon, and they often provoke legislative reform.<sup>24</sup> 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.

We may conclude that the ability of the New Zealand courts to provide advisory indications when legislation is found to be incompatible with protected rights is not an effective means of utilising the courts as a means of ensuring that legislation is rights-compliant. The courts can only consider

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23 Ian Leigh “The UK’s Human Rights Act 1998: An Early Assessment” in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 323 at 324.

24 There is a difference, of course, in that an advisory declaration will identify that a statutory provision is inconsistent with a statutory standard rather than with a more general idea of justice or fairness or a common law principle.

rights-compatibility in a narrowly defined set of circumstances, and, unless an argument for reading legislation consistently with protected rights has considerable merit, there are strong disincentives to individuals and their lawyers bringing such a case. The cases in which courts are seized of the issue of compatibility of legislation with protected rights are therefore likely to arise infrequently and on a fairly ad hoc basis. It is therefore unsurprising that the CAP registered support for enhanced judicial powers to ensure legislation is rights-compliant.

The second reason that the position in New Zealand is substantially different to the declaration of incompatibility model is that declarations of incompatibility are not entirely devoid of legal effect. When made, they trigger a power, contained in s 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 which has not been subjected to much academic thought or analysis. The provision has much in common with s 2(2) of the European Communities Act 1972, which permits amendments to primary legislation by way of statutory instrument to give effect to EU law. Section 10 of the HRA provides a mechanism to give effect to the ECHR by means of statutory instrument in cases where Parliament cannot be expected to do so.

I have previously argued that s 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 as embodied in declarations of incompatibility, rather than s 4 providing, as some have argued, a platform for courts and Parliament engaging in a *debate* about the scope and content of Convention rights.<sup>25</sup> Section 10 suggests that the HRA envisages that declarations of incompatibility should lead to a change in the law, if not by Parliament then by statutory instrument. Section 10 ensures that if an amendment is not likely to be forthcoming by means of further primary legislation this can be done by the executive. It can be seen to reflect an expectation that such amendment will be made, one way or another. It can be seen to reflect the reality that declarations of incompatibility will often require re-drafting of legislation — such as where the incompatibility goes to a key part of the legislation — which cannot be done by the courts.<sup>26</sup> The fact that s 4 triggers this power therefore suggests that s 4 was not intended to be a means for courts issuing advisory rulings to be debated by the political branches, but that s 4 declarations were supposed to be acted upon and to

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25 Tom Hickman *Public Law after the Human Rights Act* (Hart Publishing, Oxford, 2010) at 83.

26 Indeed, no declaration of incompatibility would be made were it possible to interpret the legislation consistently with Convention rights.

trigger an amendment of the law. I will return to this point shortly, but for present purposes the key point is that advisory declarations under the BORA do not trigger any remedial power such as is found in the HRA.

Given the differences between advisory declarations under the BORA and declarations of incompatibility under the HRA, any future reform in New Zealand will undoubtedly consider the merits of adopting the declaration of incompatibility model. Consultation of the various UK reports on bills of rights would provide support for New Zealand adopting that model. JUSTICE in its 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.<sup>27</sup> The JCHR 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 without the power to strike down legislation was “innovative and widely admired”.<sup>28</sup> It also recommended the adoption of the additional reporting requirement found in the Australian Capital Territory’s Human Rights Act 2004 and Victoria’s Charter of Human Rights and Responsibilities Act 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.<sup>29</sup> This was also one of the few issues on which the members of the Bill of Rights Commission reached agreement. They reported that the declaration of incompatibility has been “widely seen as striking a sophisticated and sensible balance between Parliament and the courts”.<sup>30</sup> The members of the Commission concurred with this view.

I however do not. I do not consider that the declaration of incompatibility model 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

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27 In its 2007 report JUSTICE Constitution Committee, above n 9, at 89 expressed approval for the “parliamentary” style of bill of rights found in Canada, New Zealand and the UK which preserves parliamentary sovereignty as being “well suited” to the British constitution in its current form. Although it did not choose between them, it said that there should be the “greatest degree of parliamentary participation possible” and emphasised the dialogue between courts and Parliament and appears to have preferred a declaration of incompatibility model with a trigger — such as is found in the ACTHRA 2004 (ss 30 and 33) and the Victorian Charter 2006 (ss 36(2) and 37)), which requires the government to present a report to Parliament.

28 JCHR, above n 9, at [218].

29 At [218].

30 Commission on a Bill of Rights vol 1, above n 9, at [69]. It was said consultees had had no appetite for a strike-down power — my consultation response was evidently not read: at [96].

effective at providing a mechanism for judicial scrutiny of legislation on human rights grounds. 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 fallback solution or — the function it currently performs in the UK — as a constitutional placeholder. It is capable of being supported by persons who have very different, indeed diametrically opposed, constitutional visions because it embodies such a high degree of ambiguity as to the relationship between courts and Parliament that it is intended to embody. But this renders it unsatisfactory as a means of protecting human rights in a number of respects and in the UK it has contributed to an unsettled constitutional position in which human rights reform has become increasingly politicised.

My focus is on the deficiencies in the declaration of incompatibility model as a means of protecting human rights and securing human rights compliance. The vices are principally three: (a) the fact that successful litigants do not obtain an effective remedy; (b) connectedly, the fact that it offers a limited incentive to bring challenges to primary legislation before the courts; and (c) the fact that it fails to enhance democratic accountability for legislation that breaches protected rights.

### *A 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 starkest example of the unprincipled nature of this decoupling arises in the context of criminal convictions. Absent 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. Precisely this situation arose in *Momcilovic v The Queen*, under s 36 of the Victorian Charter which is the functional equivalent of s 4 of the HRA. In the High Court of Australia, Crennan and Kiefel JJ explained that the:<sup>31</sup>

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31 *Momcilovic v The Queen* [2011] HCA 34, [2011] 245 CLR 1 at [604]. Section 36 differs from s 4 HRA in that it requires a declaration of inconsistency be given to the Attorney-General, who must give a copy of the declaration to the relevant minister. Section 37 then obliges the minister to prepare a written response and lay it before each House.

making of a declaration placed the Court of Appeal in a position where it acknowledged that the trial process conducted by the County Court involved a denial of the appellant's Charter rights even though it upheld the validity of the conviction.

The Judges, understandably, did not consider this was a satisfactory position for the Court to be in.<sup>32</sup>

There is no difficulty in accepting that it is unsatisfactory in principle for individuals to be denied a remedy that is effective in relieving them of the injustice to which they are exposed, particularly where such injustice arises from infringements of what are recognised to be important human rights. The right to an effective remedy is for example a principle reflected in modern international human rights instruments.<sup>33</sup> But it could be said that, if we look at the substance rather than the legal form, individuals in the UK *are* provided with an effective remedy in the form of political responses to declarations of incompatibility. Therefore the substance of the position is that it does provide an effective remedy. This line of response would rely on the fact that of the 20 declarations of incompatibility that had been made by May 2014, all but one (prisoner voting) 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, I suggest, provide a satisfactory answer.

The first is that it remains constitutionally unsatisfactory for the courts to be given a power to declare whether a fundamental right has been violated but 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. We have seen that it has been suggested that this arrangement is in the best traditions of the British

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32 At [604]: They stated that in such circumstances "not only does a declaration serve no useful purpose to the appellant, but it is not appropriate that it be made".

33 ECHR, art 13; *United Nations Declaration of Human Rights* GA Res 217 A (III) (1948), art 8; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), art 2(3); also Charter of the Fundamental Rights of the European Union [2000] OJ C364/01, art 47. The argument here proceeds on the premise that it is self-evidently problematic for rights not to be reflected in effective remedies. Indeed it was a principal objective of the HRA that it would satisfy the UK's obligation under art 13 of the ECHR (and for this reason art 13 is not itself given effect by the Act). This is not the place for a theoretical exploration of the importance of effective remedies or to justify the importance of the correlative relation of right and remedy. Some readers may reject this at a fundamental level but it is not my purpose here to engage at such level of disagreement.

constitution because it preserves parliamentary sovereignty. But in doing so it radically departs from another deeply rooted constitutional principle. It is harder to find areas of agreement between Dicey and Bentham than it is to find it between members of the UK Bill of Rights Commission, but one thing they did agree upon was an opposition to abstract declarations of rights that were not legally enforceable. Bentham described them as “nonsense upon stilts”.<sup>34</sup> Likewise, Dicey emphasised that such declarations were objectionable unless the “rights of individuals are really secure” through the provision of legal remedies. He wrote:<sup>35</sup>

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’s censure of foreign proclamations of rights applies equally to s 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”.<sup>36</sup>

The correlativity of right and remedy is at the heart of our constitutional traditions, and it is associated with an aversion to abstract declarations of rights which fail to provide concrete benefits to individuals. Indeed, for British constitutional lawyers, to say that there can be a right without a remedy in a British court is to inhabit a topsy turvy world, since a right properly so-called is only that for which the law provides a remedy: right derives from remedy. This is not only a way of thinking, it has traditionally been regarded as the essence of the rule of law as it has been secured under the British constitution that individuals can obtain relief from the courts where their rights are infringed.

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34 Jeremy Bentham “Anarchical Fallacies: An Examination of the Declarations of Rights Issued During the French Revolution” in John Bowring (ed) *The Works of Jeremy Bentham* (William Tait, Edinburgh, 1843) vol 2, 489 at 501.

35 Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan, London, 1915) at 194–195.

36 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) at 663. This was in the context of a civil claim against a public authority. See, for recent consideration, *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, [2014] AC 366. See also *Ashby v White* (1703) 2 Ld Raym 938, 92 ER 126 (Comm Pleas).

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. This problem has surfaced in Australia, in relation to the declaration of incompatibility under the Victorian Charter 2006. In *Momcilovic*, the High Court of Australia held unanimously that s 36(2) of the Victorian Charter does not confer “judicial power” on the courts as defined by Chapter III of the Constitution of Australia.<sup>37</sup> Chief Justice French reasoned that this is because it “does not decide or affect ... rights or liabilities”.<sup>38</sup> In strident remarks that dovetail with those made here, Heydon J stated:<sup>39</sup>

A s 36 declaration is merely advisory in character. It does not declare any rights of the parties. It decides nothing. And it does not affect their rights: ... . This is illustrated by one of the appellant’s arguments for a special costs order in these proceedings. She submitted that debate about s 36 was a matter of complete irrelevance to her rights and duties. In this respect her submission was entirely correct. A s 36 declaration does not involve the exercise of a judicial function and it is not an incident of the judicial process.

Such remarks clearly transcend the particular context of the judicial role under the Australian Constitution and speak to a general feature of the declaration of incompatibility model that is in real tension with common law constitutional traditions.

I should make clear that it is no part of my argument at this juncture that the connection between right and remedy is *more* important than parliamentary sovereignty. My point here is a different one. It is to draw attention to the fact that the declaration of incompatibility model — whatever its virtues might be — is contrary to this deeply rooted constitutional idea which is at the heart of the rule of law.

The second reason why it is no answer to look at the legislative and executive responses to declarations of incompatibility in order to identify an effective remedy is because 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 ECtHR which has held that, unless and until individuals can be completely confident

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37 *Momcilovic*, above n 31.

38 At [88] per French CJ (with whom Bell J agreed at [661]); at [584], [586] and [589] per Crennan and Kiefel JJ. A majority nonetheless concluded that it was not constitutionally invalid on the basis that it conferred a permissible incidental power.

39 At [457].

in receiving a satisfactory political response following a declaration of incompatibility, such as by the evolution of a firm political convention that an effective remedy will be provided, s 4 of the HRA does not provide an effective domestic remedy that individuals must exhaust before applying to the Strasbourg Court.<sup>40</sup>

The third reason why it is no answer to look at the political postscript to declarations of incompatibility as a means of identifying an effective remedy 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. Take the case of Mrs Bellinger. Mrs Bellinger changed sex by a gender reassignment process and obtained a declaration that the Matrimonial Causes Act 1973, which sets out the law on marriage, was incompatible with her rights under art 8 in failing to recognise her as a female. The declaration might have hastened the enactment of the Gender Recognition Act 2004 (which was in train but stalled), which changed the law, but it had no effect whatsoever on Mrs Bellinger's petition, out of which the declaration arose, that her marriage to her husband in 1981 had been valid.<sup>41</sup> The marriage was invalid and her petition was dismissed. The Gender Recognition Act 2004 did not render the marriage valid.

One can take another example, of Messers Anderson and Taylor, both prisoners, who obtained a declaration that the power exercised by the Home Secretary to extend their prison terms was contrary to the ECHR. The law was changed by the Criminal Justice Act 2003 but the legislation did not shorten the length of Anderson's or Taylor's prison term nor of course could

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40 In *Burden v United Kingdom* (2008) 47 EHRR 38 (Grand Chamber, ECHR) (footnotes omitted) the Grand Chamber stated:

[41] The Grand Chamber ... has carefully examined the material provided to it by the Government concerning legislative reform in response to the making of a declaration of incompatibility, and notes with satisfaction that in all the cases where declarations of incompatibility have to date become final, steps have been taken to amend the offending legislative provision ... . However, given that there have to date been a relatively small number of such declarations that have become final, it agrees with the Chamber that it would be premature to hold that the procedure under section 4 of the Human Rights Act provides an effective remedy to individuals complaining about domestic legislation.

...

[43] The Grand Chamber agrees with the Chamber that it cannot be excluded that at some time in the future the practice of giving effect to the national courts' declarations of incompatibility by amendment of the legislation is so certain as to indicate that section 4 of the Human Rights Act is to be interpreted as imposing a binding obligation.

See also *Malik v United Kingdom* (32968/11) Section IV, ECHR 28 May 2013.

41 *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467. See also my consultation response to the JCHR in Commission on a Bill of Rights vol 2, above n 9, at Ev 135, making this point.



they have recovered any damages.<sup>42</sup> Similarly, the claimants in *International Transport Roth GmbH v Secretary of State for the Home Department*, lorry drivers and haulage companies who were subject to strict liability criminal penalties for unwittingly transporting persons into the country in the back of lorries, never got their money back although the penalties imposed upon them were held to violate their Convention rights. Parliament changed the law to bring it into line with the ECHR but this political victory did not provide a remedy for the particular infringements found as the legislation had only prospective effect.<sup>43</sup> Recent research by Jeff King has shown that of the 20 declarations of incompatibility made by May 2014, there is only one instance in which remedial legislation following a s 4 declaration has been retrospective.<sup>44</sup> The consequence is that in only one instance has a remedy been provided to the victim of a rights infringement under the Human Rights Act where the violation has been attributable to primary legislation.

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.<sup>45</sup> In one case, *R(M) v Secretary of State for Health*, the delay exceeded five years,<sup>46</sup> and in another, the prisoner voting case of *Smith v Scott*, the declaration of incompatibility was made as long ago as January 2007 and no measure has yet been forthcoming.<sup>47</sup> No prisoner in the UK yet has the vote.

The issue of delay is not a marginal issue but also raises serious questions about the compatibility of the declaration of incompatibility model with our

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42 *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 387; Criminal Justice Act 2003 (UK), ss 303(b)(i) and 332 and sch 37 pt 8.

43 *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728.

44 I am grateful to Jeff King for providing me with, and permitting me to refer to, results of ongoing empirical work which is partly published as Jeff King "Parliament's Role Following Declarations of Incompatibility under the Human Rights Act" in Murray Hunt, Hayley Hooper and Paul Yowell (eds) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, Oxford, 2015) 165. The exception is *Blood and Tarbuck v Secretary of State for Health* (unreported, 28 February 2003). The subsequent remedial legislation retrospectively permitted father's name to be added to child's birth certificate. On this see Joint Committee on Human Rights *Scrutiny of Bills: Further Progress Report: Eighth Report of Session 2002–03*, HL Paper 90, HC 634 at [33].

45 King, above n 44, at 168–171. King finds that the period of delay is significantly longer even than in countries in which declarations of invalidity are suspended.

46 *R (M) v Secretary of State for Health* [2003] EWHC 1094, [2003] ACD 95 (Admin).

47 *Smith v Scott* 2007 SLT 137 (Registration Appeal Court).

constitutional traditions. Chapter 29 of Magna Carta, which is still on the statute book, provides, “we will not deny or defer to any man either Justice or Right” and art 6 of the ECHR guarantees a determination of civil rights within a “reasonable time”. Declarations of incompatibility under the HRA do not always meet these standards.

In concluding this discussion of the disconnect between right and remedy under the declaration of incompatibility model, let us consider the most famous declaration of incompatibility that the UK courts have made: the declaration in the celebrated *Belmarsh case* that pt 4 of the Anti-terrorism, Crime and Security Act 2001, which authorised indefinite detention for foreign terrorist suspects, was incompatible with art 5 of the ECHR following a finding that the UK’s derogation from art 5 had not been valid. This case resulted in the replacement of executive detention by the control order regime within a few months;<sup>48</sup> but these surface facts tell a very incomplete story. The detainees had to continue to pursue their claim in Strasbourg in order to obtain compensation for their imprisonment which, although it had been found to be contrary to the ECHR, had been lawful under domestic law.<sup>49</sup> The government argued strenuously that the House of Lords had been wrong, including by arguing for the first time that the detention had been consistent with art 5.<sup>50</sup> Thus, the absence of a fully effective remedy in the domestic courts resulted in the whole substantive issue being reargued before the Strasbourg court and opened up the prospect of the victory in the domestic courts being reversed. A victory in Strasbourg would also in theory have enabled the government to reintroduce the detention power had it wished to do so since the domestic declaration of incompatibility had no binding force by virtue of s 4(6)(b) of the HRA. Indeed, had the government not resolved to change the law following the House of Lords’ judgment, the

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48 *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 [*Belmarsh case*], 16 December 2004; Prevention of Terrorism Act 2005 (UK), s 16, 11 March 2005 (now itself replaced by the Terrorism Prevention and Investigation Measures Act 2011 (UK)). The repeal of pt 4 of the 2001 Act was also promoted by the uncompromising report of the Newton Committee in December 2003; see Hickman, above n 25, at 343–345.

49 *A v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221; *A v United Kingdom* (2009) 49 EHRR 29 (Grand Chamber, ECHR).

50 The government had in the domestic courts accepted that, if the UK’s derogation from art 5 under art 15 of the ECHR had not been valid, art 5 would have been breached. Before the Grand Chamber they argued for the first time that art 5 was complied with because the applicants were persons against whom action is being taken with a view to deportation (art 5(1)(f)). The government has no right of appeal or application to the ECtHR but is entitled to reargue domestic proceedings if a domestic litigant applies to that court.

Strasbourg proceedings might have been used to justify the government not doing so until the conclusion of those proceedings was known.

In fact, the *Belmarsh* detainees did prevail (again) and several obtained some compensation. But the Strasbourg proceedings were not determined until 19 February 2009, over four years after the House of Lords had made the declaration of incompatibility. The *Belmarsh* case therefore presents a rather striking example of how the declaration of incompatibility model can operate as a very imperfect means of providing remedies for breaches of Convention rights in domestic courts, because even when a declaration of incompatibility is made, victims who wish to obtain an effective remedy will need to apply to Strasbourg and doing so can delay resolution for years and even put them back to square one.

*B Limited incentives to bring claims, resulting in an imperfect human rights audit function*

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 persons 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 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 CAP, is intended to be a tool to “assess legislation for consistency with the [BORA]” and improve “compliance by ... Parliament with the standards in the Act”,<sup>51</sup> 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 that this occurs.

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, or where the impact of the legislation is ongoing, where there are stronger incentives to bring claims merely for a declaration of incompatibility in the hope of a favourable change in the law.<sup>52</sup> Such cases are more likely, certainly in England and Wales, where the claimant can obtain public funding. Where legal aid is

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51 CAP Report, above n 1, at 17.

52 See, for example, *R (Reilly) v Secretary of State for Work and Pensions* [2014] EWHC 2182 (Admin); *R (H) v London North and East Region Health Review Tribunal* [2001] EWCA Civ 415, [2002] QB 1; and *R (Countryside Alliance) v Attorney General* [2007]

available an individual does not have to pay their lawyers and the claimant also has costs protection against the costs of the other side's lawyers if the case is lost.<sup>53</sup> 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 ordinary 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. They will be advised that, even if they win, the legislation will remain in full force and effect, and the judgment will not be binding. Can it really be expected that they would bring a claim to the courts for a declaration of incompatibility?

Certainly in many cases they will not. There is of course no way of measuring how many cases there are which are not brought at all because the declaration of incompatibility model provides an inadequate incentive. Likewise there is no way of knowing the number of potentially rights-infringing Acts on the statute book that should have come before the courts but have not, and which will never be subject to judicial scrutiny. But one unusual case illustrates the point that I am seeking to make.

*Wilson v First Country Trust Ltd (No 2)* concerned a dispute between Mrs Wilson and a pawnbroker about the enforceability of a small loan for which Mrs Wilson had given a BMW as security.<sup>54</sup> The courts held that, due to a formal defect in the contract, the operation of the Consumer Credit Act

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UKHL 52, [2008] 1 AC 719 (although some of the claimants also sought disapplication under EU law).

53 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. Claims might also be brought by representative organisations or interest groups. The courts in England and Wales have sought to reduce the disincentive for public interest challenges by inventing "protective costs orders" which, when applicable, can shield litigants in public interest cases from the adverse costs risk. However, such litigation, particularly cases brought by NGOs or representative bodies, remains rare in the UK and more prevalent in certain contexts in which there are established representative bodies, such as in the areas of the environment and mental health. See Varda Bondy and Maurice Sunkin "The Value and Effects of Judicial Review" (Nuffield Foundation, 2015) (forthcoming). Bondy and Sunkin studied 502 judgments in judicial review cases between 2010 and 2012 and found only 14 (3 per cent) had been brought by interest groups, although this accounted for a high proportion (38 per cent) of challenges that they categorise as having wide public interest. I am grateful to Maurice Sunkin for these statistics.

54 *Wilson v First Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816.

1974 rendered the loan agreement unenforceable with the rather surprising consequence that Mrs Wilson was entitled to keep the loan, pay no interest and recover her BMW as well. Given this result, the Court of Appeal raised a question of compatibility with the ECHR of its own motion and then granted a declaration of incompatibility. The Secretary of State for Trade and Industry appealed the declaration, but neither Mrs Wilson nor the unfortunate pawnbroker played any further part in the proceedings. Neither had any interest in the compatibility of the Consumer Credit Act 1974 with — let's not forget — *their* rights. Any ruling by the House of Lords would not affect them. The costs of the case must already have spiralled. They bowed out. Instead the proceedings in the House of Lords were argued between four intervening insurance companies, the Finance and Leasing Association, the Secretary of State for Trade and Industry (represented by no less than the Attorney-General), the speaker of the House of Commons, the Clerk of the Parliaments, and an *amicus curiae*. What a jamboree!

*Wilson* vividly illustrates that individuals will often not have an adequate incentive to obtain a s 4 declaration, and important issues of constitutional compliance will therefore not be litigated. The legislative audit function of the HRA was only activated in *Wilson* because the claim had not been brought to seek a declaration of incompatibility and the issue was raised by the court well after the case had commenced. The indications are that, had Mrs Wilson and First Country Trust (No 2) Ltd known from the beginning that their only prospect of a remedy was a declaration of incompatibility, the case would never have been brought.<sup>55</sup>

Mrs Bellinger's case tells a similar story. Her claim was brought seeking a compatible reading of the legislation. She requested a declaration of incompatibility for the first time in the House of Lords. This appears at least partly to have been intended to mitigate her costs exposure; in this she was partially successful: she recovered 50 per cent of her costs before the House but she was still out of pocket for the other 50 per cent (and presumably all of the costs of the proceedings in the lower courts). The declaration of incompatibility granted in her case was undoubtedly a booby prize. The circumstances in which the declaration was sought in this case suggest that, had Mrs Bellinger thought at the outset that there was no reasonable prospect of obtaining a compatible reading of the legislation under s 3 and the only remedy was a declaration under s 4, the claim would not have been brought.<sup>56</sup>

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55 See also the comments of Heydon J in *Momcilovic*, above n 31, at [457], that one of the appellants in that case had made the point that the debate about s 36 had been a "complete irrelevance to her rights and duties".

56 Of course it was a feature of *Bellinger*, above n 41, that legislative reform was under way. Had it not been there would have been a greater incentive for a claim seeking a declaration of incompatibility, particularly given the ongoing impact on Mrs Bellinger.

These cases illustrate the key problem: in the absence of the prospect of a remedy binding on the parties and affecting their legal rights, the balance of incentives for bringing proceedings, already tipped heavily against litigating, is tipped further against doing so. The upshot is that a great deal of legislation that violates rights will continue to apply without anyone challenging it. Indeed, there is also a paradox here. The more clearly the legislation violates their rights the less incentive there is to challenge it because the possibility of obtaining a s 3 read-down is correspondingly more remote.

Indeed, I suggest that in many, if not most, cases in which a declaration of incompatibility is sought — although I accept not all — there is some other incentive for bringing the claim to court, particularly where a claim is privately funded. I can think of four such incentives:

1. In a great many cases, claimants will principally be seeking an ECHR-compatible reading of legislation pursuant to s 3 of the HRA. In such cases, a declaration of incompatibility will be claimed as a “booby prize”, often to mitigate costs exposure.<sup>57</sup>
2. In other cases claimants will be claiming that the exercise of power by a public authority is contrary to a Convention right. Such claims are brought under ss 6 and 7 of the HRA. In such cases, declarations of incompatibility are sought as a fallback (often in tandem with a s 3 argument) in cases where the government raises by way of defence that they were compelled or authorised to act in the manner that they did by primary legislation, which is a defence to such a claim.<sup>58</sup> This was the case in *R (Hooper) v Secretary of State for Work and Pensions*, where claims were brought by widowers for benefits payable only to widows on the basis that the governing legislation was discriminatory.<sup>59</sup> They claimed that the government had a common law power to make payments to them outside the legislation and failure to do so was a breach of s 6. The government made good a defence under s 6(2) and therefore the most that was achieved was a declaration of incompatibility. Lord Brown noted sagely that in such a scenario the “most the complainant can attain is a declaration of incompatibility pursuant to section 4(2) — the last thing most complainants want since it carries with it no redress (save as to costs) ...”.<sup>60</sup>

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<sup>57</sup> See, for example, *Bellinger*, above n 41.

<sup>58</sup> Human Rights Act 1998, s 6(2).

<sup>59</sup> *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681.

<sup>60</sup> At [105]. The declaration of incompatibility had been granted at first instance by Moses J in *R (Hooper) v Secretary of State for Work and Pensions* [2002] EWHC 191 (Admin).

3. In some cases it is contended that the dispute is within the scope of European Union law which would result in the disapplication of the legislation if a breach of the ECHR was found. This was the case in *Roth*, where the principal remedy sought was disapplication of the legislation.<sup>61</sup> As the issue was found to be outwith the scope of EU law, a declaration of incompatibility but not disapplication was the result.<sup>62</sup>
4. There are also cases where a declaration of incompatibility has been sought in order to ensure that domestic remedies have been exhausted for the purposes of ensuring that there is no procedural obstacle in making an application to the ECtHR. However, as mentioned previously, in a judgment delivered in 2008, the ECtHR indicated that this is not necessary because a declaration of incompatibility does not provide a guarantee of an effective remedy.<sup>63</sup> There will nonetheless continue to be cases where litigants will be well advised to bring domestic proceedings to demonstrate that they have done everything possible to exhaust domestically available remedies.

There are therefore a number of incentives for bringing claims which include a request for a declaration of incompatibility. These incentives help to explain many of the cases in which declarations of incompatibility have been sought. Such cases may not have been brought had the only relief available been a s 4 declaration. Although no systematic analysis of the cases looking at this issue has yet been done, the presence of these collateral incentives, which clearly operate in many cases as the driver behind the litigation in which a declaration is sought (and sometimes granted), reinforces that one must be very cautious before inferring from the fact that declarations of incompatibility are sought from time to time that the HRA provides an effective judicial means of ensuring that primary legislation is compatible with Convention rights.

To conclude on this point about incentives, I suggest that whilst 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 one adopts the perspective of a lawyer advising his or her clients whether they should litigate in circumstances in

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To the same effect see *R (Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30, [2005] 1 WLR 1718.

61 *Roth*, above n 43.

62 For an overview of the relationship between the ECHR and EU law see Kieron Beale and Tom Hickman "Beano No More: The EU Charter of Rights After Lisbon" [2011] JR 113.

63 *Burden*, above n 40. See also *Malik*, above n 40; and *Kennedy v United Kingdom* (2011) 52 EHRR 4 (Section IV, ECHR).

which primary legislation violates their human rights. Looked at from this perspective, the declaration of incompatibility looks decidedly unappealing; and if that is so, then the declaration of incompatibility model, although providing better incentives and better human rights scrutiny of legislation than is found under the BORA, still fails to provide an effective means of ensuring that legislation is human rights compliant.

*C Failure adequately to require Parliament to take responsibility for human rights violations*

We have seen that it has been suggested that declarations of incompatibility are a sophisticated compromise between parliamentary sovereignty and the protection of human rights. 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 which ensures that rights infringements are the product of an informed decision taken by a democratic institution.

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.

Let us assume that 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 (although not necessarily acting by simple majority). 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 requiring 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 s 19(1)(a) of the HRA that it is believed to be compatible with the ECHR. 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 unsatisfactory because Parliament has expressed no such intention, let alone done so unequivocally. If Parliament is to take clear responsibility for rights-infringing laws, Parliament 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 s 3 of the HRA and s 6 of the BORA. Where these provisions are invoked by the courts 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.

For this reason, to suggest that a s 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 s 3 read-down seems to me to be 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 system in which Parliament has to reaffirm the law following a court judgment. A judicial power to invalidate legislation combined with a power of legislative override or “final say” would have this effect. It would be a variant of the system under the Canadian Charter of Rights and Freedoms.<sup>64</sup> That system 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 Charter rights.<sup>65</sup> This model better achieves the objective of ensuring Parliament addresses and takes responsibility for rights violations and also preserving 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.

It is also said that s 4 has the happy consequence of enabling a *debate* to take place between Parliament and the political branches on the one hand and the courts on the other as to what the scope of our rights should be. For

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64 Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, sch B to the Canada Act 1982 (UK), c 11 [Canadian Charter].

65 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. There is a great deal of literature on the Canadian notwithstanding clause and the circumstances of its use in Canada (which has been rare). My point here is one of principle and does not rely on the circumstances of its actual use in Canada, consideration of which would also take us too far afield. I also, much more reluctantly, leave aside the question of whether and how an override power could work in the UK given the commitments to the ECHR and the right of individual petition to the ECtHR. Not only would this also require a substantial digression but whilst this would be of considerable interest in relation to the constitutional reform agenda in the UK it is not of direct relevance to that in New Zealand.

instance, Stephen Gardbaum argues that, following a court pronouncement on legislation, the legislature should “engage in a serious and principled reconsideration of the judicial decision on the rights issue”.<sup>66</sup> 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 s 4 of the HRA enables the courts to generate public debate about the scope of human rights<sup>67</sup> and 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.<sup>68</sup>

I have elsewhere explained why this view rests on an inaccurate and undesirable conception of the separation of powers.<sup>69</sup> 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 court judgments should not 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

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66 Stephen Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, Cambridge, 2013) at 89.

67 Francesca Klug “The Human Rights Act — a ‘third way’ or a ‘third wave’ Bill of Rights” [2001] EHRLR 361 at 370.

68 Tom Campbell “Incorporation through Interpretation” in Tom Campbell, KD Ewing and Adam Tomkins (eds) *Sceptical Essays on Human Rights* (Oxford University Press, Oxford, 2001). Other writers to espouse such an approach include: Alison Young *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing, Oxford, 2009); Danny Nicol “Law and Politics After the Human Rights Act” [2006] PL 722; and in other jurisdictions Mark Tushnet *Taking the Constitution Away from the Courts* (Princeton University Press, New Jersey, 1999); Kent Roach *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto, Irwin Law, 2001); Christopher Manfredi *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, (2nd ed, Oxford University Press, Oxford, 2001). See Hickman, above n 25, at ch 3 for further references and an attempt to locate such theories within the wider field of constitutional theory.

69 See generally the discussion in Hickman, above n 25, at ch 3; and Tom Hickman “The Courts and Politics after the Human Rights Act 1998: A Comment” [2008] PL 84. I have also argued that it is incoherent for judicial determinations to have the status of provisional determinations when a declaration of incompatibility is made but for them not to have this status when legislation is read down or when an executive decision is quashed. In such cases the courts do resolve what rights are. Their judgments are not provisional determinations. It seems to me both inaccurate and destabilising to view the courts as merely proposing arguments, like a privileged pressure group, for debate and resolution by others.

judicial pronouncements if they were taken to be mere arguments for others — politicians — to accept or reject.<sup>70</sup>

It is also far from clear that the HRA is intended to give rise to this type of dialogue. The scheme of the Act tends to suggest that the Parliament and the government will respect declarations of incompatibility, should act to bring the law into line quickly, and that the need for parliamentary or executive action to change the law is principally intended to reflect the fact that the law may often need to be rewritten and this is not something the courts can themselves do.<sup>71</sup> Section 10 of the HRA strongly suggests that remedial measures should be forthcoming promptly and that the inability of courts to declare legislation invalid was more a recognition of the limited competence of courts to make law than it was an invitation for Parliament to debate with the courts about the scope of Convention rights. The great New Zealand judge Lord Cooke of Thorndon, speaking in the debates on the Human Rights Bill, certainly understood the Bill in this way. He expressed the view that although the power to make remedial orders under s 10 was not expressed as a duty nor restricted in time, it made clear that “reasonable expedition” in providing a remedy was of the “essence” under the HRA scheme. After all, he asked rhetorically, if “expeditious remedial steps have not followed, will not that state of affairs amount to a plain invitation to a journey to Strasbourg?”<sup>72</sup>

The form of dialogue between courts and Parliament which many supporters of the declaration of incompatibility model champion is also not reflected in the practice under the HRA. In all but the case of prisoner voting, the government and Parliament have accepted the courts’ decisions, rather than viewing themselves as engaged in a debate with the courts about the content and meaning of Convention rights, with the judgment of the court being open for either acceptance or rejection.<sup>73</sup>

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70 If courts or judges are to be given such a function, it is one that should be clearly delineated from their ordinary functions of determining rights and duties. This was another issue that came to the fore in *Momcilovic*, above n 31. Gummow J for instance considered that s 36(2) represented a “change to the constitutional relationship between the arms of government” by requiring courts to give an “advisory opinion on a question of law”: at [183]; and see also Crennan and Kiefel JJ at [534]: “A ‘dialogue’ is an inappropriate description of the relations between Parliament and the courts and it is inaccurate to describe the process suggested by s 36(2) as involving a dialogue”.

71 Hickman, above n 25, at 82–83.

72 (3 November 1997) 582 GBPD HL 1272.

73 For detailed consideration of how Parliament has responded see Alison L Young “Is Dialogue Working under the Human Rights Act 1998?” [2011] PL 773; Young, above n 68; Aruna Sathanapally *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford University Press, Oxford, 2012); and King, above n 44, at 174–186.

Moreover, the case of prisoner voting does not provide much in the way of counter-example. Following a declaration of incompatibility made by a Scottish court, itself following an adverse Strasbourg ruling, we have witnessed seven years of delay.<sup>74</sup> There was a debate in Parliament only in 2011 but this was not part of any legislative proposal that had been introduced and the debate principally consisted of Members of Parliament putting forward their settled views not only on prisoners voting but also on the role of the Strasbourg court.<sup>75</sup> At the end of 2013, the issue was put to a joint committee of Parliament which recommended change to the law. In doing so it stated that parliamentary sovereignty was not a reason for not complying with the ECtHR's judgment. It said Parliament remained sovereign but that sovereignty resided in the Parliament's power to withdraw from the ECHR system: "while we are part of that system we incur obligations that cannot be the subject of cherry picking".<sup>76</sup> It stated further that "[i]t is not possible to reconcile the principle of the rule of law with remaining within the Convention while declining to implement the judgment of the Court".<sup>77</sup> This reasoning applies equally to judgments of UK courts under the HRA. It demonstrates the limited scope for the HRA to operate as a tool for debating the content of Convention rights.

It remains to be seen what Parliament and the government will decide to do about prisoner voting. There was nothing in the Queen's speech in June 2014 that indicated it was on the legislative agenda before the May 2015 general election. The episode suggests that the declaration of incompatibility model is not an effective means of generating a sophisticated debate about the scope and content of human rights and, rather, serves only to muddy the waters about what Parliament should do following such a declaration, with Parliament possibly creeping ever-so-slowly and painfully towards the conclusion that it really has little room for manoeuvre. To put this another way, some of the ambiguity which I mentioned at the outset is being resolved in the direction of rights supremacy rather than parliamentary supremacy. For Gardbaum and other dialogue theorists, the prisoner voting issue should

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74 *Smith*, above n 47, following *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 (Grand Chamber, ECHR).

75 (10 February 2011) 523 GBPD HC 493ff. Sandra Fredman has written: "the debate ... was conducted in highly emotive terms, with little supporting evidence or justification for many of the assertions made. Although the court can be credited for stimulating a debate, which would not [have] otherwise occurred, it is difficult to consider the Parliamentary proceedings as having sufficiently deliberative credentials." Sandra Fredman "From dialogue to deliberation: human rights adjudication and prisoners' rights to vote" [2013] PL 292 at 310.

76 *Joint Committee on the Draft Voting Eligibility (Prisoners) Bill* HL Paper 103, HC 924 (16 December 2013) at 33.

77 At 3.

provide a model example of dialogue in practice, but instead it is showing how the declaration of incompatibility model is an inefficient and often politically tortuous means of getting from A (judicial determination) to B (remedy).

In conclusion, 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 does it have the advantage of promoting a beneficial dialogue between courts and politicians.

#### **IV A Response to Stephen Gardbaum**

During the symposium in Wellington at which an earlier version of this article was presented, it was suggested by Stephen Gardbaum in response to my criticisms of the declaration of incompatibility model that they could be solved or at least mitigated if the executive or Parliament were to make changes to legislation retrospective and if compensation were to be provided in appropriate cases. This raises an important point, and one that we need to subject to some scrutiny.

The first difficulty with this response is that it does not address the unprincipled position of courts being denied the power to provide remedies after determining that there has been a violation of protected rights. That part of my criticism remains, it seems to me, untouched. Likewise, it does not address the criticism that the declaration of incompatibility model does not locate responsibility for rights infringements clearly with Parliament. The criticism is directed principally at the concerns I have expressed about incentives and about the absence of remedies *in practice*.

In order for Gardbaum's response to have traction it would seem that the following three conditions would have to be met in the constitutional system in question.

First, there would have to exist a strong political norm or convention requiring that remedial legislation would be forthcoming and forthcoming promptly such that individuals could have a very high degree of confidence that this would be the result. Secondly, it would have to be the case that the norm or convention extended to ensuring that where appropriate to provide an individual with a remedy, the legislative amendment would be retrospective in effect. And, thirdly, the norm or convention would also have to extend to requiring that compensation must be provided where necessary to ensure a person obtained just satisfaction for the violation.

In a system in which such a norm or convention existed, a declaration of incompatibility would make no alteration to existing law as a matter of legal *form* but in *reality* it would trigger an obligation to amend the law in a way that provided an effective remedy to affected persons. But let us

reflect on the situation we would then be in if these conditions pertained. In such a system Parliament would be the loyal servant of the courts in fixing legislation that the courts had found infringed protected rights. In these circumstances a substantial part of the perceived value of the declaration of incompatibility model would be removed. The value I am referring to is the value that Gardbaum and others identify in the declaration of incompatibility model in creating a space between court judgments and political responses for Parliament to engage in a full reconsideration of the rights issue, with the option of disagreeing with the courts about the meaning and scope of the protected right. It is this room for disagreement which is said to enable the courts to generate debate or engage in a dialogue about matters of principle. But in a system in which the three conditions are met no such space for disagreement would exist: it would be constitutionally improper for the courts' rulings not to be followed and it would be a constitutional responsibility for Parliament to provide the remedy that the courts, were they to have the legal power to do so, would have provided to the litigant.<sup>78</sup>

Indeed, I can think of only two reasons for having such a system. The first would be to enable Parliament or the executive to redesign laws in accordance with the court judgment, in a manner that courts lack capacity to do. But this is not a particularly persuasive reason. In Canada, for example, the courts have been prepared to suspend remedies for a short time to enable amending laws to be put in place that are consistent with the court's judgment, where this is felt to be necessary. Indeed, legal systems in which the courts have power to invalidate primary legislation work perfectly well in countries all over the world. It would also still be possible for a bill of rights to include a power for the government to respond to a court judgment which strikes down legislation by means of delegated legislation, so that a legislative sticking-plaster (or if necessary reconstructive surgery) can be applied to address the consequences of the judgment.

The second reason would be to maintain an attachment to parliamentary sovereignty, in the sense of the courts being unable to disapply or strike down primary legislation. But this would be a purely formal attachment to sovereignty of this kind. Under the conditions we have hypothesised Parliament would have no option but to amend the law. It could not therefore decide to continue the legislation in force or to reaffirm the legislation. Parliament would not be able to enact any law it saw fit. It is difficult to see that such a preservation of sovereignty justifies the adoption of a

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78 In his book, Gardbaum recognises that the value of the "new Commonwealth Model" is greatly reduced in such a system: above n 66. He states at 88 that the "routine use or non-use of [the] power of the final word ... would undoubtedly reduce — although perhaps not eliminate altogether — the distinctness of the new model in practice ... its exercise should fall somewhere in between these two extremes".

declaration of incompatibility model, and in any event greatly reduces its appeal. Ultimate parliamentary sovereignty could still be preserved, in much the same way that it is in respect of EU law, by the ability of Parliament to repeal the bill of rights.<sup>79</sup>

It is important to appreciate that those who argue for a declaration of incompatibility model on “dialogic” grounds should see no value in preserving parliamentary sovereignty in this formal way. As we have seen, in a system in which all three conditions were satisfied, there would be no prospect of Parliament doing anything other than following the court judgment.

In a system in which the three conditions are met the objections to a declaration of incompatibility model would undoubtedly be greatly reduced. But the model has to be modified in a manner that robs the declaration of incompatibility model of those features which are regarded by many of its supporters as its principal virtues, namely the space for and legitimacy of debate between Parliament and the courts and the preservation of Parliament’s ability to enact any law it sees fit.

We also should not overlook the fact that the system that we have hypothesised does not actually exist and would be very difficult to design. The difficulty would be to establish a powerful political norm or convention giving potential litigants the requisite degree of confidence in the political response, without setting this out in law in the bill of rights itself (and thereby making it higher law). If the three conditions were embodied in law then the bill of rights would be little different from a bill of rights that conferred a strike-down power. It seems very doubtful that such a system provides a workable or sensible model for New Zealand to attempt to adopt. It is more likely that a declaration of incompatibility system, such as that in the UK, could *evolve* in such a way that the three conditions came to be politically accepted. But as we have seen, the UK remains some way off this gold

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79 It is important to recognise when considering the value of maintaining parliamentary sovereignty, that it does not follow that if the courts have a power to strike down legislation that sovereignty is lost. There are at least two ways in which it can be preserved. The first is if the bill of rights contains a form of notwithstanding clause allowing Parliament to affirm the law. The second is if Parliament retains power to amend or repeal the bill of rights itself. This second scenario is the same as that which applies in the UK in relation to EU law. Whilst legislation that conflicts with EU law must be disappplied, ultimate sovereignty is preserved by Parliament’s ability to amend or repeal the European Communities Act 1972. So, under any future bill of rights, Parliament’s power to amend or repeal such an Act could be preserved by preserving Parliament’s ability to amend or repeal the bill of rights itself. There would undoubtedly be a further erosion of, or qualification to, parliamentary sovereignty in such an approach, but it would be an extension of a model already applying in relation to EU law.

standard, and it is not a necessary consequence of a bill of rights containing a declaration of incompatibility power.

For these reasons, I suggest the objections to the declaration of incompatibility model can only be substantially addressed if the model is modified to align it closely with a model that is closer to a strong form of judicial review of legislation. Of course, another way that the objections can be addressed is to revert to a system in which there is no review of primary legislation for human rights compliance. But this is the opposite direction of travel to that recommended by the CAP Report.

## V The Declaration of Incompatibility Model as a Product of the United Kingdom's Position as Contracting State to the ECHR

In reflecting on these issues, it seemed to me rather extraordinary that the United Kingdom ever adopted such a bizarre provision as s 4 of the HRA and, more so, that we have arrived at a position where this declaration of incompatibility model is being lauded and held up for other jurisdictions to follow.

There is an important point buried beneath the surface which needs to be unearthed and made explicit. There is a pervasive tension at the heart of the HRA as to whether it is intended to be a domestic constitutional rights document or whether its purpose is to give a domestic remedy for a violation of international law<sup>80</sup> — the White Paper memorably referred to the reform as intended to save the five years and average £30,000 bill of taking a case in Strasbourg.<sup>81</sup>

Section 4 exhibits this tension. On the one hand it can be understood as part of a continuum with s 3 and common law approaches to statutory construction, which, by requiring express words to authorise interferences with common law rights, ensures that Parliament is fully aware of the consequences of its legislation.<sup>82</sup> Furthermore, since s 4 does not have any effect on the parties to the litigation, lead to the invalidation of any legislation, or permit an award of damages, it is difficult to conceive of it as part of the mechanism for providing an “effective remedy” for violations of international law.<sup>83</sup>

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80 Hickman, above n 25, at 22–49.

81 *Rights Brought Home: The Human Rights Bill* Cm 3782 (October 2007) at [1.14].

82 See *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 132 per Lord Hoffmann.

83 *Burden*, above n 40. One of the purposes of the HRA was to satisfy art 13 which guarantees an effective remedy for violation of Convention rights.



However, I am much more inclined to the view than I once was,<sup>84</sup> that this puzzling provision makes more sense from looking at the HRA from the perspective of international law.

Whenever the ECtHR rules against the United Kingdom, that court has no power to quash or invalidate any domestic legislation, because it is an international court ruling on international law. The British government must respond to its judgments and generally will do so by amending the law prospectively. Litigants in Strasbourg usually have to make do with a declaration that their rights have been infringed and take solace in some future change in the law. They can obtain damages but at the time the HRA was enacted damages awards in Strasbourg were infrequent and very low (this has changed to some degree).

Section 4 is in large part a product of this context. Section 4 allows Parliament to react in the same way as it would do to a judgment of the ECtHR; it enables Parliament to bring the law into line with the judgment and the requirements of international law. And s 4 and s 10 work together in order to enable the government to bring the law into line with international law by remedial delegated legislation where there are compelling grounds for amending the law in this way, rather than leaving it to Parliament. As we have seen, this follows a similar approach taken to EU law. Looked at in this way, the HRA provides the tools to enable British law to be brought into line with the ECHR. That this is the right way to understand these provisions is given further credence by the fact that the power under s 10 is triggered not only by a finding of a domestic court but also by an adverse ruling of the ECtHR. Section 10(1)(b) states that the section applies also if it appears to a Minister that “having regard to a finding of the European Court of Human Rights ... in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention”.

Section 4 can thus be understood — albeit imperfectly — as a component of that part of the HRA scheme which reflects the idea that its purpose is to give domestic effect to an international treaty and to allow the government to comply more easily and quickly with international law, avoiding a trip to Strasbourg. This helps to explain some of its peculiarities and the reason why it sits so uneasily with our basic constitutional tradition that rights are worth only as much as the remedies available for their infringement. Of course, it also runs counter to the idea that s 4 is intended to inculcate a “dialogue” between courts and Parliament.

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84 See Hickman, above n 25, at 29.

## VI Reasons Why the Declaration of Incompatibility Model is Particularly Unsuitable in New Zealand

Now let us turn back 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. And there are a number of reasons why it would be more problematic and less effective even than it is in the United Kingdom.

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

Secondly, there is also not the same safety net in New Zealand of an international court able to provide an individual a remedy where the continuing effect of primary legislation denies that 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 makes non-binding conclusions and which confers no remedies, is not equivalent to an application to the ECtHR. The absence of a remedy issue is therefore more acute in New Zealand.

Thirdly, 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 — (1) the ability to disapply legislation for breaching the ECHR when the legislation is within the scope of EU law, because of the effect given to those rights as part of the general principles of law of the EU; and (2) the need to exhaust remedies under the ECHR art 34 — do not arise in New Zealand. Whilst there would be cases brought and there would be more of an incentive for claims to test legislation than there is currently under the BORA, 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 United Kingdom which I have set out above.

Therefore tested against the objectives identified by the CAP 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 model does not, I suggest, make the grade.

It might also be asked whether there are any reasons (other than those set out above) why governments such as the New Zealand government might support a judicial power to strike down or disapply primary legislation, given the inevitable erosion of their power. There are at least two considerations that they might be attracted by.

The first of these is the latent ambiguity in a declaration of incompatibility model as to what model of constitutionalism it is intended to reflect. This gives rise to very practical problems about what the response of government and Parliament should be. We see this ambiguity at play in the prisoner voting controversy. It is unclear to what degree Parliament can or should depart from the domestic courts and the Strasbourg court. We have seen that the joint parliamentary committee has spelt out its view that there is really no room at all for Parliament to reject those judgments. The process of working out what Parliament's role under the HRA should be is generating a great deal of confusion, delay and political heat. Indeed, it can be argued that this is having very damaging consequences in the United Kingdom, with the question of compliance with court judgments under the HRA, and the fate of the HRA itself, becoming increasingly politicised.

This problem of ambiguity would potentially be greater in New Zealand because there is not the same issue of Parliament being straightjacketed by obligations found by the courts to exist under international law, although it will arise in different form in cases in which it is said that failure to comply with the judgment of New Zealand courts will result in a violation of the International Covenant on Civil and Political Rights. Of course this ambiguity is part of the "fudge" of the declaration of incompatibility which makes it attractive to people with very different constitutional visions. It is this fudge which assists in garnering agreement to the enactment of such a provision. But as we have seen in the United Kingdom, very quickly these differences come to the fore and the fudge looks less like a sound compromise and more like a focal point for the exacerbation of underlying constitutional tensions. It is preferable for a constitutional document to reflect a clearer and more coherent constitutional model from the outset. It avoids problems down the road.

By contrast, a bill of rights with a form of "notwithstanding clause" embodies a clearer constitutional model. Whilst I do not suggest that it is devoid of ambiguity, it does at least make absolutely clear that Parliament can legitimately override court judgments. Such a model can prescribe — with greater or lesser precision — the circumstances and the terms on which Parliament can exercise this power (it might for example require more than a bare majority or might require a particular form of words to be used).

The second consideration is that it is surprising how often the government in the United Kingdom does not want a declaration of incompatibility to

be made and urges the court to apply a s 3 “fix”.<sup>85</sup> Given this, it should not be assumed that the government would not prefer the court to have the necessary powers to prune legislation to remove those parts that are contrary to protected rights. Of course it will not always be the case that the courts can simply extract an incompatibility like a bad tooth and leave the legislation functioning in a healthy state, but there will be cases, possibly many, where this can be done. The government is likely to be particularly persuaded by this consideration if it accepts that it will in some cases at least have a political or international law obligation to respond to a declaration of incompatibility by amending the law — as is the practice in the UK — since it removes the burden of doing so, and avoids political pitfalls, in cases in which the courts can do so themselves.

## VII 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 CAP Report. The declaration of incompatibility model was developed in the context of the system of individual petition to the ECtHR which does not pertain in New Zealand. As a system of giving effect to constitutionally protected rights I have suggested that the declaration of incompatibility model 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 fallback or placeholder in an on going process of constitutionalising human rights. But New Zealand should have higher ambitions. The CAP 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 United Kingdom, 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 United Kingdom before the very judges that decide the cases under

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85 See, for example, *Secretary of State for the Home Department v AF (No 3)* [2008] EWCA Civ 1148, [2010] 2 AC 269 (HL); *R (Hammond) v Secretary of State for the Home Department* [2005] UKHL 69, [2006] 1 AC 603.

the HRA.<sup>86</sup> New Zealand and the United Kingdom, together with Australia, are outliers. New Zealand set the pace for the United Kingdom and Australia back in 1990. In this article I have set out the case for it doing so again.

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86 See further Robert Leckey *Bills of Rights in the Common Law* (Cambridge University Press, Oxford, 2015) (forthcoming) at ch 3 making the important and to my mind much overlooked point that there is a deeply rooted tradition in Commonwealth constitutional traditions of judges reviewing legislation.