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The Institutional and Substantive Effects of the Human Rights Act in the United Kingdom

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This article reviews the institutional and substantive impact that the Human Rights Act has on English law through its incorporation of the European Convention on Human Rights. Under the Act, higher courts can now move beyond a formalistic method of judicial review and substantively evaluate legislation in light of the Convention. The judiciary can accordingly issue declarations that statutes are incompatible with the Convention which, although not invalidating the act in question, will bring considerable political pressure to bear on Parliament to ensure compliance. The Act further directs courts to give special regard to the decisions of the European Court of Human Rights when considering cases involving Convention rights. This new source of jurisprudence, along with the Convention, brings a positive conception of rights into English law that conflicts with the negative conception found in the common law and the Act's attempts to preserve parliamentary sovereignty. Where authority from the European Court is lacking, English courts in the future will have to anticipate its response by engaging in a teleological approach to rights interpretation that is based on broad principles rather than textual formalism. Nevertheless, the common law should successfully accommodate these developments into its own framework.

L'auteur examine les retombées institutionnelles et matérielles de la Loi sur les droits de la personne de 1998 (Human Rights Act 1998), enchâssée dans la Convention européenne sur les droits de l'homme, sur le droit britannique. Aux termes de la loi, les cours supérieures ne sont plus limitées à un examen judiciaire formaliste et peuvent dorénavant se prononcer sur le fond des lois à la lumière des dispositions de la Convention. En conséquence, la magistrature peut déclarer une loi incompatible avec les dispositions de la Convention, auquel cas, même si la loi en question ne s'en trouve pas invalidée d'office, le parlement risque de faire l'objet de pressions politiques considérables visant à modifier la loi en question pour la rendre conforme. De plus, selon les dispositions de la Loi sur les droits de l'homme, le tribunal doit prendre en compte les décisions de la Cour européenne des droits de l'homme dans toute décision mettant en cause les droits établis par la Convention. Cette nouvelle source de jurisprudence de même que les dispositions de la Convention inscrit dans le droit britannique une conception positive des droits de la personne qui se trouve en heurt avec la conception négative de la common law de même que les dispositions de la Loi sur les droits de l'homme ayant pour but de maintenir la souveraineté du parlement. En l'absence de décisions préalables de la Cour européenne des droits de l'homme, à l'avenir, les tribunaux britanniques devront anticiper la réaction de cette dernière. Ils devront donc adopter une approche téléologique axée sur les principes de fond plutôt que de s'appuyer sur la lettre de la loi afin d'interpréter les droits de la personne. Néanmoins, il y a lieu d'espérer que la common law réussira à s'accommoder à cette nouvelle donne. I. Rights Adjudication in the United Kingdom and the Human Rights Act 1998.

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Introduction

In October 2000, the *Human Rights Act 1998* (*HRA*)[1] came into effect in the United Kingdom. As the first written guarantee of rights since the Bill of Rights of 1689, the *Act* represents a landmark in the constitutional history of the nation. The *Act* incorporates the European Convention on Human Rights (Convention) directly into English law. It requires that legislation be read and given effect in a manner that is compatible with the Convention rights and takes into account the decisions of the European Court of Human Rights. It further provides that courts may issue statements declaring parliamentary legislation incompatible with its requirements.[2]

The *Act* will have significant effects on English law. First, the *HRA* places effective political limits upon the sovereignty of Parliament and grants the judiciary the power to review legislation in a substantive manner for the first time. Underlying this change is a theoretical shift away from a formal concept of judicial review. Secondly, the incorporation of the Convention introduces a new body of rights jurisprudence directly into English law. Under the *Act*, English courts will now have to give greater regard to the case law of the European Court of Human Rights and confront new approaches to rights adjudication. Therefore, the process of incorporation fundamentally entails a clash between the negative conception of rights inherent in the common law and the more positive interpretation of Convention rights advanced by the European Court of Human Rights. In addition, English courts, in engaging in substantive review and having to interpret the Convention, must now consider a teleological approach to rights interpretation. This is in sharp contrast to the stricter textual method to which they are accustomed.

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1. *Human Rights Act 1998* (U.K.), 1998, c. 42 [hereinafter *Act*].
2. While the Human Rights Act applies throughout the United Kingdom, this article will confine its discussion to English law, as the Act might affect the mixed common-law and civil-law jurisdiction of Scotland somewhat differently.

I. *Rights Adjudication in the United Kingdom and the Human Rights Act 1998*

The doctrine of parliamentary sovereignty dictates that any bill passed through both houses of Parliament and receiving the Royal Assent becomes law.[3] British courts must give effect to all legislation notwithstanding conflicting common law, prior statutes, or international obligations, as Parliament is sovereign and its will is supreme. Although the interpretation of statutes has become rather sophisticated to allow courts more latitude in shaping the law, the adjudicative process nevertheless remains a highly formalistic one dedicated to discerning and applying parliamentary intent.[4] To strike down or invalidate an act of Parliament would violate the doctrine of parliamentary sovereignty, therefore, the courts cannot engage in any substantive review of legislation.[5] As courts are limited to a formalistic method of statutory interpretation requiring them to give effect to the will of Parliament, they lack the power to prevent determined legislative encroachments upon liberties.[6] For the courts to review a statute for its compliance with common-law or international human rights standards would be to judge such acts in a substantive manner and possibly question the sovereign will of Parliament.[7]

Consistent with this tradition, the British constitution completely lacked any bill of rights restraining the legislature before the passage of the *HRA*. The United Kingdom's accession to the European Convention on Human Rights placed only international obligations upon the British government, having no legal effect within domestic law. Without a domestic remedy, the only available recourse for a litigant whose rights

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3. "The doctrine of parliamentary sovereignty, according to which the legislature can make or unmake any law whatever, has, since the constitutional settlement of 1688, constituted this country's most fundamental legal norm." R. Mullender, "Parliamentary Sovereignty, the Constitution, and the Judiciary" (1998) 49 N. Ire. L.Q. 138 [footnotes omitted]; Parliamentary sovereignty could also be termed the "grundnorm" or "ultimate rule of recognition" of the British constitution. G. Winterton, "The British Grundnorm: Parliamentary Supremacy Re-Examined" (1976) 92 L.Q. Rev. 591.

4. For a review of judicial formalism, see D. F. Partlett, "The Common Law as Cricket", Book Review of *Form and Substance in Anglo-American Law* by P. S. Atiyah & R. S. Summers (1990) 43 Vand. L. Rev. 1401 at 1409-1415, and for a comparison of formal and substantive meanings of law, see P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] Pub. L. 467.

5. A. W. Bradley, "The United Kingdom, the European Court of Human Rights, and Constitutional Review" (1995) 17 Cardozo L. Rev. 233 at 234.

6. S. Wright, "The Bill of Rights in Britain and America: A Not Quite Full Circle" (1981) 55 Tulane L. Rev. 291 at 300-301.

7. V. P. Pace, "Partial Entrenchment of a Bill of Rights: The Canadian Model Offers a Viable Solution to the United Kingdom's Bill of Rights Debate" (1998) 13 Conn. J. Int. L. 149 at 159.

had been violated by an act of Parliament was to file a petition with either the European Commission or, after 1998, the European Court of Human Rights in Strasbourg.[8] This approach usually results in a lengthy and costly process.

Defenders of the constitutional status quo justified this situation on the grounds of majoritarian politics and the flexibility it allows in legislating for societal changes. They also argued that the United Kingdom already provided adequate protections to rights.[9] In contrast, supporters of a bill of rights characterized parliamentary sovereignty as limitless government power that provides no guarantees against human rights infringements. In support of their argument, advocates pointed to the fact that the United Kingdom has had one of the worst records before the European Court of Human Rights.[10] In addition, they suggested that a domestic solution to human rights claims would be cheaper, more efficient, and give greater consideration to British legal culture than continued recourse to Strasbourg.[11] The debate over the need and desirability of a bill of rights continued to grow over the past decade, producing lively and learned discussions on the issue of what form of rights protection, if any, the United Kingdom should have.

Three general models of rights protection were available for consideration. The first, and most extreme, was full constitutional entrenchment like the Bill of Rights in the United States. This type of bill would be essentially absolute in its provisions, completely restricting Parliament's ability to infringe protected rights and giving the judiciary power to invalidate offending primary legislation. Both supporters and opponents of a bill of rights rejected this option as too radical a departure from British political and legal traditions.[12]

A system based upon the Canadian Charter of Rights and Freedoms was more popular among advocates.[13] Canada, whose government was otherwise modeled on the British doctrine of parliamentary supremacy,

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8. J. A. Andrews, "The European Jurisprudence of Human Rights" (1984) 43 Md. L. Rev. 463 at 480-81, 487.

9. Lord Browne-Wilkinson, "A Bill of Rights for the United Kingdom – The Case Against" (1997) 32 Tex. Int. L. J. 435 at 437; Pace, *supra* note 7 at 168-69; C. Adjei, "Human Rights Theory and the Bill of Rights Debate" (1995) 58 Mod. L. Rev. 17 at 32.

10. Pace, *supra* note 7 at 159.

11. See generally M. Zander, "A Bill of Rights for the United Kingdom – Now" (1997) 32 Tex. Int. L. J. 441; Pace, *supra* note 7 at 162-63.

12. Pace, *supra* note 7 at 170-73, 187-89; S. Kentridge, "Parliamentary Supremacy and the Judiciary Under a Bill of Rights: Some Lessons from the Commonwealth" [1997] Pub. L. 96 at 106-11; Mullender, *supra* note 3 at 146, 163.

13. M. L. Principe, "Dicey Revisited: Great Britain Joins the Fray in Examining Individual Rights Protections in the Westminster System" (1993) 12 Wis. Int. L. J. 59 at 60; Pace, *supra* note 7 at 177-78.

included the Charter in its 1982 constitution.[14] Canadian courts have since exercised the power to review and invalidate acts of Parliament for substantive non-conformance with the Charter's provisions. The essential distinction between the Canadian and American models is the Charter's inclusion of a "notwithstanding" clause, which Parliament can expressly invoke to override Charter provisions should it see the need.[15] The Canadian model would offer the United Kingdom a substantial degree of rights protection, while still respecting the core doctrine of parliamentary sovereignty.[16]

A third model was that of New Zealand, which would be least disruptive of British constitutional orthodoxy and thus garnered the most political support.[17] Unlike the Canadian and American models, New Zealand's *Bill of Rights Act* is a simple statute.[18] Subject to repeal at any time, it requires the courts to interpret all subsequently enacted statutes as compatible with its provisions. Nevertheless, it denies the courts the power to declare legislation invalid.[19] This model would therefore better reflect the constitutional tradition of the United Kingdom than would the American and Canadian ones. In 1997, after winning an overwhelming majority in Parliament, the Labour Party carried through on its commitment to a bill of rights and secured passage of the *Human Rights Act* modeled on the New Zealand approach.[20]

The *Act* incorporates most sections of the Convention into domestic English law, subject to any reservations or derogations made by the United Kingdom.[21] This blanket incorporation means that British courts

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14. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
15. *Ibid.*, s. 33.
16. R. Penner, "The Canadian Experience with the Charter of Rights: Are there Lessons for the United Kingdom?" [1996] Pub. L. 104 at 109-110.
17. Principe, *supra* note 13 at 63; H. Woolf, "Judicial Review – The Tensions Between the Executive and the Judiciary" (1998) 114 L.Q. Rev. 579 at 592.
18. *New Zealand Bill of Rights Act 1990* (N.Z.), 1990, no. 109 [hereinafter *Bill of Rights Act*]; *Human Rights Act 1993* (N.Z.), 1993, no. 82.
19. Principe, *supra* note 13 at 62; *Bill of Rights Act, ibid.*, ss. 4, 6.
20. Pace, *supra* note 7 at 151-52.
21. *Supra* note 1, s. 1 of the *Act* incorporates Articles 2 to 12 and 14 of the Convention, Articles 1 to 3 of the First Protocol, and Articles 1 and 2 of the Sixth Protocol, as read with Articles 16 to 18 of the Convention. The United Kingdom has so far made one derogation to the Convention, declaring a public emergency under Article 15(1) in response to the situation in Northern Ireland. It also made a reservation to sentence 2, Article 2 of the First Protocol respecting the right of parents to ensure education and teaching in conformity with their own religions and philosophical conventions. In incorporating the Convention, the *Act* omits Article 13, which states that anyone whose rights and freedoms under the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation was committed by persons acting in an official capacity. This article would likely violate the doctrine of parliamentary sovereignty by allowing private persons to seek damages in the courts against public authorities for acts clearly permitted by Parliament, or perhaps even against Parliament itself.

must have increased regard for the jurisprudence of the European Court of Human Rights in giving protection to those rights. Section 2 of the *HRA* directs the English courts to "take into account" the decisions and opinions of the European Court of Human Rights, the Commission, and the Committee of Ministers. However, the section stops short of expressly giving the decisions of the European Court of Human Rights the status of binding precedent, thus reserving discretion to English courts in applying them. Nevertheless, these decisions will now have considerably more authority.[22]

Sections 3 and 4 of the *Act* lay out the extent of judicial review. Section 3(1) states:

> [s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.[23]

In fact, courts have often employed a similar canon of statutory construction to prevent conflicts between legislation and either common-law rules, treaty obligations or other legislation. Section 3(1) now mandates such interpretation and encourages the courts to push their interpretation of legislation farther in seeking compliance with the Convention. Section 3(2) also makes it clear that even if courts find acts of Parliament incompatible with the Convention, the legislation remains valid. Therefore, the *Act* does not give the judiciary the power to strike down an act of Parliament or ignore its express grant of administrative authority. Instead, section 4 authorizes the judiciary to issue non-binding declarations of incompatibility.[24]

When a domestic court, or even the European Court of Human Rights, finds a law incompatible, section 10 allows for a Minister, or the Queen in Council, to order amendments to the legislation to remove the defect. The fast-track amending procedure is available when a minister finds

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22. H. Fenwick & G. Phillipson, "Public Protest, the Human Rights Act and Judicial Responses to Political Expression" [2000] Pub. L. 627 at 640.

23. *Supra* note 1.

24. *Supra* note 1, s. 4(6)(b) stipulates that a statement of incompatibility also has no effect on the parties to the proceedings. Geoffrey Marshall critically characterizes such a statement as "not a legal remedy but a species of booby prize," useless to a litigant who should prefer to argue for a favorably compatible interpretation of the law in question. He further suggests that the desire to interpret legislation as compatible with the Convention will possibly lead courts to give a thin reading to the rights in need of protection. G. Marshall, "Two Kinds of Compatibility: More about Section 3 of the Human Rights Act 1998" [1999] Pub. L. 377 at 382 [hereinafter "Two Kinds of Compatibility"] and "Interpreting Interpretation in the Human Rights Bill" [1998] Pub. L. 167 at 170; Courts will have to review substantively not only parliamentary acts and administrative actions, but will also have to interpret the scope of Convention provisions. F. Bennion, "What Interpretation is 'possible' under section 3(1) of the Human Rights Act 1998?" [2000] Pub. L. 77 at 86.

compelling reasons for its use. This expeditious remedial alternative will likely put considerable political pressure on the government to take action and correct incompatible legislation. Incidentally, section 19 further requires the responsible Minister, before the second reading of a bill, to make a statement as to whether the bill is compatible with the Convention. If the Minister declares that it is not compatible, he or she may nevertheless urge Parliament to pass the legislation.[25]

Another significant part of the *Act* is section 6(1) which provides that:

> [i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right.[26]

Section 6(6) adds that a public authority may also act unlawfully by a failure to act as required by the Convention. Interestingly, section 6(3) classifies courts and tribunals as public authorities. This will mean that courts cannot apply statute or common law in a way that contravenes the Convention.[27] This limitation will also restrict a court's power to award remedies and damages. However, section 6(3) notably excludes Parliament from its definition of a public authority, thereby preventing any claims directly against it. Moreover, section 6(6) provides that an unlawful failure to act does not include the failure to introduce legislation in Parliament.

The remaining sections of the *HRA* are predominately procedural in nature. As such, they will likely have little effect on larger constitutional issues. While ultimately respecting parliamentary sovereignty, the *Act* will nevertheless significantly impact institutional structures and substantive law in the United Kingdom.[28]

II. *Institutional and Substantive Effects of the Human Rights Act*

The *HRA* will influence the recognition of human rights in the United Kingdom in two significant ways. First, it will have institutional effects creating a constitutional atmosphere more congenial to rights protection. Political pressures will restrict Parliament's ability to contravene guaranteed rights while courts will exercise substantive review in determining the compatibility of legislation with the Convention. The adjudication of rights will accordingly shift from a formalistic to a more

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25. Nicholas Bamforth suggests that section 19 might come to be considered as a manner and form restriction on Parliament, which does not limit its substantive powers of legislation, but does alter the constitutionally required procedure by which a bill passes through Parliament. N. Bamforth, "Parliamentary Sovereignty and the Human Rights Act 1998" [1998] Pub. L. 572 at 575, 577.

26. *Supra* note 1.

27. Sir J. Laws, "The Limitations of Human Rights" [1998] Pub. L. 254 at 262-63.

28. M. Elliott, "The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review" (1999) 115 L.Q. Rev. 119 at 126-27, 128.

substantive process. Secondly, incorporation of the Convention and case law of the European Court of Human Rights introduces a more positive rights jurisprudence and an adjudicative process that is also more teleological. English courts will have to confront these differences and reconcile them with a traditional common-law approach stressing negative rights and judicial formalism.

1. *Institutional Effects*

The formalism of English adjudication has diminished considerably in the past several decades with *ultra vires* judicial review. The *ultra vires* doctrine allows courts to review acts of executive officers and administrative agencies to ensure that their decisions are within Parliament's statutory grant of authority. If a court finds that an administrative action strays beyond the authority that Parliament has delegated to the officer or public body, the courts will invalidate it as *ultra vires*.

This limited measure of judicial review curtails administrative action potentially detrimental to individual rights. In theory, when examining administrative action, the courts only make sure that the challenged decision falls within the delegated grant of authority without judging its substantive merits.[29] However, courts have broadened the grounds on which administrative actions are evaluated and have inferred a parliamentary intent of rationality in the decision-making process. Courts have thereby effectively engaged in some degree of substantive review.[30]

The *HRA* builds upon the *ultra vires* doctrine by allowing courts to review parliamentary legislation in light of the Convention. Although courts cannot strike down statutes, they may still aggressively scrutinize legislation for compatibility.[31] In doing so, courts will now have to undertake a greater degree of substantive review.[32]

While adjudication under both the *ultra vires* doctrine and the *Act* is likely to be similar in that courts must ultimately give effect to Parliament's intent, the implications of the *Act* for the constitutional order are far-reaching.[33] The *HRA*, as a regular statute, is subject to repeal by Parliament

29. J. Jowell, "Of Vires and Vacuums: The Constitutional Context of Judicial Review" [1999] Pub. L. 448; C. Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) 55 Cambridge L.J. 122 at 136-37; Elliott, *supra* note 28 at 120, 123.

30. Jowell, *ibid.* at 453; J. E. Levitsky, "The Europeanization of the British Legal Style" (1994) 43 Am. J. Comp. L. 347 at 350.

31. Lord Irvine of Lairg, "The Development of Human Rights in Britain under an Incorporated Convention on Human Rights" [1998] Pub. L. 221 at 225.

32. *Ibid.* at 235.

33. S. Greer, "A Guide to the Human Rights Act 1998" (1999) 24 Eur. L. Rev. 3 at 15.

and its provisions are tailored to respect parliamentary sovereignty. For example, sections 3(2)(b) and 4(6)(a) ensure that the judiciary's new power to issue declarations of incompatibility are limited and subordinate to Parliament in that they have no legal effect. Nevertheless, actual practice under the *Act* will effectively limit Parliament. Strong political pressures will come to bear on the Executive and Parliament should the government attempt to repeal the *HRA* or seriously infringe upon guaranteed rights.

A declaration of incompatibility by a court will also bring attention to legislation that is in violation of the Convention and will no doubt motivate political action to amend the offending statute.[34] The provision in section 19 that requires Ministers to give a statement to Parliament as to whether a pending bill will or will not conform to the Convention should further galvanize political pressure during parliamentary debate to ensure that legislation will comply. Rights will therefore not only be protected in post-enactment legal challenges but throughout the actual law-making process. The political effects of the *HRA* might therefore restrict the actions of the government far more than formal theory would suggest.[35]

2. *Substantive Effects*

The *HRA* will not only introduce institutional changes into the British constitution, but will also have implications for substantive law as well. The *Act*'s incorporation of the Convention and the jurisprudence of the European Court of Human Rights will introduce a foreign approach to some rights that is more positive in nature. However, its careful attempts to preserve parliamentary sovereignty will still make it difficult to claim a right requiring affirmative government action, rather than forbearance.

Section 2 of the *Act* provides that a court or tribunal must take into account decisions made by the European Court of Human Rights. This will greatly impact the judiciary's application of the Convention. English courts had referenced the decisions of the European Court of Human

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34. Greer writes that judicial statements of incompatibility will "thrust the legislative provisions to which they attach into a half-way house between legality and illegality, the precise implications of which are difficult to fathom." Greer, *ibid.* at 13, 15; Elliott, *supra* note 28 at 127; Bamforth, *supra* note 25 at 573; Lord Woolf of Barnes, "The Civil Justice Framework for Incorporation of the European Convention" (1997) 32 Tex. Int. L.J. 427 at 430-431.

35. Courts may very well consider ministerial statements of compatibility under the rule in *Pepper v. Hart*, [1993] A.C. 593, that they can consider legislative history and ministerial statements made in Parliament when interpreting legislation. F. Klug, "The Human Rights Act 1998, *Pepper v. Hart* and All That" [1999] Pub. L. 246 at 271-72; A judicial statement of incompatibility will also offer support for a claim before the European Court of Human Rights should the Government fail to take corrective measures. Greer, *supra* note 33 at 13, 20; Lord Irvine, *supra* note 31 at 226, 228.

Rights even before enactment of the *HRA*. In doing so, they followed a canon of construction to interpret statutes as far as possible to comply with the United Kingdom's political obligations under the Convention.[36] Section 2 now requires English courts to give considerably more weight to European Court of Human Rights decisions and the need for consistent and logical development of the principles in the Convention will further necessitate the incorporation of its jurisprudence.[37] This increased authority of the European Court of Human Rights will further integrate English law into a European wide legal system of rights.

While the adjudicative process in the United Kingdom is generally one of formalism, there is a substantive aspect that does exist in common-law rights jurisprudence. Rights exist as a negative concept thereby limiting the state's power to encroach upon liberties.[38] Although the common law remains subject to modification by Parliament, it nevertheless limits government power in two important ways. First, courts interpret statutes consistently with the common law, assuming that Parliament would never intend to violate it without a clear expression.[39] Second, violations of common-law liberties raise sharper political scrutiny of government action.[40] This negative conception of rights fosters a view of society in which individuals are free from government constraint or coercion, but lack any affirmative claim of right.[41]

The European Court of Human Rights' approach to adjudication includes a positive conception of rights. An example is provided by the finding that Article 8 of the Convention, which establishes a right to privacy, places an affirmative obligation upon member states to protect personal privacy against infringements by third parties. The state can therefore violate Article 8 not only by violating someone's privacy, but also by failing to take steps to prevent other private parties, such as the

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36. Such construction is based upon the presumption that, in ambiguous instances, Parliament intends to legislate consistently with its obligations under the Convention and the European Community. L. P. Carnegie, "Privacy and the Press: The Impact of Incorporating the European Convention on Human Rights in the United Kingdom" (1998) 9 Duke J. Comp. & Int'l L. 311 at 332; Lord Woolf, *supra* note 34 at 429.

37. "Two Kinds of Compatibility", *supra* note 24 at 378.

38. Lord Scarman, "Human Rights in an Unwritten Constitution" [1987] Denning L. J. 129 at 135.

39. Bradley, *supra* note 5 at 236; T. R. S. Allan, "Constitutional Rights and Common Law" (1991) 11 Ox. J. L. Stud. 453 at 453-54.

40. The political culture of the United Kingdom has generally been sensitive to the protection of rights, despite having no constitutional guarantees. "Instead, precedent, customs, conventions, and Acts of Parliament collectively safeguard basic rights." Pace, *supra* note 7 at 151; Adjei, *supra* note 9 at 22-23.

41. Lord Scarman, while applauding the common-law's defense of some rights, nevertheless finds its inability to protect rights of a more positive nature to be a weakness. Lord Scarman, *supra* note 38 at 135.

press, from doing so.[42] Nevertheless, the European Court of Human Rights' interpretation of Article 8 potentially conflicts with the relatively broad common-law conception of freedom of expression. In possible anticipation of such a positive obligation, section 12 of the *Act* directs that courts must give particular regard to the freedom of expression. While there may be opportunity for reconciling these two concerns, possibly through a margin of appreciation or the common-law doctrines of slander and libel for instance, they reflect a fundamental difference in the conception of rights.

A positive notion of rights might also expand the concept of the state from that generally recognized in the political tradition of the United Kingdom. In addition to persons or institutions that are actual instruments of government policy, "public authority" under the *Act* could arguably be interpreted so broadly as to encompass organizations receiving public monies and support, or legislatively created bodies such as incorporated businesses. As section 6 includes courts in the definition of public authorities, the Convention could conceivably be applied to numerous transactions between private parties.[43] Not only would courts then be under a duty to resolve private disputes in accordance with the Convention, but the government might also have an obligation to regulate traditionally private conduct.

The *HRA* aims to guarantee rights against government encroachment, while maintaining the constitutional orthodoxy of parliamentary supremacy. Therefore, the *Act* seems to contradict the notion that citizens might rely on the Convention to claim a positive right from the state. The *Act*'s negative approach to rights is very much in the common-law tradition, which has always been based upon the premise that everything is allowed that is not prohibited according to law. The common law shields individual liberty by restraining state action through procedural safe guards and substantive principles.[44] The Convention mirrors this approach by guaranteeing rights to a fair trial and no punishment except according to law in Articles 6 and 7. These rights do create positive obligations of judicial process within an otherwise negative conception

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42. Carnegie, *supra* note 36 at 334-35, 338-39; Laws, *supra* note 27 at 259.

43. See generally D. Oliver, "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act" [2000] Pub. L. 476; Laws, *supra* note 27 at 262-63.

44. It should again be noted that any restraint offered by common-law rights is only of a moral nature and is not legally enforceable against Parliament in the courts; Lord Browne-Wilkinson, *supra* note 9 at 436; Sir S. Sedley, "Human Rights: a Twenty-First Century Agenda" [1995] Pub. L. 386; Allan, *supra* note 39 at 455-57, 462, 478; Winterton, *supra* note 3 at 599; Lord Irvine, *supra* note 31 at 224-25; Jowell, *supra* note 29 at 455-56.

of rights.[45] However, procedural protections do not restrict the substantive scope of Parliament's power or policy options, but direct the manner in which it may exercise them. As Parliament remains sovereign, a claim to require any sort of positive action against its will is doctrinally untenable.[46]

The provisions of the HRA will make it difficult for any individuals to claim positive rights under the Convention. Although section 6(1) makes it unlawful for any public authority to act in a way incompatible with the Convention, section 6(3) specifically excludes Parliament from the definition of "public authority." In some instances, however, individuals may be able to claim a positive right against public authorities using section 6(6), which includes "a failure to act" within the definition of "an act" for the purposes of the *HRA*. The courts could find that, unless the enabling statute clearly provides otherwise, the *HRA* effectively imposes positive obligations on public authorities. This interpretation could maintain the doctrine of parliamentary sovereignty by founding a positive claim upon implied legislative intent.

The hierarchy between Parliament and subordinate public bodies supports the idea that any positive rights ultimately derive from either Parliament's actual creation of such a right or its implied acquiescence to a claim directly under the Convention. Section 6(6) further guarantees that any claim to a positive right cannot be asserted against Parliament, as the failure to introduce legislation cannot be unlawful. Finally, the *HRA* does not incorporate Article 13 of the Convention, requiring an effective legal remedy for violations of its guarantees. The *Act*'s exclusion of this article therefore disallows claimants to seek relief based upon a claim that the government has not satisfied a positive right.

Just as the European Court of Human Rights has interpreted some of the rights in the Convention in a positive manner, its method of adjudication is very different from English formalism. Whereas English courts have traditionally focused upon statutory language when searching for parliamentary intent, the European Court of Human Rights has taken a teleological approach to the Convention. This interpretive approach has a purposive outlook and seeks to fulfill the spirit or goals of the legal regime involved. It is useful for applying the broad statements of principle contained in the Convention, many of which are not well suited to a formalistic and textually based approach to interpretation as found in

45. Laws, *supra* note 27 at 259-61.

46. Allan, *supra* note 39 at 455; In the English common-law tradition, "[t]he individual citizen enjoys no legal rights as against the legislature, save the democratic right to vote out the Government which passed the offending legislation so as to procure its repeal." Lord Browne-Wilkinson, *supra* note 9 at 436.

the common law.[47] English courts will sometimes be able to avoid this problem by relying directly upon the decisions of the European Court of Human Rights. However, in instances when the law is vague or the circumstances are novel, courts must have regard to the principles of the Convention in their attempt to develop the law consistently and correctly. Courts will first have to analyze a statute formalistically to discern parliamentary intent and then review it substantively against the Convention. Courts will therefore have to take into account the broader purposes of the Convention when looking at its provisions to find their meaning. These guiding ideals will be value-laden, intended to promote concepts such as human dignity, equality, and pluralist democracy.[48]

Conclusion

The *HRA*'s incorporation of the Convention will have significant implications for English law. The first effects will be upon the institutional structure of the British constitution. Courts, armed with the power to issue statements that a statute is incompatible with the Convention, will now be able to substantively review acts of Parliament. Such a review will be a break from the judiciary's formalistic tradition, although courts must continue to determine parliamentary intent in order to apply it. Despite having no legal effect upon the validity of the statute in question, a statement of incompatibility will nonetheless place strong political pressures upon the government to amend the legislation. In addition, the *HRA*'s requirement that ministers must issue a statement of a bill's compatibility during the legislative process will provide a further obstacle to Parliament's infringement of human rights. Although the *HRA* does not impair the doctrine of parliamentary sovereignty, political pressure and increased consciousness of rights in the political sphere will erect practical, even if not theoretical, limits upon Parliament's legislative powers.

Secondly, the incorporation of the Convention and the accompanying jurisprudence of the European Court of Human Rights will also have a substantive impact on English law. The interpretation given to some rights by the European Court of Human Rights are positive in nature, placing affirmative obligations upon the state to comply with the

47. Lord Irvine, *supra* note 31 at 232; This same judicial approach arises in the context of European Community law and the jurisprudence of the European Court of Justice. Levitsky, *supra* note 30 at 348, 350-52; Bennion, *supra* note 24 at 81-82.

48. Lord Irvine, *supra* note 31 at 229, 233; Bennion, *supra* note 24 at 89.

Convention. This notion of rights conflicts with the common-law idea of negative rights, reflected in the *Act*, which will possibly make it difficult for a claimant to pursue a positive right in the courts. Although positive rights are foreign to the common-law concept of liberty and the state, the courts' new powers of substantive review may allow them to derive new principles and rules for positive claims that are uniquely suited to English law. Along with its positive conception of rights, the European Court of Human Rights also employs a purposive approach to interpretation. Intended to promote the spirit of the Convention, this method differs from the formalistic manner in which English courts determine the intent of Parliament. Courts will have to consider such a purposive approach when interpreting the Convention in order to develop a conception of rights consistent with that of the European Court of Human Rights.

Institutional changes will be immediately evident but it may take some time before the substantive effects of the *Act* begin to appear in English jurisprudence. However, this paper concludes by offering one prediction: the *Act* will re-invigorate the common law as a system for rights protection. As a legal tradition premised upon both precedent and continuing experience, the common law is simultaneously resilient in the face of dramatic change and flexible in incorporating new ideas. The common law is thus quite suited to embrace the European Convention on Human Rights and weave it into its own fabric.[49]

49. Laws, *supra* note 27 at 264-65; Allan, *supra* note 39 at 461, 467-68, 471, 477-79.