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# **THE IMPLEMENTATION AND IMPACT OF THE HUMAN RIGHTS ACT 1998 IN THE UK**

A Context Statement submitted to Middlesex University in partial fulfilment of  
the requirements for the degree of Doctor of Philosophy by Public Works.

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## **Abbreviations**

BIHR	British Institute of Human Rights
CPA	Child Poverty Act 2010
CRC	UN Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EHRC	Equality and Human Rights Commission
HRA	Human Rights Act
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JCHR	Joint Committee on Human Rights
JRF	Joseph Rowntree Foundation
NIHRC	Northern Ireland Human Rights Commission
NHRI	National Human Rights Institution
SHRC	Scottish Human Rights Commission

## **Personal background**

I graduated in 1987 with a First Class Honours degree in History from Emmanuel College, Cambridge University. After a period of employment in voluntary sector organisations in the UK and the Philippines, the first phase of my career spanned 14 years (1991-2005) as a radio and online journalist, journalism trainer, editor and commissioner in the BBC World Service. Among other roles, from 1999-2004, I edited the daily news and current affairs radio programme *East Asia Today*. I gained first-hand experience of reporting on, or coordinating coverage of, events with a strong human rights dimension in authoritarian (or recently authoritarian) states such as China, North Korea, Burma, Laos, Indonesia and the Philippines.

In 2005, I left the BBC in order to pursue a new career in academic research and teaching in the field of human rights. In 2006, I passed the MSc Human Rights at the London School of Economics with Distinction. My intention in taking the MSc was to build on my experience of reporting (and voluntary activism) on human rights issues by exploring the historical and philosophical origins of human rights and their potential to influence policy and animate social movements, through both the legal process and other forms of social action. I was aware of the prominence of human rights in the UK, and in particular the purported tension between human rights and public security in the context of the ‘war on terror’. I was struck by the disjuncture between the ubiquity and near incontestability of the human rights discourse internationally and its increasingly contentious profile in the UK. I was attracted by the inter-disciplinary nature of the MSc because I consider that the subject of human rights is strengthened when it extends beyond the legal sphere and engages, as my work has subsequently done, with disciplines such as social policy and democratic theory.

From 2006, I worked for four years as an independent consultant. Initially, my consultancies were in the field of media and communications; I undertook research, evaluations, training and teaching for, among others, the United Nations Scientific and Cultural Organisation; Polis (the centre for the study of journalism and society at LSE), the BBC, the Foreign and Commonwealth Office, the Joseph Rowntree Foundation and the Catholic Fund for Overseas Development. Over time, I successfully developed bids for and completed research projects in the fields of human rights, with the first research outputs being published in 2009. Several of these were conducted jointly with the Human Rights and Social Justice Research Institute at London Metropolitan University.

In June 2010, I joined the Institute as a Senior Research Fellow. In January 2013, I moved to Middlesex University along with my colleague Professor Philip Leach and the European Human Rights Advocacy Centre. The publications submitted for this PhD originate from research conducted while I was an independent consultant and while employed at London Metropolitan University.

## Abstract

The premise of my research is an understanding of human rights not only as a technical, legal discourse but also as a set of standards and principles which, when applied outside the courts, provide a framework for decision-making, a vehicle for social and organisational change, and a basis for moral, as well as legal, claims upon the exercise of power. My research proceeds within the conceptual framework provided by recent theory conceiving of a democratic legal order which includes human rights as a ‘culture of justification’ - a culture in which exercises of power, or failures to exercise power, which impinge upon human rights require reasoned public justification that is open to independent scrutiny.

In this statement I divide my research into two strands. The first concerns the application of human rights standards and principles in public services. Its distinct contribution lies in the use of empirical research methods to explore how, and with what results, public authorities have embedded human rights standards and principles in decision-making since the enactment of the Human Rights Act (HRA) 1998. This inquiry contributes to the emergent understanding of what constitutes a ‘human rights culture’ in public services, in both empirical and normative terms. I identify factors that tend either to encourage or inhibit the systematic application of human rights at the levels of both individuated and corporate decision-making. I conclude that a human rights culture has largely failed to materialise among public authorities. However, I identify variation between the nations of the UK (with more explicit adoption of human rights standards in the devolved nations) and between public authorities (with a few that demonstrate what an overtly ‘rights-respecting’ service looks like). I evaluate the evidence that may be adduced as to the impact of human rights in public services and propose how evaluative work might proceed in the future.

The second strand of my research concerns the political discourse surrounding the HRA and, in particular, initiatives to create a new UK bill of rights. I identify principles and methods that have been used to create bills of rights in comparable jurisdictions, situating these within the post-war trend towards ‘process-driven constitutionalism’. I evaluate bills of rights processes in the UK in the light of this experience. I conclude that conditions for reform of human rights law in the UK are deeply unfavourable and that the consultative processes pursued by successive governments are ill-designed to achieve democratic legitimacy for the project. My research establishes that dissensus on human rights in the UK traverses the ‘fault lines’ of profound social and political antagonisms. These include the relationship between the individual and the community, commonly invoked through the lens of ‘rights and responsibilities’; between the nation state and Europe; and between parliament and the courts. Human rights have also become a prime venue for the negotiation of religious and cultural differences. Within this turbulent context, my research proposes ways of advancing debate about human rights such that it meets the requirements of open justification.



## **Guide to context statement**

Part 1 of this statement introduces my research in relation to the conceptual frameworks to which it connects; the provenance of my publications and the methodology employed. Part 2 outlines the political and legal context in which I conducted my research.

Structured around the two principal strands of my research, parts 3 and 4 provide a synoptic account of its main themes and findings and explain its contribution to the socio-legal study of human rights.

I draw some overall conclusions of my research in part 5 and in part 6, I explain my current research and how I wish to develop my research interests in the future.

While the statement focuses principally on the findings of my research at the time of publication, I have also taken the opportunity to update aspects of it in order to show where subsequent developments either reinforce my findings or, conversely, where there are grounds to think that the findings might need to be revised in the light of new evidence and/or where further research is required to determine whether such revision might be necessary.

Several of my publications have been co-authored and/or co-researched with others. For concision, I do not refer to this co-authorship every time that I refer to a specific publication. Annex B sets out in detail the division of labour with respect to the various co-authored or co-researched publications.

## 1. INTRODUCTION

The research outputs submitted for this PhD form a coherent body of work published between 2009 and 2013 examining the implementation and impact – broadly defined – of the Human Rights Act (HRA) 1998 following its enactment across the UK in 2000. My research combines empirical research with normative argument, thereby making a distinctive contribution to the socio-legal study of human rights in the UK.

Below, I introduce my research in relation to: the conceptual approaches to which it connects (section 1.1); the provenance of my publications (section 1.2); and the methodology employed (section 1.3).

### 1.1 Conceptual framework

The premise of my research is an understanding of human rights not only as a technical, legal discourse but also as a set of standards and principles which, when applied outside the courtroom, provide a framework for decision-making, a vehicle for social and organisational change, and a basis for moral (as well as legal) claims upon the exercise of power. My principal interest is in the processes by which human rights standards and principles are ‘translated’ into the realisation of rights. My research encompasses the application of human rights standards and principles in public policy and the design and delivery of public services as well as the way in which human rights are invoked in wider political discourse.

My starting point, then, is a political conception of human rights which understands rights as substantive norms that establish ‘the social and political conditions of a decent society [and] ... the basic aspects of a dignified life for individuals and groups’;<sup>1</sup> that may demand not only limitations on state action but also positive and systematic action by a wide range of actors,<sup>2</sup> and that invite deliberation and argument outside, as well as inside, the courts.<sup>3</sup> From this point of departure, my research connects in particular to theory which explores the interaction between the various branches of the state in the protection and

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<sup>1</sup> A. Sathanapally (2012) *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford: Oxford University Press), p. 1. For influential accounts of the political (as opposed to natural rights) conception of human rights, see: C. Beitz (2009) *The Idea of Human Rights* (Oxford: Oxford University Press); T. Pogge (2008) *World Poverty and Human Rights*, Second Edition (Cambridge: Polity); J. Rawls (1999) *The Law of Peoples* (Cambridge MA: Harvard University Press); H. Shue (1980) *Basic Rights: Subsistence, Affluence and US Foreign Policy*, Second Edition (Princeton: Princeton University Press).

<sup>2</sup> See, e.g., S. Fredman (2008) *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press).

<sup>3</sup> A. Sen (2004) ‘Elements of a Theory of Human Rights’ *Philosophy and Public Affairs* 32(4): 315.

fulfilment of human rights and thus, in turn, the broader relationship between the legal and political spheres and between human rights and democracy.

In this section, I outline the (overlapping) conceptual approaches which have helped my thinking to evolve and explain how my research connects to them. For the purposes of this statement, I have drawn on recent conceptual literature as well as that which predates my publications. In this sense, the frameworks elaborated in this section are in part a retrospective analysis of my research, as well as an explanation of the conceptual approach which will inform my current and future research.

I examine (i) the development of theoretical approaches which seek to transcend the traditional divide in scholarship between legal and political constitutionalism; (ii) the concept of law as a ‘culture of justification’; and (iii) the notion of ‘inter-institutional collaboration’ in the protection and fulfilment of human rights. Finally, (iv), I examine briefly the state of debate in the UK in relation to these conceptual approaches.

### **(i) The issue of who decides**

In normative terms, the divide in public law thought between legal and political constitutionalism may be outlined as follows: legal constitutionalists champion the judicial model of rights protection since otherwise, they argue, the rights of individuals and minorities are placed at the mercy of transient and potentially irrational or unjust legislative majorities or executive dictat.<sup>4</sup> Political constitutionalists, on the other hand, doubt the legitimacy of justiciable bills of rights, because they remove from the sphere of democratic contestation matters (such as the meaning and scope of rights) which are inescapably contestable and hand them over to unaccountable judges.<sup>5</sup> Bellamy observes that both kinds of constitutionalism in fact allow for a balance to be struck: different forms of legal constitutionalism give greater or lesser weight to the legislature and popular sovereignty, in deciding constitutional questions, and different forms of political constitutionalism allow greater or lesser degrees of judicial

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<sup>4</sup> See, e.g., T. R. S. Allan (1994) *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press); V. Bogdanor (2009) *The New British Constitution* (Oxford: Hart Publishing) Chapter 3; R. Dworkin (1996) *Taking Rights Seriously* (London: Duckworth); T. Hickman (2005) ‘In Defence of the Legal Constitution’ *University of Toronto Law Journal* 55(4): 981; J. Jowell (2000) ‘Beyond the Rule of Law: Towards Constitutional Judicial Review’ *Public Law* Winter: 671.

<sup>5</sup> R Bellamy (2007) *Political Constitutionalism: A Republican Defence of the Constitutionalism of Democracy* (Cambridge: Cambridge University Press); T. Campbell, K. D. Ewing and A. Tomkins (2010) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press); A. Tomkins (2005) *Our Republican Constitution* (Oxford: Hart Publishing); M. Tushnet (1999) *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press); J. Waldron (2009) ‘The Core of the Case Against Judicial Review’, *Yale Law Journal* 115: 1346; G. Webber (2009) *The Negotiable Constitution: On the Limitation of Rights* (Cambridge: Cambridge University Press).

independence and discretion.<sup>6</sup> Normatively speaking, the crux of the divide is where *ultimate* supremacy for human rights adjudication should lie. For legal constitutionalists, the legal context and independence of courts give them the advantage in exercising impartial reasoning about rights; for political constitutionalists, the deliberative attributes of legislatures and their greater institutional capacity, coupled with the accountability of legislators to citizens, make them the superior forum.<sup>7</sup>

The role of legislatures in relation to the protection of fundamental rights has traditionally been far less theorised than that of courts. Yet in the past two decades, interest has grown among both legal scholars and political scientists in the role of the legislature in determining what rights require and how they are to be balanced both against each other and other public policy objectives. This literature has engaged with both the theory and practice of the development (or attempted development) since the early 1980s of national bills of rights in the common law world.<sup>8</sup> Some of this literature advocates parliamentary scrutiny of law and policy for human rights compatibility as an *alternative* to judicial review for such compatibility, arguing (in line with the political constitutionalist position outlined above) that it is both a more effective and more legitimate way of protecting rights.<sup>9</sup> Other accounts, while sharing the concern to avoid a judicial monopoly on determining the meaning and scope of human rights, are more concerned with how, within a democratic legal order, bills of rights might be structured so as to ensure the engagement of *both* the judiciary and the elected branches of government in the interpretation and application of fundamental rights norms.<sup>10</sup> There is variation within this literature as to the extent to which is purely normative or also empirical and as to the particular scope of judicial and legislative roles proposed or described.

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<sup>6</sup> R. Bellamy (2011) 'Political Constitutionalism and the Human Rights Act', *International Journal of Constitutional Law* 9(1): 86.

<sup>7</sup> Contrast, e.g. D. Dyzenhaus (2009) 'Are legislatures good at morality? Or better at it than the courts?' *International Journal of Constitutional Law* 7(1): 46 and J. Waldron (2009) 'Judges as Moral Reasoners' *International Journal of Constitutional Law* 7(1): 2.

<sup>8</sup> Early accounts include S. Gardbaum (2001) 'The New Commonwealth Model of Constitutionalism' *American Journal of Comparative Law* 49: 707 and J. Waldron (1999) *Law and Disagreement* (Oxford: Oxford University Press).

<sup>9</sup> See, e.g., T. Campbell, J. Goldsworthy and A. Stone (eds) (2006) *Protecting Rights Without a Bill of Rights* (Aldershot, UK: Ashgate); C. Evans and S. Evans (2006) 'Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights' *Public Law* Winter: 785; Tushnet, *Taking the Constitution Away from the Courts* as above n 5; Waldron, *Law and Disagreement* as above n 8.

<sup>10</sup> For a useful summary, see M. Hunt, H. Hooper and P. Yowell (2012), *Parliaments and Human Rights: Redressing the Democratic Deficit*, AHRC Public Policy Series No. 5, pp.14-17. See also J. Hiebert (2006) 'Parliamentary Bills of Rights: An Alternative Model?' *Modern Law Review* 69(1):7; J. Hiebert (2004) 'New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance when Interpreting Rights?' *Texas Law Review* 82(7):1963.

Gardbaum's 'new Commonwealth'<sup>11</sup> model traces the historical development of bill of rights in Canada, New Zealand and the UK, arguing that each affirms a model of parliamentary democracy that consciously rejects the American model of constitutionalism with its perceived excess of judicial power and 'places the representative legislature, at least symbolically, at the apex of government'.<sup>12</sup> Erdos similarly explores the shared constitutional heritage of bills of rights in the 'Westminster world'.<sup>13</sup> A related concept is that of Tushnet's 'weak-form' judicial review; this approach is more conceptual than historical and emphasises the similarities between bills of rights which are structured in various ways so as to empower legislatures to provide constitutional interpretations which differ from or alter interpretations made by the courts, in contrast to the US-style 'strong-form' model, in which fundamental rights are entrenched as supreme law.<sup>14</sup> Straddling these approaches is the ubiquitous metaphor of an institutional 'dialogue' between the judiciary and the elected branches, in which each participates in an iterative process of decision-making.<sup>15</sup> The dialogic approach still leaves significant room for variation, particularly as to whether a national model of rights protection permits the legislature to decide not only *how* to respond to judicial interpretations of rights but also *whether* to respond.<sup>16</sup> Yet, in all its varieties, the 'new dialogue scholarship' (as Sathanapally terms it) accepts the need for interaction between the judiciary and the elected branches and eschews the 'either/or' dichotomy between parliamentary sovereignty and judicial supremacy.<sup>17</sup>

My research proceeds within this broad conceptual framework in which the three main branches of government – and, as I argue in section (iii) below, an even wider circle of actors - have legitimate and necessary roles to play in the shared enterprise of protecting and fulfilling human rights. In particular, my research connects to two closely-related ideas that

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<sup>11</sup> Gardbaum, 'The New Commonwealth Model of Constitutionalism' as above n 8. See also S. Gardbaum (2010) 'Reassessing the New Commonwealth Model of Constitutionalism', *International Journal of Constitutional Law* 8: 167.

<sup>12</sup> Sathanapally, *Beyond Disagreement*, as above n 1, p. 13.

<sup>13</sup> D. Erdos (2010) *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (Oxford: Oxford University Press).

<sup>14</sup> M. Tushnet (2003) 'Alternative Forms of Judicial Review' *Michigan Law Review* 101(8): 2781.

<sup>15</sup> T. Hickman (2005) 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' *Public Law Summer*: 306; C.R.G. Murray (2013) 'The Continuation of Politics, by Other Means: Judicial Dialogue under the Human Rights Act 1998' in R. Masterman and I. Leigh (eds) *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford: Oxford University Press).

<sup>16</sup> Sathanapally, *Beyond Disagreement*, as above n 1, Chapter 2. See also G. Phillipson (2013) 'The Human Rights Act, Dialogue and Constitutional Principles' in Masterman and Leigh (eds) *The United Kingdom's Statutory Bill of Rights*, as above n 15.

<sup>17</sup> Sathanapally, *Beyond Disagreement*, as above n 1, p.38.

are integral to the 'shared enterprise' proposition: that of law as a 'culture of justification' and that of 'inter-institutional collaboration'.

**(ii) Law as a culture of justification**

Building on the work of South African scholar, Etienne Mureinik,<sup>18</sup> Hunt defines a culture of justification as one in which,

... all exercises of power which impinge upon fundamental rights, interests or values require public justification by reference to reasons, that is, rational explanations for why a particular action or decision has been taken, or why there has been an omission to act.<sup>19</sup>

This approach rejects arguments which are based upon formalistic notions of competing sovereignties since, as Hunt argues, such notions bear little relation to the way in which 'public power is now dispersed and shared between several layers of constitutional actors, all of which profess an identical commitment to a set of values which can loosely be termed democratic constitutionalism'.<sup>20</sup> Rather, Hunt ventures, there is a need to reconfigure public law towards more substantive concepts of value and reason as a basis for justification.<sup>21</sup>

As elaborated by Dyzenhaus, Mureinik's conception of the culture of justification rests on two ideals: participation and accountability.<sup>22</sup> The first is required because people whose rights and interests are affected or determined by a public policy should have the opportunity to participate in its formation. The second is required because the powerful are prone to monopolise such opportunities for participation. Hence, the principle of accountability - one which requires the justification of official decisions - must come into play by invoking the scrutiny of a review body independent of the official or agency, in order to protect the interests of people who find it hard to access participatory processes. For Mureinik, then, decisions that invoke the authority of 'the people' are only legitimate if they can be shown to be justifiable.<sup>23</sup> The possibility of judicial scrutiny forces the authors of public policy 'to articulate their reasons for dismissing the objections and the alternatives to the programme,

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<sup>18</sup> See especially E. Mureinik (1994) 'A Bridge to Where?: Introducing the Interim Bill of Rights' *South African Journal on Human Rights* 10: 31.

<sup>19</sup> M. Hunt (2007) 'Reshaping Constitutionalism' in J. Morison, K. McEvoy and G. Anthony (eds) *Judges, Transition and Human Rights* (Oxford: Oxford University Press), p. 470.

<sup>20</sup> Hunt, 'Reshaping Constitutionalism', as above n 19, p. 468.

<sup>21</sup> Hunt, 'Reshaping Constitutionalism', as above n 19, p. 470.

<sup>22</sup> D. Dyzenhaus (1998) 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' *South African Journal on Human Rights* 14: 11, pp. 34-35.

<sup>23</sup> Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture', as above n 22, p. 27.

and precisely to articulate the reasons that link evidence to decision, premises to conclusion'.<sup>24</sup>

Within such a culture of politico-legal justification, as Feldman terms it, rights are viewed as facilitative rather than constraining of democracy.<sup>25</sup> On this account, human rights and democracy do not stand in opposition to each other but, rather, debate shifts to the appropriate institutional machinery and modes of argument by which, collaboratively, the different arms of the state may fulfil their complementary roles. The concept of law as a culture of justification thus opens up for analysis a range of empirical questions such as whether and how a legal instrument like the HRA changes the structures of justification used by legislators or other decision-makers to explain their actions or omissions.<sup>26</sup>

My research connects to this idea in two ways. First, I view the concept of law as a culture of justification as setting a standard for the conduct of debate about public policies which implicate rights - including, naturally, public policy *about* human rights, such as, in the UK context, proposals to reconfigure the legal architecture for human rights protection. My research critically evaluates efforts by successive administrations to create a new bill of rights for the UK, drawing both on comparable experience from other common law jurisdictions and normative arguments about the relationship between human rights and different conceptions of democracy. Further, my research analyses contemporary critiques both of the HRA and the UK's relationship with the European Court of Human Rights (ECtHR) and assesses the basis of their justification.

Secondly, my research has involved empirical investigation of the application of human rights standards and principles at the level of policy-making and in the operational delivery of services. In this sense, I have examined how the culture of justification has played out at the level of the individual public authority or service as well as in the wider political realm.

### **(iii) Inter-institutional collaboration**

I established in (i) above that my research proceeds within a conceptual framework that views the protection and fulfilment of human rights as a shared endeavour of all branches of the state. The question remains as to *how* this joint responsibility is to be fulfilled, both with respect to its effectiveness and to the normatively sensitive allocation of authority. The

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<sup>24</sup> E. Mureinik (1992) 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' *South African Journal on Human Rights* 8: 468, pp. 472-73.

<sup>25</sup> D. Feldman (2011) "'Which In Your Case You Have Not Got'": Constitutionalism at Home and Abroad' *Current Legal Problems* 64: 117.

<sup>26</sup> Such empirical studies are rare. See especially Hunt, Hooper and Yowell, *Parliaments and Human Rights*, as above n 10.

concept of inter-institutional collaboration<sup>27</sup> arises in the context of literature which examines the relative advantages and drawbacks of the courts, as compared with other institutions, as a mechanism for solving problems relating to fundamental rights. Proponents of the ‘institutional approach’ reject formalist notions of demarcating separate and autonomous functions for each branch of government; rather, in examining the judicial role, they ask how the division of labour between courts and other institutions should best be achieved.

Several authors have sought to refine this discussion by means of a concept of judicial deference to elected institutions.<sup>28</sup> A common element of their approach is that judges should take an expansive view of what is appropriate for judicial resolution, rather than regarding some areas of policy (such as national security or resource allocation) as inherently inappropriate for adjudication. From this perspective, human rights cut across all substantive areas of decision-making, and there are no hard boundaries between legal and political redress. Another dimension of this approach is that judges should assign weight, and sometimes considerable weight, to the views of decision-makers in other institutions to whom the law has delegated policy-making and interpretative roles.

Some,<sup>29</sup> but not all,<sup>30</sup> advocates of the *practice* of judicial restraint have gone further to elaborate a doctrine of judicial restraint structured around certain explicit principles. Notably, Kavanagh distinguishes between ‘minimal’ and ‘substantial’ judicial deference to the elected branches.<sup>31</sup> Minimal deference is always due as a matter of respect, while substantial deference has to be earned by the elected branches and is justified only where a court considers itself to suffer from particular institutional shortcomings with regard to the matter

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<sup>27</sup> J. King (2012) *Judging Social Rights* (Cambridge: Cambridge University Press), p. 139.

<sup>28</sup> A. Kavanagh (2010) ‘Defending Deference in Public Law and Constitutional Theory’ (2010) *Law Quarterly Review* 126: 222; A. Kavanagh (2009) *Constitutional Review under the Human Rights Act* (Cambridge: Cambridge University Press); King, *Judging Social Rights*, as above n 27; M. Hunt (2003) ‘Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of “Due Deference”’ in N. Bamforth and P. Leyland (eds) *Public Law in a Multi-layered Constitution* (Oxford: Hart Publishing); E. Palmer (2007) *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Oxford: Hart Publishing), Chapter 4; A. Young (2009) ‘In Defence of Due Deference’ *Modern Law Review* 72: 554.

<sup>29</sup> For arguments in favour of a specific doctrine of judicial restraint, see: Kavanagh, ‘Defending Deference in Public Law and Constitutional Theory’, as above n 28; Young, ‘In Defence of Due Deference’ as above n 28; King, *Judging Social Rights*, as above n 27, Part II. See also the model of proportionality proposed by Brady, which integrates deference within the multi-stage proportionality test applied by the courts to assess the Convention-compatibility of all executive and legislative action; A. Brady (2012) *Proportionality and Deference under the UK Human Rights Act* (Cambridge: Cambridge University Press).

<sup>30</sup> For arguments against a doctrine of judicial restraint, see: T.R.S. Allan (2010) ‘Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review’ *University of Toronto Law Journal* 60(1): 41; T. Hickman (2012) *Public Law after the Human Rights Act* (Oxford: Hart Publishing).

<sup>31</sup> Kavanagh, *Constitutional Review under the Human Rights Act*, as above n 28, p. 181.



in question. These are cases in which a court judges parliament, the executive or another decision-maker to have either more institutional competence; more expertise, and/or greater legitimacy to assess a particular issue.<sup>32</sup> King pulls in the same direction in his examination of the capacity and legitimacy of the judicial process as an institutional mechanism for rights adjudication.<sup>33</sup> King proposes what he terms a ‘contextual institutional approach’ to judicial restraint, structured around certain principles, in which the judicial role is not a privileged form of higher law, situated above common politics, but rather ‘one institutional method of problem-solving acting in concert with other institutions’.<sup>34</sup> King endorses Kavanagh’s notion of ‘inter-institutional comity’<sup>35</sup> but, recognising that comity can exist between wholly separate institutions, extends it to include a more active relationship, which he terms inter-institutional collaboration.<sup>36</sup>

I find the concept of inter-institutional collaboration attractive for several reasons. Compared to inter-institutional comity, it implies both a more dynamic and a more cohesive relationship between the various actors. From this perspective, parliament, the executive and the courts are ‘part of a joint-enterprise for the betterment of society’ and ‘conflicts between them are subsumed within one vision of governance’.<sup>37</sup> Further, the concept has important consequences for how we evaluate the impact, value and significance of the HRA (and comparable justiciable bills of rights). It implies that the impact of the HRA is to be calculated by considering the collective behaviour of *all* types of institution that act (or attempt to act) to the public good under its influence in a way, or to an extent, that they did not do before it was enacted. Following this approach, in my research, I conceptualise these would-be agents of collaboration as including not only the courts, parliament and the executive but also other types of public authority such as regulators, inspectorates, ombudsmen, local authorities and other providers of public services. Moreover, they include not only the directors of public authorities but also operational staff who manage or deliver ‘frontline’ services, since all these actors are ultimately bound to act compatibility with the rights contained in the European Convention on Human Rights (ECHR).

This approach has led me to examine not only the impact of judicial review on the behaviour of public authorities but also the more nuanced ways in which human rights standards and principles influence decision-making and catalyse organisational change. I view the latter dimension as especially significant since only a tiny proportion of meritorious

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<sup>32</sup> Kavanagh, *Constitutional Review under the Human Rights Act*, as above n 28, p. 182.

<sup>33</sup> King, *Judging Social Rights*, as above n 27.

<sup>34</sup> King, *Judging Social Rights*, as above n 27, p. 150.

<sup>35</sup> Kavanagh, *Constitutional Review under the Human Rights Act*, as above n 28, p.180.

<sup>36</sup> King, *Judging Social Rights*, as above n 27, p. 139.

<sup>37</sup> King, *Judging Social Rights*, as above n 27, p. 139.

claims reach the courts. In particular, people who experience poverty and social exclusion experience multiple barriers from asserting their rights using legal process. As Clements observes, these include low awareness about human rights; an ingrained sense of powerlessness; fear of retribution; barriers inherent in the civil justice system itself, including its cost, adversarial nature and inaccessibility to (among others) people with physical or learning disabilities and people who are chronically poor or homeless; and a lack of cohesion and resources to instigate group action when administrative or corporate decisions require collective, rather than individual, challenge.<sup>38</sup> Such barriers to access to justice are increasing with the removal in England and Wales of publicly-funded legal advice and representation from the majority of civil law claims concerning family, immigration, employment, debt, welfare and education matters;<sup>39</sup> proposals to restrict criminal legal aid;<sup>40</sup> and measures (and proposed measures) to curb applications for judicial review.<sup>41</sup> In view of these multiplying obstacles to access to justice, I suggest that the transformative potential of human rights in the UK context lies increasingly in the extent to which they influence the design and delivery of services and the habitual frameworks of decision-making of those that deliver them.

It is only by examining these diverse actors and types of impact that one can begin to understand how far, as King asks, ‘*justiciable* rights can spur better political and administrative action’ [emphasis in original] and litigation (or the possibility of litigation) ‘can serve as a gadfly to further development in many subtle ways’.<sup>42</sup> Indeed, the HRA is an excellent test case for assessing, using social scientific research methods, whether the creation of judicial remedies (as opposed to new *rights*) can drive political actors and complex bureaucracies alike to embed human rights considerations into their decision-making.<sup>43</sup>

#### **(iv) The state of debate in the UK**

Hunt, Hooper and Yowell identify an emerging consensus in the UK, both in academic and political circles, ‘in favour of human rights and the desirability of their protection by legal instruments’.<sup>44</sup> They note, for example, that many critics of the HRA are nevertheless in

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<sup>38</sup> L. Clements (2005) ‘Winners and Losers’ *Journal of Law and Society* 32(1): 34. See also R. Costigan and P.A. Thomas (2005) ‘The Human Rights Act: A View from Below’ *Journal of Law and Society* 32(1): 51; J. Watson (2002), *Something for Everyone: The impact of the Human Rights Act and the need for a Human Rights Commission* (London: British Institute of Human Rights).

<sup>39</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012.

<sup>40</sup> Ministry of Justice (2013) *Transforming Legal Aid; Next Steps* (London: Ministry of Justice)

<sup>41</sup> Ministry of Justice (2013) *Judicial Review: Proposals for Further Reform* CM 8703 (London: Ministry of Justice).

<sup>42</sup> King, *Judging Social Rights*, as above n 27, p. 54.

<sup>43</sup> King, *Judging Social Rights*, as above n 27, p. 53.

<sup>44</sup> Hunt, Hooper and Yowell, *Parliaments and Human Rights*, as above n 10, pp. 10-11.

favour of a new UK bill of rights, which would maintain a significant role for the courts.<sup>45</sup> Some academic proponents of political constitutionalism have likewise accepted that courts have a legitimate role to play in adjudicating about rights, at least within certain constraints.<sup>46</sup> However, this consensus around what I have called the ‘shared enterprise’ proposition is not unanimous.<sup>47</sup> Moreover, so far as it exists, it is built on unstable foundations. As Hunt observes, constitutional discourse in the UK is prone to lurch between democratic positivism and liberal constitutionalism, each being invoked (sometimes by the same judge or commentator) to justify a particular decision at a particular moment.<sup>48</sup>

These inconsistencies highlight, for Hunt, the absence in the UK of an ‘overarching coherent vision of democratic constitutionalism’ which would permit a reconciliation of these apparently contradictory foundational commitments without resort to the language of sovereignty.<sup>49</sup> In the absence of such a coherent vision, political debate about human rights in the UK continues to be dominated by a remarkable degree of *dissensus* about who is the final arbiter on matters of human rights, the courts or parliament. This dissensus is fuelled by a small number of judgments which have excited persistent controversy and has increasingly been framed as a critique of the ECtHR and its impact on the UK. In part 4, I examine the nature of these controversies and explain how my publications have analysed and responded to them.

## 1.2 Overview of publications

In this section, I provide an overview of the publications submitted for this PhD by Public Works. I introduce (i) the type and of provenance of the publications; (ii) the quality control mechanisms to which they were subject; and (iii) their geographical scope.

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<sup>45</sup> See, e.g. remarks by Dominic Raab MP, who criticises the purported judicial activism of the European Court of Human Rights (ECtHR) and its impact on the UK, yet advocates a new Bill of Rights under which UK courts would have stronger powers, including the power to strike down legislation which is incompatible with a ‘core’ (but unspecified) list of fundamental freedoms; see ‘The conversation: Judging rights from wrong’, *The Guardian*, 8 October 2011.

<sup>46</sup> For example, in ‘Political Constitutionalism and the Human Rights Act’ (as above n 6), Bellamy ventures that, by virtue of its institutional design, the HRA, far from relinquishing supremacy for rights adjudication from the legislature to the courts, in fact reinforces political constitutionalism.

<sup>47</sup> See, e.g., K. Ewing (2012) ‘Doughty Defenders of the Human Rights Act’ in N. Kang-Riou, J. Milner and S. Nayak (eds) (2012), *Confronting the Human Rights Act: contemporary themes and perspectives* (London: Routledge).

<sup>48</sup> Hunt, ‘Reshaping Constitutionalism’, as above n 19, p. 469.

<sup>49</sup> Hunt, ‘Reshaping Constitutionalism’, as above n 19, p. 469.

**(i) Type and provenance of publications**

My publications are listed in Annex A. Several of them were co-authored with, or include contributions by, others, as explained in Annex B. The publications comprise:

- **Five research reports commissioned by the Equality and Human Rights Commission:**
  - *Human Rights in Britain since the Human Rights Act 1998: A Critical Review* (hereafter, *Critical Review*);<sup>50</sup>
  - *Evaluating the Impact of Selected Cases under the Human Rights Act 1998 on Public Service Provision* (hereafter, *Evaluating the Impact of Selected Cases under the HRA*);<sup>51</sup>
  - *Developing a Bill of Rights for the UK* (hereafter, *Developing a Bill of Rights*);<sup>52</sup>
  - *The UK and the European Court of Human Rights*;<sup>53</sup> and
  - *Religion or Belief, Equality and Human Rights in England and Wales* (hereafter, *Religion or Belief* report);<sup>54</sup>
- **A research report commissioned by the Joseph Rowntree Foundation:**
  - *Poverty, Inequality and Human Rights: Do Human Rights Frameworks Make a Difference?* (hereafter, *Poverty, Inequality and Human Rights*);<sup>55</sup>
- **A research report commissioned by the Department of Health:**
  - *A Guide to Evaluating Human Rights-Based Interventions in Health and Social Care* (hereafter, *Evaluating Human Rights-Based Interventions*).<sup>56</sup>

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<sup>50</sup> A. Donald, P. Leach and J. Watson (2009) *Human rights in Britain since the Human Rights Act 1998: A Critical Review*, Research Report 28 (Manchester: Equality and Human Rights Commission).

<sup>51</sup> A. Donald and E. Mottershaw (2009) *Evaluating the Impact of Selected Cases under the Human Rights Act 1998 on Public Service Provision* (unnumbered) (Manchester: Equality and Human Rights Commission).

<sup>52</sup> A. Donald with the assistance of P. Leach and A. Puddephatt (2010) *Developing a Bill of Rights for the UK*, Research Report 51 (Manchester: Equality and Human Rights Commission).

<sup>53</sup> A. Donald, J. Gordon and P. Leach (2012) *The UK and the European Court of Human Rights*, Research Report 83 (Manchester: Equality and Human Rights Commission).

<sup>54</sup> A. Donald with the assistance of K. Bennett and P. Leach (2012) *Religion or Belief, Equality and Human Rights in England and Wales*, Research Report 84 (Manchester: Equality and Human Rights Commission).

<sup>55</sup> A. Donald and E. Mottershaw (2009) *Poverty, Inequality and Human Rights: Do Human Rights Frameworks Make a Difference?* (York: Joseph Rowntree Foundation).

<sup>56</sup> A. Donald (2012) *Evaluating Human Rights-Based Interventions in Health and Social Care* (London Metropolitan University: Human Rights and Social Justice Research Institute; produced for the Human Rights in Healthcare programme of the Department of Health).

- **Two articles in peer-reviewed journals:**
  - ‘Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for Optimism?’ (hereafter, ‘Advancing Debate about Religion or Belief’);<sup>57</sup> and
  - ‘Evaluating the Impact of Human Rights Litigation on Policy and Practice: A Case Study of the UK’ (hereafter ‘Evaluating the Impact of Human Rights Litigation’).<sup>58</sup>
  
- **Two peer-reviewed book chapters:**
  - ‘Developing a Bill of Rights for the UK: Lessons from Overseas’ (hereafter ‘Lessons from Overseas’);<sup>59</sup> and
  - ‘Limits and Achievements of the HRA from the Socio-Economic Point of View’ (hereafter, ‘Limits and Achievements of the HRA’).<sup>60</sup>

Each of the research reports was commissioned following a competitive tendering process. Thus, the research briefs were initiated by the commissioning organisations and connected to their broader policy work. The *Critical Review* report was commissioned as the scoping study for the EHRC’s statutory Human Rights Inquiry in 2008-09, which framed the human rights mandate of the (then) newly-formed Commission. The *Critical Review* identified as a research gap the unexplored impact of human rights legal cases on public service provision; the EHRC agreed that this was a research priority and re-engaged the team to address it as part of the Human Rights Inquiry, resulting in the report on *Evaluating the Impact of Selected Cases under the HRA*.

Three reports were commissioned to examine specific policy areas of concern to the EHRC: respectively, the reports on *Religion or Belief*; *The UK and the European Court of Human Rights* and *Developing a Bill of Rights*. The report on *Poverty, Inequality and Human Rights* was commissioned by the Joseph Rowntree Foundation (JRF) as part of its broader

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<sup>57</sup> A. Donald (2013) ‘Advancing debate about religion or belief, equality and human rights: Grounds for optimism?’ *Oxford Journal of Law and Religion* 2(1): 50.

<sup>58</sup> A. Donald and E. Mottershaw (2009) ‘Evaluating the Impact of Human Rights Litigation on Policy and Practice: A Case Study of the UK’ *Journal of Human Rights Practice* 1(3): 339.

<sup>59</sup> A. Donald (2013) ‘Developing a Bill of Rights for the UK: Lessons from overseas’ in I. Leigh and R. Masterman (eds) *The UK’s Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford: Oxford University Press) 281.

<sup>60</sup> A. Donald and E. Mottershaw (2012) ‘Limits and achievements of the HRA from the socio-economic point of view: the HRA and Poverty’, in Kang-Riou, Milner and Nayak (eds), *Confronting the Human Rights Act*, as above n 47: 141.

‘Public Interest in Poverty’ research programme, which aimed to understand and influence public attitudes towards and media reporting of poverty in the UK. In view of their engagement with contemporary policy questions, each of the research reports contains recommendations directed at various actors and/or elaborates principles or broader approaches to policy which are congruent with human rights and equality standards.

While the commissioning organisations drew up the respective research briefs, in each case, my fellow researchers and I substantively determined the scope of the research, as well as the detailed methodology. For example, the report on *Poverty, Inequality and Human Rights*, commissioned by JRF, began with an open-ended brief to explore how, and to what effect, human rights have been used to address poverty and inequality, without being prescriptive as to the geographical remit, methodology, disciplinary approach or scope of the research. My co-author and I determined the detailed research questions and methodology in order to impose coherence on a potentially vast topic.

The report *Evaluating Human Rights-Based Interventions* – a manual for health and social care practitioners - stands apart from the rest in that combines elements of research and content of a more applied nature. I have included it because it is to my knowledge the first attempt in the UK to critically analyse both published and unpublished evaluations of human rights-based interventions in health and social care and propose methodological approaches for future evaluations.

The journal articles and book chapters submitted utilise in various ways the data from the research reports. They examine specific research questions in greater depth; apply analytical frameworks in new contexts and/or engage critically with the methodology employed in the research reports. The article on ‘Advancing Debate about Religion or Belief’, drawing on the data in the research report on *Religion or Belief*, identifies ways of advancing public discussion of equality, human rights and religion or belief in Britain, arguing that it has been unduly dominated by often partial interpretations of legal cases. The article on ‘Evaluating the Impact of Human Rights Litigation’ draws on *Evaluating the Impact of Selected Cases under the HRA* and examines the methodological challenges involved in determining whether and how human rights judgments influence the policy and practice of public authorities. The chapter on ‘Lessons from Overseas’ uses the data in the report on *Developing a Bill of Rights* to critique the remit and operation of the Commission on a Bill of Rights, which was created by the coalition government in 2010. The chapter on the ‘Limits and Achievements of the HRA’ applies the analytical framework developed in the research report *Poverty, Inequality and Human Rights* to demonstrate the disconnection between two significant policy goals of the New Labour administration: on the one hand, to promote a

human rights culture and, on the other, to tackle social exclusion and poverty, especially child poverty.

**(ii) Quality control**

The journal articles and book chapters were subject to the normal process of anonymous peer-review. The research reports were also subject to rigorous quality control mechanisms. In each case, the commissioning organisation formed a research management team to liaise with me and, where relevant, my co-authors. This provided a forum for discussing methodological questions, as well as the logistical and other challenges inherent in conducting a large number of semi-structured interviews on frequently contentious topics. In addition, four of the reports (*Religion or Belief*; *Developing a Bill of Rights*; *Poverty, Inequality and Human Rights*; and *Critical Review*) benefited from the input and scrutiny of academic advisers and advisers selected for their professional expertise. Advisers are listed in the Acknowledgements pages of the respective reports. For the report on *Poverty, Inequality and Human Rights*, JRF also engaged a 13-strong Project Advisory Group, which scrutinised draft chapters and approved the final report. *Evaluating Human Rights-Based Interventions* was subject to review by the departmental lead on human rights in the Department of Health. All the research projects (except for *Poverty, Inequality and Human Rights*) were additionally subject to review by the research ethics committee of London Metropolitan University.

**(iii) Geographical remit**

In respect of their geographical remit within the UK, the research reports (and the associated journal articles/chapters) variously cover England and Wales (*Religion or Belief* and *Evaluating the Impact of Selected Cases under the HRA*); Britain (*Critical Review*; *Evaluating Human Rights-Based Interventions*) or the UK as a whole (*The UK and the European Court of Human Rights*; *Developing a Bill of Rights*; and *Poverty, Inequality and Human Rights*). Interviews, focus groups and research seminars were conducted accordingly in England, Wales, Scotland and/or Northern Ireland. My research on public services has focused principally on Britain and therefore developments in Northern Ireland are not comprehensively reflected in this statement.

Four of the research reports also have a strong regional or international dimension (*Religion or Belief*; *The UK and the European Court of Human Rights*; *Developing a Bill of Rights*; and *Poverty, Inequality and Human Rights*). The reports necessarily engage with the context of devolution within the UK, in respect both of the political, legal and constitutional arrangements in the devolved nations and the evident variations across the UK in how human rights are publicly understood, reported and invoked in political discourse.

### 1.3 Methodology

Each research output describes in detail the methodology followed and appends the research tools used (interview and focus group schedules). In this section, I summarise my methodological approach and assess its strengths and limitations.

The research reports each used a qualitative methodology: principally semi-structured interviews and focus groups. Interviewees and focus group participants were purposively sampled according to criteria which are set out in the respective publications. The reports on *Religion or Belief*, *Developing a Bill of Rights* and *Poverty, Inequality and Human Rights* also involved research seminars which were used to test emerging findings with invited participants. While drafting *Developing a Bill of Rights*, I also used observational methods during my attendance at a deliberative event organised in 2009 by the Ministry of Justice as part of the Labour Government's consultation on a Bill of Rights and Responsibilities.

The data were gathered mainly from legal, political and policy actors, as well as practitioners within public authorities at different levels of managerial responsibility. In total, the six research reports involved around 220 semi-structured interviews, of which I conducted more than half. Interviews were conducted both face-to-face and by telephone. Interviews and focus groups were recorded and transcribed. In the case of my co-authored works, the transcriptions were shared among the research team and discussed on an iterative basis. The transcriptions were then analysed and manually coded on the basis of emergent themes, including differing perspectives and the reasons for that differentiation. In each case, as the analysis developed, I returned continuously to the transcripts in order to verify the interpretation placed upon them. The works make extensive use of quotations which illustrate key themes and perspectives. Ethical research methods were strictly adhered to in order to ensure informed consent from participants, including written consent for each published attribution.

In addition, for each of the research reports, I carried out a literature review (and, where relevant, a review of case law), either solely or in collaboration with one other researcher. The publications make extensive use of 'grey' literature and unpublished material supplied by public authorities. Each of the reports integrates within thematic chapters both the analysis of the primary data and those of the literature/case law review, rather than presenting the literature/case law review separately. This approach permitted a detailed analysis and contextualisation of the findings of the primary data in terms of how far they advanced or contradicted the knowledge gained from the existing literature and/or case law.

The qualitative approach I adopted provides a depth of insight into the views and experiences of research participants which quantitative methods would not have yielded. I



have been able to analyse in detail the use of language and normative perspective of interviewees, as well as obtaining rich factual data. Qualitative methods also have the advantage of permitting interrogation of *why* interviewees think or act as they do, with sensitivity to context and personal experience.

However, there are unavoidable limitations in the use of qualitative methods alone; mainly, the difficulty in ensuring that the data obtained is representative of the constituencies involved in relation to geography, affiliation, type of service, role or seniority, gender and other variables. Each research output required a compromise between depth (e.g. 'drilling down' in one institution from senior management to frontline staff) and breadth (e.g. comparing and contrasting experience between peers in different institutions and gaining the view of individuals with a cross-institutional perspective). In some instances, this limited me and my co-researchers to taking 'snapshots' of practice which could not confidently be identified as universal or consistent either within or between institutions. Purposive sampling can mitigate but not remove these limitations and the scope of each research project had to be delimited, and the research findings qualified, accordingly. My findings are throughout inductive rather than deductive, in the sense that they provide strong evidence, rather than proof, of certain conclusions.

My research has involved additional methodological challenges. The first was presented by the dynamic nature of the subject of human rights in the UK. On occasions, substantive legal or political developments occurred during the lifetime of a research project, which demanded a flexible and iterative approach. The contentiousness of my research themes has also presented difficulties. For example, the *Religion or Belief* report required careful sampling based on transparent criteria in order to reflect the views of a range of religion or belief groups, as well as minority perspectives within religion or belief groups and those concerned mainly with equality and/or human rights. The sensitivity of this sampling process was heightened by the fact that the commissioning organisation, the EHRC, had been publicly criticised by several religion or belief groups for alleged bias or ineffectiveness and was therefore keen to ensure that certain groups did not feel excluded from participating in the research. The selection of interviewees had to be carefully negotiated with the Commission to ensure that such considerations did not skew the selection criteria which had previously been agreed. Similarly, the reports on *The UK and the European Court of Human Rights* and *Developing a Bill of Rights* engaged with the political controversy surrounding the future of human rights legislation in the UK and required careful sampling of interviewees to ensure a balance of perspectives.

## 2. LEGAL AND POLITICAL CONTEXT

Before I examine in detail the themes and findings of my research, I will outline the fluid and contested context in which it was conducted.

The Human Rights Act received royal assent in November 1998 and came into force across the UK in October 2000. The devolved administrations in Scotland, Wales and Northern Ireland had been bound by the Act from their inception in 1999. The HRA gives further effect in UK law to the fundamental rights and freedoms in the ECHR. It makes available in UK courts a remedy for breach of a Convention right, without the need to go to the ECtHR in Strasbourg.

The enactment of the HRA underpinned a period of substantial constitutional adjustment in the UK from the late 1990s, which also saw the devolution of some powers from the UK Parliament to the Northern Ireland Assembly,<sup>61</sup> the National Assembly for Wales<sup>62</sup> and the Scottish Parliament.<sup>63</sup> Labour ministers proclaimed both a remedial and transformative purpose behind the HRA. As one put it: ‘Remedies will be nearer home, and ... people will seek them ... The result will be the beginning of the strong development of a human rights culture in this country’.<sup>64</sup>

Subsequent statements downplayed the litigious aspect of the HRA amid fears, which proved unfounded, of a rash of litigation once the Act came into force.<sup>65</sup> As Butler notes, government pronouncements became more ‘ambiguous and ambitious’,<sup>66</sup> vaunting the new law as a vehicle for both public service modernisation and a broader cultural and moral renewal.<sup>67</sup> The (then) Home Secretary Jack Straw ventured that the Act,

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<sup>61</sup> Northern Ireland Act 1998

<sup>62</sup> Government of Wales Act 1998 (see also Government of Wales Act 2006, which reformed the Welsh Assembly and gave it legislative competence).

<sup>63</sup> Scotland Act 1998

<sup>64</sup> Mike O’Brien MP, Parliamentary Under-Secretary of State for the Home Department, HC Debs col 1322, 21 October 1998.

<sup>65</sup> V. Bondy (2003) *The Impact of the Human Rights Act on Judicial Review: An Empirical Research Study* (London: Public Law Project), Chapter 5.

<sup>66</sup> F. Butler (2005) ‘Building a Human Rights Culture’ in C. Harvey (ed) *Human Rights in the Community: Rights as Agents for Change* (Oxford: Hart Publishing), p.65.

<sup>67</sup> See, for example: Human Rights Task Force (2000) *A New Era of Rights and Responsibilities: Core Guidance for Public Authorities* (London: Home Office); Lord Irvine of Lairg, Evidence to the JCHR, 19 March 2001, JCHR HL 66-ii HC 332-ii; Mike O’Brien MP, Parliamentary Under-Secretary of State for the Home Department, HC Debs col 1322, 21 October 1998; Jack Straw MP, Constitution Unit Annual Lecture: Church House, 27 October 1999.

... confirms an ethical bottom line for public authorities ... There's a new system of ethical values here. It's a system of values which everyone can sign up to. Unifying, inclusive and based on common humanity.<sup>68</sup>

The key provision in the HRA, which laid the foundation for this putative transformation of public services, was that which makes it unlawful for any public authority,<sup>69</sup> or private person exercising public functions,<sup>70</sup> to act in a way which is incompatible with Convention rights unless primary legislation requires them to act otherwise,<sup>71</sup> and which provides individuals with remedies if a public authority breaches their human rights.<sup>72</sup> The implications of the HRA for public service delivery have been comparatively neglected in academic literature.<sup>73</sup> However, these implications have been examined by, among others, UK Government departments;<sup>74</sup> national human rights institutions in the UK;<sup>75</sup> the Joint Committee on Human Rights (JCHR);<sup>76</sup> audit, inspectorate,

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<sup>68</sup> Jack Straw MP, 'Building a human rights culture', address to Civil Service College seminar, 9 December 1999.

<sup>69</sup> HRA 1998 s. 6(1)

<sup>70</sup> HRA 1998 s. 6(3)(b).

<sup>71</sup> HRA 1998 ss. 6(1) and (2).

<sup>72</sup> HRA 1998 ss. 7 and 8.

<sup>73</sup> See, however, L. Clements and R. Morris (2004) 'The Millennium Blip: Local Authority Responses to the Human Rights Act 1998', in S. Halliday and P. Schmidt (eds) *Human Rights Brought Home: Socio-Legal Studies of Human Rights in the National Context* (Oxford: Hart Publishing); J. Gordon (2010) 'A developing human rights culture in the UK? Case studies of policing', *European Human Rights Law Review* 6: 609; Harvey (ed) *Human Rights in the Community: Rights as Agents for Change*, as above n 66. See also publications produced by the *Human Rights Futures* project at the London School of Economics; e.g. its July 2013 briefing on 'Human Rights Act impact on everyday life – some examples'.

<sup>74</sup> Department of Constitutional Affairs (2006) *Review of the Implementation of the Human Rights Act* (London: DCA); Department of Health (2008) *Human Rights in Healthcare: A Framework for Local Action*, Second edition (London: British Institute of Human Rights and Department of Health); Ministry of Justice (2008) *Human Rights Insight Project*, Ministry of Justice Research Series 1/08 (London: Ministry of Justice).

<sup>75</sup> See, e.g., Equality and Human Rights Commission (2009) *Human Rights Inquiry* (London: EHRC); Equality and Human Rights Commission (2012) *Human Rights Review 2012: How Fair is Britain? An Assessment of How Well Public Authorities Protect Human Rights* (London: EHRC). The Scottish Human Rights Commission has examined the impact of the HRA from various perspectives, e.g. the impact on health and social care; see, *inter alia*: Scottish Human Rights Commission (2009), *Human Rights in a Health Care Setting: Making it Work - An Evaluation of a human rights-based approach at The State Hospital* (Glasgow: SHRC); 'Care about Rights' training and awareness programme about embedding human rights in the care of older people: <http://www.scottishhumanrights.com/careaboutrights/>. For research reports produced or commissioned by the Northern Ireland Human Rights Commission, see <http://www.nihrc.org/index.php/research-and-investigations/item/209-research>.

<sup>76</sup> See, *inter alia*, the following thematic reports of the Joint Committee on Human Rights: (2009) *Demonstrating respect for rights? A human rights approach to policing protest*, Seventh Report of Session

regulatory and complaint-handling bodies;<sup>77</sup> non-government organisations;<sup>78</sup> and policy bodies.<sup>79</sup> Further, public authorities which have sought explicitly and systematically to apply human rights have, in some instances, described and evaluated the impact of this activity (*Evaluating Human Rights-Based Interventions*, Chapter 10).<sup>80</sup> In part 3, I explain how my research contributes to this literature and to our emergent understanding of what constitutes a human rights culture in public services.

As I document in the *Critical Review* report (Chapter 2), preparations for the coming into force of the HRA across the UK included: extensive training for judges; policy reviews within central government departments; the establishment of a specialised unit within the Home Office<sup>81</sup> to oversee implementation and disseminate guidance to public authorities, and, crucially, the establishment of a parliamentary Joint Committee on Human Rights (JCHR).<sup>82</sup> However, the HRA contained no mechanism to lead the would-be cultural renaissance in public services. Plans to create a human rights commission in Britain were postponed (the EHRC was finally established in 2007)<sup>83</sup> and the role of promoting the Act

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2008-09, Volume 1, Report together with formal minutes and written evidence, HL Paper 47-1, HC 320-1; (2008) *A Life Like Any Other? Human Rights of Adults with Learning Disabilities*, Seventh Report of Session 2007-08, Volume I, HL Paper 40-I, HC 73-I (London: TSO); (2007) *The Human Rights of Older People in Healthcare*, Eighteenth Report of Session 2006-07, Volume I – Report and Formal Minutes, HL Paper 156-1, HC 378-1 (London: TSO); (2006) *The Human Rights Act: the DCA and Home Office Reviews*, Thirty-second report of Session 2005-06, HL Paper 278, HC 1716 (London: TSO); (2003) *The Case for a Human Rights Commission*, Sixth Report of Session 2002-03, HL 67-I and II, HC 489-I and II, Volume II – Appendices, Section 2.1, ‘Human Rights and Public Authorities’, a report prepared for the Joint Committee on Human Rights by Jeremy Croft.

<sup>77</sup> See, e.g., Audit Commission (2003) *Human Rights: Improving Public Service Delivery* (London: Audit Commission); Office of Public Management (2009) *The Role and Experience of Inspectorates, Regulators and Complaint-Handling Bodies in Promoting Human Rights Standards in Public Services*.

<sup>78</sup> See generally the work of the British Institute of Human Rights; e.g. (2008) *The Human Rights Act - Changing Lives*, Second Edition (London: BIHR).

<sup>79</sup> K. Chetty, J. Dalrymple and H. Simmons (2012) *Personalisation and human rights* (Sheffield: The Centre for Welfare Reform); Institute for Public Policy Research/F. Butler (2005) *Improving Public Services: Using a Human Rights Approach* (London: IPPR and DCA); Office of Public Management (2009) *The impact of a human rights culture on public sector organisations: lessons from practice* (Manchester: Equality and Human Rights Commission).

<sup>80</sup> See literature cited below n 203.

<sup>81</sup> Subsequently, the Lord Chancellor’s Department, which in 2003 was subsumed into the newly-created Department for Constitutional Affairs, which in 2007 was reconfigured and renamed as the Ministry of Justice.

<sup>82</sup> For an overview of these measures, see C. McCrudden (2005) *Mainstreaming Human Rights*, in Harvey (ed) *Human Rights in the Community: Rights as Agents for Change*, as above n 66.

<sup>83</sup> The Northern Ireland Human Rights Commission was established in 1999 and the Scottish Human Rights Commission in 2008. As a general principle, the SHRC deals with human rights matters devolved to the Scottish Parliament, while the EHRC deals with matters of policy in Scotland that are reserved to Westminster, in addition to its coverage of England and Wales.

effectively stayed within the Department for Constitutional Affairs (later renamed the Ministry of Justice) and did not extend in any significant way to other government departments. Further, as successive JCHR reports deplored, the Labour Government's transformative vision for the Act soon gave way to a narrower and increasingly negative political discourse about the Act.<sup>84</sup> My publications *Critical Review; Evaluating the Impact of Selected Cases under HRA* and 'Evaluating the Impact of Human Rights Litigation' (which were published in 2009 and for which the fieldwork was conducted in 2008) found that the twin consequences were a corrosive tendency among public authorities to see the HRA in narrow, legalistic terms and a failure of the rationale of the Act to take root among government departments and public authorities – a finding reinforced by surveys of public authorities conducted in the early 2000s.<sup>85</sup> However, as I discuss in section 3.7, this picture is not uniform across the UK or across all public authorities, and there is scope for new research to identify more recent developments in respect of implementation of human rights principles and standards.

The HRA was also envisaged as creating a culture of human rights in *governance*, based on the expectation that prospective state actions that implicated rights should be subject to scrutiny both of their merits and legitimacy before becoming law, thereby preventing abuses from occurring rather than relying solely on judicial correctives.<sup>86</sup> In particular, the JCHR, although it was not specifically mandated by the HRA, was conceived politically as the way to strengthen parliamentary rights-based scrutiny of proposed legislation.<sup>87</sup>

As is well known, the structure of the HRA differs from that of *constitutional* bills of rights in other countries in that it provides a statutory protection for human rights while being designed ultimately to preserve the authority of parliament.<sup>88</sup> The Act has no entrenched

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<sup>84</sup> Joint Committee on Human Rights, *The Case for a Human Rights Commission*, as above n 76, p.7; Joint Committee on Human Rights (2006) *The Human Rights Act: The DCA and Home Office Reviews*, as above n 76, pp.43-44; Joint Committee on Human Rights (2008) *The Work of the Committee in 2007 and the State of Human Rights in the UK*, Sixth Report of Session 2007–08, HL Paper 38, HC 270 p.7.

<sup>85</sup> Audit Commission, *Human Rights: Improving Public Service Delivery*, as above n 77; Clements and Morris, 'The Millennium Blip', as above n 73; District Audit (2002) *The Human Rights Act: a Bulletin for Public Authorities* (London: District Audit), p. 3; Joint Committee on Human Rights, *The Case for a Human Rights Commission*, as above n 76, Volume II – Appendices, Section 2.1, 'Human Rights and Public Authorities'.

<sup>86</sup> J. Hiebert (2006) 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?' *International Journal of Constitutional Law* 4(1) :1, p. 11.

<sup>87</sup> J. Hiebert (2012) 'Governing Under the Human Rights Act: The Limitations of Wishful Thinking' *Public Law* 1: 27, p. 30.

<sup>88</sup> C. Gearty (2002) 'Reconciling Parliamentary Democracy and Human Rights' *Law Quarterly Review* 118: 248; F. Klug (2012) 'The Human Rights Act: Origins and Intentions' in Kang-Riou, Milner and Nayak (eds) *Confronting the Human Rights Act*, as above n 47.

status and can be revised or repealed on the basis of a parliamentary majority. It permits the courts to read primary and subordinate legislation in a way that is compatible with Convention rights, but only 'so far as it is possible to do so'.<sup>89</sup> If such an interpretation is impossible, the courts are provided with a non-coercive mechanism – a declaration of incompatibility – which signals to the executive and legislature the inconsistency between domestic statute and Convention rights.<sup>90</sup> Crucially, it is left to the elected branches of government to decide whether they agree that there is an incompatibility and, if so, whether and how to remedy it.<sup>91</sup> Parliament's role in the scheme of the HRA is further enshrined in a provision requiring ministers introducing draft legislation to attach a statement as to its compatibility with the Convention, thereby disciplining ministers to conduct scrutiny of a bill's compatibility at the same time as providing a legal foundation for parliamentary rights-based scrutiny.<sup>92</sup>

Masterman and Leigh observe that academic accounts of the HRA's short existence are paradoxical,<sup>93</sup> variously portraying the Act as either democratic or counter-majoritarian;<sup>94</sup> an effective remedial instrument or one that provides insufficient protection;<sup>95</sup> an established part of the UK's uncodified constitution or an ordinary statute subject to the vagaries of political opinion.<sup>96</sup> These accounts correspond broadly to the legal versus political constitutionalist divide in scholarship, which (as noted in section 1.1 (iv)) persists despite the

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<sup>89</sup> HRA 1998 s. 3(1).

<sup>90</sup> HRA 1998 s. 4. On the operation of which, see Sathanapally, *Beyond Disagreement*, as above n 1, Parts II and III.

<sup>91</sup> In practice, there have been relatively few declarations of incompatibility (28 between 2000, when the HRA came into force, and July 2013) and most are remedied by primary legislation or remedial orders. See Ministry of Justice (2013) *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government's Response to Human Rights Judgments 2012-13*, CM 8727 (London: TSO), p.5.

<sup>92</sup> HRA 1998 s. 19.

<sup>93</sup> Masterman and Leigh (eds) *The United Kingdom's Statutory Bill of Rights*, as above n 15, p.1.

<sup>94</sup> Contrast, e.g., P. Craig (2011) 'Political Constitutionalism and the Judicial Role: A Response' *International Journal of Constitutional Law* 9(1): 112 with K. D. Ewing (1999) 'The Human Rights Act and Parliamentary Democracy' *Modern Law Review* 62(1): 79. See also A. Young (2009) *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart Publishing).

<sup>95</sup> Contrast, e.g., K. D. Ewing and J-C. Tam (2008) 'The Continuing Futility of the Human Rights Act', *Public Law* Winter: 668 (and the earlier K. D. Ewing (2004) 'The Futility of the Human Rights Act', *Public Law* Winter: 829) with A. Lester (2005), 'The Utility of the Human Rights Act: A Reply to Professor Ewing' *Public Law* Summer: 249. See also S. Gardbaum (2011) 'How Successful and Distinctive is the Human Rights Act? An Expatriate Comparatist's Assessment' *Modern Law Review* 74: 195.

<sup>96</sup> For discussion of the HRA in its constitutional context, see Bogdanor, *The New British Constitution*, as above n 4, Chapter 3; Hickman, *Public Law after the Human Rights Act*, as above n 30; C. O'Connell (2012) *Human Rights and the UK Constitution* (London: British Academy); C. O'Connell (2012) *The Human Rights Act and the Slow Transformation of the UK's 'Political Constitution'*, UCL Institute for Human Rights Working Paper No. 01 (London: UCL Institute for Human Rights).

emergence of an alternative - and, in my view, preferable - conception of democratic constitutionalism based on shared responsibility for human rights. This debate has often been conducted in normative terms, with reference to idealised models rather than observed institutional behaviour. Conversely, Phillipson advocates an approach which grounds analysis in political reality, recognising that the latter frequently fails to conform to the former.<sup>97</sup>

This observation is a salient reminder of the increasingly politicised nature of discourse about human rights in the UK. As I discuss in *The UK and the European Court of Human Rights* and *Developing a Bill of Rights*, the existing state of human rights law has been subject to existential criticism by some politicians, jurists and commentators, who have called for a fundamental revision of the UK's relationship with the Strasbourg Court and the replacement of the HRA with a new bill of rights.<sup>98</sup> My analysis of these challenges to the utility and legitimacy of both the HRA and the Strasbourg Court is presented in part 4.

### **3. HUMAN RIGHTS AND PUBLIC SERVICES**

In this part of my statement, I provide a synoptic account of my research relating to the implementation and impact of the HRA in public services in the UK. I identify cross-cutting themes and relate each to the existing literature and the conceptual frameworks introduced above.

I have argued (section 1.1 (iii)) that a holistic assessment of the impact of the HRA requires analysis of the changes to the behaviour of all types of institution that act, or attempt to act, to the public good under its prompting. I noted also (part 2) that a situation in which a public authority becomes habitually responsive to human rights has commonly been termed a 'human rights culture'. Another, closely-related term is also used in relation to the programmatic application of human rights: the 'human rights-based approach'.

The first strand of my research thus addresses the following questions. First, how might we define a 'culture of human rights' or 'human rights-based approach' (section 3.1)? Secondly, how is such a culture or approach realised in institutional and policy terms (section 3.2)? Thirdly, what attitudinal and institutional factors have tended to encourage or inhibit such a culture or approach, with particular reference to the implementation of human rights judgments (section 3.3)? Fourthly, what evidence may be adduced as to the impact of human

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<sup>97</sup> Phillipson, 'The Human Rights Act, Dialogue and Constitutional Principles', as above n 16, p. 49.

<sup>98</sup> Prime Minister David Cameron has stated that 'we will abolish the Human Rights Act and introduce a new Bill of Rights, so that Britain's laws can no longer be decided by unaccountable judges': see 'Rebuilding Trust in Politics', speech at the University of East London, 8 February 2010.

rights-based interventions (section 3.4)? Fifthly, how far has the HRA connected to public policy concerned with poverty and social exclusion (section 3.5)? Sixthly, what are the key differences and similarities between the nations of the UK with respect to the implementation of human rights norms (section 3.6)? In conclusion, to what extent - and with what variation - has a human rights culture materialised among public authorities in the UK following the enactment of the HRA (section 3.7)?

### **3.1 What is a human rights culture or a human rights-based approach?**

My research approaches the matter of definition from both an empirical and normative perspective (*Critical Review*, Chapter 2; *Evaluating the Impact of Selected Cases under the HRA*, Chapter 8; ‘Evaluating the Impact of Human Rights Litigation’ and *Poverty, Inequality and Human Rights*, Chapter 1). I use existing definitions and their normative content in order to analyse the experience of public authorities that have applied human rights systematically in their work. The results of this inquiry have, in turn, contributed to the emergent understanding of what constitutes a human rights culture or human rights-based approach in both empirical and normative terms.

As noted in part 2, the term ‘human rights culture’ was invoked by government ministers and others frequently in the early years of the Act but proved, as Clements observes, to be ‘admirably imprecise’.<sup>99</sup> The term has retained its currency but is often loosely defined or not defined at all.<sup>100</sup> An unusually dense definition is offered by the JCHR and is worth citing at length. The JCHR views what it calls a ‘culture of respect for human rights’ as encompassing two dimensions – institutional and ethical:

... the former requires that human rights should shape the goals, structures and practices of our public authorities ... Achieving that requires public authorities to understand their obligations both to avoid violating the rights of those in their care, or whom they serve, and to have regard to their wider and more positive duty to ‘secure to everyone ... the rights and freedoms’ which the Human Rights Act ... and the other [international human rights] instruments define.<sup>101</sup>

The ethical dimension has three components:

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<sup>99</sup> L. Clements (2005) ‘Winners and Losers’, as above n 38, p. 36.

<sup>100</sup> For example, the EHRC’s *Human Rights Inquiry* report (as above n 75) uses the phrase ‘human rights culture’ or close variants numerous times but its meaning is implied rather than expressly stated.

<sup>101</sup> Joint Committee on Human Rights, *The Case for a Human Rights Commission*, as above n 76, Volume I, pp.11-12.



First, a sense of entitlement. Citizens enjoy certain rights as an affirmation of their equal dignity and worth, and not as a contingent gift of the state. Second, a sense of personal responsibility. The rights of one person can easily impinge on the rights of another and each must therefore exercise his or her rights with care. Third, a sense of social obligation. The rights of one person can require positive obligations on the part of another and, in addition, a fair balance will frequently have to be struck between individual rights and the needs of a democratic society and the wider public interest.<sup>102</sup>

The term ‘human rights-based approach’ has been more thoroughly debated and theorised. As discussed in *Poverty, Inequality and Human Rights* (Chapter 1), the term originated in the international development sector and has become increasingly central to anti-poverty strategies developed by the United Nations, governments and non-government organisations.<sup>103</sup> In the development context, the human rights-based approach emphasises the need to identify and redress power imbalances and prioritise the interests of those who face unusual levels of discrimination or social exclusion. Consequently, it insists on certain procedural requirements (participation, empowerment, non-discrimination, accountability and transparency) and the structures required to fulfil them. Central to the human rights-based approach as commonly defined is the idea that every individual is a ‘rights-holder’, having inherent dignity and equal worth, and that there are also ‘duty-bearers’ with correlative obligations both of delivery and oversight (primarily states and their agencies). Applying human rights entails a normative shift from discretionary meeting of needs to socially and legally guaranteed entitlements: human rights-based interventions aim to strengthen the capacities of rights-holders to claim their entitlements and of duty-bearers to meet their obligations.<sup>104</sup> Further, the human rights-based approach commonly conceptualises human rights as both a means and an end, being concerned both with process (adopting methods which expressly conform to human rights standards and principles) and outcomes (the

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<sup>102</sup> Joint Committee on Human Rights, *The Case for a Human Rights Commission*, as above n 76, Volume I, p.12.

<sup>103</sup> Concerted thinking on the link between human rights and development broadly dates from global summits on human rights in Vienna (1993) and on social development in Copenhagen (1995). See, e.g., P. Gready (2008) ‘Rights-based approaches to development: what is the value-added?’ *Development in Practice* 18(6): 735; P. Gready and J. Ensor (eds) (2005) *Reinventing Development? Translating Rights Based Approaches, from Theory to Practice* (London: Zed Books); IAG (Inter-Agency Group on Rights Based Approaches)/S. Crawford (2007) *The Impact of Rights-based Approaches to Development: Evaluation/Learning Process Bangladesh, Malawi and Peru*; P. Uvin (2007) ‘From the right to development to the rights-based approach: how “human rights” entered development’ *Development in Practice* 17(4–5): 597.

<sup>104</sup> P. Gready and B. Phillips (2009) ‘An unfinished enterprise: visions, reflections, and an invitation’ *Journal of Human Rights Practice* 1(1):1, p. 3.

substantive realisation of human rights) and viewing the two as interdependent.<sup>105</sup> Thus, such an approach is integrally concerned with the programmatic aspect of applying human rights standards and principles to policy, planning and practice (*Poverty, Inequality and Human Rights*, Chapter 5).

There is a degree of congruence between such a human rights-based approach and the human rights culture envisaged by the JCHR. Indeed, in the UK the terms are often used interchangeably. Each is underpinned by an understanding of human rights as universal and inalienable, and as deriving from the full range of domestic and international human rights instruments. Each involves both *recognition* of rights (institutional thinking) and *respect* for rights (systematic application). Some difference in emphasis is apparent: the JCHR's ethical dimension stresses the importance of personal responsibility and horizontal social obligations; the human rights-based approach (with its emphasis on the relationship between the state and the individual) does not. However, a human rights-based approach is compatible with the notions of personal responsibility and social obligation, as long as those notions are not used as a pretext for attenuating human rights protection or making rights contingent upon certain types of behaviour.<sup>106</sup> Indeed (as I discuss in the UK context in the *Critical Review*, pp. 7-8), the duty to respect the rights of others is implicit in the exercise of rights under the HRA.

In the UK, the term human rights-based approach has been readily adopted by public authorities,<sup>107</sup> national human rights institutions,<sup>108</sup> and civil society organisations.<sup>109</sup> My research focuses principally on public authorities as the primary duty-bearers (*Critical Review; Evaluating the Impact of Selected Cases under the HRA*; 'Evaluating the Impact of Human Rights Litigation'; *Poverty, Inequality and Human Rights*, Chapter 5). I suggest (*Evaluating the Impact of Selected Cases under the HRA*, Chapter 8) that this activity may be conceptualised as the 'supply' side of human rights. Secondly, I examine the adoption of a human rights-based approach by non-government actors for whom the normative content of

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<sup>105</sup> Gready, 'Rights-based approaches to development: what is the value-added?', as above n 103, p. 738.

<sup>106</sup> Such conditionality was proposed by Martin Howe QC in his proposed draft UK Bill of Rights appended to the report of the Commission on a Bill of Rights. Article 24(2) of his proposed bill states that, 'In considering whether a restriction is justified under this Article, regard may be had to the extent of the fulfilment of their responsibilities by those affected by the restriction'. See Commission on a Bill of Rights (2012) *A UK Bill of Rights? The Choice Before Us* Volume 1 (London, Commission on a Bill of Rights), p. 213. For a comprehensive discussion, see L. Lazarus, B. Goold, R. Desai and Q. Rasheed (2009) *The Relationship between Rights and Responsibilities*, Ministry of Justice Research Series 18/09 (London: Ministry of Justice).

<sup>107</sup> See, e.g., Department of Health, *Human Rights in Healthcare*, as above n 74, Section 3.

<sup>108</sup> See, e.g., Equality and Human Rights Commission, *Human Rights Inquiry*, as above n 75, *passim*.

<sup>109</sup> See, e.g., British Institute of Human Rights, *The Human Rights Act - Changing Lives*, as above n 78, p. 27; and the work of the Participation and Practice of Rights project based in Belfast (<http://www.pprproject.org/>).

human rights is a means of framing advocacy and pursuing accountability for state action or inaction that implicates human rights (*Poverty, Inequality and Human Rights*, Chapters 3 and 4; 'Limits and Achievements of the HRA'). Such advocacy, which promotes and facilitates the initiation of rights claims, may be viewed as the 'demand' side of human rights.

### **3.2 Embedding human rights: the institutional dimension**

My research indicates that adopting an organisational approach to human rights is a creative - and still experimental - rather than prescriptive process (*Critical Review*, Chapter 2).

However, the experience of public authorities in the UK which have developed such approaches has allowed me to identify common and mutually reinforcing features which encompass both the institutional and ethical dimensions proposed by the JCHR (*Critical Review; Evaluating the Impact of Selected Cases under the HRA*; 'Evaluating the Impact of Human Rights Litigation').

These features are: (i) an express recognition of the positive obligations that are required of public authorities as a result of the application of human rights standards; (ii) the systematic involvement of people who use public services in their design and delivery, and in decisions that affect them; and (iii) the integration of human rights standards, and the associated concepts of necessity and proportionality, into routine decision-making.

#### **(i) Positive obligations**

The interpretative principle of positive obligations is well-established in human rights case law.<sup>110</sup> Public authorities have not merely a negative obligation to refrain from interfering with individuals' human rights but also a positive obligation to take proactive steps to ensure that individuals' rights are protected, regardless of who or what is causing the harm. These obligations are not expressly stated in the HRA or indeed in the ECHR. Rather, they are imposed through the common law as a result of court judgments interpreting the requirement of Article 1 of the Convention (which obliges a state to secure human rights for everyone under its jurisdiction) taken together with the other substantive Convention rights.

The contribution of my research is to highlight the way in which positive obligations have been used instrumentally as the foundation for an organisational approach to human rights, an imperative which is evident in the institutional dimension of the JCHR's definition of a human rights culture cited in section 3.1. The *Critical Review* report (Chapter 2) identifies examples of public authorities which have promoted understanding among staff of their positive obligations (if not always expressly labelled as such) in order to challenge

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<sup>110</sup> See A. Mowbray (2004) *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing).

entrenched practices or attitudes which are inimical to the realisation of human rights; for example, by developing procedures to protect the right to life under Article 2 ECHR in prisons in relation to suicide prevention and the provision of healthcare. Another compelling example is the way in which police services in England and Wales have responded to the case of *Osman*,<sup>111</sup> which established the circumstances in which the authorities should reasonably be expected to take preventative measures to avert a risk to life. *Evaluating the Impact of Selected Cases under the HRA* (Chapter 2) finds that police services have embedded the *Osman* principles into policing policy and practice in respect of a far wider range of situations than those examined by the court.

*Evaluating the Impact of Selected Cases under the HRA* analyses other examples from case law and their variable impact on the behaviour of public authorities. These concern the positive action that public authorities must take to secure the dignity and integrity of people with disabilities (Chapters 4, 6 and 7);<sup>112</sup> and (building on *Osman*) the holding of effective investigations where there has been preventable loss of life (Chapter 3).<sup>113</sup> The JCHR has additionally highlighted the positive dimension of rights in the context of areas such as equality, education and schools, human trafficking, housing and property rights, corporate manslaughter and homicide, and the protection of children in the immigration system.<sup>114</sup>

Other initiatives offer a model for embedding positive obligations in the structures and processes of public authorities. For instance, Wiltshire Council has developed an innovative outcomes-based approach to the provision of social care for older people.<sup>115</sup> This involves social workers supporting older people to determine what they want the outcomes of their care to be - outcomes which private and voluntary providers are then contractually required to deliver. Although Wiltshire's approach is not expressly rights-focused, the EHRC has identified the potential to promote the outcomes-based approach into one which incorporates human rights standards and principles into the commissioning and delivery of social care in the home, thereby putting in place structures and processes to help ensure that local authorities fulfil their positive obligations in this area.<sup>116</sup>

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<sup>111</sup> *Osman v UK* (2000) 29 EHRR 245.

<sup>112</sup> These chapters consider, respectively, the impact of: *Price v UK* (2001) 34 EHRR 128; *R v East Sussex County Council Ex parte A, B, X and Y* [2003] EWHC 167; and *R (Bernard) v Enfield LBC* [2003] HRLR 4.

<sup>113</sup> *R (on the application of Amin) v S/S for the Home Department* [2004] 1 AC 653; *R (on the application of Wright) v S/S for the Home Department* [2001] 1 Lloyd's Rep Med 478; [2001] EWHC Admin 520; 2001 WL 606447; *Edwards v UK* (2002) 35 EHRR 19.

<sup>114</sup> Hunt, Hooper and Yowell, *Parliaments and Human Rights*, as above n 10, pp. 32-33.

<sup>115</sup> J. Bolton (2012) *Wiltshire Council Help to Live at Home Service: An Outcome-Based Approach to Social Care – Case Study Report* (Oxford Brooks University: Institute of Public Care).

<sup>116</sup> Equality and Human Rights Commission (2013) *Guidance on Human Rights for Commissioners of Home Care* (London: EHRC). This guidance was a follow-up to the Commission's inquiry into home care: Equality

Advocates of an organisational approach which expressly embraces positive obligations view it as a means of reconceptualising human rights and their implications for service delivery: rights are no longer viewed minimally as ‘red lines’ which must not be crossed, but are likened instead to a magnet pulling policy and practice in a positive direction (*Critical Review*, p. 38). I conclude in the *Critical Review* (p. 41) that an organisational approach which expressly recognises and acts upon positive obligations provides the basis for moving beyond a minimal and defensive approach to human rights compliance and towards a more expansive and potentially transformative approach. However, my research suggests that public authorities generally do not have such a comprehensive understanding of what positive obligations entail and in what circumstances they may come into play (*Critical Review*, p. 40), a finding confirmed - and deplored - by the JCHR.<sup>117</sup>

## **(ii) Participation of service users**

I noted in section 3.1 that human rights provide a normative framework within which to challenge unequal power relationships and recast relationships between groups with differential power. In the context of a public service, this means identifying and redressing power imbalances, principally (although not exclusively) between the users and providers of services. Proceeding from this premise, I argue that guaranteed opportunities for the participation of service users and carers in decisions that affect them - which extend beyond the tokenistic - form part of a normative blueprint for an organisational approach to human rights (*Critical Review*, Chapter 3). This imperative is especially acute where individuals face high levels of social exclusion or discrimination or experience circumstances or treatment in which their human rights may be particularly vulnerable to abuse, such as people who need to access services because they have physical or learning disabilities or mental health problems. In such settings, the cumulative effect of guaranteeing participation of service users was likened by one practitioner whom I interviewed to ‘restoring citizenship to those who have had their citizenship taken away’ (*Critical Review*, p. 59).

My research documents examples of public authorities which habitually involve service users and carers in diverse ways as part of an avowedly human rights-based approach.<sup>118</sup>

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and Human Rights Commission (2011) *Close to Home: An Inquiry into Older People and Human Rights in Home Care* (London: EHRC).

<sup>117</sup> See, e.g., Joint Committee on Human Rights, *The Work of the Committee in 2007 and the State of Human Rights in the UK*, as above n 84, p.6.

<sup>118</sup> Each of the elements listed in this paragraph are present in the organisational approach to human rights developed by Mersey Care NHS Trust. See L. Dyer (2010) ‘A Human-Rights Based Approach to Involving Service Users and Carers’ *British Journal of Well-Being* 1(3): 26; Mersey Care NHS Trust (2011) *An Evaluation of Service User and Carer Involvement in Mersey Care NHS Trust* (Liverpool: SURE (Service User Research and Evaluation)); Office of Public Management, *The impact of a human rights culture on public sector organisations: lessons from practice*, pp. 69-70.

These include aspects of individual care and treatment, such as the assessment and management of risk to a person or to others. They also include activities which relate to the planning and delivery of services, such as: the recruitment, induction and training and performance review of staff, including senior staff; reviews of serious incidents such as suicides; inspection and evaluation of specific services; procurement and finance; and the development of information and communication strategies to enable people using services to make informed decisions. In order to ensure that such participation progresses beyond the superficial, public authorities have in some cases elected to invest resources in training service users about human rights and building their capacity in other respects; and remunerating service users for their contribution.

Evaluations of human rights-based initiatives which place emphasis on the participation of service users indicate a range of beneficial outcomes for service users, staff and the service as whole.<sup>119</sup> These include attitudinal changes, such as the erosion of stigma and mistrust between service users and professionals and consequent improvements to relationships.<sup>120</sup> They also include measured improvements in outcomes (e.g. clinical or educational);<sup>121</sup> reported levels of self-esteem and well-being among people using a service; and levels of sickness and stress among staff (*Critical Review*, pp. 53-62). It should be noted, however, that such evaluations are few and are limited to a handful of public authorities, albeit ones which have several years' experience in applying human rights at an organisational level.

The systematic participation of people using services in decisions that affect them is not a goal unique to avowedly human rights-based interventions. Other initiatives, such as that of 'co-production' which is taking root in public services in Wales<sup>122</sup> and Scotland<sup>123</sup> have similarly placed emphasis on public participation in the commissioning, procurement, design, delivery and evaluation of public services in Wales. Co-production is defined as 'delivering public services in an equal and reciprocal relationship between professionals, people using

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<sup>119</sup> See, e.g., Commission for Social Care Inspection (2007) *Experts by Experience in Regulatory Inspections 2006–07 (Evaluation Report Summary)* (London: Commission for Social Care Inspection); Scottish Human Rights Commission, *Human Rights in a Health Care Setting*, as above n 75.

<sup>120</sup> Dyer, 'A Human-Rights Based Approach to Involving Service Users and Carers', as above n 118; Mersey Care NHS Trust, *An Evaluation of Service User and Carer Involvement in Mersey Care NHS Trust*, as above n 118.

<sup>121</sup> K. Covell and B. Howe (2008) *Rights, Respect and Responsibility: Final Report on the County of Hampshire Rights Education Initiative* (Nova Scotia, Canada: Cape Breton University).

<sup>122</sup> The co-production approach is being promoted by practitioners and advocacy organisations in Wales, with the support of the First Minister Carwyn Jones who describes co-production as a central tenet of the Social Services and Well-Being Bill currently passing through the Welsh Assembly; see <http://allinthistogetherwales.files.wordpress.com/2013/07/first-minister-reply-to-aitt-4th-june-2013.pdf>.

<sup>123</sup> See <http://www.coproductionscotland.org.uk/>.

services, their families and their neighbours’ such that both services and neighbourhoods become more effective agents of change.<sup>124</sup> Co-production has found concrete expression in, for example, the participation of people with gender dysphoria in initiatives to redesign services for their communities in Wales<sup>125</sup> and Scotland.<sup>126</sup> Such approaches are congruent with a human rights-based approach without always being framed as human rights-driven. In this context, I suggest that a key contribution of the human rights-based approach is to provide a set of transparent criteria by which to assess such initiatives in terms of how far they achieve the aim of power-sharing and the organisational and attitudinal change required to achieve it.

Civil society organisations have demonstrated the utility of human rights as a vehicle to secure opportunities to participate in decision-making about resource allocation and service delivery. A compelling example is that of the Participation and Practice of Rights project in Belfast, which has pioneered the development – by communities affected by endemic poverty – of indicators and time-bound targets to measure the realisation of their human rights (*Poverty, Inequality and Human Rights*, pp. 24-25). Tangible improvements have resulted. In one initiative, families affected by disproportionately high rates of suicide and self-harm secured policy change across Northern Ireland on guaranteed follow-up appointments for mental health service users.<sup>127</sup> In another, residents in a housing estate devised indicators to measure whether a regeneration project fulfilled the state’s obligation to progressively realise their rights under international human rights law to work, education, adequate housing and the highest attainable standard of health. Residents secured improvements relating to the prompt clearing of pigeon waste, rehousing families out of unsuitable accommodation and preventing sewage flowing into bathrooms.<sup>128</sup> However, progress on indicators relating to residents’ systematic involvement in decision-making was minimal, suggesting that, even

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<sup>124</sup> D. Boyle, A. Coote, C. Sherwood and J. Slay (2010) *Right Here, Right Now: Taking Co-Production into the Mainstream* (London: NESTA).

<sup>125</sup> Up to one-third of the members of the All-Wales Gender Dysphoria Partnership Board are service users. See Welsh Health Specialised Services Committee (undated), *All-Wales Gender Dysphoria Partnership Board: Terms of Reference*.

<sup>126</sup> In 2012, the Scottish Government introduced a new Gender Reassignment Protocol which was devised with the participation of the transgender community and, uniquely in the UK, guarantees the option of self-referral to a gender identity clinic without the need to be referred by a GP. See NHS Scotland (2012) *Gender Reassignment Protocol*.

<sup>127</sup> F. V. McMillan, N. Browne, S. Green and D. Donnelly (2009) ‘A Card before You Leave: Participation and Mental Health in Northern Ireland’, *Health and Human Rights* 11(1): 61. See also <http://www.pprproject.org/right-to-health>.

<sup>128</sup> Participation and the Practice of Rights (2009) *Seven Towers Monitoring Group: Fourth Report on Progress of Human Rights Indicators* (Belfast: PPR).

with sustained rights-based mobilisation in pursuit of participation, it may very hard to achieve in the absence of an explicit commitment on the part of public authorities.

### **(iii) Human rights as a framework for decision-making**

I argued in section 1.1 (ii) and (iii) that the culture of justification pertains to all public authorities that are bound to act compatibly with Convention rights. This implies that from a normative perspective public authorities must be able to justify interfering with, or failing to protect, human rights by reference to publicly available reasons which must be open to independent scrutiny. Such an approach may raise concerns about introducing excessive legalism into operational decision-making. Such concerns are not new but can be traced back to Titmuss's thesis on the 'pathology of legalism'<sup>129</sup> and similar critiques which focus on the risk of introducing undue rigidity into decision-making and constraining bureaucratic discretion.<sup>130</sup> Indeed, this is a critique that I have encountered among decision-makers in public authorities who are fearful that the effect of the HRA may be to restrict the ability of professionals to exercise their judgment or burden them unduly with concerns about possible litigation (see, e.g., *Evaluating the Impact of Selected Cases under the HRA*, p. 110).

Such concerns can only be heightened by accounts in the media and political debate of instances in which the HRA has purportedly been misinterpreted or misapplied, a persistent theme being the alleged propensity of decision-makers to allow ill-founded considerations about individuals' human rights to trump wider public interests.<sup>131</sup> However, no evidence has been adduced to support the argument that such instances are either endemic or insuperable. Some notorious instances have been reiterated by politicians even after they have been authoritatively refuted, suggesting a degree of contempt for the requirement of open justification proposed in section 1.1 (ii).<sup>132</sup> Moreover, the JCHR notes that the HRA has been used in several high-profile cases as a scapegoat for unrelated administrative failings.<sup>133</sup>

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<sup>129</sup> R. Titmuss (1971) 'Welfare "Rights", Law and Discretion' *Political Quarterly* 42: 113.

<sup>130</sup> King, *Judging Social Rights*, as above n 27, pp. 76-79.

<sup>131</sup> In August 2011, in the aftermath of riots in several English cities, David Cameron stated: 'The truth is, the interpretation of human rights legislation has exerted a chilling effect on public sector organisations, leading them to act in ways that fly in the face of common sense, offend our sense of right and wrong, and undermine responsibility' ('Speech on the fight-back after the riots', Witney, 15 August 2011). In response, the (then) Chair of the EHRC, Trevor Phillips, pledged that the Commission would devote greater effort to putting an end to 'rigid, inflexible and misleading interpretations' of human rights, which 'should not be about bureaucratic or unnecessary restraints' (Letter to the Right Hon David Cameron MP, 17 August 2011).

<sup>132</sup> See, e.g., the erroneous claim that the HRA prohibits police from circulating posters of fugitive criminals, which was refuted by both the Director of Public Prosecutions (K. Starmer, 'The role of the prosecutor in a modern democracy.' Public Prosecution Service Annual Lecture, Royal Society of Medicine, London, 21 October 2009) and the police force concerned ('Tories slammed over attack on Derbyshire police during party



I suggest that legitimate concern about misapplication does not invalidate attempts to embed human rights in the process of decision-making; rather, it raises questions about *how* this process is undertaken. My research analyses the application of the human rights framework as a means of structuring bureaucratic discretion, drawing on the experience of public authorities that have developed and applied such an approach over a period of years (*Critical Review; Evaluating the Impact of Human Rights-Based Interventions*). There are striking commonalities between these experiences, despite the fact that they were pursued largely independently of each other,<sup>134</sup> in different types of public service, and with variable ‘triggers’, such as negative inspectorate reports;<sup>135</sup> fatal or violent incidents,<sup>136</sup> or specific legislative requirements.<sup>137</sup>

#### **a. Structures and processes**

The most visible area of commonality is the institutional; that is, the structures and processes that were used to develop and sustain the human rights-based approach. The following list distils the experience of overtly rights-respecting public authorities and reflects the lessons gained from evaluations of that experience (*Critical Review*, Chapter 2; *Evaluating the Impact of Human Rights-Based Interventions*). As such, it provides a model for securing institutional commitment to positive human rights compliance, though one which leaves much room for creative adaptation. These steps include:

- Systematic review, assessment and readjustment of policies and procedures (and, less commonly, monitoring of outcomes) for human rights compliance, e.g. using a ‘traffic light’ warning system;

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conference’, *Derby Telegraph*, 8 October 2009), yet which was subsequently restated by David Cameron (‘David Cameron Answers Your Questions’, *Gloucestershire Echo*, 10 January 2010).

<sup>133</sup> Joint Committee on Human Rights, *The Human Rights Act: The DCA and Home Office Reviews*, as above n 76, p.16. The JCHR referred in particular to the case of Anthony Rice, a prisoner who was released on license and went on to kill a woman, Naomi Bryant. The Committee later noted that there was ‘no evidence that Naomi Bryant had been killed as a result of officials misinterpreting’ the HRA, despite claims to the contrary by ministers, the Chief Inspector of Probation and some media reports; see also Joint Committee on Human Rights, *The Work of the Committee in 2007 and the State of Human Rights in the UK*, as above n 84, p.5.

<sup>134</sup> The exception being the NHS Trusts which were pilots for the Department of Health’s Human Rights in Healthcare programme.

<sup>135</sup> In the case of a forensic mental health hospital; see Scottish Human Rights Commission, *Human Rights in a Health Care Setting*, as above n 75, p. 3.

<sup>136</sup> In the context of policing; see Gordon, *A Developing Human Rights Culture in the UK?*, as above n 73, p. 617.

<sup>137</sup> In the case of the Northern Ireland Policing Board; see Gordon, *A Developing Human Rights Culture in the UK*, as above n 73, pp. 615-17.

- Committed leadership which articulates how human rights reinforce other organisational priorities and values;
- The identification of human rights ‘champions’ at different levels of seniority in order to create a continuous cycle of reinforcement throughout an organisation;
- Structures to support the participation of people using services in design and delivery of services and in decisions that affect them (see above section 3.2 (ii));
- Steps to gauge staff members’ and/or service users’ knowledge and understanding of human rights;
- Training and guidance for staff which relate human rights standards and principles clearly to operational roles;
- Arrangements to monitor human rights case law and disseminate to operational staff in accessible language the implications for policy and practice, including in respect of positive obligations;
- The production of specific tools (e.g. manuals, checklists) to support staff to make human rights compliant decisions with confidence;
- The use of human rights as a foundation for the integration of other duties and functions, e.g. those focused on equality and diversity, care planning, commissioning; procurement; freedom of information or mental capacity; and
- Steps to broadcast an organisation’s commitment to human rights to staff and service users, e.g. using human rights language in communications; or producing practice guides, codes of ethics or a human rights ‘charter’.

Several public authorities have made intermittent use of external human rights experts, e.g. to train staff or help identify areas in which policy and practice may be at risk of non-compliance.

#### **b. Human rights-based policy change**

There is also commonality as to the types of policy change that have flowed from these structural and procedural innovations, albeit very unevenly between public authorities, as discussed throughout *Evaluating the Impact of Selected Cases under the HRA*. In some instances, policies or practices which are indiscriminate in nature have been replaced by ones which are personalised and sensitive to context. For example, some public authorities have: replaced blanket bans on the manual handling of individuals in health or social care settings with individualised risk assessments (*Evaluating the Impact of Selected Cases under the HRA*, Chapter 6);<sup>138</sup> stopped the indiscriminate use of policies and practices such as mail vetting, body searches and restrictions on movement;<sup>139</sup> or revised blanket policies on intentional

<sup>138</sup> In response to the judgment in *R v East Sussex County Council Ex parte A, B, X and Y* [2003] EWHC 167.

<sup>139</sup> Scottish Human Rights Commission, *Human Rights in a Health Care Setting*, as above n 75, pp. 63, 66, 70.

homelessness because they disadvantage vulnerable children (*Evaluating the Impact of Selected Cases under the HRA*, p. 111). Policies or practices which are punitive in their purpose or application (e.g. the use of seclusion as a form of punishment) have similarly been discontinued after human rights-based review.<sup>140</sup>

Evaluations reveal express use of (as one professional termed it) the ‘mantra’ of legality, necessity and proportionality.<sup>141</sup> In particular, practitioners working with individuals whose circumstances render them vulnerable, or who may pose a risk to themselves or others, have embraced human rights as a means of assessing and managing risk, recognising that both failure to take account of risk and excessive risk aversion can lead to infringements of human rights (*Critical Review*, pp. 77-80). Health practitioners have used human rights standards and principles to develop a ‘positive risk management’ approach with patients with complex needs who may pose a risk to themselves or others (*Evaluating the Impact of Human Rights-Based Interventions*, pp. 46-56).<sup>142</sup> This uses the principles of necessity and proportionality in order to make decisions which transparently balance the rights involved in an individual’s risky behaviour against the rights (or restriction of rights) involved in the strategy being proposed to manage that risk. The intention is to ensure that intervention follows the least restrictive route available and that the infringement of a person’s human rights is thereby kept to a minimum. This approach also involves acting preventatively by analysing the individual’s life history and the context in which risky behaviour occurs, as well as providing structured opportunities for the individual to participate in decision-making, in contrast to approaches which view risk assessment and management as the sole preserve of the professional. Further, the positive risk management approach uses human rights as a unifying framework to integrate equality considerations into the assessment and management of risk.

The relationship between risk and human rights is a dominant theme of human rights-based guidance for public authorities produced by national human rights institutions, inspectorates, government departments and non-government actors.<sup>143</sup> Some public

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<sup>140</sup> Scottish Human Rights Commission, *Human Rights in a Health Care Setting*, as above n 75, p. 65.

<sup>141</sup> Scottish Human Rights Commission, *Human Rights in a Healthcare Setting*, as above n 75, p. 26.

<sup>142</sup> A. Roberts, J. Vyas, L. McEwan, G. Evans, Z. Khawaja, C. Punshon and B. Greenhill (2010) *Human Rights in Healthcare Project Phase III: Part 1: A Human Rights Based Approach to Risk - Evaluating the Incorporation of the ‘Keeping Me Safe and Well’ Risk Screen into Community Learning Disability Services* (Liverpool: Mersey Care NHS Trust).

<sup>143</sup> See, e.g., Commission for Social Care Inspection (2007) *Rights, risks and restraints: An exploration into the use of restraint in the care of older people* (Manchester: CSCI); Mental Welfare Commission for Scotland (2006) *Rights, risks and limits to freedom: principles and good practice guidance for practitioners considering restraint in residential care settings* (Edinburgh: Mental Welfare Commission for Scotland); Ministry of Justice

authorities have adopted human rights as part of a corporate risk-management approach, in the sense that reviewing policies and practices for human rights compliance is perceived to reduce the risk of having to react to critical media comment, censure by inspectorates or litigation.<sup>144</sup> However, the interaction of risk-based public policy and human rights is not yet fully understood. Murphy and Witty argue, for example, that prison governance in the UK has become ‘enveloped by discourses of risk and of rights’, yet there is scant interchange between criminologists and human rights lawyers as to how the two discourses interact.<sup>145</sup> For some authors, human rights law and principles play a normative as well as a practical role in risk assessment and management. Writing of the move from ‘risk management’ to ‘risk control’ in the probation service, and the concomitant risk of rights infringement, Hudson encourages ‘a whole-hearted embrace of the ideas of human rights: not just ... the Human Rights Act, but also embrace of a rights culture’.<sup>146</sup> Zedner argues that, to the extent that risk-based measures may infringe rights, it is all the more important that they be bound by legal strictures enshrining basic values such as equality, fairness, and the preservation of human rights.<sup>147</sup> In summary, there is scope for further research and development of professional practice in respect of the relationship between risk and human rights in different public services and among different spheres of expertise.

My research further indicates the potential utility of human rights as a framework of values within which to balance competing interests in the context of a public service or workplace. For example, claims under equality and human rights law concerning religion or belief have been a particularly vexed area for decision-makers, especially where they appear to be in tension with claims based on other characteristics such as sexual orientation or gender. My *Religion or Belief* report examines from both an empirical and normative perspective situations in which an individual’s right to manifest their religion or belief appears to clash with operational imperatives or the equally-held rights of others e.g. dilemmas relating to the wearing of clothes or symbols or requests to be exempt from certain tasks. I argue that such dilemmas have been (or *could* have been) resolved using human rights principles (*Religion or Belief*, Chapters 8 and 9). As established in case law (and explained in *Religion or Belief*, pp. 73-77), these include not only the considerations of legality, necessity

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(2006) *Human Rights, Human Lives - A handbook for public authorities* (London: Ministry of Justice), *passim*; J. Watson and M. Woolf (2008) *Human Rights Act Toolkit* (London: Legal Aid Group), *passim*.

<sup>144</sup> Scottish Human Rights Commission, *Human Rights in a Health Care Setting*, as above n 75, pp. 71-72 and *passim*.

<sup>145</sup> T. Murphy and M. Whitty (2007) ‘Risk and Human Rights in UK Prison Governance’ *British Journal of Criminology* 47(5): 798.

<sup>146</sup> B. Hudson (2001) ‘Human Rights, Public Safety and the Probation Service: Defending Justice in the Risk Society’, *Howard Journal* 40: 103, p. 110.

<sup>147</sup> L. Zedner (2006) ‘Neither Safe nor Sound? The Perils and Possibilities of Risk’ *Canadian Journal of Criminology and Criminal Justice* 48: 423, p. 425.

and proportionality but also the requirement for any restrictions to the freedom of religion or belief to be non-discriminatory and for public authorities to act in a neutral fashion as between religions and as between religious and non-religious forms of belief. These principles provide decision-makers outside the courtroom with a substantive set of positive principles with which to shape their policy and practice. Moreover, I argue that, from the perspective of those implementing the law, an approach based on human rights is likely to be more satisfactory and capable of commanding support than one based solely or principally on equality (*Religion or Belief*, pp. 152-53). This is because the equality framework, when used in isolation, risks encouraging an undue insistence on the assertion of competing identities, as has been evident in a number of high-profile cases.<sup>148</sup> My research on religion or belief is discussed in detail in section 4.3.

In summary, there is an emerging body of evidence as to the utility of human rights as a framework for decision-making at the level of policy and operational decision-making. Experience of applying human rights in a thoroughgoing way within a service or organisation is limited to a relatively small number of public authorities. Yet the evidence to date addresses the critique that human rights necessarily stifle discretion by imposing a legal straightjacket on decision-makers. It suggests, rather, that – properly understood - human rights provide a framework within which to manage risk, ensure transparency and find balanced and proportionate solutions to complex problems. Moreover, my research indicates that practitioners who have developed a human rights-based approach have, in practice, been creative and eclectic in the process of implementation. Some public authorities use human rights as a unifying conceptual framework within which to integrate other legislative obligations or initiatives such as the personalisation of care and treatment; commissioning; legal reform in the field of mental capacity; and equality duties (*Evaluating the Impact of Human Rights-Based Interventions*, p. 51).

### **3.3 The impact of human rights judgments**

Writing in the South African context, Heywood describes human rights judgments as ‘pieces of paper with untapped potential’<sup>149</sup> – potential, that is, to influence decision-makers or effect social change beyond the parties to the particular case. Literature on the impact of judicial review on institutional behaviour reaches mixed conclusions, in relation both to the UK and other common law jurisdictions (my focus in this section is literature relating to the UK).<sup>150</sup>

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<sup>148</sup> See, especially, *Eweida and Others v UK*, Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.

<sup>149</sup> M. Heywood (2009) ‘South Africa’s Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health’ *Journal of Human Rights Practice* 1: 14, p. 22.

<sup>150</sup> M. Hertogh and S. Halliday (eds) (2004) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press).

One strand of literature may be characterised as ‘impact agnosticism’ – the view that it will never be possible to collect sufficient data to analyse comprehensively the impact of judicial review on complex bureaucracies.<sup>151</sup> Among scholars who defend the enterprise of judicial impact studies, the dominant message has been to emphasise the limited ability of judicial review to influence administrative decision-making.<sup>152</sup> Moreover, where courts *are* said to exert influence, this is sometimes perceived to be negative in various ways.<sup>153</sup> For instance, authors who have conducted empirical studies of individuated decision-making about homelessness in local authorities in the UK argue that there is minimal absorption of public law duties identified in judicial review and a strong tendency for authorities to use creative means to evade compliance.<sup>154</sup> However, studies conducted in other realms of decision-making such as social security highlight the educative and scrutiny function of judicial review and its beneficial impact on administrative justice.<sup>155</sup> King further argues that studies which are principally concerned with the policy level impact of judicial review may neglect the significance of individual redress, both in relation to the decisions of courts and tribunals and the far greater number of claims which are resolved short of judicial consideration.<sup>156</sup> These divergent conclusions suggest that the identification of the impact of judicial review is likely to vary according to the sectors which are being examined and the methodology employed.

Platt, Sunkin and Calvo employ both qualitative and quantitative methodologies to assess the impact of administrative law review on local authority performance in England and Wales.<sup>157</sup> They conclude that judicial review is correlated in a statistically significant way to modest improvements in the quality of public services (according to officially-defined performance indicators).<sup>158</sup> In addition, qualitative responses from local authority officials gave many indications that judicial review is considered to have improved the quality of

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<sup>151</sup> M. Hertogh and S. Halliday (2004) ‘Introduction’ in Hertogh and Halliday (eds), *Judicial Review and Bureaucratic Impact*, as above n 150, p.11.

<sup>152</sup> L. Platt, M. Sunkin and K. Calvo (2009) *Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England & Wales*, Institute for Social and Economic Research No. 2009-05, p.2.

<sup>153</sup> Platt, Sunkin and Calvo, *Judicial Review Litigation as an Incentive to Change*, as above n 152, p. 2. See also G. Richardson (2004) ‘Impact Studies in the UK’ in Hertogh and Halliday (eds), *Judicial Review and Bureaucratic Impact*, as above n 150.

<sup>154</sup> S. Halliday (2004) *Judicial Review and Compliance with Administrative Law* (Oxford: Hart Publishing); I. Loveland (1995) *Housing Homeless Persons* (Oxford: Oxford University Press) quoted in King, *Judging Social Rights*, as above n 27, p.71.

<sup>155</sup> See, e.g., T. Buck (1998) ‘Judicial Review and the Discretionary Social Fund: The Impact on a Respondent Organisation’ in T. Buck (ed) *Judicial Review and Social Welfare* (London: Pinter). See also the discussion in King, *Judging Social Rights*, as above n 27, pp. 70-76.

<sup>156</sup> King, *Judging Social Rights*, as above n 27, p. 75.

<sup>157</sup> Platt, Sunkin and Calvo, *Judicial Review Litigation as an Incentive to Change*, as above n 152.

<sup>158</sup> Platt, Sunkin and Calvo, *Judicial Review Litigation as an Incentive to Change*, as above n 152, p. 22.

decision making.<sup>159</sup> They conclude that judgments ‘give expression to the needs of individualised administrative justice; to the requirement that public authorities are able to justify their actions in law and that they act fairly and in a manner that is compatible with human rights’.<sup>160</sup>

My research contributes to this literature by identifying both attitudinal and institutional factors which tend to encourage or inhibit the smooth transition from a legal judgment to changes in policy and practice that would have a wider impact on the realisation of particular human rights (*Evaluating the Impact of Selected Cases under the HRA*; ‘Evaluating the Impact of Human Rights Litigation’; ‘Limits and Achievements of the HRA’). Assessing the impact of judgments requires us to cast the net wide for evidence: impact may be visible in changes to law, public policy and its implementation, including the process by which decisions are made. It may also be evident in outcomes in the form of both empirical social realities and the experience of people delivering and using the services that are implicated in the judgment. In addition, the imprint of judgments may be visible in professional manuals and codes of practice and in wider discussion in professional circles and the media of the principles at stake.

#### **(i) Levers for achieving impact**

There are different mechanisms by which human rights judgments influence institutional behaviour, as examined in *Evaluating the Impact of Selected Cases under the HRA*, ‘Evaluating the Impact of Human Rights Litigation’ and *The UK and the European Court of Human Rights* (Chapter 5). Impact beyond that on the parties to a case can most easily be identified where a legal judgment has immediate implications for legislation, administrative action or statutory guidance, i.e. where a judgment leads directly to a change in the law or the way that the law is applied.

In some instances, judgments are revolutionary in their effect, impelling public authorities to drive visible and sometimes rapid change from the top down. A compelling example is *Napier*, which ended the inhuman or degrading practice of ‘slopping out’ in Scottish prisons (*Critical Review*, pp. 149-50).<sup>161</sup>

Another is *Limbuela*, concerning the application of Section 55 of the Nationality, Immigration and Asylum Act 2002 which allowed support to be refused to individuals who failed to apply for asylum ‘as soon as reasonably practicable’, causing many to become

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<sup>159</sup> Platt, Sunkin and Calvo, *Judicial Review Litigation as an Incentive to Change*, as above n 152, pp. 22-23.

<sup>160</sup> Platt, Sunkin and Calvo, *Judicial Review Litigation as an Incentive to Change*, as above n 152, p. 24.

<sup>161</sup> *Napier v Scottish Ministers* 2005 SC 229 OH

destitute (*Evaluating the Impact of Selected Cases under the HRA*, Chapter 5). The case established the principle that, where the fate of individuals is in the hands of the state (because it denies them support and bars them from either working or claiming mainstream benefits), consequent severe destitution constitutes inhuman or degrading treatment under Article 3 ECHR.<sup>162</sup> Although *Limbuella* related to a specific regime of hardship imposed on the claimants, the case may be viewed as articulating the far-reaching proposition that ‘the state can be held responsible to meet the basic needs of everyone in the jurisdiction, wherever existing legal structures have been directly implicated in their denial’.<sup>163</sup> My research showed that *Limbuella* had a direct impact on the use of Section 55: after the House of Lords judgment in 2005, some 9,000 fewer applicants were deemed ineligible for support compared to 2003 (*Evaluating the Impact of Selected Cases under the HRA*, p. 68).<sup>164</sup> Guidance to asylum case workers and policy teams was revised and expressly adopted the destitution threshold set out in *Limbuella*. Unlike pre-*Limbuella* guidance, it indicated how to apply the Article 3 test in practice. However, I argue that the judgment had a narrower impact that might have been expected. Despite the generalisable implications of the judgment, it was interpreted extremely narrowly by the UK Government to apply only to the specific matrix of factors arising in the case. Thus, the case had no impact on government policy, e.g. in addressing the rising incidence of destitution among failed asylum seekers, including those who are unable to leave the UK through no fault of their own yet who are denied support under section 4 of the Immigration and Asylum Act 1999.<sup>165</sup> However, I found that *Limbuella* had impacted – albeit with considerable variation – on how local authorities assess and support destitute people with no recourse to public funds (*Evaluating the Impact of Selected Cases under the HRA* pp. 74-77).

The ECtHR judgment in the ‘Bournewood’ case,<sup>166</sup> concerning the lack of safeguards for individuals who lack the mental capacity to consent or disagree to their care or treatment, presents an even more complex picture. The case had a direct impact in that it triggered a restructuring of mental capacity law and regulation in England and Wales through the introduction of Deprivation of Liberty Safeguards (DoLS).<sup>167</sup> However, there is evidence that DoLS are neither widely understood nor consistently implemented by public authorities,

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<sup>162</sup> *R (Limbuella and Others) v Secretary of State for the Home Department* [2005] UKHL 66

<sup>163</sup> Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act*, as above n 28, p. 276.

<sup>164</sup> Interviewing and assessments of eligibility under section 55 were suspended in May 2004, following the Court of Appeal’s judgment in *The Secretary of State for the Home Department v (1) Wayoka Limbuella (2) Binyam Tefera Tesema (3) Yusif Adam* Case No: C/2004/0383, 2/2004/0384 & C/2004/0277 21 May 2004.

<sup>165</sup> Asylum Support Appeals Project (2008), *Unreasonably Destitute? A report by ASAP into the difficulties of obtaining Section 4 Support for refused asylum-seekers taking reasonable steps to leave the UK* (London: ASAP).

<sup>166</sup> *HL v UK*, No. 45508/99, 5 October 2004

<sup>167</sup> The safeguards were introduced into the Mental Capacity Act 2005 through the Mental Health Act 2007.



suggesting that it will be a considerable time before the full impact of the case in protecting the rights of individuals who lack the capacity to make informed decisions about their care or treatment can be determined.<sup>168</sup> Clements adds that thousands of individuals, such as elderly people with dementia, may never benefit from the judgment unless, like the claimant in the Bournemouth case, they have conscientious and persistent advocates.<sup>169</sup>

In other instances, impact has been substantial but cumulative over a period of years; e.g. the elaboration in successive ECtHR and domestic judgments of detailed procedural obligations for the investigation of deaths at the hands of the state or when people are in the care of the state (*The UK and the European Court of Human Rights*, pp. 46-51).<sup>170</sup> Elsewhere, legislative responses to judgments may be delayed due to political resistance or the persistence of controversy about the implications of the judgment. Note, for example, the time-lag between judgments and outcomes in cases concerning corporal punishment (*The UK and the European Court of Human Rights*, pp. 63-64).<sup>171</sup> Delay may also be attributed simply to inertia, e.g. the time lag of nine years in legislating to ensure the right of people who have

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<sup>168</sup> Care Quality Commission (2013) *Monitoring the Use of the Mental Capacity Act Deprivation of Liberty Safeguards in 2011/12* (London: Care Quality Commission).

<sup>169</sup> Clements, 'Winners and Losers', as above n 38, p. 35.

<sup>170</sup> See, especially, cases at the ECtHR concerning the death of the applicants' next-of-kin during security forces operations (or in circumstances giving rise to suspicions of collusion of such forces) in Northern Ireland: *Jordan v UK*, No. 24746/94, 4 May 2001; *McKerr v UK*, No. 28883/95, 4 May 2001; *Kelly v UK*, No. 30054/96, 4 May 2001; *Shanaghan v UK*, No. 37715/97, 4 May 2001; *Finucane v UK*, No. 29178/95, 1 July 2003; *McShane v UK*, No. 43290/98, 28 May 2002. For analysis of these cases, see B. Dickson (2010) *The European Court of Human Rights and the Conflict in Northern Ireland* (Oxford: Oxford University Press). See also cases in the ECtHR and the domestic courts which have applied the principles established in the Northern Ireland-related judgments to circumstances beyond those involving deliberate killing by state agents: *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653; *R (Wright) v Secretary of State for the Home Department* [2001] 1 Lloyd's Rep Med 478; *R (Middleton) v Coroner for the Western District of Somerset* [2004] 2 AC 182; *Keenan v UK*, No. 27229/95, 3 April 2001; *Paul and Audrey Edwards v UK*, No. 46477/99, 14 March 2002; *R (Smith) v Secretary of State for Defence and another* [2010] UKSC 29; and *R (Moss) v HM Coroner for the North and South Districts of Durham and Darlington* [2008] EWHC 2940.

<sup>171</sup> *Campbell and Cosans v UK*, Nos. 7511/76; 7743/76, 25 February 1982, concerning corporal punishment in schools, led to the banning of such punishment in state-funded schools in 1987 and privately-funded schools in 1999. *Tyrer v UK*, No. 5856/72, 25 April 1978 found that judicial corporal punishment (in the form of birching) in the Isle of Man constituted inhuman or degrading treatment, in violation of Article 3 ECHR, yet birching was not formally outlawed on the Isle of Man until 1993. *A v UK*, No. 25599/94, 23 September 1998 concerned corporal punishment within the home. As a consequence, in England and Wales, section 58 of the Children Act 2004 removed the defence of 'reasonable chastisement' for those with parental responsibility and replaced it with one of 'reasonable punishment', which may be used only in relation to charges of common assault, where the injury suffered is transient or trifling.

been in public care to access records relating to their time in care (*The UK and the European Court of Human Rights*, p. 74).<sup>172</sup>

The process by which impact is achieved may result from the combination of multiple social and political factors. For example, a judgment which highlights a particular law or policy as being inconsistent with human rights norms may be used by civil society actors to reframe an issue or make it more prominent, thereby tipping the balance in favour of legal or policy reform. ECtHR judgments concerning the rights of lesbian, gay, bisexual or transgender people contributed to legal reform in respect of the decriminalisation of adult homosexual acts in private;<sup>173</sup> equalisation of the age of consent;<sup>174</sup> removing the prohibition on gay men and lesbians joining the armed forces;<sup>175</sup> and recognition of the rights of transsexuals<sup>176</sup> (*The UK and the European Court of Human Rights*, pp. 71-74).

Practitioners also report using judgments instrumentally to vindicate existing ‘grassroots’ efforts to challenge their authority’s existing ethos or specific policies or practices (e.g. those which are indiscriminate and insensitive to individual circumstances) (*Evaluating the Impact of Selected Cases under the HRA*, pp. 112-13) – a process described by Halliday as ‘subversive decision making’.<sup>177</sup>

## **(ii) Barriers to achieving impact**

Here, I examine the attitudinal and institutional barriers which may prevent human rights judgments with generalisable implications from having the impact that might be expected.

### **a. Perceptions of human rights**

Surveys of public sector staff reveal knowledge and understanding of human rights and the HRA to be generally low, especially ‘explicit’ rather than ‘implicit’ knowledge.<sup>178</sup> Similar results are evident in surveys of the public.<sup>179</sup> Yet my research indicates that lack of

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<sup>172</sup> *Gaskin v UK*, No. 10454/83, 7 July 1989; the law was changed to comply with the judgment in 1998.

<sup>173</sup> *Dudgeon v UK*, No. 7525/76, 22 October 1981.

<sup>174</sup> *Sutherland v UK*, No. 25186/94, 27 March 2001.

<sup>175</sup> *Smith and Grady v UK*, Nos. 33985/96 and 33986/96, 27 September 1999.

<sup>176</sup> *Goodwin (Christine) v UK*, No. 28957/95 [GC], 11 July 2002.

<sup>177</sup> S. Halliday (2000) ‘The Influence of Judicial Review on Bureaucratic Decision-Making’ *Public Law*: 110, p. 118.

<sup>178</sup> Ministry of Justice, *Human Rights Insight Project*, as above n 74, p.64; ‘explicit’ knowledge refers to those who understand and behave according to the principles and also know that they are human rights principles; ‘implicit’ knowledge refers to those who understand and behave according to the principles, but do not know that they have anything to do with human rights.

<sup>179</sup> Equality and Diversity Forum (2012) *Public Attitudes to Human Rights: A summary of research commissioned by the Equality and Diversity Forum* (London: Equality and Diversity Forum, unpublished);

knowledge and understanding may present less insuperable an obstacle than the variable *perceptions* of human rights, and of the HRA in particular, which condition both individual and corporate receptiveness to the implications of judgments. The *Critical Review* report and the report on *Evaluating the Impact of Selected Cases under the HRA* identify a range of negative responses. These include a fear among staff that human rights will be used by service users as the basis for unrealistic or unfounded claims;<sup>180</sup> and feelings of guilt, anxiety or demoralisation at the notion that human rights might be vulnerable to abuse within a service. Practitioners speak of the ‘emotional labour’ expended when considering the implications of their actions in human rights terms.<sup>181</sup> Decision-makers may resent human rights law as, in their view, burdensome, peripheral to everyday pressures, or actively threatening. My research also identifies a tendency among decision-makers in public authorities to view human rights cases as arising from extreme or aberrant circumstances (typically expressed as, ‘it could not happen here’), or from the persistence of litigious individuals, rather than from any systemic shortcomings (*Evaluating the Impact of Selected Cases under the HRA*, p. 111). This evidence suggests that if efforts to embed human rights in routine decision-making are to prosper, they need to address emotional and psychological responses as well as cognitive change.<sup>182</sup>

Yet negative responses are neither universal nor insurmountable. Generalisations about perceptions of human rights, and therefore willingness to use them as a guide to behaviour, are hard to sustain: opinions within a single public authority can differ markedly; e.g. officers of the same rank within the same police force described the consequences of the *Osman* case as, on the one hand, a ‘bureaucratic nightmare’ and, on the other, evidence of increased professionalism and accountability (*Evaluating the Impact of Selected Cases under the HRA*, pp. 15-16). My research indicates that an organisational human rights approach can reconnect staff with their original motivation for taking up their profession, especially in

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Ministry of Justice, *Human Rights Insight Project*, as above n 74, pp. 26-27; K. Kaur-Ballagan, S. Castell, K. Brough, and H. Friemert (2009) *Public Perceptions of Human Rights* (Manchester: Equality and Human Rights Commission), pp. 17-18.

<sup>180</sup> However, the Ministry of Justice’s *Human Rights Insight Project* (pp. 67-68) suggests that engaging service users does not, in fact, lead to unreasonable demands on public services by those that use them. On the contrary: ‘User “unreasonableness” was diffused when users were consulted and involved more in the design of their care ... far from being over-demanding – users were realistic in their suggestions and did not propose budget-busting initiatives. Furthermore, amongst Social Services providers there were fewer reports of tension and conflict on the “front line”’.

<sup>181</sup> Emotional labour refers to the suppression of emotion in order to sustain an outward appearance; see A. Roberts, J. Vyas, A. Cookson, M. Redman, B. Hiley, Y. Hornby, D. Howard and B. Greenhill (2010), *Human Rights in Healthcare Project Phase III: Parts 2 & 3* (Liverpool: Mersey Care NHS Trust), pp. 178-86.

<sup>182</sup> See also P. Kinderman and F. Butler (2006) *Implementing a Human Rights Approach within Public Services: An Outline Psychological Perspective, A Report for the Department of Constitutional Affairs* (London: DCA).

services where the ethos has been perceived as being under attack from, among other factors, contracting out or target-driven approaches (*Critical Review*, Chapter 3). Similarly, Platt, Sunkin and Calvo observe that judicial review may be received positively as reinforcing the public service ethos, which embodies (among other values) fidelity to the law and impartiality in reconciling competing claims for resources.<sup>183</sup> Individual decision-makers may welcome the clarity that judicial decisions offer in reconciling the ever present tension between the claims of universalism and particularism; e.g. to prompt the reallocation of resources to neglected areas that have suffered from budget-setting driven by more populist concerns.<sup>184</sup>

#### **b. Development and dissemination of generalisable principles**

Another factor that affects how case law translates into institutional and behavioural change is the nature of the judgment itself. Judgments which articulate a discrete principle with broad potential application<sup>185</sup> or which spell out the extent of the obligation on public authorities to take positive steps to secure human rights<sup>186</sup> are more likely to influence decision-makers than those which are ambiguous, opaque or which do not extend beyond a specific interpretation of the law applied to a particular set of circumstances.

Further, judgments can only influence behaviour if public authorities monitor human rights case law and disseminate the implications for policy and practice to those that need to know about and act upon them. The report *Evaluating the Impact of Selected Cases under the HRA*, (pp. 108-10) indicates that mechanisms to review policy and guidance in the light of case law, and to disseminate the implications, are often haphazard or dependent on personal initiative. In local authorities, differing perceptions exist between legal staff and service departments as to the adequacy of those arrangements, in respect of their timeliness and accessibility, with service departments tending to have a more negative view of arrangements than legal officers.

There is also debate about how far down an organisation it is helpful to signpost changes to policy or guidance as being based on human rights. In its response to the research project on *Evaluating the Impact of Selected Cases under the HRA*, the Ministry of Justice

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<sup>183</sup> Platt, Sunkin and Calvo, *Judicial Review Litigation as an Incentive to Change*, as above n 152, pp. 19-22. See also P. du Gay (ed) (2005) *The Values of Bureaucracy* (Oxford: Oxford University Press).

<sup>184</sup> Platt, Sunkin and Calvo, *Judicial Review Litigation as an Incentive to Change*, as above n 152, p. 21.

<sup>185</sup> E.g. *Osman v UK* (2000) 29 EHRR 245.

<sup>186</sup> E.g. *R (on the application of J) v Caerphilly County Borough Council* [2005] EWHC 586, which held that the local authority had failed in its duties to a minor who had left a young offender institution, in violation of Article 8 of the Convention (the right to respect for private and family life), and spelt out (at para 34) what authorities must do in future in such cases, especially with regard to care planning.

ventured that making this linkage explicit to frontline staff may be unnecessarily legalistic and burdensome (p. 110). However, my research has found an appetite among some practitioners for changes originating in human rights judgments to be explained as such, since it is useful for staff to know that changes are not arbitrary and may involve a balancing of rights, including their own. Where an absolute right is engaged, and where legal obligations are strong because someone is in the state's care, interviewees were more likely to articulate a need to have their human rights obligations explained expressly.

### **c. Receptiveness of public authorities to human rights judgments**

In addition, a public authority's response to judicial review may be significantly determined by the degree to which judgments fit with its existing goals, priorities and budgets, as well as its engrained corporate culture. Authorities may take the route of minimal or non-compliance when there is a need (actual or perceived) for additional resources or for a substantial revision of budgeting priorities. In some cases, public authorities appear to develop ways of interpreting the obligations they might be expected to take on as a result of case law in such a way as to fit within available resources. For instance, in the *Behre* case,<sup>187</sup> which held that a local authority (Hillingdon) had mistaken the scope of its duties to former unaccompanied asylum seeking children who had been 'looked after' by the local authority, the additional costs were such that many authorities were unable to fully respond to the judgment and some did not do so at all.<sup>188</sup>

In other instances, case law concerned with a minimum level of decency and respect for a claimant's human rights can struggle to gain purchase in a system which is primarily organised around the equitable and transparent *rationing* of resources and in localities which cannot meet the needs of all people in a position similar to that of the claimant. A case in point is that of *Bernard*, concerning a severely disabled woman who had knowingly been left in unsuitable accommodation for 20 months, confined to one room and unable to access a toilet (*Evaluating the Impact of Selected Cases under the HRA*, Chapter 7).<sup>189</sup> In circumstances of pressure on suitably adapted housing stock, my research interviewees did not see *Bernard* as pertinent to the hard decisions that must be made in conditions of scarcity. In areas where there was sufficient capacity comfortably to meet the basic level of decent treatment set by *Bernard*, interviewees tended to view the case as an aberration, which had no generalisable implications for social housing providers.

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<sup>187</sup> *R (on the application of Behre) v London Borough of Hillingdon* [2003] EWHC 2075.

<sup>188</sup> Commission for Social Care Inspection (2005) *Safeguarding Children: The Second Joint Chief Inspectors' Report on Arrangements to Safeguard Children* (London: CSCI), p. 78. Some authorities appeared to have responded formally (by listing claimants as falling under the relevant statutory provision) but without significantly altering the level of service provided, which relied on central government funding.

<sup>189</sup> E.g. *R (Bernard) v Enfield LBC* [2003] HRLR 4.

Reluctance to embrace the implications of judgments may also be due to political factors, which may make it expedient for an authority to delay or evade implementing a judgment, however clear its implications. As Clements and Morris demonstrate, where judgments are seen as benefiting minority interests, especially those of unpopular groups such as gypsies and travellers, local authorities appear to find inaction the most attractive option, even where compliance may be substantially cheaper in the long term.<sup>190</sup> Similarly, they explain, local authorities have proved more reluctant proactively to review policies and practices for Convention compliance when they concern gypsies and travellers than for more general ‘Strasbourg-proofing’ purposes.

Further complexity is added when the implications of human rights obligations appear to sit uncomfortably with, or are viewed as subordinate to, other policy imperatives. For instance, Clements and Morris analyse the impact that the (more or less simultaneous) introduction of the Best Value performance measurement regime<sup>191</sup> had on local authorities’ implementation of the HRA soon after it came into force.<sup>192</sup> Best Value, they argue, had a ‘materially negative impact’ on HRA implementation by imposing a competing demand on officers’ attention, stifling their initiative and fixating them with the objective of meeting centrally-generated targets.<sup>193</sup> My research reveals a similar tendency among some public officials to regard human rights as secondary to, in their view, stronger - and almost invariably better understood - drivers, e.g. performance indicators and targets; codes of practice; audit, inspection and complaint-handling regimes; and other statutory and regulatory regimes (*Evaluating the Impact of Selected Cases under the HRA*, pp. 104-105). The suggestion of one specialist advisor to local authorities (interviewed in 2008) was that the HRA is not ‘in the DNA’ of authorities unlike, for example, equality law.

#### **d. The implementation cycle**

As a result of the barriers identified above, judicial declarations of rights may often, as Epp observes, find only ‘pale reflections’ in institutional practice.<sup>194</sup> My research contributes to understanding of the mechanisms by which legal judgments are (or are not) translated into changes in law, policy and behaviour. This is critical, I suggest, since knowing *how* human rights judgments achieve impact, or are impeded from doing so, enables human rights

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<sup>190</sup> Clements and Morris, ‘The Millennium Blip’, as above n 73.

<sup>191</sup> Best Value conferred ‘a duty to deliver services to clear standards – covering both cost and quality – by the most economic, efficient and effective means available’. See Audit Commission (1999) *Best Assured: the role of the Audit Commission in Best Value* (London: Audit Commission).

<sup>192</sup> Clements and Morris, ‘The Millennium Blip’, as above n 73.

<sup>193</sup> Clements and Morris, ‘The Millennium Blip’, as above n 73, p. 225.

<sup>194</sup> C. R. Epp (1998) *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press), p. 2.

proponents to devise strategies and make recommendations that go beyond individual cases to the very process of translating law into the realisation of rights. The report *Evaluating the Impact of Selected Cases under the HRA* (Chapter 8) proposes a normative scheme which takes account of the complex legal, policy and social environment in which new principles need to be applied if they are to affect institutional or individual behaviour. It is premised on the view that litigation is part of a long-term process involving promotion and implementation and harnessing multiple formal and informal channels. The process is presented as a cycle, as shown in Figure 1.

**Figure 1: Human rights implementation cycle**



Within this scheme, *national leadership* is required to promote the principles of human rights case law – both from central government policy departments and national human rights institutions, as well as others with national influence such as regulators, inspectorates and ombudsmen. This is especially valuable to counteract any tendency among public authorities to respond to judgments in a reactive or piecemeal way rather than considering whether human rights principles demand a more fundamental shift in thinking. *Promotion* of human rights judgments via professional networks and traditional and social media is proposed as an effective way to reach practitioners, given the patchy institutional application of case law. The public profile of a judgment may also galvanise authorities concerned about reputational risk.

*Advocacy* – both legal representation and campaigning advocacy – is required to boost the ‘demand side’ in relation to human rights judgments. In the UK, advocacy has been especially important in relation to cases which involve politically unpopular and marginalised

groups, such as asylum seekers.<sup>195</sup> The human rights organisation Liberty views litigation and campaigning as ‘mutually reinforcing enterprises’ and notes that success in campaigning terms has sometimes arisen from unsuccessful legal challenges.<sup>196</sup> The article ‘Evaluating the Impact of Human Rights Litigation’, situates this aspect of the model in the context of wider argument concerning the relationship between litigation and other forms of social action. It argues that concerns about a ‘crisis of legalism’ – that is, about the fetishizing of human rights claims in their legal form above their operation in the political community – may be overstated.<sup>197</sup> The article ventures that civil society activists both in established and newer democracies have used litigation instrumentally along with other forms of political campaigning and social mobilisation to achieve human rights goals (and draws on evidence presented in *Poverty, Inequality and Human Rights* to substantiate this point).

Returning to the implementation cycle, it is suggested that effective *institutional application* involves monitoring and review mechanisms, training, and the ‘translation’ and dissemination of principles in case law in a way that makes sense to practitioners’ everyday roles. My research indicates that these systems vary considerably between authorities and that the lessons of case law do not consistently filter down to those on the frontline. To maximize the potential for human rights litigation to translate judgments into the desired behaviour change *across sectors*, I endorse Klug’s proposed approach of ‘smart compliance’: that is, providing guidance to public authorities on the implications of human rights case law which extend beyond the public authority and specific facts raised by a particular case in ways that may not be immediately apparent.<sup>198</sup> In recent years, such guidance has been developed by

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<sup>195</sup> The *Limbuella* case was championed by organisations concerned with the welfare of asylum seekers and these organisations have used the judgment as part of strategies to achieve specific policy changes. The judgment in the case of *T and S*, brought by the Child Poverty Action Group and promoted via campaigning advocacy, forced the Home Office to give a cash equivalent to milk tokens to asylum seeker mothers to prevent transmission of HIV to their babies (*R vs. Secretary of State for Health and Secretary of State for the Home Department ex parte T and S* [2002] EWHC 1887).

<sup>196</sup> R. Maiman (2004) ‘We’ve Had to Raise Our Game: Liberty’s Litigation Strategy under the Human Rights Act 1998’ in Halliday and Schmidt, *Human Rights Brought Home*, as above n 73, p. 22. An example of failed litigation which achieved an exceptionally high profile is Liberty’s representation of Diane Pretty, who was terminally ill with motor neurone disease. Liberty argued unsuccessfully on her behalf in the UK courts and in Strasbourg that Article 2 ECHR on the right to life includes a right to assisted suicide (*Pretty v UK*, No. 2346/02, 29 April 2002; *The Queen on the Application of Mrs Diane Pretty (Appellant) v Director of Public Prosecutions (Respondent) and Secretary of State for the Home Department (Interested Party)* [2001] UKHL 61).

<sup>197</sup> See especially C. Gearty (2006) *Can Human Rights Survive? The Hamlyn Lectures* (Cambridge: Cambridge University Press), Chapter 3.

<sup>198</sup> F. Klug (2004) ‘Establishment of the Commission for Equality and Human Rights: Implications for the Public Sector’, Speech at Westminster Explained 36: An Assessment of the Impact of the HRA, 7 December 2004, pp. 3-4.



the EHRC and various public authorities.<sup>199</sup> However, my research leads me to conclude that the absence until 2007 of a human rights commission in Britain charged with this role of promoting human rights principles and translating the lessons of case law into effective guides to practice has led to the HRA being significantly under-sold and under-exploited (*Critical Review*, Chapter 2).

### 3.4 Identifying impact: the evidentiary challenge

Gready notes that the human rights movement has historically had an ambivalent and inconsistent attitude towards evidence-based justifications and evaluation of its work.<sup>200</sup> Such caution is understandable. Human rights proponents may justifiably mistrust the notion that whatever ‘works’ is right, ‘the classic human rights trump over the dominant utilitarian calculus for decision-making’.<sup>201</sup> Cost-benefit analyses of human rights-based decisions appear especially objectionable, since they shift debate from the moral and legal terrain to one in which rights - and the interests of those that claim them - might be deemed expendable.<sup>202</sup> Yet I agree with Gready that justifications in terms of evidence and effectiveness *are* required if human rights-based practice is to expand beyond (in the UK context) its still low and uneven level of development. Without such an evidence base, human rights practitioners must rely either on unsubstantiated claims or moral exhortations, neither of which is likely to sway decision-makers who are as yet unpersuaded.

The imperative, I argue, is to develop evaluatory frameworks which are congruent with the strategic priorities of human rights and do not seek externally to determine or distort or them. Moreover, such frameworks need to reflect the dual function of human rights as, on the one hand, a framework to critique public policy and, on the other, a framework within which to shape and deliver services. Within these parameters, evaluations of human rights-based practice need to address the following question: are interventions which choose to privilege human rights as a framework for decision-making preferable to alternatives that could be pursued with similar resources and which at least aim to produce similar – human rights compliant - outcomes? If so, in what ways are they preferable?

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<sup>199</sup> In 2011-12, I led a project commissioned by the Equality and Human Rights Commission to create a website designed principally for public authorities that presents human rights-based guidance documents from numerous sources and conveys key generic messages relating to human rights implementation. Available at: <http://www.equalityhumanrights.com/human-rights/human-rights-practical-guidance/>.

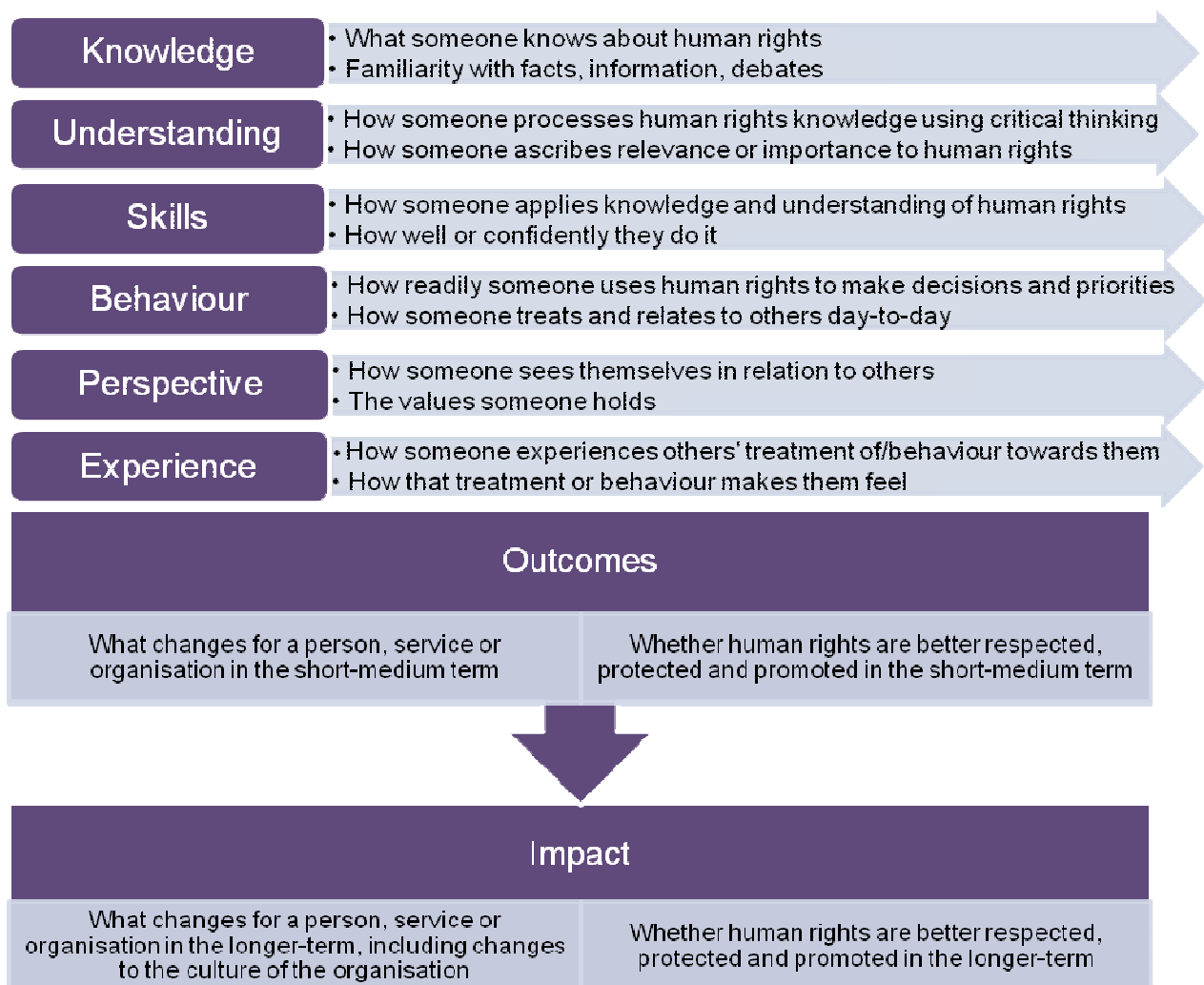
<sup>200</sup> P. Gready (2009) ‘Reasons to Be Cautious about Evidence and Evaluation: Rights-based Approaches to Development and the Emerging Culture of Evaluation’ *Journal of Human Rights Practice* 1(3): 380.

<sup>201</sup> Gready, ‘Reasons to Be Cautious about Evidence and Evaluation’, as above n 200, p. 382.

<sup>202</sup> R. Morris and L. Clements (2002), *At What Cost? The Economics of Gypsy and Traveller Encampments* (Bristol: Policy Press), pp. 1-2.

In *Evaluating the Impact of Human Rights-Based Interventions*, I propose an approach to evaluation which addresses these requirements. I suggest (Chapter 1) that one *prima facie* benefit of viewing human rights as a means as well as a goal - ‘using human rights to achieve human rights’ - is that it helps to ensure that human rights are respected and promoted at each stage of a process or activity and not only at some supposed end-point. I examine (Chapter 2) what it means in practical terms to embrace human rights as a framework for organisational change – to use human rights ‘along the journey’ as well as viewing them as the goal to be achieved (see also section 3.2 above). I explore (Chapter 5) the types of change that human rights-based interventions may seek to achieve, conceptualising these as shown in Figure 2:

**Figure 2: A human rights-based model of change**



I use this framework to analyse previous evaluations of human rights-based practice (Chapter 10).<sup>203</sup> Overall, evaluative work in the UK is still at an early stage and has a number

<sup>203</sup> Brap (2010) *Developing and Evaluating the Practical Application of a Human Rights Framework in Cancer Care – a report for MacMillan Cancer Support*; Covell and Howe, *Rights, Respect and Responsibility*, as above n 121; Ekosgen, The University of Bedfordshire and Queen Margaret University (2011) *Evaluation of Care*

of limitations. In particular, evaluations are often preoccupied with matters of process (the institutional application of human rights) and have not extended to consideration of outcomes (the results of that application, in the form of changes to knowledge and understanding, attitudes, perceptions, experience and the substantive realisation of human rights).

These limitations reflect the methodological challenges inherent in evaluating rights-based practice. For example, some of the most compelling evidence – yet among the hardest to identify - is that which captures fine-grained changes within a particular service or setting, such as the reformulation of individuals’ self-perception and perception of others when they are exposed to the idea of human rights. Similarly persuasive, yet elusive, is evidence about the way in which relationships change between providers and users of overtly rights-respecting services, becoming, according to some evaluations, less conflictual and more respectful (see also section 3.2 (ii) above).<sup>204</sup> Such attitudinal and behaviour changes may be diffused unevenly across an organisation. They may ebb and flow over time as personnel and priorities change.

Policy and practice which is initially embedded as part of a human rights framework may, over time, lose its human rights ‘label’ and it may therefore be harder to establish a causal link between the human rights-based intervention and particular outcomes.<sup>205</sup> This effect has been observed in evaluations of longstanding human rights-based initiatives, where approaches to decision-making become habitual and their provenance is forgotten or is poorly

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*about Rights – Phase 2: Report to the Scottish Human Rights Commission* (Glasgow: Ekosgen); B. Greenhill and R. Whitehead (2010) ‘Promoting Service User Inclusion in Risk Assessment and Management: A Pilot Project Developing a Human Rights Based Approach’ *British Journal of Learning Disabilities* 39: 277; Ipsos MORI (2010) *Human Rights in Healthcare Project Phase III: Evaluative Review* (Ipsos MORI for the Department of Health); Mersey Care NHS Trust, *An Evaluation of Service User and Carer Involvement in Mersey Care NHS Trust*, as above n 118; M. Redman, E. Taylor, R. Furlong, G. Carney and B. Greenhill (2012) ‘Human rights training: impact on attitudes and knowledge’ *Tizard Learning Disability Review* 17(2): 80; A. Roberts, B. Greenhill, A. Talbot, and M. Cuzak (2012) ‘Standing up for my human rights’: a group’s journey beyond consultation towards co-production’ *British Journal of Learning Disabilities* 40(4): 292; A. Roberts et al, *Human Rights in Healthcare Project Phase III: Parts 2 & 3*, as above n 181; A. Roberts et al, *Human Rights in Healthcare Project Phase III: Part 1: A Human Rights Based Approach to Risk*, as above n 142; Scottish Human Rights Commission, *Human Rights in a Health Care Setting*, as above n 75; E. Taylor, M. Redman, A. Roberts and R. Furlong (2010), *Human Rights Training Evaluation: Descriptive Results and Thematic Analysis of Responses* (Liverpool: Mersey Care NHS Trust); R. Whitehead, G. Carney and B. Greenhill (2011) ‘Encouraging positive risk management: Supporting decisions by people with learning disabilities using a human rights-based approach’, in R. Whittington and C. Logan (eds), *Self-Harm and Violence: Towards Best Practice in Managing Risk in Mental Health Services* (Chichester: Wiley-Blackwell).

<sup>204</sup> See, e.g., Dyer, ‘A Human-Rights Based Approach to Involving Service Users and Carers’ as above n 118; Covell and Howe, *Rights, Respect and Responsibility*, as above n 121.

<sup>205</sup> Scottish Human Rights Commission, *Human Rights in a Health Care Setting*, as above n 75, p. 28.

understood, especially among newer staff. An example is the assessments performed by local authorities to determine whether people with no recourse to public funds should be supported to prevent destitution. It was apparent in my research on the impact of *Limbuela* that whereas in some local authorities assessment forms made express reference to Article 3 ECHR, and even to the *Limbuela* judgment itself, in others this linkage was omitted (see section 3.3 (i)). As such assessments become standardised over time, the connection with human rights standards and case law may become increasingly obscure. Such an outcome is not necessarily problematic in and of itself, yet it may make the *evidence* for the impact of the HRA harder to determine and require careful design of methodology in order to capture it.

Timescales are also a matter of sensitivity: a service into which human rights are explicitly introduced may appear to deteriorate in the short- to medium-term as individuals appropriate the language of human rights to describe their conditions or claims or feel emboldened to access complaints mechanisms. Indeed, from a human rights perspective, such outcomes may be viewed as indicators of success. Substantive beneficial outcomes, so far as they can be identified, may be more visible in the longer term. In *Evaluating the Impact of Human Rights-Based Interventions* (Chapters 3-7), I propose various ways of mitigating these methodological problems; for example, in relation to the design of evaluations and the framing of objectives in a way which is sensitive to the types of change to which human rights-based interventions aspire.

So far in this section, I have discussed the difficulties of identifying impact at the level of a specific organisation or service. Still more problematic is the identification of impact on a larger scale. Some accounts of the HRA make Panglossian statements, e.g. that the application of human rights principles will ‘inevitably lead to improved outcomes’ across public services; however, evidence is not adduced for such expansive claims.<sup>206</sup> I suggest (*Critical Review*, Chapter 3) that the evidence base consists of a rich but still fragmentary array of experience demonstrating a range of beneficial impacts at the level of individual services – many of them anecdotal, a few more systematically analysed. There is no *prima facie* reason why these beneficial impacts could not be replicated in other services; however, more evaluative research is required to make such a case beyond doubt.

### **3.5 Human rights, poverty and social exclusion**

The chapter ‘Limits and Achievements of the HRA’ examines how the HRA has, from its enactment, been isolated from other aspects of public policy which it might have been expected to underpin. The HRA was not the only expansive declaration of intent by the Labour administration to transform society. Another was the promise to end child poverty

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<sup>206</sup> Audit Commission, *Human Rights: Improving Public Service Delivery*, as above n 77, p.8.

within a generation and build a ‘popular welfare state’ which would tackle the fundamental causes of poverty, social exclusion and community decay.<sup>207</sup> However, the two narratives were largely disconnected from each other by the Labour government, both rhetorically and in public policy. The twin aspirations to promote human rights and tackle poverty were like trains on parallel tracks, sometimes accelerating and at other times slowing down or reversing, but with no shared timetable and only rare exchanges of passengers. I found no express reference to the HRA in key documents setting out government strategy or charting progress in relation to poverty and social exclusion. Reports on poverty and social exclusion after 2007 refer to the creation of the EHRC but there is no indication that human rights were a significant driver of strategy. Some documents refer to ‘rights and responsibilities’ (the two terms invariably being bracketed together) but this is primarily in the context of compulsion and conditionality in relation to welfare benefits. Similarly, official documents explaining the HRA to public authorities or reviewing its implementation do not refer to poverty or social exclusion, suggesting that the framers of the Act and those charged with promoting its application did not aspire for it to improve the lives of communities affected by structural deprivation.<sup>208</sup>

The Child Poverty Act (CPA) 2010 illustrates the way in which the Labour government largely kept human rights and anti-poverty strategies apart.<sup>209</sup> As Palmer notes, although aspects of the CPA contribute to the realisation of some socio-economic rights, the language of human rights was absent from the moral justification for prioritising the needs of children and families in the official consultation that preceded the Act.<sup>210</sup> It should also be noted that in at least one policy area – that of asylum – the human rights and anti-exclusion ‘trains’ travelled in opposite directions, producing a grotesque disparity between the language of

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<sup>207</sup> T. Blair, ‘Beveridge revisited: a welfare state for the 21<sup>st</sup> century’, Beveridge Lecture, Toynbee Hall, London, 18 March 1999.

<sup>208</sup> See, e.g., Department of Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, as above n 74.

<sup>209</sup> The Apprenticeship, Skills, Children and Learning Act 2009 is a rare example of a piece of Westminster legislation that both explicitly embraced obligations to fulfil a social or economic right – in this case, the right to education – and that was recognised as doing so in government analysis of the Bill. Hunt observes that generally, even where a Bill includes measures that contribute to implementation of human rights obligations, this ‘does not feature in [the government’s] own analysis of the Bill’s human rights implications’; M. Hunt (2010) ‘Enhancing Parliament’s role in relation to economic and social rights’, *European Human Rights Law Review* 3: 242.

<sup>210</sup> E. Palmer (2010) ‘The Child Poverty Act 2010: holding government to account for promises in a recessionary climate?’ *European Human Rights Law Review* 3: 307.

universal rights and the deliberate dehumanisation of an already impoverished and marginalised group.<sup>211</sup>

This disconnection at the level of public policy raises the larger question of whether, as Clements asks, the HRA is, in itself, capable of materially improving the lives of those who experience chronic poverty and social exclusion – or whether, indeed, it may exacerbate their difficulties given the tendency of better-resourced and more assertive members of society to monopolise the legal process.<sup>212</sup> The HRA does not, of course, contain the type of socio-economic rights that might underpin a strong egalitarian or redistributive agenda. However, as is now well-established, the historic demarcation between civil and political and socio-economic rights, and the associated negative-positive dichotomy, is not firm, either in theory or practice.<sup>213</sup> As Palmer notes, over time, a dynamic approach to the interpretation of ECHR rights has created legal avenues for the protection of vulnerable individuals in respect of claims to receive a minimum standard of living consistent with their basic human dignity and the maintenance of their physical and psychological integrity.<sup>214</sup> Both the ECtHR and domestic courts have incrementally recognised that the protection of ECHR rights may not only require ‘hands-off’ restraint by states parties but may also give rise to positive obligations of both a procedural and substantive kind (as discussed in section 3.2 (i)). However, as I established in section 3.3, the *impact* of human rights judgments on decision-making by public authorities has, so far as it can be determined, frequently been belated, inconsistent, circumscribed or peripheral. Thus, I return to the imperative established in section 1.1 (iii) for public authorities proactively to apply human rights standards and principles in the design and delivery of services if the Act is to hold promise for those who are effectively stranded from the prospect of legal remedy.

Further, my research engages with the element of a human rights culture that I have called the ‘demand side’; i.e. social action by campaigning and advocacy groups to pursue accountability inside and outside the courtroom for infringements of rights or failures to protect rights. Such activism - suitably financed, organised and sustained by the involvement of human rights legal expertise - is identified as the wellspring of the ‘rights revolution’

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<sup>211</sup> S. Chakrabarti (2005) ‘Rights and Rhetoric: The Politics of Asylum and Human Rights Culture in the United Kingdom’, *Journal of Law and Society* 32(1): 131.

<sup>212</sup> Clements, ‘Winners and Losers’, as above n 38, p. 34.

<sup>213</sup> See, e.g., Fredman, *Human Rights Transformed*, as above n 2, *passim*; King, *Judging Social Rights*, as above n 27, Chapter 2; J. W. Nickel (2007) *Making Sense of Human Rights*, Second Edition (Oxford: Blackwell Press) Chapter 9; T. Pogge (ed) *Freedom from Poverty and a Human Rights* (Oxford: Oxford University Press/UNESCO); Shue, *Basic Rights*, as above n 1, *passim*; Sen, ‘Elements of a Theory of Human Rights’, as above n 3, pp. 345-48.

<sup>214</sup> E. Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act*, as above n 28, Chapter 2.

conceptualised by Epp.<sup>215</sup> The report *Poverty, Inequality and Human Rights* and the chapter ‘Limits and Achievements of the HRA’ identify a growing body of practice among civil society organisations in the UK that uses human rights principles and standards (drawn both from the Convention and international human rights treaties) to promote and facilitate the initiation of rights claims and to advocate for rights-based changes to law or policy. For example, the British Institute of Human Rights (BIHR) has supported London-based organisations working with and for people facing social injustice to use human rights to strengthen their influence with national and local policy makers.<sup>216</sup> Some used human rights to seek the revision or abandonment of policies or practices including the practice of waking rough sleepers in the night and hosing down their sleeping areas; the lack of ‘joined-up’ services resulting in high numbers of women becoming homeless on release from prison; and policies which result in social services departments refusing to support undocumented migrant families and threatening to take their children into care due to the family having no recourse to public funds. BIHR also documents examples of carers, advocates and professionals raising arguments about dignity, inhuman and degrading treatment, and the right to private and family life to secure changes in the practices of local authorities, care homes and hospitals.<sup>217</sup> As noted in section 3.2 (ii), the Participation and Practice of Rights project in Belfast provides a further example of a civil society initiative to use the normative content of human rights to frame advocacy and pursue accountability.

The report *Poverty, Inequality and Human Rights* (Chapter 3) also explores the growth of civil society (and academic) practice which uses international human rights obligations and mechanisms to pursue accountability for state action or inaction which impinges on the realisation of rights. These include the rights-based auditing of macro-economic policies (especially the setting of local and national budgets);<sup>218</sup> engagement with ‘shadow reporting’ mechanisms and UN special procedures as a strategic way of taking domestic concerns onto an international stage (‘Limits and Achievements of the HRA’, pp. 150-51);<sup>219</sup> and the

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<sup>215</sup> Epp, *The Rights Revolution*, as above n 194, pp. 2-6.

<sup>216</sup> <http://bihr.org.uk/projects/poverty>

<sup>217</sup> British Institute of Human Rights, *The Human Rights Act – Changing Lives*, as above n 78.

<sup>218</sup> In the UK context, see especially Queen’s University Belfast Budget Analysis Project (2010) *Budgeting for Economic and Social Rights: A Human Rights Framework* (Belfast: QUB School of Law); Queen’s University Belfast Budget Analysis Project (2010) *Budgeting for Social Housing in Northern Ireland: A Human Rights Analysis* (Belfast: QUB School of Law); Queen’s University Belfast Budget Analysis Project (2012) *Human Rights Obligations and Budgeting for Mental Health in Northern Ireland* (Belfast: QUB School of Law).

<sup>219</sup> See, e.g., ‘Symposium on Fairness, Justice and Human Rights: Realising Economic, Social and Cultural Rights in the UK’, 21-22 October 2011, Law Society, London. This, among other initiatives, led to the creation of an NGO consortium, convened by Just Fair, to coordinate a shadow report on England (in parallel with shadow reports from the devolved nations) when the UK’s record is next reviewed by the Committee on Economic, Social and Cultural Rights in 2015.

development of indicators to monitor over time whether duty bearers are meeting their human rights obligations.<sup>220</sup>

Overall, my research suggests that civil society activity in the UK to integrate human rights and efforts to combat structural deprivation and social exclusion is fragmented both geographically and in terms of the actors involved (*Poverty, Inequality and Human Rights*, Chapter 6). Nevertheless, strategic integration of these two areas of work is steadily increasing given the potential of the human rights framework to strengthen moral, political and legal arguments for the UK government to ensure a threshold of decency in meeting the elementary needs of the population in the context of severe public austerity and the restructuring of social security.

### **3.6 The context of devolution**

In this section, I synthesise my findings in respect of evidence of the differential impact and implementation of the HRA in public services in different parts of the UK.

The entrenching of human rights as a core pillar of the devolution settlements has helped to secure stronger institutional commitment for the protection and promotion of human rights in the devolved nations than at the level of the UK government. This is most visible in Northern Ireland where, following a commitment made in the Belfast (Good Friday) Agreement, the then Labour Government established the Northern Ireland Human Rights Commission (NIHRC) in 1999, before the HRA had even come into force in England.<sup>221</sup> The Commission's functions include promoting understanding and awareness of the importance of human rights across Northern Ireland and reviewing the adequacy and effectiveness of law and practice in order to advise government on measures which should be taken to protect human rights.<sup>222</sup> Most notably, human rights were integral to the fundamental reform of policing in Northern Ireland.<sup>223</sup> The Northern Ireland Policing Board monitors the performance of the Police Service of Northern Ireland (PSNI) systematically for compliance with the HRA<sup>224</sup> and human rights are also embedded in the PSNI Code of Ethics.<sup>225</sup>

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<sup>220</sup> In the UK context, see especially Participation and Practice of Rights (2011) *The Right to Housing: A People's Inquiry: Recommendations from the International Panel* (Belfast: PPR); Participation and the Practice of Rights, *Seven Towers Monitoring Group: Fourth Report on Progress of Human Rights Indicators*.

<sup>221</sup> Created under s.68 of the NIA.

<sup>222</sup> Sections 68-71 and Schedule 7 NIA.

<sup>223</sup> Gordon, *A Developing Human Rights Culture in the UK?*, as above n 73.

<sup>224</sup> Northern Ireland Policing Board (2003) *Monitoring PSNI Compliance* (Belfast: Northern Ireland Policing Board).

<sup>225</sup> Northern Ireland Policing Board (2008) *Police Service of Northern Ireland Code of Ethics 2008* (Belfast: Northern Ireland Policing Board).



In Scotland, too, there is evidence of political and institutional commitment to human rights. Notably, the 2003 Homelessness etc (Scotland) Act resulted from a policy commitment to using legally enforceable rights to tackle homelessness (*Poverty, Inequality and Human Rights*, p. 36). The Act has been described as ‘the closest thing to the practical implementation of the right to housing the world has yet seen’.<sup>226</sup> It identified specific rights and correlative obligations held by specific entities and enshrined a commitment that, by 2012, all unintentionally homeless people in Scotland would have the right to settled accommodation.<sup>227</sup>

In Wales, the political and institutional commitment to human rights is most visible in respect of the priority accorded by the Welsh Assembly Government to children’s rights. The Children and Families (Wales) Measure 2010 encompasses a broader approach to child poverty than the UK Child Poverty Act, encapsulating thirteen aims, some of which are clearly connected to human rights principles, such as non-discrimination, participation and survival and development. The Rights of Children and Young Persons (Wales) Measure 2011 made Wales the first nation in the UK to incorporate the UN Convention on the Rights of the Child (CRC) into domestic law. This measure imposes a legal duty on Welsh ministers to have due regard to the rights and obligations in the CRC and its Optional Protocols in two stages: from May 2012 in the making of new law or policy and review of existing policies and from May 2014 in respect of all their functions.<sup>228</sup> Wales was also the first nation in the UK to appoint a Children’s Commissioner, whose mandate is based on the CRC,<sup>229</sup> and an Older Person’s Commissioner, who is legally obliged to have regard to the UN Principles for Older Persons.<sup>230</sup>

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<sup>226</sup> E. Tars and C. Egleson (2009) ‘Great Scot!: the Scottish plan to end homelessness and lessons for the housing rights movement in the United States’ *Georgetown Journal on Poverty Law & Policy* XVI(1): 187, p. 190.

<sup>227</sup> In its most recent report on progress towards meeting this commitment, the Infrastructure and Capital Investment Committee of the Scottish Parliament reported that the Act had ‘delivered considerable improvements to the situation faced by homeless people in Scotland. The progress towards 2012, particularly in the area of homelessness prevention, has facilitated a culture change towards supporting people rather than focussing on assessment’. It commended on ‘the extensive work at central and local government level to reform housing services and improve practice’, while noting that full implementation of the pledge remained a ‘significant challenge’. See Infrastructure and Capital Investment Committee (2012) *2<sup>nd</sup> Report, 2012 (Session 4): Homelessness in Scotland: the 2012 Commitment*, SP Paper 97 (Edinburgh: APS Group Scotland), pp. 19-20.

<sup>228</sup> J. Williams (ed) (2013) *The United Nations Convention on the Rights of the Child in Wales* (Cardiff: University of Wales Press)

<sup>229</sup> Children’s Commissioner for Wales Act 2001.

<sup>230</sup> Commissioner for Older People (Wales) Act 2006.

Yet policy and legislative innovations have not translated comprehensively into the realisation of rights. The Scottish Human Rights Commission, in research undertaken to inform the development of a Scottish National Action Plan for Human Rights, finds that, while there are ‘frequent and explicit’ references to human rights in the operation of law and institutions in Scotland, processes to enact policies and strategies are rarely rights-focused.<sup>231</sup> Moreover, the material outcomes of policies indicated ‘the greatest risk to the realisation of human rights in Scotland’, with divergent practice even in areas with human rights-based laws and strategies.<sup>232</sup> An unpublished survey of Scottish public authorities conducted by Amnesty International in 2006 found that two-thirds of respondents either did not understand the meaning of the Act or could not provide any evidence of steps taken to ensure compliance (*Critical Review*, pp. 25-26). In Wales, too, an ‘implementation gap’ has been identified between ‘national policy rhetoric’ on children’s rights and local delivery.<sup>233</sup> In the *Critical Review* report (p. 29), I identify a disjuncture between a rising edifice of bodies, legislation and governance principles drawn from human rights and the struggle to embed human rights approaches within public authorities in Wales. Welsh interviewees also drew attention to endemic problems which make it harder for people in Wales to secure their human rights, including a dearth of sources of specialist legal advice (*Critical Review*, p. 31).<sup>234</sup>

As in England, there is evidence of significant variation between public authorities in respect of the application of human rights at an organisational level. The State Hospital in Carstairs, a high-security forensic mental health facility, has been praised for its ‘international class best practice’ in embedding a human rights-based approach.<sup>235</sup> Moreover, interviewees in all three devolved nations spoke of a more promising environment for the application of human rights in public authorities in Northern Ireland, Scotland and Wales as compared to England (*Critical Review*, pp. 23-31; *Poverty, Inequality and Human Rights*, Chapter 6). This was attributed to various factors. Some are common to all three devolved nations, such as the fact that in smaller nations, ministers are viewed as being more accessible to non-government actors and as enjoying greater scope to integrate human rights stands and principles across multiple services, as compared to their counterparts in the UK government (*Critical Review*, p. 24). My research further suggests that the political environment surrounding the HRA in the devolved nations is significantly more benign than at Westminster (with, for example, no

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<sup>231</sup> Scottish Commission on Human Rights (2012) *Getting it Right? Human Rights in Scotland – Executive Summary* (Glasgow: SHRC) p. 5.

<sup>232</sup> Scottish Commission on Human Rights, *Getting it Right?*, as above n 231, pp. 5-6.

<sup>233</sup> Save the Children (2013) *Rights Here, Rights Now: Are Children’s Rights a Reality in Wales? Wales NGO Interim Report* (Cardiff: Wales Programme of Save the Children).

<sup>234</sup> See also Costigan and Thomas, *Human Rights Act: A View From Below*, as above n 38.

<sup>235</sup> A. Miller (2005) ‘Making the Connections’, Speech to the British Council Scotland event ‘Promotion Scotland Worldwide – Governance & Human Rights’, Scottish Parliament, 1 March 2005, p.9.

strident voices calling for the repeal of the Act) and that public service practitioners view this difference in climate as critical to efforts to embed the HRA in service delivery (*Critical Review*, p. 23-31). In Wales and Scotland, the increasing momentum behind the co-production of public services offers significant scope for the integration of human rights standards and principles.<sup>236</sup> Integrated equality and human rights approaches might also be expected to gain ground in Wales and Scotland in view of the specific equality duties which (unlike in England) require public authorities to demonstrate their compliance with specific equality objectives. Further, the devolved administrations have proved more ready to adopt international human rights treaties as an explicit basis for law and policy making than the UK government.

However, these broad commonalities should not be permitted to mask the distinctiveness of the political environments which have developed in each of the devolved nations since 1999. For example, in Northern Ireland, human rights ‘literacy’ among civil society organisations is substantially greater than elsewhere in the UK due partly to the extensive consultation on a Bill of Rights, led by the NIHR and involving a wide range of actors over more than a decade (*Developing a Bill of Rights*, pp. 17-21). At the same time, interviewees in Northern Ireland report that sectarian differences have complicated efforts to (among other initiatives) integrate human rights into anti-poverty strategies given the lack of consensus about matters of resource allocation (*Poverty, Inequality and Human Rights*, p. 42).

Overall, my research suggests that differences between devolved and non-devolved governance in respect of the existing state of implementation of the HRA should not be overstated. Generalisations are perilous, either within or between devolved nations, since the visible influence of the HRA on public authorities is highly variable.<sup>237</sup> Yet the legal and political context for the future development of systematic approaches to human rights implementation is generally more propitious in the devolved nations than outside them.

### **3.7 Conclusion**

In this section, I return to the overarching question posed in my introduction to part 3: how far has a human rights culture materialised in public services in the UK since the enactment of the HRA just over a decade ago?

My research published in 2009 (for which the fieldwork was conducted mainly in 2008) – *Critical Review, Evaluating the Impact of Selected Cases under the HRA* and ‘Evaluating

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<sup>236</sup> See above n 122 and 123.

<sup>237</sup> Notably, the EHRC’s *Human Rights Inquiry* (as above n 75), which adduces considerable evidence from a range of actors in both England and Wales, attempts no generalised comparison between the two nations in relation to the main focus of the Inquiry - the impact of the HRA on public services.

the Impact of Human Rights Litigation’ – concluded that, so far as public authorities viewed human rights law as relevant to the design and delivery of services, they regarded it predominantly as an area of legal risk and hence a technical problem to be managed, rather than as a source of normative values and a framework for habitual decision-making. I identified highly variable patterns both within and between public authorities of knowledge, institutional commitment, exercise of professional judgment and fear of sanction. I concluded that a human rights culture had largely failed to materialise among public authorities in the UK, but that there were greater grounds for optimism in the devolved nations (as discussed in section 3.6).

I indicated various reasons why this might have happened, including the substantial delay after the enactment of the HRA in establishing human rights commissions across the UK to promote understanding and implementation of it; the failure to spread responsibility for promoting human rights standards and principles beyond what is now the Ministry of Justice (and, belatedly, the Department of Health); and the adversarial political and media discourse surrounding the HRA, which has dwelt almost exclusively on matters of terrorism, asylum and immigration and the rights of unpopular groups rather than the application of human rights standards and principles to public services at large. However, I also identified striking exceptions in the form of public authorities, or specific teams or initiatives within them, which demonstrate what an overtly rights-respecting service looks (or *could* look) like. These authorities - ‘laboratories’ of the human rights-based approach - have begun to generate a valuable reservoir of evidence and experience on which to build.

The question arises: in the five years since I began my qualitative research, has progress been made on the embedding of human rights standards and principles in public services that would give rise to a more positive overall conclusion in respect of the impact of the HRA on public services? Notwithstanding the negative discourse that still surrounds the HRA, such an effect might be expected given the passage of time to consolidate human rights-based decision-making, combined with the likely impact of more recent case law. Indeed, there is some documentary evidence of such cumulative impact, at least in some areas of law and policy. This includes the almost 3,000 responses to the two consultation documents issued by the Commission on a Bill of Rights, especially those from organisations with expertise in specific areas of law and policy.<sup>238</sup> For example, the Family Rights Group, a leading advocacy organisation concerned with local authority children’s services, states that the HRA has made ‘a profound difference’ to families affected and has been relied upon extensively in

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<sup>238</sup> For responses to the Commission’s August 2011 discussion paper, see <http://www.justice.gov.uk/about/cbr/discussion-paper-responses>. For responses to its second consultation in July 2012, see <http://www.justice.gov.uk/about/cbr/second-consultation>.

family proceedings concerning fairness in decision-making procedures, removal of children from the home and adoption.<sup>239</sup>

At the same time, there is evidence of persistent failure by public authorities to embed human rights standards, consistent with the findings in my publications. In its *Human Rights Review* of 2012, the EHRC states that ‘there is widespread lack of awareness of the benefits of a human rights approach within the health and social care sector ... The evidence consistently points to staff members not making the link between human rights and the care they are supposed to be giving’.<sup>240</sup> The EHRC’s inquiry into older people and home care in England found numerous instances of poor care and treatment, some of which amounted to violations of Article 3.<sup>241</sup> With notable exceptions, local authorities were generally found to have a poor grasp of their positive obligations and human rights were integrated into commissioning and procurement of care services only superficially, if at all. A follow-up survey of local authorities found that a small number are implementing a systematic human rights-based approach to the assessment, commissioning and monitoring of care services.<sup>242</sup> Around two-thirds of local authorities in England responded, and some three-quarters of respondent authorities had taken some action to review their commissioning practice in the light of the inquiry’s recommendations.<sup>243</sup> This in itself suggests modest progress with respect to the ‘mainstreaming’ of human rights considerations in public policy and a greater degree of responsiveness than was evident in comparable surveys in the early-mid 2000s.<sup>244</sup>

It is beyond the scope of this statement to offer a comprehensive analysis of the current ‘state of play’ with regards to human rights implementation in public services. However, in part 6, I propose ways in which further research in this area might be framed.

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<sup>239</sup> Response from Family Rights Group, 10 November 2011; see <http://cbr.cjs.gov.uk/group/Family%20Rights%20Group.pdf>.

<sup>240</sup> Equality and Human Rights Commission, *Human Rights Review 2012*, as above n 75, p. 293.

<sup>241</sup> Equality and Human Rights Commission, *Close to Home*, as above n 116.

<sup>242</sup> Equality and Human Rights Commission (2013) *Close to Home Recommendations Review* (London; EHRC), p. 27.

<sup>243</sup> Equality and Human Rights Commission, *Close to Home Recommendations Review*, as above n 242, pp. 27-28.

<sup>244</sup> See above n 85.

## 4. CONTROVERSIES ABOUT HUMAN RIGHTS

Integral to the political conception of human rights introduced in section 1.1 is the inevitability of disagreement about their meaning and scope.<sup>245</sup> If human rights are not only legal but also moral claims on the exercise of power, existing beyond positive law, then they must invite public deliberation and argument about their content, about which rights should prevail when they come into conflict, and about the justifications for interfering with or derogating from them. As a framework of norms which societies use in deliberating about how to act, human rights may exclude some options (such as torture or capital punishment) but will not necessarily yield a definitively ‘correct’ one.<sup>246</sup> Thus, the presence of disagreement about rights is not only inevitable but also desirable within a democratic legal order.

In this part of my statement, I examine how my research has engaged with the controversies that surround human rights protection in the UK. I do so with respect to three broad themes: first, the conduct of debate about the HRA and the UK’s relationship with the ECtHR (section 4.1); secondly, initiatives to create a new bill of rights for the UK (section 4.2); and thirdly, a particularly contentious area in law and public policy – the interaction of human rights, equality and religion or belief (section 4.3). I draw some broad conclusions in section 4.4.

### 4.1 The conduct of debate about human rights

In this section I examine the conduct of debate about human rights, including (i) the factual and normative basis of critiques of the HRA and the ECtHR and (ii) evidence as to the state of public opinion about human rights and the way in which different measures of public opinion are invoked within political discourse about human rights.

In *Developing a Bill of Rights*, ‘Lessons from Overseas’ and *The UK and the European Court of Human Rights*, I examine the political and media discourse surrounding the proposed creation of a new bill of rights. This includes discourse about both the HRA and the UK’s relationship with the ECtHR, since the case for replacing the HRA with a new bill of rights is expressed as arising from perceived problems in both areas. As noted in section 1.1 (ii), the culture of justification requires (in Mureinik’s words) that public officials articulate the reasons that link evidence to decisions. Accordingly, my research interrogates the factual basis of public argument about human rights and highlights instances where erroneous

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<sup>245</sup> Sen, ‘Elements of a Theory of Human Rights’, as above n 3; A. Sen (2009) *The Idea of Justice* (Cambridge, MA: Harvard University Press) Part IV.

<sup>246</sup> Sathanapally, *Beyond Disagreement*, as above n 1, p. 2 (see also Chapter 3).

information and/or flawed methodology have transgressed the requirements of open justification.

**(i) Debate about the HRA**

The Conservative Party first pledged to abolish the HRA in 2001.<sup>247</sup> Political discourse has since centred on the purported impact of the HRA on efforts to tackle crime and terrorism, a narrative which became dominant after the attacks on the United States in 2001, Madrid in 2004 and London in 2005.<sup>248</sup> The human rights culture foreseen by the architects of the HRA is now invoked more often in pejorative than laudatory terms: the Act has been variously blamed for creating an infantilised, individualistic and socially irresponsible culture and for being a contributory cause of the English riots in 2011.<sup>249</sup> As noted in section 3.2 (iii), senior ministers have asserted that the HRA is commonly misinterpreted and misapplied, with deleterious effects of public safety; yet evidence has not been adduced to suggest that such instances are widespread or intractable.<sup>250</sup>

Debate about the way in which the HRA operates in the domestic context has sometimes been prone to misrepresentation by politicians, including senior ministers. An egregious example is the response to the judgment in a case concerning the requirement that those convicted of sexual offences and sentenced to more than 30 months in prison must be placed on the Sex Offenders Register for life, with no possibility of review.<sup>251</sup> The Supreme Court found the lack of any provision for review a disproportionate breach of the right to respect for private life under Article 8 HRA, resulting in a declaration of incompatibility. The response of the Government was to suggest that the declaration of incompatibility was binding and necessitated legislative reform to comply, when in fact it was open to the government to decline to legislate in accordance with the judgment.<sup>252</sup> Phillipson ventures that so striking was the misrepresentation of the judgment and its legal consequences that the only explanation for the Government's response was its wish to generate hostility to the HRA

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<sup>247</sup> D. Erdos (2009) 'Ideology, Power Orientation and Policy Drag: Explaining the Elite Politics of Britain's Bill of Rights Debate' *Government and Opposition* 44: 20-41.

<sup>248</sup> H. Fenwick (2013) 'Conservative anti-HRA Rhetoric, the Bill of Rights "Solution" and the Role of the Bill of Rights Commission' in Masterman and Leigh (eds) *The United Kingdom's Statutory Bill of Rights*, as above n 15: 309; F. Klug (2007) 'A Bill of Rights: What For?' in C. Bryant MP (ed) *Towards a New Constitutional Settlement* (London: Smith Institute), p. 133.

<sup>249</sup> For Prime Minister David Cameron, 'the Human Rights Act and the culture associated with it' are exerting 'a corrosive influence on behaviour and morality ... twisting and misrepresenting of human rights in a way that has undermined personal responsibility' (Speech on the fight-back after the riots', Witney, 15 August 2011).

<sup>250</sup> See above n 132.

<sup>251</sup> *R (on the application of F (by his litigation friend F)) and Thompson (FC) (Respondents) v Secretary of State for the Home Department* [2010] UKSC 17.

<sup>252</sup> See remarks by David Cameron at Prime Minister's Questions, HC Debs col. 955, 16 February 2011, Q9.

and the senior judiciary in general.<sup>253</sup> This interpretation is given added plausibility by the express linkage created by the Prime Minister David Cameron between this ‘offensive’ judgment and the promised creation of a ‘British Bill of Rights’ which would, he said, ensure that such decisions would in future be made by Parliament rather than the courts.<sup>254</sup>

The failure to acknowledge that the HRA already gives parliament the final say with respect to declarations of incompatibility breached the comity between different branches of government. Moreover, it fell short of the requirements of open justification for official action or omission implicating human rights proposed in section 1.1 (ii) - requirements which could hypothetically have been met via a reasoned explanation of the Government’s disagreement with the Supreme Court as to the balance to be struck between the privacy interests of sex offenders and public safety. I conclude that public argument about judicial decisions must, at a minimum, rest upon an accurate account of judgments and the principle/s they establish, as well as of their legal status and consequences.

## **(ii) Debate about the European Court of Human Rights**

As documented in *The UK and the European Court of Human Rights* (Chapters 9 and 10) and *Developing a Bill of Rights* (Chapter 4), commentators, jurists and elected politicians, including senior Conservative ministers, have called for the UK to withdraw from the ECHR, temporarily<sup>255</sup> or permanently,<sup>256</sup> or to renegotiate the terms on which it applies to the UK<sup>257</sup> - steps which no democracy has ever taken and which, to my knowledge, have not been proposed within mainstream political debate in any other Council of Europe state (*The UK and the European Court of Human Rights*, pp. 174-77).<sup>258</sup> Critiques of the ECtHR have been

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<sup>253</sup> Phillipson, ‘The Human Rights Act, Dialogue and Constitutional Principles’, p. 46.

<sup>254</sup> As above n 252.

<sup>255</sup> On 24 April 2013, the Home Secretary, Theresa May, stated that temporary withdrawal from the ECHR was one option being considered by the UK government in its efforts to deport the Islamic cleric Omar Mohammed Othman (also known as Abu Qatada); Hansard HC, 24 April 2013, col 887.

<sup>256</sup> Two members of the Commission tasked with investigating the creation of a UK Bill of Rights advocated withdrawal from the ECHR unless the Court ceased its ‘judicially activist approach’: J. Fisher QC and Lord Faulks QC (2012) ‘Unfinished Business’ in Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* Volume 1, as above n 106, p. 182. See also R. Broadhurst (2011) *Human Rights: Making Them Work for the People of the UK* (London, European Research Group); Daniel Hannan MEP, ‘Britain should withdraw from the European Convention on Human Rights’, *Daily Telegraph*, 12 February 2011; Nick Herbert MP, ‘On prisoner voting, we shouldn’t defy the [European Court of Human Rights], we should resile from it altogether’, *Conservative Home*, 22 November 2012.

<sup>257</sup> M. Pinto-Duschinsky (2011) *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK* (London: Policy Exchange).

<sup>258</sup> This finding as to the particularity of the debate in the UK is based partly on the findings of comparative research, funded by the Nuffield Foundation, which will be incorporated into a book co-authored by Professor



based on various grounds. Some criticisms may be straightforwardly refuted; e.g. those relating to the purported cost of adverse judgments to the UK;<sup>259</sup> or the argument that the Court lacks legitimacy because its judges are unelected.<sup>260</sup>

Another common trope is the assertion (whether explicit or implicit) that the ECtHR has become increasingly prone to overrule without justification decisions taken by national authorities in the UK. In *The UK and the European Court of Human Rights* (pp. 30-36), I address this assertion in part by means of a statistical analysis of the UK's record at the ECtHR. I conclude that the UK's 'rate of defeat' in Strasbourg has always been, and remains, extremely low. The rate of defeat is most meaningfully expressed as the proportion of applications against a state that ultimately result in an adverse judgment.<sup>261</sup> Between 1999 and 2010, of the nearly 12,000 applications brought against the UK, fewer than two per cent eventually resulted in a judgment finding at least one violation.<sup>262</sup> This figure reflects the Court's very high threshold for admissibility, which means that some ninety-seven per cent of applications fall at the first stage and only a few of substantial merit proceed to a judgment.

This low rate of defeat equated to an average of about eighteen adverse judgments per year between 1999 and 2010.<sup>263</sup> To be sure, compared to the very small numbers of judgments in 1970s and 1980s, the number of judgments concerning the UK increased markedly after the entry into force of Protocol 11 in November 1998, after which individuals had the right of direct petition to the Court without having to apply initially to the European

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Philip Leach and me to be published in 2014 by Oxford University Press, entitled *National Parliaments and the Implementation of Judgments of the European Court of Human Rights* (see also part 6 below).

<sup>259</sup> For example, a report for the Taxpayers' Alliance estimated the total cost of complying with judgments at £17.3 billion up to 2010 and the cost of the 'compensation culture fostered by the Court' at a further £25 billion (Lee Rotherham, *Britain and the ECHR* (London: Taxpayers' Alliance, 2010), p. 3). The report is methodologically flawed; it extrapolates from analysis of relatively few cases and includes compensation claims that are wholly unrelated to human rights.

<sup>260</sup> See, e.g. 'Unelected Euro judges are bringing terror to the streets of Britain', *Daily Mail*, 18 January 2012. The Parliamentary Assembly of the Council of Europe elects judges of the Court from a list of three candidates nominated by each member state.

<sup>261</sup> An example of statistics being presented with insufficient context is Broadhurst, *Human Rights: Making Them Work for the People of the UK*, as above n 256, p. 14, which states that three-quarters of judgments involving the UK between 1966 and 2010 found a breach of a Convention right, without putting this figure in the context of the total number of applications lodged against the UK. This aspect of the report was highlighted in the national press: see, e.g., 'Europe's war on British justice: UK loses three out of four human rights cases, damning report reveals', *Daily Mail*, 12 January 2012.

<sup>262</sup> The rate of defeat is almost identical for the period between 1966 (when the UK accepted the right of individual petition) and 2010 (*The UK and the European Court of Human Rights*, p. 33).

<sup>263</sup> The figure reduces to 13 if the figures are adjusted to treat repetitive cases as a single case, reflecting the fact that the violation has the same root cause (*The UK and the European Court of Human Rights*, p. 32).

Commission of Human Rights.<sup>264</sup> However, heightened hostility towards the ECtHR over the past decade cannot be explained by any increasing tendency on the part of the Court to find violations in cases involving the UK.<sup>265</sup> Nor has there been an increase in recent years either in the number of applications lodged against the UK or the proportion of applications declared admissible by the Court (*The UK and the European Court of Human Rights*, p. 36). Further, there is no evidence that the UK fares worse at the ECtHR than other Council of States in respect, for example, of the proportion of applications against it that are deemed admissible or the proportion of all judgments against it that find at least one violation.<sup>266</sup> Indeed, one might have expected greater controversy about the UK's relationship with the Convention system in previous decades when, despite the lower numbers overall, the UK, having accepted the right of individual petition comparatively early, accounted for a significantly higher proportion of applications and judgments than other states. As a snapshot, in 1983, the UK accounted for a third of all applications registered by the European Commission of Human Rights;<sup>267</sup> three decades later, in the context of a greatly enlarged Council of Europe, it accounts for less than three per cent of pending applications.<sup>268</sup>

My research has also analysed the nature of violations in all judgments against the UK, in order to examine the concern that the ECtHR has become a 'small claims' court, preoccupied with matters that are more appropriately the province of national decision-makers (*The UK and the European Court of Human Rights*, pp. 40-42).<sup>269</sup> The Convention right most commonly violated in UK cases was Article 6 (the right to a fair trial and length of proceedings; 30 per cent of adverse judgments), followed by Article 8 (the right to a private and family life; 17 per cent) and the Article 5 (the right to liberty and security; 16 per cent). A sizeable minority of judgments (around eight per cent) involved a violation of either the right to life or the prohibition of torture and inhuman or degrading treatment. I conclude that the statistics relating to the UK do not, in and of themselves, substantiate the assertion that the ECtHR has become a small claims court: while judgments against the UK have been

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<sup>264</sup> House of Commons Library, *UK Cases at the European Court of Human Rights since 1975*, SN/IA/5611, 30 April 2013.

<sup>265</sup> Because the annual figures are so low, and naturally fluctuate year-by-year, it is not possible to discern a pronounced reduction in the number of ECtHR judgments finding violations against the UK since the enactment of the HRA. If allowance is made for repetitive cases, a slight downward trend is apparent since 2005. A more consistent reduction may be expected in future due to the fact that, as a consequence of the HRA, the UK courts consider human rights more explicitly and intensively than before and therefore the ECtHR is, in turn, more likely to follow their reasoning and conclusions (*The UK and the European Court of Human Rights*, p. 36).

<sup>266</sup> European Court of Human Rights (2011), *Statistics on Judgments by State* (Strasbourg: Council of Europe).

<sup>267</sup> Secretary to the European Commission of Human Rights, *Stock-Taking on the European Convention on Human Rights: The First Thirty years 1954-1984* (Council of Europe, 1984), p. 325.

<sup>268</sup> European Court of Human Rights, *Pending Applications Allocated to a Judicial Formation*, 31 October 2013.

<sup>269</sup> Prime Minister David Cameron, 'Address to the Council of Europe', Strasbourg, 25 January 2012.

relatively few in number, they have frequently been serious in nature, concerning both basic civil liberties and Convention rights considered to be of the most fundamental importance.

Statistical evidence alone does not adequately address the nature of the controversy about the Court and its perceived impact on the UK. Criticisms of the Strasbourg Court advanced by jurists and politicians have focused upon its allegedly over-expansive approach (*The UK and the European Court of Human Rights*, pp. 91-98). This argument is primarily based on the propositions that the Convention is being applied in ways that would not have been foreseen by those who drafted it in 1949-50, or that it is taking an over-activist approach which interferes unduly with decisions made by national bodies, especially parliaments.<sup>270</sup> It is suggested that the Court thereby seeks inappropriately to impose uniform standards on member states.<sup>271</sup> Particular controversy surrounds the appropriate response to the ECtHR's decisions on the disenfranchisement of convicted prisoners,<sup>272</sup> which has led the UK Government to contemplate breaking treaty obligations.<sup>273</sup> Disputation has also surrounded the ECtHR judgment which, combined with decisions of domestic tribunals, deferred the deportation to Jordan of the terror suspect known as Abu Qatada until assurances had been obtained that he would not face the risk of a trial at which evidence obtained by torture might be used (*The UK and the European Court of Human Rights*, pp. 56-58 and 128-31).<sup>274</sup> Conservative ministers have also criticised the ways in which the right to respect for family life (Article 8 ECHR) has been interpreted and applied by both domestic courts and the ECtHR in cases relating to deportation so as, it is argued, unjustifiably to prevent deportation, particularly of foreign criminals (*The UK and the European Court of Human Rights*, pp. 93-97).<sup>275</sup>

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<sup>270</sup> See above n 256. For recent judicial interventions that challenge the legitimacy of the ECtHR and portray it as usurping the functions of parliament, see The Rt Hon. Lord Judge, 'Constitutional Change: Unfinished Business', University College London, 4 December 2013; and 'Lord Sumption gives the 27th Sultan Azlan Shah Lecture, Kuala Lumpur - The Limits of Law', 20 November 2013.

<sup>271</sup> For example, Lord Hoffmann (a former Law Lord) has argued that the ECtHR 'has no mandate to unify the laws of Europe on the many subjects which may arguably touch upon human rights'; see 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, 19 March 2009.

<sup>272</sup> *Hirst v UK* (No 2) No 74025/01 [GC], 6 October 2005; *Greens and MT v UK*, Nos. 60041/08 and 60054/08, 23 November 2010.

<sup>273</sup> One of the three options proposed in the Voting Eligibility (Prisoners) Draft Bill, CM 8499, November 2012 is a restatement of the existing ban on the right of all prisoners to vote, which would be a straightforward breach by the UK of its undertaking in Article 46(1) to abide by the final judgment of the Court in any case to which it is a party. It is the official position of the Labour Party that no convicted prisoner should be allowed to vote; see <http://www.labour.org.uk/echrs-prisoner-voting-decision>.

<sup>274</sup> *Othman (Abu Qatada) v UK* No. 8139/09, 17 January 2012.

<sup>275</sup> Clause 14 of the Immigration Bill 2013-14 requires a court, when considering Article 8 in an immigration case, to have particular regard to the public interest and sets out what the public interest requires in cases involving foreign criminals and in other cases raising Article 8. In a factsheet accompanying the Bill, the

These challenges to the ECtHR's legitimacy and authority have caused considerable disquiet among senior figures in the Court.<sup>276</sup> The report *The UK and the European Court of Human Rights* responds to them in various ways. First, it argues (pp. 98-102) that it has always been a fundamental principle that the Convention should be interpreted and applied by taking account of changes in society, morals and laws, as well as in technological and scientific developments – and that such a dynamic approach to interpretation is a common feature of international treaties, which permits those interpreting and applying them to take account of new, or previously neglected, threats to human rights.<sup>277</sup> It ventures (pp. 110-13) that this approach has permitted the development in recent years of positive Convention obligations, the effect of which has been to provide increased human rights protection for vulnerable groups, such as the victims of rape, domestic violence and human trafficking. Further, the report observes (pp. 102-106) that a dynamic approach to interpretation is not alien to the common law tradition; judges in domestic courts are used to applying an evolutive approach to the common law and in interpreting statutes (as, for example, the development of case law with respect to marital rape and the criminalisation of homosexuality attests).

The report examines the critiques of a number of particularly contentious judgments and finds that, in some instances, they are based on an exaggeration or misconception of the principle established in the judgment and/or its practical import. Notably, in the *Hirst* judgment concerning the disenfranchisement of convicted prisoners, both press reports and the pronouncements of politicians have frequently failed to make clear that it was the blanket nature of the legislative ban that the ECtHR found problematic, not the ban as such, and that the UK Government has considerable discretion as to precisely how it amends the law to remedy the violation (*The UK and the European Court of Human Rights*, pp. 126-27). My research has also highlighted a degree of inconsistency in responses to Strasbourg case law: for example, like *Hirst*, the case of *S and Marper v UK* concerned an indiscriminate measure: in this case, the power to retain fingerprints, cellular samples and DNA profiles of all persons who had been acquitted of offences as well as those who had been convicted of offences, in violation of Article 8 ECHR.<sup>278</sup> However, the decision in *S and Marper* suffered nothing like

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Immigration Minister, Mark Harper, states that 'Parliament and the public are fed up with cases where foreign criminals are allowed to stay, or our family rules are undermined, because of an over generous interpretation of Article 8 by the courts ... The Bill will ensure that the courts are in no doubt about Parliament's view on what the public interest requires' (Home Office, *Immigration Bill Factsheet: Article 8 (clause 14)*, October 2013, p. 1.

<sup>276</sup> N. Bratza (2011) 'The Relationship between the UK Courts and Strasbourg' *European Human Rights Law Review* 5: 505; M. O'Boyle (2011) 'The Future of the European Court of Human Rights' *German Law Journal* 12: 1862.

<sup>277</sup> See also M. Andenas and E. Bjorge (2011) *National Implementation of ECHR Rights: Kant's Categorical Imperative and the Convention*, University of Oslo Faculty of Law Research Paper No. 2011-15.

<sup>278</sup> *S and Marper v UK*, Nos. 30562/04 and 30566/04 [GC], 4 December 2008.

the opprobrium directed at *Hirst* and, indeed, was ‘widely applauded in British political and legal circles’.<sup>279</sup> In the light of such inconsistency, I suggest that calls for the UK to consider taking the drastic step of withdrawing from the Convention on the basis of *particular* judgments which frustrate the will of parliament appear, at best, insufficiently grounded and, at worst, opportunistic.

As discussed in section 1.1 (iv), in the past decade disagreement about rights in the UK has dwelt with increasing intensity on the question of which institution should be the ultimate arbiter of matters concerning human rights: the courts - including the Strasbourg Court - or parliament. Hunt, Hooper and Yowell deplore this turn in debate, since persistent disagreement about the question ‘who decides?’ threatens what they view as the ‘fragile new consensus about the worth of human rights and of giving them legal form’.<sup>280</sup>

Senior UK judges have recently spoken of the ‘democratic deficit’ that they perceive as being created by the expansion of the scope of the rights protected under the ECHR and the tendency (as they see it) of the Strasbourg Court to ‘tread on matters of policy that are not for unelected judges, let alone international judges, to decide’.<sup>281</sup> My research (including research I am currently conducting on the role of national parliaments in the implementation of ECtHR judgments; see part 6) leads me to make two observations about this critique. First, debate in the UK that emphasises the sovereignty of parliament does not always acknowledge the implications of this position when it is applied in the international, as opposed to the domestic, legal context. The question of supremacy has a particular significance in the context of the ECtHR in view of the undertaking of the state under Article 46(1) ECHR to abide by the final judgment of the Court in any case to which it is a party. In the light of this obligation, the assertion of parliamentary sovereignty as overriding final decisions of the ECtHR risks fatally undermining the Convention system, which rests upon the legally-binding nature of the obligations placed on individual states, as well as the principle of the collective guarantee of human rights which is embodied in the Convention and its machinery of supervision. Such a position – that parliamentary sovereignty should indeed outweigh these foundational principles of the Convention system – may be honestly held; however, it is imperative that, at a minimum, those who espouse such a position should acknowledge the far-reaching implications it holds for the Convention system and for the UK’s place within

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<sup>279</sup> N. Bratza, ‘Britain should be defending European justice, not attacking it’, *The Independent*, 24 January 2012.

<sup>280</sup> Hunt, Hooper and Yowell, *Parliaments and Human Rights*, as above n 10, p. 11.

<sup>281</sup> Lord Sumption, ‘The Limits of Law’, as above n 270, p. 9. See also The Rt Hon. Lord Judge, ‘Constitutional Change: Unfinished Business’, as above n 270, para 47.

that system. Where these implications are ignored or downplayed the resulting debate risks becoming both ill-informed and parochial.<sup>282</sup>

Secondly, discussion about a democratic deficit created by the ECtHR frequently fails to acknowledge that there are differing concepts of democracy and of the relationship between human rights and democracy. Rather, a particular conception of democracy – which views it as existing in tension with human rights – is sometimes assumed. As argued in section 1.1 (ii), within the conceptual framework of law as a culture of justification, which rests upon the principles of accountability and participation, human rights are viewed as constitutive, rather than constraining, of democracy. This is my preferred conception, which I develop in my research on *Developing a Bill of Rights* in relation to the principles and methods by which bills of rights are created (see section 4.2 below). Again, there may be valid disagreements about the relationship between human rights and democracy; however, informed debate can only proceed if such differences – and their implications for the institutional machinery of rights protection - are acknowledged and their normative foundations made explicit.

### **(iii) Public opinion about human rights**

The unpopularity of the HRA is widely asserted in public discourse, but the nature and extent of discontent is rarely substantiated.<sup>283</sup> My publications have examined data relating to public opinion in Britain both about the HRA and about a bill of rights.<sup>284</sup> In broad terms, evidence from quantitative and qualitative surveys over the past decade has consistently suggested that the *existence* of a law in the UK to protect rights and freedoms in line with international standards is popular, as are the specific rights contained in the HRA (*Critical Review*, pp. 174-77; *Developing a Bill of Rights*, pp. 69-70).<sup>285</sup> Human rights in the abstract are

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<sup>282</sup> A recent example is a speech by Rt Hon Lord Judge, who stated in respect of the ECtHR: ‘My personal belief is that parliamentary sovereignty on these issues should not be exported, and we should beware of the danger of even an indirect importation of the slightest obligation on Parliament to comply with the orders and directions of any court, let alone a foreign court’. (The Rt Hon. Lord Judge, ‘Constitutional Change: Unfinished Business’, as above n 270, para 48). Lord Judge neglected to make clear in his remarks that, as a signatory to the Convention, the UK *has* imported such obligations and that the constraining effect of those obligations cannot be bypassed by reliance upon constructs of competing sovereignties which originate in domestic constitutional discourse.

<sup>283</sup> See, e.g., S. Pollard, ‘Yet another farce from the hated Human Rights Act’, *Daily Express*, 13 January 2012.

<sup>284</sup> The polls referred to in this section do not cover Northern Ireland. In *Developing a Bill of Rights* (pp. 18-19), I refer to polling data from Northern Ireland about a possible Northern Ireland Bill of Rights; I am not aware of polling in Northern Ireland specifically on attitudes to the HRA.

<sup>285</sup> ComRes poll for Liberty in 2010 at [www.comres.co.uk/polls/Liberty\\_HRA\\_poll\\_27.09.10.pdf](http://www.comres.co.uk/polls/Liberty_HRA_poll_27.09.10.pdf); K. Kaur-Ballagan, S. Castell, K. Brough and H. Friemert (2009) *Public Perceptions of Human Rights* (Manchester: Equality and Human Rights Commission), p. 22; Ministry of Justice, *Human Rights Insight Project*, as above n 74, p. 47.

commonly associated with positive values such as fairness and protecting the vulnerable.<sup>286</sup> As discussed in the *Critical Review* (Chapter 6), surveys suggest that hostility towards the HRA itself derives specifically from the way in which the Act is perceived to be interpreted or implemented so as to protect disproportionately ‘undeserving’ groups (identified in polls as refugees and asylum seekers, immigrants and criminals, among others).<sup>287</sup> In addition, surveys suggest widespread ignorance about the way that the HRA works (e.g. in respect of the decision-making power of parliament vis-à-vis the courts) and a prevalent view that human rights are not relevant to everyday life or public services.<sup>288</sup> Another persistent theme of surveys is public resentment at perceived ‘interference by Europe’ in national decision-making on human rights, fuelled by the erroneous yet widespread understanding that the ECtHR is part of the European Union.<sup>289</sup>

Taken together, these factors constitute a significant image problem for the HRA; however, the evidence should not be misconstrued. Hostility to the HRA which derives from lack of knowledge and understanding should be distinguished from that which is connected to more deep-rooted sources of alienation. Nor should the vitriolic tone of some media coverage be taken as a proxy for public attitudes as a whole. The most recent research on public perceptions of rights in Britain suggests that around a quarter of the population is strongly supportive of human rights, while just over half are either neutral or ambivalent; one in four held implacably hostile views about human rights.<sup>290</sup> While this data is not disaggregated geographically, there are grounds for assuming that the balance of views may vary significantly between the different nations of the UK (see section 3.6).

Opinion surveys on a new bill of rights are inconsistent, as I discuss in *Developing a Bill of Rights* (pp. 70-71).<sup>291</sup> In 2006, an ICM State of the Nation survey reported that more than three-quarters of those polled agreed that ‘Britain needs a Bill of Rights to protect the liberty of the individual’.<sup>292</sup> As Klug notes, we may infer that even though the HRA can fairly

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<sup>286</sup> Equality and Diversity Forum, *Public Attitudes to Human Rights*, as above n 179; Kaur-Ballagan et al, *Public Perceptions of Human Rights*, as above n 179, p. 20.

<sup>287</sup> Kaur-Ballagan et al, *Public Perceptions of Human Rights*, as above n 179, p. 57; Ministry of Justice, *Human Rights Insight Project*, as above n 74, p. 44; YouGov/ITV survey in 2011 at [http://cdn.yougov.com/today\\_uk\\_import/yg-archives-pol-yougovitv-humanrights-240311.pdf](http://cdn.yougov.com/today_uk_import/yg-archives-pol-yougovitv-humanrights-240311.pdf).

<sup>288</sup> Equality and Diversity Forum, *Public Attitudes to Human Rights*, as above n 179, p. 6.

<sup>289</sup> Equality and Diversity Forum, *Public Attitudes to Human Rights*, as above n 179, p. 6.

<sup>290</sup> Equality and Diversity Forum, *Public Attitudes to Human Rights*, as above n 179, pp. 4-7.

<sup>291</sup> I refer to polls conducted after the enactment of the HRA.

<sup>292</sup> Joseph Rowntree Reform Trust (2006) *State of the Nation 2006: Summary Results* (York: Joseph Rowntree Reform Trust).

be described as a ‘bill of rights’, people in the UK do not necessarily recognise it as such.<sup>293</sup> The Hansard Society’s 2008 Audit of Political Engagement found significantly lower levels of enthusiasm.<sup>294</sup> The issue of ‘whether Britain needs a new Bill of Rights’ scored third lowest out of 11 constitutional issues for public understanding at 28 per cent.<sup>295</sup> Almost two-thirds were ‘effectively neutral’ on the matter.<sup>296</sup> The apparent discrepancy between the ICM and Hansard surveys is explicable in part by their methodology. The ICM poll gauged support for a new bill of rights in the context of specific rights it might contain, including the right to a fair trial by jury and the right to hospital treatment on the National Health Service within a reasonable time, each supported by almost 90 per cent of respondents. The Hansard survey did not discuss specific rights; it concluded that, compared with other constitutional issues, the question of whether Britain needs a new bill of rights is ‘among the most technical and the vaguest’ and has no ‘real resonance, at least when stated in these terms’.<sup>297</sup> It cannot safely be inferred from the available polling data, then, that popular enthusiasm for a bill of rights in the abstract is proven. I consider the implications of these findings for the formation of a new UK bill of rights in the next section.

## **4.2 Initiatives to create a new bill of rights for the UK**

In this section, I synthesise my research which has examined initiatives under successive governments to create a new bill of rights - variously termed a ‘British’ or ‘UK’ bill - to subsume or replace the HRA. I examine (i) the post-war trend towards ‘process-driven constitutionalism’; and (ii) the principles and methods which my research suggests are most likely to create a sense of democratic legitimacy for bills of rights. In (iii), I evaluate initiatives to create a new bill of rights under both the Labour and Conservative-led coalition governments in the light of the proposed principles and methods.

### **(i) Bills of rights and process-driven constitutionalism**

While much commentary has focused on the possible content of a new UK bill of rights,<sup>298</sup> the *process* by which it might be created has invited less scrutiny. My research (*Developing a Bill of Rights*) addresses this omission by analysing the processes used to develop bills of rights (or proposed bills) in comparable common law jurisdictions. I examine the consultative

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<sup>293</sup> F. Klug (2007) ‘A Bill of Rights: Do we need one or do we already have one?’ Irvine Human Rights Lecture 2007, Human Rights Centre, University of Durham, p. 12.

<sup>294</sup> Hansard Society (2008) *Audit of Political Engagement 5: the 2008 Report with a special focus on the constitution* (London: Hansard Society).

<sup>295</sup> Hansard Society, *Audit of Political Engagement*, as above n 294, p. 5.

<sup>296</sup> Hansard Society, *Audit of Political Engagement*, as above n 294, pp. 28-29.

<sup>297</sup> Hansard Society, *Audit of Political Engagement*, as above n 294, p. 39.

<sup>298</sup> See, for example, Joint Committee on Human Rights (2008) *A Bill of Rights for the UK?* Twenty-ninth report of Session 2007-08, HL Paper 165-I and II, HC 150-I and II (London: TSO); JUSTICE Constitution Committee (2007) *A British Bill of Rights: Informing the debate* (London: JUSTICE).



or deliberative processes followed in Australia, Canada, New Zealand and Northern Ireland and identify aspects of the design of process that participants in the research considered to be of greatest importance and to be transferable between national contexts. I critically assess the Labour Government's consultation on a Bill of Rights and Responsibilities in 2009-10 and the more recent Commission on a Bill of Rights in the light of this experience. Further, I examine both the normative and pragmatic reasons for inviting public engagement in the formation of a bill of rights and, based on this discussion, propose a set of principles that should underpin future processes.

In *Developing a Bill of Rights* (Chapter 2), I establish that a characteristic of the more recent processes to develop bills of rights (at state/territory and federal level in Australia and in Northern Ireland) has been the premium placed on public participation and not solely elite negotiation. I connect these participatory endeavours to the normative proposition that the process by which a bill of rights is created is as important as the outcome if the document is to enjoy democratic legitimacy. In the chapter 'Lessons from Overseas', I adopt Peter's definition of democratic legitimacy as 'the normative concept that establishes under what conditions the members of a democratic constituency ought to respect a democratic decision'.<sup>299</sup> Following a procedural (as opposed to substantive) conception of democratic legitimacy, Peter proposes that a prerequisite of democratic legitimacy is that the normative and empirical premises for proposals are subjected to 'the scrutiny of an inclusive process of public deliberation'.<sup>300</sup> This proposition is congruent with – and, in some ways, extends – the concept of law as a culture of justification outlined in section 1.1 (ii). I noted in that section that Mureinik's conception of the culture of justification rests in part on the principle of participation: that people whose rights and interests are affected or determined by a law or policy should have the opportunity to participate in its formation. Peter's approach expands upon *how* the requirement of participation is to be fulfilled, i.e. via public participation that, being 'inclusive', creates opportunities for participation for individuals or groups who are relatively powerless or unassertive or face other barriers to participation.

My research also draws on other literature which examines the post-war trend towards process-driven constitutionalism, according to which human rights have emerged as both a right and a necessity in the formation of constitutional documents - and process has joined outcome as a necessary criterion for legitimating a new constitution.<sup>301</sup> The United Nations Committee on Civil and Political Rights recognises a specific right to participate in choosing

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<sup>299</sup> F. Peter (2009) *Democratic Legitimacy* (Oxford: Routledge), p. 4.

<sup>300</sup> Peter, *Democratic Legitimacy*, as above n 299, p. 3.

<sup>301</sup> V. Hart (2003) *Democratic Constitution Making: Special Report No 107* (Washington: US Institute of Peace).

or changing a constitution.<sup>302</sup> Nedelsky argues that in order to justify constitutionally-entrenched rights as constraints on democratic decision-making ‘the processes by which [rights] are defined must themselves be universally recognized as legitimate’.<sup>303</sup> In addition to democratic legitimacy, participatory constitutional development has been associated with other benefits. Writing about the transition from authoritarian to democratic systems in Europe, Arato argues that ‘it is unthinkable that legitimate constitution making bypass extended public discussion’, one benefit being that such discussion permits the main actors to ‘advance and defend positions for which normatively convincing arguments can be devised’ – again, an approach which is closely aligned with that of law as a culture of justification.<sup>304</sup>

## **(ii) Principles for designing a bill of rights process**

While the right to participation is becoming established in law and theory, the *means* of realising that right in the formation of bills of rights, and the consequences for democratic legitimacy, are matters of debate and experimentation. The contribution of my research report *Developing a Bill of Rights* is to examine empirically the development of such processes from the 1982 Canadian Charter to the more recent processes in Australia and Northern Ireland (Chapter 2) and, having evaluated that experience in the light of the normative arguments considered above, to suggest approaches to their future design (Chapter 3). However, I do not take a prescriptive approach, recognising that the particular methods chosen may legitimately vary between different national (or sub-national) contexts. In addition (Chapter 6), I propose certain principles that should underpin such processes, to which I attach considerable normative significance.

In *Developing a Bill of Rights*, I argue that the development of consultative and deliberative methodologies, including technology that permits ever more sophisticated forms of public engagement, have increased the legitimate expectation that the process of creating a bill of rights will be a participatory endeavour. In this statement, I focus particularly on the experiences in Australia and Northern Ireland as these have been more participatory than both earlier processes (Canada and New Zealand) and subsequent processes (the UK).

In the Australian Capital Territory (2002),<sup>305</sup> Victoria (2005),<sup>306</sup> Western Australia (2007),<sup>307</sup> and at the federal level (2008-09),<sup>308</sup> energetic consultation processes were

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<sup>302</sup> Committee on Civil and Political Rights, *The right to participate in public affairs, voting rights and the right of equal access to public service* (Art. 25) (1996), 12/07/96, CCPR General Comment No 25, para. 6.

<sup>303</sup> J. Nedelsky (2008) ‘Reconceiving Rights and Constitutionalism’ *Journal of Human Rights* 7(2) 139: p. 162.

<sup>304</sup> A. Arato (2000) *Civil Society, Constitution, and Legitimacy* (Lanham, MD: Rowman & Littlefield) p. 250.

<sup>305</sup> The consultation resulted in the Human Rights Act 2004.

<sup>306</sup> The consultation resulted in the Charter of Human Rights and Responsibilities Act 2006

<sup>307</sup> Western Australia deferred action pending the outcome of a National Human Rights Consultation.

designed which, over periods of a few months, variously used: community organising techniques; deliberative exercises; televised hearings; ‘town hall’ meetings; roadshows; social media; materials for schools and other creative forms of public engagement (*Developing a Bill of Rights*, pp. 10-17).<sup>309</sup> In Victoria, Western Australia and at the federal level, techniques were developed for ‘devolved’ consultations, in which specialist and community groups facilitated the engagement of marginalised individuals and groups who would otherwise have been effectively excluded from participation. Each of the Australian consultations was run by an independent committee, usually comprising four people nominated on a cross-party basis and with diverse backgrounds (including a Jesuit priest, a basketball player and a poet) (*Developing a Bill of Rights*, p. 29-31).

The Northern Ireland process shared the emphasis on community participation but was considerably more protracted and necessarily reactive to political circumstances (*Developing a Bill of Rights*, pp. 17-21).<sup>310</sup> The consultation was run by the Northern Ireland Human Rights Commission (NIHRC), as mandated by the 1998 Belfast (Good Friday) Agreement. Starting in 2000, it involved, among other methods, the training of some 400 community facilitators; targeted consultations with community-based groups of women, and children and young people; advertising campaigns on television, radio, billboards and bus-shelters; and other educational and promotional work carried out jointly with civil society networks such as the Human Rights Consortium, which was formed in 2000 to promote community engagement.<sup>311</sup> Another key development was the establishment in 2006 of the Bill of Rights

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<sup>308</sup> The National Human Rights Consultation report recommended the adoption of a federal Human Rights Act broadly similar to the ACT and Victorian models (which were themselves broadly modelled on the UK HRA). However, the Australian Government declined to introduce such legislation and deferred reconsideration of the matter until 2014. Instead, it initiated other reforms in the areas of education and pre-legislative scrutiny against a wide range of international; human rights standards.

<sup>309</sup> ACT Bill of Rights Consultative Committee (2003) *Towards an ACT Human Rights Act* (Canberra: Publishing Services); A. Byrnes, H. Charlesworth and G. McKinnon (2009) *Bills of Rights in Australia: History, Politics and Law* (Sydney: University of New South Wales Press); Consultation Committee for a Proposed WA Human Rights Act (2007) *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act* (Perth: Government of Western Australia); National Human Rights Consultation Committee (2009) *National Human Rights Consultation Report* (Canberra: Commonwealth of Australia); Victorian Human Rights Consultation Committee (2005) *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (Melbourne: Victorian Human Rights Consultation Committee).

<sup>310</sup> C. Harvey and A. Schwartz (2009) ‘Designing a Bill of Rights for Northern Ireland’ *Northern Ireland Law Quarterly* 60: 181.

<sup>311</sup> Northern Ireland Human Rights Commission (2001) *Making a Bill of Rights for Northern Ireland* (Belfast: NIHRC); Northern Ireland Human Rights Commission (2004) *Progressing a Bill of Rights for Northern Ireland: An Update* (Belfast: NIHRC); Northern Ireland Human Rights Commission (2005) *Taking Forward a Bill of Rights for Northern Ireland* (Belfast: NIHRC); Northern Ireland Human Rights Commission (2008) *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (Belfast: NIHRC).

Forum, a negotiating body comprising political parties and civil society representatives under an international chair.<sup>312</sup> Consensus proved elusive and the Forum's recommendations to the NIHRC expressed divergent views on many issues. Informed by these recommendations and its own consultations, the NIHRC submitted its advice on a Northern Ireland Bill of Rights to the UK Government in December 2008.<sup>313</sup> Each proposed right (including social and economic rights, environmental rights and victims' rights) was explained and justified with reference to a detailed methodology.<sup>314</sup> In November 2009, the Northern Ireland Office responded with a consultation paper which accepted only two of the proposed rights for inclusion; other rights and enforcement issues were either discarded or left open for consultation.<sup>315</sup> The NIHRC criticised the three-month consultation as belated and inadequate for a constitutional enterprise of such significance.<sup>316</sup>

Drawing on this experience, I present below the *principles* which I propose should underpin bills of rights processes, and connect to these to specific aspects of the *design* of process which are most likely to fulfil the recommended principles.

#### **a. Non-regression**

I argue (*Developing a Bill of Rights*, pp. 22-25) that a bill of rights process should be non-regressive. All modern bills of rights have been designed to incorporate international human rights into domestic law and/or to strengthen existing human rights protection.<sup>317</sup> No processes that I have reviewed permitted even the possibility of regression, either in terms of standards or mechanisms and institutions for protecting human rights. This approach is consistent with the principle of non-regression established by UN bodies that monitor states' compliance with their international human rights obligations. In broad terms, this requires that standards of protection that have been adopted should not be undone at a later date

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<sup>312</sup> Bill of Rights Forum (2008) *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland* (Belfast: Bill of Rights Forum).

<sup>313</sup> Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland*, as above n 311.

<sup>314</sup> Harvey and Schwartz, 'Designing a Bill of Rights for Northern Ireland', pp. 190-91.

<sup>315</sup> Northern Ireland Office (2009) *Consultation Paper - A Bill of Rights for Northern Ireland: Next Steps*. (London: NIO).

<sup>316</sup> Northern Ireland Human Rights Commission, 'Commission rejects NIO consultation on a Bill of Rights', 17 February 2010.

<sup>317</sup> The Canadian Charter of 1982 built upon the existing (non-entrenched) Bill of Rights enacted in 1960, itself largely based on the International Covenant on Civil and Political Rights (ICCPR). The New Zealand Bill of Rights Act 1990 expressly affirmed New Zealand's commitment to the ICCPR. The South African Bill of Rights built upon the Canadian Charter, the ICCPR and the International Covenant on Economic and Social Rights (ICESCR). Bills of Rights which have been enacted or recommended in Australia have drawn explicitly on the ICCPR and in some cases the ICESCR and on models of enforcement from jurisdictions including the UK.

without compelling justification.<sup>318</sup> I conclude that a process premised on weakening human rights protection would disturb these norms and set a damaging precedent internationally.

The principle of non-regression goes to the heart of the relationship between human rights and democracy and reflects a view of bills of rights as not only negative instruments to constrain the state, but also positive instruments to enable relatively powerless groups to exert influence in the democratic process. On this account, a utilitarian calculus that justifies the weakening of human rights protection (or countenances that possibility) on the grounds that it expresses the majority will, or protects society at large, is spurious. Rather, the democratic imperative is to construct a process which facilitates participation by groups whose rights are most vulnerable to abuse. To fulfil this principle, I propose that governments initiating the formation of a bill of rights should enshrine the principle of non-regression in the terms of reference for the process of creating it.

#### **b. Transparency**

Politicians should be transparent about the purpose of a bill of rights and the terms of reference for the process by which they propose to create it (*Developing a Bill of Rights*, pp. 22-25). This entails a clear procedural commitment to act on the results of public consultation and deliberation within certain parameters which must be clearly stated and justified. The methods employed to consult the public must also be transparent and open to scrutiny and those designing the process should explain the advantages and disadvantages of the chosen approach.

Bills of rights processes are necessarily constrained by what is considered legally and politically feasible in terms of the possible substantive outcome(s). In *Developing a Bill of Rights* (pp. 25-29), I examine differences of approach in different jurisdictions as to how these constraints should be managed. Some consultation bodies favoured a clear statement of intent from government about what options it favours, since it is disempowering and distracting for people to be consulted about outcomes which are politically unattainable. Others favoured the inclusion of options that do not have elite support, as long as they are non-regressive.

Whichever approach is taken, I suggest that transparency should extend to the final outcome of the consultation process, including recommendations as to whether or not to create a bill of rights and as to its content. The consultative body should set out a clear rationale for the inclusion of specific provisions and how these relate to the balance of views

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<sup>318</sup> See, for example, Committee on Economic, Social and Cultural Rights, *The nature of States parties obligations (Art 2, par 1)* (1990) 14/12/90, CESCR General Comment No 3, para.9.

obtained via consultation or deliberation, as well as to international standards (*Developing a Bill of Rights*, pp. 47-50). The rationale is likely to require an explanation of the weight given to certain types of submissions. Research participants who had run such exercises noted that submissions may need to be assessed qualitatively as well as quantitatively; e.g. to give appropriate significance to detailed submissions and those from organisations with large memberships as compared to ‘tick box’ responses from individuals, and to give particular weight to the views of groups who face an unusual level of disadvantage or discrimination.

### **c. Independence**

I argue that the credibility of a bill of rights process is likely to be enhanced if it is independent of government and has no vested interest in the outcome (*Developing a Bill of Rights*, pp. 29-32). While the government will set the framework for the consultation and provide its resources, the process should not be owned by ministers or be manipulated for partisan ends. These considerations lead me to conclude that the independent committee model developed in Australia has significant advantages over the options of processes being run either by national human rights institutions (NHRIs) (as in Northern Ireland) or by government (as in the UK and New Zealand) or a parliamentary committee (as in Canada). NHRIs may be viewed as having a vested interest in the outcome of the consultation and are better suited to a role of influencing and monitoring the process; championing key principles; generating public engagement; speaking authoritatively about human rights and engaging in ‘myth-busting’. Government- or parliament-run consultations have tended to be more conventional and static in their methods than independently-run processes and significantly less able to generate community engagement. Such processes may also be more vulnerable to becoming a proxy for other political battles than in the relative safe haven of an independent exercise.

### **d. Inclusivity**

I propose (*Developing a Bill of Rights*, pp. 35-41) that bills of rights should strive to be participatory, using consultative methods and sometimes also deliberative ones.<sup>319</sup> The process should place a high premium on eliciting the views and experiences of groups whose human rights are most vulnerable to being breached, and should give those voices due weight in the analysis of responses. Any process should also include meaningful efforts to elicit the views of groups who are most alienated or marginalised from the legal and political system

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<sup>319</sup> I define these terms as follows: consultation refers to a process intended to elicit the views or preferences of the public on an issue, with the aim of informing decision-makers – the citizen as ‘sounding board’. Deliberation refers to a process that brings a random sample of citizens together to deliberate on public policy issue/s and reach considered judgements on the basis of balanced information – the citizen as decision-maker. A process is generally described as participatory when it engages a significant proportion of those targeted and includes people who are considered hard to reach because of discrimination or disadvantage.

(as was achieved in Australia and Northern Ireland). Further, the process should be inclusive in respect of different geographical areas and should respect the competency and self-determination of sub-national authorities.

The body running the process should be capable of facilitating community-level discussions as well as eliciting expert opinion. This will generally require combining qualitative and quantitative methods and providing multiple opportunities for people to participate. This imperative was captured by one research participant as meaning that the bill of process should be ‘an exercise in building citizenship rather than just market research’ (*Developing a Bill of Rights*, p. 84).

Deliberative forums have been shown to engender public trust if they are adequately publicised, properly constructed to be representative and independent from government and if government gives clear procedural commitments to act on their recommendations (*Developing a Bill of Rights*, pp. 41-45). Of particular interest are ‘micro-forums’ that select participants by forms of statistical or random sampling to ensure their representativeness and design a safe environment where they can deliberate, sometimes over an extended period, on the basis of balanced and comprehensive information. In *Developing a Bill of Rights*, I examine the relative merits of deliberative polling (which was used in the ACT process) and the more extended model of ‘citizens’ assemblies’.<sup>320</sup> I argue that deliberative forums should not be used in isolation from other channels of public engagement, but that they are a useful vehicle to inform public discussion and increase trust in the process.

Other aspects of the design of process are likely to affect the degree of public engagement achieved. Once political conditions are considered propitious to invite public engagement in the formation of a bill of rights, it is desirable for the process to have a clear timeframe with, at some point, a momentum-building phase with the aim of generating interest even among those who were previously unengaged (*Developing a Bill of Rights*, pp. 50-51). Further, the process should be adequately resourced so as to be appropriately ambitious for the stated purpose (*Developing a Bill of Rights*, pp. 52). The risk of a process that lacks political commitment and momentum is disillusionment and a lack of legitimacy for the outcome.

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<sup>320</sup> For analysis of the most celebrated example, see M. E. Warren and H. Pearse (2008) ‘Introduction: democratic renewal and deliberative democracy’ in M.E. Warren and H. Pearse (eds.), *Designing Deliberative Democracy: the British Columbia Citizens’ Assembly* (Cambridge: Cambridge University Press).

#### **e. Education and information**

I argue (*Developing a Bill of Rights*, pp. 45-47) that consultation and deliberation should be as unconstrained as possible whilst being informed to the greatest possible extent about existing human rights protections and obligations and options for reform. I suggest that a time-limited consultation aimed principally at gauging public preferences is unlikely to fulfil a serious educational function in relation to human rights. However, a minimum requirement of such a process is the provision of impartial and accessible information (in appropriate formats and languages) and a concerted strategy, adhered to by all actors in the consultation, to correct misperceptions about human rights.

#### **(iii) Achieving democratic legitimacy for a UK bill of rights**

In *Developing a Bill of Rights* and ‘Lessons from Overseas’, I evaluate the two post-HRA initiatives to create a UK bill of rights in the light of the principles and methods synthesised above.

#### **a. Consultation on a Bill of Rights and Responsibilities**

The first post-HRA initiative was the Labour government’s eleven month consultation on its 2009 Green Paper on a Bill of Rights and Responsibilities, which was run by civil servants in the Ministry of Justice.<sup>321</sup> The process was non-regressive in that it ruled out the options of repealing or resiling from the HRA, or making rights legally contingent on the exercises of personal responsibility (*Developing a Bill of Rights*, pp. 61). It consisted partly of a series of deliberative events held around Britain, at which a total of around 500 randomly-selected participants debated national identity and values, a Bill of Rights and Responsibilities and a written constitution (*Developing a Bill of Rights*, pp. 58-65).<sup>322</sup> However, these events were largely hidden from public view, which may be viewed as a missed opportunity to ignite broader interest in the process. The Ministry also held roundtable discussions with, among others, representatives of faith communities and disability organisations, as well as establishing a website and Twitter feed. The consultation process overall did not fulfil the principle of inclusivity as it did not attempt any thoroughgoing engagement with groups that might have experienced particular difficulties in contributing to it.

The Ministry of Justice concluded that the consultation showed ‘strong public appetite’ for further debate on the consultation’s themes and ‘broad support’ for adoption of a Bill of

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<sup>321</sup> Ministry of Justice (2009) *Rights and Responsibilities: Developing Our Constitutional Framework* (London: The Stationery Office).

<sup>322</sup> Ministry of Justice (2010) *People and power: shaping democracy, rights and responsibilities* (London: The Stationery Office); Ministry of Justice (2010) *Rights and Responsibilities: developing our constitutional framework: a summary of responses* (London: The Stationery Office).



Rights and Responsibilities as part of a suite of constitutional changes.<sup>323</sup> The assertion that public appetite was ‘strong’ is contestable: the process in fact took place largely unnoticed by the media and the wider public. While the consultation ‘reached’ a total of 2,500 people, including some 600 Twitter followers, only 123 submissions were received.<sup>324</sup> This lacklustre response appears to bear out my research participants’ observations as to the deficiencies of government-administered consultation processes. The Labour government’s exercise had, one interviewee noted, made a new UK bill of rights appear to be ‘just another piece of legislation’ (*Developing a Bill of Rights*, p. 65). Moreover, I conclude, it had failed to overcome a sense of unease and disengagement with the bill of rights project in the devolved nations (*Developing a Bill of Rights*, Chapter 5).

#### **b. Consultation run by the Commission on a Bill of Rights**

In ‘Lessons from Overseas’, I evaluate the consultative process run by the Commission on a Bill of Rights in the light the principles elaborated above.

The UK coalition parties entered the 2010 general election with divergent positions on human rights. The Conservative manifesto pledged to repeal the HRA and replace it with a new UK bill of rights;<sup>325</sup> the Liberal Democrats were committed to the protecting the HRA.<sup>326</sup> After negotiating these apparently incompatible positions, the coalition stated:

We will establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties. We will seek to promote a better understanding of the true scope of these obligations and liberties.<sup>327</sup>

This non-regressive mandate was plainly at odds with the Conservative manifesto pledge, and was widely interpreted as being intended to defer a potentially coalition-wrecking issue, creating a taint of bad faith about the process which, I suggest, any Commissioners

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<sup>323</sup> Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework: a summary of responses*, as above n 322, p.6.

<sup>324</sup> Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework: a summary of responses*, as above n 322, p.9.

<sup>325</sup> The Conservative Party (2010) *Invitation to Join the Government of Britain: The Conservative Manifesto 2010* (London: The Conservative Party), p. 79.

<sup>326</sup> Liberal Democrats (2010) *Liberal Democrat Manifesto 2010* (London: Liberal Democrats), p. 94.

<sup>327</sup> HM Government (2010) *The Coalition: Our Programme for Government*, p.11. Note that the coalition agreement speaks of a ‘British Bill of Rights’ while the Commission on a Bill of Rights refers consistently, and correctly, to a ‘UK Bill of Rights’.

would have struggled to expunge.<sup>328</sup> The coalition issued no clear statement about the purpose of a new UK bill of rights and gave no commitment to act upon the outcome of the Commission's recommendations within certain parameters, thus failing to fulfil the principle of transparency proposed above.

The Commission's eight members (excluding the chair) were equally split between avowed supporters and detractors of the HRA, raising concerns in parliament – which proved well-founded - that the Commission would fail to reach a consensus.<sup>329</sup> The Commission was also forced to defend itself against the accusation that it was insufficiently diverse, being comprised of eight white men and one white woman, almost all QCs, with two Scottish members and none based in Wales or Northern Ireland.<sup>330</sup>

In August 2011, the Commission issued a 'discussion paper' inviting responses to the question of whether the UK needs a bill of rights and, if so, what it should contain and how it should apply to the devolved nations.<sup>331</sup> The document provided a factual description of the UK's human rights and constitutional architecture but omitted any discussion of what a bill of rights might entail, why it might be needed or how it might relate to the HRA. Nevertheless, the consultation elicited some 900 submissions.<sup>332</sup> In July 2012, the Commission issued a second consultation document, more substantial and discursive than the first.<sup>333</sup> It elicited more than 2,000 submissions.<sup>334</sup> Thus, the consultation generated a much greater response than the Labour consultation on a Bill of Rights and Responsibilities, reflecting perhaps the heightened political discord surrounding the HRA and the ECtHR. Yet the consultation proved as unsuccessful as its predecessor at reaching out to marginalised and disadvantaged constituencies or generating momentum behind the project from civil society groups or the wider public. Minutes of the Commission's meetings betray a tension between the ambitious community outreach that some Commissioners aspired to conduct and constraints imposed by their budget.<sup>335</sup>

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<sup>328</sup> See also Fenwick, 'Conservative anti-HRA Rhetoric', as above n 248.

<sup>329</sup> HC Debs, vol 1049-ii, 16 June 2011, Q58.

<sup>330</sup> HC Debs, vol 1049-ii, 16 June 2011, Q62.

<sup>331</sup> Commission on a Bill of Rights (2011) *Discussion paper: Do we need a UK Bill of Rights?* (London: Members of the Commission on a Bill of Rights).

<sup>332</sup> See <http://www.justice.gov.uk/downloads/about/cbr/cbr-respondents.pdf>.

<sup>333</sup> Commission on a Bill of Rights (2012) *A Second Consultation* (London: Members of the Commission on a Bill of Rights).

<sup>334</sup> Commission on a Bill of Rights (2012) *List of respondents to the Commission's Second Consultation Paper: 'A Second Consultation'* (London: Members of the Commission on a Bill of Rights).

<sup>335</sup> A. Donald (2012) 'Will the Bill of Rights Commission achieve anything at all?', *UK Human Rights Blog*, 19 September 2012.

### c. The context of devolution

In *Developing a Bill of Rights* (Chapter 5), I address the implications of devolution for the bill of rights project. Convention rights are deeply embedded into the UK constitutional framework within which devolved powers are exercised in Scotland, Wales and Northern Ireland. Convention rights as contained in the HRA form part of the devolution statutes;<sup>336</sup> and the devolved institutions have no competence to act in a manner that is contrary to Convention rights.<sup>337</sup> The devolved Scottish Parliament and Northern Ireland Assembly have no power to amend the HRA;<sup>338</sup> and the devolution statutes contain mechanisms similar to those in the HRA, such as the requirement under section 3 of the HRA to interpret legislation consistently with Convention rights.<sup>339</sup> As a result, any amendment or repeal of the HRA would either have to leave Convention rights applicable to areas of policy within devolved competence, or else alter the fundamental structure of the devolution settlements.<sup>340</sup> This would, in turn, give rise to complex constitutional questions in each of the devolved nations. These questions are especially acute in Northern Ireland: a decision to repeal the HRA, or to amend the HRA and/or enact a UK bill of rights covering Northern Ireland in a way which diminished existing human rights protection, would be likely to breach the Good Friday Agreement (*Developing a Bill of Rights*, p. 75). Further, it may put the UK in breach of its international treaty obligations owed to the Republic of Ireland as one of the guarantors of the Agreement. I argue in *Developing a Bill of Rights* (pp. 78-81) that the bill of rights ‘project’ also has significant political implications. In particular, it risks being seen as a move to centralise power, values and identity - at odds with devolution processes which are rooted in recognition of the multi-national character of the UK and the principle of self-determination.

The Chair of the Commission on a Bill of Rights, Sir Leigh Lewis, ventured at the outset that the Commission was ‘acutely conscious’ of the devolution dimension.<sup>341</sup> The Commission met representatives of the devolved administrations and legislatures in two day visits to each nation.<sup>342</sup> It also established an Advisory Panel formed of individuals nominated by the devolved administrations.<sup>343</sup> Members of this panel from Scotland and Wales ventured that a new UK bill of rights was being conceived primarily to address what

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<sup>336</sup> Section 126 Scotland Act (SA) 1998; Section 98 Northern Ireland Act (NIA) 1998; and Section 158 Government of Wales Act (GOWA) 2006.

<sup>337</sup> Section 29 (2)(d) and 57 (2) SA; Section 6 (2)(c) and 24 (1)(a) NIA; and Section 81(6) and 94 (6)(c) GOWA.

<sup>338</sup> Section 29 and Schedule 4 Part 1 (2)(f) SA, and Sections 6(2) (f) and 7(1) (b) NIA.

<sup>339</sup> Section 83 NIA; Section 101 SA and Section 154 and Schedule 5 Part 2 GOWA.

<sup>340</sup> Fenwick, ‘Conservative anti-HRA Rhetoric’, as above n 248, pp. 314-15; JUSTICE (2010) *Devolution and Human Rights* (London: JUSTICE).

<sup>341</sup> Hansard HC Vol.1049-i, 9 June 2011, Q31.

<sup>342</sup> See <http://www.justice.gov.uk/about/cbr/consultation-prog>.

<sup>343</sup> Nominations were made by the Welsh and Scottish Governments, but not by the devolved administration of Northern Ireland. See Minutes of the meeting of the Commission on a Bill of Rights, January 26, 2012, p.6.

were perceived as ‘English problems’ and, ‘there was no view in Scotland and Wales that a UK Bill of Rights was necessary or desirable in order to address a perceived lack of public confidence in the current human rights system’.<sup>344</sup> The Commission itself acknowledged that its consultations revealed that there was ‘little or no call’ for a new bill of rights in Scotland, Wales or Northern Ireland.<sup>345</sup>

#### **d. Assessing the recommendations of the Commission on a Bill of Rights**

Since my research was published, the Commission on a Bill of Rights has issued its report. It is striking that the majority of members based its recommendation to create a new bill of rights *principally* on its perception of the degree of public alienation from the HRA;<sup>346</sup> as well as the strident and polarised nature of disagreement about the current structures which, it suggested, call for a ‘fresh beginning’.<sup>347</sup> This was despite the fact that a majority of respondents to the Commission’s two consultation documents were in favour of retaining the HRA.<sup>348</sup> The majority report correctly observes that respondents to the consultations, being self-selecting, may not represent public opinion; and that polling data is ‘notoriously unreliable’, with contradictory results reflecting the phrasing of questions, among other factors (see also section 4.1 (iii)).<sup>349</sup> However, the very unreliability of numerical measures of public opinion means that the Commission’s majority is unable to adduce evidence beyond the anecdotal for *its* view that the HRA is irretrievably unpopular.

In *Developing a Bill of Rights* and ‘Lessons from Overseas’, I concluded that the frequently ill-informed and tendentious discourse surrounding a possible new bill of rights was incommensurate with the gravity and complexity of the project. Public enthusiasm for a

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<sup>344</sup> Minutes of the meeting of the Commission on a Bill of Rights, January 26, 2012, p.13.

<sup>345</sup> Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us*, Volume 1, as above n 106, p.15.

<sup>346</sup> For the majority, the ‘lack of “ownership” [of the HRA] by the public ... is ... the most powerful argument for a new constitutional instrument’; Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us*, Volume 1, as above n 106, p. 29. The same argument was made by the (then shadow) Attorney General Dominic Grieve; see D. Grieve, ‘Liberty and Community in Britain’, Speech for Conservative Liberty Forum, October 2, 2006. He argued that stated that one of the most compelling reasons given for introducing a new bill of rights is ‘so that all British citizens of different backgrounds feel ownership of it’.

<sup>347</sup> Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us*, Volume 1, as above n 106, p. 30.

<sup>348</sup> The report does not provide a numerical breakdown of opinion; however, in their minority opinion, two Commissioners, Baroness Helena Kennedy and Philippe Sands QC observe (at p. 178) that: ‘Whilst in the minority on the Commission, our views are aligned with the views of respondents to our two consultations, as this report recognises, in the sense of overwhelming support to retain the system established by the Human Rights Act (and very considerable opposition, for now at least, to the idea of a UK Bill of Rights)’.

<sup>349</sup> Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us*, Volume 1, as above n 106, p. 28.

new bill of rights had not been established, particularly in the devolved nations; and nor had public antagonism towards the HRA been demonstrated to be entrenched or irrecoverable. I argued that much political (and especially Conservative) discourse about the need for a new bill of rights was predicated on the assertion that the UK does not already have one. This assertion obscured both the origins and the nature of the HRA and had produced ill-informed debate about the options available. I concluded that the conditions to create a bill of rights were highly unfavourable.

I see no cause to revise this assessment in the light of subsequent developments. It is not evident why a new bill of rights that fulfilled the Commission's non-regressive mandate would necessarily enjoy a greater sense of popular ownership than the HRA, unless the underlying reasons for the unpopularity of the Act were addressed. I conclude that cosmetically 'rebranding' of the Act (for example, as being based on 'British' values) or tinkering with its provisions is unlikely to shift public attitudes or understanding and would, in any event, be an insufficient basis to embark on a process of significant constitutional change.

### **4.3 Human rights, equality and religion or belief**

Legal judgments concerning human rights or equality and religion or belief have been especially contentious in Britain in recent years.<sup>350</sup> In this section – drawing on my *Religion or Belief* report and the article 'Advancing Debate about Religion or Belief' - I examine the origins and nature of this controversy and propose ways in which debate might be shifted onto more constructive ground.<sup>351</sup> My focus is on the way in which legal standards and judgments concerning religion or belief have been understood and invoked in public discourse.

#### **(i) The nature of the controversy**

Public discussion of equality, human rights and religion or belief in Britain has assumed a rancorous tone in recent years. There has been strident commentary by some newspapers<sup>352</sup> and Christian clerics<sup>353</sup> about the purported intention of proponents of the 'secular' values of

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<sup>350</sup> My research on religion or belief involved interviews and focus group discussions in England and Wales. Given the differences in legal frameworks and other social and cultural factors, particularly in Northern Ireland, I do not attempt to generalise about religion or belief at a UK-level.

<sup>351</sup> The report on *Religion or Belief* covers additional themes such as the implementation of human rights and equality law in the workplace and in public services, but for reasons of space I do not attempt a comprehensive synthesis of the research in this statement.

<sup>352</sup> See, e.g., 'Christianity under attack: Anger as major court rulings go against British worshippers', *Mail Online*, 11 February 2012.

<sup>353</sup> See, e.g., 'Lord Carey: Christians "vilified" by courts', BBC News website, 14 April 2012.

equality and human rights to drive faith out of public life. Groups advancing competing claims for protection under anti-discrimination law have traded accusations of totalitarianism<sup>354</sup> and bigotry.<sup>355</sup> In particular, as Stychin observes, ‘the construction of rights in conflict and in need of balancing pervades the relationship of sexuality and religion’.<sup>356</sup>

Beneath this antagonistic rhetoric lies a more temperate, yet anxious, discussion about the way in which courts and tribunals have adjudicated equality- or human rights-based claims concerning religion or belief. Some legal scholars, commentators and human rights organisations have criticised decisions made both by domestic courts and the ECtHR.

The main thrust of this critique (as discussed in *Religion or Belief*, Chapter 6) is that the right to freedom of thought, conscience and religion, enshrined in Article 9 ECHR, has been insufficiently and erratically protected in the courts. Courts, it is suggested, have taken such a cautious approach to protecting the manifestation of religion or belief that the law has come to protect only a restrictive and conservative form of religious life.<sup>357</sup> In this regard, it is argued, domestic courts have ‘essentially tracked the limitations of the Strasbourg approach’<sup>358</sup> to claims based on religion or belief, albeit with occasional misgivings.<sup>359</sup> In particular, the argument continues, domestic courts have been increasingly ready to establish that Article 9(1) has not been interfered with, thereby short-circuiting any need to consider the merits of each case in detail using the criteria for justification under Article 9(2).<sup>360</sup> This has sometimes involved courts inappropriately assuming the role of theological arbiter over an applicant’s beliefs by seeking to determine whether particular beliefs or practices are prescribed by the particular religion or belief.<sup>361</sup> Particular controversy has surrounded cases

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<sup>354</sup> ‘Human rights ‘agenda’ is new totalitarianism, bishop warns judges’, *The Telegraph*, 1 September 2012.

<sup>355</sup> ‘Stonewall unapologetic over Scottish cardinal’s “bigot of the year” award’, *The Guardian*, 2 November 2012.

<sup>356</sup> C Stychin (2009) ‘Faith in the Future: Sexuality, Religion and the Public Sphere’ *Oxford Journal of Legal Studies* 29(4): 733.

<sup>357</sup> R. Sandberg (2011) *Law and Religion* (Cambridge: Cambridge University Press), p. 98.

<sup>358</sup> I. Leigh (2011) ‘Religious freedom in the UK after the Human Rights Act 1998’ in P. Babie and N. Rochow (eds), *Freedom of Religion under Bills of Rights* (The University of Adelaide Press). p. 242.

<sup>359</sup> See, e.g., the dissenting opinions of Lord Nicholls and Lady Hale in *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, at paras. 41 and 92-99.

<sup>360</sup> See, e.g., *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932 and *R (Playfoot) (A Child) v Millais School Governing Body* [2007] EWHC (Admin) 1698. The Equality and Human Rights Commission (EHRC), identifies as one of two ‘key issues’ concerning the protection of Article 9 its view that: ‘Courts are setting too high a threshold for establishing “interference” with the right to manifest a religion or belief, and are therefore not properly addressing whether limitations on Article 9 rights are justifiable’; Equality and Human Rights Commission (2012) *Human Rights Review 2012* (London: EHRC), p. 323.

<sup>361</sup> D. Whistler and D. J. Hill (2012) *Religious discrimination and symbolism: a philosophical perspective* (study funded by the Arts and Humanities Research Council).

concerning whether employees (such as registrars or relationship therapists)<sup>362</sup> or religious organisations (such as a Roman Catholic adoption agency)<sup>363</sup> can refuse to provide a service which conflicts with their religious views where this may result in discrimination against others. Some Christian commentators venture that these and other legal judgments both demonstrate and perpetuate an anti-religious – and specifically anti-Christian – bias in public life.<sup>364</sup>

As one measure of the contentiousness of certain judgments, the former president of the ECtHR, Nicolas Bratza, notes that the Court was ‘flooded by an exceptional number’ of third-party requests to intervene in four UK cases brought by Christian claimants.<sup>365</sup> These interventions – coming from perspectives as far apart as the National Secular Society<sup>366</sup> and the former Archbishop of Canterbury, Lord Carey<sup>367</sup> – remind us that criticism of judicial decision-making on religion or belief is by no means unanimous. For some authors, far from enjoying too *little* legal protection, religion or belief may enjoy too *much*.<sup>368</sup> McColgan proposes an attenuated form of protection against discrimination on grounds of religion or belief due to the inevitability of conflict between these and other protected characteristics under equality legislation, in particular sex and sexual orientation.<sup>369</sup> Vickers argues that the emergence of a *de facto* hierarchy between different protected characteristics (with religion or belief enjoying a lower level of protection) ‘may be inevitable given the lack of consensus over so many issues regarding religion’.<sup>370</sup>

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<sup>362</sup> *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 and *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880.

<sup>363</sup> *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2012] UKUT 395 (TCC).

<sup>364</sup> The Christian Institute argues that there is a ‘growing feeling that “equality and diversity” is code for marginalising Christian beliefs’; Christian Institute (2009) *Marginalising Christians: Instances of Christians Being Sidelined in Modern Britain* (Newcastle-upon Tyne: Christian Institute) p. 5.

<sup>365</sup> N. Bratza (2012) ‘The “precious asset”: freedom of religion under the European Convention on Human Rights’ *Ecclesiastical Law Journal* 14(2): 256, p. 270.

<sup>366</sup> Lord Lester of Herne Hill QC, R. McCrea and M. Schaeffer, ‘Application nos. 48420/10 and 59842/10 *Eweida and Chaplin v the United Kingdom*, Application nos. 51671/10 and 36516/10 *Ladele and McFarlane v the United Kingdom* - Submissions on behalf of the National Secular Society’, 14 September 2011.

<sup>367</sup> Lord Carey has gone so far as to call for a separate court structure for religious cases in order to ensure the involvement of judges who have a ‘proven sensibility to religious issues’. See *McFarlane v Relate Avon* [2010] EWCA Civ 880, paras. 16-18.

<sup>368</sup> A. Lester and P. Uccellari (2008) ‘Extending the Equality Duty to Religion, Conscience and Belief: Proceed with Caution’ *European Human Rights Law Review* 5: 567.

<sup>369</sup> A. McColgan (2009) ‘Class Wars? Religion and (In)equality in the Workplace’, *Industrial Law Journal* 38(1): 1.

<sup>370</sup> L. Vickers (2010) ‘Religious Discrimination in the Workplace: An Emerging Hierarchy?’ *Ecclesiastical Law Journal* 12(3): 280, pp. 301-302.

These arguments and counter-arguments reflect a degree of instability at the heart of the legal framework surrounding religion or belief. This is perhaps unsurprising. In the past decade, both the quantity and reach of the law have expanded significantly as the state seeks both to protect and regulate religious life in the context of a pluralistic society. The law prohibiting discrimination on grounds of religion or belief is also of recent origin and the inclusion of religion or belief alongside other protected characteristics in the Equality Act 2010 has, I argue, stretched legal concepts in often uncomfortable ways. Sandberg refers to these developments as the ‘juridification of religion’, one consequence being that litigation is increasingly being resorted to or invoked as a means of addressing conflicts and seeking to influence policy.<sup>371</sup>

## **(ii) The social significance of legal judgments**

In the article ‘Advancing Debate about Religion or Belief’ (pp. 55-57), I argue that debate about religion or belief in Britain has become unduly dominated by particular - and sometimes partial - understandings of legal judgments. Further, I suggest that judgments are mistakenly adduced as evidence of wider patterns of experience or behaviour. This phenomenon is especially striking in the debate about whether Christians in Britain (and other parts of Europe) are being marginalised. Many Christian participants in my research appeared to base their view that Christianity is being marginalised *principally* on their interpretation of a number of legal judgments, rather than on other types of social scientific evidence.<sup>372</sup> Conversely, I argue that legal cases are not necessarily representative of common experience or a reliable indicator of the place of religion or belief (or specific religions or beliefs) in society. Indeed, the opposite is likely to be true. There are invariably contingent reasons why certain cases come to court and others do not. Meritorious claims may not reach court because individuals do not wish to litigate or lack the means to do so. Unmeritorious claims may reach court because of the persistence of individual claimants or the backing of campaign groups.<sup>373</sup>

Further, my research suggests that public responses to certain high-profile cases make tensions between religion or belief and other interests appear more prevalent or intractable

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<sup>371</sup> Sandberg, *Law and Religion*, as above n 357, p. 194.

<sup>372</sup> For example, Dr Don Horrocks of the Evangelical Alliance, argued that, ‘the human rights and equality agenda is being used as a blunt instrument to silence religion ... through legal decisions in the courts’ (‘Advancing Debate about Religion or Belief’, p. 55).

<sup>373</sup> See, for example, *Haye v London Borough of Lewisham* ET Case No. 3301852/2009, 16 June 2010, concerning a council employee who was dismissed for sending an email from her workplace account to Reverend Sharon Ferguson of the Lesbian and Gay Christian Movement, which the tribunal described (at para. 36) as ‘highly offensive, homophobic ... aggressive and violent’. It was submitted by the Christian Legal Centre on behalf of the claimant that the email was a legitimate expression of her religious beliefs - arguments that found no favour with the tribunal.



than they actually are. For example, the conspicuousness of certain cases concerning religious individuals who have been prevented from wearing or displaying religious symbols at work might suggest that such instances are widespread or increasing; this perception is not supported by data from Employment Tribunals.<sup>374</sup> Misrepresentation of judgments is especially likely where understanding is reliant upon media reports or the messages of campaigning groups and is not also informed by the detailed circumstances of each case, the legal reasoning and the wider sociological context. Judgments may be given a more expansive meaning or significance in public discourse than the facts of the case warrant.<sup>375</sup>

Further, I establish that the outcome of cases is often unpredictable and may appear contradictory. This is partly due to the reliance on the principle of proportionality in assessing whether interference or disadvantage is justified in a given case. Even within a single national context (and still more at the Council of Europe level), it is perilous to ‘read across’ from one judgment to another because each case is highly fact- and context-specific.<sup>376</sup> For example, it may appear difficult to reconcile why one employment tribunal held that a Muslim security guard did not suffer indirect discrimination when his employer refused him permission to leave work early on a Friday;<sup>377</sup> while another held that a Christian care worker did suffer indirect discrimination when her employer introduced a rota requiring her to work on Sundays.<sup>378</sup> In the former, the disadvantage was held to be a proportionate means of achieving a legitimate aim; in the latter, it was not. In other instances, judgments may actually *be* contradictory or inconsistent. For example, the notion that voluntary submission to a system of norms such as a contract of employment creates a ‘specific situation’ which limits the claimant’s right to manifest their religion or belief has been applied inconsistently

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<sup>374</sup> The most recent comprehensive analysis of Employment Tribunal cases where religion or belief discrimination was the main jurisdiction, together with calls to the helpline of Acas (the Advisory, Conciliation and Arbitration Service), found that problems concerning working hours and time off or leave to meet religious obligations were far more frequent than those relating to dress codes. Around half the claims were brought by Muslims and around half of the calls which referred to a specific religion or belief related to Islam. See B Savage (2007) *Sexual Orientation and Religion or Belief Discrimination in the Workplace* (London: Acas).

<sup>375</sup> One example is a case concerning a Pentacostalist Christian couple who wished to become short-term foster carers, but whose application was deferred because their negative views about same-sex relationships were not in line with the National Standards for Fostering Services. Several interviewees observed that the judgment showed – or had even expressly stated – that the prevention of discrimination on grounds of sexual orientation would invariably trump claims based on religion or belief. In fact, the judgment makes no such assertion, but a more limited statement giving priority in the particular circumstances of the case to national standards and statutory guidance aimed at protecting looked after children. See *R (Johns) v Derby City Council* [2011] EWHC Admin 375 at para. 93.

<sup>376</sup> E. Howard (2012) *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (London: Routledge).

<sup>377</sup> *Cherfi v G4S Security Services Limited* EAT Case No. 0379/10/DM, 24 May 2011.

<sup>378</sup> *Williams-Drabble v Pathway Care Solutions* [2004] ET Case No. 2601718/2004, 2 December 2004.

over time by the ECtHR, while recent domestic judgments which apply the rule restrictively are at odds with recent Strasbourg judgments which chose to disregard it.<sup>379</sup>

I conclude that legal judgments need to be contextualised with other types of evidence in order to determine what (if any) social significance they have. Weller's review of research evidence about religious discrimination in Britain in the past decade notes the growth in recent years of 'at least concerns and claims about discrimination in relation to Christians' but finds no evidence to substantiate such claims at a societal level.<sup>380</sup> By contrast, a consistent body of research evidence suggests that in Britain, Muslims experience discrimination of a greater frequency and seriousness than any other religious group.<sup>381</sup> The nature and extent of discrimination against Christians in the UK has not been comprehensively studied (save for studies of sectarian prejudice against particular forms of Christianity) but is likely to vary with, among other factors, class, ethnicity, geography and type of Christianity.<sup>382</sup> At a minimum, this suggests the need for a more nuanced analysis of the incidence of discrimination against Christians and its causes than the generalised 'marginalisation' narrative presently articulates. Further, it suggests that considerable caution is required when seeking to generalise from specific legal judgments and to ascribe them with social, as well as legal, significance.

### **(iii) Advancing debate about religion or belief**

My research (*Religion or Belief*, Chapter 10) proposes various means of advancing public discussion about religion or belief beyond its current, rancorous state, which I summarise below.

#### **a. Areas of consensus**

First, I argue that divisive currents of debate should not be permitted to obscure the areas of law and policy where there is (or is potential for) consensus. Practice and understanding are likely to be advanced if these areas can be identified and, as far as possible, insulated from more acrimonious discussion. One area of broad agreement among my research participants was the criteria for deciding whether exceptions to general rules or practices should or should not be made on the basis of a person's religion or belief where there is no conflict with the equally-protected rights of others; e.g., in relation to religious dress or symbols; working

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<sup>379</sup> Sandberg, *Law and Religion*, as above n 357, pp. 86-99.

<sup>380</sup> P. Weller (2011) *Religious Discrimination in Britain: A Review of Research Evidence, 2000-10* (Manchester: Equality and Human Rights Commission), p. 23.

<sup>381</sup> Weller, *Religious Discrimination in Britain*, as above n 380, viii.

<sup>382</sup> L. Woodhead with R. Catto (2009) '*Religion or Belief*': *Identifying Issues and Priorities* (Manchester: Equality and Human Rights Commission) p. 16.

patterns; the provision of facilities; or the meeting of dietary requirements. Virtually all participants acknowledged that individuals whose religion or belief is important to them have a responsibility to make sensible career choices and may have to make personal sacrifices to avoid conflict with the law or professional guidelines, especially where conflict is foreseeable. Criteria which were advanced by many participants as potentially legitimate reasons for restricting the manifestation of religion or belief include genuine health or safety concerns and requirements for corporate uniformity and business efficiency. Another broadly accepted criterion was the need to avoid detrimental impact on colleagues.

There was a presumption *towards* the accommodation of religion or belief where these criteria do not apply or are not compelling. Participants generally acknowledged that decisions about what it is reasonable to accommodate are always fact-specific and may involve nuanced judgments as to the social context involved. These responses indicate a high degree of acceptance of the desirability of what might be termed ‘routine’ accommodation of the manifestation of religion or belief in the workplace, where there is no conflict with the rights of others. This finding stands in stark contrast to approaches elsewhere in Europe, where there is frequent controversy around the implementation of non-discrimination provisions relating to dress codes and religious symbols.<sup>383</sup>

Another area of broad agreement between research participants of different backgrounds and affiliations was the undesirability of pursuing litigation except as a last resort and in matters of strategic importance (*Religion or Belief*, pp. 119-21). Virtually all interviewees viewed litigation as symptomatic of failure, whoever instigated it. A litigious environment was viewed by many research participants (including employers and trade unions) as inimical to proportionate and balanced decision-making: threats or fear of litigation were seen as likely to produce knee-jerk responses, which tended to polarise and harden divisions. Allied concern about the potentially negative consequences of litigation (or threats of litigation) was the view that the law is limited in its capacity to address complex questions of multiculturalism and social identity (*Religion or Belief*, pp. 121-24).

#### **b. Alternatives to litigation**

If litigation is to be used selectively, there is a requirement to pre-empt or resolve disputes relating to religion or belief by other means, such as conciliation, mediation or negotiation. These approaches are, of course, not peculiar to disputes connected to religion or belief. However, the existential importance of religions or beliefs to some of their adherents, and the evident potential for tension with other equality strands, may make such disputes appear

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<sup>383</sup> T. Do (2011), ‘2011: A Case Odyssey into 10 Years of Anti-discrimination Law’, *European Anti-Discrimination Law Review* 12: 15; Howard, *Law and the Wearing of Religious Symbols*, as above n 376.

intractable and in greater need of principled approaches to resolution, whether in the workplace or community.

In ‘Advancing Debate about Religion or Belief’, I endorse the approach of Stychin, who argues that conditions - or ‘ethical rules of engagement’ – should be attached to entry into the public sphere.<sup>384</sup> He suggests that acceptance of these conditions is a minimum requirement for groups or individuals who seek to negotiate a particular outcome in a context where competing interests are at stake. Stychin proposes as one response an approach based on human rights. Specifically, he argues for a model of rights based on ‘democratic dialogue and compromise’, in which nuanced analysis of the context in each case is preferable to abstract determinations on how to balance competing rights or the pursuit of victory in a ‘zero-sum game’.

### **c. Ground rules for the conduct of debate**

The contextual analysis proposed by Stychin requires us to elaborate the ‘rules of engagement’ according to which public deliberation about conflicting interests or worldviews is to be pursued. The possible content of these ground rules was explored among participants in my research and was an area in which they broadly concurred (*Religion or Belief*, pp. 134-38).

The ‘ground rule’ most frequently invoked by interviewees was: ‘Do no harm’. At a general level, this principle suggests a position of mutual restraint, according to which individuals or groups refrain from asserting human rights or equality claims if to do so entails harm to others; for example, because it compromises health and safety or places an undue burden on colleagues. In the context of the workplace, asking the question ‘What is the harm?’ was considered a useful means of distinguishing situations in which requests for the accommodation of particular beliefs or practices are refused by decision-makers for compelling reasons as opposed to merely a disinclination to embrace religious difference.

Several interviewees proposed as a ‘rule of thumb’ the recognition that religions are important to their adherents.<sup>385</sup> It was argued that religion was too often viewed as an impulse that perpetually threatens to overflow into irrationality or conflict and that therefore needs to be constrained. This observation does not necessarily entail protection of religious believers from offence; however, it establishes at minimum a respect for the intrinsic value of religions to their adherents.

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<sup>384</sup> Stychin, ‘Faith in the Future: Sexuality, Religion and the Public Sphere’, as above n 356.

<sup>385</sup> Respondents tended to invoke this principle specifically in relation to religious belief; however, it might apply equally to the holder of a philosophical belief for whom that belief is of overriding importance.

Another broadly-agreed proposition was that individuals should be free to pursue their own preferences subject only to reasonable limitations imposed in the interests of others. The principle of personal autonomy was given nuanced interpretation by many of our participants. It was acknowledged that it will sometimes have to be balanced against the integrity of the organisation and the imperative to achieve its objectives. Organisational imperatives were, in turn, considered to include the promotion of diverse and hospitable workplaces in respect of religion or belief as well as other characteristics. Such diversity was generally considered to be of inherent value to *all* employees and to organisations as a whole.

Yet another proposed ‘rule of engagement’ was the requirement to respect the integrity of the position of each party to a dispute, since impugning the motives of others tends to foreclose any possibility of dialogue.

In ‘Advancing Debate about Religion or Belief’ (pp. 69-71), I conclude that the ground rules which commanded consensus among my research participants - though generally expressed in non-legal terms - are broadly congruent with the core principles established in international human rights law which inform the assessment of the legitimacy of any restriction to the freedom of religion or belief. These may be outlined as follows. In addition to requirements of legality, necessity and proportionality, any restriction should be non-discriminatory in the sense that it should not bear more directly or more harshly on the followers of one religion or belief than of another.<sup>386</sup> The state is required to act in a neutral fashion as between religions and as between religious and non-religious forms of belief.<sup>387</sup> The fostering of pluralism and tolerance is seen as a goal in its own right as a means of preserving democracy; it requires religious adherents to accept a fairly high degree of challenge to their belief systems in the pursuit of this goal.<sup>388</sup> Human rights law has also established the principle of respect for the right of others to believe, i.e. the duty of the state to create a ‘level playing field’ between different parties, with one side being free to present its point of view, and the other to reject it. This principle might also be expressed as respecting the ‘believer’ rather than the ‘belief’.<sup>389</sup>

These principles provide decision-makers with a substantive set of positive values that might underpin their policy and practice. My research indicates that, in Britain, these are likely to be broadly accepted, whether or not they are expressly labelled as originating in

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<sup>386</sup>M. D. Evans. (2009) *Manual on the Wearing of Religious Symbols in Public Areas* (Council of Europe/ Martinus Nijhoff), pp. 30-40.

<sup>387</sup> See, e.g., *Manoussakis and Others v. Greece* No. 18748/1991, 26 September 1996 at para. 47.

<sup>388</sup> See, e.g., *Serif v Greece* No. 38178/97, 14 December 1999 at para. 53.

<sup>389</sup> Evans, *Manual on the Wearing of Religious Symbols in Public Areas*, as above n 386, p. 30.

human rights law. This finding, however tentative, suggests that there are grounds for optimism that the embittered tone of discussion about religion or belief in public life can be shifted into one which is more constructive. It further suggests that those on the ‘front line’ of decision-making about the complex social and political challenges posed by multiculturalism and identity politics are not, in fact, judges, but decision-makers in public authorities and workplaces. It is school governors, workplace managers and town hall officers whose decisions may need to withstand considerable scrutiny lest they find their way into legal process. This implies, I argue, a focus on the use of human rights standards and principles, as well as equality law, as a framework for day-to-day decision-making – on implementation rather than litigation. A further imperative is the provision of accurate and balanced information about the principles established in specific judgments and their implications for decision-makers.<sup>390</sup>

#### **4.4 Conclusion**

In part 4, I have examined areas of persistent controversy surrounding the application and impact of the HRA. My research reveals that dissensus on human rights in the UK is wide-ranging in origin and traverses the ‘fault lines’ of deep social and political divisions. These include the relationship between the individual and the wider community, commonly invoked through the lens of ‘rights and responsibilities’; the tension between individual liberty and collective security; and notions of the ‘deserving’ and ‘undeserving’. Other fault lines concern the relationship between the nation state and Europe; between parliament and the courts and more broadly between democracy and human rights.

Human rights (as well as equality law) have also become a prime venue for the negotiation of religious and cultural differences. Indeed, debate about human rights in the UK has been likened with some justification to a ‘pale version of the American culture wars’, in the sense that fundamental conflicts between ideas and values are played out in the language (whether positive or negative) of human rights.<sup>391</sup> The HRA and the ECtHR have felt the full shock of their position on these various fault lines.

### **5. OVERALL CONTRIBUTION OF RESEARCH**

Within the turbulent context identified above, the contribution of my research has been to advance both empirical knowledge and normative argument about the implementation and impact of human rights law in the UK. My preoccupation with the application of human

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<sup>390</sup> See, e.g., guidance issued by the EHRC in response to the ECtHR judgment in *Eweida and Others v UK*; available at: <http://www.equalityhumanrights.com/advice-and-guidance/guidance-for-employers/religion-or-belief-new-guidance-february-2013/>.

<sup>391</sup> C. Douzinas (2012) ‘Human Rights or a Bill of Rights’, *Critical Legal Thinking* blog, 27 November 2012.

rights standards and principles in public services provides a necessary counter-weight to a political narrative about rights which is otherwise dominated by the purported tension between human rights and the public interest. My analysis of the impact of judicial review on the behaviour of public authorities, and the more subtle ways in which human rights standards and principles influence decision-making and catalyse organisational change, form an indispensable part of this alternative narrative.

In addition, my research has established that the conduct of debate about human rights has frequently fallen short of the requirements of open and reasoned justification which I established in section 1.1 as integral to my conceptual framework. This analysis underpins my conclusion that conditions for the creation of a new bill of rights for the UK are highly unpropitious. My research contributes to existing empirical and theoretical research which seeks to advance debate about human rights in the UK based on a more coherent vision of democratic constitutionalism. This approach eschews the ‘either/or’ dichotomy between parliamentary sovereignty and judicial supremacy and examines instead how different public actors should fulfil their legitimate and necessary roles in the shared enterprise of protecting and promoting the realisation of human rights.

## **6. CURRENT AND FUTURE RESEARCH**

I am presently co-authoring (with Philip Leach) a book to be published by Oxford University Press on the role of national parliaments in the implementation of ECtHR judgments. This will present the findings of qualitative research funded by the Nuffield Foundation and undertaken in 2012-13 in Ukraine, Romania, Germany, the Netherlands and the UK. The book will examine the nature and extent of parliamentary involvement in the implementation of judgments in the selected Council of Europe states, as well as engaging with normative arguments about the legitimacy of universal or regional human rights systems and theories of state compliance with international norms. In relation to the themes addressed in this statement, it is hoped that the book will help to advance discussion in the UK about the democratic legitimacy of the Strasbourg Court beyond its present rancorous and parochial state; first, by situating the debate about the Court’s relationship with national authorities within the context of the Council of Europe as a whole, and secondly by examining the normative value of involving parliamentarians in the implementation of human rights judgments with respect to legitimation, transparency and public participation.

I am also co-editing a collection on the harmonisation of international human rights law, to be published by Brill (Martinus Nijhoff) as part of the *Nottingham Studies on Human Rights* series. The aim of the book is to explore the extent to which the jurisprudence and procedures of the regional and international legal systems for the protection of human rights

takes into account different sources of law and practice when developing their own jurisprudence and practice, the extent of any differences and whether those differences are justified (and if so, on what basis).

I am keen to continue my UK-focused research on human rights, not least as a contribution to informed debate in advance of the 2015 election in which the future of the HRA is likely to be a prominent issue. The evident variation of human rights debate in different parts of the UK requires a methodology which takes account of differences in the legal and policy environment relating to devolved and non-devolved decision-making. Evaluative research (of the type discussed in section 3.4) will be of particular value in determining the impact of human rights-based practice. This is likely to require intensively focused research in one or two public authorities where human rights have been integrated into decision-making over a period of time. Separately, there is also scope for broader research which might focus on the impact of the HRA on certain area/s of law, policy and practice or in particular localities. I suggest that such research should also take account of initiatives which are congruent with human rights (such as co-production of public services; see section 3.2 (ii)) and personalisation<sup>392</sup> and/or which are framed using principles such as respect for dignity,<sup>393</sup> but which do not explicitly refer to or integrate human rights standards. The intention would not be to 'claim' such initiatives as evidence of impact of the HRA, but rather to explore how the express application of human rights standards (e.g., in relation to dignity, Articles 3 and 8 of the ECHR) might strengthen or intersect with them.

In addition to research focused on the HRA and the UK's obligations under the Convention, I am interested in pursuing work which analyses the UK's performance under its international human rights obligations (an interest I presently pursue as a Trustee of 'Just Fair', which raises awareness and conducts monitoring of the UK's implementation of, in particular, the International Covenant on Economic, Social and Cultural Rights).

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<sup>392</sup> Chetty, Dalrymple and Simmons, *Personalisation and human rights*, as above n 79.

<sup>393</sup> See, e.g., Department of Health (2009) *Dignity in Care Campaign Case Studies* (London: Department of Health).



## ANNEX A – LIST OF PUBLIC WORKS SUBMITTED

### Research reports

- (2012) *Religion or belief, equality and human rights in England and Wales*, Research Report 84 (Manchester: Equality and Human Rights Commission) [with the assistance of Karen Bennett and Philip Leach]
- (2012) *Evaluating Human Rights-Based Interventions in Health and Social Care* (London Metropolitan University: Human Rights and Social Justice Research Institute; produced for the Human Rights in Healthcare programme of the Department of Health).
- (2012) *The UK and the European Court of Human Rights* Research Report 83 (Manchester: Equality and Human Rights Commission) [with Jane Gordon and Philip Leach].
- (2010) *Developing a Bill of Rights for the UK*, Research Report 51 (Manchester: Equality and Human Rights Commission) [with the assistance of Philip Leach and Andrew Puddephatt].
- (2009) *Poverty, inequality and human rights: Do human rights frameworks make a difference?* (York: Joseph Rowntree Foundation) [with Elizabeth Mottershaw].
- (2009) *Evaluating the impact of selected cases under the Human Rights Act 1998 on public service provision* (unnumbered) (Manchester: Equality and Human Rights Commission) [with Elizabeth Mottershaw].
- (2009) *Human rights in Britain since the Human Rights Act 1998: a critical review*, Research Report 28 (Manchester: Equality and Human Rights Commission) [with Philip Leach and Jenny Watson].

### Peer reviewed journal articles

- (2013) ‘Advancing debate about religion or belief, equality and human rights: Grounds for optimism?’, *Oxford Journal of Law and Religion* 2(1) 50-71.

- (2009) 'Evaluating the Impact of Human Rights Litigation on Policy and Practice: A Case Study of the UK', *Journal of Human Rights Practice* 1(3) 339-361 [with Elizabeth Mottershaw].

### **Book chapters**

- (2013) 'Developing a Bill of Rights for the UK: Lessons from overseas' in I. Leigh and R. Masterman (eds) *The UK's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford: Oxford University Press) 281-307.
- (2012) 'Limits and achievements of the HRA from the socio-economic point of view: the HRA and Poverty', in N. Kang-Riou, J. Milner and S. Nayak (eds), *Confronting the Human Rights Act: Contemporary themes and perspectives* (London: Routledge) 141-158 [with Elizabeth Mottershaw].

## ANNEX B – JOINT AUTHORSHIP AND COLLABORATION

It is evident from the publications listed in Annex A that much of my work has been collaborative and/or involved joint authorship. Several of the publications are based on a substantial amount of original qualitative research, which in each case I conducted with one or two others.

I have written four publications jointly with Elizabeth Mottershaw. The longer research reports (*Poverty, Inequality and Human Rights* and *Evaluating the Impact of Selected Cases under the HRA*) involved a clear division of labour: Elizabeth and I each researched and wrote a number of chapters before synthesising the complete text. The chapters that I wrote were as follows:

- *Poverty, Inequality and Human Rights*: Introduction and chapters 1, 2, 3, 6.
- *Evaluating the Impact of Selected Cases under the HRA*: Chapters 1, 5, 6 and 7.

Our joint authorship of the book chapter ‘Limits and achievements of the HRA’ and journal article ‘Evaluating the Impact of Human Rights Litigation’ involved a more fluid division of labour, in which we each wrote sections and exchanged comments before finalising the whole.

Two of the other research reports were jointly authored with other colleagues. In each case, I was responsible for bringing the final draft to publication. The details are as follows:

- *The UK and the European Court of Human Rights*: I wrote the first drafts of the Executive Summary and Chapters 1, 2, 3, 4, 5 and 10. This was a truly collaborative process in which Philip Leach, Jane Gordon and I produced drafts chapters and then met to discuss them and agree revisions.
- *Critical Review*: as stated in the Acknowledgements, I wrote the full draft of this report, with comments and contributions from Philip Leach and Jenny Watson.

Two of the research reports were written ‘with the assistance of’ others. This means that others were involved in conducting some of the primary research and/or providing comments on the final report. In each case, I wrote the full draft of the report and was responsible for bringing it to publication. The details are as follows:

- *Religion or Belief*: I was the sole author of the report; Karen Bennett and Philip Leach were co-researchers and Philip provided comments on the final draft.

- *Developing a Bill of Rights*: I was the sole author of the report. Philip Leach and Andrew Puddephatt provided comments on the final draft.