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SPECIALIST HUMAN RIGHTS TRIBUNALS FOR THE UK WITHIN A "DIFFERENTIAL CONSTITUTIONAL MODEL"

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ABSTRACT/LAY SUMMARY

The central question posed by this thesis is how effectively the "ordinary" domestic "common law courts" in the UK are currently adjudicating, protecting and providing remedies for victims of violations of the European Convention on Human Rights, as incorporated by the Human Rights Act 1998 ("HRA"). It asks whether, and to what extent, the existing structures, rules, traditions and procedures of the common law courts are capable of interpreting and applying positive rights. The approach taken to answering this question is doctrinal, drawing on case law, common law principles, legislation as well as procedural rules. The conclusion reached is that there are difficulties and deficiencies in the current system and reliance cannot continue to be placed on the ordinary common law courts to protect positive rights. In reaching this conclusion the thesis explores the differences between the use of residual liberties to protect rights (the Diceyan approach) and the granting of positive rights contained in a "bill of rights" and suggests that there are significant differences when it comes to litigation and adjudication. The difficulties identified concern and include: the reluctance of the courts to develop the common law to provide remedies for failures to act (as positive rights require); the common law's greater concern as to whether it is fair to impose liability, rather than a focus on harm caused to an individual; and, more specifically in terms of the change brought about by the enactment of the HRA, the inability to litigate claims domestically against the UK as a state. These are difficulties which it is argued can be addressed by the creation of a domestic human rights jurisdiction, with special tribunals with bespoke rules and procedures, and presided over by expert judges. It is proposed that the specialist jurisdiction is situated within the tribunal systems in each nation of the UK, this offers flexibility, ease and speed of access, as well as benefits in terms of the devolved nature of the UK.

This thesis also asks the normative question of whether the protection of rights should constitutionally be primarily for the courts, particularly where acts or omissions by public officials and bodies are under challenge. It is recognised that in advocating for new specialist tribunals a more prominent role for the protection of rights is being accorded to the judiciary. The thesis therefore engages with the academic debates concerning political constitutionalism, legal constitutionalism, democratic dialogue, the Commonwealth model and the Collaborative Constitution. It is argued that creating specialist tribunals would fit with a constitutional theory of democratic dialogue or a collaborative constitution, but with the addition that it should be

for the courts to protect rights where the actor or actions are those of a public body or official. It is also argued that it should be for the courts to decide if they have the institutional competence to decide a case when faced with a claim concerning the potential violation of individual rights. This constitutional model is termed a "differential constitution"; which constitutional institution is primarily responsible for protecting rights differs depending on the actors, or actions in issue. Such a model will however remain within the bounds of a parliamentary democracy and respect the primacy of the UK Parliament. The central constitutional institutions would largely remain undisturbed, including the UK Supreme Court, but underneath the main institutional bodies would be a dynamic and efficient court structure providing effective protection for individual rights.

Having decided on the need, and the constitutional legitimacy of, new expert tribunals this thesis embarks on constitutional design, looking at what type of constitutional body the tribunals would be, what powers would be granted and where and how they would fit within the UK's constitution. Creating a new human rights jurisdiction for the UK necessarily requires grappling with devolution, which presents both benefits and challenges. Benefits in that it allows for each of the nations that make up the UK to develop and apply rights in a way that best suits each nation's legal and political culture and history. Challenges however exist due to the complex and asymmetric way in which devolution has evolved in the UK, and as result of the labyrinthian nature of the devolution legislation. This thesis has not attempted to set out a legislative plan for the introduction of the new tribunals in each nation but identifies what will need to be considered and broadly how the new expert tribunals could fit within the existing legal systems and constitutional settlements.

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At the very heart of this this piece of work and research, and the reason for my undertaking it, are all those individuals I have had the privilege to represent as a barrister in the courts and tribunals in England and Wales over the last twenty plus years. All those who have sought and fought to protect their rights in county courts, coroner's courts, in the Court of Protection, in mental health review tribunals, in the High Court and in the Administrative Court of England and Wales. All of them looking to the courts to vindicate their rights and protect them from the abuse of power by state bodies and officials, but not all of whom have been able to succeed and many of whom have been let down by legal rules and procedures that have created barriers and insurmountable hurdles. It was a need to reflect on those difficulties and try to resolve them that led to this PhD.

In giving thanks, I must first acknowledge my sincere gratitude to my two amazing supervisors, Dr Elisenda Casanas-Adam and Dr Asanga Welikala; this PhD would not have been possible without their incredible guidance and support. Both have shown enduring patience in guiding a practicing lawyer to think like an academic. They have managed to perfectly balance encouragement with constructive criticism, and pushed me in new directions. You both have my sincere gratitude and admiration.

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INTRODUCTION

This thesis will argue that there are deficiencies in the current system for positive rights protection in the United Kingdom and a lack of development of a UK domestic human rights jurisprudence. It will propose the creation of a new expert and distinct domestic human rights jurisdiction, with specialist tribunals for each of Scotland, England and Wales, and Northern Ireland, but which remain subject to the appellate jurisdiction of the UK Supreme Court. The new tribunals would sit with expert judges, have bespoke rules and procedures suited to rights adjudication, and would adjudicate on and develop the UK's domestic human rights jurisprudence. They would be institutions that would sit somewhere between an ombudsman system and the private law (or "ordinary" law) model created by the Human Rights Act 1998 ("HRA"), they would provide a less adversarial approach to human rights protection, with the aim of being less costly and more easily accessible. It will be argued that this would lead to more effective protection of individual rights, more effective accountability for rights violations, whilst maintaining and leaving relatively undisturbed the UK's central constitutional institutions and settlement. The new tribunals would operate within a "differential constitutional model" where the decision as to which constitutional institution has the primary role for rights protection will depend on the act or actor concerned, and where the specialist tribunals would be afforded flexibility and discretionary powers to constitute the tribunal in the most appropriate way. They would be the constitutional institution recognised as expert in the protection of human rights, would have the ability to receive questions from other courts, provide advisory opinions, and would be the preferred court of first instance for legislative review (declarations of incompatibility under s.4 HRA and of devolved legislation). It will also be argued that they are given a new role of pre legislative review in respect of legislation proposed by the devolved parliaments. The focus is however on enabling greater accountability for, and the protection of individual rights, from acts of the Government (executive), rather than acts of Parliament (legislature).

The thesis is concerned with the "nuts and bolts" and the internal workings of the courts; the focus is on "every day" cases, and asking whether the current courts and court system, are and are able, to fully protect individual rights. The thesis is not directly concerned with the

effectiveness of the provisions of the HRA[1], but rather the model of rights protection it created by enabling the ordinary courts to adjudicate claims based on Convention rights. The aim is to provide meaningful and effective access to courts for individuals seeking protection of their individual rights when they argue that a public body or official has violated their rights. It will be argued that constitutionally the courts are the appropriate constitutional institution to provide this accountability and protection within the UK's constitution, but that the lack of specialist bespoke human rights courts and judges prevents effective protection and hinders development of a UK human rights jurisprudence.

The approach the thesis takes is largely doctrinal, drawing on case law, common law principles, legislation as well as procedural rules to explore existing weaknesses in litigating positive rights cases in the UK. However, the thesis will also engage with constitutional theory and the academic debates around political and legal constitutionalism[2]; it will locate the proposed new tribunals within the field of theoretical constitutionalism providing a theoretical framework, grounding, and normative justification for new specialist tribunals. The new tribunals will be shown to fit with, and enhance, concepts of democratic dialogue and "the collaborative constitution"[3] but would lean the UK more towards legal constitutionalism in the protection of individual rights, specifically where acts of the executive (the main focus of this thesis) are under review. For these situations a more assertive and robust role is proposed for the judiciary, and the term used to describe this approach is one of "differential constitutionalism", or the differential constitutional model.

The thesis will propose that where decisions or acts of the executive, particularly when acting through public officials, administrators, and public bodies, are challenged on human rights

[1] The Independent Human Rights Act Review (IHRAR) established in December 2020 examined the operation of the HRA, in respect of the relationship between domestic courts and the European Court of Human Rights and the impact that the HRA has had on the relationship between the Judiciary, the Government and Parliament. In its final report published in October 2021 it made a series of recommendations but essentially did not consider any fundamental changes to the HRA was required: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf. This thesis is mindful of the thorough and detailed work of the panel and similarly is not advocating for radical changes to the HRA, the focus here is more on the UK's court system and constitutional model, of which the HRA is part, and not the provisions of the HRA itself.

[2] See Chapter Two. The academic debates include those who advocate for legal constitutionalism including for example Trevor Allen, Dawn Oliver, Paul Craig and Sir John Laws, those who argue more for political constitutionalism, for example Adam Tomkins, Richard Bellamy, and JAG Griffith. There is also Stephen Gardbaum and the "Commonwealth model" of constitutionalism, and those who advocate for "democratic dialogue" within the constitution, including Alison Young, and most recently the concept of a "Collaborative constitution" as articulated by Aileen Kavanagh.

[3] Aileen Kavanagh, *The Collaborative Constitution*, (Cambridge: Cambridge University Press, 2023).

grounds the courts should lead and have the primary constitutional role of protecting rights. Where executive acts and decisions are at the heart of litigation concerning human rights, the courts should be trusted to make determinations as to the scope and application of rights and be trusted to assess whether to defer to Parliament (or not). Where legislative decisions are concerned, the UK and devolved parliaments should lead and have the primary (but not exclusive) role in protecting rights. Which constitutional institution is best suited and competent to lead in the determination of matters affecting human rights is therefore to be determined by the nature of the act or decision, and the type of actor or decision maker. It is in this way that the approach argued for will be termed "differential constitutionalism"; the cogs of the constitution (the constitutional bodies) will turn differently depending on the matter under consideration, they will function and proceed differently according to their attributes, strengths, competencies, and limitations.

The structure of this thesis is first to provide context, setting out recent history of rights protection in the UK; the developments since becoming a signatory to the European Convention on Human Rights 1950 ("ECHR"), joining and leaving the European Union, the enactment of the HRA, devolution and the creation of the UK Supreme Court. Significant context to this thesis is that prior to the HRA and devolution the predominate culture in the British legal system was towards protecting rights by relying on common law civil (negative or residual) liberties, rather than the promotion and protection of positive rights. The HRA ushered in a new approach, providing for the first time at the domestic level a written set of positive rights. Despite the proclaimed change in culture and the addition of a written set of legally enforceable positive rights, very few amendments were made to the existing court structures, or to court rules and procedures. The ordinary common law courts were to be and are used to protect positive rights. Rules of evidence, rules of disclosure remained the same, there was no special procedure for bringing an HRA claim, the remedies available were those that could be obtained before the European Court of Human Rights ("ECtHR") and the adversarial approach to litigation was to be maintained. This, it will be argued, left the project of "bringing rights home" unfinished and incomplete[4].

[4] Writing in 2013 Singh suggested that the HRA had "bedded in surprisingly easily" and that "it has not on the whole led to new procedures having to be devised". This view will be tested in this thesis, where it will be suggested that there is need for bespoke procedures for HRA claims. See Rabinder Singh "The Impact of the Human Rights Act on Advocacy" in Roger Masterman and Ian Leigh (eds) *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford University Press, 2013) 177

A question to be addressed by this thesis is why new tribunals are said to be needed when the HRA provided for claims for breaches ECHR rights to be brought before **all** domestic courts[5]. When the Human Rights Bill was debated in Parliament very little was said about the possibility of or the need for domestic human rights courts, or specialist human rights jurisdictions. Instead, it was said that the HRA would enable rights to be relied upon in any domestic legal proceedings, or a claim could be brought in private law or public law proceeding based on a breach of a Convention right in the ordinary courts. Beatson, Grosz, Hickman and Singh said in respect of this:

> In adopting this scheme [s.7] for the HRA it was decided that there should not be a special "human rights court" similar to constitutional courts as exist in some countries, to which a point under the HRA would have to be referred. Although there can be advantages to such a system, such as the creation of a body of expertise in a relatively small court, the intention behind the HRA was rather that human rights should be absorbed into the entire fabric of our legal system rather than be regarded as an adjunct to it.[6]

The enactment of the HRA was intended to usher in a new rights culture, the aim being to absorb *positive rights* (as opposed to negative liberties) into the fabric of domestic law. This thesis will challenge whether this strategy for incorporating and developing positive rights in domestic law, without the creation of specialist courts, was, or remains, the best approach. The 'absorbing into the entire fabric of the legal system' can be achieved, and it will be argued would be better achieved, with the addition of specialist tribunals within the current court structures. What is not being proposed is a constitutional court or a court to rival the UK Supreme Court[7]. It will also be argued that in any event the courts have now landed on, in effect, two separate systems, or jurisdictions, one common law and one HRA, operating in the main in parallel and side by side within the common law courts; the common law has rarely been adapted to accommodate positive rights following the enactment of the HRA, and in judicial review a separate and different approach is adopted by the courts when an act or decision is challenged on the grounds of a violation of Convention rights[8]. While common law negative liberties and the positive rights contained in the Convention share much at the level of principle, it will be argued that there are marked differences in the way they are protected

[5] This thesis is not concerned with the need, or otherwise, for a British Bill of Rights, about which much has already been written and debated.
[6] Jack Beaston, Stephen Grosz, Tom Hickman, Rabinder Singh, *Human Rights: Judicial Protection in the United Kingdom* (Sweet and Maxwell, 2008) 63
[7] Chapter Six will set out the type of tribunal being proposed and its relationship with the existing courts, including the UK Supreme Court, the Westminster Parliament and the devolved parliaments.
[8] This will be explored in Chapters Three and Four

by the courts. Differences in the adjudication method, which warrants, it will be argued, a separate court system with bespoke rules and procedures.

It is also important context to recognise that while the HRA is often spoken about as having "incorporated" Convention rights into domestic law, it is more accurate to say that the HRA has enabled claimants to seek a domestic remedy for a breach of an international right; the HRA enables UK citizens to seek redress for breaches of rights contained in an international treaty. Compliance with and responsibility for breaches of ECHR rights is owed by the UK in international law, but signatory states do have a very clear obligation to protect the Convention rights of their citizens and those within their jurisdiction[9]. While the ECtHR is the regional specialist human rights court which is tasked with interpreting and implementing the rights contained in the Convention, it is the Member States who are primarily responsible for securing the individual rights of those within their jurisdictions. The enactment of the HRA was intended to further this obligation and to embed rights more fully into domestic law, to secure rights provided at the European level domestically, and lead to the development of domestic human rights jurisprudence. In the White Paper introducing the Human Rights Bill, when setting out the case for incorporation, it was said that incorporating rights will mean that 'the rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom, and their interpretation will thus be far more subtly and powerfully woven into our law'[10]. Whether the enactment of the HRA on its own has succeeded in doing so, and whether reliance on the existing courts, court structures and court procedures has been sufficient is open to question. Additionally, there is a question as to whether heavy reliance can continue to be placed on the ECtHR to develop rights available in the UK, given its heavy workload, reaffirmation of the principle of subsidiarity, and revised stricter admissibility criteria. Questions arise here as to the application of the Margin of Appreciation at the level of domestic courts; the approach of the UK Supreme Court will be discussed in Chapter Four.

One of the key themes to be explored in this thesis are the clear differences that exist between the Convention approach to rights protection and the quite different common law approach to

[9] The principle of subsidiarity has recently been re affirmed through the adoption of Protocol 15 inserting a new recital into the Preamble of the Convention affirming the primacy of national authorities for securing rights and invoking the principle of subsidiarity and the doctrine of the margin of appreciation.

[10] Para 1.14, Human Rights Brought Home: The Human Rights Bill, presented to Parliament by the Secretary of State for the Home Department, October 1997, CM 3782: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf, accessed on 21 August 2025

protecting residual or negative civil liberties. What will be referred to as the UK's legal tradition. Following becoming a signatory to the Convention and later the enactment of the HRA, the UK's domestic courts and lawyers have sought to use existing private law actions and public law judicial review proceedings to bring and determine claims domestically based on Convention rights. But neither were *designed* to protect positive fundamental human rights as contained in the Convention, although both are capable to a degree. Human rights protection is not, at least is not always, the same as enforcing private law rights, and orthodox public law and judicial review is not always equipped to provide an individual with a remedy to a violation of an individual right and often will not enable executive action to be subject to the level of scrutiny or accountability required. In private law the focus is primarily on remedying (providing damages or compensation for) a wrong, and in public law the focus is primarily on the lawful decision-making by public bodies. Private law claims require there to be a wrong doer and not just a violation of a right[11]. Tort lawyers are used to concepts such as foreseeability of harm and the need to show that but for a wrongful act damage would not have been caused. These are concepts, principles and a general approach that are not well known to or suited to the effective vindication and protection of human rights[12]. In public law cases judicial review is most usually focussed on the decision-making process, and not on the outcome. If the decision maker has erred in law in making the decision, or acted "irrationally", then the decision is usually quashed and remitted back to the decision maker for the decision to be made lawfully. This again is not a human rights approach where the outcome is as important (if not more so) than the process[13]. These differences have become clear in the case law post the enactment of the HRA and has led, it is argued, to different approaches to human right claims. The question raised is can, and have, the ordinary common law courts been able to fully accommodate the differences or are there still claims that fail and fall into gaps due to the lack of a specialist positive rights approach, and a lack of specialist judges.

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[11] This is discussed further in Chapter Five, but see for example Donal Nolan, "New Forms of Damage in Negligence" (2007) MLR 70(1) 59-88, and Donal Nolan, "Negligence and Human Rights Law: The Case for Separate Development", (2013) MLR 76(2) 286-318. There has also been much judicial and academic debate about the ability of common law rights to protect positive rights, driven in part by the possibility of the repeal of the HRA. For a comprehensive review of the extent the common law can protect rights see Mark Elliott and Kirsty Huges *Common Law Constitutional Rights* (Hart, 2020). See also Roger Masterman and Se-Shauna Wheatle "A common law resurgence in rights protection?" [2015] EHRR Vol.157, and Richard Clayton "The empire strikes back: Common law rights and the Human Rights Act" (2015) PL Vol.1(1) 3-12.

[12] For an analysis of some of the differences see Gemma Turton "Causation and Risk in Negligence and Human Rights Law" (2020) CLJ, Vol.79 Issue1148-176

[13] There are several examples of how UK courts have failed to abide by this difference approach, e.g. *R. (on the application of Begum) v Denbigh High School Governors* [2006] UKHL 15, [2007] 1 AC 100). This is explored further in Chapter Four.

The central question for this thesis then is whether the approach, structure and the mechanism adopted by the introduction of the HRA has been effective, or whether it has given rise to difficulties and limitations in the way that rights are now protected within the domestic legal system. Has the HRA, without associated specialist domestic courts, enabled and encouraged a positive rights judicial culture throughout the legal system and led to positive rights becoming part of the domestic legal fabric, or on the contrary has it left gaps in protection and in fact stifled and hindered the development of a domestic positive rights jurisprudence. Is there a need for the creation of a specialist tribunal and the creation of a body of expertise to fully challenge the traditional approach to rights protection in domestic courts.

The answer this thesis arrives at it that a separate jurisdiction with specialist tribunals with expert judges can be justified and are needed; it would ensure the better protection of individual rights and would provide the legal (constitutional) environment and judicial culture within which a truly domestic human rights (positive rights) jurisprudence can develop. It is also argued that from a normative perspective such expert tribunals would have legitimacy, they would be part of a differential constitutional model, where institutional competence determines the constitutional body with the lead (and final) responsibility for rights protection, but always remaining within the bounds of a Parliamentary democracy and respecting the primacy of the UK Parliament. The central constitutional institutions would largely remain undisturbed, but underneath those big institutional bodies would be a dynamic and efficient court structure providing effective protection for individual rights.

The proposed specialist human rights tribunals.

It is helpful at this initial stage to sketch out in outline what is being proposed in terms of new specialist tribunals, identifying the aims, scope, and limits of what is being advocated. Importantly the intention is not to create new courts with significantly increased powers of review, or a constitutional court, but rather new specialist tribunals with bespoke rules and procedures, with specialist judges approaching the task of adjudicating rights claims using a written set of positive rights. While some of the existing deficiencies of the current system that will be identified[14] (in Chapters Three and Four) and the constitutional role being ascribed to the courts will require some additional powers, for example the ability of the tribunals to act as a court of reference, to issue advisory opinions to ensure a consistent and comprehensive

[14] The focus will be on the court structure and procedures in England and Wales.

interpretation and application of rights, and potentially (a matter for the devolved parliaments) an additional layer of pre-enactment legislative review of devolved legislation, increased judicial powers are not the primary aim or intention behind the proposal.

The aim is for a more dynamic and expert adjudication of cases against public bodies or public officials, where individual rights are central. The aim is to enable flexible processes in recognition of the incredibly varied and often complex nature of claims made against public bodies and officials in such cases. Access for individuals to a remedy for violations is also of central importance, as is speed. This being the case what is being proposed are specialist human rights tribunals ("HRTs") that are part of the UK, and devolved, tribunal systems. Creating a tribunal rather than a court is in no way to diminish the significance and importance of the cases heard or judgments delivered. The intention is to create expert superior courts (from which there would be no appeal to the High Court, but only to the Appellate courts); judges sitting in the HRTs would be high court judges, with the Senior President of the Tribunals being appointed from the ranks of Court of Appeal judges (as is currently the case). The advantages offered by tribunals and the tribunal system include providing for and allowing judges greater flexibility and choice as to the composition of the court, choice as to the extent to which an inquisitorial approach is to be taken, and the ability to keep costs down and so to increase access for claimants and protect the public purse. There could be the additional benefit of having the specialist human rights judges located alongside tribunals likely to make references to the specialist human rights jurisdiction; tribunals dealing with immigration, housing, social security, and education. The reasons for proposing HRTs, rather than courts, are set out in Chapter Five. The specialist domestic HRTs would be the bodies responsible for the interpretation and application of the ECHR rights protected by the HRA, and the incorporation of the HRA through the devolution settlements (subject to the oversight of the UK Supreme Court), and potentially for any future Acts incorporating rights[15], or indeed any British Bill of Rights.

Creating a new specialist jurisdiction and expert tribunals will result in a reduction, or more limited jurisdiction, for cases involving human rights for existing courts and transferral of jurisdiction to the new specialist tribunals. This is likely, and for good reason, to be

[15] So, for example the Scottish Government has succeeded in passing an Act incorporating the UNCRC in Scottish law, so the Scottish Human Rights Tribunal would be the body responsible for the interpretation and application of that Act and the rights contained within it.

controversial and objectionable to some; an (almost) exclusive[16] jurisdiction will require some form of gate keeping or permission stage before the new tribunal is seized of the claim, and there will need to be process for transferring in and transferring out claims and cases. While this will no doubt create yet further litigation and complexity it will be argued that these downsides would be outweighed by the benefits of the new tribunals.

In overview the parameters for the HRTs are that:

- The role of the UK Supreme Court remains the same; no changes are proposed to its current constitutional role or position as the highest court in the UK, it will remain as the final court of appeal for all cases including human rights cases.
- The new tribunals would sit in each of the three legal jurisdictions of the UK. The UK Parliament, with the agreement of the devolved parliaments[17], would provide for the power to create the new tribunals and create the tribunal for England and Wales. It would be for the Scottish Parliament and the Northern Ireland Assembly to bring forward legislation under the devolution settlements to create specialist Human Rights Tribunals for their jurisdictions.
- The Tribunals would be part of the Upper Tribunal and be presided over by a High Court Judges with expertise in human rights. The Senior President of the Tribunals would have the power to determine that a tribunal sit with specialist non-legal members where they have additional practical or specialist knowledge relevant to the matter to be decided[18].
- The HRA would be amended to include the new tribunals in s.4(5) to grant the power to make declarations of incompatibility.
- The new tribunals would have the ability to adopt a more inquisitorial and less adversarial procedure where appropriate[19], have additional powers in respect of the

[16] It is not intended to remove human rights claims completely from all other courts, it is recognised that there will still be reasons why a claim is better heard in a non-specialist human rights court, but with the availability of a reference process if necessary to the specialist court. This is set out in more detail in Chapters Five and Six.
[17] When reference is made to "devolved parliaments" this term includes the Northern Ireland Assembly.
[18] As currently exists in the tribunal system. See The First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008: https://www.legislation.gov.uk/ukdsi/2008/9780110817811/contents accessed 24 August 2024
[19] An example of an existing court with the ability to determine its own procedures is the Investigatory Powers Tribunal. See Chapter Five.

issuing advisory opinions, receiving questions/references from other courts[20] and have a power to scrutinise bills of the devolved parliaments pre-enactment (if given that power by the devolved parliaments).

The purpose behind creating the specialist tribunals is to ensure (i) the consistent development of a domestic rights jurisprudence, one which reflects the UK's legal, political and social traditions, and respects the devolved nature of the UK, (ii) provides victims of violations of rights meaningful access to court and to meaningful remedies, and (iii) allows for the future development of rights, other than those civil and political rights contained in the ECHR. Examples of specialist courts and tribunals already exist in the UK, including for example the Court of Protection in England and Wales, the Investigatory Powers Tribunal, the Immigration and Asylum Tribunal, the Employment Appeals Tribunal, and the Administrative Appeals Chambers. Each of these specialist courts and tribunals have been created and granted jurisdiction over particular types of cases, they have been given defined and limited powers over the jurisdiction they cover, and the level of judges permitted to sit in the court or tribunal is specified. Each have specialised rules and procedures and develops expertise. The same could, and it will be argued should, be done for new HRTs.

What is not being addressed.

It is important in this introduction to also set out what this thesis will not consider. First, the thesis will not consider in detail the question of whether the HRA should be replaced by a British Bill of Rights[21], or whether the HRA should be amended, although at times these arguments will be referred to. The question of whether there is a need for, or it would be preferable to have, a British Bill of Rights is not one that needs to be considered or answered and are arguments that are extensively covered by existing academic literature. This thesis is

[20] An example of such an existing power is the power to transfer cases and refer questions from other courts to the Employment Tribunal, see s.128 Equalities Act 2010, which provides for the transfer of claims to Employment Tribunals, and for questions as to an equality rule or clause to be referred to an Employment Tribunal.

[21] There has been a wealth of public, political and academic debate about the need for a British Bill of Rights. For examples of academic writings see Helen Fenwick, "Replacing the Human Rights Act with a British Bill of Rights", in Nicolas Kang-Riou, Francesca Klug (eds.) *Confronting the Human Rights Act 1998: contemporary themes and perspectives*, (1st Ed. Routledge, 2012), Francesca Klug "A Bill of Rights: do we need one or do we already have one? [2007] PL 701, see also JUSTICE (society), (2007), "A British Bill of Rights: informing the debate: the report of the JUSTICE Constitution Committee', London: JUSTICE, Lord Carnwath lecture on Human Rights Act reform – is it time for a new British Bill of Rights? February 9 2022, Centre for Public Law, Cambridge,https://constitutionallawmatters.org/2022/02/09/lord-carnwath-lecture-on-human-rights-act-reform-is-it-time-for-a-new-british-bill-of-rights accessed 27 June 2024.

not concerned with the content or source of rights, nor with whether the rights in the Convention need to be re articulated or balanced against obligations to make them more suited to Britain and British values. The source of or content of positive individual rights, so whether as currently provided for by the HRA or as has been argued for contained in a British Bill of Rights, does not much matter when considering the need for specialist domestic HRTs; it does not impact on the central arguments for (or indeed against) the creation of new specialist tribunals. The focus here is on rules and procedures, on constitutional structures and roles of constitutional institutions. It is on the approach to be taken to a set of written positive rights and how best to effectively enforce them, how to give effective access to them and provide appropriate redress for breaches. It is on the creation of specialist tribunals with expert judges. In what document the rights are contained, and what the rights specifically say is of much less importance to these questions.

Secondly, questions concerning the approach of the courts to legislative review and the use of s.3 and s.4 HRA, and the surrounding debates, will also not be addressed in any detail[22]. Normative constitutional questions about whether it is the courts or the legislature who should have the final or dominant say in the content and application of rights in a representative democracy are relevant to the theoretical framework underpinning the arguments to be made[23]. But specific issues as to the whether the courts should use s.4 declarations of incompatibility more or less, or the breadth and extent of the s.3 interpretative power under the HRA, are not questions that need to be extensively considered or answered. The arguments concerning the use of s.3 and s.4 HRA have already been extensively debated by academics and commentators[24].

Thirdly, the (largely political) question of whether the UK should remain a State Party to the ECHR is not a topic that will be covered, nor indeed will the impact or implications of such a radical act. The thesis proceeds on the basis that the UK is a member of the Council of Europe and a signatory to the ECHR and so will consider the relationship between new specialist domestic tribunals, and the specialist international court, namely the ECtHR. However, it is the

[22] See for example Connor Gearty, "Reconciling Parliamentary Democracy and Human Rights" [2002] LQR 118(Apr) 248, 250; Danny Nicol, "Statutory interpretation and human rights after Anderson" [2004] PL 274, and Tom Campbell "Incorporation Through Interpretation" in T Campbell, KD Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford, OUP, 2001).
[23] See Chapter One
[24] See for example Tom Hickman *Public Law After the Human Rights Act* (Oxford: Hart Publishing, 2010) 58-63.

case that even if the UK were to take the seismic step of leaving the Convention or Council of Europe, it is likely that this would strengthen rather than weaken the argument for specialist domestic HRTs, albeit then there would be a greater need for a British Bill of Rights.

Finally, this thesis will not address or consider in detail the philosophical and jurisprudential debates around the nature of rights. Theories concerning the normative nature of rights, around whether rights, or human rights, are natural, universal, and inalienable, whether they have a moral dimension, or whether they are political or social constructs will not be considered[25]. To the extent that adjudicating rights involves the evaluation of morals and balancing of public policy with individual rights this will be touched on as part of the reasoning and debates surrounding the relative advantages and disadvantages of political and judicial institutions in deciding the content and application of rights, a matter covered mainly in Chapter Two. To go further and consider whether the nature of rights should or does dictate by whom and how rights should be adjudicated would take this thesis in a different direction, a more theoretical and less doctrinal direction.

This thesis is uncompromisingly doctrinal; save for the identification of a constitutional theory into which the arguments made fit, and the positioning of the new tribunals in the field of constitutional theory, the arguments made come from review and analysis of legislation, case law, common law principles, the Convention, and practice. It will start though with some context setting and a review and analysis of the development of the protection of individual rights in the UK. The focus will be on the transition away from negative residual civil liberties towards the protection of positive rights contained in a document and, following the devolution settlements, the transition away from a formally unity state towards a pluralistic state. The thesis will then move to consider the theoretical context and constitutional theory in Chapter Two, before moving on to identify the problems and difficulties of the current model for individual rights protection in Chapters Three and Four. The final two chapters, Chapters Five and Six will set out how new tribunals would meet the difficulties identified and fit within the UK's constitution and legal framework.

[25] For some interesting debates and writings see Samuel Moyn *Not Enough: Human Rights in an Unequal World* (Cambridge, Harvard University Press, 2018), Benjamin Gregg *Human Rights as Social Construction* (Cambridge, Cambridge University Press, 2012) and C Douzinas and C Gearty (eds) *The Meanings of Rights*: *The Philosophy and Social Theory of Human Rights*, (Cambridge, Cambridge University Press, 2014)

CHAPTER ONE

Context setting

Introduction

This chapter provides context and background for the central arguments concerning the need and normative case for specialist domestic HRTs. It charts the UK's journey from the traditional common law protection of residual civil liberties to the addition of the protection of positive rights, via the incorporation into domestic law of (some of) the rights contained in the Convention[1]. The focus is on the period from the UK's ratification of the Convention in March 1951, the acceptance of the right of individual petition in 1965, joining (of what became) the European Union in 1973 (and leaving in January 2020), the enactment of the HRA, devolution in 1998, and the creation of the UK Supreme Court. It will consider how the older Strasbourg case law illustrates the traditional attitude and approach of the judiciary in the UK towards rights protection, and highlights the difference between protecting positive rights, and respecting residual liberty[2]. As will be explored later in Chapters Three and Four, this marrying together of positive rights contained in a written document with the common law tradition of residual liberties by means of the enactment of the HRA has given rise to difficulties in litigating positive rights-based cases domestically under the HRA. It will also be argued the courts have all but abandoned developing the common law in line with Convention rights, leading in effect to two different systems of rights protection within the same the courts.

Charting the difficulties, and objections, encountered when acceding to the Convention and the acceptance of individual petition will set the scene for analysing the difficulties that it is argued persist and which provides one of the justifications for the need to create specialist domestic HRTs. The aim is to use the challenge faced when the UK's common law system came into direct contact with the ECHR positive rights regime, in order to ask whether that challenge has been fully met.

[1] The Convention rights included in the HRA are set out in Schedule One to the Act.
[2] In *Wheeler v Leicester City Council* [1985] AC 1054, Lord Browne Wilkson LJ referred to the distinction between common law civil liberties and positive rights in these terms 'Basic constitutional rights in this country such as freedom of the person and freedom of speech are based not on any express provision conferring such a right but on a freedom of an individual to do what he will save to the extent that he is prevented from doing so by law' 1065

The approach adopted is to consider the main staging posts on the journey of rights protection in the UK since 1945, but this is not to step into the specialist field of legal history. This chapter does not claim to be one of a legal historian; the aim is not to provide a comprehensive *historical account* to explain complex recent rights and constitutional theory. The aim is more modest; it is to set the recent historical context. It is to locate and tether the proposal of new expert tribunals to the UK's most recent constitutional changes, and it is to try to shed some light on why difficulties in domestic rights protection persist. The question being asked is to what extent are the difficulties in protecting positive rights within the existing court structure a result of the UK's legal tradition and history? It will be argued that it is the UK's legal tradition that has proved hard to shift following the enactment of the HRA, providing one of the justifications for the new tribunals. This argument will be developed in Chapters Three and Four, where current difficulties enforcing positive rights domestically under the current model will be considered in more detail. What is being contended is that it is the deep-rooted common law legal tradition that is proving problematic in the development of a domestic human rights jurisprudence. This cannot be changed, or at least not changed in the near to medium future, purely through judicial training. What is required is something more substantial, both in terms of changes to the court structure, to rules and procedures, but also in terms of perception. Rights claims are different and require a different approach.

This journey towards the enactment of the HRA has been influenced by both practical politics as well as political and legal theory, there continues to be a debate as to whether the absence of a written British Bill of Rights is a strength and not a weakness[3]. Historically the orthodox view was that a Bill of Rights was not seen as necessary to protect rights and did not fit with the UK's unwritten constitution. Parliament was entrusted with the protection of civil liberties, which together with independent courts and the Rule of Law was seen to provide citizens with all the protection they needed against arbitrary and abusive power[4]. The common law principles of personal liberty and *habeas corpus*, equality before the law and natural justice were

[3] See among others: JUSTICE (society) "A British Bill of Rights: informing the debate: the report of the JUSTICE Constitution Committee" (London: JUSTICE, 2003); The Institute of for Public Policy, (1991), "The Constitution of the United Kingdom" (London: IPPR, 1991); Ministry of Justice, The Commission on a Bill of Rights *A UK Bill of Rights? The Choice Before Us* (2012) <www.gov.uk/government/news/a-uk-bill-of-rights-the-choice-before-us> accessed 15 October 2023

[4] See e.g. "In England, it was assumed that wise opinion and tradition would protect unwritten rights making it unnecessary to announce them, much less provide a high court to protect them", Samual Moyn "Plural Cosmopolitanisms and the origins of human rights" in Costas Douzinas, and Connor Gearty (eds) *The Meaning of Rights: The Philosophy and Social Theory of Human Rights*, (Cambridge: Cambridge University Press, 2014) 205

considered to offer better protection of rights than a written Bill of Rights; the Diceyan view was that the common law and its protection of residual liberties[5], with the absolute sovereignty of Parliament was superior to a written constitution with a written Bill of Rights. But, the UK has, since around 1945, been slowly moving away from this orthodox Diceyan view towards a system for the protection of human rights by means of a written set of positive rights, and away from the purely residual protection of civil liberties[6]. A major step was becoming a signatory to the ECHR[7], with its positive list of rights. Becoming a member of the European Union (the European Community as it then was) in 1972 brought the significant step of creating for the first time directly enforceable individual rights domestically, albeit limited to where matters concerned EU (then EC) law, and in addition provided for the first time a body of law superior to domestic law[8]. Most recently, came the enactment of the HRA. Throughout this time the debate as to the unlimited nature of the sovereignty of Parliament and the role of the courts in protecting fundamental rights, as well as the debate around the benefits or otherwise of a written Bill of Rights has raged on. The HRA has not put that debate to bed.

This chapter will also broadly set out the path to devolution and the devolution settlements, which are linked to the debates around the need for a British Bill of Rights. Devolution was a significant constitutional change; the UK went from a highly centralised unitary state to a complex multi-layered plural state with devolved parliaments existing alongside the sovereign Westminster parliament. The enactment of the HRA was part of this much wider program of significant and transformative constitutional reform undertaken by the Labour government of 1997 – 2010. Setting out the road to devolution will introduce relevant parts of the devolution

[5]Albert Venn Dicey, *Introduction to the study of the Law of the Constitution* (first published 1915, London Macmillan and Co).

[6] This is addressed more in Chapter Two, but as to the effect of the HRA and the extent to which it has shifted the UK towards legal constitutionalism see Tom Hickman, *Public Law After the Human Rights Act*, (Oxford, Hart Publishing) (2010), 57, and see Gavin Phillipson "The Human Right Act, Dialogue and Constitutional Principles" in Roger Masterman and Ian Leigh (eds), *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives,* Proceedings of the British Academy (London, Oxford Academic, 2013).

[7] As well as UN human rights treaties, including for example the Universal Declaration of Human Rights 1945, The International Covenant on Civil and Political Rights 1966, and the International Covenant on Economic, Social and Cultural Rights 1966.

[8] A step which has been reversed with the UK leaving the European Union and the enactment of the European Union (Withdrawal Agreement) Act 2000.

Acts, but issues and potential difficulties posed in setting up specialist HRTs in the devolved nations[9] will be considered more in Chapters Five and Six.

The last part of the historical context is the UK leaving the EU, "BREXIT", and how this has added a yet further layer of complication to the protection of rights across the UK, with the amended Ireland/Northern Ireland Protocol to the European Union (Withdrawal Agreement) Act 2020 creating what now appears to be a different structure of rights protection in Northern Ireland compared to the rest of the UK.

When looking at the history and development of the protection of rights in the UK account is also taken of the recent developments at the level of the of the ECtHR, including the stricter admissibility criteria[10] and the increasing emphasis on subsidiarity and the margin of appreciation. These developments call into question the extent to which the ECtHR can continue to be heavily relied upon to further develop Convention rights as they apply in the UK. If access to the ECtHR becomes more restricted, then the argument for more extensive, in-depth and expert analysis of rights domestically becomes more pressing. The coming into force of Protocols 14 and 15, have arguably made making an application to Strasbourg more difficult, and greater emphasis is being placed on the role of national authorities to protect Convention rights. Protocol 15[11] reenforced the principle of subsidiarity and the margin of appreciation and introduced the shorter four-month time limit for lodging an application. Protocol 14, which came into effect in June 2010, added a new admissibility criterion to Article 35 of 'suffering a significant disadvantage'[12]. These changes evidence the greater need for effective, comprehensive, and more proactive legal protection of individual human rights at the domestic level. Reliance can no longer be placed on Strasbourg to be the primary body responsible for developing, defining, and limiting the rights in the Convention, as they apply in the UK; the domestic courts should take a more leading role[13].

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[9] It is acknowledged that refence to Northern Ireland as a "nation" or "nation state" is controversial and not accepted as accurate by all. The term is used here loosely and for ease as means of referring collectively to the devolved "nations" of Scotland, Northern Ireland and Wales. An alternative would be to refer to "sub state territories", but this has not been adopted here.

[10] See in particular the addition in 2010 of the criteria in Article 35 for there to be 'significant disadvantage' before an application will be found to be admissible.

[11] Agreed in 2013 but which came fully into force in August 2021

[12] For admissibility criteria see "Practical Guide on Admissibility Criteria" www.echr.coe.int/documents/d/echr/adminisbilityguide_eng, updated 28 February 2023

[13] The application of the margin of appreciation and how this is applied at the domestic level requires careful consideration of the Supreme Court decision in *R (on the application of Elan-Cane) v Secretary of State for the*

The ratification of the ECHR

Until the coming into force of the HRA there was no means by which an individual could enforce positive individual rights by bringing a claim before the domestic courts; rights were primarily enforced by limiting the power of state bodies and officials, by protecting civil liberties[14], or by a weak form of judicial review. The UK famously has no written[15] constitution, no comprehensive codified body of legal principles, no (modern) Bill of Rights and has no constitutional court[16]. Ratification of the ECHR and the right of individual petition before a supranational court, the ECtHR, brought with it the ability to enforce positive rights at the international level. To what extent was it recognised at the time of acceding to the Convention and accepting the right individual petition that it would be a seismic step for the UK's constitutional institutions, and to what extent was it?[17].

The ECHR was part of, what Ignatieff has referred to as the 'juridical revolution in human rights' that occurred after 1945[18]. While this thesis is not going to include philosophical analysis and review of the *nature* of rights or the history of the idea of rights in political thought, a very brief acknowledgment of the relatively recent concept of human rights as legally enforceable rights is helpful in setting the scene. While legal systems have, since at least the time of the Roman Empire, *afforded* rights, people were, as Moyn has argued, afforded rights

Home Department [2021] UKSC 56 which will be considered in more detail in Chapter Four. For a critical analysis of the UK Supreme Court's approach to the application of the Margin of Appreciation see Kacper Majewski "Mirroring the Margin" (2022) PL 553. More generally see Y. Arai-Takahashi "The Margin of Appreciation doctrine: a theoretical analysis of Strasbourg's variable geometry" in A. Follesdal B. Peters and G. Ulfstein (eds.) *The European Court of Human Rights in National, European and Global Context*, (Cambridge university Press, 2015) 62-105, O.M Arnardotti "Re thinking the two margins of appreciation", European Constitutional Law Review, (2016) 12(1) pp.27-53 and Nicholas Bratza "The Relationship Between the UK Courts and Strasbourg" (2014) EHRLR 116-128

[14] This is more fully explored in Chapter Three.

[15] Historically there is Magna Carter 1215, the Petition of Right 1628 and the Bill of rights 1689 in England, and the Claim of Right Act 1689 in Scotland. These documents were however more concerned with the distribution of power between the Monarch and others, rather than the rights of individuals. See generally E. Wicks *The Evolution of a Constitution: Eight Key moments in British Constitutional History* (Oxford: Hart Publishing, 2006).

[16] The UK Supreme Court does act in some respects, particularly with regard to devolution, as the UK's "constitutional court", but it is not in the form of a constitutional court with powers to strike down primary legislation, nor is it a constitutional body with ultimate power to interpret and protect a written constitution, such as for example the US or German Constitutional courts.

[17] McLean suggests that when the UK acceded to the ECHR in 1953 and to the optional protocol allowing for individual petition in 1966 it did so confident in the belief that "they were giving rights to the rest of Europe and that everything would proceed as usual at home…Much to Britian's surprise and chagrin, however, soon after its accession to the optional protocol successful petitions were brought against it to the Strasbourg court" Mclean J. *Searching for the State in British Legal Thought: Competing conception of the public sphere*, (Cambridge, Cambridge University Press, 2012) 285.

[18] Together with the signing of the UN Charter of 1945, the Universal Declaration of Human Rights 1948, the Genocide Convention 1948 and the international convention on asylum in 1951.

as citizens. These rights were rights associated with state inclusion, or the recognition of subjecthood rather than rights that considered to be inalienable human rights[19]. They were also not seen as rights to be protected by law. For example, the rights in the French Declaration of Man and Citizen of 1798 and the American Declaration of Independence 1776 did not provide for enforceable legal rights or rights that existed outside of the state[20]. The practice of judicial review of legislation in the United States was not 'a foregone conclusion' in 1789[21]. In England the earlier proclamations of rights, including Magna Carta, did not so much assert positive rights, but reserved prerogatives from the king; it was not considered necessary to declare rights, nor to provide a court to protect them, it was assumed that wise opinion and tradition would protect unwritten rights'[22]. It was Lauterpacht in 1945 who, in *An International Bill of the Rights of Man,* expressed the hope to end 'the omnipotence of the state' and who hoped for a time when 'the individual human being – his welfare and the freedom of his personality in its manifold manifestations – is the ultimate unit of all law'[23]. Rights were for Lauterpacht to be enforceable against the state by individuals in courts of law[24]. It was following the Second World War that the UDHR and associated Covenants, and the ECHR provided for individual rights to be asserted against the state. Arguably then, it was not until 1945 that the concept of declared inalienable individual rights that could be legally enforced outside the state emerged[25].

The concept of a legally enforceable right against the state contained in a document was unfamiliar to British legal thought and the ECHR was from the start seen as foreign. While British lawyers were heavily involved in the drafting of the Convention, it was 'a product of

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[19] Moyn has been said to have provided a 'full scale revisionist monograph' on the history of rights and there is now said to be a 'new generation of scholarship that has dispensed with long genealogies and located human rights order in a much more proximate milieu – the transitional NGO breakthrough in the 1970s'. See Roland Burke "How time flies: Celebrating the Universal Declaration of Human Rights in the 1960s", (2016) Internation History Review, Vol 38(3), 394, 395. These debates will not be commented on here, but it is noted that the views of Moyn are not universality accepted.

[20] Samuel Moyn, "Plural cosmopolitism and the origins of human rights" in Costas Douzinas and Conor Gearty (eds) *The Meaning of Rights* (Cambridge University Press, 2014) 203- 205.

[21] *Ibid.* Also, on America see Larry Kramer *The People Themselves: Popular Constitutionalism and Judicial Review*, (New York, 2005), and on France see Philippe Raynaud, *Des droits de l'homme a l'Etat de Droit, Droits* 2 (1985), and Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective,* (New York, 1992)

[22] *Ibid.* Note 11.

[23] It is said that Lauterpacht 'did much to inspire' the drafting of the ECHR, he reviewed early drafts and advised on the text. See Philipp Sales, 'Law reform challenges: the judicial perspective.' (2018) StatLR, 39(3) 229-243.

[24] For an account of how Lauterpacht's own personal history and the influence of his university teacher Hans Kelsen helped inform his views, see Phillippe Sands *East West Street* (London: Weidenfeld & Nicholson, 2016) 59 - 114

[25] See Alfred William Brian Simpson, *Human Rights and the End of Empire*: *Britian and the Genesis of the European Convention* (Oxford University Press, 2004) 10.

British Foreign Policy, not of the British Legal tradition…much less of British Domestic policy'. It was arguably politics, and not changes in constitutional thought that was the main driving force behind the UK's involvement in the ECHR project and the recognition of legally enforceable rights contained in a single document: the 'explanation as to why the UK promoted and ratified the Convention must not be sought in the history of English constitutional thought, but in the general political history of the period'[26].

The ECHR was radical as compared to the UDHR, which was in the process of being drafted when the concept of a European charter of rights was first mooted[27]. The intention at the European level was, in contrast to the UDHR, to create an internationally legally enforceable Charter (Convention) with provision for the requirement for remedies; there was to be a Commission with investigatory powers, and a Court with the power to decide whether a violation had taken place and if so to prescribe what measures or remedies were required. Concerns were expressed that there would be profound implications for the UK's constitution if the UK became part of such a Convention[28]. At both the UN level and the European level the UK was concerned to ensure that there would be no right of individual petition, and no power granted to any international or foreign court to interfere with Acts of Parliament and decisions of the domestic courts.

One reason why the UK was against the right of individual petition was concern about the effect on domestic law. The agreed minutes from a cabinet meeting held on 1 August 1950 recorded that 'It would be intolerable that the code of common law and statute law which had been built up in this country over many years should be made subject to review by an International court administering no defined system of law'.[29]

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[26] *Ibid.* n.20 18

[27] The UDHR was adopted on 10 December 1948, and at a "Congress of Europe" in May 1948 a resolution was passed desiring 'a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition' and 'a court of justice with adequate sanctions for the implementation of this Charter', See A.H. Robertson, *The Council of Europe* (2nd edn, 1961) 3. Quoted in Geoffrey Marston, "The United Kingdom's part in the preparations of the European Convention on Human Rights, 1950" (Oct 1993) ICLQ Vol.42, No.4, 796, n.25 801

[28] Anthony Lester "European Rights and the British Constitution*",* in Jeffery Jowell, Dawn Oliver (eds), *The Changing Constitution* (Third Edition, Oxford University Press, 1996), 35. For a brief history and discussion of the impact of the ECHR on the UK see Steven Greer "The Legal and Constitutional Impact of the European Convention on Human Rights in the United Kingdom", in Steven Greer, Rainer Arnold (eds.) *The Universalism of Human Rights*" (Dordrecht, Netherlands, 2013) 189-207

[29] Anthony Lester, 'Fundamental Rights: The United Kingdom isolated?' (1984) Commonwealth Law Bulletin, 10:2, 995-997, 958

The UK was however in the minority in objecting to a court and a right of individual petition[30], and recognised that politically it could not be seen to be obstructing the process of the creation of a system to protect human rights at the European level. The UK therefore pushed for the jurisdiction of a court and the right of individual petition to be optional and the UK Cabinet considered that the Foreign Secretary should urge the Council of Europe to accept that 'Governments needed more time to consider the repercussions of the draft Convention on their domestic law.'[31] Right from the outset it would seem that the executive branch of the UK was resistant to the concept of vague positive rights being applied to the common law system and tradition, as well as any impact on primary Acts of Parliament. There was concern at the idea that foreign courts would have a role in reviewing domestic law's compliance with such vague rights. Similar views were also to be expressed by the judicial branch and (predominantly English) judges.

The text of the draft Convention which was in the end largely adopted was essentially the revised text provided by British lawyers and drafted in English style, but this did not save it from being seen as foreign. Unlike earlier drafts it included exception clauses to the broadly defined rights and freedoms[32]. The draft text was adopted by the Committee of Ministers on 3 August 1950, with the right to individual petition and the jurisdiction of the court being optional, as had been pushed for by the UK. It would appear from Cabinet papers from the time that while politically it was recognised that the UK should accept the draft text, the Lord Chancellor at least was of the view that, despite the influence of British lawyers, they would be horrified by its lack of precision. In a strongly worded Memorandum for the Cabinet the Lord Chancellor wrote about the lack of precision of the document and that:

> I should be unable to advise with any certainty as to what result would be arrived at in any given case, even if the judges were applying the principles of English law. It completely passes the wit of man to guess what results would be arrived at by a tribunal composed of elected person who need not even be lawyers, drawn from various European states possessing completely different systems of law, and whose deliberations take place behind closed doors.
>
> …

[30] The right of individual petition was to the Commission who would then decide whether to take the case to the Court.
[31] Geoffrey Marston, "The United Kingdom's part in the preparations of the European Convention on Human Rights, 1950" (1993) ICLQ Vol.42, No.4, 796, 813
[32] Anthony Lester "*European Rights and the British Constitution"* in Jeffrey Jowell, Dawn Oliver (eds), *The Changing Constitution* (Third Edition, Oxford University Press, 1996) 34

> Any student of our legal institutions – particularly one acquainted with the history of our Chancery courts and the jurisdiction at one time exercised by the Lord Chancellor, when equity was described as a "roguish thing" because it lacked all precision – must recoil from this document with a feeling of horror.
>
> …
>
> I cannot believe that any lawyer would accept such a document for a moment unless he thought that the political advantages to be gained outweighed the legal disadvantages of signing.[33]

This memorandum vividly encapsulates some of the considerable differences of opinion and approach that existed between British lawyers and their European counterparts as to the benefits and advantages, or disadvantages, of written bills of rights. It highlights the significant differences between the UK legal system, with its lack of a constitutional court, domestic bill of rights and its long common law tradition, which stood in stark contrast with the other European states. The rights were seen to be vague and lacking in precision, something that was an anathema to British lawyers. This significant difference of approach and the strength of feeling expressed can, it will be argued, be seen to play out in the approach of domestic courts to cases brought post the enactment of the HRA and underpins this thesis' contention for the need for a separate domestic human rights jurisdiction and specialist tribunals, a jurisdiction designed for the adjudication of positive (including vaguely worded) rights.

Concern was also expressed as to the extent to which domestic law complied with the Convention. It was said that on 'a strict interpretation of the Convention of Human Rights there are some respects in which English law[34] and practice could be shown to be not altogether in accordance with its terms'[35]. Despite this, it was decided that the Convention could be signed without any reservations or any need to amend any domestic legislation as it was thought that 'the Convention must be interpreted broadly and that in this interpretation there is no discrepancy between its provisions and the existing English law[36] on the subjects dealt with by the Convention.'[37] The vagueness of the rights in this way was seen as advantageous.

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[33] CAB 128/16 [CM (49) 67th Conclusions, minute 6], quoted in G. Marston, "The United Kingdom's part in the preparations of the European Convention on Human Rights, 1950" (1993) ICLQ Vol.42, No.4, 796, 817.
[34] There appear to be no references to any concerns or indeed consideration of Scottish law and procedure, or Northern Ireland.
[35] H.C. Hansard, 5th Series, Vol. 481, Col 15
[36] Again, there is no mention of Scottish law.
[37] H.C. Hansard, 5th Series, Vol. 481, Col 15

The UK ratified the Convention with no reservations in March 1951. It was however another 15 years before, in 1965, the Wilson government decided to allow for individual petition[38]. The Wilson government was the first Labour government to come to power since Attlee's government had ratified the Convention. The change in policy – to accept the right of individual petition – was not discussed in Cabinet but was instead dealt with by way of an exchange of letters between Ministers. Given the extent and level of objection previously expressed around the right to individual petition this is perhaps surprising. Pressure was being put on the UK at this time by the Council of Europe to sign up to the optional protocols concerning individual petition and the jurisdiction of the Court and in May 1965 the Secretary-General of the Council of Europe wrote to the UK Permanent Representative urging the UK to accept the optional clauses as this would be of significant benefit to the effectiveness of the European Convention enforcement mechanisms[39].

Governmental papers from the time suggest there was still considerable reluctance to accept the right of individual petition and the jurisdiction of the court; this concern was once again political and focused not only on the position it would leave the dependent overseas territories in, and the need to consult them, but potentially the implications for the War Damages Bill that was then going through Parliament. The government had been in dispute with the Burma Oil Company over the destruction of the company's property as part of the "scorched earth" policy. The company had successfully sued the government for damages, but the level of damages was yet to be determined. The War Damages Bill was introduced to indemnify the Crown and was to have retrospective effect. There was some concern that the Convention would be used by the Burma Oil Company to claim that it had been deprived of its property arbitrarily and retrospectively[40]. While this would be a claim by a private company and not an individual, it would seem that the executive branch of the UK was reluctant to allow for any limitation or review of their actions based on rights contained in an international convention (a theme running through the history leading up to the signing of the ECHR). The War Damage Bill received the Royal Assent on June 2 and a week later the Treasury informed the Foreign Office

[38] This came into effect on 14 January 1966
[39] See Anthony Lester "U.K. acceptance of the Strasbourg jurisdiction: what really went on in Whitehall in 1965", (1998) PL 237. Quoted at 246 "Germany is so far the only major country to have accepted all the provisions of the Convention; and experience has shown that several of the smaller countries which have already done so, feel it is unfair that the other major countries cannot see their way to accepting similar obligations".
[40] *Ibid.* p.239-240

that the Government should be asked to delay acceptance of the clauses until six months after Royal assent to the War Damage Bill.[41]

It was politics and international affairs then that appears to have played a central role in the UK's decision to and timing of the acceptance of the right to individual petition and the acceptance of the jurisdiction of the court[42]. There did not appear at this time to have been any further concerns raised or consideration given to any potential implications of the decision for domestic law and the UK's constitution[43], despite significant concerns raised earlier by the then Lord Chancellor. There was no positive move or desire to perform any form of audit of the protection of rights in the UK nor any review of the balance of power within the constitution in light of the changing way rights were to be protected. There were though potentially profound implications for the British legal system because of the growing development of legally enforceable individual human rights.

It was Leslie Scarman (then a judge of the English Court of Appeal, later to become Lord Scarman) in 1974, who acknowledged the change brought about by the ECHR and likely increased impact of the human rights movement on the UK when he delivered the 26th Hamlynn Lecture*: English Law the New Dimension*[44]. He noted that neither the UDHR nor the ECHR were part of domestic law, but he considered that 'both instruments reflect a rising tide of opinion which, one way or another, will have to be accommodated in the English legal system.'[45] There was a clear reluctance for such an accommodation. Lord Scarman recognised this reluctance, particularly on the part of common law jurists, but also recognised the weakness of the protection of rights only by means of the common law when faced with the power of Parliamentary Sovereignty. In his lecture he considered the contemporary challenges to English Law at that time, including the 'movement to secure Human Rights', he said of the emergence of Human Rights treaties:

> This may be thought to be difficult stuff for the common law. Charters, constitutions, broadly generalised declarations of right, just do not fit. We have no written constitution: our one charter is to be found in a document of 1297

[41] *Ibid* quoted at 342
[42] For a review of the political events surrounding the acceptance of the optional protocols see: Geoffrey Marston, "The United Kingdom's part in the preparations of the European Convention on Human Rights, 1950", (1983) ICLQ Vol.42, No.4, 796, see also James Young "The Politics of the Human Rights Act", (1999) Journal of Law and Society, Vol. 6 1-127, in particular 1-31
[43] Anthony Lester "*European Rights and the British constitution",* in Jeffrey Jowell, Dawn Oliver (eds), *The Changing Constitution* (Third Edition, Oxford University Press, 1996) 36
[44] Sir Leslie Scarman, *English Law – The New Dimension*, (London: Stevens and Sons Ltd., 1974)
[45] *Ibid.* 14

> entitled "Magna Carta de Libertatibus Angliae et de Libertatibus Foreste: confirmata a Rege Edwardo," the key provision of which is often said only to be concerned to ensure that barons are tried by barons: and the one great declaration of human rights conceived and drafted by common lawyers owes its origin to rebellion, and is no part of the law of England. There are many who believe that the response of the common law to pressure for the incorporation of a declaration of human rights into English law should be, quite simply, that it is unnecessary. The point is a fair one and deserves to be taken seriously. When times are normal and fear is not stalking the land, English law sturdily protects the freedom of the individual and respects human personality. But when times are abnormally alive with fear and prejudice, the common law is at a disadvantage: it cannot resist the will, however frightened and prejudiced it may be, of Parliament….It is the helplessness of the law in face of the legislative sovereignty of Parliament which makes it difficult for the legal system to accommodate the concept of fundamental and inviolable human rights. Means therefore have to be found whereby (1) there is incorporated into English law a declaration of such rights, (2) these rights are protected against all encroachment, including the power of the state, even when that power is exerted by a representative legislative institution such as Parliament.[46]

Reference was made in the lecture to Professor Lauterpacht's book, and his view that nineteenth-century thinkers had chosen to ignore features of the common law and the English constitution, and he challenged the view that rights were secured by the courts through the common law only against the executive, and not against the legislature. Lord Scarman commented that 'Historically the question is wide open. As Sir Frederick Pollock has remarked, '[t]he omnipotence of Parliament was not the orthodox theory of English law, if orthodox at all, in Holt's time.'[47] The question of whether the common law can and does, without the need for a declared set of rights, afford protection of individual human rights continues to be hotly debated to this day[48], as do arguments around the absolute supremacy of Parliament. Debate continues as to whether the supremacy of the UK Parliament means that the UK Parliament is all powerful (political constitutionalism), or whether Parliament is itself subject to the Rule of Law to be applied by the courts (legal constitutionalism). Debates that will be further considered in the next chapter when constitutional theory is to be addressed.

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[46] *Ibid. p.14-15*

[47] *Ibid* 46, quoting Sir Fredrick Pollock, *International Law and Human Rights* (London, 1950) 128 and 134

[48] See for example, Richard Clayton 'The Empire Strikes Back: Common Law Rights and the Human Rights Act' (2015) PL 3; Roger Masterman and Se-Shauna Wheatle, 'A Common Law Resurgence in Rights Protection?' (2015) EHRLR Vol.1, 57; Lady Hale, (2014), Keynote address to the Constitutional and Administrative Law Bar Association, 'UK Constitutionalism on the March' www.supremecourt.uk.docs/speech-140712.pdf; Lord Sumption, Reith Lectures 2019 "Law expanding empire": https://www.bbc.co.uk/programmes/b00729d9/episodes/downloads, accessed 24 October 2023

Despite Lord Scarman saying in 1974 that there was a need to find a means to incorporate into English law a declaration of rights it was to be another twenty-six years before the enactment of the HRA and the incorporation of the Convention into domestic law. It however remains moot as to whether a means has been found to not only incorporate a declaration of rights, but, as Lord Scarman argued for, a means has been found by which to protect rights from the power of the state when exerted by a representative legislative institution like the UK Parliament. The status of the HRA is debated[49], it is not entrenched and could be repealed by Parliament, indeed that was recently proposed by the Conservative Party when in government.

Joining the EU

Another challenge to the prevailing orthodox view of the unlimited supremacy of Parliament came when the UK joined the then European Economic Community ("EEC") in 1973 through the signing of the Treaty of Rome (establishing the EEC), the Treaty of Paris (establishing the Coal and Steel Community), and the Euratom Treaty, (establishing the Atomic Community)[50]. The three Treaties established common institutions and decision-making mechanisms, including the Court of Justice in Luxembourg (the "ECJ"[51]), which has final jurisdiction in respect of the interpretation of EC and EU Treaties and EC, now EU, law. At the time of becoming a member of the EEC it was not envisaged by the UK government that this would lead to the creation of new legally enforceable individual rights within domestic law. The impact membership *in* the European Community would have on individual rights in those area of law within the competence of the EEC (later the EC and the EU) and the decisions of the ECJ (now the Court of Justice of the European Union) does not appear to have been foreseen. At the time there was very little case law from the ECJ dealing directly with human rights. The concept of European "citizenship", which provided for positive, legally enforceable individual rights, was undeveloped[52].

[49] For discussion see for example Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Bloomsbury publishing, 2008), chapter 8 "Interpretation and implied repeal".
[50] For a review of the history and impact on the UK of joining the EU see Peter Marshall "Forty Years on: Britain and the EU", (2013) Round Table (London) Vol. 102(1), 15-28, Philip Norton "Divided Loyalties: The European Communities Act 1972" (2011) Parliamentary History, 30: 53-64, and see John Todd *The UK's Relationship with Europe: Struggling over sovereignty"* (Palgrave Macmillan, 2016)
[51] The court is commonly referred to as the "ECJ", the European Court of Justice, although it is officially "the Court of Justice", in French: *Cour de Justice*.
[52]See Anthony Lester "European Human Rights and the British Constitution*"* in Jeffrey Jowell, and Dawn Oliver (eds), "*The Changing Constitution*" (Third Edition, Oxford University Press, 1996) 39

The enactment of the European Communities Act 1972, required to become a member of the EEC, provided for the first time a law that was superior to domestic law. The Act gave the force of law to the then existing Community Legislation, and to future legislation, which was to have direct effect in Britain[53]. The consequences for the protection of rights in the UK (and indeed the legal system generally) of joining the EEC were thought at the time to be minimal. There are echoes here of the similar attitude and belief expressed in respect of becoming a signatory to the ECHR and accepting the jurisdiction of the Strasbourg Court and the right of individual petition. The White paper published by the Government in July 1971 said:

> …the English and Scottish legal systems will remain intact. Certain provisions of the treaties and instruments made under them, concerned with economic, commercial and closely related matters, will be included in our law…the common law will remain the basis of our system, and our courts will continue to operate as they do at present. In certain cases however they will need to refer points of community law to the European Court of Justice…
>
> All essential features of our law will remain, including the safeguards for individual freedom such as trial by jury and *habeas corpus* and the principle that a man is innocent until proven guilty, as well as the law of contract and tort (and its Scottish equivalent), the law of landlord and tenant, family law, nationality law and land law.[54]

Lord Scarman in his lecture in 1974, referred to above, said it was too early to assess what impact joining the ECC would have on domestic law; no case had by that time reached the House of Lords, but in offering some predictions for the future he referred to the words of Lord Denning in the English Court of Appeal in the 1974 case of *Bulmer Limited and Anor. v. Bollinger S.A. and Anor*[55]. Lord Denning appears to have more fully understood the significant change brought about by the UK joining the EEC, he famously said:

> …when we come to matters with a European element the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforth to be part of our law... It is equal in force to any statute…
>
> …We must no longer speak or think of English law as something on its own. We must speak and think of Community law, of Community rights and obligations, and we must give effect to them. This means a great effort for the lawyers. We have to learn a new system.[56]

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[53] S.2(1)
[54] White Paper on the United Kingdom and the European Communities (1971) Cmnd 4715, pars 29 - 31
[55] [1974] 3 W.L.R. 202
[56] *Ibid* 418 - 419

Lord Denning went on comment on the different task of *interpreting* the Treaty, for which the ECJ was the final authority, and *applying* the Treaty to the case at hand, which was for the domestic courts and judges. In doing so he referred to s.3 of the European Communities Act 1972, which set out in a UK Act of Parliament that any question as to the meaning or effect of any of the Treaties or Community instrument was for the ECJ, and that Judicial notice was to be taken in respect of Treaties, the Official Journal of the Communities and of any decision or opinion of the ECJ. Lord Denning went on to say that 'even the House of Lords has to bow down to [the ECJ]' such that if a question of law arose 'as to the interpretation of the treaty' to which an answer was necessary to determine the case 'the House of Lords was bound to refer it to the ECJ.' [57]. Lord Scarman in his lecture referred to Lord Denning's judgment as explaining the need for English lawyers[58] to learn a 'new system' and setting out how different it was from the 'English model'. Lord Denning had noted that the new system was based on statutes that were drafted in more general terms, and with differing principles of interpretation[59]. These principles would involve the courts in a more positive and active role in ensuring that 'the policy and intent of the statute are not defeated by obscurities, ambiguities or omissions in its wording', it would be a role which would include the 'power of bridging gaps by "judicial legislation"'[60]. In short there was going to be a more Continental approach. Undoubtedly membership of the EU and the jurisprudence and decisions of the ECJ had a significant effect on the law in Britain[61]. There has however arguably been more resistance to a general change of approach towards a 'Continental approach' than Lord Scarman anticipated, and there are certainly those who strongly argue against a more activist role for the courts[62]. That there were predictions for such fundamental shifts in the approach of the domestic common law courts back in the early 1970s that have not come to pass speaks to the depth to which the common law tradition runs in the English, and British, legal system and courts. The roots are deep and strong and appear resistant to change. The act of creating new tribunals, dedicated to the protection of positive rights as contained in the Convention, would, it is argued, provide the

[57] *Ibid* 419
[58] This of course would also apply to all lawyers in the UK
[59] Sir Leslie Scarman, *English Law – The New Dimension*, (London: Stevens and Sons Ltd., 1974) 25
[60] *Ibid. 26*
[61] The UK is now no longer a member of the EU and with leaving goes the European Charter of Rights, save to the extent that it will continue to apply in Northern Ireland as a result of the Windsor Framework (see further below and see Chapter Six). UK citizens are no longer European citizens and no longer hold the legally enforceable individual rights that went with EU citizenship. It is not yet known however what the legacy membership of the EU will be on the British legal system, on rights and on the approach by British lawyers and judges, who for the past nearly 50 years have been exposed to a more Continental approach to law and rights.
[62] Argument which are dealt with in more detail in Chapter Two.

catalyst for the changes argued for here, including the development of a domestic human right jurisprudence, that have to date failed to fully materialise. A more inquisitorial and less adversarial approach, one suited to the protection of positive codified rights set out in the Convention (or any other bill or treaty of rights) could be ushered in with the creation of such specialist tribunals. Normative arguments as to why this should happen are addressed in the next chapter.

The early decisions of the ECtHR.

Turning back to consider developments within the Council of Europe, while the debates continued as to the rights and wrongs, or the need or otherwise, for a written declared set of legally enforceable rights within domestic law (see further below), the Strasbourg Court was busy considering and ruling on applications against the United Kingdom. Despite the views expressed at the time the Convention was ratified that there was 'no discrepancy' between the Convention and domestic law, this proved not to be the case in some significant areas.

Examples of early discrepancies include cases firstly where the residual nature of rights in English law, as opposed to a positive declaration of a right, led to a failure to protect and a finding of a violation by the ECtHR. An illustration of this is the case of *Malone v Metropolitan Police Commissioner (No.2)*[63] where Mr Malone had been charged with handling stolen property. His telephone had been "tapped" by the Post Office by means of recording telephone conversations. The prosecution had admitted to intercepting conversations in this way and this had been authorised by the Secretary of State. Mr Malone sought declarations against the Commissioner of Police that such conduct was unlawful. Megarry V-C dismissed the action on several bases, all of which serve to highlight the significant difference between protecting positive rights contained in the Convention, and protecting rights by means of residual liberties.

First, Megarry V-C found that the Convention had the status of a treaty which was not justiciable in England. In considering rights available in English law, the court found there was no right to privacy and that words transmitted over the telephone could not amount to a property right, further there was no contractual right of confidentiality with the Post Office. The court also found that although there was no law that authorised telephone tapping, there was no law

[63] [1979] Ch. 344. For a discussion of the *Malone* case and the right to privacy in domestic law see e.g. Kirsty Hughes "A Common Law Constitutional Right to Privacy – waiting for Godot" in Mark Elliott and Kirsty Hughes (eds.) *Common Law Constitutional Rights*, (Hart, 2020) in particular 97.

against it, and, finally, that in any event it was not the defendant who had intercepted the conversations, it was the Post Office and there was no law against the Post Office tapping telephones by means of recording from wires which were not on the subscriber's premises. In short, Parliament had not provided for any protection against such an invasion of privacy by way of Statute, and there was no common law right to privacy.

Having exhausted his domestic remedies Mr Malone made an application to the European Commission of Human Rights alleging a breach of his right to privacy protected by Article 8. The Commission found a violation of Article 8, which the Court subsequently upheld. The basis of the decision was that the interference with Mr Malone's right to privacy protected by Article 8(1) was not 'prescribed by law' as required by Article 8(2)[64]. Domestic English law did not provide the necessary clarity as to when the executive could intercept telephone calls. As a result of the judgment the UK Parliament enacted the Interception of Communications Act 1985[65]. The orthodox common law approach to protecting rights had come up short.

A second area concerns not so much the lack of any domestic right or protection, but rather the approach adopted by the domestic courts to affording the individual protection of rights. This can be illustrated by considering the case of *The Sunday Times v. United Kingdom*[66], where the domestic protection for freedom of expression was found wanting by the Strasbourg Court[67]. The case concerned an injunction granted by the High Court restraining the publication of a newspaper article about the drug thalidomide on the grounds of contempt of court. The thalidomide drug had been taken by several pregnant women whose children had then sadly suffered birth defects and a high mortality rate. Writs were issued by the parents against the drug company. The Sunday Times began a series of articles with the aim of assisting the parents in obtaining a more generous settlement. The Attorney-General obtained an injunction restraining publication of one of the articles on the ground that it would constitute a contempt of court. The injunction was granted in the English High Court, and although then rescinded

[64] *Malone v. United Kingdom* (1985) 7 EHRR 14 [69] – [82]
[65] It remains the case however that there is no common law tort of invasion of privacy, further discussed in Chapter Four.
[66] (1979-80) 2 EHRR 245
[67] The *Sunday Times* case is often referred to in academic writing, but for an analysis of the case as an example of the difficulties faced implementing and enforcing rights in international treaties in domestic law see Wing-Wah Mary Wong "*The Sunday Times Case:* Freedom of expression versus English contempt-of court law in the European Court of Human Rights" (1984) New York Journal of international law and politics Vol.17(1) 35, see also C.J. Miller "The Sunday Times case" (1979) MLR Vol.37(1) 96-102, and see J.A.G. Griffith, "The Political Constitution" (1979) 42 MLR 1, 14 at 15

by the English Court of Appeal it was restored by the House of Lords[68]. In re-instating the injunction and preventing publication the approach taken by the House of Lords can be described as being a rules-based approach; the publication would offend the general rule prohibiting the prejudgment of a case, it would be a contempt of court, and for this reason the injunction was justified. This approach can be seen in the speeches of Lord Reid and Lord Cross. Lord Reid said:

> I think that anything in the nature of prejudgment of a case or of specific issues in it is objectionable, not only because of its possible effect on that particular case but also because of its side effects which may be far-reaching. … Most cases of prejudging of issues fall within the existing authorities on contempt. I do not think that the freedom of the press would suffer, and I think that the law would be clearer and easier to apply in practice if it is made a general rule that it is not permissible to prejudge issues in pending cases.[69]

Lord Cross said that:

> An absolute rule—though it may seem to be unreasonable if one looks only to the particular case—is necessary in order to prevent a gradual slide towards trial by newspaper or television.[70]

The publisher, editor and a group of journalists of The Sunday Times filed an application with the European Commission of Human Rights claiming that the injunction infringed their right to freedom of expression guaranteed by Article 10. The Commission concluded that there had been a breach of Article 10 and referred the case to the Court. The Court agreed with the Commission and found a breach of Article 10 on the grounds that the interference by the injunction with the applicants' freedom of expression was not justified under Article 10(2). In approaching the case the Court acknowledged and accepted that contempt of court was peculiar to common law countries and may have been in contemplation when drafting Article 10(2) but considered nevertheless it was legitimate for the European Court to consider whether the specific application of the contempt of court law complied with Article 10. It was for the Strasbourg Court to interpret and apply the 'necessity' test set out in Article 10(2), which was an autonomous term within the Convention. The Court said that:

> If and to the extent that Article 10(2) was prompted by the notions underlying either the English law of contempt of court or any other similar domestic institution, it cannot have adopted them as they stood: it transposed them into an autonomous context. It is 'necessity' in terms of the Convention which the Court has to assess, its role being to review the conformity of national acts with

[68] *Attorney General Appellant v Times Newspaper Ltd.* [1973] AC 273
[69] *Ibid* p.300F
[70] *Ibid.* p.323B

> the standards of that instrument…the concluding words of Article 10(2) might have been designed to cover such a concept, the words provided only that the general aims of the contempt law should be considered legitimate, not every detail of them, so that the test of 'necessity' still fell to be applied in a particular case.[71]

This was not what the House of Lords was found to have done. The Court went on to find that:

> [i]t was not sufficient that the interference belonged to that class of exceptions listed in Article 10(2), nor that it was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms, but the Court had to be satisfied that it was necessary having regard to the facts and circumstances of the specific case.[72]

The Strasbourg Court found that on the *particular facts* of the case it could not be said that the publication of the article denied the drug company a fair trial, nor could it be said on the *particular facts* of the case that the authority of the judiciary would be undermined. There was here then a significantly different approach taken to the protection of the right to freedom of expression as between the House of Lords, based on the common law, and the ECtHR, based on positive rights contained in the Convention. The House of Lords adopted a more rules-based approach, seeking to generally protect the authority of the judiciary even when the right to freedom of expression was concerned, whereas the European Court's approach was more focused on the specific facts and circumstances of the case, adjusting the weight of the competing principles according to those specific facts[73]. This case illustrates the clash between the two systems, and that despite the involvement of British lawyers and the influence of English law on the drafting of the text of the Convention, there were fundamental differences between the enforcement of rights by domestic common law courts, and by the more continental Strasbourg court. Importantly the case illustrates the different approach needed in order to protect positive rights; in order to protect positive rights the arguments before the court need to be approached from the starting point of the protection the positive right of freedom of expression, an approach not adopted by the House of Lords.

The lack of procedural guarantees protecting rights was another area where domestic law was found wanting by the ECtHR in its early jurisprudence involving the UK. Examples here

[71] [60]
[72] [65]
[73] For an analysis of the different approaches see for example T.R.S. Allan 'Constitutional Rights and Common Law', (1991) OJLS Vol.11, No. 4 453, 460-462

include *Weeks v. UK*[74], concerning Article 5(4), which protects the right to speedy access to court to determine the lawfulness of detention[75]. The applicant had been sentenced to indeterminant life imprisonment and concurrent determinant sentences of imprisonment. He was released on life licence in 1976 but was recalled to prison by the Secretary of State for the Home Department in June 1977. In finding a breach of Article 5(4) the ECtHR found that the procedural safeguards in the parole board proceedings did not satisfy the requirement of Article 5(4) that lawful detention had to be decided speedily by a court. While the ECtHR noted that there was a 'duty on the Board to act fairly, as required under English law by the principles of natural justice' it found that this 'does not entail an entitlement to full disclosure of the adverse material which the Board has in its possession' and so 'did not allow proper participation of the individual adversely affected by the contested decision, this being one of the principal guarantees of a judicial procedure for the purposes of the Convention, and cannot therefore be regarded as judicial in character'[76]. Despite the existence at common law of the principle of natural justice and a duty to act fairly, these common law safeguards were found wanting and failed to protect the positive right to liberty. Further, the Strasbourg Court found that recourse to judicial review did not rectify the deficiency in the Parole Board process, finding that the limited grounds of judicial review (illegality, irrationality and procedural impropriety) were not 'wide enough to bear on the conditions essential for the "lawfulness", in the sense of Article 5(4) of the Convention[77].

These early cases illustrate the challenge to the traditional or orthodox view that Parliament could be entrusted with the protection of rights, together with the common law principles of personal liberty and natural justice, and that it afforded equivalent or better protection of rights than a positive rights-based approach. The case of *Weeks* also questioned whether the existing grounds for judicial review were going to be broad enough to allow for the full protection of human rights domestically[78]. A specific problem was the inability to consider the particular merits or substance of a decision, as opposed to the procedure, save on the very exceptional or

[74] (1988) 10 EHRR 293
[75] Following the case of *Weeks*, as well as the cases of *Thynne Wilson and Gunnell v United Kingdom* (1991) 13 EHRR 666 and *Stafford v. United Kingdom* (2002) 35 EHRR 32, the functions and procedures of the Parole Board of England and Wales were developed to comply with the procedural obligations contained in Article 5. For discussion see Patricia Londono "The executive, the parole board and Article 5 ECHR: Progress within "an unhappy state of affairs?" (2008) CLJ Vol.67(2) 230-233
[76] [66]
[77] [69].
[78] For a discussion on the impact of the HRA on judicial review see Chapter Four.

narrow basis of irrationality[79]. The influence of the Convention was therefore to see the Administrative Courts in the UK develop the interpretive 'principle of legality', and to introduce a "proportionality" test as part of a rationality assessment even before it was incorporated via the HRA into domestic law[80]. The creation of specialist domestic HRTs would go further and ensure that where necessary to protect rights there would be a full merits-based adjudication and not merely a review of the legality of a decision.

An example of the principle of legality at work can be seen in the case of *Simms*[81]. *Simms* concerned prisoners who were protesting their innocence and wanted to speak to journalists about their cases. It was accepted by the House of Lords that this in effect amounted to an impediment to access to justice. A prisoner had a legitimate interest in trying to obtain a reference back to the Court of Appeal to challenge the safety of his conviction, and a journalist could assist in this by helping to obtain new evidence. The Secretary of State however had introduced a blanket requirement that journalists sign an undertaking confirming that none of the information obtained in oral interview would be used in a professional capacity. Rules promulgated by the Secretary of State[82] enabled a prisoner to correspond with his legal advisers, to have interviews with legal advisers in prison[83] and made provision for a prisoner to correspond with a journalist[84], but the provisions regulating an oral interview by a journalist[85] were in more restrictive terms. The journalists refused to comply and a Judicial Review of the decision of the Secretary of State to in effect prevent oral interviews with journalists was issued. The House of Lords found the decision of the Secretary of State *ultra vires* as they curtailed the prisoners' fundamental rights, although did not find the Rules themselves to be. In his speech Lord Steyn referred to the 'constitutional principle of legality' in these terms:

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[79] See Jack Beatson, Stephen Grosz, Tom Hickman, Rabinder Singh, and Stephanie Palmer, *Human Rights*: *Judicial Protection in the United Kingdom*, (London: Sweet and Maxwell, 2008) 20-25

[80] See *R v. Secretary of State for the Home Department ex parte Pierson* [1998] AC 539; *R v. Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115. For discussion on the predicted shift in judicial reasoning in public law cases post the HRA see e.g. Jeffrey Jowell "Beyond the rule of law: towards constitutional judicial review" (2000) PL Win 671

[81] *R. v Secretary of State for the Home Department Ex p. Simms* [2000] 2 AC 115, a case that will be referred to again in more detail in Chapter Two. For discussion on the principle of legality and rights see for example Thomas Poole "Legitimacy, Rights and Judicial Review" (2005) Oxford Journal of Legal Studies, Vol.25, No.4, 697-725, Jason N.E. Varuhas "The Principle of Legality" (2020), CLJ 79(3) 578, and Robert French "The Principle of Legality and Legislative Intention" (2019) Statute Law Review, Vol 40, No.1 40

[82] Pursuant to Section 47(1) of the Prison Act 1952

[83] [34] of section A of the Prison Service Standing Order 5

[84] [34] of section B

[85] In section A

> even in the absence of an ambiguity there comes into play a presumption of general application operating as a constitutional principle … this is called "the principle of legality[86]

The domestic administrative law jurisprudence began to develop a more intense form of review where the decision under review affected fundamental rights[87]. The courts were to subject such decisions to 'anxious scrutiny'[88]. However, even this change of approach was still on occasion found to be insufficient to provide for the full protection of Convention rights. In *Smith and Grady v. United Kingdom*[89], the ECtHR found that the ban on gays serving in the armed forces violated Article 8. In reaching this conclusion the Court said:

> … the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention.[90]

As with the failure then of the principle of natural justice to come to the aid of Mr Weeks, the failure of the common law and Parliament to protect Mr Malone from an invasion of privacy, and the failure of the courts to properly consider the necessity of the infringement of the Sunday Times' right to freedom of expression, the reluctance (or inability) of the Administrative Court to consider the substance of the decision to ban gays in the armed forces also meant that the domestic law fell short of protecting individual human rights. These cases demonstrated weaknesses in the common law approach to rights protection. There was not only a difference of approach between protecting common law civil liberties and positive human rights, but it was a difference that had a substantive (negative) effect.

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[86] *Simms* [130] E-F
[87] For a critical view of this analysis see Jason N.E. Varuhas "The Reformation of English Administrative Law? "Rights, Rhetoric, and Reality" (2013) CLJ Vol 72, Issue 2, 369-413. See further in Chapter Four.
[88] See e.g. *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514*; R v Secretary of State for the Home Department, ex part Brind* [1991] 1 AC 517. See also post HRA Michael Fordham and Thomas de la Mare "Anxious Scrutiny, the principle of Legality and the Human Rights Act" (2000), JR Vol.5(1) 40-51
[89] (2000) 29 EHRR 493
[90] *Smith and Grady* [138]

A British Bill of Rights and the enactment of HRA

The call for a British Bill of Rights, over and above membership of the Convention, had by the end of the 1960s begun to increase. Anthony Lester (then a practicing barrister, later to become Lord Lester) and John MacDonald (also a practicing barrister), published pamphlets in 1968[91] and 1969[92] respectively calling for a British Bill of Rights. Momentum built in the 1970s, with Lord Scarman delivering his influential Hamlyn lecture (referred to above) in 1974. In 1975, the House of Commons held a general debate on the issue of a British Bill of Rights, and Lord Wade presented a draft of a Bill of Rights which was debated by the House of Lords[93]. There was also a Labour Party discussion paper published, *United Kingdom Charter of Human Rights: a discussion document for the Labour Movement* in 1976[94] and in 1977 the Standing Advisory Committee on Human Rights for Northern Ireland published a report in favour of a Charter of Rights[95], based on the Convention. The same year a House of Lords Select Committee was set up to consider the question of 'whether a Bill of Rights is desirable and if so what form it should take' which reported in May 1978[96]. By a majority the Committee recommended a Bill of Rights be adopted, the report and Lord Wade's bill were debated[97] but ultimately no British Bill of Rights was created.

Moving into the 1980s, while many MPs across all political parties favoured a British Bill of Rights, or incorporation of the ECHR, both the Conservative government under Margaret Thatcher and the Labour Party (most notably when under the leadership of Michael Foot and Neil Kinnock) remained opposed of any form of Bill of Rights[98]. Following a review of Labour

[91] Anothy Lester, *Democracy and Individual Rights* (1968) Fabian Tract No.390

[92] John MacDonald *Bill of Rights* (1969) Liberal Research Department

[93] HL Deb 25 March 1976 vol 369 cc775-817. During this debate Lord Wade said 'It used to be assumed that adequate protection for human rights and the preservation of individual liberty against the abuse of power could and would be provided by the development of case law, coupled with Statute Law. But there is a growing consensus of opinion that the individual citizen today lacks the protection which, in a modern, civilised community, he needs. Some further safeguards are required. The development of the Common Law is too slow and the mass of modern legislation is so overwhelming that that in itself may be a danger against which the individual needs protection. Hence, the growing interest in the subject of a Bill of Rights.' See for discussion generally at this time M Glen Abernathy "Should the United Kingdom Adopt a Bill of Rights?", The American Journal of Comparative Law (1983) 431, and Michael Zander, *A Bill of Rights?* (British Institute of Human Rights, 1975), and later editions (London: Sweet and Maxwell, 1985 and 1997)

[94] Written by the Human Rights Sub-committee of the Labour Party (London: Labour Party, 1976)

[95] Standing Advisory Commission on Human Rights (SACHR): proposed Bill of Rights for Northern Ireland; views of the Northern Ireland Committee of Irish Congress of Trade Unions, Her Majesty's Stationary Office 1977, Cmd 7009, https://cain.ulster.ac.uk/hmso/cmd7009.htm, access on 30 July 2024

[96] Bill of Rights: Select Committee Report (H.L, 176, 1977-78)

[97] HL Deb 29 November 1978 vol 396 cc1301-97, https://api.parliament.uk/historic-hansard/lords/1978/nov/29/bill-of-rights-select-committee-report, accessed on 30 July 2024

[98] See Robert Blackburn, *Towards a Constitutional Bill of Rights in the United Kingdom: Commentary and Documents (Constitutional Reform Series)*, (London and New York, Pinter,1999) 7-11

party policy in 1987, under the leadership of Neil Kinnock, the conclusion of the report in 1989 was that:

> A Bill of Rights … will not provide the protection that we regard as necessary … a Bill of Rights would need constant and detailed interpretation by the courts, with no certainty that its general provisions would protect the most vulnerable members of the community.[99]

The policy the Labour party subsequently adopted was that, instead of a Bill of Rights there was to be a series of Acts Parliament covering differing rights, so for example children's rights, employee rights, and the right of assembly. This policy was then further revised in the lead up to the 1992 general election when the concept of a general statement of human rights contained in primary legislation was to be favoured[100]. In the event Labour lost the 1992 election and the Conservative Government of John Major remained against the enactment of a British Bill of Rights. It was to be the new Labour government under Tony Blair in 1998 which finally delivered domestically enforceable human rights by means of the HRA, incorporating Convention rights into domestic law.

The eventual enactment of the HRA came in 1998, with the Act coming into force on 2 October 2000. The HRA incorporated rights in the Convention into domestic law[101], together with the jurisprudence of the Strasbourg Court and Commission. Gearty has described the HRA as having 'transplant[ed] a regional human rights instrument (the ECHR) into domestic law, at the same time bringing with it all the material that had been/was to be generated by the ECHR's adjudicative mechanism, chiefly …the rulings of the European Court of Human Rights'[102].

Two of the rights omitted from the Convention rights scheduled to the HRA were Article 1, that provides that the 'High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms' set out in the Convention, and Article 13, the 'right to an effective remedy before a national authority'. The reason for the omission of these Articles was because the HRA was intended to enable the enforcement of the Convention rights

[99] Papers on the party's 18-month review of all policy areas following the loss of the 1987 election, published in May 1989 under the title "Meet the Challenge, Make the Change".
[100] See Robert Blackburn, *Towards a Constitutional Bill of rights in the United Kingdom: Commentary and Documents (Constitutional Reform Series)*, (London and New York, Pinter,1999) 7-11
[101] Some argue that the HRA did not 'incorporate' the Convention rights, see for example the then Lord Chancellor at HL Debs, 585, col 422 (5 Feb 1998)
[102] Connor Gearty, "The Human Right Act comes of age", (2022) EHRLR 2, 117

domestically, making the inclusion of Article 1 and Article 13 unnecessary[103]. In setting out the case for incorporation, the White Paper made explicit reference to the cost and delay in taking a case to Strasbourg, both of which clearly impede enforcement of Convention rights. The White paper said:

> It takes on average five years to get an action into the European Court of Human Rights once all domestic remedies have been exhausted; and it costs an average of £30,000. Bringing these rights home will mean that the British people will be able to argue for their rights in the British courts – without this inordinate delay and cost.[104]

Following the enactment of the HRA it will be argued that the issue of costs can still be a barrier to protecting and enforcing rights in the domestic courts, both because of limited funding available, the costs of litigation and the generally low level of damages awards impacting on costs benefit analysis. It is suggested that the creation of specialist tribunals with bespoke cost rules would be one way of further reducing the costs barrier and giving greater access to claimants seeking to enforce their rights, by for example extending Qualified One-Way Costs Shifting to all HRA claims, and/or widening the use of cost capping in HRA cases.

The intention was not however for the HRA to be the final step in rights protection in Britain, but rather it was to be the first step towards the creation of a British Bill of Rights[105] (which to date has not happened) and was drafted in a way to avoid some of the thorny constitutional issues a British Bill of Rights presented. It was drafted so as to preserve the sovereignty of the UK Parliament and maintain the balance of power as between the courts and Parliament. The domestic courts were not given the power to strike down Acts of Parliament (primary legislation), but only to issue declarations of incompatibility under s.4 (by the higher courts), and then only if it was not possible to interpret and give effect to primary legislation compatibly with Convention rights using the power granted by s.3. The domestic courts were directed to 'take into account' the judgments and decisions of the Strasbourg Court and Commission (s.2) and 'as far as it is possible to do so' to read and give effect to primary legislation in a way that is compatible with Convention rights (s.3). On the other hand, some, arguably modest, limit was placed on UK Parliamentary Sovereignty by the inclusion of s.19 which requires the

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[103] See https://www.equalityhumanrights.com/human-rights/human-rights-act accessed on 21 August 2025
[104] Para 1.14 "Rights Brought Home: The Human Right Bill, CM 3782, October 1997: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf, accessed 21 August 2025. Allowing for inflation, £30,000 as at August 2025 would be £76,401.25.
[105] See Tom Hickman, *Public Law after the Human Rights Act* (Hart Publishing, 2010) 22, and see also for discussion Francesca Klug "A Bill of Rights, do we need one or have we got one?", (2007) PL 701.

Minister responsible for a Bill to make a 'statement of compatibility', so state that they believe the Bill to be compatible with Convention rights, or alternatively, if they do not so believe, to make a statement to the House of Commons setting out that the Bill may not be compatible but that the Bill should in any event be enacted. A Joint Committee on Human Rights was also set up whose role is to scrutinise proposed legislation for its likely impact on human rights and to report back to Parliament[106].

The HRA was described as 'bringing rights home'[107] and was intended to bring about a culture change. Lord Irvine stated during the Second Reading of the Bill 'A culture of awareness of human rights will develop'[108]. He said that 'This bill will bring rights home. People will be able to argue for their rights and claim their remedies under the Convention in any court or tribunal in the United Kingdom. Our courts will develop rights throughout society.' As Hickman has put it '[t]he idea was that human rights values and human rights thinking would be integrated into the process of public authorities and the mind-set of public officials…human rights would be come to be seen as values and considerations that shaped government projects as they happened'[109]. The extent of s.6 HRA (making it unlawful for a public body to act incompatibly with Convention rights) was significant in this regard because it applies not only to discretionary decision making, a matter that could already be subject to public law challenge, but also to operational decisions, which were matters that could give rise to claims in tort. In this way the HRA 'challenges the normative and procedural distinction in domestic law between administrative law and tort.'[110] This distinctiveness, this new type of claim, is argued here to give rise to the need for new and distinctive adjudicative processes and procedures, and that using the existing common law courts and administrative courts as the forums for rights claims and remedies failed to recognise the distinct nature of claims of breaches of Convention rights, and that distinct, bespoke courts/tribunals are needed[111].

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[106] For more detail see e.g. David Feldman "Parliamentary Scrutiny of Legislation and Human Rights" (2002) *Public Law* 323, and see also Anthony Lester "Parliamentary Scrutiny of legislation under the Human Rights Act 1998", (2002), Victoria University of Wellington Law Review, Vol.33(1), 1-26, and Michael C Tolley "Parliamentary Scrutiny in the United Kingdom: Assessing the work of the Joint Committee on Human Rights", (2009), Australian Journal of Political Science, Vol.44, 41-55

[107] The HRA provided for a new cause of action under s.7, enabling a claim to be brought before any UK court based on a violation of Convention rights, and an obligation under s.6 for public bodies to act compatibility with Convention rights.

[108] Hansard HL col 1228, 3 November 2007

[109] Tom Hickman, *Public Law after the Human Rights Act* (Hart Publishing, 2010) 24

[110] *Ibid.* 23

[111] The difficulties of using the existing courts to enforce and protect positive rights (as opposed to negative liberties) are the subject of Chapters Three and Four.

It was clear that another intention of the HRA, or 'distinct benefit' was that 'British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe' and 'our judges will be able to contribute to this dynamic and evolving interpretation of the Convention.'[112] Hickam suggests, surely correctly, that the intention was for the HRA to lead to 'a distinctive and domestic jurisprudence on human rights.'[113] This it will be argued here has not come to pass in the way that was envisaged, not least due to the way the doctrine of the Margin of Appreciation is now being interpreted by the domestic courts[114] and the mirror approach taken to damages awards under s.8[115]. It will be argued that the creation of specialist tribunals with expert judges is more likely to give rise to a distinctive domestic human rights jurisprudence, not only at the UK Level, but also at the devolved level. Devolution, and the constitutional transformation it ushered in, is the next significant stage to be considered.

Devolution and human rights

The passing of the HRA was part of wider and significant constitutional reform in the UK[116] that transformed the UK from a heavily centralised unitary state, into a pluralistic state with powers devolved to national parliaments. While devolution has been described as a 'radical constitutional change'[117], it has also been said that this was not 'part of a wider strategy' but rather a 'pragmatic attempt to solve particular problems and aspirations'[118]. The White Paper accompanying the Human Rights Bill firmly placed the enactment of the HRA within this wider context of constitutional reform[119].

The debates that had been ongoing about rights protection in the UK and the need for a British Bill of Rights, with differing views as to the omnipotence or otherwise of Parliament, the

[112] Secretary of State for the Home Department, "Rights Brough Home: The Human Rights Bill" (cm 3782, 1997), para 1.14 and 2.5
[113] Tom Hickman, *Public Law after the Human Rights Act* (Hart Publishing, 2010) 27
[114] See Chapter Four.
[115] See Chapter Four.
[116] For discussion on the constitutional change brought about by devolution see Michael Keating "Reforging the Union: devolution and Constitutional Change in the United Kingdom" (1998) The Journal Federalism, Vol.28(1), 217 and see also Charlie Jeffrey "Devolution in the United Kingdom: Problems of a Piecemeal Approach to constitutional Change", (2009) The Journal of Federalism, Vol.39(2) 289
[117] Peter Leyland, "The multifaceted constitutional dynamics of U.K. devolution" (2011) International Journal of Constitutional Law, 9(1) 251
[118] *Idib.*251- 252.
[119] The Home Department, Rights Brought Home: The Human Rights Bill, 1997 CM3782, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf accessed on 25 October 2021, see the Forward by Tony Blair

impact and influence the Convention was having on domestic law, were running alongside the debates around self-government of Scotland and Wales, and a determination to bring "the Troubles" in Northern Ireland to an end.[120]. A Royal Commission on the Constitution had been set up in 1969 with the report published in 1973[121] which recommended a transfer of power to Scottish and Welsh Assemblies and executive bodies but rejected the idea of a federal system with a justiciable Bill of Rights[122]. The HRA was to be the way rights would be protected and was to apply across the whole of the United Kingdom. The obligation owed to protect the rights in the Convention was owed by the UK government, and, as Himsworth has noted[123] there was 'an underlying assumption – an assumption which has sustained during the period since the HRA was passed – that the international treaty basis of the rights demanded a high degree of harmonisation (if not uniformity) of observance and implementation of rights.'[124] The means by which this was to be achieved was through 'United Kingdom-level judicial supervision'[125]. At this time this was through the separate jurisdictions of the Appellate Committee of the House of Lords, and the devolution jurisdiction of the Judicial Committee of the Privy Council, later with the creation of the UK Supreme Court the jurisdictions were combined. There was then an apparent divergence in respect of human rights, in that at the same time as power was being decentralised and devolved, the incorporation of human rights was to be done at the UK level.

Before looking in more detail as to how human rights protection fits within the devolved settlements, it is helpful first to make some observations about the UK's devolved constitution. An important feature of the UK's constitution is that it has evolved over time, it has not been designed but rather amended to meet particular concerns and demands[126]. There is no one document that contains the UK's constitution. Constitutionally, the UK Westminster Parliament is sovereign and supreme, however that Parliament has now created devolved institutions to which devolved powers have been granted to Scotland, Northern Ireland and Wales. The

[120] In Scotland and Wales, there was the question of how to meet the demands for greater self-government without destroying the national framework of the UK as a whole.
[121] Report of the Royal Commission on the Constitution, 1969-1973, Cmnd. No. 5460 (1973).
[122] *Ibid.* 538-39, 746-55.
[123] Chris Himsworth, "Devolved Human Rights", 4 October 2011, *University of Edinburgh Working Papers*, (Edinburgh Law School Working papers No.2011/22)
[124] *Ibid* 2-3
[125] *Ibid.* 3
[126] N. Walker *Final Appellate Jurisdiction in the Scottish Legal System* Scottish Government https://www.pure.ed.ac.uk/ws/portalfiles/portal/13482020/FINAL_APPELLATE_JURISDICTION_IN.pdf 15. For a history of the evolution of the UK's constitution see Peter Cane (ed) *The Cambridge constitutional history of the United Kingdom. Volume 2, The Changing Constitution* (Cambridge University Press, 2023) and see Dawn Oliver *Constitutional Reform in the United Kingdom* (Oxford University Press, 2003)

current settlement is asymmetric[127]; there is, for example, no legislature for England and the devolved powers differ as between the nations that make up the UK. Additionally, England and Wales (to a large extent) share their law and form a single jurisdiction, and there is no separate court system within Wales (save for some tribunals). There is in contrast a separate and distinct Scots Law and Scotland and Northern Ireland have their own courts, tribunals and court structures. There is however only one apex court, the UK Supreme Court, the final appellate court of the UK, although not for criminal cases arising in Scotland[128]. As is apparent, it is difficult to make general statements about the UK's constitutional structure and settlement, there are often "but fors" and exceptions. The UK's constitution is complex and is to be found and understood by reference to several Acts of Parliaments, and conventions. It is therefore necessary to consider each devolved nation individually due to the many differences that arise, in terms of history, politics and law.

Below is a summary of the constitutional history and the road to devolution for each of Scotland, Northern Ireland and Wales, including the incorporation of rights via the HRA and Acts of devolution. It will be important to understand the different constitutional histories of the devolution settlements now in place in order to consider how new specialist Human Rights Tribunals could be created and operate. The HRA remains a treaty-based system of rights protection, with duties owed by the UK at the international level. There is therefore a need for a degree of harmonisation of rights protection at the UK level. However, there may also be advantages in having at the devolved level a higher degree of flexibility to allow each devolved nation to apply and give effect to rights in a way that can adjust and allow for political, social and legal differences. The relationship between specialist HRTs with the respective devolved governments and parliaments, and with the UK Parliament and the UK Supreme Court will be important considerations. These relationships and how specialist tribunals would fit within the UKs constitution and be part of a "differential constitution" will be explored more in Chapters Two and Six, but for now more a descriptive approach is adopted.

Scotland:

The original Parliament of Scotland existed from the early 13th century until 1707, when the then independent Kingdom of Scotland merged with the Kingdom of England under the Acts

[127] See C.M.G. Himsworth "Devolution and its jurisdictional Asymmetries", (2007) MLR Vol.70(1) 31-58
[128] Save to limited extend set out further below in respect of procedural matters raising human rights compatibility issues.

of Union of 1707[129]. It was at this time that Great Britain was created. The Parliament of Scotland was closed, and a new Westminster Parliament created, a Parliament for Great Britain. Jumping, indeed leaping forward some 300 years, it was in 1969 that a Royal Commission was established to consider the structure of the UK constitution and various models of devolution. Pressure for some form of devolution for Scotland then grew and in 1978 a Scottish Assembly was created following the enactment of The Scotland Act 1978. The UK conservative government of 1979 to 1997 devolved further powers to the administrative government of Scotland and Scottish business in Parliament was afforded distinct treatment but it was not until the new Labour Government of 1997 that devolution to Scotland increased in any significant way[130]. A referendum on proposals for further devolution was held in September 1997 which supported further devolution. A Scotland Bill was introduced in December 1997, which became the Scotland Act in December 1998[131].

The Scotland Act 1998 created (or re-created) the Scottish Parliament and provided for a reserved model of devolution; the Scottish Parliament was granted primary legislative powers in respect of all matters, save for those that were reserved to the Westminster Parliament. The Scottish Parliament cannot amend the Scotland Act, cannot restrict the UK Parliament's power to legislate for Scotland, and cannot legislate on reserved matters as contained in schedule 5 of the Scotland Act ("SA"). The reserved matters pertain in the main to matters of foreign affairs, defence, immigration and nationality, national security, extradition as well as some matters concerning finance, trade, industry and energy. Human rights are not included as a reserved matter, but the HRA is a protected enactment in Schedule 4. Specific issues relating the HRA and devolution in Scotland will be set out further below.

The SA comprehensively provides for the means by which questions as to the competence or otherwise of the Scottish Parliament are to be determined by the courts[132], these are referred to

[129] See Chrsitopher A. Whatley "The Making of the Union of 1707: History with a history", in Tom. M Devine (Edinburgh University Press, 2008)
[130] See Richard Findlay "The Turbulent Century: Scotland since 1900", in Jenny Wormald *Scotland: A History* (Oxford University Press, 2020) 215-224
[131] See Kevin Harrison, Tony Boyd, *The Changing Constitution*, (Edinburgh University Press, 2006), 123-126 and see "The Evolution of Scottish Devolution", in Russell Deacon and Alan Sandry *Devolution and United Kingdom: England, Scotland, Wales and Northern Ireland* (Edinburgh University Press, 2007) 50-62
[132] See Scheule 6 Part II SA. For a discussion of constitutional review in the devolved context as it applies in particular to Scotland see Christopher McCorkindale, Aileen McHarg and Paul Scott "The courts, devolution and constitutional review", (2017) University of Queensland Law Journal, Vol.36(2), 289-310

as "devolution issues"[133]. Under the SA the lower courts can refer devolution issues to the Inner House of the Court of Session for civil matters[134] and to the High Court of Judiciary for criminal matters[135]. For a tribunal from which there is no appeal, any devolution issue must be referred to the Inner House of the Court of Session, any other tribunal may also make such a reference[136]. Any reference made to the Inner House must be determined by that court, but the decision can be appealed, as of right, to the UK Supreme Court[137]. Additionally, the Inner House may itself refer a devolution issue to the UK Supreme Court[138], where the issue has arisen in a case before it (so not when it has been referred by a lower court to the Inner House)[139]. The High Court of Judiciary must determine any devolution issue referred to it by a lower court but has a discretion as to whether to refer a devolution matter arising in a case before it or determine it itself. If the court chooses to determine the matter itself and not make a reference, then while an appeal can be made to the UK Supreme Court, permission is required either from the UK Supreme Court, or from the Scottish High Court of Judiciary[140]. The UK Supreme Court has an additional and specific role in reviewing and scrutinising Bills prior to enactment for competence and compatibility with the HRA[141]. This role is similar across Scotland, Northern Ireland and Wales and so will be dealt with further below when considering the constitutional role of the UK Supreme Court.

In terms of the HRA and human rights more specifically, it is not possible to describe human rights as being either a devolved matter or a reserved matter. Whether or not a human rights matter is reserved or devolved will depend on whether the specific issue to be decided is reserved or devolved.

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[133] Whether a devolution issue is a matter related to competency or human rights compliance can at times be a hotly contested and important distinction. An illustration of this can be seen in the case of *Somerville v Scottish Ministers* (2008) SC (HL) 45, which concerned a human rights challenge that was raised as a devolution issue against the Scottish prison service. It was argued by the Scottish Minister that the 12-month time limit in the HRA should apply to matters raised under the SA. The House of Lords ultimately determined that matters of competency should be treated the same, whether the lack of competence arose as a result of an incompatibility with the HRA or otherwise, there could be no time bar on a challenge to lack of competency.

[134] Schedule 6 Part II para 7

[135] Schedule 6 Part II para 9

[136] Schedule 6 Part II para 8

[137] Schedule 6 Part II para 12

[138] Schedule 6 Part II para 10

[139] Schedule 6 Part II para 11

[140] Schedule 6 Part II para 13

[141] How these provisions may be altered and allow for a role for a specialist human rights tribunal in Scotland will be considered in Chapter Six.

While the HRA itself operates in a similar way in Scotland as it does in England, there are significant differences as a result of devolution and the SA. The s.6 obligation on public bodies applies in the same way, but importantly the Scottish government is a public body subject to the s.6 obligation. The obligation on courts to enforce rights through s.7 and s.8 is the same, but there are further significant differences when it comes to legislative powers, legislative review of Acts of the Scottish Parliament, and the effect of s.4 declarations of incompatibility. There are limits placed on the legislative power of the Scottish Parliament in respect of Convention rights in that the Scottish Parliament cannot legislate in a way that is incompatible with Convention rights, to do so would be outside its competence[142]. Further, Acts of the Scottish Parliament are deemed to be 'subordinate legislation'[143] in respect of the HRA and so can be struck down by the courts if incompatible with Convention rights. When it comes to s.4 declarations of incompatibility matters become more complex. If a court makes a s.4 declaration, which will obviously concern an Act or provision of an Act of the UK Parliament, if it concerns a devolved matter and something which falls within the competency of the Scottish Parliament, then the duty to take remedial action will fall on the Scottish Ministers[144].

While the Scottish Parliament is clearly competent to legislate for additional human rights protection, and so in this way deviate from the rest of the UK, difficulties have been encountered. An example is the original United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill ("UNCRC Bill") passed in Scotland in March 2021 to incorporate the UN Convention on the Rights of the Child ("UNCRC") into Scotland. The Bill was the subject of a Reference by the Attorney General and Advocate General for Scotland[145]. The UNCRC Bill sought to incorporate the rights contained in the UNCRC in a similar way the way the HRA incorporated Convention rights. While it was not contended that the Scottish Parliament did not have the legislative competence to incorporate a version of the UNCRC into Scottish law, it was argued that the manner in which it was to be done would give the Scottish courts extensive powers to interpret and scrutinise primary legislation passed by the UK Parliament, such that would impact on (limit) the power of the UK Parliament to legislate for Scotland. It was argued by the Law Officers that provisions in the UNCRC Bill modified

[142] S.29(2)(d) of the Scotland Act 1998
[143] S.21(1) HRA.
[144] S.10(3) HRA
[145] Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [2021] UKSC 42, [2021] 1 WLR 5106. For an analysis of the Reference see for example Graeme Cowie "The Power to Make Laws for Scotland", (2022), PL Apr, 189-199

s.28(7) of the SA and were therefore outside the legislative competence of the Scottish Parliament[146]. The UK Supreme Court agreed. A revised and much paired down version of the UNCRC Bill was subsequently drafted and enacted in 2024.

In addition to incorporating the UNCRC the Scottish government has also consulted on a Human Rights Bill for Scotland, which would incorporate additional rights contained in international human rights treaties, including the International Covenant for Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the UN Convention on the Rights of Persons with Disabilities. In addition, the Bill will include a right to a healthy environment. The Bill was due to be introduced by June 2024, but has been delayed.[147]

Mention ought also to be made here the Scottish Commission of Human Rights, which was set up in 2006[148] and whose duty is to promote human rights[149], including Convention rights under the HRA as well as other human rights 'contained in any international convention, treaty or other instrument ratified by the United Kingdom.'[150] The Commission has no power to provide assistance to or in respect of legal proceedings[151], but may intervene in civil proceedings[152]. It will be argued that Third Party interventions should be encouraged and easily facilitated in the specialist HRTs, and a dialogue with the devolved nations' Human Rights Commissions encouraged.

Ultimately, while the UK Parliament retains the power to legislate on devolved matters under the SA[153], and while sovereignty remains with the UK Parliament and it is the UK Parliament that is supreme, the decision as to whether to set up a new HRTs, what role it should play and what powers it should have should constitutionally (politically) be left to the Scottish

[146] Guidance was also sought by the Law Officers from the UK Supreme Court on the proper application of s 101(2) of the SA to the referred provisions (s.101(2) of the SA requires that a provision that could be read in such a way as to be outside the competence of the Scottish Parliament must be read as narrowly as is required for it to be within legislative competence, if such a reading is possible).
[147] https://www.gov.scot/publications/human-rights-bill-scotland-analysis-consultation-responses/. Accessed 26 August 2020
[148] Scottish Commission for Human Rights 2006, s.1
[149] *Ibid*. s.2
[150] *Ibid*. s.2(2)
[151] *Ibid.* s.6
[152] *Ibid* s.14
[153] s.28(7)

Parliament. It will be argued creating a specific human rights jurisdiction with expert human rights tribunals will be an important part of the differential constitutional model being argued for here and that many of the benefits within the tribunal system and at the devolved level would be lost if provision is not made for each tribunal to be tailored to each nation of the United Kingdom, it will nevertheless be for each devolved nation to decide upon and set up their own specialist tribunals, albeit with the need for the Westminster Parliament to provide for the power to do so. There are important political, historic and legal traditions within the different nations of the UK which will and should impact on how human rights are protected and enjoyed. An obvious example in Scotland is the desire of the Scottish Parliament to incorporate more rights contained in international treaties into domestic (Scottish) law. The precise way in which such a Tribunal could be set up compatibly within the current devolution settlement is open to debate, and the full legal implications need to be carefully thought through. This will be returned to in Chapter Six.

Northern Ireland.

Northern Ireland has had a traumatic and turbulent past, the reasons for which are many, and deep rooted. A constant feature however has been the relationship of Ireland and Northern Ireland with the UK, and the Westminster Parliament[154]. Putting things very simply and neutrally, a Union between Ireland and Great Britain was first formed in 1801 creating the United Kingdom of Great Britain and Ireland. Then in 1920, following failed attempts to introduce limited home rule for Ireland, much of the island of Ireland was removed from the union[155]. The Government of Ireland Act 1920 established parliaments for "Southern Ireland and Northern Ireland and a Council of Ireland"[156], providing for two "home rule" institutions in Ireland. Both jurisdictions remained part of the UK with a provision for future reunification in the formation of a Council of Ireland[157]. The Irish War of Independence meant that Home Rule however never in fact took effect in Southern Ireland and in 1922 the Anglo-Irish Treaty led to the establishment of the Irish Free State. The institutions set up under the 1920 Act for Northern Ireland continued to function until they were suspended by the British parliament in 1972, as a consequence of "the Troubles". It was not until the Belfast (Good Friday) Agreement signed on 10 April 1998 that the Troubles were ended and a devolved form of government was

[154] See Johnathan Tonge *Northern Ireland: conflict and change* (Routledge, 2013) 4-49
[155] See John Ranalagh *A Short History of Ireland* (Cambridge University Press, 2012) Chapter 4 "Home Rule" 145-191
[156] See introductory text of the 1920 Act.
[157] The Government of Ireland Act 1920, S. 3

established in Northern Ireland.[158] The devolution Act for Northern Ireland, the Northern Ireland Act 1998, repealed the Ireland Act 1920 (s.2).

The protection of rights and the ECHR were central to the Belfast Agreement. The Agreement is, in part, a treaty between two sovereign states, the UK and Ireland, and made specific reference to the possibility of a Bill of Rights for Northern Ireland, it declares, *inter alia*, that:

> There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including
> (a) …
> (b) the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission;
> (c) arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland.

The approach and model of devolution to Northern Ireland under the Northern Ireland Act 1998 is like that in Scotland, with some important differences reflecting the specific history, and politics of Northern Ireland. As with Scotland legislative powers in Northern Ireland are restricted by reference to excepted matters and compatibility with Convention rights, and also significantly now in respect of compatibility with Article 2(1) of the Protocol on Ireland in the EU Withdrawal Agreement.[159] (the effect on Northern Ireland as a result of the UK leaving the EU will be further discussed below).

In terms of the application of the HRA, again this reflects the position as exists in Scotland, but there are some additional equality and discrimination rights protections included in the Northern Ireland Act 1998. A statutory duty is placed on public authorities to have 'due regard to the need to promote equality of opportunity' between persons of different religions, between men and women, between persons with disability and between persons with and without dependants[160]. Public authorities are also required to have due regard to 'the national and

[158] Kevin Harrison, Tony Boyd, *The Changing Constitution*, (Edinburgh University Press, 2006), 116-119, and see also "Northern Ireland: Historical Political Development", in Russell Deacan and Alan Sandry *Devolution and United Kingdom: England, Scotland, Wales and Northern Ireland* (Edinburgh University Press, 2007) 150-161

[159] S.6(2) Northern Ireland Act 1998. How s.2 of the Windsor Framework impacts on the continued application of UK legislation in Northern Ireland see the recent decision of the Northern Ireland High Court in *Dillon and others Application and In the Matter of the Northern Ireland Troubles (Legacy Reconciliation) Act 2023 and the Secretary of State for Northern Ireland* [2024] NIKB 11

[160] S.75 Northern Ireland Act 1998

cultural identity principles', which are that everybody in Northern Ireland is free to 'choose, affirm, maintain and develop their national cultural identity and express and celebrate that identity in a manner that takes account of the sensitivities of those with different national and cultural identities and respects the rule of law.'[161] Provision is also made in the Northern Ireland Act for the recognition of the status of the Irish language.[162]

As with Scotland, The Northern Ireland Act provides for the means by which devolution issues are to be determined by the courts. References can be made to the Northern Ireland Court of Appeal by the lower courts[163], and the Court of Appeal can make a reference to the UK Supreme Court, but permission is required[164].

An important consequence of the Belfast (Good Friday Agreement) was the setting up of the Northern Ireland Human Rights Commission[165] whose powers were set out in the Northern Ireland Act 1998 as amended by the Justice and Security (Northern Ireland) Act 2007, and the EU Withdrawal Act 2020. The Commission's functions[166] include advising the Northern Ireland Assembly whether a Bill is compatible with Convention rights, either on its own initiative or after receipt of a request for advice[167]. The Commission can also provide assistance to individuals who have or wish to bring proceedings that involve 'law or practice relating to the protection of human rights', and this assistance includes seeking permission to intervene[168]. The Commission can also 'bring proceedings involving law or practice relating to the protection of human rights.'[169]

A further constitutional upheaval, with consequences for rights protection in Northern Ireland, came with the UK leaving the EU ("Brexit") in December 2020, which arguably had a more

[161] S.78F Northern Ireland Act 1998, national and cultural identity is a reference to a person's "religious belief, political opinion or racial group".
[162] S.78J Northern Ireland Act 1998. The Act also creates an Irish Language Commissioner, a commissioner for the Ulster Scots and the Ulster British tradition and an Office of Identity and Cultural Expression, see also Schedules 9A, 9B and 9C.
[163] Schedule 10 Part II para 7
[164] Schedule 10 Part II para 9 and 10
[165] For the importance of the Northern Ireland Human Rights Commission see Colin J Harvey "Building a Human Rights Culture in a Political Democracy: The Role of the Northern Ireland Human Rights Commission" in Colin Harvey *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Bloomsbury Publishing, 2001).
[166] Set out in s.69 Northern Ireland Act 1998
[167] S.69(4) Northern Ireland Act 1998
[168] S.69(5)(a) and s.70 Northern Ireland Act 1998
[169] S.69(5)(b) Northern Ireland Act 1998.

significant impact on Northern Ireland than the rest of the UK given the land border with Ireland (which is of course a member of the EU)[170]. The impact of Brexit on rights protection in the UK is briefly and broadly dealt with below, but it is important here to make reference to the specific issues it created in Northern Ireland. When leaving the EU there was a need to somehow impose a customs and regulatory border across the island of Ireland which satisfied both the EU, the UK government and the political parties in Northern Ireland, in particular the Democratic Unionist Party which staunchly supports the Union with Great Britain. The compromise finally agreed was contained in the Windsor Framework to the Withdrawal Agreement, signed in February 2023, which amended the previous Ireland/Northern Ireland Protocol to the Withdrawal Act 2020. The Windsor Framework retained a role for the CJEU in respect of matters affecting trade but, importantly in the context of this thesis, it also contains the commitment in Article 2[171] to ensure that there is no 'diminution' in rights protection[172]. Article 2 provides that the protections in place in Northern Ireland pre-Brexit for the 'rights, safeguards, and equality of opportunity' set out in the Belfast (Good Friday) Agreement are not to be reduced as a result of the UK leaving the EU. In addition, some equality laws, set out in Annex 1 to the Windsor Framework, will 'keep pace' with EU equality laws. Some of the rights contained in the Belfast (Good Friday) Agreement are themselves underpinned by these EU anti-discrimination laws, protecting against discrimination on the grounds of gender, race, religion, belief, disability and sexual orientation. Other relevant EU laws, set out in Annex 1, include Parental Leave Directive, Victims' Directive, Pregnant Workers Directive as well as other specific measures aimed at protecting those with disabilities. The commitments in the

[170] For an analysis devolution and the relationship between the Belfast Agreement, the UK Parliament and the EU pre Brexit see Gordon Anthony and Andrew Evans, "Northern Ireland, Devolution and the European Union", in Colin Harvey *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Bloomsbury Publishing, 2001).

[171] Article 2, Rights of individuals (1). The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.(2). The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards.

[172] For an analysis of the negotiations leading up to the adoption of Article 2 see Christopher McCrudden, "Law and a crisis of trust: human rights and the negotiation of article 2 of the Ireland-Northern Ireland Protocol", (2023) Irish Jurist 70, 156

Windsor Agreement apply to *all law* in effect in Northern Ireland, so to legislation passed by the Northern Ireland Assembly and significantly the UK Parliament[173].

A dedicated mechanism has been put in place to ensure compliance with the commitments contained in Article 2 of the Windsor Framework which comprises of the Northern Ireland Human Rights Commission and the Equality Commission of Northern Ireland. These bodies are responsible for monitoring and reporting on the implementation of the commitments as well as providing advice to the government. The Commissions can either work jointly or separately and can also work with the Irish Human Rights and Equality Commission. Individuals also have the right to bring a claim by way of judicial review in the domestic courts if they consider that there has been a breach or will be a breach of the commitment contained in Article 2.[174]

The importance and implications of these various interrelated pieces of legislation protecting rights[175], and the role of the Northern Ireland Human Rights Commission, can be seen from the recent challenges to Northern Ireland (Legacy and reconciliation) Act 2023 and the Illegal Migration Act 2023 claiming breaches of the Convention and a violation of the commitment not to diminish rights contained in the Windsor Framework[176]. The challenge to the Illegal Immigration Act was brought by the Northern Ireland Human Rights Commission and by a 16-year-old asylum seeker from Iran[177]. The applicants claimed that core provisions of the Illegal Migration Act 2023 were incompatible with Article 2 of the Ireland/Northern Ireland Protocol or Windsor Framework, as amended by the Section 7A of the European Withdrawal Act 2018, and were incompatible with Articles 3, 4, 5, 6 and/or 8 of the Convention, for which declarations of incompatibility were sought. The claims succeeded and the court disapplied the relevant provisions of the Illegal Immigration Act (an Act of the UK Parliament) in Northern Ireland and made s.4 declarations of incompatibility in respect of the duty to remove illegal

[173] The Northern Ireland High Court has ruled that provisions of UK Acts of Parliament can be disapplied in Northern Ireland under Art 2 of the Windsor Framework: see *Dillon*. This is currently under appeal.
[174] For a short overview of the protection of rights post Brexit in Northern Ireland see the Northern Ireland Human Rights Commission "Short Guide: Equality and Human Rights after Brexit".
[175] For a recent discussion on the impact of the Windsor Framework see Eleftheria Asimakopoulou "Treaty Scrutiny and the "boundaries" of the UK's constitution after Brexit: lessons from the Windsor Framework" PL (2024) Jan 70.
[176] For a discussion and analysis of the *Dillon* case see Steve Foster "Legislation, human rights and the rule of law: what was wrong with the Northern Ireland Troubles Act 2023 and the Illegal Migrants Act 2023", Cov LJ 2024 29(1) 15
[177] *In the Application by the Northern Ireland Human Rights Commission for Judicial Review; In the Matter of an Application by JR295 for Judicial Review* [2024] NIKB 35, [2024] 5 WLUK 151

migrants (s.2(1), 5(1), 6(3) and 6(7)), and in respect of sections 2(1), 5, 6, 22 and 25 insofar as they related to victims of modern slavery or human trafficking, and to children. It is an extremely complex and lengthy judgment, and no attempt will be made here to set out the details of the decision. But what is clear is that if a specialist Human Rights Tribunal were to be set up in Northern Ireland, careful thought would need to be given as to how it would fit with the existing framework and legislation for rights protection in Northern Ireland, and how challenges concerning the rights protected by the Windsor Framework, and Belfast (Good Friday) Agreement would be dealt with. So, for example, whether by the "ordinary courts" would continue to hear claims not directly reliant on breaches of Convention rights, or whether all positive rights claims, whether under the HRA or the Windsor Framework or otherwise, should be started in the new Human Rights Tribunal. Significant issues also arise as on the current case law courts in Northern Ireland can disapply Acts of the Westminster Parliament where they amount to a 'diminution of rights' under Article 2 of the Windsor Framework.

Northern Ireland's constitutional settlement has, as can be seen, been heavily influenced by its particular history. The reaching of the Belfast (Good Friday) Agreement was a pivotal moment in Northern Ireland's and Ireland's history, and the Human Rights Act is central to it[178], so too is being a signatory to the Convention and the role of the ECtHR. Rights protection in Northern Ireland is clearly extremely important and culturally and politically sensitive. There also continues to be consultation and discussion around a Northern Ireland Bill of Rights[179]. It should also be noted that there is a proposal for a Charter of Rights for the Island of Ireland, a proposal made by the Joint Committee of Northern Ireland Human Rights Commission and Irish Human Rights and Equality Commission, which if created would be a further potential source of rights.[180]

It is of note that it is only in Northern Ireland that the setting up of a specialist human rights court has been considered in any detail, and it did so noting that a court separate from the ordinary courts would be perceived to have greater legitimacy. This no doubt was due to The Troubles and distrust of the existing courts and judiciary, and also the influence of events in

[178] See Aoife O'Donoghue and Ben T C Warwick, "Constitutionally Questioned: UK debates, international law and Northern Ireland" The Northern Ireland Legal Quarterly, vol.66 No.1, 93
[179] For recent views expressed by a number of stake holders see the Report of the Ad Hoc Committee on a Bill of rights, published on 4 February 2022. Report NIA 156/17-22 Ad Hoc Committee for a Bill of Rights. https://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/reports/report-of-the-ad-hoc-committee-on-a-bill-of-rights/ accessed on 9 August 2024
[180] < https://nihrc.org/about-us/joint-committee-nihrc-ihrec > accessed 2 July 2024

South Africa with the end of apartheid and the establishing of a new constitutional court in South Africa. In a paper published in 1997 (so prior to the HRA coming into force, and when many debates around how Convention rights could be enforced in the UK were taking place) the Committee on the Administration of Justice (CAJ) considered a Bill of Rights for Northern Ireland, and options as to how, and to what extent, such a bill could be entrenched and enforced in Northern Ireland. One of the questions posed was who should deal with complaints. The CAJ noted that in the United States all legislative administrative or judicial acts could be challenged on the basis of incompatibility with the Bill of Rights and can be invalidated by the courts if a violation is found. In the paper the Committee went on to say that while it would be possible under the (then) present Constitutional arrangement for ordinary courts to enforce a bill of rights in Northern Ireland, with the final Court of Appeal being the House of Lords (as was then the case) the Committee felt that 'special expertise is required when human rights documents have to be interpreted' and that a bill of rights would 'only command full respect in Northern Ireland if disputes were ultimately decided by a body that is different from existing courts.'[181] The CAJ's preference was then given as:

> The CAJ's preferred option is to have a special court appointed to hear final appeals on the interpretation and application of bills of rights it believes existing cause should also have the power to hear such cases at first instance provision would have to be made as in South Africa for references to be made to the new court from lower courts and for direct access litigants in appropriate cases.

In then end no separate court was set up, and the Convention rights in Northern Ireland are enforceable in ordinary courts under the HRA, the Northern Ireland Act, the Belfast (Good Friday Agreement) and the Windsor Framework.

Wales

Unlike Scotland and Northern Ireland, Wales was absorbed politically into England in the Middle Ages, formally in 1530s, and there is no separate legal, court or education system. But, from the 1960s onwards there was a measure of administrative devolution. In 1964 the then Labour government created the Secretary of State for Wales and the following year the Welsh Office was created which was headed by the new Secretary of State. As with Scotland the 1970s

[181] Making a Bill of Rights Stick: Options for Implementation in Northern Ireland. A Discussion Paper published by the Committee of Administration of Justice. 1997, 14-15, < https://caj.org.uk/publications/reports/making-bill-rights-stick-options-implementation-northern-ireland-discussion-paper-1997/ > accessed 2 July 2024

saw increasing debates around further devolution and in 1973 the Royal Commission on the Constitution recommended the creation of elected bodies in Scotland and Wales. A referendum on the recommendation was held in 1979, but the recommendation was rejected. Support then increased through the 1980s and 1990s and in May 1997 the Labour Party put a further referendum for Welsh devolution in its election manifesto. A White paper, 'A voice for Wales', was published in July 1997 and a referendum held in September 1997. This time the people of Wales voted in favour of the creation of an elected Welsh Assembly and in 1998 the UK Parliament passed the Government of Wales Act 1998 and the Welsh Assembly was created. It provided a higher degree of devolution, but had no tax raising powers, nor any independent control of home affairs and the judiciary. The Assembly's structure was a single body that was responsible for both executive and scrutiny functions, this proved problematic and calls for change began to be made. In 2002 the functions of legislating and scrutiny were separated, and the term 'Welsh Assembly Government' began to be used to refer to those responsible for action of the Cabinet, so the executive, and the term 'National Assembly' for those carrying out the legislative, and scrutinising functions. Formal legal separation of the executive and legislature was recommended in 2004 by the Richard Commission[182] which was accepted by the UK government and implemented by the enactment of the Government of Wales Act 2006. The separation that was created allowed for the National Assembly to make laws and represent the people of Wales, and with the First Minister, the Deputy Minister, the Welsh Ministers and the Consul General making up the Government of Wales, responsible as the executive for making and implementing decisions and secondary legislation. The Government of Wales Act 2006 then substantially increased the powers of the Welsh Government enabling the Assembly to pass primary legislation for the first time in policy areas that fall within its competence[183].

A third devolution referendum was held in 2011 when the people of Wales were asked whether further full primary legislating powers should be given to the National Assembly. There was support for this and further devolution took place, with the UK Parliament passing the Wales Act 2014, this allowed for greater financial power for Wales, including taxing and borrowing powers. The (almost) final step in devolution for Wales, to date, was in 2017 when the Wales Act 2017 changed the devolution model for Wales from a conferred powers model to a reserved

[182] https://commonslibrary.parliament.uk/research-briefings/sn03018/, accessed 2 July 2024
[183] See for history of devolution in Wales, Kevin Harrison and Tony Boyd *The Changing Constitution* (Edinburgh University Press, 2006), 130-133 and see Russell Deacon and Alan Sandry *Devolution and United Kingdom: England, Scotland, Wales and Northern Ireland* (Edinburgh University Press, 2007) 108-145

powers model, bringing it in line with Scotland and Northern Ireland. The last step was in 2020 when the National Assembly was recognised as the Welsh Parliament[184], in recognition of its status as a fully-fledged parliament with tax raising powers.

As with the other devolution Acts, the Wales Act 2017 limits the legislative power of the Welsh Parliament, so limiting the ability to legislate on reserved matters or to legislate in a way that is incompatible with Convention rights[185]. In contrast to Scotland and Northern Ireland there is a single legal jurisdiction of England and Wales and so there are no additional provisions regarding challenges to the courts on devolution issues. The Wales Act 2007 reserves powers in respect of courts, including in particular their creation and jurisdiction, judges, civil and criminal proceedings and judicial review of administrative action[186]. Although there is a separate Welsh Tribunal system, it will not be proposed that a specialist HRT is created as a 'Welsh tribunal', but rather an England and Wales tribunal. The reasons for this will be addressed further in Chapter Six.

As with Scotland and Northern Ireland there is in Wales a distinct cultural, socio-economic and political identity, and it has been suggested that there is now also a 'rise of legal Wales' with legal pluralism being a 'natural consequence of devolution'[187]. In terms of culture, particular reference ought to be made to the Welsh Language Act 1973 and to the Government of Wales Act 2006 s.78 that requires Ministers to adopt a strategy setting out how to promote and facilitate the use of the Welsh language. In terms of socio-economic factors, there is also a requirement in the Government of Wales Act 2006 on Welsh Ministers to make appropriate arrangements to ensure that their functions are exercised with "due regard to the principle that there should be equal opportunity for all people"[188] and that Welsh Ministers must in the exercise of their functions make 'appropriate arrangements for sustainable development.'[189]

When exploring the potential consequences of devolution to Wales and the HRA, Rawlings made reference to the high level of socio-economic deprivation in Wales and to the fact that

[184] Senedd and Elections (Wales) Act 2020, Part Two, which also changed the 2006 Act to replace 'the National Assembly for Wales' to 'Senedd Cymru or the Welsh Parliament'. Part 2, s.1.
[185] Wales Act 2017 s.3(2)
[186] Schedule 1 of the Wales Act 20177, paragraph 8(1)
[187] Richard Rawlings "Taking Wales Seriously", in Tom Campbell (ed), *Sceptical Essays on Human Rights*, (Oxford Scholarship online, 2001) 182
[188] s.77
[189] s.79

Wales has consistently been found to be 'at or near the bottom of the UK league tables of income and competitiveness' with high concentration of deprivation being concentrated 'among the two-thirds of the population and geographical area that make up west Wales and the old coal Valleys.'[190] This type of cultural, and socio-economic differentiation between nations that make up the UK are ones that could well impact of the application of rights as between the different devolved nations, with specialist devolved tribunals reaching different conclusions on the balancing of rights and placing greater emphasis on differing factors relative to the conditions of each nation. This is argued to be welcomed and would be part of a differential constitutional model.

The UK Supreme Court

The UK Supreme Court was created a few years after devolution and was set up in 2009 under the Constitutional Reform Act 2005. Its creation was part of a wider range of constitutional reform to make clearer the separation of powers between the executive, the legislature and the judiciary. By creating the UK Supreme Court, the judicial and legislative powers of the House of Lords were separated[191] and, as noted above, in creating the UK Supreme Court the jurisdictions of the Appellate Committee of the House of Lords and the devolution jurisdiction of the Judicial Committee of the Privy Council were combined[192]. The UK Supreme Court is not a constitutional court as the term would ordinarily be understood[193]. There is no written constitution over which the Supreme Court has the final say and no power to strike down primary legislation passed by the Westminster Parliament[194]. The Supreme Court sits within a Parliamentary democracy where the Westminster Parliament is sovereign; there is, essentially, Parliamentary Sovereignty and not Constitutional Sovereignty. While the UK Supreme Court is not a constitutional court it does have an important constitutional role within the UK's

[190] *Ibid* 193 see also generally on Wales and devolution, Richard Rawlings, *Delineating Wales: constitutional, legal and administrative aspects of national devolution* (University of Wales Press, Cardiff, 2003).
[191] William Arnold "The Supreme Court of the United Kingdom: "something old" and "something new"" (2010) Commonwealth Law Bulletin Vol.36 No.3 443-451
[192] For discussion see Aidan O'Neill QC "Constitutional Reform and the UK Supreme Court – A view from Scotland" (2015) JR 216
[193] The various meanings of constitutional court are discussed further in Chapter Six.
[194] There remains a debate over whether there is any limitation or exception to Parliamentary Sovereignty in terms of the Rule of Law, a fundamental principle of the UK constitution. Section 1 of the Constitutional Reform Act 2005 states the Act does not adversely affect (a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle. Interesting as the issue and debate is, the extent to which the Parliamentary Sovereignty in the UK is limited by the Rule of Law is not something that needs to be debated or any conclusions reached when considering the creation of new Human Rights Tribunals. Mention should also be made of the power in s.2 Windsor Framework to disapply Acts of the UK Parliament, a power that is currently the subject of appeal.

constitution; it is the ultimate arbitrator of matters concerning the exercise of devolved power by the governments and parliaments of the devolved nations of Scotland, Wales and Northern Ireland. Not of course of England, as England is not a devolved nation, there is no devolved English legislature.

The UK Supreme Court then has the final say as to whether acts of the devolved governments have gone beyond the limits set by the devolution Acts. Those limits include whether an act has transgressed or strayed into matters reserved to the Westminster Parliament, but also importantly in this context, whether they are compatible with Convention rights[195]. It should also be emphasised however that devolution issues are not reserved to the UK Supreme Court, or indeed the superior or higher courts, devolution issues can, and often are, raised before any court in the United Kingdom.

Before leaving the historical context of rights protection in the UK some mention should be made of continuing debate around the need for a British Bill of Rights and repeal of the HRA.

A British Bill of Rights?

The need for, or desirability of, a British, or UK, Bill of Rights, and the repeal of the HRA[196] is still a live question, albeit the new Labour government is not committed to repealing the HRA. A Commission on a Bill of Rights was set up as part of the coalition government agreement in 2010[197]. The Scottish Human Rights Commission ("SHRC") responded to the Second Consultation on a Bill of Rights in September 2012, it was in favour of retaining the HRA and expressed doubt about what form a UK Bill of rights would take. The SHRC highlighted that in the devolution context, 'it is important that any additional Bill of Rights continues to apply equally to all people in the United Kingdom.'[198] In Northern Ireland the Northern Ireland Human Rights Commission continues to support the adoption of a Bill of Rights for Northern Ireland and does not accept that the progress 'has to be stalled pending the

[195] For an analysis of the approach of the Supreme Court to the protection of rights and the HRA see Brice Dickson *Human Rights and the United Kingdom Supreme Court* (Oxford University Press, 2013).
[196] For a discussion on the proposed reform of the HRA and lessons on constitutional change see Merris Amos "Democratic state, autocratic method: the reform of human rights law in the United Kingdom, ICLQ (2024) 73(1), 1
[197] https://researchbriefings.files.parliament.uk/documents/SN06404/SN06404.pdf accessed on 7 August 2024
[198] < https://www.scottishhumanrights.com/news/second-consultation-british-bill-of-rights >accessed 10 April 2024

outcome of the current consultation regarding a possible UK Bill of rights'[199] (this has now concluded, see below). The Commission on a Bill of Rights published its report in December 2012 but was unable to reach a unanimous conclusion. Professor Philippe Sands, a member of the commission, is reported to have said that the majority 'couldn't agree on what should be in a Bill of Rights and they couldn't even agree on whether or not it should be based on the European Convention', further 'We were told in no uncertain terms Wales, Northern Ireland, Scotland do not want to have a United Kingdom Bill of Rights. There were no ifs and buts, it was across the political spectrum.'[200]

In October 2014, the Conservative Party (then in coalition government) published a policy document, 'Protecting Human Rights in the UK', which set out their proposal to repeal the HRA and replace it with a 'British Bill of Rights and Responsibilities'. The subsequent manifesto for the 2015 election promised to 'scrap the Human Rights Act and introduce a British Bill of Rights', with the avowed aim being to 'break the formal link between the British courts and the European Court of Human Rights', and make the UK Supreme Court 'the ultimate arbiter of human rights matters in the UK.'[201] In any event, the Bill of rights was not included in the Queen's Speech in May 2015 and no consultation was brought forward during that Parliament[202].

The Conservative Government that came into power in 2019 promised a review of the HRA, the UK's constitution and 'the relationship between the Government, Parliament and the courts.'[203]. An Independent Human Rights Act Review ("IHRAR") was subsequently established in December 2020. It was to consider the operation of the HRA and any

[199] A Bill of Rights for Northern Ireland: Is that Rights, Fact and Fiction on a Bill of Rights, The Northern Ireland Human Rights Commission, 2012. Foreword by Professor Michael O'Flaherty, Chief Commissioner.
[200] < https://www.bbc.co.uk/news/uk-politics-20757384> accessed 10 April 2024
[201] The Conservative Party, Strong Leadership, a clear economic plan, a brighter, more secure future: The Conservative Party Manifesto 2015, p 60:< https://www.conservatives.com/ > accessed on 30 October 2023
[202] The House of Lords European Community Committee further considered the question of a British Bill of Rights and concluded that the government should think again about repealing the HRA, among its conclusions were that 'The difficulties the Government faces in implementing a British Bill of Rights in the devolved nations are substantial. Given the seemingly limited aims of the proposed Bill of Rights, the Government should give careful consideration to whether, in the words of the Secretary of State, it means unravelling "the constitutional knitting for very little". If for no other reason, the possible constitutional disruption involving the devolved administrations should weigh against proceeding with this reform.' See report from the 12th Session 2015-2016 < https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/139/139.pdf > accessed 10 April 2024
[203] Conservative Party Manifesto, 2019, < https://archive.org/details/ConservativeandUnionistPartyManifesto2019 > accessed 26 June 2024

amendments needed[204]. In a Forward to the Final Report the Chair of the Panel, Sir Peter Gross, set out the aims of the Review. The review was to examine two areas: 'first the relationship between domestic courts and the European Court of Human Rights (the ECtHR); secondly, the impact that the HRA has had on the relationship between the Judiciary, the Government and Parliament.' [205] A number of recommendations were made, including (i) an effective programme of civic and constitutional education particularly focussing on questions about human rights, the balance to be struck between such rights and individual responsibilities, (ii) amendment of s.2 to clarify the priority of rights protection applying UK domestic statute and common law first before proceeding to interpret convention rights, (iii) to continue to enable judicial dialogue and (iv) to amend s.3 to clarify the order of priority of interpretation, coupled with increased transparency in the use of section 3, and enhanced role for Parliament in particular through the Joint Committee of Human Rights. None of the recommendations included repeal or any significant changes to the HRA.

The new current Labour Government is not advocating for the repeal or amendment of the HRA.

Brexit

Before moving on to look at developments at the European level, mention must also be made of the further impact on rights protection in the UK that occurred when the UK left the European Union in 2020[206], some of which have already been touched on above when considering rights protection in Northern Ireland. It has been argued that BREXIT has led to a loss of rights protection in the UK, primarily with the loss of rights protected in the EU Charter of Fundamental rights, but also as a result of a loss of remedies for breaches of human rights that originate in EU law[207]. The EU Charter was not intended to create any new rights, but rather to set out the fundamental rights that are general principles of EU law[208]. It contains both civil and political rights and social and economic rights and has the same status as an EU Treaty

[204] For an analysis and review of the various concerns as to the operation of the HRA see Breanda Hale "The fact of the UK Human Rights Act?" EHRLR 2024, 3, 212-219
[205] The Independent Huaman Rights Act Review, Final Report, Presented to Parliament in December 2021: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf.> accessed 28 May 2021
[206] The UK formally left the EU on 31 January 2020 following the referendum held on the UK's continued membership on 23 June 2016.
[207] See Tobias Lock, "Human Rights Law in the UK after Brexit" (2017), PL November supp (Brexit Special Extra Issue) 117
[208] Case 29/69 *Stauder* [1969] E.C.R. 419; Case 11/70 *Internationale Handelsgesellschaft* [1970] E.C.R. 1125

as a result of the Treaty of Lisbon[209]. The Charter applies to Member Sates whenever they are implementing EU law[210]; this has been interpreted quite broadly by the CJEU to mean that Member States are bound by the Charter whenever they are acting within the scope of EU law[211]. The UK's devolution settlements set out that the devolved parliaments were not competent to pass legislation that contravened EU law, and so the Charter[212], but EU law and the legal status of Charter of Rights was dependent on the continued effect of the European Communities Act 1972, which has now been repealed following the enactment of the EU (Withdrawal) Act 2018[213]. The devolution Acts were amended by the European Union (Withdrawal) Act 2018 (Repeal of EU Restrictions in Devolution Legislation etc.) Regulations 2022 to finally remove any limitations on the power of the devolved parliaments to legislate by reference to EU law. It is now the case that EU law (unless it has been retained and made part of domestic law) no longer has any force in the UK, save importantly in respect of Northern Ireland because of the Ireland/Northern Ireland Protocol, and Windsor Framework (referred to above).

Finally in this Chapter, important developments at the European level need to be considered as it will be argued that in future the UK cannot, and should not, wait and rely on Strasbourg to set the pace for the development of human rights, as they apply to the UK and within each devolved nation of the UK. Domestic courts should not sit back and wait for determinations by the Strasbourg court where new matters arise, or where previous case law needs to be re-considered in light of evolving conditions, challenges and developments. The ECHR is a 'living instrument'[214], whose interpretation does not stand still, steadfastly waiting for Strasbourg to develop the Convention rights may not in the future be a realistic option. It will be argued that developing this jurisprudence should be done primarily within a specialist human rights jurisdiction, with oversight of the appellate courts.

[209] See Article 6(1) TEU. It has been argued that it is open to question as to whether the legal effect of the rights in the Charter are the same in any event to the fundamental rights forming part of the general principles of EU law. Daniel Denman, "The Charter of Fundamental Rights" (2010) EHRLR 4, 349 at 350
[210] Article 51(1) Charter
[211] Case C-617/10 *Fransson* 2013, para 19
[212] S.57(2) Scotland Act 1998, s.80 Government of Wales Act 2006, s.24(1)(b) Northern Ireland Act 1998.
[213] S.1. see for discussion on the Withdrawal Act 2018, e.g. Mark Elliott and Stephen Tierney "Political Pragmatism and constitutional principle: the European Union (Withdrawal) Act 2018", (2019) PL Jan, 37
[214] Marckx v Belgium (1979) 2 EHRR 330

Developments at the European Level.

By the early 2000s the number of cases the ECtHR was dealing with was becoming overwhelming; between 1995 and 1982 the Court received 22,158 applications, in 2000 alone the court received 26,398 applications in that one year, an increase of 553%. Previous amendments to the Convention system had failed to adequately consider the impact of the accession of Central and Eastern European and former Yugoslav Republics in the 1990s[215]. More reform was needed if the system were not to completely collapse. The Council of Europe's Steering Committee for Human Rights[216] ("CDHH") recommended a series of changes in April 2003. They were aimed at 'preventing violations at the national level and improving domestic remedies', 'optimising the effectiveness of the filtering and subsequent processing of applications' and 'improving and accelerating execution of judgments of the courts.'[217] The recommendations were welcomed, largely accepted and included in Protocol 14, which was formally adopted on 12 May 2004.

Protocol 14 introduced four main changes (i) the ability of a single judge to make decisions on admissibility in straight forward cases (article 7) (ii) a new procedure for 'manifestly well founded' cases (article 6) (iii) the ability to declare an application admissible and at the same time give a judgment on the merits where the application concerns a question that is already the subject of well-established case law of the court and (iv) a new admissibility requirement that the applicant has suffered 'a significant disadvantage' (article 12). This final amendment comes with two caveats, first the court cannot reject an application if the case requires examination to ensure respect for human rights and second it cannot reject an application if the case has not received due judicial examination at the national level. This new admissibility criterion has been opposed on both principled and practical grounds. First on principle, the concern has been raised that it limits the right to individual petition, so limiting the very essence of the Convention mechanism, and second on practical grounds, it has been questioned whether

[215] Report of the Evaluation Group to the Committee of Ministers on the ECtHR, EG Court (2001) 1, September 27, 2001 (2001) 22 Human Rights Law Journal 308, para.25; A. Mowbray, "Proposals for reform of the European Court of Human Rights" [2002] PL 252

[216] Set up by the Committee of Ministers in 1976. It undertakes "intergovernmental work of the Council of Europe in the human rights field in the light, in particular, of the Council of Europe legal standards and the relevant jurisprudence of the European Court of Human Rights…Under the Supervision of the CDDH, the Committee of Experts on the system of the European Convention on Human Rights conducts intergovernmental work intended to enhance the protection of human rights by improving the effectiveness of the control mechanisms of the European Convention on Human Rights and the implantation of the later at national level." http://coe.int/en/web/human-rights-intergovernmental-cooperation/ accessed 7 December 2022

[217] https://rm.coe.int/steering-committee-for-human-rights-cddh-comments-adopted-by-the-cddh-/1680abd629 accessed 2 July 2024

this change will in fact lead to a reduction in cases[218]. On any view, however, it raised the threshold to be met before an application will be declared admissible and so made it harder to have a claim considered by the Strasbourg Court.

The next set of changes were introduced by Protocol 15 which came into force in August 2021. The significant amendment made by Protocol 15 was to add a recital to the Preamble referencing the principle of subsidiarity and the doctrine of the Margin of Appreciation. Once again re-enforcing that the prevention of violations of rights and the provision of remedies is primarily the role of the national authorities of the Member States. This amendment has its origin in the Brighton Declaration adopted at the Brighton conference in 2012 and has the intention of rebalancing the national authorities' relationships with the Strasbourg court. Member States, including the UK, considered that there had been an excessive degree of interference with decisions of national legislatures and courts and that it was becoming a 'fourth instance court'[219]. The most recent change was in Protocol 16 which extended the competence of the ECtHR to give advisory opinions, which is intended to 'enhance the interaction between the Court and national authorities, thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity.'[220]

An in-depth consideration and analysis of the changes these three Protocols have ushered in is outside and beyond the scope of this thesis. It is however worth noting that the direction of travel at the European level is clearly to put more emphasis on domestic protection and domestic remedies. The Court, with the use of advisory opinions, pilot judgements and speedy judgments for cases that concern questions already part of the court's case law, is very clearly signalling that it is a standard setting court, rather than a final appeal court. The reaffirmation of subsidiarity and the doctrine of the Margin of Appreciation are likewise aimed at emphasising the important role national authorities play in the protection of individual rights. This requires national authorities to ensure that their domestic system for rights protection is effective and accessible. Whether this is the case for the UK will be analysed in Chapters Three and Four; to the extent that it does not may no longer be remedied by the ability to make an

[218] Marie-Aude Beernaert 'Protocol 14 and new Strasbourg procedures: towards greater efficiency? And at what price?' (2004) EHRLR 5, 544, 547
[219] See for example Prime Minister Cameron's speech to the Parliamentary Assembly of the Council of Europe on 25 January 2012 https://www.theguardian.com/law/2012/jan/25/cameron-speech-european-court-human-rights-full accessed 28 June 2024
[220] See Preamble to Protocol 16

application to the ECtHR. National courts need to step up, and it will be argued the domestic UK courts need to lead the way in the interpretation of Convention rights as they apply to the UK. New specialist tribunals, with clearly defined constitutional roles to do just that will be required given the changes happening at the European level.

Concluding remarks

The aim of this chapter has been to set the context for the arguments that are to come, to touch on potential reasons for the difficulties litigating human rights cases domestically – including in particular the reluctance of ordinary courts to shake off the traditions of the common law and adopt a more positive rights based approach to adjudication. Identifying these difficulties paves the way for the justifications that are being put forward for the creation of specialist HRTs.

As this chapter has set out the last 70 years have seen significant changes in the protection of rights in the UK; the changes have occurred very much under the influence of a European constitutional model and the positive declaration of rights model. The early confidence of some that acceding to the Convention would not cause any disturbance to rights protection in the UK proved misplaced. The early cases decided by the ECtHR against the UK can be seen to have demonstrated differences between the UK's common law traditions and the positive rights approach of the Convention. The inability of the common law principle of natural justice to provide a remedy for a breach of Mr Week's Article 5 rights, the failure of the common law and Parliament to protect the right of privacy in Mr Malone's case, the failure of the domestic courts to properly consider the infringement of the Sunday Times' right to freedom of expression, and finally the reluctance (or inability) of the Administrative court to consider the substance of the decision to ban gays in the armed forces have all been given as examples of where the domestic courts fell short of protecting individual human rights due to the orthodox approach to rights protection. These cases also serve to illustrate the deep roots of the traditional approach to rights protection in the UK's common law courts. A tradition that it is argued needs to be changed if positive rights are to be fully protected as intended by the enactment of the HRA, and one that can be shifted by the creation of new specialist HRTs.

This chapter has also highlighted remaining deep divisions as to the way forward; the desirability of a UK Bill of Rights, how rights are or should be protected within the three jurisdictions of the UK, and the role the courts should play in protecting fundamental rights.

There is a need for the protection of human rights to have a firm base in the UK's constitution, whether this be by way of a British Bill of Rights or otherwise. It is argued here that this can be achieved, is best achieved, by the establishment of new specialist HRTs, presided over by expert High Court judges. What is needed is a highly developed, sophisticated, and clear UK human rights jurisprudence, a jurisprudence crafted by specialist, expert, judges[221]. Establishing a specialist domestic human rights jurisdiction may also go some way to meet the concerns expressed by some that Convention rights are part of a foreign jurisdiction presided over by foreign judges and reduce the clamour to leave the ECHR.

This chapter has also touched on how devolution and the devolution settlements are an important part of the picture of human rights protection in the UK. The devolution settlements, and the Northern Ireland Protocol and Windsor Framework, have created a complex, multi-layered, asymmetrical and pluralistic tapestry of rights protection. As will be argued in the next chapter and in Chapter Six, in keeping with this complex picture, and in keeping with respecting and acknowledging devolution, rights protection provided by courts/tribunals needs to differentiate between the devolved nations, rights protection must be flexible, dynamic and consonant of the differences that exist within the UK. Each UK nation has a different history, each nation has cultural traditions, and each nation should be able to take this into account when developing and applying rights, whilst of course ultimately abiding by the UK's international obligations under the ECHR.

Tracing through the developments in rights protection in the UK since 1945 has evidenced an historic mismatch between the UK's deep rooted common law, civil liberties tradition, and the more continental codified approach to the positive protection of human rights. How this mismatch has manifested itself in practice and the difficulties it has led to will be considered in detail in Chapters Three and Four, but first the thesis will turn to more theoretical considerations and situate the proposed new specialist tribunals in constitutional theory.

[221] That is not to categorically state that such a British Bill of Rights should not be adopted; this thesis has specifically excluded any detailed consideration of the need for or the advantages or disadvantages of a British Bill of Rights.

CHAPTER TWO

A Theoretical Framework

Introduction

This chapter is concerned with constitutional theory and addresses the theoretical issues surrounding the central question posed by the thesis, namely whether the HRA has ensured the effective domestic protection of positive rights within the UK or is more needed. If more is needed can and should this be achieved by increasing legal protection, political protection or both, and what would the creation of specialist HRTs mean in terms of the balance between legal and political protection in the field of constitutional theory. Its aims include proposing a model of *differential*[1] *constitutionalism* and consideration of the perennial problem of rights protection in representative democracies. There will be a review of the various constitutional theories that seek to provide a resolution: political constitutionalism, legal constitutionalism, democratic dialogue, the Commonwealth model and most recently the Collaborative Constitution as articulated by Aileen Kavanagh[2]. The chapter will go on to conclude which if any, of the existing theories new specialist human rights tribunals in the UK would fit and why. It is argued that creating a bespoke jurisdiction and tribunals for positive rights protection in the UK will meet the difficulties created by the approach taken by the HRA of bolting on positive rights onto a common law residual rights model.

In approaching the question posed from a theoretical perspective, both the "is" and the "ought" will be considered. Drawing from the history and the more significant and relevant legal, constitutional and political events and debates set out in Chapter One, there will be an endorsement and agreement with those commentators and academics[3] who have posited that there has been a move in the UK towards the positive protection of individual rights, both political as well as legal, and that the enactment of the HRA and devolution has moved the UK

[1] Differential here means "of showing, or depending on a difference; varying according to circumstances or relevant factors". *Oxford English Dictionary* (OUP, 2024)
[2] Aileen Kavanagh *The Collaborative Constitution* (Cambridge University Press, 2024)
[3] For a discussion of the various schools of thought as to the effect of the HRA and the extent to which it has moved the UK towards legal constitutionalism see Tom Hickman, *Public Law After the Human Rights Act*, (Oxford, Hart Publishing, 2010), 57, Gavin Phillipson "The Human Rights Act, Dialogue and Constitutional Principles" in Roger Masterman and Ian Leigh (eds.), *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives,* Proceedings of the British Academy (London, Oxford Academic, 2013)

constitution towards a more legal than political one[4]. It will be recognised that creating new specialist domestic HRTs will be seen as a further step in this direction, a direction that it is suggested should be welcomed. But it will be argued that it would not be a step that would significantly alter the current constitutional balance between Parliament, the executive and the courts, nor would it dilute or weaken the principle of (UK) Parliamentary Sovereignty. What is being proposed is the creation of an expert jurisdiction, not a wholly new constitutional institution, but it will be a new jurisdiction whose creation would overtly endorse the use of the judicial branch of the constitution to determine rights protection, especially where acts of the executive (public bodies and public officials) are concerned. In according the judicial branch of the constitutional a greater role in rights protection, the limitations of judges and courts determining matters that touch on policy and resources will be recognised. Potential solutions to address any such limitation will be proposed, including for example the adoption of bespoke rules and procedures for the new tribunals, the ability of the tribunals to act more inquisitorially, to be open to third party interventions and to sit with specialist lay members. The tribunals should be dynamic and flexible and be able to adapt to the type of case to be decided, the remedy being sought, and the Parties concerned. In this way they will be part of a *differential* constitutional model.

This thesis is mainly focused on claims by individuals against state bodies for acts or omissions which are said have violated their rights. It is gaps and deficiencies in litigating these cases that are the focus of Chapters Three and Four. It is concerned with "every day" cases and is not primarily concerned with the constitutional role afforded to the courts in reviewing primary legislation for compatibility with rights, although there is a proposed additional role for the new tribunals in pre legislative review of Acts of the devolved legislatures. It will also be the case that if claims under the HRA are to be started in the specialist expert tribunals most s.4 declarations will be for the tribunal to determine, at least in the first instance. The new tribunals will add a layer of expertise below the appellate courts, as well as providing for the most appropriately constituted judicial forum for the adjudication of claims concerning positive rights.

[4] See for example Stephen Gardbaum. *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013) 23

For some, particularly those who advocate for a purer form of political constitutionalism, the creation of new HRTs will still be objectionable; creating new tribunals does hand further power, and a more prominent role, to the unelected judiciary and could be seen to promote individual rights above the rights of the community. For others, particularly legal constitutionalists, it may conversely be seen as a welcome step in further protecting individual rights against an increasingly powerful and decreasingly accountable executive. It will be argued that there is a legitimate role for courts in protecting fundamental rights in a representative democracy, certainly where acts or decision of the executive are concerned. Judges, especially specialist expert judges, are well able to decide whether they have the constitutional competence to determine the matter before them in a case raising the protection of individual rights, deciding whether the case is one for the courts or one for the elected parliament. In this way the courts will be operating in a *differential constitutional* model, deciding whether to determine a case based on the actor and actions under challenge.

Where a specialist role for the courts is being specifically argued for, is where challenges are brought by individuals against decisions by or actions of public officials or bodies. In such cases the courts have the necessary legitimacy, attributes, and competencies to adjudicate and reach binding decisions, notwithstanding that resources, policy, ethics/morals or values may be in issue. Decisions and actions by such officials or bodies do not have the clear mark of democratic legitimacy; administrators, health officials, housing bodies, police, prison governors and local authorities (to name but a few) are largely unelected officials and bodies, they do not have the same democratic legitimacy as, for example, Members of Parliament acting as legislators. But they are able and very often do infringe individual rights and must be fully accountable. Claims concerning violations of individual rights against public bodies that do not directly concern decisions made by the legislature acting democratically are ones that the courts are pre-eminently well placed to adjudicate upon. The constitutional approach or model that will therefore be argued for is one that is sensitive to the nature of the decision or act under consideration and the decision maker; whether the political institutions or legal institutions take primacy in determining and applying rights should transparently and overtly be determined and vary according to the case at hand. Judges and the courts should be trusted to decide when to step in and when to step back. They will be afforded the power and discretion to determine, for example, how to constitute the court, whether to allow for third party interventions and whether to adopt a more inquisitorial approach. The constitutional model will in this way be a differential one; different constitutional institutions taking the lead at different

times in differing contexts but remaining respectful of the overarching principle of UK Parliamentary Sovereignty. The tribunals will also act in a differential way, adapting their approach to adjudication in accordance with the nature of the case and the Parties involved.

It will be suggested that creating the new tribunals would fit with the view of the UK constitution as being one of collaboration or dialogue as between the three branches of the constitution. The term differential will be used to describe a constitution with the new specialist tribunals in recognition of the proposal that which constitutional institution takes the lead, or bears the greatest responsibility for rights protection, should be determined by reference to the act or actors concerned. It is not a once and for all decision, the constitutional institutions work in collaboration but also operate differently at different times. The addition of the new specialist tribunals fits with a Constitution with different moving parts which interact. It fits with theories of dialogue and collaboration between the political and legal institutions. But it also provides for a readjustment and more effective collaboration *within* the judicial structures. In this way there will be both a vertical realignment of relationships and a horizontal one. The specialist tribunals, with recognised expertise, will be the central part of the constitutional human rights protection machine, both as between different constitution bodies, and as *within* the judicial bodies.

Having a specialised tribunal to carry out this judicial function, rather than the ordinary courts, allows for the differential approach advocated to be achieved. It will enable some of the arguments made against the use of the judicial branch of the constitution for rights protection to be met. For example, the need for a process that allows for consideration of wider views, so for increased participation through third party interventions, judicial chairs of tribunals sitting with lay experts, the ability to adopt a more inquisitorial and less adversarial approach, and costs rules allowing greater access. All of which could be implemented with the creation of a specialist tribunal with bespoke procedures and rules. Another advantage of specialism is the ability for the judges to become experts, and for a greater degree of consistency of approach to rights interpretation and application by utilising the power to refer cases and questions to the specialist tribunal, together with the power to issue advisory opinions. Expert courts with a concentration of knowledge and awareness of rights issues will also help foster a deeper human rights jurisprudence in the UK, and within each devolved nation. The expert tribunals would gain the respect and trust needed to act as reviewers of legislation within a Parliamentary

democracy and be trusted with applying a margin of appreciation at both the UK level and at the level of the devolved nations.

Such a system requires clarity and transparency as to the roles and responsibilities of each part, and respect and recognition of those roles, in order for it to operate smoothly and in harmony and prevent conflict. The new tribunals will be the UK's specialist human rights constitutional institutions, they will need to command respect as such from the other branches of the constitution, from the other courts and from citizens. When and how they are to be used must be clear and they must both jealously guard their specialist role and generously share their expertise. There will need to be a procedure for transferring cases into and out of the specialist tribunal, for references to be made to the specialist tribunals and an ability to request an opinion.

While the creation of specialist domestic human rights tribunals would undoubtedly be a significant change, there is here no overt political agenda agitating for increased individual rights that are to be legally enforced by judges. What is intended is to ask and explore whether the existing UK courts and court structures currently provide *effective protection* of rights domestically and *effective accountability*, and whether the current court structures and processes allow for *effective access* and *meaningful remedies*, and further whether the current judicial set up allows for a truly domestic (UK wide and at the level of the devolved nations) human rights jurisprudence to develop. A jurisprudence that fits with the culture, history, and traditions of the UK and of the nations that make up the UK.

As set out in Chapter One there are potentially some important cultural and political differences as between the nations of the UK which are likely to require differing applications of rights and the balancing of rights. Obvious examples include the protection of the Welsh language, Scottish law and the desire in Scotland to further incorporate Treaty rights (e.g. UNCRC), the existence in England and Wales of the Coronial courts and the Court of Protection raising different issues with regards to Article 2 (right to life) and Article 5 (right to liberty), and the importance of equality and non-discrimination rights between different communities in Northern Ireland. There may also be divergence between the nations with regards to penal policy and prisons, for example in Scotland stopping sending 17- and 18-year-olds to Young

Offender institutions which is part of a wider strategy on youth justice[5]. Is there currently the space, capacity, recognition and systems within the existing court structures for domestic human rights jurisprudence to be finessed, to be refined, developed and adapted by expert judges to fit modern Britain? It will be suggested that there is not. It is hoped new specialist tribunals would bring much needed clarity as to the balance between Parliament and the courts where matters of human rights are concerned, and enable the institutions to work together confidently, respectful and understanding of each other's roles, and provide meaningful and effective domestic protection of rights across the whole of the UK.

Having sketched out what a *differential constitutional model* refers to, and how the new tribunals would be part of such a model, the next question to address is whether and how such a model would fit with existing constitutional theories.

Protecting individual rights in a representative constitution.

An enduring and contested question in constitutional theory is the protection of individual rights in a representative democracy. It is a thorny question, not only when striving to describe a constitution that *is*, but also when considering normatively what it *ought* to be. Questions arise as to which institution within the constitution is, or should be, responsible for protecting, defending and promoting fundamental rights. Should the democratically elected Parliament have "the last word" or the independent judiciary? Is it, or should it be, a shared responsibility, or is one, or should one constitutional institution have the ultimate responsibility to protect individual rights. How are individual rights protected against parliamentary majorities, should they be, to what extent? Should there be, and is there, a strict separation of powers, a collaborative approach[6] or dialogue[7]? Do the answers to these questions differ depending on the rights in question, whether rights are inalienable and part of natural law, or granted by a sovereign power? Do the answers differ depending on the task the courts are performing, so as between legislative review or review of administrative or executive acts? Different constitutional theories and constitutions reach different answers to all these questions, and even within differing theories different answers are reached dependent on assumptions made or the specific constitution under consideration. There are many theories, and many overlap, describing and allocating different theories into categories is not easy.

[5] www.gov.scot/policies/youth-justice/ accessed 8 august 2024
[6] See Aileen Kavanagh *The Collaborative Constitution* (Cambridge University Press, 2023)
[7] See Alison Young *Democratic Dialogue and the Constitution* (OUP, 2017)

Academic writing on these questions is voluminous and wide ranging. It is not possible, nor is it argued necessary, to attempt resolve these constitutional questions, or attempt reach a definitive view as to the correctness or otherwise of the various theories in order to make the case for specialist domestic human rights tribunals in the UK. But consideration of the various theories and how they apply to the British constitution does provide a means by which to evaluate and determine the role to be afforded to such tribunals, the powers granted and procedures to be followed, the position they could take up within the constitution of the UK and the relationship with the other constitutional institutions, and other courts and tribunals. All matters which will be more fully explored later in this thesis. The main constitutional theories concerning the control of the executive and legislature in respect of the protection of individual rights are considered below, with the focus on legal constitutionalism[8], political constitutionalism, the commonwealth model, democratic dialogue and the collaborative constitution.

Political Constitutionalism

Put simply, a theory of political constitutionalism allocates control over the legislature and the executive to political institutions and limits the control that can be exerted by the courts. Political constitutionalists favour political institutions over legal institutions to provide accountability; it is for Parliament and not the courts to hold the executive to account. There are those, including JAG Griffith, who argue that law and politics are very different and separate entities, which have distinct roles, and that courts have no role to play in political decisions.

Writing in 1979 Griffith[9] attacked the views then being expressed by Lord Hailsham and Lord Scarman[10] about the need for constitutional reform aimed at limiting the power of elected governments. Lord Hailsham was particularly concerned about the unlimited legislative power of minority governments elected by the First Past the Post system who were able to make 'fundamental and irreversible changes.'[11] He identified three safeguards, the first involved setting legal limits on the power of politicians, second was to ensure that no one organ of the

[8] Also referred to as common law constitutionalism or legal liberalism
[9] J.A.G. Griffith, "The Political Constitution" (1979) 42 MLR 1, 7
[10] Lord Scarman's seminal lecture delivered in 1974 referred to in Chapter One
[11] Quoted by J.A.G. Griffith in J.A.G. Griffith, "The Political Constitution" (1979) 42 MLR 1, 8

constitution could be dominate, and the third was to consider the voting process and the need for referenda on particular issues[12]. His constitutional package also included a Bill of Rights[13], in this he was joined by Lord Scarman, who was also advocating a Bill of Rights. Lord Scarman wanted a Supreme Court charged with protecting the constitution. In responding to these proposals Griffith said:

> The proposals for a written constitution, for a Bill of Rights, for a House of Lords with greater powers to restrain governmental legislation, for regional assemblies, for a supreme court to monitor all these proposals, are attempts to write laws so as to prevent Her Majesty's Government from exercising powers which hitherto that government has exercised.[14]

Griffith goes on to summarise his objections passionately and forcefully to the proposals based on a theory of political constitutionalism, it provides a succinct account of political constitutionalism and the basis for it:

> The fundamental political objection is this: that law is not and cannot be a substitute for politics. This is a hard truth, perhaps an unpleasant truth. For centuries political philosophers have sought that society in which government is by laws and not by men. It is an unattainable ideal. Written constitutions do not achieve it. Nor do Bills of Rights or any other devices. They merely pass political decisions out of the hands of politicians and into the hands of judges or other persons. To require a supreme court to make certain kinds of political decisions does not make those decisions any less political.
>
> I believe firmly that political decisions should be taken by politicians. In a society like ours this means by people who are removable. It is an obvious corollary of this that the responsibility and accountability of our rulers should be real and not fictitious. And of course our existing institutions, especially the House of Commons, need strengthening. And we need to force governments out of secrecy and in-to the open… Governments are too easily able to act in an authoritarian manner. But the remedies are political. It is not by attempting to restrict the legal powers of government that we shall defeat authoritarianism. It is by insisting on open government.
>
> That is why these present proposals by Lord Hailsham, Lord Scarman and others are not only mistaken but positively dangerous. They seem to indicate a way by which potential tyranny can be defeated by the intervention of the law and the intervention of institutional devices. There is no such way. Only political control, politically exercised, can supply the remedy.[15]

[12] Hailsham *The Dilemma of Democracy, diagnosis and prescription*, (Colins, 1978), 68
[13] As well as devolution to Scotland, Wales, Northern Ireland and England in a federal structure and a proportionally elected second chamber.
[14] J.A.G. Griffith, "The Political Constitution" (1979) 42 *Modern Law Review*, 1, 16
[15] J.A.G Griffith, "The Political Constitution" (1979) 42 *Modern Law Review* 1, 16.

While political constitutionalists do not reject the value of the courts, emphasis is firmly placed on the use of political control over the executive, focussing on Parliament as the constitutional institution having greater democratic legitimacy and accountability. Political constitutionalists, when considering the UK's constitution will likely take a more absolutist/orthodox approach to Parliamentary Sovereignty and a narrow, formal approach to the rule of law, confining it to a requirement to comply with procedural and institutional norms[16]. There is no, or little, room for judges to engage in normative dialogue and no room for judges to strike down legislative acts. Described in this way it is easy to see the risk posed to the protection on individual rights, and specifically to minority rights. The preference for political control and oversight of human rights is seen as a defining feature of political constitutionalism[17]. But, affording the elected body within the constitution the role of controlling the executive and legislature risks allowing the elected majority to ignore, or worse to violate, the individual rights of the minority. This risk is arguably starker, and less defendable on democratic grounds, where, as in the UK, the elected UK Parliament is elected on a First Past the Post system, and where the party in power rarely commands the approval of a majority of the electorate[18].

It also must be recognised that the role and nature of government has changed and grown significantly in recent times. Modern government has assumed a greater role and responsibility in areas of social policy, economic activity and provides a much wider range of public services. Further, in reality the UK Parliament arguably has limited impact on the control of the

[16] Goldsworthy challenges the suggestion that it is increasingly assumed that unlimited legislative sovereignty is incompatible with the Rule of Law. He notes strong arguments on both sides, for the assumption is that 'if Parliament can change any law at any moment then the Rule of Law is nothing but a joke' (G. de Q. Walker) and on the other side he says claims of that kind have been disparaged as 'judicial supremacist rhetoric' (M. Elliott): Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, 1999), Chapter 3 "Legislative Sovereignty and the Rule of Law" 57. Allen and Laws claim that Parliamentary Sovereignty is incompatible with more fundamental legal principles including the Rule of Law: T.S. Allan*, Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press, 1993), 116; Sir John Laws "Law and Democracy" PL 72 (1995) 85 and 88. Hickman sees Dicey as resolving the tension between the Rule of Law and Parliamentary Sovereignty. He argues that Dicey's theory is best understood as although Parliament can ultimately overrule a judicial decision, the long-standing principles of the common law endure in their application by the courts. This allows for 'political compromises to be made and given effect to whilst at the same time limiting the effect of such compromises and ensuring that courts protect fundamental principles to which society is committed are not undermined' Tom Hickman "Public Law after the Human Rights Act" (Hart Publishing, 2010) 80

[17] Graham Gee and Grégoire Webber, "What is a political constitution?" (2010) 20 OJLS 473

[18] Hailsham in *The Dilemma of Democracy, diagnosis and prescription*, (Colins, 1978), refers with alarm to 'the position of when a government elected by a small minority of voters, and with a slight majority in the House regards itself as entitled, and, according to its more extreme supporters, bound to carry out every proposal in its election manifesto'. This has happened 'more than once in the past few years and it seems to me that at almost any cost we must ensure that it cannot happen again', quoted in J. A. G. Griffith, 'The Political Constitution' (1979) 42(1) MLR 1, 8-9. Concern about the power of the executive in the UK Parliament and its lack of democratic mandate is not new.

executive or the legislature[19]. It is the government who propose legislation and is generally able to have its bills enacted in the manner and form it chooses, and, it is argued by some, that Parliament does not even engage in effective scrutiny. Additionally, primary legislation is often very brief, with the details left to Ministers passing Statutory Instruments. Loughlin suggests that today Parliament can be said to legislate only in a formal sense[20]. All this would seem to point to the need for a greater role for the courts in controlling the legislature and executive and protecting individual rights; it cannot, in the UK, be left to the political institutions alone.

It is fair to say that the description thus far of political constitutionalism has been broad and simplistic, and masks the detail, complexity and differences that exist within and between political constitutional thought. Tomkins, an avowed political constitutionalist and a civil libertarian[21], has argued that even within a theory of political constitutionalism courts have an important and distinct role to play in holding the executive to account[22], and rather than focussing on what the courts should not do he argues that it is important to focus on what they should do. He recognises the dilemma of arguing against a greater role for the judiciary and arguing for greater protection of rights. In seeking to address this dilemma he argues that the courts should be seen as 'an instrument of the political constitution.'[23]

Why is it that the protection of individual rights by courts causes such angst by those advocating political constitutionalism? It probably has to do with the way in which rights are characterised and viewed. One characteristic of rights that it is argued makes Parliament and not the courts the proper constitutional institution to hold the executive to account, and to make decisions as to the scope, application, and limitations of rights, is their moral dimension. Objection to a role for the courts is taken by some particularly in respect to qualified rights and those contained in the ECHR. Griffith has described the rights in the ECHR as 'political conflict pretending to be resolutions of it'[24]; he considers legal rights are in reality political

[19] See Paul Craig, "Political Constitutionalism and the Judicial Role: A Response" (2011) IJCL 9(1) 112, at 117 'The orthodoxy among political scientists is old hat, over the last century, the executive has dominated the legislature.'
[20] Martin Loughlin, *The British Constitution: A Very short introduction*, (OUP 2013), 57-58.
[21] Adam Tomkins, "The Role of the Courts in the Political Constitution" (2010) 60 University of Toronto Law Journal 1, 3
[22] Tomkins is credited as being one the few political constitutionalists to have articulated a thesis for the scope of judicial review. One which Paul Craig has challenged as being neither consistent or coherent: Paul Craig, "Political Constitutionalism and the Judicial Role: A Response" (2011) IJCL 9(1) 112
[23] *Ibid.* n.23 3
[24] J.A.G. Griffith, "The Political Constitution" (1979) 42 MLR 1, 14, this was said in the context of the *Sunday Times case* and the balance to be struck between contempt of court laws and freedom of expression.

claims which require assessments of political rather than legal issues[25]. Parliament is argued to be institutionally more suited to the resolution of rights where controversial moral or ethical issues are concerned, or where there is a need to balance the rights of an individual against the rights of the community as a whole. It is argued that Parliament is better placed to make decisions about the content and limitation of rights in these cases due to its ability to hold debates, to subject legislation to scrutiny by committee, request reports and conduct consultations. This is in addition to arguments based on democratic legitimacy[26].

Tomkins acknowledges that there are some rights for which the courts are better suited to adjudicate, namely process or procedural rights, and absolute rights. Where however there is a need to apply a proportionality or reasonableness test (which require balancing) in determining the content, scope, and limitation of a right then Tomkins considers the appropriate constitutional institution is Parliament; the nature of qualified rights he argues is problematic for courts[27]. In making this argument Tomkins relies on the *Animal Defenders*[28] case as being a good example of why the legislature, here the UK Parliament, and not the courts, is in a better position, and is the correct constitutional institution, to protect rights. In that case legislation was passed banning political advertisements in the broadcast media. Tomkins highlights how the legislation was subjected to detailed scrutiny by specially appointed committees of both Houses of Parliament and was the subject of two reports by the Joint Committee on Human Rights. The implications of the ban on freedom of expression were considered, and an informed decision in support of the ban was reached. Tomkins describes this as an 'exemplary use of Parliament's law-making powers.'[29] Undoubtedly it was. Indeed, as Tomkins points out the legislative process was an 'influential factor in persuading the House of Lords to uphold the ban.'[30] There are of course however limits as to how far the courts should consider

[25] *Ibid.* 18
[26] As Hickman defines these twin arguments 'ballot box' and 'allocation of function': Tom Hickman "Public Law after the Human Rights Act" (Hart Publishing, 2010) 156
[27] Adam Tomkins "The role of courts in the Political Constitution", University of Toronto Law Journal, Vol 60, No 1, Winter (2010), 1-22, 4-5
[28] *R (on the Application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL, [2008] 1 A.C. 1312
[29] Adam Tomkins, "The Role of the Courts in the Political Constitution" (2010) 60 University of Toronto Law Journal 1, 5
[30] *Ibid.* n.4

parliamentary proceedings given the prohibition on the courts reviewing parliamentary debates.[31]

It can also be argued however that it will not always be the case that there is such an informed and detailed debate and scrutiny over proposed legislation touching on human rights.[32] And it will not always be the case that where there is such a legislative process it will not be constitutionally right for the court to nevertheless conclude that a piece of legislation violates individual rights. In *Re G (Adoption: Unmarried Couple)*[33] the House of Lords (Northern Ireland) was asked to determine whether a complete ban on unmarried couples being considered as adoptive parents violated Convention Article 8 (right to privacy) and 14 (right of not to be discriminated against in the protection of Convention rights). The Appellate Committee of the House of Lords reviewed and took into account the passage of the legislation, which sought to protect and the views of committees and reports, and that the matter was to be further debated by the Northern Ireland Assembly, but nevertheless went on to find a violation of Article 8 and 14[34]. The Appellate Committee of the House of Lords gave weight, as it saw fit, to the views of the legislature but reached the view that in the end it was for the courts to make a determination on the violation of rights in this case. Lord Hoffmann in his speech said that the question raised, whether unmarried couples should be allowed to adopt, was a question of social policy, and that where questions of social policy admit of more than one rational choice the courts will ordinarily regard that choice as being a matter for Parliament. However, Lord Hoffmann said that this did not mean that Parliament is entitled to discriminate in any case which can be described as one of social policy. Any discrimination, he said, must at least have a rational basis[35], He went on to say:

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[31] See Article 9 Bill of Rights 1689 and *Wilson v First Country Trust (No.2)* [2003] UKHL 40, [2004] 1 A.C. 816. But see also Singh who suggests post HRA the Administrative Court in judicial review proceedings is more willing to consider statements made in parliament when considering challenges to primary legislation. See Rabinder Singh "The Impact of the Human Rights Act on Advocacy" in Roger Masterman and Ian Leigh (eds) *The United Kingdom's Statutory Bill of Rights: constitutional and comparative perspectives* (Oxford University Press, 2013) 178

[32] And query the extent to which the courts should enquire into the adequacy of Parliamentary debates and procedures.

[33] [2008] UKHL 38, [2009] 1 AC 173

[34] The judgment was criticised by the Supreme Court and Lord Reed in *R(Elan-Cane)* [2021] UKSC 56, [2023] AC 559, mainly in respect of the approach taken to the margin of appreciation. Lord Reed disagreed with Lord Hoffmann's characterisation of the ECtHR as not making a determination on the scope, content or limitation of rights in cases where it was found that the Margin of Appreciation applied. These criticisms do not however affect the points made here.

[35] *Ibid.* n.33 20

> Cases about discrimination in an area of social policy … will always be appropriate for judicial scrutiny. The constitutional responsibility in this area of our law resides with the courts. The more contentious the issue is, the greater the risk is that some people will be discriminated against in ways that engage their Convention rights. It is for the courts to see that this does not happen. It is with them that the ultimate safeguard against discrimination rests[36].

Lord Hoffmann is surely right to identify that just because an issue to be decided lies with the field of social or economic policy or is a political issue necessarily means that constitutional responsibility resides with the legislature and not the courts. There will be cases, even where issues in these fields arise, where it will be constitutionally legitimate, and necessary to protect individual rights, for the courts to make the determination. The relative strengths and weaknesses of the different constitutional institutions will be considered later in this chapter, as will the factors which it is argued that influence decisions as to which institution should provide the ultimate safeguard.

Legal constitutionalism.

Legal constitutionalists advocate for the courts providing additional controls to political control over the legislature and executive. Courts are seen to operate their own additional independent controls, rather than just providing a supplementary role to parliamentary control. Legal constitutionalists are more likely to argue for a general test of rationality or proportionality performed by the courts[37], and for a more substantive interpretation of the Rule of Law and for the concept of legality restraining the use of executive and legislative power. For those legal constitutionalists, including Kumm, who advocate an extreme version of legal constitutionalism courts should be afforded the power to strike down legislative acts[38], others, including Craig, do not argue for a power to strike down legislation, but only executive acts.[39]

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[36] *Ibid.* 48

[37] Compare Kumm who argues for a more active role for the courts in applying a proportionality test, focussing on whether good reasons exist, objectively, with Tomkins who argues for the role of the courts to be restricted to scrutinising only the actual reasons given, and not apply a more abstract or general reasoning. See Tom Hickman "Public Law after the Human Rights Act" (Hart Publishing, 2010) 66

[38] See for example, Mattias Kumm "Institutionalizing Socratic Contestation: The Rationalists Human rights Paradigm, Legitimate Authority and the Point of Judicial Review" (2007) 1 *European Journal of Legal Studies* 1; Mattias Kumm "Democracy is not enough: Rights, Proportionality and the Point of Judicial Review" (2009) New York University Public Law and Legal Theory Working Papers, Paper 118,1

[39] Paul Craig, "Political Constitutionalism and the Judicial Role: A Response" (2011) IJCL 9(1) 112

Legal constitutionalism was most obviously first adopted in the United States with the judgment of Chief Justice Marshall in *Marbury v Madison*[40] where he rejected arguments concerning of constitutional supremacy, finding that a law that was repugnant to the Constitution was void[41]. In the UK legal constitutionalism is linked to common law constitutionalism[42]; Allan, Laws, Oliver and Craig have been identified as developing theories of common law constitutionalism[43]. Poole argues that the 'primary guardian' of rights and values in a particular community should be the courts, and that '[t]he role of the court is to apply fundamental standards of political morality, as enshrined in the principles of the common law, to protect individuals from interference by the state.'[44] Similarly Laws argues that it is the responsibility of the courts to protect fundamental normative principles and values[45]. While for political constitutionalists rights can be contained in statute and the common law, it must be possible for the political institutions to be able to change and control those rights through ordinary parliamentary procedure, without the need for any special or additional limitations. This contrasts with legal constitutionalism where at least some rights are regarded as being a 'higher form of law' requiring special procedures for any changes or amendments[46]. In recent years it has been argued that the UK is moving away from political constitutionalism towards legal constitutionalism[47]. The growth and strengthening of judicial review, the development of the principle of legality and the advent of the HRA being relied on as examples for this.

Hickman, in analysing the development in the UK of the concept of legality[48], has referred to the speech of Browne-Wilkinson LJ in *Wheeler v. Leicester City Council*[49] as the starting point of the development of the common law (and so courts) protecting individual rights in the

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[40] 5 U.S. (1 Cranch) 137 (1803)
[41] Arguments for and against both legal and political constitutionalism can be found in the Federalist papers. Gardbaum points to the comparisons to be drawn between Madison's reliance on political limits and Hamilton's arguments for legal constitutionalism and judicial review: Stephen Gardbaum. *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013) 22. For a general discussion see also Geoffrey Marshall, *Constitutional Theory* (OUP, 1971) 103-109
[42] See for example T.R.S Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press, 2001); John Laws "Law and Democracy" (1995) PL 73-93; John Laws, "The Constitution, Morals and Rights" (1996) PL 622-35
[43] See Alison Young *Democratic Dialogue and the Constitution*, (Oxford University Press, 2017) 37. Quoting T Poole, "Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23 OJLS 435.
[44] *Ibid* Alison Young 41
[45] John Laws, "Law and Democracy" [1995] *Public Law* 72, 92-93. See also John Laws "The Constitution: Morals and rights", (1996) PL 622
[46] See for example Danny Nicol "Are Convention rights a no-zone for Parliament?" (2002) PL 438
[47] See for example Stephen Gardbaum. *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013) 23
[48] Tom Hickman, *Public Law after the Human Rights Act* (Hart Publishing, 2010) 107-108
[49] [1985] AC 1054

absence of written constitution using the concept of illegality. In *Wheeler*, a case concerning a challenge to the decision of the city council to ban a rugby club from using its ground where members of the club had refused to object to a proposed tour to Apartheid South Africa, Lord Browne-Wilkinson, sitting in the Court of Appeal and giving a dissenting judgment, said that in his judgment the appeal should be allowed on a point of fundamental importance. He said that the case raised a conflict been two basic principles of a democratic society, namely the right of a democratically elected body to conduct their affairs in accordance with their own views and, on the other, the right to freedom of speech and conscience enjoyed by each individual in a democratic society[50]. He went on to comment that:

> Until comparatively recent times this sort of question did not arise in practice. Without any written constitution ensuring individual human rights, constitutions and conventions were observed whereby the majority exercised their powers so as to give effect to their own policies but not so as to discriminate against individuals who did not agree with them. However, with the present polarisation of political attitudes the observance of such conventions has diminished. There is no written constitution which delimits what is within the ambit of the powers of the elected majority by declaring certain individual rights which cannot be overridden by the views of the majority. In my judgment it is undoubtedly part of the constitution of this country that, in the absence of express legislative provision to the contrary, each individual has the right to hold and express his own views.[51]

Lord Browne-Wilkinson observed that absent a written constitutional bill of rights substantive checks on government acts were political and not legal. He rejected this position as being outdated. He considered such political checks to be inadequate and for there to be a deficit in the protection of rights as a consequence. Lord Browne-Wilkinson's views were not adopted and were rejected by the House of Lords who went on to consider the case.[52] Lord Roskill saying in his speech that 'I would not with profound respect, rest my decision upon the wider grounds which appealed to Browne-Wilkinson LJ in his dissenting judgment.'[53] While quashing the decision and allowing the appeal their Lordships did so on the grounds of a lack of procedural impropriety and a misuse of statutory powers[54].

[50] *ibid* 1061H.
[51] *Ibid* 1063C-D
[52] *Ibid* 1079D
[53] *Ibid*
[54] s.71 Race Relations Act 1976

Once Lord Browne-Wilkinson was in the House of Lords, together with Lord Steyn and Lord Hoffmann, the concept of illegality was developed, most particularly in the cases of *Pierson*[55] and *Simms*[56]. In *Simms* Lord Hoffmann stated:

> In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the Sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.[57]

In the UK there is now of course the HRA which provides a statutory means for challenging executive and administrative acts on the basis of a violation of Convention rights using s.6 and s.7, and a more limited ability to restrict the legislative power of Parliament on the basis of compatibility with Convention rights using s.3 and s.4. The interpretive tools in the HRA (s.3 in particular) and the power to issue declarations of incompatibility (s.4) have led many to now argue[58] that the UK's constitution is an example of "democratic dialogue" or the "new commonwealth model". These models will be considered further below.

Democratic Dialogue, the New Commonwealth Model, and the Collaborative Constitution.

Rights protection in modern democratic constitutions is clearly complex, relative to the particular constitution, and it is evolving. Taking up the position of an extreme version of legal constitutionalism or an extreme version of political constitutionalism would likely fail to consider the nuances of a particular constitution or sufficiently protect individual rights[59]. That this is in any event a 'false dichotomy' and one that does not fit the reality of democratic constitutions, including the UK has, been noted by many commentators.[60] Adherence to a strict

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[55] *R v. Secretary of State for the Home Department ex parte Pierson* [1998] AC 539
[56] *R v. Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115
[57] *Ibid* 131
[58] Including Francesca Klug, see Francesca Klug "The Human Rights Act – a "third way" or a "third wave" Bill of Rights" [2001] EHRLR 361 and "Judicial deference under the Human Rights Act 1998" (2003) EHRLR 125. See also Connor Gearty "Reconciling Parliamentary democracy and human rights." (2002) LQR 118, 248, Richard Clayton "Judicial Defence and "democratic dialogue": the legitimacy of judicial intervention under the Human Rights Act" (2004) PL 33 and Alison Young *Parliamentary Sovereignty and the Human Rights Act* (Hart, 2009) Chapter 5
[59] As Alison Young points out no account of legal constitutionalism argues that only courts should control the executive and protect rights, not does any account of political constitutionalism argue that only the legislature should do so. Alison Young "Democratic Dialogue and the Constitution" (OUP, 2017), 65-66
[60] See, for example, Aileen Kavanagh *The Collaborative Constitution* (Cambridge University Press, 2023) 53 fn 178. Kavanagh points out that the UK constitution 'envisages a role for both Parliament and the courts in holding the executive to account thus relying on a combination of political and legal modes of accountability.'

separation of powers is problematic, as is strict adherence to Parliamentary Sovereignty. It is likely that individual rights are best protected within a democratic or representative constitution, and particularly the British constitution, by both political institutions and the courts. This makes inter institutional relations and dialogue of critical importance, both in terms of how such dialogue *does in practice* take place, but also equally important is *how it should take place*, this should, it is argued, be explicitly articulated. Clarity is needed as to which institution has the "last word"[61] and the roles and powers accorded to the different constitutional institutions made clear if matters are not to be muddied and the role of the courts are to be properly and transparently understood. In the UK the concept or constitutional theory of "democratic dialogue" has, with the passing of the HRA come more to the fore, but it is far from clear how it does and should operate as debates around the use of s.3 and s.4 evidence[62].

Hogg and Bushell's account of human rights protection under the Canadian Charter provides, what Young has described as a "seminal account"[63] of constitutional dialogue[64]. Hogg and Bushell have argued that the Canadian Charter facilitates a dialogue between the courts and judiciary, with the legislature being afforded the opportunity to respond to a decision by the courts, including through the "override clause" that allows for legislation to be passed "notwithstanding" the provisions of the Charter[65]. The work of Hogg and Bushell suggested that a decision needs to be made as to whether to opt for a strong protection of human rights through the courts, with the problems that causes with democracy, and a weak protection relying on parliamentary protection, with the fear of majorities harming minority rights. It was, and is, it is argued possible to combine both.

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[61] For a discussion of the approach and analysis of which institution should have the last word and "constitutional collaboration" and "constitutional counter-balancing" see Young, *Ibid* n.58 118-136

[62] As Kavanagh has noted one of the lines of debate opened up by the HRA and the concept of democratic dialogue was 'the judicial choice between sections 3 and 4 HRA, with many supporters of dialogue arguing that courts should issue more declarations of incompatibility rather than "re writing legislation" using creative tools of interpretation under Section 3.' Aileen Kavanagh *The Collaborative Constitution* (Cambridge University Press 2023) 71. See Connor Gearty *Principles of Human Rights Adjudication* (Oxford: Oxford University Press, 2004), 504, Connor Gearty "Reconciling Parliamentary Democracy and Human Rights" (2002) 118 LQR 248, 250, Tom Campbell "Incorporation Through Interpretation" in Campbell, Ewing and Thomkins (eds.) *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2011) 99

[63] Alison Young "Democratic Dialogue and the Constitution" (Oxford, Oxford University Press, 2017) 2

[64] Also referred to by Aileen Kavanagh as the "influential article", Aileen Kavanagh *The Collaborative Constitution* (Cambridge University Press, 2023) 64, but also note that given the 'fervour with which the metaphor was subsequently embraced by scholars from all sides "it is sobering to recall how tentative Hogg and Bushell initially were about the aptness of the metaphor of dialogue' 65

[65] Peter Hogg and Allison Bushell, "The Charter Dialogue between Courts and Legislatures (Or perhaps The Charter of Rights Isn't Such a Bad Thing after All)" (1997) 35 Osgoode Hall Law 75

Discussion of democratic dialogue led to the development of commonwealth models of human rights protection which are designed to protect human rights through facilitating dialogue between the courts and the legislature[66]. Gardbaum had argued that this Commonwealth Model is distinct from both legal constitutionalism and political constitutionalism because it is specifically designed to promote and facilitate dialogue. In describing this model Gardbaum says it represents:

> A third approach to structuring and institutionalising basic constitutional arrangements that occupies the intermediate ground in between the two traditional and previously mutually exclusive options of legislative and judiciary supremacy. It also provides novel, and arguably more optimal techniques for protecting rights within a democracy through a reallocation of powers between courts and legislatures that brings them into greater balance than under either of these two lopsided existing models.[67]

Gardbaum considers the term "democratic dialogue" to be too vague to be a useful label[68], he focuses on constitutional design and argues that the commonwealth model is a distinct model as the constitution has been designed in order to facilitate dialogue between the courts and the legislature.[69] The UK, along with Canada, New Zealand, Australia and the United States (at the State and not the Federal level) are all examples of the "Commonwealth Model". Gardbaum describes the new Commonwealth Model as 'exciting' in transcending the existing choice between legal or political constitutionalism and offering a 'third institutional form of constitutionalism in between the two traditional and dichotomous ones of legal or political constitutionalism, constitutional or legislative supremacy, judicial review or no judicial review.' It consists of a combination of two techniques for protecting rights, mandatory pre-enactment scrutiny and weak form judicial review.[70]

More recently Kavanagh has introduced what she has termed the theory of 'The Collaborative Constitution.'[71] Kavanagh considers that the 'last word' constitutional theories are

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[66] Alison Young *Ibid* n.62 3
[67] Stephen Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013), 1
[68] Kavanagh similarly considers the metaphor to be vague 'Without the analytical resources to distinguish between different modes of engagement, the metaphor became a vague placeholder for any conceivable type of interaction between the branches of government across time and space. Rather than shedding light on a complex phenomenon, dialogue became and opaque, abstruse and malleable term', A. Kavanagh *The Collaborative Constitution* (Cambridge University Press, 2023) 79
[69] Stephen Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013), 25
[70] *Ibid.* For a more developed discussion of the techniques see 30-31 and 33.
[71] *Ibid.*

problematic[72], that there is a need to move away from the 'Manichean narrative' that pits courts against legislatures, but that dialogue is a 'metaphor that has got out of control.' She argues that those on both sides of the argument (legal constitutionalism and political constitutionalism) have relied on the concept of dialogue, it has become malleable, and it is not an accurate metaphor[73]. Instead, Kavanagh has suggested the concept of collaboration, arguing that it more accurately encapsulates and describes the interaction between the constitutional institutions, as well as providing a normative dimension. She argues that the branches of government should act as partners in a collaborative exercise 'based on a division of labour where each branch has a distinct but complementary role to play in upholding rights'[74], and responsibility is shared between courts[75], legislature, and the executive. Each institution should discharge their responsibility in 'institutionally specific ways.'[76] This very clearly chimes with what is being argued for here, but with the addition of a more granular analysis of how claims of rights abuse against the executive should be discharged and the importance of judicial expertise. Specialist HRTs with expert judges who can decide whether they have the constitutional competence to determine a rights issue, with the presumption being they do in cases involving acts or omissions of the executive that are claimed to have violated individual rights. Such courts would fit within the definition of a 'collaborative constitution' and institutions discharging their responsibilities in an 'institutionally specific way'.

Constitutional theories and the Human Rights Act

The above is acknowledged as being only a brief outline of these constitutional theories. A more detailed analysis and discussion of democratic dialogue theories, Commonwealth constitutional models, or 'The Collaborative Constitution', is not going to be attempted here; it would be huge task and an unnecessary one for this thesis to attempt. As set out in the introduction to this chapter this thesis is not advocating for a completely new constitutional theory, but rather offers the differential constitutional model as being part of a constitutional model of dialogue or collaboration, but with a greater role for courts where acts of the executive (public bodies or public officers) are concerned and additional powers of pre legislative review of devolved legislation. It is not suggested, for example, that there be any amendments to the

[72] *Ibid.* 59
[73] *Ibid.* 67-70, 79
[74] *Ibid.* 24
[75] That responsibility is a shared one has also been posited by Nicol: Danny Nicol, "Law and Politics After the Human Rights Act" [2006] PL 722, 743
[76] Aileen Kavanagh *The Collaborative Constitution* (Cambridge University Press, 2023) 83

current operation of s.3 and s.4 HRA[77], which is where dialogue is arguably most readily facilitated, and where much academic debate has been focussed. However, what is being proposed in creating the new specialist tribunals could be argued to further promote dialogue, and collaboration, between the courts and the legislature (and between courts), even if not in any formal sense. With HRA claims being started in the specialist tribunal s.4 declarations will in the vast number of cases be decided in the first instance by the expert tribunals, and there would be the option for other courts to refer a case or a question that raises the potential for a s.4 declaration to the specialist tribunals. The expert judges would be encouraged to develop human rights jurisprudence, in line with the UK's legal and cultural tradition and history; it would be the HRTs that would be recognised as having the expertise and knowledge necessary to interpret Convention rights as they apply in and across the UK. To that end a brief explication of how in the UK the HRA is said to promote dialogue and is an example of theories of democratic dialogue and/or the Commonwealth Model, and/or 'The Collaborative Constitution' will be of some benefit. In particular, the aspect of 'The Collaborative Constitution' that speaks of branches of the constitution acting in institutionally specific ways.

Klug is among those who emphasise the innovative nature of the HRA. She posits that the HRA is not based on an assumption that it is the judiciary which is to be the exclusive protector of human rights, but rather that it sets up a dialogue between the courts, Parliament and the executive. A dialogue in which the meaning and application of rights can be debated[78]. Klug also makes the point the this 'tripartite' approach creates 'space for any of us to join the debate about where the line should be joined when rights collide.'[79] While the HRA is innovative in many ways in the UK, the conceiving of modern constitutionalism in terms of a dialogue between the courts, legislature and executive is now common across the world. As already alluded to there is much academic debate in the UK as to whether s.3 or s.4 should be more or less utilised by the courts. Those who support the concept of constitutional dialogue advocate for greater use of s.4 declarations of incompatibility. The courts can and should they argue use s.4 as a means to signal a disagreement over the compatibility of primary legislation and force the executive and Parliament to rethink, leaving the legislation unaffected. Parliament can choose to debate the matter and pass new or amending legislation, and it is also possible for a

[77] On the basis that currently the courts only rarely make s.4 declarations and more often use s.3 powers of interpretation.
[78] Francesca Klug, "The Human Rights Act – a "third way" or "third wave" Bill of Rights", (2001) EHRLR 4, 361
[79] *Ibid* 370

Minister of the Crown to order such amendments to the legislation 'as he considers necessary to remove the incompatibility.'[80] In this way the courts raise the issue and create debate but leave to the political institutions as to what action, if indeed any, should be taken.[81]

It has been argued by Nicol, that this articulation and conception of the HRA reveals a profound shift in the judicial role such that judicial opinions are a 'contestable entity, wherein the courts present their thoughtful opinion on rights, which Parliament can substitute with its own favoured interpretation.'[82] Determining the content of rights under this model is a shared responsibility between the judicial and the legislature. Those who favour legal constitutionalism will take a different approach to the use of s.4 and s.3, advocating for the greater use of the court's power of interpretation in s.3 and only resort to making a declaration under s.4 on the rare occasions legislation cannot be read in a compatible way. Viewed in this way s.4 and s.10 are intended only to prevent disruption being caused by a power to strike down legislation. Section 4 is not a means for generating debate and its dialogic contribution does not relate to and questions of constitutional justice[83].

The concept of dialogue, to the extent that it reduces the courts as a form of "advisory" body on rights is firmly rejected.[84] Determining which institutional body should discharge the responsibility of rights protection should be done based on the specific attributes of the specific institution given the specific issue at hand. Here there is some common ground with Tomkin's acceptance that there is a greater role for the courts when reviewing acts of the executive.[85] As will be further argued below, courts have the necessary attributes and constitutional competence to determine human rights claims, even when matters of policy, ethics, or public resources are in issue, provided that the case does not directly concern a decision very clearly taken by Parliament in an area where Parliament is the obvious constitutionally competent

[80] S.10
[81] See Tom Campbell "Incorporation through interpretation' in Tom Campbell, KD Ewing and Adam Tomkins (eds.) *Sceptical Essays on Human Rights* (OUP, 2001)
[82] Danny Nicol, "Law and Politics After the Human Rights Act" [2006] PL 722, 743
[83] For a discussion see Tom Hickman *Public Law after the Human Rights Act*, (Hart Publishing, 2010), 58-63, and generally on constitutional dialogue and the HRA 63 – 97.
[84] Kent Roach was right in his observation that if the concept of dialogue connotes an exchange of ideas then it becomes 'an implausible way to describe the authoritative act of judging. At the end of the day, [judges] do not enter into dialogue or a conversation with anyone … they decide cases according to their view of the law. Institutionally, they expect their decisions will settle disputes and be obeyed and not start a conversation' Kent Roach "Constitutional Remedial and international Dialogues about Rights: The Canadian Experience" (2005) 10 Texas International Law Journal 537
[85] Adam Tomkins, "The Role of the Courts in the Political Constitution" (2010) 60 University of Toronto Law Journal 1, 5

body. Further, in creating specialist tribunals for human rights claims bespoke procedures and rules can be created to enhance the constitutional competency of the tribunal to determine rights cases. The courts have demonstrated the ability to determine when a mater is for them and when it is for Parliament[86], and they should continue to be trusted, indeed encouraged, to do so. In setting up new human rights tribunals it should be transparently and emphatically acknowledged that the tribunals' role is to protect rights, that they should reach a conclusion and determine the case before them, unless it is a matter that is very clearly for the legislature. The courts or tribunals should only provide advice when clearly and overtly requested to do so. Otherwise, they must adjudicate. Kavanagh's suggestion that the responsibility of rights protection is a shared one, and that discharging that responsibility should be done in 'institutionally specific ways' chimes closely with what is being advocated for here. As Kavanagh argues the real question is not 'whether to choose between *either* a political *or* legal constitution but to establish which modes of accountability are suitable for which kinds of governmental decision within a composite, multi-national constitutional framework.'[87] When it comes to decisions of branches of the executive that impinge on rights, more often it will be the courts who possess the constitutional competence to adjudicate and provide accountability.

In considering what powers the new tribunals should be granted the need for such clarity and transparency in respect of the courts institutionally specific role will be kept well in mind. For example, the addition of the power for new specialist HRTs to issue advisory opinions would make clear the demarcation between the courts/tribunals and Parliament and be clear when a decision is being reached and when an opinion is being offered; it will avoid the profound shift that Nicol has articulated.[88] Where the courts and tribunals issue opinions or advice this should be explicit, and not implicit such as the use of S.4 advocated by some involves. The specialist tribunals will be expressly providing views and advice having been invited to do so, rather than doing so under the guise of a s.4 declaration. It is for the judiciary to determine the scope, limitation and application of rights in *individual* cases, and this should not implicitly be watered down. An overly dialogical approach to the HRA by overuse of s.4 risks muddying the waters and risks leading to differing views as to the role of the courts in human rights adjudication. Section 3 should continue to be the powerful interpretative tool it is, and s.4 should continue to be rarely used. Providing a power to issue advisory opinions to new specialist tribunals

[86] See for example the *Animal Defenders* case and *Re G (Adoption: Unmarried Couple)*
[87] Aileen Kavanagh The Collaborative Constitution (Cambridge University Press, 2023) 52
[88] Danny Nicol, "Law and Politics After the Human Rights Act" [2006] *Public Law* 722, 743

would have the advantages of maintaining a democratic dialogue approach but would do so by being explicit as to when this was happening and would not render the courts to 'a form of privileged pressure group whose function is to raise good reasons why a litigant's interests should be respected.'[89]

Control over the executive and the character of rights.

The above overview of the various constitutional theories has largely focussed on the role of the courts when providing control over the legislature, and less so over administrative and executive acts and decisions. The latter are however more relevant to this thesis whose focus is primarily the role of courts in protecting rights against infringements by the executive and administrative acts and decisions. Claims against the police, the CPS, social services, DWP, claims concerning individual discrimination, claims arising from inquests involving deaths in state detention, privacy claims, free speech claims. In these types of claims rarely do the courts need to consider the interpretation of legislation, or the compatibility of legislation with rights, but are more concerned with individual decision making, individual judgment calls, individual abuse of power, or individual arbitrary decision making. Here the debates around the concern for democracy are less relevant and pertinent. While passing of legislation is clearly the act of a democratically elected and accountable bodies (parliaments), the same cannot be said of the acts of public officials and bodies. As Craig has highlighted:

> … the extent to which the primary decision makers in administrative law have democratic credentials varies very considerably. Political constitutionalist argument assumes that the initial decision will normally be made by the legislature, or a member of the executive with some direct democratic credentials, the paradigm being a government minister. The tapestry of administration in the modern state, however, is far more complex. The initial determination will often be made by bodies such as local authorities, local agencies, central agencies, prison governors, school governors, health boards, and bodies to whom power has been contracted out. The extent of their democratic credentials varies considerably. There is, clearly, a distinction between the existence of democratic legitimacy, which inheres by virtue of the vote, and the authority given by a democratically elected body to an agency or institution that is not itself democratically elected.[90]

Adjudication by courts to challenges of decisions made by, for example, police, prison governors, health boards and Trusts do not give rise to anti-democratic arguments in the same way as challenges involving the interpretation and application of legislation. But they can and

[89] Tom Hickman *Public Law after the Human Rights Act*, (Oxford: Hart Publishing, 2010), 61
[90] Paul Craig, "Political Constitutionalism and the Judicial Role: A Response" (2011) IJCL 9(1) 112, 114

often do involve the courts in making decision that involve the balancing of individual rights against the community as a whole and can involve issues of social and economic policy. So, debates about relative institutional competency still arise. It is because of the particular characteristics of rights that this is the case. The objection of the courts' involvement in cases concerning challenges to executive and administrative acts that involve individual rights is based more on their "institutional competence" and the relative strengths and weaknesses of the court process and the Parliamentary processes in cases that concern balance and social policy. Although it is not exclusively the case that the courts involve themselves in such areas in cases involving individual human rights, it invariably is.

When it comes to control over the executive and protecting rights Young has questioned the extent to which a bright line that can be drawn between political constitutionalists and legal constitutionalists, she suggests that the distinction may in fact lie in a different view of the character of rights:

> [P]olitical constitutionalists think rights are more contestable and more likely to require political assessments of contestable and more likely to require political assessments of competing interests. Legal constitutionalists think rights are less contestable and therefore require more moral reasoning from courts to ensure political balances of interest do not remove rights from minority groups. Some political constitutionalists think rights and merely expressions of interests and therefore should be determined by the political process. Other political constitutionalists think that democratic decision-making bodies are less likely to harm minority rights than courts.[91]

It must not be forgotten that ordinary courts in the UK regularly adjudicate on controversial and sensitive issues raising profound ethical and moral questions, including for example cases involving end of life decisions, cases such *Bland*[92], and the *Conjoined Twins* case[93]. As Craig has pointed out the courts are, without serious objection, involved in cases where there are 'contentious value assumptions or difficult balancing exercises' in private law cases involving tort, contract, restitution and crime courts:

> …routinely develop doctrine that is reflective of defensible, albeit contestable, normative assumptions and will often balance competing values. Judicial doctrine within criminal law is premised on conceptions of moral responsibility and justifiable excuse, while contract law is shaped by considerations relating to matters such as consent, autonomy, bargain and the like. Tort theorists debate as to whether the law should be informed by corrective or distributive justice,

[91] Alison Young *Democratic Dialogue and the Constitution*, (OUP, 2017) 66
[92] *Airedale NHS Trust v Bland* [1993] AC 789
[93] *Re A (Conjoined Twins)* [2001] 2 WLR 480

> or some admixture of the two …Similar academic debates and judicial discourse are apparent in areas as diverse as restitution and trusts.[94]

It is therefore necessary to subject the objections raised to the involvement of courts in what are characterised as political assessments of competing interests, or moral reasoning, in rights cases to careful scrutiny; are the courts really ill-equipped to deal with such issues and if so why?

Tomkins, and others, focus on the relative strengths and weaknesses of political and judicial institutions when assessing which institution should adjudicate on rights issues[95]. In analysing the strengths and weakness of the two institutions, courts and Parliament, Young draws on Habermas' 'interest formed co-ordination' and 'value-orientated co-ordination' categorisation of decision making.[96] Interest formed co-ordination occurs when different groups express their interests with no space for negotiation or compromise. Co-ordination (or outcome) results from the weight of numbers or political influence. By contrast value-orientated co-ordination occurs when arguments are based on reasons, and where parties are prepared to weigh up competing reasons and reach compromises. Young suggests that Parliament operates more based on interest formed coordination and the courts on value-orientated co-ordination. Which then should be the institutional body who determines contested rights issues depends on the view taken of rights. For Griffith, who see rights as in reality contested political claims, it is the interest formed co-ordination approach used by Parliament, whereas for Allan, who views rights as more objective, the value-orientated co-ordination approach used by the courts[97]. Differences also emerge as to which institution is better suited to moral reasoning; legal constitutionalists argue it is the courts, and advocate for reliance on The Rule of Law. Political constitutionalists disagree and would point to the much wider debates that take place within Parliament and its ability to take into account more varied views and can better judge the community's moral compass.

A defining feature of courts, aside from their independence, is their experience and ability to reach decisions in individual cases, applying general principles to specific situations and

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[94] Paul Craig, "Political Constitutionalism and the Judicial Role: a Response" (2011) IJCL 9, No.1, 112-131.
[95] For a discussion of the case for and against strong judicial protection based on institutional competency see Young *Ibid* n.36, 52-56
[96] Young *Ibid.* 105
[97] Alison Young *Democratic Dialogue and the Constitution*, (OUP, 2017), 112-113

determining what justice requires. Courts are also well able to identify when a decision they are being asked to make truly involves a matter best decided by the political institutions; that decision must be left to the courts to make on a case-by-case basis. If Parliament disagrees it can intervene. There are many examples of courts reviewing and assessing the involvement of the political institutions before reaching a decision as to whether it is or is not a matter the courts should deal with. For example, as referred to above, in *In re G (Adoption: Unmarried Couple)*[98], Lord Hoffmann considered the legislative history of adoption legislation for England and Wales, and in Northern Ireland. Careful thought was given as to the previous debates and amendments to legislation in England and Wales, and the ongoing debates and likelihood of fresh legislation in Northern Ireland.[99] Lord Mance in his speech made clear that:

> In performing their duties under sections 3 and 6 [HRA], courts must of course give appropriate weight to considerations of relative institutional competence, that is "to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies": see Brown v Stott [2003] 1 AC 681 , 703 though the precise weight will depend on inter alia the nature of the right and whether it falls within an area in which the legislature, executive or judiciary can claim particular expertise.[100]

The House of Lords in that case decided that it was for the court to protect against discrimination and was not a matter to be left to the legislature (here the Northern Ireland Assembly).

The contrary view was reached by the Supreme Court in *R (on the application of Elan-Cane) V. Secretary of State for the Home Department*[101], a case that concerned a policy not to provide for a person to declare themselves to be neither male or female on a passport application by indicating 'X'. The Supreme Court decided that this was a matter for Parliament and not one in which the courts should intervene. Other examples include the prisoner voting cases, *R (Nicklinson) v Ministry of Justice*[102], a case concerning assisted suicide, and *Bellinger v Bellinger*[103], a case concerning the recognition of gender re-assignment.

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[98] [2008 UKHL 38, [2009] 1 AC 173
[99] *Ibid.* 39-46.
[100] *Ibid* 130
[101] [2021] UKSC 56, [2023] AC 559
[102] [2014] UKSC 38, [2014] AC 657
[103][2003] UKHL 21, [2003] 2 AC 467, where Lord Nichols said a 'the recognition of gender reassignment for the purposes of marriage is part of a wider problem which should be considered as a whole and not dealt with in a piecemeal fashion. There should be a clear, coherent policy. The decision regarding recognition of gender

Removing rights adjudication from the courts on the basis that they involve the determination of political contests is overly broad and simplistic and does not reflect the reality of the extensive and broad reach of governmental action in individual lives. As Lord Neuberger said in Nicklinson 'the mere fact that there are moral issues involved plainly does not mean that the courts have to keep out. Even before the 1998 Act came into force, the courts were prepared to make decisions which developed the law and involved making moral choices.'[104] Nor does it respect the proven ability of the courts to make an assessment as to whether it is a matter for the courts or for Parliament. Decisions by public bodies and officials do not necessarily have, and often do not have, the cloak of democratic legitimacy ousting a role for the courts. The courts also have the advantage of independence, free from political influence. As Marshall has articulated:

> The argument against having an enforceable declaration of rights in a constitution is often presented as leading to a choice between the decisions of democratically elected representatives who will have their way if there is no fundamental rights legislation, and, on the other hand, non-representative judges who will have their way if there is. This leaves out of the account the fact that on many issues which might be expected to arise the choice, in effect, would not be between parliamentary decisions and judicial decisions but between executive or departmental decisions and judicial decisions. It is characteristic of civil liberties issues that they concern questions about the application of uncontroversial general principles of situations often unforeseen by the legislature or anybody. General principles may be widely accepted but particular instances which hinder embarrass or complicate policy making are less easily recognised or admitted. It is administrators who are particularly liable to find themselves in this position. Governmental agencies in any country and not least the UK are rarely completely free from the temptation occasionally to refrain from securing the maximum possible degree of publicity procedural fairness and public criticism where their own decision-making processes are concerned.[105]

Where the choice is between executive or departmental decisions and judicial decisions, which give rise claims of rights violations, the courts, and new human rights tribunals, should not feel democratically inhibited or excluded from reaching a definitive conclusion. The courts must

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reassignment for the purpose of marriage cannot sensibly be made in isolation from a decision on the like problem in other areas where a distinction is drawn between people on the basis of gender.' 45. For discussion see Danny Nicol "Gender re-assignment and the transformation of the Human Rights Act" (2004) 120 LQR 194.

[104] *R (Nicklinson) v Ministry of Justice* [98]. Ref was made *to In re B (A Minor) (Wardship: Medical Treatment)* [1981] 1 WLR 1421 , *In re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33 , *Airedale NHS Trust v Bland* [1993] AC 789 , *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 and *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147

[105] Goeffrey Marshall, *Constitutional Theory* (OUP, 1971) 133

uphold the rule of rule, be the guardian against abuse and excessive use of power and protect minority rights.

Concluding Remarks

This chapter considered how new specialist HRTs would fit with the more prominent constitutional theories pertinent to the UK and has set out what is meant by a proposed *differential constitutional model*. Both extreme versions of legal constitutionalism and political constitutionalism have been rejected, but it has been accepted that creating new specialist tribunals would nudge the UK further towards legal constitutionalism. However, the new tribunals will not be granted the power to strike down legislation passed by the UK Parliament, or to always be the constitutional institution with the 'last word' on rights. It is though proposed that they are to be granted additional power to conduct pre legislative review of devolved legislation and will inevitably be the court/tribunal which issue s.4 declarations of incompatibility for Acts of the Westminster Parliament and review devolution legislation. This it is argued would be in keeping with recognising the tribunals as expert, specialist constitutional institutions.

Legal constitutionalism is not a perfect fit. But in creating the new tribunals the intention is to give greater weight, or prominence to the legal institution as the expert body responsible for holding the executive to account for the protection of rights. It does not therefore fit with political constitutionalism. Democratic dialogue, the Commonwealth Model and the Collaborative Constitution provide better fits. To the extent that the Collaborative constitution most clearly articulates an 'institutionally specific' approach to determining which constitutional institution has the primary role in rights protection, it provides the best fit.

Adopting a dialogue or collaborative approach requires an articulation of how and why it is to be determined which institutional body takes a lead, or has a primary role, and articulation of how they interact. What is being advocated is a *differential constitution*, with different institutional bodies moving in different ways; individual rights protection is to be concentrated in specialist tribunals, those tribunals move and interact both with other constitutional institutions and with other judicial bodies, at times taking the lead, at others following. Where there are crossroads and junctions with other institutions, on either plain, clear signalling is required. What has been urged here is that when deciding on the appropriate institution to

determine a matter involving individual rights the strength of the independence[106] of the courts and their expertise must not be overlooked. The mere fact that rights claims usually involve political questions, moral or ethical considerations and the balancing of rights, cannot override the legitimate and necessary role of the courts as guardians of rights within a democratic constitution.[107]

The objections to courts deciding rights issues cannot however be ignored. Committed political constitutionalists disagree with a role for the courts and would point as part of the justification to the much wider debates that take place within Parliament and its ability to take into account more varied views and so the ability to better judge the community's moral compass. In proposing the creation of new specialist HRTs, the focus will be on maximising the strengths of the courts as independent rights adjudicators, and of the expertise of specialist courts and minimising their weaknesses as neither democratically elected nor directly accountable. In setting up a new constitutional institution the aim should be to both mitigate weakness and maximise strengths.[108] This does not require any significant constitutional shifts or adjustments. Rather, procedures and processes can be adjusted and altered; ones which for example encourage and increase the use of third party interventions to provide the court (here tribunal) with a wider spectrum of opinions and views, having a more inquisitorial rather and adversarial procedure, where appropriate, and encouraging the court to seek out disclosure or information on its own initiative, and increasing the role and involvement of the three Human Rights Commissions, and even potentially the Joint Committee on Human Rights, giving them greater access to court proceedings. But all time leaving undisturbed that the final say rests with the UK Parliament.

Precisely how and where the new tribunals would fit into the UK's pluralistic constitution, and what powers and procedures they should adopt to effectively carry out their constitutional role within the differential constitutional model set out here is the subject of Chapters Five and Six. The next stage however, having considered the theoretical context and having set out the history and debates leading up to the enactment of the HRA, is to assess how the common law

[106] Adjudicatory, electoral and institutional: A. Kavanagh *The Collaborative Constitution* (Cambridge University Press, 2023) 207
[107] For an analysis and discussion of the role of judges in balancing rights, policy considerations and the role of the courts in protecting rights see Steven Greer "" Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy debate", (2004), CLJ 63(2) 412-434
[108] Dimitrios Kyritsis "Constitutional Review in Representative Democracy" (2012) 32 OJLS 297

courts have dealt with claims based on the positive rights contained in the Convention, and identify the difficulties this clash of legal culture has thrown up. This is the task of Chapters Three and Four.

CHAPTER THREE

Litigating HRA claims

Introduction

Having set out the relevant context and history of rights protection in the UK in Chapter One, and considered the theoretical framework in Chapter Two, this chapter, and the following chapter, identify and consider difficulties litigating HRA claims in the existing common law courts. It is important at the outset to make clear that the focus here will be on litigation in the courts in England and Wales. The practice, procedure and case law discussed in this chapter concerns predominantly English law, and the courts in the jurisdiction of England and Wales. It is likely that similar difficulties have been and are being encountered in Scotland and Northern Ireland, and some case law from those jurisdictions is referred to and included here. But it is acknowledged that Scotland and Northern Ireland both have their own separate court structures and procedures and in Scotland there is the distinct Scottish law. The arguments proceed therefore on the basis that for many of the reasons articulated as to the current difficulties in England and Wales, and the advantages the creation of such expert tribunals would bring in England and Wales, the same are likely to apply to Scotland and Northern Ireland. The relevant constitutional differences as between England and Wales, Scotland and Northern Ireland, and the effect of devolution on rights protection has been touched on in Chapter One, will be considered in more detail in Chapter Six.

One of the central arguments of this thesis concerns the difference between adjudicating individual rights and protecting residual liberties, it is argued that the common law's focus is on requiring a claimant to establish the culpability of an individual state actor, rather than on the protection of the positive right of the individual claimant. This fundamental difference of approach reflects the contrast between the traditional approach of the ordinary courts of protecting residual liberties, rather than protecting positive rights. This distinction was succinctly summarised by Laws LJ in *DSD v Commissioner of Police of the Metropolis*[1]:

> There are important differences between the Convention's strategic purpose to secure minimum standards of human rights protection, and the English private law purpose…of compensation for loss. It is elementary that in a negligence claim at common law, the court asks whether the defendant owes a duty of care

[1] [2016] QB 161

> to the claimant... If the duty is established, the question will be whether any act or omission relied on by the claimant (a) constitutes a breach of the duty and (b) has caused the claimant loss; loss is a defining element of the tort.
>
> The process by which a human rights claim is adjudicated is quite different. The starting point is not the relationship between the claimant and the (state) defendant. It is to ascertain whether the case is within the scope of any of the rights or freedoms which the Convention requires the state to secure; and then, if it is, to decide whether the state has or has not violated the article or articles in question… The focus is on the state's compliance, not the claimant's loss.[2]

In these two problem chapters it will be argued that this distinction gives rise to litigation difficulties in the protection of individual human rights in the UK. It will be argued that the difficulties arise because of the decision to make it possible, through the HRA, to bring claims for positive rights protection in common law courts, whose history, rules, procedures and judges are steeped in a traditional residual liberties jurisprudence. They also arise, it will be argued, from the significant change brought about by the HRA by means of s.6 and s.7 that enables claimants to claim breaches of Convention rights not against the UK as a state before the ECtHR but rather claim breaches of Convention rights against public bodies before domestic courts. The HRA provided for a new statutory cause of action in s.7(1)(a) and allowed for Convention rights to be directly relied on in other causes of action, s.7(1)(b). This allowed for the first time a claim before the domestic courts to be founded solely upon Convention rights. No longer was there any need for a back door; Convention rights could march on through the front door[3]. But, despite these significant changes, it is to the ordinary common law courts that claims are made, using existing court procedures and rules. These are significant changes and are ones that the thesis posits requires a change to the current court structure and the creation of a specialist positive rights jurisdiction with the UK.

In this and the following chapter the question asked is whether the approach of using the ordinary common law courts to protect positive rights has in effect worked. Has it proved effective in providing domestic remedies for breaches of Convention rights against public authorities, has it enabled and encouraged a positive rights legal culture, has it avoided the costs of taking a claim to Strasbourg. Has it enabled the common law to be developed to march

[2] [65]-[66]

[3] Lord Donaldson famously (or infamously) said in *ex part Brind,* when rejecting the submission that subordinate legislation should, where there is ambiguity in the primary legislation, be read in accordance with Convention rights 'This I unhesitatingly and unreservedly reject, because it involves imputing to Parliament an intention to import the Convention into domestic law by the back door, when it has quite clearly refrained from doing so by the front door', *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 718F

in step with, or absorb, Convention rights, if indeed that was or is desirable. Or, on the contrary, has it left gaps in protection and in fact stifled and hindered the development of a domestic positive rights jurisprudence.

It seems increasingly to be the case that there are now two systems of rights protection that are operating separately within the same court structure, one as part of the common law tradition of negative liberties and one a new(er) system of positive rights contained in a written "bill of rights". If that is the case, why not have separate courts, why not have specialist domestic HRTs whose judges are expert in interpreting and applying positive, Convention, rights, and which operate under a bespoke set of rules and procedures tailored to the adjudication of claims by private individuals against public bodies for positive rights violations?

To answer the question these chapters focus on some of the current issues concerning the litigation and the adjudication of rights by and before the UK's ordinary common law courts and consider how the traditional or orthodox (Diceyan) legal tradition of public bodies being subject to the ordinary law in the ordinary courts has fared when tasked with holding public bodies domestically to account for violations of positive rights contained in an international treaty. The questions to be asked are how well and how easily do common law causes of action and remedies sit alongside claims for just satisfaction for violations of positive rights in the same courts, to what extent have the two run along in parallel, have they collided, are they happy bed fellows?[4] In approaching these questions these chapters take a heavily doctrinal approach. The focus is on practice, procedure, and case law.

In this chapter, the focus is on what are being termed as 'litigation issues' and HRA claims predominantly brought by way of s.6 and s.7(1)(a) HRA. The primary focus is on the use of private law claims to protect individual rights before the common law courts. The chapter starts with an exploration of the difficulties that can arise due to the concept of 'the state' in British legal thought, and the inability to sue the UK state domestically. The historical development of the use of private law to bring claims against public bodies is used as a means of demonstrating the deep roots civil liberties have in the UK and the courts, and how alien the concept of written positive rights jurisdiction is to its legal tradition. This history also provides one possible

[4] Nolan has argued to separate development of negligence and human rights law: Donal Nolan "Negligence and Human Rights Law: The Case for Separate Development" MLR 76(2) (2013) 286

explanation as to why legislation protecting rights in the UK is predominantly aimed to limiting power, rather than conferring positive rights.

As the state cannot be sued domestically, but rights can and often are violated when a number of public bodies act, or fail to act, together the chapter includes consideration of the problems encountered when litigating against more than one public body. It will consider claims concerning vicarious responsibility, in particular in cases concerning the right to liberty in Article 5 and claims for unlawful detention where the detaining authority is not the public body who is claimed to have breached rights. While these areas may appear distinct, and seemingly disparate, it will argued that in fact many of these problems are interrelated and arise as a consequence of trying to "add on" or "add in" remedies for breaches of international positive rights onto a common law, civil liberties orientated court system and legal tradition without any significant changes to that system.

The Chapter will also consider access to court for HRA claims, and the current costs and funding of HRA claims, for which there is no specific set of rules. It will be argued in Chapter Five that a bespoke set of costs rules within a specialist HRT system would be part of the way to ensure access court to have rights claims adjudicated. The Chapter will end with a review of the current approach of domestic courts to the awarding of damages under s.8 HRA, and the problems caused by so closely following ('mirroring') the ECtHR's Article 41 practice and case law. This has led to low levels of damages being awarded by domestic courts, when compared to damages in the common law, which has a knock-on negative impact to the availability of funding and so access to court. These difficulties will again be argued to be the result of an attempt to "bolt on" an international treaty to a domestic legal system, and a failure of the domestic courts to develop a truly domestic human rights jurisprudence.

Before embarking on an examination of some the current problems faced when litigating human rights claims against public bodies under the HRA, it is helpful to first consider the ability to bring a claim against a public body prior to the enactment of the HRA. Doing so provides some context for the first two problem areas to be considered. As with Chapter One what follows is not intended to be a comprehensive legal historian's take on the development of administrative law, or private law claims against public bodies in the UK (predominantly in England). The aim is to provide the context for what is to follow. It is an overview of the legal landscape and legal tradition prior to the enactment of the HRA with regards to legal

accountability of acts or omissions of public bodies towards individuals. An appreciation of this tradition and history provides the context for the difficulties that are to be explored, and why the difficulties that are argued to exist are ones that could be resolved and addressed by a change in court rules and procedure, and the creation of a distinct jurisdiction and new specialist tribunals with expert judges. It is a change to adjudication process, procedure and attitude that is proposed. What is not proposed is a full-scale rejection of the traditional orthodoxy, or much more fundamental change to the concept of 'the state' in British legal thought, or the wholesale merging of common law and HRA claims and/or absorption of Convention rights into common law causes of action. Arguably the domestic courts have now significantly limited the use of Convention rights to develop common law *remedies*[5] (particularly in the tort of negligence) and have rejected the idea that the common law should *always* reflect positive obligations owed under the Convention[6], effectively consigning claims concerning breaches of Convention rights to claims under the HRA[7]. There now does appear to be parallel causes of action available in the ordinary courts, HRA claims and common law claims, this raises the question of whether there should now also be parallel (specialist) jurisdictions. This duality is explored more in the following chapter.

Dicey and ordinary law and ordinary courts.

The starting point for setting the context is Dicey's view of the British constitution as having a foundational and unwavering commitment to everyone being subject to the *ordinary law* in the *ordinary courts*. Dicey was dismissive in his attitude towards the concept of administrative law, such as existed and exists for example in France. Instead of a separate system of administrative law and administrative courts, Dicey famously said of the English system that

[5] As opposed to the *principles* that underlie Convention rights, which arguably are more extensively reflected in common law rights.

[6] *Smith v Chief Constable of Sussex* [208] UKHL 50 [2009] 1 AC 225, Lord Hope 'In my opinion the common law with its own system of limitation periods and remedies should be allowed to stand on its own feet side by side with the alternative remedy. Indeed, the case for preserving it may be thought to be supported by the fact that any perceived shortfall in the way that it deals with cases that fall within the threshold for the application of the Osman test can now be dealt with in domestic law under the 1998 Act.' 82 Lord Brown 'it is suggested that the common law should now be developed to reflect the Strasbourg jurisprudence about the positive obligation arising under articles 2 and 3 of the Convention. This, indeed, is what which so clearly influenced the Court of Appeal in the present case. For my part however I would reject the argument to the extent articles 2 and 3 of the convention and Section 7 and 8 of the Human Rights Act already provide for claims to be brought in these cases it is quite simply unnecessary now to develop the common law to provide a parallel cause of action, although it might have been otherwise had the Osman line of authority become established before the Human Rights Act came into force.' 136

[7] Jane Wright *Tort Law and Human Rights* (2nd Ed.) (Hart Publishing, 2017) 156. The authors of *Clerk & Lindsell on Torts* (24th Ed.) (Sweet and Maxwell, 2024) suggest that the courts "have more recently had increasing confidence in the appropriateness of applying independent principles in the fields of common law and actions under the Human Rights Act." 24th ed. 13.83.

'every official from the Prime Minister down to a constable or a collector of taxes is under the same responsibility for every act done without legal justification as any other citizen.'[8]. In the often-cited case of *Entrick v. Carrington*[9] it was declared that "[a]t common law, public authorities are generally subject to the same liabilities in tort as private individuals and bodies".[10] Dicey rejected French administrative law as contrary to the English Rule of Law[11], although he did later 'begrudgingly' recognise the growth of 'official law' through the development and use of expert and independent administrative tribunals[12], but he maintained that the granting to officials something akin to judicial authority was rare and did not 'betray the least intention on the part of the English statesmen to modify the essential principles of English Official Law' and that there remained in England 'no true French *droit administratif*'[13]. Taking a very broad historical approach, it can be said that until around the middle of 20th Century there was no distinct concept of administrative or public law in English law, there was just the common law and the ordinary courts[14].

It is interesting perhaps to also note at this stage that historically administrative power was of a local and individual nature, very different from the modern concept of an official public *body* with *central* accountability. Power was previously vested in public office holders who were independent of the administrative hierarchy and Parliament[15]. Agents were not answerable to any political master and public officers were not paid a salary, but rather charged fees for the

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[8] Albert Venn Dicey, *Introduction to the study of the Law of the Constitution* (first published 1915, London Macmillan and Co).
[9] (1765) 2 Wils KB 275
[10] There was an exception to this common law principle, namely the Crown; The Crown or the King it was said "could do no wrong"; while the Crown was in principle considered to be subject to the law, in practice procedural rules prevented access to redress, a King's prerogative prevented the King from being sued in the central courts. The courts found there to be immunity for the Crown from claims in tort and they were reluctant to find the Crown liable based on the doctrine of vicarious responsibility. It was possible to appeal directly to the King by way of Petition of Right, but any remedy was within the King's discretion and the procedure was complex. The inability to sue the Crown in tort persisted until the end of World War II and the enactment of the Crown Proceedings Act 1947 ("CPA") which equated the Crown to a private person.
[11] A V Dicey, *An Introduction to the Study of the Law of the Constitution* (London: Macmillan, 10th Edn, 1959) chapter 12
[12] J W F Allison, "The Spirits of the Constitution" in N Bamford and P Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013) 36
[13] Albert Venn Dicey, *Introduction to the study of the Law of the Constitution* (first published 1915, London Macmillan and Co). See generally J W F Allison *A Continental Distinction in the Common Law: A Historical and Comparative perspective on English Public Law* (Oxford: Oxford University Press, 2000) 18ff.
[14] Although Dicey did acknowledge that the approximation of English Official Law and French *droit administrative* was 'very noticeable though comparable slight" and that it was "at least conceivable that modern England would benefited by the extension of official law". See generally J W F Allison *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford University Press, 2000).
[15] Janet McLean *Searching for the state in British Legal Thought: Competing Conceptions of the Public Sphere*, (OUP, 2012) 24, fn 11

services they provided[16]. At the beginning of the 19th century the holding of a public office was often for profit, so holding a public office was seen more akin to having a property right rather than being seen as a position held for the public good. Office holders were not generally vicariously liable for any actions of their employees, unless they were acting under direction or acted in a way that profited the public officer. Claims were therefore brought against individual office holders, rather than against the 'the public office' or any concept of a 'public body'. There was no centralisation of matters such as policing, prisons, utilities or health[17]. These were all matters dealt with at a local level. Central government was concerned more with matters such as 'tax, waging war, expanding the empire and economic interests on the high seas.'[18] Tort law, in particular public law torts such as false imprisonment, did provide some check on the use and abuse of power by public officials, but any claim was against the actual individual person who committed the tort, rather than against the public body or 'the state'. It is therefore not surprising that it was to the ordinary law and ordinary courts that claims concerning the exercise of administrative power were brought by and against individuals.

After the Second World War, with increasing nationalisation of services, power then became more centralised. In 1947 the Crown Proceedings Act ("CPA") was enacted and matters concerning claims against state bodies changed significantly. The CPA explicitly enabled the application of the doctrine of vicarious responsibility to apply to the Crown; public bodies would become vicariously liable for tortious acts of their employees, servants or agents.[19] As McLean put it, the CPA 'allowed for the spread of private law norms into the public sphere.[20] But importantly and fundamentally the concept of 'the State' in British Legal Theory remained unchanged. There is no unilaterally agreed or accepted concept (domestically as opposed to at the international level) of 'the state.' [21] The CPA did not require the state to be recognised as a legal person, nor as a unified entity, it remained the case that the state was perceived as a 'diffuse and variegated complex of entities whose "unity" is created by the application of

[16] Janet McLean, *Searching for the state in British Legal thought: Competing Conceptions of the Public Sphere*. Cambridge Studies in Constitutional Law, (Cambridge University Press, 2012) 25
[17] *Ibid.*22-24
[18] *Ibid.* 21
[19] s.38(2)
[20] Janet McLean, *Searching for the state in British Legal thought: Competing Conceptions of the Public Sphere*, Cambridge Studies in Constitutional Law, (Cambridge University Press, 2012) 21
[21] For the concept of "the state" more generally see Quentin Skinner "A Genealogy of the Modern State", Proceedings of the British Academy, 162 (2009), 325-70

shared public law norms.[22] There was some concern about whether a private basis for tortious liability was appropriate to the Crown and public authorities. Rights, including rights protected by the common law, 'needed to be tailored to accommodate social needs'[23].

The broad position prior to the enactment of the HRA and following the enactment of the CPA, was that a claim for damages could be brought against a public authority or body in the ordinary courts using a private law remedy[24], where one existed. This still accorded with the orthodox/Diceyan view of the British constitution. There was no different procedure, rules or indeed any different courts. The same rules and procedure applied whether the claim was between two private persons or between a private individual and a public official or body. An application for judicial review could (and can) also be brought, but only within strict time limits, where the claimant has standing, and in order to seek one of the discretionary public law remedies of orders for *mandamus*, *prohibition, certiorari*, or *habeas corpus*, or an injunction. Any claim for damages being additional or incidental. The HRA however provided for a very different cause of action under s.6,7 and 8, and provided for a claim against a 'public authority'[25] by a "victim"[26], for 'just satisfaction'[27] for breaches of an international obligation to protect positive rights. Claims under the HRA are claims aimed at the protection and vindication of rights, they are not primarily claims for damages for wrongs committed and are not seeking a public law remedy.

Having briefly set out the legal tradition of the domestic courts and the ability to bring a claim against public bodies in private law, prior to the HRA, consideration will turn to the primary objective of this chapter, identifying some of the difficulties encountered by the HRA having added a new distinct cause of action against public bodies (and not the UK) aimed at protecting positive rights into the domestic common law legal system, culture and procedure. The first issue to be considered is the change brought about by the enactment of the HRA in respect of pivoting away from suing the UK internationally to suing public bodies domestically, and the

[22]Janet McLean, *Searching for the state in British Legal thought: Competing Conceptions of the Public Sphere*, Cambridge Studies in Constitutional Law, (Cambridge University Press, 2012) 167
[23] *Ibid.* 21
[24] There was, and is, of course also the possibility of seeking a public law remedy in a claim for judicial review, but the focus here is on claims for damages, not claims for one of the public law remedies.
[25] As defined by s.6(3)
[26] S.7(1) allows for claims 'only if he or she is (or would be) a victim'. 'Victim' is defined in s.7(7) by reference to Article 34 of the Convention
[27] Damages can be awarded but only if necessary to afford 'just satisfaction': s.8.

litigation difficulties that have arisen when trying to sue more than one public body but being unable to sue the UK.

The inability to sue the "UK" and violations by multiple public bodies.

A fundamental difference between making an application to the ECtHR and bringing a claim under the HRA is of course the defendant. An application to the ECtHR involves a claim against the UK for breach of an international obligation owed by a state. This is the case even where the application concerns an act or omission by, for example, a police force or officer, a local authority, a health body or professional, or indeed any other part of the state apparatus or administration. By contrast when bringing a claim under the HRA the defendant will be the particular public body[28], or bodies, that are alleged to have breached, or which intend to breach a Convention right. While the domestic constitutional location of sovereignty is of no relevance and creates no difficulties on the international scene, it is the UK against whom an application is made, the same is not true when dealing with the application and enforcement of international obligations domestically, before domestic courts.

The significantly different approach that was required to enable claims for breaches of Convention rights to be brought domestically, and thus to 'bring rights home', was achieved by the scheduling of some of the rights contained the Convention to the HRA. The HRA provides by way of Section 7 what was a new cause of action before the domestic courts for breaches of 'the Convention rights by a 'public authority.'[29] What s.7 allows for is for proceedings to be brought against a *public authority* which has acted or 'proposes to act' in a way made unlawful by s.6(1) of the HRA. Section 6(1) makes it unlawful for a *public authority* to act in a way that is incompatible with a Convention right. The way in which 'proceedings can be brought' are either before an 'appropriate court or tribunal' or reliance can be placed on a Convention right in any legal proceedings. Claims brought under the HRA are in this way treated in the same way as any other private law, or indeed public law claim, with minor exceptions, such as the requirement to join the Crown to proceedings and commence a claim in the High Court where a declaration of incompatibility under s.4 is sought[30].

[28] s.6 HRA
[29] Public authority is defined to include 'any person certain of whose functions are functions of a public nature' (s.6(3)(b)). For a recent discussion of the issues and proposed reform of this definition see Erin Colleen Ferguson "Human rights reform and "Functions of a public nature" (2022) Edin.L.R, 26(2), 244-250
[30] s.5 HRA

The structure of the HRA and the way in which it brought 'rights home' was explained by Lord Hobhouse in one of the earliest cases brought under the HRA, *Wilson v First County Trust Ltd (No.2)*[31]. The HRA drew a distinction between the international obligations owed by the UK and what were now to be the municipal law obligations of the three organs of the state, namely the executive, the legislature and the judiciary. As Lord Hobhouse articulated the Convention is not concerned with these distinctions, it is only concerned with the UK as a state. The HRA in contrast recognises the role of the judiciary in applying and enforcing Convention rights, treats branches of the executive (in the form of public bodies) as civilly liable, and recognises that laws passed by the legislature may be incompatible with Convention rights. Each of the three branches of the state are, he stated, treated differently in the HRA but not in the Convention. The HRA then made relevant what had previously been irrelevant. It became *relevant* to the Convention rights that there are three organs of the state, the legislature, the executive and the judiciary (which is of course not the case at the international level) and made *public authorities* (not the UK as a state) 'civilly liable' for breaches of Convention rights. It created legal liabilities on emanations of the executive and legal rights for citizens[32]. In *Re McKerr*[33] Lord Hoffman made the following clear:

> What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention… They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg.[34]

This inability to sue the UK domestically when litigating HRA claims has given rise to problems in practice, not least because of the complex and interdependent manner in which a number of public bodies often work together (or not) to provide a public service or perform a

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[31] [2003] UKHL 40, [2004] 1 AC 816, para 126
[32] Para 130
[33] [2004] UKHL 12, [2004] 1 WLR 807 [65]
[34] Arguably the statement in the final sentence, that the meaning and application of Convention rights is a matter for domestic courts and not the court in Strasbourg, did not stand the test of time. See the development of 'mirror principle' following Lord Bingham's judgment in *R (Ullah) Special Adjudicator* [2004] 2 A.C. 323, para 20, Lord Hope in *N v. Secretary of State for the Home Department* [2005] 2 A.C. 296, when he said at para 25 "it is not for us to search for a solution to [the appellants problem] which is not to be found in the Strasbourg case law" Lady Hale in *R (Countryside Alliance) v. Attorney General* [2008] A.C.719 para 126, and Lord Hope (with whom all seven members of the court agreed) in *Smith v Ministry of Defence* [2014] AC 52 at 43 'Lord Bingham's point in *Ullah* was that parliament never intended by enacting the Human Rights Act 1998 to give the courts of this country the power to give a more generous scope to the convention rights than that which was to be found in the jurisprudence of the Strasbourg court, to do so would have the effect of changing them from Convention rights based on the treaty obligation into freestanding rights of the court's own creation.' That is not to say that the domestic courts consider they have to follow the jurisprudence of the ECtHR, they can depart where there is good reason to do so, see *Manchester City Council v Pinnock* [2011] AC 104 para 48, nor that they are prevented from developing the law where the principles established by Strasbourg enable them to do so, see *R (on the application of AB) v. Secretary of State for Justice* [2022] A.C. 487, 54.

public duty. The history of the availability of private law claims against public bodies, briefly outlined above, has resulted in difficulties in pursuing a claim for damages for breaches of individual rights domestically. But so too has the increasing complexity of decision making and provision of services by public bodies. In many cases involving a potential breach of an individual right the relevant act or omission is one for which more than one public body is responsible or involved, but where there is no ability to bring a claim against any overarching concept of the state. It is also the case that for public policy reasons, the courts have been reluctant to impose liabilities on individual state bodies where they are required by a statutory framework to work together to provide services or protect vulnerable individuals[35]. The courts, due it is suggested in part to the structure and fundamental principles of tort law (discussed further below), have focused on the justice of imposing *state body liability* rather than on *the breach of right* suffered by the victim. Where there are difficult and complex decisions the courts have appeared reluctant to find liability owed on the part of the state body, the focus being on whether it is just to impose liability, rather than whether an individual's right has been infringed and whether such an infringement can be justified.

The opinion of Lord Browne-Wilkinson in the House of Lords in the pre HRA case of *X (minors) v Bedfordshire County Council and M (a minor) v Newham London Borough Council*[36] encapsulates the policy considerations and the approach of the courts to cases where there are complex (delicate) interdisciplinary decisions to be made across various state bodies. The claims in *X v Bedfordshire* were in the tort of negligence for damages for injuries suffered by children as a result of parental abuse and neglect against the local authorities on the basis that they failed to use their statutory powers to protect them. Lord Browne-Wilkinson[37] started his analysis by asking whether it was fair to impose a duty of care on the local authority in respect of its performance of its statutory duties to protect children. He determined that it was not. Despite the law requiring that wrongs should be remedied he considered that there were important counter considerations. The first was that imposing a common law duty of care would cut across the statutory system set up, as a result of ministerial decisions, for the protection of children at risk. The 'Working Together' system set up for the protection of children was not exclusively the responsibility of the local authority's social services

[35] See for example *X (minors) v Bedfordshire County Council and M (a minor) v Newham London Borough Council* [1995] 2 A.C. 633, discussed further below.
[36] *Ibid.*
[37] At 749-751

department, but rather was inter-disciplinary and involved the police, educational bodies, doctors and others. It involved joint discussions, joint recommendations and joint decisions with the key organisation being the Child Protection Conference, a multi-disciplinary body whose responsibility it was to decide whether to place the child on the Child Protection Register. Lord Browne-Wilkinson noted that this procedure was not merely to be considered good practice, but it had statutory force binding on the local authority. He went on to recognise the difficulty of imposing a duty of care on one, or on multiple public bodies in such circumstances saying that it would be unfair to impose a duty on only one, but to impose a duty on all would lead to impossible problems of disentangling between the different liabilities of each to reach a decision as to whether any had acted negligently. Because of this focus on the fairness of a duty being imposed on the public bodies, and not on the damage to the victim, the conclusion reached by the domestic court was that no duty should be imposed. This leaves out of the equation the impact on the victim and their rights; why should the victim of a violation of rights be without a remedy on the basis that as the violation was as a result of acts of more than one body it would be unfair, or too difficult, to impose liability? And why should there not be an ability to hold multiple bodies to account if they fail to act together?

Following this decision of the House of Lords an application was made to the ECtHR, *Z and others v United Kingdom*[38], where it was found that there had been a breach of Article 3, in that there had been a failure to protect the children from inhuman treatment. This case provides a clear example of the difference of approach and outcome between a claim against the state at the ECtHR under the Convention, and a claim domestically based on all the same facts (albeit pre HRA). There was a remedy in Strasbourg, but not before the domestic courts. This is one of those cases which highlights the difference of approach of English law and how it failed to provide the protection required by the Convention. Subsequently, in *JD v East Berkshire NHS Trust and others*[39] the House of Lords said that *X v Bedfordshire* should no longer be followed.[40]

[38] (2002) 34 EHRR. 3
[39] [2005] UKHL 23, [2005] 2 A.C. 373
[40] For an analysis of issues involved in bringing child abuse claims under the HRA see Jane Wright "Child abuse claims against public authorities under the Human Rights Act", in Duncan Fairgrieve and Sarah Green (eds.) *Child abuse tort claims against public bodies: a comparative view*, (Aldershot, Hant, Ashgate, 2004, and Jane Wright, "Immunity No More, Child Abuse Cases and Public Authority Liability in negligence after *D v East Berkshire Community NHS Trust*" (2004) Journal of Professional Negligence, 58

The judgment of the House of Lords in *X v. Bedfordshire* is used here as it provides a good illustration of the difficulties that arise for victims of violations of Convention rights due to the different concept of the state internationally and domestically and the ability to only sue the state domestically by way of claims against public bodies in private law. While *X v. Bedfordshire* is no longer to be followed in cases concerning the protection of children, it is not the case that the difficulties identified in bringing a claim in cases where there are multiple public bodies working in an interdisciplinary way has been resolved. Post the HRA it remains the case that it is not possible to sue the State or the Crown in domestic courts. The problem of protecting individual rights against violations of rights committed by multiple public bodies or agencies, either acting or failing to act together, remains as does the inadequacy of an alternative remedy in negligence.

An example of a case that succeeded in Strasbourg where there was no available domestic remedy, and one that would likely still present problems to litigate domestically under the HRA, is the case of *McGlinchey and others v United Kingdom*[41]. The applicants in that case were the mother and children of Judith McGlinchey who died following her transfer to hospital from prison after a period of dehydration caused by excessive vomiting and diarrhoea when withdrawing from opiates. They claimed that the UK had breached its obligations under Article 3 and Article 13. Judith McGlinchey's death followed several failings in her treatment by the prison authorities, with medication for opiate withdrawal not being administered, with dehydration from vomiting and diarrhoea not being managed, and delays in transferring Ms McGlinchey to hospital. The claim was not for a breach of Article 2, but rather Article 3 in respect of the distress she suffered prior to death. The negligent failings were primarily due to the actions of the prison senior medical officer: Dr K. At that time prison healthcare was the responsibility of the Ministry of Justice, and not the Department of Health (the NHS took over responsibility for healthcare in prisons in April 2003). The applicants had not been able to pursue any claim domestically in negligence due to a lack of evidence of causation in respect of the negligent failings and the death, and it not being possible to claim in negligence for pre death distress that did not manifest as physical or psychiatric injury. The ECtHR found a violation of Article 3 and Article 13. In respect of the breach of Article 13 the Court found that

[41] Application No. 50390/99, 29 July 2003

no action in negligence could be pursued and concluded that no compensation was available for the suffering and distress caused by a breach of Article 3.[42]

While it is now the case that a claim in such circumstances could be brought under the HRA domestically, this would be more difficult and complicated as medical care is now provided in prisons by independent doctors and healthcare trusts and not by prison authorities. It would be necessary for a claimant to establish that there was a systemic failure in the provision of healthcare in order to succeed in a claim for a violation of Article 2, and not mere acts of individual negligence, and if the failings were due to a lack of communication as between healthcare and prison staff, or a failing to work together, a claim would need to be brought against both the governor of the prison and the healthcare trust, which brings with it an increase in costs risks. The facts would still be the same, but a claim domestically under the HRA would be difficult due to the way in which healthcare is provided within prisons, involving at least two different public bodies and potentially in addition GPs working on an independent basis.

An attempt was made in *Morgan v Ministry of Justice*[43] to mitigate this difficulty by arguing either for a non-delegable duty, or for an interpretation of "public body" in s.6 HRA as including 'The Crown', in order to enable a claimant to succeed in a claim in tort, or for a breach of Article 2 where the tort or violation was argued to be as a result of cumulative failures by different individuals or bodies. The claim was brought by the partner and (alleged) daughter of a prisoner who took his own life while detained in HMP Stoke Heath. It was argued that failures by prison officers, healthcare staff and doctors collectively contributed to the death. The preliminary issues the High Court was asked to determine was (i) whether the Secretary of State for Justice, or the Governor of the prison, owed a non-delegable duty of care to the deceased, such that a claim in tort could succeed against either, or alternatively (ii) whether 'The Crown' was a 'public body' for the purposes of s.6 HRA such that 'The Crown' could be held liable for a breach of Article 2 based on the acts or omissions of <u>all</u> the various individuals or bodies involved in the care of the deceased[44] . The court rejected both the Claimant's

[42] Another example, again involving healthcare and prison staff, is *Keenan v. UK* [2001] 3 EHRR 913, where the ECtHR also found a violation of Article 3 and 13. In that case Mark Keenan, a prisoner with mental illness, took his own life while in segregation following an assault by him on prison officers. It was found that lack of medical care gave rise to the assault. It was not possible, or necessary to decide whether the failings in medical care or the disciplinary actions caused Mark to be subjected to inhuman treatment, as the ECtHR was only concerned with the "prison authorities" and the State. This would not be the case if the claim were to be brought now under the HRA where healthcare and prison officers come under different public bodies.
[43] *Morgan v Ministry of Justice* [2010] EWHC 2248 (QB), [2010] 9 WLUK 40
[44] *Ibid* 12.

arguments in tort and under the HRA. The court accepted the Defendant's arguments that (i) they could only be vicariously liable in tort for acts or omissions of employees, who here were the prison officers and nurses and not the doctors who were separately contracted to provide their services, and (ii) that under s.6 HRA public authorities could only be liable separately, it was not possible to argue for a collective liability. An application would in such circumstances only be possible to the ECtHR against the UK. Here then is another example of a claim that could not succeed under the HRA, where there is no alternative claim in tort, and so the only available option would be an application to the ECtHR.

For such claims domestically, invariably, a claimant must either seek to argue for some form of non-delegable duty against one body or base an argument on the principle of joint tortfeasor, or try and fix one state body or agent with liability for the breach of the right concerned. This can leave the claimant with a weak claim or no claim at all in domestic litigation. The principle of a 'non-delegable duty' received detailed consideration by the Supreme Court in the decision of *Woodland v Swimming Teachers Association & Ors* [45]. The issue in *Woodland* was whether a local educational authority owed a non-delegable duty of care in respect of a pupil's safety when attending a swimming lesson provided by an independent contractor. Lord Sumption identified the factors that together gave rise to a non-delegable duty of care in negligence, these included (i) whether the claimant was in a vulnerable position or dependant on the protection of the defendant against risk of injury, (ii) whether by virtue of the relationship between the claimant and the defendant it was possible to impute an assumption of a positive responsibility to protect the claimant from harm, (iii) whether the defendant had delegated to a third party a function which is an integral part of that positive duty and (iv) whether the third party had been negligent in the performance of that very function rather than in a collateral respect[46]. Lord Sumption went on to say:

> The defendant is not usually in control of the environment in which the injury is caused by an independent contractor. That is why as a general rule he is not liable for the contractor's negligence. Where a non-delegable duty arises, the defendant is liable not because he has control but in spite of the fact that he may have none. The essential element in my view is not control of the environment in which the claimant is injured, but control over the claimant for the purpose of performing a function for which the defendant has assumed responsibility.[47]

[45] [2013] UKSC 66, [2014] AC 357
[46] *Ibid.* 23
[47] *Ibid.* 24

In the subsequent case of *GB v. Home Office*[48], which concerned very similar facts to those in *Morgan* but in respect of an immigration detainee rather that a prisoner, Coulson J found that the finding in *Morgan* that the Ministry of Justice owed no non-delegable duty of care to prisoners should no longer be regarded as good law following the Supreme Court's decision in *Woodland*. This leaves open a possible claim in negligence where the factors identified by Lord Sumption in *Woodland* exist and give rise to a non-delegable duty, but not otherwise, and there remains the problem under the HRA of being unable to bring a claim collectively against more than one public body. It is also the case that a statutory scheme may prevent the duty of care arising[49]. This line of cases does not provide a clear and emphatic basis on which to succeed in alternative claims under the HRA for a violation of a Convention right in circumstances where the s.6 public body has delegated functions, or indeed where there are multiple public bodies acting, or failing to act, together. There remains a gap in protection, or remedies, available in tort and protection, or remedies, under the HRA. There does not appear to be a straightforward solution in substantive law, but it will be suggested that changes in practice may provide an answer with bespoke cost and procedural rules making suing multiple public bodies easier (less costly), together with expert judges adjudicating in specialist HRTs applying a human rights approach, this would go at least some way to meet the challenges.

Violations imputable to the public body: vicarious responsibility.

Another difficulty, also arguably resulting at least in part in consequence of the history briefly outlined above, is that domestic legislation provides for the negative protection of residual liberties; it is aimed at limiting and controlling the use of state power by individuals. The focus is primarily upon the *individual* who exercises the power granted, and the legality of their actions or inactions. For example, under domestic common law if a person is "imprisoned" (in the broadest sense as articulated in the case law concerning false imprisonment[50]) then there will be a claim in the tort of false imprisonment unless the person exercising the power can establish that they have been granted and have lawfully exercised a power to imprison. The granting of lawful power is either by statute (for police under Police and Criminal Evidence Act 1984 ("PACE")), and/or common law. Problems in positive rights protection can arise here because the legislation passed is to control the use of powers by *individual* officers exercising

[48] [2015] EWHC 819, [2015] 3 WLUK 880
[49] *Hopkins v Akramy* [2020] EWHC 3445 (QB) [2021] QB 564
[50] Any restraint within confined bounds is imprisonment: *Collins v Wilcock* [1984] 1 WLR 1172 at pp1180F-1180H, DC.

their *individual* powers and not the public body as an entity. The situation can arise where, for example, in the tort of false imprisonment it is not the actions of the arresting officer that are under challenge but that of another officer who provided wrong information that procured the arrest. Here the arresting officer may have acted lawfully under domestic law, but the person concerned may still have been arrested without objective justification. This difficulty does not arise so clearly under Article 5 where the focus is on whether the individual's deprivation of liberty was 'arbitrary', rather than on whether an arresting officer acted lawfully. However, this has yet to be fully tested by the courts and the case law is unclear as to whether the test under Article 5 involves only an objective test, or also (as is the case under PACE and at common law) does it involve a subjective test.

In *O'Hara v Chief Constable of the Royal Ulster Constabulary*[51], the House of Lords identified that whether the arresting officers had reasonable grounds for suspicion in order to justify an arrest, as required under s.24 PACE, is to be evaluated by reference to the information known to him/her at the time, even if s/he were given a partial / inaccurate / false account by a briefing officer. So, where the "reasonable suspicion" which renders the arrest lawful is founded on information supplied by another officer, *O'Hara* confirms that provided it was reasonable for *the arresting officer* (so a subjective test) to rely on the information given to him/her, the arresting officer will have reasonable grounds to suspect even if that information subsequently turns out to be wrong (an objective test). A claim for false imprisonment will then fail.

This approach of the House of Lords was found by the ECtHR to be compliant with Article 5[52]. However, while Article 5(1)(c), as with s.24 PACE, requires that any arrest and detention must be based upon a 'reasonable suspicion', this is arguably not a *subjective* test under Article 5. 'Reasonable suspicion' under Article 5(1)(c) is not confined only to matters present in the mind of the arresting officer[53]. In this way it is arguable that there are important differences between the protection afforded by the tort of false imprisonment and under Article 5 of the Convention[54].

[51] [1997] AC 286
[52] *O'Hara v UK* (2002) 34 EHRR 32
[53] See *ibid.* paras 42-45
[54] See Alison Gerry, Sam Jacobs, Tom Stoate and Pippa Woodrow "False imprisonment and deprivation of liberty" in Stephen Cragg and Sam Jacobs (eds.) *Police Misconduct: Legal remedies* (LAG, 2022)

There does however remain a question in domestic claims in tort following *O'Hara*, as to whether the officer who provides the information to the arresting officer (rather than the arresting officer) could be liable for false imprisonment where they did not themselves have reasonable grounds to suspect the arrestee, such that had they made the arrest it would have been unlawful. Could a claim for false imprisonment then succeed on the basis of the actions of the officer providing the information to the arresting officer? In such a claim the Chief Constable *may* become vicariously liable for the false imprisonment, but the case law is not entirely clear on this issue. There is a line of cases to support the proposition that the Chief Constable will be vicariously liable where an officer has directed the arrest of someone by another officer without a proper basis, starting with *Davidson v Chief Constable of North Wales*[55] through to the case of *Mouncher v Chief Constable of South Wales*[56], but there are conflicting cases including *Alford v Chief Constable of Cambridgeshire*[57], which was cited without criticism in the more recent case of *Parker v Chief Constable of Essex*[58]. Arguably the *Davidson* and *Mouncher* approach is more in keeping with what is required by Article 5, where the focus is on whether the person has been unlawfully deprived of their liberty, rather than whether individual officers have acted lawfully.

Alford, where the claim failed, concerned a challenge to an arrest on suspicion of causing death by dangerous driving. Senior investigating officers had failed to pass on to the arresting officer an expert report which expressed the opinion that the suspect's standard of driving had "on the whole" been satisfactory. The trial judge found that this omission had not been deliberate and on this basis the claim failed. The claimant appealed, amongst other grounds, on the basis of Sedley LJ's *obiter* observation in *Clarke v Chief Constable of North Wales Police*[59] that:

> [If a] briefing officer has told the arresting officer that there is reliable information when there is not, the Chief Constable may become vicariously liable for a wrongful arrest – but on behalf of the briefing officer, not the arresting officer. These, it seems to me, are the protections the law affords against arrest on unjustified suspicion.

[55] [1994] 2 All ER 597, [1993] 4 WLUK 123
[56] [2016] EWHC 1367 QB [2016] 6 WLUK 318
[57] [2009] EWCA Civ 100, [2009] 2 WLUK 927
[58] [2018] EWCA Civ 2788, [2019] 1 WLR 2238, [2019] 3 All ER 399, *Reversing* [2017] EWHC 2140(Q), [2017] 8 WLUK 223
[59] [2000] 4 WLUK 201

The Court of Appeal in *Alford* rejected the appeal and interpreted Sedley LJ's comments in *Clarke* as only related to situations where the failure to pass on the information was in some way deliberate and in bad faith, which could amount to misfeasance in a public office and render the arrest unlawful.[60] A similar approach was taken by Weatherup J sitting in the High Court of Northern Ireland in *Salmon v Northern Ireland Chief Constable*[61]. In that case, the claimant sought to argue that his arrest had been unlawful because the investigating officers had failed to complete reasonable enquiries and had they done so, they would have discovered and passed on to the arresting officer information which would have negated reasonable grounds for suspicion in relation to the claimant. Weatherup J endorsed the *Alford* interpretation of Sedley LJ's comments in *Clarke* and concluded that:

> The deliberate mis briefing of an arresting officer as to reasonable grounds for suspicion that do not actually exist will attract liability for misfeasance in public office and render the arrest unlawful and the Chief Constable vicariously liable for the actions of the briefing officer. The careless briefing of an arresting officer that omits relevant information, malice being absent, will not render the arrest unlawful, provided the arresting officer has the requisite honest and reasonable grounds for suspicion.[62]

These cases would seem to shut the door on any argument that a claimant can bring a claim for false imprisonment based on the principle of joint tortfeasor, or vicarious responsibility of the Chief Constable, absent bad faith or deliberate wrongdoing. The position seems to be that absent a claim for misfeasance in a public office, which requires proof of malice, a claimant would have difficulty in seeking a remedy in the tort of false imprisonment where their arrest and detention had been based on false or inaccurate information. But this limitation appears not to have been fully recognised by Strasbourg when it found domestic law to be compatible with Article 5. In *O'Hara v UK*[63], the ECtHR, in setting out the domestic legal position recorded that:

> Although section 12 concerns the suspicion held by the arresting officer, where a briefing officer has told an arresting officer that there is reliable information when there is not, the Chief Constable may become vicariously liable for a wrongful arrest, on behalf of the briefing officer, not the arresting officer.[64]

[60] 38
[61] [2013] 1 WLUK 328
[62] 33
[63] (2002) 34 EHRR 32
[64] 25

The ECtHR cited *Clarke* as authority for this proposition[65], but this missed out the interpretation given to *Clarke* by the courts in *Alford* and *Salmon* that the arrest will only be unlawful if the misinformation provided in effect amounted to misfeasance. It is arguable that the ECtHR's decision in *O'Hara* (that there was no violation of Article 5(1)) might have been different had it not been misunderstood that there was in fact a mechanism under domestic law whereby a person responsible for having wrongfully caused or procured the imprisonment of another could be held liable for those acts (even absent bad faith).

It is of note – as referred to above - that the requirement of 'reasonable suspicion' in Article 5(1)(c) is not subjective in the way that s.24 PACE is: in *O'Hara* (HL), Lord Steyn observed:

> It is clear from the drafting technique employed in article 5(1)(c), and in particular the use of the passive tense, that it contemplates a broader test of whether a reasonable suspicion exists and does not confine it to matters present in the mind of the arresting officer. That is also the effect of the judgment of the European Court of Human Rights in *Fox, Campbell & Hartley v. United Kingdom*.[66]

This suggests that under Article 5(1)(c), whether there is reasonable suspicion is an objective test, such that where the detaining authority has information undermining a suspicion of person being guilty of an offence, any arrest and detention will be unlawful, even if the arresting officer was not in possession of that information and there is an entirely innocent reason for that being the case.

In the different context of detention under the Mental Health Act 1983 ("MHA") a different outcome has however resulted. In *TTM v Hackney LBC*[67] there was a claim for false imprisonment by a mental health patient against the local authority responsible for the doctor who had (wrongly, but in good faith) applied for the claimant's compulsory detention in hospital. The claimant had no claim against the hospital which had actually detained him, because the hospital had a statutory defence under s.6(3) MHA[68].The issue therefore arose as to whether the doctor who applied for the claimant to be detained could be liable for false imprisonment when there was no false imprisonment by the detaining body. The Court of

[65] *Ibid.*
[66] *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286, 292E
[67] [2011] EWCA Civ 4, [2011] 1 WLR 2873
[68] Namely, that a duly completed application for admission was sufficient authority for detention.

Appeal held that the doctor could be so liable, even though there was no suggestion the Dr had acted in bad faith.

Another difficulty that arises, again most obviously in the tort of false imprisonment, is where the failings or unlawful acts leading to a violation of rights are ones attributable to body who is not directly inflicting the violation. In false imprisonment/right to liberty cases, this arises where the body detaining a person is not responsible for the illegality of that detention. An example is the case of *Zenati v The Commissioner of Police for the Metropolis*[69], where the claimant had been charged and remanded in custody for offences under the Identity Card Act 2006 for possession of what was alleged to be a counterfeit passport. On further analysis by the police (requested by the Crown Prosecution Service "CPS") the passport was found to be genuine, but there was a delay in the police informing the CPS and consequently the court. The claimant was lawfully imprisoned by the courts, as long as they were not told of the genuineness of the passport, but detention had become arbitrary once the police were aware the passport was genuine. There was a delay of 21 days during which time it was said there was both a breach of Article 5, and a false imprisonment. The Court of Appeal, hearing an appeal against the decision to strike out the claims, held that there could be no claim in tort as the claimant was not detained by the Police or CPS (against whom the claim was brought) but by the prison service pursuant to judicial authority. The claims under the HRA could however proceed. The court found that the 'state overall breached Article 5.'[70]

The case law in this area around Article 5 and false imprisonment is complex and arguably contradictory. The domestic courts appear to have reached different decisions depending on the context of the power to detain, so for example as between police powers and powers granted under mental health law. There is also an inconsistency as to the outcome of a case as between those brought in tort, and those brought under the HRA. The domestic courts have yet to *directly* address whether and when there is a difference between the protection of liberty under Article 5 and the tort of false imprisonment in these types of cases and if so why. The cases once again highlight the, at times, very different approach to protecting positive rights, and the common law tradition of residual liberties.

[69] [2015] EWCA Civ 80, [2015] QB 758
[70] *Ibid* 63

The conflicts and uncertainties in the law identified above are ones that are unlikely to be matters than can or will be easily resolved solely at the Strasbourg level, or at least certainly not in the near or medium future. What is required is the development of domestic positive rights jurisprudence, where domestic courts through case law are able to clarify the law and ensure that Article 5 rights are fully protected. Currently some claims will likely be abandoned, or not proceeded with, due to the uncertainty in the law and the consequent effect this has on litigation risk and associated costs risk. Issues of costs, funding and damages will be dealt with later in this chapter, but just to note here that often the low level of damages available in these cases (absent proof of significant personal injury) and the costs of litigation will mean public funding is not available, insurers are unwilling to provide After the Event Insurance, and Qualified One Way Costs Sharing ("QOCS") which provides some protection to claimants may not apply. This all combines to create barriers to court and prevents the development of a domestic rights jurisprudence. In Chapter Five it will be argued that creating new HRTs would be a way to address these problems. One of the advantages of new HRTs would be the ability to fashion costs rules in such a way so as reduce the negative impact on access to court, making the resolution of issues such as those set out above through litigation more likely, and would provide expert judges and a specialist jurisdiction within which a more comprehensive damages jurisprudence could be developed. These are not issues for Parliament to resolve, they are complex legal questions, expert judges sitting in domestic specialist tribunals will be better able to more quickly deliver the coherent jurisprudential development required.

The last sections in this Chapter will consider access to court in more detail, and specifically the cost of litigation, how cases are currently funded, and then move on to consider the related matter of damages.

Access to Court:

Access to court is undeniably a fundamental right, many argue a fundamental constitutional right[71], recognised both in the common law[72] as well as under the Convention. The ECtHR has found that the right to access to court arises from the right to a fair hearing under Article 6, but it is a matter for Member States to decide what measures need to be taken, including the extent

[71] In *R v Home Secretary, ex p. Leech* [1994] QB 198, 210, Lord Steyn said 'access to court is of fundamental importance" and "Even in our unwritten constitution it must rank as a constitutional right'.
[72] Sh-Shauna Wheatle "Access to Justice: From Judicial Empowerment to Public Empowerment" in Mark Elliot and Kirsty Hughes (eds), *Common Law Constitutional Rights* (Hart Publishing, 2020).

of any legal aid provision, to comply with Article 6. In civil cases Article 6(1) guarantees to litigants an effective right of access to courts for the determination of their civil rights and obligations but leaves to the state the choice of the means used. The institution of a legal aid system is one of the means but there are others. What the Convention requires is that the individual should 'enjoy his effective access to the courts in conditions not at variance with Article 6(1).'[73]. Access to court can of course be impeded by court fees, cost rules and funding provisions, and impeding access to court can prevent the enforcement and enjoyment of rights. These are important matters to consider when looking at how effectively rights are currently protected in the UK.

Not only is access to court an important right for an individual however, but it is also important for public empowerment, and access more generally to the public to enable democratic participation. This was an important consideration in *R (Unison) v Lord Chancellor*[74] (discussed further below) with Lord Reed rejecting the idea that 'bringing a claim before a court or a tribunal is a purely private activity, and the related idea that such claims provide no broader social benefit' and that for courts to perform 'the role of ensuring the executive branch of government carries out its functions in accordance with the law…people in principle must have unimpeded access to them.'[75]

Public participation is at the heart of any democracy, not only in the form of elections but also more generally to be able to contribute to public debate and be able to have access to the institutions of the constitution, including the courts. If the UK constitution is to work as a differential constitution with the courts playing their role in the protection of rights as advocated for here, then there needs to be meaningful and effective access to the courts by the public and by individuals. In setting up specialist HRTs, fees, costs and funding will be crucial considerations if they are to deliver a more effective means for the protection of rights. This is a complex and technical part of the legal system, and so can only be briefly considered here, but it is an important part of any democratic constitution.

[73] *Airey v Ireland* (1979) 2 EHRR Para 26.
[74] [2017] UKSC 51, [2020] AC 869
[75] *Ibid.* [67 – 68]

Court Fees

Considering first court fees. The UK Supreme Court of *Unison* provides an example of the chilling effect court fees can have on access to justice. In that case fees were introduced by way of an Order for claims in the Employment Tribunal and the Employment Appeals Tribunal where there had previously been no fees charged. It was argued that introducing the fees was unlawful and had led to a significant reduction in the number of claims being brought. Evidence presented to the Supreme Court included evidence of a 'dramatic and consistent fall in cases' since the fees were introduced; there was evidence of a reduction of between 66% and 70%.[76] It was argued by the Government that the fees were needed to transfer some of the costs burden from the general taxpayer to those who use the tribunals. The fees were also intended to incentivise settlement and discourage vexatious litigants.[77] Ultimately the Supreme Court held that the fees Order effectively prevented access to justice and was therefore unlawful at common law.[78] To provide some indication of the level of court fees, currently the for Judicial Review the costs to apply for permission is £174 and to renew a failed application for permission is £438[79]. The applicable fees in civil cases depend on the value of the claims brought and will be touched on below when looking at costs and funding. In Chapter Five it will be proposed that given the less prominent role damages plays in HRA cases it may be appropriate for any court fee to be standardised and set at a level that avoids any chilling effect. That though would depend on the costs regime more generally created for the new HRTs.

Funding and Costs

Next to be considered are funding and costs of litigation. It is axiomatic that claims have to be funded, even where a person acts as a litigant in person or is represented *pro bono* there are costs involved. Claimants need to be able to be able to pay for not only their own costs, including court fees, legal fees if lawyers are instructed, and any expert fees, but also the costs of the defendant should the claim not succeed, or part of the costs if only part of the claim succeeds. Litigation can be, and very often is very costly, which risks denying and limiting access to courts for individuals who claim their rights have been violated.

[76] *Ibid.* 39
[77] *Ibid.* 9
[78] *Ibid.* Headnote and 66-98
[79] For a full list of the costs for courts and tribunals see: https://www.gov.uk/government/news/court-and-tribunal-fees-updates-from-april-2025

There are complex rules dealing with costs in civil claims contained in Civil Procedure Rules ("CPR") rule 45 which have been heavily shaped by the comprehensive review of civil litigation costs in England and Wales carried out by Lord Justice Jackson commencing in 2009 and culminating in a final report published on 14 January 2010[80]. The terms of reference for the review were 'To carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost'. The terms of reference also required Lord Justice Jackson to have regard to research into costs and funding and consult widely.[81] To provide some context to this discussion on costs and funding an indication as to the costs of bringing civil claims under the HRA in the ordinary courts would be helpful. However, no specific data has been found to exist in respect of HRA claims, which of course can cover a wide variety of subject matter. Some assistance can though be derived from data and evidence provided to the Jackson Reviews of the costs of civil litigation and contained in his reports.

In May 2009 Lord Justice Jackson published a Preliminary Report of his Review of Civil Litigation Costs, this was followed by a Final Report published on 1 December 2009. There was then an additional Review and a Supplementary Report published in July 2017 on Fixed Recoverable Costs ("FRC")[82]. While costs data was received and reviewed for a number of practice areas during the Review of Costs of Civil Litigation undertaken in 2009-2010 this did not include for HRA claims specifically. Although figures were provided by the Association of Personal Injury Lawyers [83], these figures were not broken down to enable any meaningful costs to be extracted for HRA claims that included claims for personal injury. More assistance can probably be gained however from the budgeted costs figures for civil claims against the police that were provided by the Police Action Lawyers Group ("PALG") to the review conducted in 2016-2017 on FRC. PALG provided budgets for average claimant and defendant costs (incurred costs together with agreed/approved future costs) for cases against police and other public authorities. When analysed these budgets gave claimant costs figures of between £86,600 for claims valued up to £25,000, rising to costs of £162,365 for cases valued above £250,000 or value unknown. The corresponding costs for the defendant were £52,698 and

[80] https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf
[81] This research and data was set out in Appendices to a preliminary report published in May 2009 https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf.
[82] For all the reports see https://www.judiciary.uk/guidance-and-resources/review-of-civil-litigation-costs-reports/
[83] https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/app12.pdf. although only for motor related claims, clinical negligence claims, employment claims and public liability claims.

£74,004 [84]. By any measure the costs of litigation are high, for both claimants and defendants, and out of reach for most people without some form of external funding or costs regime limiting costs risks. Funding options will be considered further below, but first different forms of costs protection will be considered.

Many of the recommendations made by Lord Justice Jackson were implemented. Of note here are Qualified One-Way Costs Shifting (QOCS), extension of Fixed Recoverable Costs ("FRC"), and Protective Costs Orders ("PCO") (relevant to judicial review). QOCS provides for costs shifting in proceedings that include a claim for damages for personal injuries[85]. There has been some debate as to the meaning of 'proceedings' and claim[86] in the Rules, in respect of what have been termed 'mixed claims'. If a claim is deemed to be a 'mixed claim' then there is an exception imposed and QOCS no longer applies[87]. The question has been whether in a claim that includes a claim for damages both for personal injury and for other damages, so for example damages for breach of contract, or for emotional distress falling short of a personal injury, the exception applies. And also whether a claim for damages and for a non-pecuniary remedy, such as a declaration also constitutes a 'mixed claim'. Both circumstances can, and often do, arise in claims under the HRA, and where a claim is brought both under the HRA and in tort.

This question has been considered, together more generally with the QOCs regime, by the Court of Appeal in *Brown v Commissioner of Police of the Metropolis & Anor*[88]. In that case the court found that the exception does apply in such mixed claims, and therefore it is open to the judge to make any order for costs as the judge considers just. In the course of giving judgment the Court of Appeal also provided guidance on what a claim for personal injury was and made clear that a claim for personal injury refers to the type of damage and not the

[84] These figure are derived from budgets provided by PALG to the review. A total of 218 budgets for 65 cases following the coming into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") were provided, which were civil actions against the police or other public authorities. A few of those cases were discarded, because (for example) they contained insufficient data, or they were valued at well over £300,000. The relevant information was then extracted from the budgets for each of the remaining 59 cases. For the report see https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-3.pdf, 28-30
[85] CPR 44
[86] CPR 44.13 and CPR 44.16(2)(b)
[87] CPR 44.16(2)(b)
[88] [2019] EWCA Civ 1724, [2020] 1 WLR 1257

underlying cause of action[89]. QOCS therefore only assists a claimant where the claim is for damages for personal injury. Where a claim is brought under the HRA QOCS will only apply if therefore the claimant has suffered "personal injury", and not just a violation of their rights, and they are seeking damages for that injury. This of course will not be the case for every claim brought under the HRA. There is an on-going consultation as to whether some form of costs protection should apply to discrimination cases[90], which could include extending QOCS to discrimination cases under the Equality Act 2010, but not in respect of HRA claims. It will be suggested in Chapter Five that for the new HRTs QOCS should apply to all claims.

The FRC regime was introduced to provide certainty, proportionality and simplicity in costs recovery in low-value claims, originally for Road Traffic Accident ("RTA") claims, but was expanded following the Jackson Review in 2013 and then again following the Supplementary Report on Fixed Recoverable Costs, in 2017[91]. The Regime, including its scope, is set out in CPR 45 and provides a structured system of costs recovery, with an associated Practice Direction that sets out the relevant tables of fixed costs. Costs are fixed according to the complexity band to which the claim has been assigned, the stage at which the claim concludes, and the amount of damages agreed or awarded[92]. FRC currently apply to most low value claims[93] allocated to the fast track and the intermediate track[94].

Finally in judicial review proceedings in England and Wales (the costs of which are considered below) it is possible to obtain a Protective Costs Order ("PCO") that limits or removes the costs risk to a claimant bringing a judicial review claim. These can allow public interest litigation to go ahead, especially where it is brought by interest groups or charities or is supported by them. While such groups can raise the funds for litigation, they cannot usually afford to meet the defendant's costs if the claim fails. It is only feasible for such claimants to proceed if the other

[89] Coulson LJ agreed with the analysis of Morris J on this point in *Jeffries v Commissioner of the Metropolis* [2017] EWHC 1505 (QB), [2018] 1WLR 3633 at 53 and 54.
[90] https://www.gov.uk/government/calls-for-evidence/costs-protection-for-discrimination-claims
[91] https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-3.pdf
[92] The White Book, 45.43.1
[93] From October 2023 FRC was extended to cover cases with under £100,000 damages that are not particularly complex and a new intermediate track was created for claims worth £25,000 to £100,000.
[94] The Civil Procedure (Amendment No.2) Rules 2023/572 introduced in October 2023 clarified that FRC apply to most civil proceedings in the fast and intermediate tracks, save for housing claims. Certain claims were excluded on the basis that would be allocated to the multi-track rather than the new intermediate track, and these include claims against the police for relief or remedy in relation to the HRA and claims for damages in relation to harm, abuse or neglect of or by children or vulnerable persons.

side's costs are capped either at nothing, or at a fixed amount. PCOs are a variant of costs capping orders, but with three significant differences. First, it is claimants who seek PCOs, whereas it is normally defendants who seek cost capping orders. Secondly, there are now rules of court[95] regulating cost capping orders, whereas the principles upon which PCOs are made are contained in case law. Thirdly, a PCO may cap the recoverable costs at nil or a very low sum, whereas a costs capping order limits recoverable costs to a sum representing the reasonable and proportionate costs of conducting the case. The Criminal Justice and Courts Act 2015, s.88 – 89 removed the ability of the High Court and Court of Appeal to make cost capping orders in judicial review unless specified criteria were met. Whether an order is made is at the discretion of the judge, who will consider (i) whether the litigation involves matters of general public importance, (ii) whether the public interest requires the matters to be resolved, (iii) whether it is fair and just to make the order, having regard to the relative financial positions of the parties, and (iv) whether, if the order is not made, the applicant will probably discontinue the proceedings and would be acting reasonably in doing so.[96] There is considerable discretion and variations in the terms any order may take, including the capping of costs of the claimant's costs, but the aim is to limit or extinguish the liability of the claimant (applicant) if the claim is lost. As it is proposed that QOCS apply to all HRA claims in the new tribunals there would be no need for any PCO regime.

Turning to consider judicial review, an indication of costs can be derived from the submissions of JUSITCE and the Home Office to the Independent Review of Administrative Law in 2021 ("IRAL"). For a 2-day substantive hearing JUSTICE's the evidence was that the costs to the claimant would be £200,00, with the Home Office giving a figure of £100,000 for defending a substantive judicial review hearing.[97] However, many judicial review claims are withdrawn before any substantive hearing is reached; the figures provided to the IRAL for 2019 were that out of 3,383 applications only 2,542 reached the judge, with 841 being withdrawn[98]. It was not however possible for the panel to known which claims were settled in the Claimant's favour.

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[95] CPR 44.18-44.20

[96] The guidance on the conditions for a PCO was by the court in *R (Corner House) v Secretary of State for Trade and Industry)* [2005] EWCA Civ 192, [2005] 1 WLR 2600, and was subsequently expanded in *R (Compton) v Wiltshire PCT* [2008] EWCA Civ 749, [2009] 1 WLR 1436. See also CPR 46.16 and related Practice Direction 46 – Costs Special Cases

[97]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf 78

[98] *Ibid* 4.38

The panel noted that concerns had been expressed about the impact of the costs regime in judicial review both in terms of discouraging applicants, but also in terms of diverting government funds in defending them. It was however suggested by both Administrative Law Bar Association and the Public Law Project that detailed empirical studies were needed before any conclusions or recommendations could be made in respect of any changes to the costs regime for judicial review[99]. Ultimately the panel concluded that:

> The impact of the costs regime in judicial review cases – and what might be done about it – needs further careful study by a body equipped to carry out the kind of research and evaluation that we have been unable to apply to this question.[100]

Similarly here, no attempt will be made undertake an empirical study into the current costs under the HRA and what the precise costs regime should be for new HRTs. However, what will be argued is that creating a new tribunal provides an opportunity to consider what costs regime would be appropriate for a specialist rights jurisdiction, where the burden should fall between the taxpayer and the individual claimant, what level of costs would prevent a chilling effect on claimants bringing claims and restricting the right of access to court, but would also prevent unnecessary diversion of funds from public bodies.

Litigating cases clearly then gives rise to significant costs whether in civil litigation or in claims for judicial review and there are various ways to fund a claim in England and Wales. A thorough review of funding options available is not attempted here, but merely an overview to enable consideration of the issue of costs and funding at the level of principle. Broadly speaking the options are to fund a claim (i) privately (only available to the very wealthy), (ii) to have in place a Conditional Fee Agreement ("CFA") with lawyers, so a "no win no fee" agreement with or without After the Event Insurance ("ATE")[101], or (iii) if the qualification criteria are met Legal Aid funding from the Legal Aid Agency ("LAA"), which other than in exceptional circumstances is only available for those with extremely limited financial means. To qualify for Legal Aid the matter must first be "in scope"[102], or meet the criteria for "exceptional case

[99] *Ibid.* 4.8-4.9
[100] *Ibid* 4.165
[101] There are a number of different types of CFAs in use, see for more details of the various forms a CFA can take see Peter Hurst, Master Amanda Stevens, Judith Ayling KC, Nicola Greaney KC, Roger Mallalieu KC, Theo Barclay, Shaman Kapoor, Christopher Moss, Matthew Waszak *Costs & Funding following the Civil Justice Reforms: Questions and Answers,* 11th Ed. (2025) Sweet and Maxwell, Chapter 2
[102] The scope of Legal Aid for England and Wales is set out in the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

funding". Claims for breaches of Convention rights by public bodies both in tort and under the HRA are included in scope.[103] Where an issue falls outside the scope of Legal Aid it may still be possible to provide funding if not to do so would risk a breach of human rights, although the means and merits tests still need to be met. The merits test differs depending on the case but includes assessment of the chances of success and the benefit to the claimant, the means test assesses the claimant's financial eligibility[104] and are very stringent.

The funding and costs of litigation is a highly complex, technical and an ever-changing[105] aspect of the UK's justice system and it is not possible (given the complexities), nor necessary to descend into the detail. Detailed and empirical studies would be needed to fully understand the current position and the implication of any changes. A broad approach is being taken here with the aim of highlighting the impact funding and costs regimes have on access to justice and the benefits of having a bespoke funding and costs regime for specialist HRTs. The fact that there are, and it is possible to have, a multitude of funding and costs schemes provides an opportunity when setting up a new tribunal and jurisdiction to have schemes and regimes suited to the type and nature of litigation. There are already different fees, costs and funding regimes that apply as between the different courts and tribunals.

Damages

Allied to question of the availability of funding is the level of damages available to be recovered. Costs benefit assessment, which compares the costs of a claim with the benefit (primarily damages) of the claim is often used to make decisions as to funding, and the value of a claim will impact on which track a claim is allocated to and can determine the court fees applicable and whether the FRC regime applies. The low level of damages recoverable is a significant issue in HRA claims and can cause a knock-on (negative) effect to access to court. It can have a chilling effect and restrict access to court. As will be set out below damages under the HRA are tied to 'just satisfaction' awards by Strasbourg and the domestic jurisprudence on HRA damages is limited. It is argued that a specialist HRTs would provide an opportunity to

[103]Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1 para 22. Judicial review is also included in para 19, and *Habeas Corpus* in para 20.
[104] Some cases, for example family representation at Inquest where the procedural obligation under Article 2 is engaged, are not subject to the means test, and are referred to as 'non means-tested' cases.
[105] The Ministry of Justice under the Conservative government in power until July 2024 conducted yet another review of civil legal aid (RoCLA), launched in January 2023. A call for evidence was issued on 10 January 2024 with a closing date of 21 February 2024: https://www.gov.uk/government/calls-for-evidence/review-of-civil-legal-aid-call-for-evidence.

encourage expert judges to create a more comprehensive body of case law and more carefully consider principles of damages and domestic awards under the HRA, which would likely lead to higher awards being made.

Section 8(4) of HRA requires the domestic courts to "take into account" the principles applied by the ECtHR in relation to the award of compensation under Article 41 (awards for 'Just satisfaction') of the Convention. The ECtHR has found in most cases that in order to afford 'just satisfaction' it is necessary to make an award under Article 41 for both pecuniary (direct financial loss) and non-pecuniary (pain and suffering) loss to direct victims, and at least in cases concerning breaches of Articles 2, 3 and 4, to secondary victims (relatives of the direct victim)[106]. When determining whether to make an award of damages under the HRA and, if so, the level of the award, the domestic courts currently state they apply a series of principles said to be drawn both from the case law of the ECtHR and domestic courts.[107] It will be argued this current approach in flawed, and there has been a failure to develop a domestic damages jurisprudence by the ordinary courts and that the levels of awards made are too low.

Despite the requirement being only to 'take into account' the 'principles' of the ECtHR[108] the UK Supreme Court has adopted a 'mirror' approach when making monetary awards under the HRA[109], one result of which is that the jurisprudence on damages, and related concepts, under the HRA remains underdeveloped. The English courts have in effect sought to stand in the shoes of the Strasbourg Court and to award damages under s.8 HRA in line with the *caselaw and practice* of the ECtHR under Article 41. This was not an approach that was required by the HRA. The HRA does of course require the domestic courts to 'take into account' the principles of the ECtHR when affording just satisfaction, but nothing more[110]. This approach has been

[106] See e.g. re Article 2 *Rabone and another v Pennine Care NHS Foundation Trust* [2012] UKSC 2, in particular Lord Dyson 'The [ECtHR] has repeatedly stated that family members of the deceased can bring claims in their own right both in relation to the investigative obligation and the substantive obligations" 44.
[107] See for example *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406, [2004] QB 1124, at [52]-[70]; *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673, at [9], [19]; *R (Sturnham) v Parole Board for England and Wales* [2012] UKSC 47, [2013] 2 AC 254, at [13]; *DSD and NBV v Commissioner of Police of the Metropolis* [2014] EWHC 2493, [2015] 1 WLR 1833, at [17]-[41], [48], [68], [118]-[140]).
[108] HRA s.8(4)
[109] See for discussion practitioner text, The Hon Mr Justice James Edelman, Dr Jason Varuhas, *et al*, *McGreggor on Damages* (21st Ed.), (Sweet and Maxwell, 2023) Section 1, 50-004.
[110] This is in contrast with the requirement under s.2 HRA to take into account any 'judgment, decision, declaration or advisory opinion' of the ECtHR and any 'opinion of the Commission given in a report adopted under Article 31 of the Convention', and "any decision of the Commission in connection with Article 26 or 27(2) of the Convention' and any 'decision of the Committee of Ministers taken under Article 46 of the Convention'. There is no such equivalent requirement specified in respect of Article 41 in s.8 HRA.

criticised, and Varuhas has argued, it is suggested correctly, that the approach adopted of 'mirroring' the Strasbourg case law should be rejected.[111]

The are two significant consequences of the HRA approach to damages. One is that there are no clear, or certainly no comprehensive, principles that the ECtHR applies when making damages award as part of 'just satisfaction' for the domestic courts to follow. This lack of coherence and consistency is now reflected in domestic jurisprudence. As Varuhas has articulated, 'the mirror approach requires Engligh courts to follow a deeply problematic jurisprudence; the Strasbourg jurisprudence lacks consistency, coherence and principle, offers little guidance … and is characterised by opaque, flawed and minimal reasoning' he goes on to argue that as a result of tying domestic practice to Strasbourg practice what has emerged is a domestic damages jurisprudence which 'mirrors the most problematic features of the supranational jurisprudence'[112] and that 'lower courts have struggled with the mirror approach, routinely recording that they are unable to derive any meaningful guidance from Strasbourg.[113]

The second problem is that the awards by the ECtHR are, as Varahus identifies, and as indeed the courts have, 'ungenerous' by English tort standards.[114] This raises the question as to whether the domestic courts are complying with the obligation owed under Article 13 to provide 'an effective remedy', and also has the knock-on effect on funding as securing funding for low value claims is problematic. Article 13 jurisprudence requires remedies to be effective in practice as well as in principle and awards should not be so low as to undermine the effective protection of rights.[115]

What appears not to have been understood, or certainly not articulated or reflected in domestic judgments, is the important difference between what the supranational court (the ECtHR) is doing when making awards under Article 41 and what the domestic courts are doing when awarding damages under s.8 HRA. The ECtHR is exercising a subsidiary, supervisory jurisdiction, and rarely considers or determines detailed matters of fact. It is neither intending to, nor arguably able, to provide an 'effective remedy', but rather to afford 'just satisfaction' as

[111] Jason Varuhas, "Human Rights Damages and 'Just Satisfaction': The Mirror Approach", *Damages and Human Rights* (Hart Publishing, 2016), 235-323, 237-241.
[112] *Ibid.* 268-269
[113] *Ibid.* 237 see also quotes from first instance judges at 272–273.
[114] *Ibid.* 237
[115] See ch 6.1.II;Council of Europe Directorate-General (Human Rights and Rule of Law), *Guide to Good Practice in Respect of Domestic Remedies* (2013).

a supranational court. The ECtHR itself has said that it is 'acutely aware of its shortcomings as a first instance tribunal of fact' and that it does not have the capacity to, and nor would it be appropriate for it to, routinely undertake detailed fact finding in connection with claims for compensation as if it were a first-instance court.[116] This is in contrast the domestic courts who are the courts with primary responsibility for relief. What s.8 (together with s.7) is intended to do is to ensure compliance with Article 13, by, as Lord Roger said in *Somerville* 'giving the court power to grant necessary damages'; 'the law provides the effective remedy for the violation of the victim's Convention rights…which Article 13 requires'.[117]

Under Article 13 the Grand Chamber has made clear that it is open to domestic courts, and would be easier for domestic courts, 'to refer to the amounts awarded at domestic level for other types of damage' including 'personal injury, damage relating to a relative's death, or damage in defamation cases.[118] Despite this the domestic courts have tended to reject submissions on level of damages based on scales applicable in domestic personal injury cases[119], and have refused to consider amounts awarded under the Fatal Accidents Act 1976[120]. In *Faulkner* the Supreme Court only considered Article 5(4) Strasbourg cases and had no recourse to domestic damages for false imprisonment[121] and in *Michael* the Supreme Court described the idea of awarding damages for human rights breaches on a common law basis as "gold plating the Claimant's Convention rights"[122]. But as *Varuhus* has identified domestic damages rules, principles and methods are consciously or not at times influencing domestic practice to HRA damages awards. He has suggested that "it may be difficult for some domestic judges who routinely try common law damages claims, to shake off engrained habits of common law thinking"[123].

An additional problem associated with the mirror approach is the lack of engagement by the domestic courts with the concepts of 'causation' [124], 'foreseeability of harm' as well as the

[116] *Denizci v. Cyprus* 23 May 2001, App no.25316/94 315.
[117] *Somerville v Scottish Ministers* [2007] 1 WLR 2734 131.
[118] *Scordino v Italy (no 1)* (2007) 45 EHRR 7, 188-189.
[119] Court of Appeal in *Van Colle* 104
[120] *Ibid.* 121. See also Supreme Court in *Rabone* 80-88.
[121] *R (Faulkner) v SOSJ* [2013] 2 AC 79 29.
[122] *Michael v Chief Constable of South Wales* [2015] 2 WLR 343 125
[123] Jason Varuhas, "Human Rights Damages and 'Just Satisfaction': The Mirror Approach", *Damages and Human Rights* (Hart Publishing, 2016), 235-323 312.
[124] For a critical analysis of the difference of approach to causation in tort and under the ECHR and the lack of a detailed exposition in the case law see Gemma Turton "Causation and Risk in Negligence and Human Rights Law", [2020] CLJ, Vol.79 Issue.1 148-176

extent to which the behaviour of a claimant or defendant should impact on the level of damages awarded under the HRA. Domestic principles on damages and the extent to which they coincide with Strasbourg jurisprudence was considered by The Law Commission prior to the HRA coming into force. The Law Commission undertook a review of damages under the HRA and published its report[125] as it came into force. The Terms of Reference included carrying out a review of the case law of the ECtHR in relation to the award of compensation and the level of compensation awarded under article 41, and, in light of that case law, to consider the principles of Strasbourg jurisprudence which the domestic courts should take into account when determining whether to award damages or the amount of the award under s.8 HRA.[126] The aim of the review was to 'inform the judiciary, practitioner's and public bodies of the Strasbourg jurisprudence and the compensation levels awarded, in readiness for the implementation of the Human Rights Act."[127] Unsurprisingly The Law Commission found there to be a 'lack of clear principles' as to when damaged should be awarded and how the level of damages was to be measured, and that cases were decided case-by-case on an equitable basis rather the by applying a set of principles.[128] One of the reasons the Law Commission gave for the lack of a clear set of principles was due to the character and size of the ECtHR which 'inevitably effects its ability to deal with detailed issues of damages in a consistent way', and, the Report noted that judges at the ECtHR are 'drawn from different backgrounds and diverse jurisdictions, who will have varied experiences of awarding damages.'[129] The system was found to be closer to the French system which does not draw clear distinctions between different heads of loss, unlike in the UK.[130]

Again, this reflects the fact that the Convention is an international treaty, which, as is argued here, requires its Articles and rights to be interpreted and implemented at the domestic level in accordance with the specific legal system and culture of each Member state. It cannot simply be bolted on.

[125] *Damages Under the Human Rights Act 1998*, Law Com 266/Scot Law Com 180 (2000)
[126] *Ibid.* 1.1
[127] Letter from the Lord Chancellor enclosing the terms of refence, *ibid.* 1.2
[128] *Ibid* 3.4-3.5
[129] *Ibid* 3.10
[130] *Ibid.* 3.8.

The Law Commission looked at how the ECtHR approached matters such as speculative losses[131], interest[132], causation[133], loss of opportunity[134], and the conduct of the respondent[135]. In doing so it noted inconsistencies of approach and ultimately concluding that

> [t]he only principle which is clearly stated in the Strasbourg case law is that of *restitutio in integrum*. The aim of an award should be, so far as possible, to put an end to the breach and to make reparation for its consequences in such a way as to restore the situation existing before the breach. However, in applying that principle, the court will take account of the parties conduct on an "equitable basis", a phrase which "it has never attempted to define or reduced to a set of principles.[136]

To a very limited extent some of issues have been clarified by the publication of the ECtHR Practice Direction on Just Satisfaction in March 2007 and updated in June 2022[137] which does address the issue of causation broadly[138], stating that just satisfaction is afforded to compensate an applicant for actual damage 'established as being consequent to a violation'.[139] The Practice Direction does not however deal in any detail with issues such as speculative loss/loss of opportunity, interest, foreseeability of harm, and only very generally sets out the factors to be considered when assessing the level of damages and the approach to be taken to measuring damages, some of which are irrelevant to the domestic setting:

> Among factors considered by the Court to determine the value of such awards are the nature and gravity of the violation found, its duration and effects; whether there have been several violations of the protected rights; whether a domestic award has already been made or other measures have been taken by the Respondent State that could be regarded as constituting the most appropriate means of redress; any other context or case-specific circumstances that need to be taken into account.[140].

The Practice Direction is only four pages long, two pages deal with damages and two pages with costs and expenses. It really does not take matters much, if any, further.

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[131] *Ibid.* 3.59-3.69
[132] *ibid.* 3.70-3.75
[133] *Ibid.* 3.58
[134] *Ibid.* 3.62-3.65
[135] *Ibid.* 3.47-3.48
[136] *Ibid.* 3.78
[137] Practice direction issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007 and amended on 9 June 2022
[138] *Ibid.* 5,9 and 10
[139] *Ibid.* 245
[140] *Ibid.* 13

In the recent case of *Bell v The Commissioner of Police for the Metropolis*[141] , which concerned failures of the police in a case of child abduction where the Claimant's ex partner had taken their son to Brazil, Mrs Justice Hill referred to the Practice Direction in assessing awards for breaches of Article 8. Her judgment provides an example of how the jurisprudence may be more fully developed by the domestic courts in the future. This was a very careful and detailed judgment by a High Court judge both on the merits and on damages of the claims, concerning multiple and complex claims advanced both under the HRA and in tort, however there was still no grappling more generally with how general principles of damages in English law apply to awards under s.8 HRA. For example, with regard to the inability to make an award for pecuniary losses where the loss is too remote in tort, Mrs Justice Hill noted that no such bar exists under the Convention[142], and she found such an award could be made[143] relying on Lord Wool MR in *Anufrijev v Southwark LBC*[144] that the approach to damages under the HRA should be no less liberal than those applied at Strasbourg. But there has been no judicial consideration as to whether this is the correct approach domestically. Should some form of remoteness test be applied under s.8 HRA depending on the nature of the breach and the right in question? If not why? In claims involving non-intentional torts, in addition to the principles of causation, domestic courts apply the test of remoteness to restrict further the availability of compensatory damages for losses that are too remote; in an intentional tort a wrongdoer will be liable for all consequence losses, as consequences intended by the defendant will never be too remote. The Strasbourg court does not distinguish between causation and remoteness in the same way as domestic courts, there is no express reference to the concepts such as reasonable foreseeability. The requirement of a causal link provides the only express limit to the availability of compensatory damages. In this respect the Strasburg practise seems more akin to the domestic approach to intentional torts than non-intentional torts. But should this be the case in domestic claims under the HRA? This was not addressed in *Bell*, nor has it been addressed in any other domestic case.

In respect of the claim for future pecuniary losses, the defendant in *Bell* argued that the claim was ambiguous and speculative[145]. The claim was for the costs of future visitation rights, so that the claimant could visit his son who had been abducted to and was now living in Brazil.

[141] [2024] EWHC 379 KB, [2024] 2 WLUK 298 at 254-293.
[142] *Ibid.* 273
[143] *Ibid.* 57
[144] [2003] EWCA Civ 1406, [2004] 2 WLR 603
[145] [2024] EWHC 379 KB, [2024] 2 WLUK 298 at 284

In dismissing the defendant's submission Mrs Justice Hill relied on the Strasbourg case of *Smith and Grady*, where the ECHR has made an award for loss of future earnings dismissing the UK's arguments that no award should be made due to a large number of imponderables. The ECtHR in *Smtih and Grady* found that 'certainty' as to the amount of any future loss was not required. But as the Law Commission noted in its Report, the approach of the ECtHR to the requirement for certainty is tied the fact that the Court is a supervisory court and is not constituted for considering detailed facts. Such imponderables should be capable of more clarity in a court of first instance able to consider detailed facts.

It also appears that Mrs Justice Hill awarded interest on *all* the damages awarded, including for non-pecuniary loss[146], but it is not clear on what basis. Under the Senior Courts Act 1981 s.35A and the County Courts Act 1984 s.69 the domestic courts have the power to award interest on any damages. But, in contrast the Strasbourg Court appears to only award interest on pecuniary damages[147] and not on non-pecuniary damages under Article 41. In *Smith and Grady*, in refusing to award interest on non-pecuniary damages, the ECtHR said it did not consider such an award to be appropriate given the "nature of the loss to which it relates."[148]

It is clear that damages under the HRA, when they should be awarded, what needs to be established and what types of loss can be claimed, differ in some fundamental respects to the approach to damages under the common law. The judgment of Mrs Justice Hill[149] stands out as a case in which attention has been paid to the differences to some extent, but with no consideration as to whether those differences *should* be reflected at the domestic level. As detailed as the judgment is there is no engagement with the principles underpinning the award of damages and the role they play in tort as compared with claims for violations of rights under the HRA.

Concluding Remarks

The difficulties the pivot brought about by the operation of the HRA from claiming for breaches of the Convention against the UK as a state before an international court, to claims against

[146] *Ibid.* 354
[147] See for example *Guillemin v France* (1997) 25 EHRR 435
[148] *Smith and Grady (Article 41)* (2001) 31 EHRR [13].
[149] It is noteworthy that Mrs Justice Hill's career at the English bar was focused on human rights cases, in particular discrimination law, actions against the police, employment law and inquests and public inquiries. In appointing judges to new specialist HRTs an expertise in human rights law could be made a requirement.

public bodies before domestic courts are, as analysed above, what could be termed primarily as litigation issues. They are difficulties that manifest in practice when seeking to bring a claim against multiple public bodies, or where functions have been delegated or shared. The above examples illustrate that the current state of the law, and litigation practice, can still leave gaps in protection where an individual's Convention rights have been violated as a result of cumulative or collective action or inaction by individuals employed by different public bodies, or for whom different public bodies are liable. It is of course possible domestically to bring a claim against multiple public bodies, rather than identify and rely on a claim against one, but this is very costly, and creates litigation and costs risk that very few claimants will be able and willing to take. What is really in issue here is a lack of *meaningful* access to court to seek a remedy for a breach of a Convention right where that breach involves multiple public bodies due to the cost risks. The common law falls short of providing a remedy by restricting the application of the principle of a non-delegable duty, and a claim against multiple public bodies in either tort or under the HRA comes with a high cost risk.

The solution being proposed here is not a radical change to allow for a claim domestically against the state, but rather a practical but significant change; the creation of new, bespoke and expert domestic HRTs with specialist jurisdiction, for which bespoke costs and procedural rules can be developed. Rights protection must be meaningful and accessible. There needs to be a means by which to enforce rights and hold public bodies accountable, one that is real and not theoretical'[150]. The costs regime needs to be able to disentangle as between the respective body's contribution, and a fair way found to share any costs burden; while this is currently possible and indeed already occurs, it does not occur in a consistent, systemic and transparent way. What is lacking is the certainty that it will occur such that a claimant can run the risk of litigating a claim against multiple public bodies. A specialist jurisdiction and tribunal would have the necessary (constitutional) legitimacy to consider the issues raised by the inability to sue the UK and where necessary fashion bespoke solutions.

The time has also come to recognise that the differences between private common law claims and private claims under the HRA are such to justify separate courts with specialist judges and bespoke rules and procedures. Judges sitting in a specialist HRTs will have both the expertise and the constitutional confidence to grapple with these important but difficult issues and

[150] See *Airey v Ireland* (1979) 2 EHRR 305, discussed further in Chapter Five.

develop positive rights protection under the Convention domestically. The abuse of police power and the power to detain are classic areas in which positive individual rights should provide a remedy, rather than reliance on residual liberties. Arguably a specialist tribunal faced with these types of cases being argued and articulated based on positive rights would result in a different and consistent outcome; a consistent approach to Article 5 as between different detaining bodies, so police, prison, immigration and mental health would be developed. Claims based on liberty will be viewed through a human rights lens and from the perspective of the victim and not the detaining body.

The problematic area to be considered in the next chapter builds on the differences already alluded to in this chapter between positive rights protection under the Convention and common law protection of rights. The next chapter is however more concerned with what will be termed 'a British common law tradition' issue rather than a litigation issue, although similarly the practical realities of litigation are also a factor. What is to be considered next is how the courts have approached the availability and use of the new causes of action under the HRA, and the direct applicability of Convention rights in domestic law when developing (or not) the common law. It is also where litigating HRA claims in the Administrative courts will be considered.

CHAPTER FOUR

Common law tradition v positive rights

Introduction

The focus of this Chapter on in the dominant common law tradition in the ordinary courts and the development (or not) of the common law in light of the positive rights contained in the Convention. It will first be argued that the case law reveals a reluctance on the part of domestic courts to develop common law, in particular remedies, to protect individual rights, due in part on the impact such a development would have on claims involving purely private parties, but also importantly because changes that would be required to some fundamental principles of tort law (for example recognising non-feasance as actionable). This raises the question as to whether in fact two separate legal systems (jurisdictions) are now operating in the UK, with a specialist jurisdiction for the protection of individual positive rights[1], which exists in parallel in the ordinary courts. It will be argued that common law claims and claims for breaches of positive rights require different modes of adjudication and should be litigated within courts tailored to each mode of adjudication.

This question has been subject to much debate[2]. The reluctance shown by the courts to develop the common law to protect positive rights is closely linked to a reluctance to further develop positive obligations[3], often for fear of going beyond where Strasbourg has so far gone or being seen to be embark on judicial activism. This leads on to consideration in this chapter of the application of the margin of appreciation domestically and a critique of the UK Supreme Court's approach to the margin of appreciation in the case of *Elan-Cane*[4]. It also links back to constitutional theory and the argument being made that it is for primarily for the courts to

[1] Nolan has argued for the separate development of negligence and human rights law, albeit not separate courts: Donal Nolan "Negligence and Human Rights Law: The case for Separate Development" (2013) MLR 286

[2] This debate was focused soon after the HRA was enacted on the "horizontal effect" of the HRA, it being argued that Convention rights would play a part in claims between two private parties due to the definition of public bodies in s.6 HRA including courts. See for example Gavin Phillipson and Alexander Williams "Horizontal effect and the constitutional restraint" (2011) MLR Vol.74(6) 878-910, and see Jane Wright *Tort Law and Human Rights* (Hart, 2017), 60-67.

[3] See e.g. *Mitchell v Glasgow City Council* [2009] UKHL 11, [2009] 1 AC 874, where the House of Lords refused to extend an obligation to landlords to warn tenants of the dangers posed by a neighbour in part as this would encompass both private and social landlords.

[4] *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2023] AC 559. For a review of the approach of the Supreme Court to the application of the Margin of Appreciation see Lord Sales "The developing jurisprudence of the Supreme Court on Convention Rights", PL 2024, Jul, 444-462

protect individual rights when claimed against acts of the executive and public bodies, and where appropriate consider acts of the legislature. Creating a specialist human rights jurisdiction would enable this to be explicitly recognised and roles to be more clearly understood.

Claims under the HRA can of course also be brought in the Administrative courts, rather than as private law claims and this Chapter finishes with consideration of public law claims[5]. Questions that arise here include whether the principles, rules and procedure of judicial review in the Administrative courts are always suited to individual rights claims under the HRA. Judicial review does not provide for a merits-based review of decisions, and there are limitations on disclosure, and the use of evidence, including reluctance to allow for cross examination of witnesses[6]. While it is acknowledged that there has been development of the principle of proportionality in individual rights cases[7], and the administrative courts have shown a greater willingness to consider cases that raise issues of resources and to review decisions that are more political in nature, this is arguably not enough. A significant issue with using judicial review as a means of protecting individual rights concerns the jurisdiction, of the administrative courts. In judicial review the court is a court of review, it is not engaged in a merits review, it primarily focuses on whether the decision under challenge was reached in a fair and lawful way, rather than whether the decision reached at the end of the process was the "right" decision. In cases involving fundamental rights the administrative courts have shown some willingness to adapt and to consider whether a decision reached violated a fundamental right – and not just consider the way it was reached. But is this enough, have the adaptations made gone far enough, and would specialist tribunals command any greater legitimacy when adjudicating on claims involving the allocation of resources, the balancing of individual rights against the community at large, and matters of public policy?

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[5] Beaston has argued that the impact of the HRA on public law should be viewed in the context of the broader developments in public law since the 1960s. He has argued that the HRA has led to changes of a different order to those between 1963 and 1984, when modern public law emerged. See Jack Beaston "Human Rights and Judicial Technique" in Roger Masterman and Ian Leigh (eds) *The United Kingdom's Statutory Bill of Rights: constitutional and comparative perspectives* (Oxford University Press, 2013)

[6] See *R (Wilkinson) v. Broadmoor Special Authority* [2002] 1 WLR 419, and for discussion of this restriction on right claims in the administrative court see Rabinder Singh "The Impact of the Human Rights Act on Advocacy" in Roger Masterman and Ian Leigh (eds) *The United Kingdom's Statutory Bill of Rights: constitutional and comparative perspectives* (Oxford University Press, 2013) 183-185

[7] The Administrative court was reluctant to utilise the proportionality test in Pre HRA cases, sticking instead more closely to applying a rationality test. A good summary of the case law and current position of the domestic courts can be found in *R (Keyu and others) v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69, [2016] AC 1355.

These questions are being posed here to explore whether the two systems of rights protection, while sharing much at the level of principle and fundamental values, differ in significant and important respects in the way they are articulated, litigated, and adjudicated such that different courts/tribunals and a different jurisdiction would better serve the protection of rights and more clearly demarcate the roles of the constitutional institutions. Solutions to the gaps and deficiencies identified and the inhibiting influence of the prevailing common law tradition, will be addressed when considering the role new specialist tribunals would fulfil, their powers, rules and procedures, as well as matters of constitutional design. These matters are addressed in the final two chapters of this thesis.

The development of the common law in light of the HRA

The effect of the HRA on the development of common law remedies has been mixed, and it will be argued limited. There has been considerable debate both academic and judicial about the ability or inability of the common law to protect rights contained in the HRA[8]. Debates that were turbo charged at the time when it appeared more likely the HRA would be repealed[9] (it may yet be), with some arguing that there has been a common law resurgence, and that the 'there is some truth' in the suggestion that the HRA is simply doing what the common law could have done all long[10].

Contrasting and differing judicial views include those of Lord Hoffmann in *Simms* that the HRA, not then in force, would supplement the *principles* of fundamental human rights that exist at common law[11], and those of Lord Roger who considered that the 'heroic efforts' of judges in developing the notion of common law rights would be rendered unnecessary by the

[8] For a summary of some of the debates see Brice Dickson, "Repeal the HRA and rely on the Common Law?" in Katja S Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Rights: A Strained Relationship* (Harts Publishing, London, 2015) 115-134. For detailed consideration of the ability of the common law to protect rights if the HRA were to be repealed see Mark Elliott and Kirsty Hughes (eds), *Common Law and Constitutional Rights*, (Hart Publishing (2020)

[9] It was a Conservative party manifesto pledge to repeal the HRA in the 2015 general election manifesto and remained so in the 2019 general election manifesto. A Bill of Rights Bill to replace the HRA was introduced to Parliament by the Conservative government in June 2022, but then subsequently on 27 June 2023 the Conservative Government (that was in power until May 2024) announced that it would not be proceeding with the bill.

[10] Mark Elliott, 'Beyond the European Convention: Human Rights and the Common Law', (2015) CLP Volume 68, issue 1, 85-117

[11] *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115

advent of the HRA[12]. Whatever the true position may be, it is right to acknowledge that while the common law may well reflect most of the *values and principles* underpinning the rights in the Convention, that does not mean, and is not the same as, there being equivalent enforceable rights and remedies that exist in the common law, absent the HRA.

The intention when the HRA was drafted was that the common law should be developed in line with Convention rights: Section 2 HRA requires courts and tribunals to 'take into account' any judgment, decision or advisory opinion of the ECtHR when determining a question that arises "in connection with a Convention right", and S.7(1)(b)) provides for a claimant to rely on Convention rights in any legal proceedings. The obligation in s.2 HRA has been subject to much judicial scrutiny. It was interpreted by Lord Bigham as requiring courts to 'keep pace with the Strasbourg jurisprudence as it evolves over time'. In *R (Ullah) v. Special Adjudicator*[13] Lord Bingham said:

> [A] national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.[14]

Lord Bingham was clear here that if greater rights than those provided for in the Convention as interpreted by Strasbourg were to be guaranteed, this was a matter for parliament or at least was certainly not for the domestic courts. Domestic judges should not create greater rights through their interpretation of the Convention.[15]

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[12] *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395. But see also Lord Cooke in *R (on the application of Daly) v. Secretary of State for the Home Department* [2001] UKHL 26 [2001] 2 AC 532, where he explicitly recognised that the common law was sufficient to protect the fundamental right of confidential communication with a legal advisor.

[13] [2004] 2 AC 323

[14] 350 20

[15] For an analysis of the judicial approach to the relationship between the case law of the ECtHR and its use under s.3 HRA see, Jack Beaston "Human Rights and Judicial Technique" in Roger Masterman and Ian Leigh (eds) *The United Kingdom's Statutory Bill of Rights: constitutional and comparative perspectives* (OUP, 2013) 171-173

It has also been explicitly stated by the domestic courts that Convention rights cannot be cut down by reference to domestic law rights and duties[16], but conversely, the HRA was not intended to provide a domestic remedy where a remedy would not have been available in Strasbourg.[17] The courts interpreted the HRA as essentially a vehicle by which remedies that would be available to a claimant (applicant) in Strasbourg could be claimed domestically. Taking the *dicta* in these cases together, domestic law was to keep pace, but not outpace, Strasbourg, and the Treaty obligations owed by the UK at the international level should be mirrored by the obligations owed by public bodies at the domestic level.

The matter was further considered and clarified, or arguably corrected, in *R (Keyu and others) v. Secretary of State for Foreign Affairs*[18], where what Lord Bingham had said in *Ullah* was explained as intending to apply to the interpretation of the Convention and not the HRA. Lord Bingham's judgment was said by Lord Kerr to have been wrongly construed as indicating that, 'unless the ECtHR has given clear guidance on the nature and content of a particular Convention right, the national courts of the UK should refrain from recognising the substance of a claimed entitlement under ECHR.'[19] After considering the cases of *Rabone v Pennine Care NHS Trust*[20], *Cheshire West and Cheshire Council v P* [21] and *Moohan v Lord Advocate*[22] Lord Kerr went on to say that if there is no 'clear guidance from Strasbourg' the court could form its own judgment, but where it did so the question to consider was what Strasbourg would decide, as opposed to what the national court itself should decide.[23]

While the settled position following this line of cases now appears to be that the domestic courts are not *precluded* from developing Convention rights, such development should still only be done by reference to what the national court considers Strasbourg would do if the matter were before it. How does this approach sit with the domestic judges' role in developing the common law, where no such limitation on the national courts exists? How are judges to

[16] Correspondingly s.11 of the HRA 'safeguards' existing rights: 'A person's reliance on a Convention right does not restrict (a) any other right or freedom conferred on him by or under any law having effect in any other part of the United Kingdom; or (b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9'.
[17] *R (Quark Fishing) v. Foreign Secretary* [2005] UKHL 57, [2006] 1 AC 529 [33]-[34]
[18] [2015] UKSC 69, [2016] AC 1355
[19] *Ibid.* 232
[20] [2012] UKSC2, [2012] 2 AC 72
[21] [2014] UKSC 19, [2014] AC 896
[22] [2014] UKSC 67, [2015] AC 901
[23] *Ibid.* 235

adjudicate on cases which raise a novel issue where a claim can be articulated both as a claim in common law and under the HRA? This leads on to consideration of the margin of appreciation.

The Margin of Appreciation domestically: How and by whom?

An advantage of specialist tribunals argued for here is having expert judges applying and developing Convention rights domestically. This leads to consideration of how domestic authorities and courts should apply the margin of appreciation, a doctrine of the Strasbourg Court, a supranational court. When is it for the national courts and when it is for Parliament, or indeed the executive, to fill in the margin left to the member states of the Convention? The normative answer to this question has been addressed in part in Chapter Two where the constitutional model proposed is one of a "differential constitution"; what has been proposed is that it would be for a court to determine whether it has the constitutional competence to decide a matter, and that where the matter concerns the act of public body or official it is likely that the courts will have the necessary constitutional competence. But there is also the question of how a doctrine of a supranational court, operating at the state level, should be applied, how is it relevant to decision making and adjudication at the national level, and currently which constitutional institution is responsible for utilising it? Once again there has been much academic and judicial debate on this question; whether, when, and by whom should the margin of appreciation doctrine be applied.[24]

The margin of appreciation is a doctrine[25] that was developed by the judges of ECtHR and is now embedded in the preamble of Article 1 Protocol No 15. It is clear from the case law and

[24] See for example Marie Demetriou, Rabinder Singh and Murray Hunt "Is there a role for the 'Margin of Appreciation' in National law after the Human Rights Act" (1999) EHRLR 15-22

[25] There is an abundance of academic writing on the margin of appreciation doctrine, see for example, Y. Arai-Takahashi, 'The margin of appreciation doctrine: a theoretical analysis of Strasbourg's variable geometry' in Follesdal, A., Peters, B. and Ulfstein, G., *The European Court of Human Rights in National, European and Global Context*, (Cambridge University Press, 2015) 62-105 O.M Arnardottir, 'Rethinking the two margins of appreciation', (2016) European Constitutional Law Review, 12(1), 27-53, Dzehtsiarou Kanstantsin, European Consensus and the Legitimacy of the European Court of Human Rights (Cambridge University Press 2015), Dzehtsiarou Kanstantsin, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights', [2011] PL 534-553. J. Kratochvil, 'The inflation of the margin of appreciation by the European Court of Human Rights', (2017) Netherlands Quarterly of Human Rights, 29(3), 324-357, G. Letsas, 'Two Concepts of the Margin of Appreciation', OJLS (2006) 26 (4), 705-732, M. Saul, 'The European Court of Human Rights' Margin of Appreciation and the Process of National Parliaments' (2015) HRLR, D. Spielmann, 'Wither the Margin of Appreciation?'(2014) CLP 67(1), 49-65, D. Tsaraparsanis, D 'The margin of appreciation doctrine: a low-level institutional view', (2015) LS 35(4), 675-697. B. Tripkovic, "A New Philosophy for the Margin of Appreciation and the European Consensus" (2022) OJLS Vol. 42, No. 1 (2022) 207–234

the wording of the preamble that it is a doctrine that is tied to the concept of subsidiarity[26]; it is first for national courts to assess the compatibility of national measures with the Convention and that the ECtHR thereafter carries out a review of that assessment. But is also linked to the central aim of the Convention system of 'collective enforcement' and the 'common understanding' of rights across Europe[27]. To achieve this the ECtHR will consider the extent of any consensus among the members states, and where there is no clear consensus, it will allow the states a margin of appreciation as to the content and meaning of rights and the protection afforded. Where there is a consensus this narrows the margin of appreciation, as happened, for example, in the cases concerning the changing attitudes towards homosexuality.[28]

The doctrine first emerged in respect of Article 15 of the Convention (derogation in a time of emergency) and was based on the principle that national authorities are better placed than Strasbourg to judge to determine when the criterion of there being a 'national emergency threatening the life of the nation' had been fulfilled. It was next applied in the context of the qualified rights Article 8 to 11, and in particular in respect of interferences defended on the basis of national security, the protection of health or morals, and the prevention of disorder or crime. It also applies to Article 14 where the margin of appreciation has been used when determining the dividing line between "a difference in treatment" and discrimination. In this context matters of social policy become relevant and there is a need to strike a balance between protection of the interests of the community and respect for the rights and freedoms of the individual. The ECtHR will also allow for a margin of appreciation when considering reasonable time and promptness requirements in Article 5 and 6, and for measures 'reasonably available' in respect of the positive obligations in Article 2 and 3. A determination of the content and limits of rights often therefore requires consideration of the application of the margin of appreciation, and it has become central to the jurisprudence of the Convention[29]. The doctrine is clearly intended to allow national authorities to interpret and apply Convention rights as they deem appropriate according to each nation's legal, cultural and political make-up.

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[26] 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights'.

[27] See Preamble to the Convention

[28] *Dudgeon v UK* (1982) 4 EHRR 149, *Norris v Ireland* (1991) 13 EHRR 186 and *Modinos v Cyprus* (1993) 16 EHRR 485

[29] See Steven Greer, *The Margin of Appreciation: Interpretation and discretion under the European Convention of Human Rights* (Council of Europe Publishing, 2000)

How then should this doctrine of an international court be applied, if at all, by the domestic courts[30]. The most recent and comprehensive judicial consideration of this question is contained in the judgment of the Supreme Court in *R (on the application of Elan-Cane) v Secretary of State for the Home Department*[31] . In *Elan-Cane* the Supreme Court re-affirmed[32] that the structure of the HRA means that when determining the extent and content of a Convention right, the domestic courts should not (usually) go beyond determinations by the ECtHR. This includes where those determinations have been reached following the application of the margin of appreciation. If the ECtHR has clearly determined there has been no violation, including where they do so by application of the margin of appreciation, the domestic courts are not entitled to find a violation in the domestic setting, there is no role for the domestic courts in reaching a different decision. The application of the margin of appreciation does not leave the question of a violation unanswered; the decision of whether in a particular case a Convention right has been violated is a binary one, either yes or no. Lord Reed made clear[33] that this is as a result *of the structure* of the HRA, rather than based on any underlying principle (save Parliamentary sovereignty); the rights given effect to in the HRA are Convention rights and have the same content domestically as those which are given effect to in international law.[34]

The UK differs in this way from other Member States of the Council of Europe who have written domestic bills of rights as well as being signatories to the Convention; in contrast the UK's 'bill of rights' is in effect an international one, namely the Convention, or at least those Convention rights contained in Schedule 1 HRA. The domestic courts in for example Spain, Germany and the Netherlands will consider not just the international law rights contained in the Convention but the domestic rights contained in their Constitutions.[35] This additional layer allows space for the domestic courts to adopt an interpretation of domestic rights in a domestic constitutional bill of rights more generously and limitations more stringently than the ECtHR

[30] For an analysis of the relationship between national courts and the ECHR, and the application of the Margin of Appreciation see Geir Ulfstein "The European Court of Human Rights and national courts: a constitutional relationship" in Oddny Mjoll Arnardottir and Antoine Buyse (eds.) *Shifting Centres of Gravity in Human Rights Protection* (Routledge, 2016), 48-53

[31] [2021] UKSC 56, [2023] AC 559

[32] In line with *R (Keyu and others) v. Secretary of State for Foreign Affairs* [2015] UKSC 69*,* [2016] A.C 1355

[33] 'Since the rights have the same content at domestic level as the international level, it follows that the relevant articles of the Convention should in principle receive the same interpretation in both contexts' 80

[34] For a critical analysis of the UK Supreme Court's approach see Kacper Majewski "Mirroring the Margin" (2022) PL 553

[35] For a discussion on the impact of the ECtHR on Constitutional courts in Europe see Victor Ferreres Comella *Constitutional Courts and Democratic Values* (Yale University Press, 2009), 139-154

would require applying a margin of appreciation. The domestic courts of Member States with written bills of rights can determine when applying rights domestically how within the specific culture, tradition and social and economic conditions of their nation the balance should be struck between national interest and individual rights, and what the applicable 'morals' are. Of course, the domestic courts must ensure compliance with Convention rights, but they provide a floor and not a ceiling. The ECtHR very much acts for these Member States as reviewing court, ensuring the domestic protection of rights is consistent with the Convention, including reviewing where greater protection has been allowed for by the national authorities and courts.

Following the Supreme Court decision in *Elane-Cane* the difference between the UK and all other Member States which have written constitutions and domestic bills of rights is clear, and arguably means that in the UK the courts play a lesser role in holding the executive and legislative to account in respect of rights protection than other members of the Council of Europe; the courts in the UK are restricted to holding the UK authorities to the obligations owed under the Convention as interpretated by the ECtHR applying the margin of appreciation, which could be said to equate to the lowest common denominator. In *Elan-Cane* Lord Reed said it is only Parliament who can decide to provide any greater protection to rights or reach a different view on the balance to be struck between the interest of the community (the majority) and the interests of the individual (the minority) where the ECtHR has relied on the margin of appreciation when finding no violation. He rejected the *dicta*, said to be *obiter dicta*, in *In Re G (Adoption: Unmarried Couple)*[36] setting out the alternative reasoning of the House of Lords, he said:

> It was said [in *In Re* G] that where the European Court declared a question to be within the national margin of appreciation, it was for the courts in the UK to interpret the relevant articles of the Convention and to apply the division between the decision-making powers of the courts and Parliament in the way which appeared appropriate for the United Kingdom. On that basis, even if the European Court would have found the legislation to be compatible with the Convention, the domestic court could nevertheless hold that the legislation violated Convention Rights.
> …
>
> When the European Court finds that contracting states be permitted a margin of appreciation, it does not cede the function of interpreting the Convention to the contracting states or enable their domestic courts to divide that function between their domestic institutions. Contracting states can of course create rights going beyond those protected by the Convention, but that power exists independently of the Convention

[36] [2008] UKHL 38, [2009] 1 AC 173

> and the Human Rights Act, is not dependent on the margin of appreciation doctrine, and is exercisable in accordance with long-established constitutional principles, under which law-making is generally the function of the legislature.[37]

The interpretation of the HRA and the approach to be taken to the domestic application of the margin of appreciation set out in the House of Lords judgment of *In Re G* would however better fit the constitutional model being advocated here; it would provide for a greater role for the courts where this is constitutionally and institutionally appropriate and better protect rights. Unfortunately, and it is argued wrongly, this is not the approach the Supreme Court agreed with. Lord Reed's Supreme Court clearly found that it was not for the national courts to decide on their own approach to the question whether the issue to be determined is within the scope of the margin of appreciation or not. Where a margin of appreciation would be applied by Strasbourg, there is, according to the UK Supreme Court, no role for the domestic courts. The Convention right cannot 'bite' on the legislation as Strasbourg would allow the UK (Parliament) a margin of appreciation. This would seem to tie the UK courts to the floor of protection provided by the Convention, and it would only be for Parliament to provide any greater protection of rights.

This is a narrow reading of the HRA, and in terms of the level of accountability and rights protection this provides it is argued to be the minimal available; it all but shuts out the domestic courts from having a role in the development of domestic human rights protection and jurisprudence. This will particularly be the case if the courts also then adopt a more restrictive approach to the use of s.3 HRA and rely more on s.4 declarations of incompatibility. Lord Reed here has arguably taken a literal approach to 'bringing rights home', narrowly interpreting the HRA as purely a statute to enable a remedy of a breach of international law to be provided domestically, and not more widely as intending to create a domestic human rights culture and enable the domestic courts to develop a domestic human rights jurisprudence.

While the Supreme Court has clearly come down on one side, there are two diametrically opposed views as to the nature and application of the margin of appreciation, on the one hand it is a doctrine of an international court that has no application in the UK, leaving the domestic courts free to reach their own interpretation of Convention rights and how they apply domestically, and on the other, it is a tool of interpretation used by the ECtHR that results in a

[37] *Ibid.* 85

final determination of the limits and content of Convention rights to which the UK courts must defer by dint of the HRA[38]. These two different approaches to the margin of appreciation can be said to reflect, or can be mapped to different constitutional theories; to legal constitutionalism and political constitutionalism. But is there a third way. Taking a democratic dialogue approach, or a collaborative approach, could mean that where a case has been decided by the ECtHR by reference to the margin of appreciation this prompted a dialogue between the courts and the political institutions to reach a view as to how domestically a right should be defined and applied. It is not clear how this approach could be achieved in practice however, and in any event, what is being advocated here is for a stronger role for the courts, and specifically a specialist, expert tribunal, and for the tribunal to determine institutional competence.

Applying the differential constitutional model being advocated here to the application of the margin of appreciation would lead to entrusting the domestic courts, and as proposed here specialist HRTs with expert judges, to determine whether there is a role for the courts in determining the content, limits and application of a right in cases where the ECtHR has or would allow for a margin of appreciation. This would create a dynamic and more robust system for the protection of rights, and one better suited for the complex and diverse way in which rights are protected within the UK. It would also recognise the changing role of the ECtHR[39] and the increasing emphasis on subsidiarity and the need for domestic courts to protect Convention rights. There are many examples of courts reviewing and assessing the involvement of the political institutions before reaching a decision as to whether it is or is not a matter the courts should deal with, an example includes *In re G*[40] already referred to. Other examples include *Nicklinson*[41], a case concerning assisted suicide.

There are in addition other principles applicable to the interpretation of the Convention which are often also in play in cases where the application of the margin of appreciation is applied by the ECtHR. It is argued these principles also support the view that is legitimate for the courts and not always for parliament to fill the gaps where the ECtHR has applied a margin of appreciation; it is sometimes legitimate for the court to decide as to the relevant width of, or

[38] See Geroge Letsas "Two concepts of the Margin of Appreciation" (2006) OJLS Vol.4 70
[39] See for example Robert Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law,' (2018) HRLR Volume 18, Issue 3 473
[40] [2008] UKHL 38, [2009] 1 A.C. 173
[41] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657

how the margin of appreciation applies in a particular state. These principles include first the principle of 'effective protection'.[42] The Convention is aimed at the effective protection of individual rights, and not obligations between states (as with other types of international treaty) and Convention rights should not therefore be interpreted restrictively in deference to national sovereignty. Restrictions on rights should not undermine the "very essence" of the right. Second, the principle of legality – Rule of Law – which is a foundational principle of the Council of Europe.[43] State action should be subject to effective legal constraint against the arbitrary exercise of executive or administrative power. Third, democracy is also a foundational principle of the Council of Europe.[44] Democracy does not just mean that the views of the majority must prevail, but also includes the notion of 'pluralism, tolerance and broadmindedness'.[45] A balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Finally, when deciding 'reasonableness' or 'promptly' in Art 5 and 6, the ECtHR gives national authorities a wide margin of appreciation, but these, it is argued here, are matters that very clearly should be for courts not Parliament. It is within the institutional competence of the courts to determine what is 'reasonable' and 'prompt' in terms of liberty and fair trials. If the margin of appreciation has been applied in these types of cases by the ECtHR the domestic UK courts should not automatically find no violation and defer to Parliament, they have the necessary constitutional competence to determine the matter.

Given the wide range of circumstances and reasons why the margin of appreciation is applied by the ECtHR, and the other principles involved, there needs to be a more sophisticated and nuanced approach than that suggested in *Elan-Cane* to the relevance and application of the margin of appreciation at the domestic level. It is necessary in cases concerning Convention rights for the domestic courts to carefully consider and review the basis on which the margin of appreciation has been applied if the executive, and at times the legislature, is to be properly held to account and rights effectively protected. Further, there is a risk here of the underdevelopment of domestic rights jurisprudence. The ECtHR applies a margin or discretion when considering applications and tends to be more sweeping and less explicit when considering the content of any positive obligation. The domestic courts have no such 'margin

[42] Steven Greer, *The Margin of Appreciation: Interpretation and discretion under the European Convention of Human Rights* (Council of Europe Publishing, 2000) 15
[43] *Ibid.*
[44] *Ibid. p.17*
[45] *Handyside v United Kingdom* (1979-1989) 1 EHRR 737, 49

of discretion' or 'margin of appreciation' when deciding such matters and ought to more carefully and more transparently analyse what is required by a state body to meet any positive obligation. This will require them to consider matters touching on resources, finely balanced judgements and costs to the public purse, but from a rights-based approach and not a tort-based approach. The courts have a legitimate role, and the constitutional competence, in a liberal representative constitution like the UK in protecting minority rights and holding the legislature and executive to account. Balancing the rights of two individuals or considering the need to protect an individual against an administrative or executive act it a matter for the courts. Where the ECtHR has found there is a lack of consensus among member states and affords a choice as to how to achieve a legitimate aim it should be for the domestic UK courts to review the choice made by the UK Parliament (or devolved Parliaments) and to decide whether in the context of the UK the choice respects the rights concerned. This is a task that could be entrusted to specialist HRTs (in the first instance) within the UK constitution. This could in some way fill the gap created in the UK by the lack of domestic constitutional bills of rights, as exists in the other Parties to the Convention.

The development of private common law claims

Since the coming into force of the HRA the common law, overwhelmingly, or perhaps underwhelmingly, has not been developed to be consistent with rights protection under the Convention, as Wright argues 'public authority liability under the HRA has not been matched by developments in in public law liability under the common law'.[46]

A notable exception, often cited, is the recognition of the right to privacy and misuse of private information in tort[47], which had not been recognised prior to the enactment of the HRA, and whose content is now largely informed by Articles 8 and 10 ECHR[48]. In this line of privacy cases however the domestic courts were concerned with also considering the effect of the courts being included as public bodies in s.6 HRA. An aspect which is missing from the positive duties

[46] Jane Wright, *Tort Law and Human Rights*" (2nd Ed., Hart Publishing, 2017) 307
[47] *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 and *Vidal-Hall v Google Onc* [2015] EWCA, Civ 311, [2015] WLR 309.
[48] It would appear that the common law, in combination with the HRA, has proven to be more effective in protecting the qualified rights contained in the ECHR, in particular in the fields of privacy (e.g. *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457), freedom of expression (e.g. *R. (on the application of Laporte) v Chief Constable of Gloucestershire* [2007] 2 AC 105) and also protection against discrimination (e.g. *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 A.C. 557). This may be because these are areas of the law where the judiciary have been more willing or more able to develop the common law in line with convention rights or use the common law to fill the gaps.

owed by the police and local authority line of cases, where no new common law cause of action was created (save in child abuse claims - see further below). In *Campbell v. MGN Ltd.*[49] the speeches of Lord Nicholls of Birkenhead, Lord Hoffmann and Baroness Hale make this clear. Importantly it was also recognised that developing tort law in this way caused no issue whether the parties to a claim were both private individuals or the claim involved a public body. Development of the common law suited and fitted both tort law and Convention rights. Lord Nicholls described how the values of the Convention had been 'absorbed' into the common law and 'are now part of the cause of action for breach of confidence'[50] and that these values were now of general application and were applicable in disputes between individuals or between an individual and a non-governmental body, such as a newspaper, as well as in disputes between individuals and a public authority. In reaching this conclusion his Lordship did not consider it necessary to pursue 'the controversial question' as to whether the Convention itself this wider effect has, instead it was sufficient to recognise that the values underlying Articles 8 and 10 are not confined to disputes between individuals and public authorities[51]. Baroness Hale said that the HRA did not create any new cause of action between private persons, but 'if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' Convention rights'.[52] The need when developing tort law to consider the impact on both a claim between private parties and a claim by a private party against a public body is explored further below when the case of *Mitchell v Glasgow*[53] is considered.

The recognition of new common law remedies has however been very much the exception, as the consistent and robust refusal of the courts to develop the common law to cover non-feasance as well as misfeasance following the case of *Osman*[54] demonstrates well. A good argument can now be made that there are two different jurisdictions under which, or by which, rights can be protected, and they are being implemented and developed in parallel, but not necessarily in step. This raises the question as to whether there is an argument for separate courts/tribunals.

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[49] [2004] UKHL 22, [2004] 2 AC 457
[50] *Ibid.* 44
[51] It is worth noting that Lord Hoffmann made the point that although 'the Convention, as an international instrument, may impose upon the United Kingdom an obligation to take some steps (whether by statute or otherwise) to protect rights of privacy against invasion by private individuals, it does not follow that such an obligation would have any counterpart in domestic law.' 49.
[52] [132]. Baroness Hale quoted with approval Lord Wolf CJ in *A v. B plc* [2002] EWCA Civ 337, [2003] QB 195, 202 [4]. Refence has already been made to the debates as to the 'horizontal effect' of the HRA
[53] [2009] UKHL 11, [2009] 1 AC 874
[54] *Osman v UK* (2000) 29 EHRR 245

The analysis below will more fully explore the different approaches of the courts to common law rights and Convention rights.

Non-feasance and positive obligations – not two sides of the same coin.

The refusal to develop the common law to cover matters of non-feasance by public bodies and the development in the Convention of positive rights protection provides good evidence that the national courts are treating as separate claims under the HRA and common law obligations and rights and are not concerned to ensure rights protected by one is matched and mirrored in the other.[55] In *Michael v Chief Constable of South Wales Police*[56] the majority of the court[57] was not persuaded that there was a need to provide consistency between the common law and the Convention such as to require the development the law of negligence to impose liability on the police for a failing to act, in stark contrast to the positive obligations imposed on states to act under the Convention. It must be acknowledged however that the full picture is complex and arguably inconsistent. The courts have, in contrast to *Michael*, which concerned the failure of the police to respond appropriately to a 999 call from the victim of domestic homicide, developed the common law to impose liability for a failure to act on social workers in the field of child protection. A different approach was taken by the domestic courts in these cases following *Z v. United Kingdom* [58] and *TP and KM v United Kingdom*[59], where Strasbourg found the United Kingdom had breached the applicants Article 8 and Article 13 rights for failing to provide a remedy to victims of abuse where there had been failings by local authorities. Lord Bingham in *JD v. East Berkshire Community Health NHS Trust*[60] answered the question as to whether the common law should develop to provide a remedy in the following way:

> [T]he question does arise whether the law of tort should evolve, analogically and incrementally, so as to fashion appropriate remedies to contemporary problems or whether it should remain essentially static, making only such changes as are forced upon it, leaving difficult and, in human terms, very important problems to be swept by the Convention. I prefer evolution.[61]

This is not however a view that has universally or consistently prevailed. In *JD* the Court of Appeal had found that the refusal to recognise a duty of care owed to a child in negligence

[55] See arguments made by Donal Nolan "Negligence and Human Rights Law: The case of separate development" (2013) MLR 76(2) 286-318
[56] [2015] UKSC 2, [2015] AC 1732
[57] Hale and Kerr JJ dissenting
[58] which involved the duty owed by local authorities where there was child abuse and neglect by parents, and the applicants were same claimants in the *Bedfordshire* case.
[59] (2005) 34 EHRR 2
[60] [2005] UKHL 23, [2005] 2 AC 373
[61] *Ibid.* 400D

could not survive the coming into force of the HRA and the *Osman*[62] line of cases.[63] The court there was influenced however by the fact that not to do so would leave children who were victims of abuse before October 2000 without a remedy.[64] The focus of the judgment was more concerned with whether it would be "fair, just and reasonable" to impose a duty, rather than more generally on tort's aversion to imposing a duty for non-feasance.

What approach the domestic courts should take to positive obligations owed under the Convention, and the question as to what extent the common law should be developed to recognise and provide a remedy for a breach of positive obligations, has posed a real challenge for the domestic courts.[65] In common law claims it is usually the case that there is no common law duty owed to individuals by a public body/authority, and public bodies are not generally under a duty of care to prevent the occurrence of harm to an individual. This contrasts sharply with a claim for a breach of positive human rights under the Convention, where the individual is claiming that they hold a right which the public body must respect and uphold, and where very often a failure to protect someone from a violation of their rights gives rise to a separate violation of a positive obligation to protect. The enactment of the HRA led to the recognition by domestic courts of positive obligations being owed to individuals by public bodies to some extent in some areas, for example the positive obligation to investigate and to protect from breaches of Article 2 and 3: for example *R. (on the application of Middleton) v HM Coroner for Western Somerset*[66] in the inquest context and *The Commissioner of Police for the Metropolis v. DSD*[67] in respect police investigations. But difficulties remain, and the domestic courts have been reluctant to find a duty of care owed to individuals by public bodies in cases that concern decisions or in/actions in circumstances where the public body is having to make difficult, delicate decisions, or where issues of resources are relevant. The domestic courts have

[62] *Osman v United Kingdom* (2000) 29 EHRR 245
[63] [2003] EWCA Civ 1151, [2003] QB 558 83
[64] After noting that it would not be possible to pursue a claim concerning abuse that occurred pre 2000 under the HRA, so leaving a claimant without a remedy if one were not provided in negligence Lord Phillips, giving the judgment of the court, said '…the absence of an alternative remedy for children who were victims of abuse before October 2000 militates in favour of the recognition of a common law duty of care once the public policy reasons against this have lost their force.' 83 see also J Wright, "Immunity No Moe, Child Abuse Cases and Public Authority Liability in negligence after *D v East Berkshire Community NHS Trust*" (2004) Journal of Professional Negligence 58
[65] For a critical analysis of the domestic case law and the rejection of a convergence of the tort liability of public authorities and human rights principles, and the 'tentative emergence of a distinctive public law of liability', see Francois Du Bois "Human Rights and the tort liability of public authorities" (2011) LQR. 127 (Oct), 589-609
[66] [2004] UKHL 10, [2004] 2 AC 182
[67] [2018] UKSC 11, [2019] AC 196. Although it should be noted that the claims were all brought under the HRA.

tended to analyse such cases from the standpoint of the public body – is it fair to make them liable – rather than from that of the individual – have they suffered harm for which they are entitled to a remedy. This is in line with the common law tradition and tort law but differs to the approach in claims for breaches of positive rights.

When it comes to considering any mirroring between positive obligations in human rights law and tort law, in particular negligence, the difference between both the underlying objectives of, and the approach and application of tort law and human rights law comes into sharpest focus. There is here a tension between the common law not imposing liability for pure omissions, and the Convention which requires public bodies to take positive steps to protect against the violation of rights. Arguably different priorities are given, and a different approach taken to the balance to be struck between the public good and individual justice by the common law and by the Convention. Positive obligations clearly introduce factors such as use of resources, finely balanced judgment calls and the balancing of rights as between the individual and society at large[68]. Such factors raise constitutional questions, questions as to the appropriate role of the court and judges where qualified rights are in play, which were considered in more detail in Chapter two.

The common law approach to liability and justice, and how it contrasts to a rights-based approach is evident in the line of cases involving claims bought against local authorities concerning children, the police, and to some extent the CPS. In these cases, the courts have emphasised that public bodies generally owe a duty to the public at large, but not to individuals[69], and where there is conflict between individual rights and the public good, the domestic courts under the common law have tended to come down on the side of the public good/interest. In *Elguzouli-Daf* [70](a pre HRA case) Lord Steyn said:

[68] The effect of positive obligations on public bodies has also caused political concern. In the Conservative Government's consultation paper on Human Rights Act Reform, which ran from 14 December 2021 until 19 April 2022, one of the questions raised was 'How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigations?' Question 11, Human Rights Act Reform: A Modern Bill of Rights – consultation, updated 12 July 2022 < https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation#foreword > accessed 15 April 2024

[69] See for example in the case of *Michael* [2015] UKSC 2, [2015] AC 1732 where it was argued that no private law duty of care in negligence is owed by police to individual citizens for failure to comply with a public law duty.

[70] [1995] QB 335

> While it is always tempting to yield to an argument based on the protection of liberties, I have come to the conclusion that the interests of the community are better served by not imposing a duty of care on the CPS[71]

The courts have often found that the '[g]reater public good outweighs individual hardship'[72]. The 'in the interests of the whole community' was also an important factor in not finding a duty of care in *Smith v Chief Constable of Sussex*[73], a negligence case that was heard in the House of Lords together with the HRA case of *Van Colle v Chief Constable of Hertfordshire*[74]. In these joined cases the House of Lords had the opportunity to consider two cases where it was alleged that the police had failed to protect life, where the threat to life came from a third party. In *Van Colle* it was argued that the failure to protect life breached the positive operational obligation owed Article 2, and in *Smith* it was argued that the police owed a duty of care to the victim in negligence and as a result of a breach of that duty should pay damages. Both cases failed. The claim in *Van Colle* failed on the basis that the test set out in *Osman* for the need for there to be a 'real and immediate risk' to life before the positive obligation under Article 2 arose was not met. In *Smith* it was argued that because a positive obligation to protect life was owed by police under Article 2, the common law of negligence should be developed to create an equivalent liability in negligence; there could be no policy reasons for not imposing such a liability[75]. This argument failed[76]. In giving his judgment Lord Hope referred to the CPS case of *Elguzouli – Daf* and *Brooks v Commissioner of Police of the Metropolis*[77] and went on to say:

> The phrase "the interests of the whole community" was echoed in the last sentence of the passage which I have quoted from Lord Steyn's opinion in *Brook*s. There is an echo too in Brooks of the warning against yielding to arguments based on civil liberties...The point that he was making in *Brook*s, in support of the core principle in *Hill*, [which protects the police function of investigating and suppressing crime] was that the principle had been enunciated in the interests of the whole community. Replacing it with a legal principle which focuses on the facts of each case would amount … to a retreat from the core principle. We must be careful not to allow ourselves to be persuaded by the

[71] *Elguzouli-Daf* [1995] QB 335 Lord Steyn 349
[72] *SXH v. CPS* [2017] UKSC 30, [2017] 1 WLR 1401, [108], quoting *Elguzouli-Daf* [75]
[73] [2008] UKSC 50], [2009] 1 AC 225
[74] *Ibid.*
[75] An argument that succeeded in *JD v East Berkshire Community NHS Trust*) [2005] UKHL 23, [2005] 2 A.C. 373
[76] Lord Bingham dissenting.
[77] [2005] UKHL 24, [2005] 1 WLR 1495, a claim brought by the friend of Stephen Lawrence who was the victim of a racist murder, where the court found that a victim of a crime and eyewitness to murder was not able to bring a claim in negligence against the police for the manner in which they are treated by the police.

> shortcomings of the police in individual cases to undermine that principle…As Ward LJ said in *Swinney v Chief Constable of Northumbria Police Force [1997] QB 464* , 487, the greater public good outweighs any individual hardship. A principle of public policy that applies generally may be seen to operate harshly in some cases, when they are judged by ordinary delictual principles. Those are indeed the cases where, as Lord Steyn put it, the interests of the wider community must prevail over those of the individual.[78]

This epitomises the difference in approach as between actions in private common law and human rights law; the focus at common law is on general principles and the 'public good', while in human rights law the focus is on individual justice and individual rights. In *Robinson v Chief Constable for West Yorkshire Police*[79], counsel for the Claimant during argument in the Court of Appeal raised the question as to the what the public would think if in the process of arresting criminals police officers could injure innocent members of the public with impunity. The answer to this given by the Court of Appeal was that 'provided the police act within reason, the public would prefer to see them doing their job and taking drug dealers off the street.'[80] This again evidences where justice is seen to lie according to the common law, priority is often given to the general public good and not to individual justice[81].

Domestic common law courts are also inclined to protect public bodies from the burden of litigation and are mindful of the cost to the public purse. In proposing his test for liability in tort Lord Kerr in *Michael v. Chief Constable of South Wales*[82] referred to what Richardson J said in *South Pacific Manufacturing Co Ltd. v. New Zealand Security, Consultant and Investigations Ltd.*[83] as to there being a 'balancing of the plaintiffs moral claim to compensation for avoidable harm and the defendant's moral claim to be protected from an undue burden of legal responsibility, which is exactly what has been the aim of the test for liability that I have proposed.'[84] It is questionable whether matters of morality apply to rights cases in the same

[78] *Ibid.* 75
[79] [2018] UKSC 4, [2018] AC 736
[80] See 15. The case concerned an injury being caused to a bystander who was pushed over during the arrest of a suspected drug dealer on the street. The claim failed; it was said to be a case of omission for which no duty of care arose.
[81] Another theme that runs through these cases is the balance between certainty and justice: in *Caparo* [1990] 2 A.C. 605 it was said that there is a balance to be struck between legal certainty and justice. In tort/common law, where finely balanced, the courts come down on the side of legal certainty, see for example, *Michael v Chief Constable for South Wales* [2015] UKSC 2, [2015] AC 1732 at [62], where Lord Toulson JSC commented on Lord Hope's concern that Lord Bingham's proposed 'liability principle' in *Smith* would lead to uncertainly.
[82] [2015] UKSC 2, [2015] AC 1732
[83] [1992] 2 NZLR 282, 306
[84] *Ibid.* 147

way as they do in purely private law claims, although of course where positive obligations are concerned the Strasbourg court has been careful to emphasise the need to not impose 'impossible burdens'[85]. Similarly, the central concept of "blame" and "blameworthy behaviour" that exists in private common law claims may not be appropriate in positive rights cases.

In *N v Poole BC*[86] the approach to liability for pure omissions was reconfirmed by the Supreme Court post HRA and the traditional view in *Stovin v Wise*[87] re-affirmed. Tort law's concern with distributing harm among society, the best use of taxpayers money, and the aversion towards liability for non-feasance shines through in the judgement of Lord Hoffmann in *Stovin*. Lord Hoffman's words are in stark contrast to a positive right based legal regime, he observed that:

> it is one thing for a public authority to provide a service at the public expense and quite another to require the public to pay compensation when the failure to provide the service has resulted in a loss. Apart from possible cases involving reliance on a representation by the authority, the same loss would have been suffered if the service had not been provided in the first place and to require payment of compensation would impose an additional burden on public funds…

And

> It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible. To impose such a burden would be contrary to the ordinary principles of the common law"[88]

In a similar context, in *Mitchell v. Glasgow City Council*[89], the rationale for not developing the common law in line with Convention rights was the impact such a development would have on a purely private law claim, so one between two private individuals. The case concerned the murder of man by his neighbour, it was argued that the local authority had failed to warn the man of the threat posed by the murderer. Both the victim and the murderer were tenants of the local authority. The claims made were both in negligence and under the HRA for a breach of Article 2. In considering whether a duty of care at common should be imposed on the local

[85] *Osman v UK* (1998) EHRR 245 116
[86] [2019] UKSC 25, [2020] AC 780
[87] [1996] AC 923
[88] *Ibid.* 114
[89] [2009] UKHL 11, [2009] 1 AC 874

authority in these circumstances the court was concerned about the implications of doing so for private landlords, and the onerous duties that would be placed on local authorities: 'such proceedings, whether meritorious or otherwise would involve them in a great deal of time, trouble and expense that would be more usefully devoted to their primary functions in their respective capacities.'[90] The claim in negligence failed.

The domestic common law courts will be mindful of ensuring that tort law does not develop in different ways depending on a private/public divide. Consistent with Baroness Hale's observation in *Campbell*[91], there is an important difference between the HRA requiring the creation of a new cause of action between private parties in tort law, and the courts, as s.6 public authorities, not acting incompatibly with Convention rights. The courts have firmly found that they are not *required* to develop the common law to create new causes of actions that cover and mirror Convention rights, as there was found to be in *Mitchell*[92] and in *Smith*[93], there are good reasons for keeping and treating claims in tort and claims under the HRA separate and distinct. It has been suggested that the aims of tort law differ from the aims of human rights law – Lord Bingham in *Greenfield*[94] stated that the HRA 'is not a tort statute' and 'its objects are different and broader'. And in *Watkins*[95] he stated that the 'primary role of tort is to provide monetary compensation for those who have suffered material damage rather than vindicate the rights of those who have not.'[96]

While there has been an attempt to develop, or adapt, the common law to protect individual positive rights, it has arguably only been limited. Further, it is not clear that such a development would in any event be legitimate, would not distort the common law, or be best way to secure individual human rights in domestic law. The use of tort law to protect fundamental rights has created considerable debate and opens normative questions as to what tort law is, what is human rights law, and what is the function of tort law in protecting individual liberties.[97] It can be argued that the primary aims or gaols of tort law and human right law are different, tort law being aimed primarily as providing compensation for wrongs done and Convention rights

[90] *Ibid.* 28
[91] [2004] UKHL 22, [2004] 2 AC 457
[92] [2009] UKHL 11, [2009] 1 AC 874
[93] [2008] UKSC 50], [2009] 1 AC 225
[94] [2005] UKHL 14, [2005] 1 WLR 673 19
[95] [2006] UKHL 17, [2006] 2 AC 395 9
[96] See also Jenny Steele, 'Damages in Tort and Under the Human Rights Act: Remedial of functional Separation', (2008), CLJ Vol. 67, 606
[97] See Jane Wright, *A Human Rights Based Approach to Tort law*, (Second Ed. Hart Publishing, 2017) 17-34

seeking to protect and vindicate breaches of human rights. There are different approaches to assessing liability; in tort the focus when considering whether a duty is owed or a right exists is usually first analysed from the standpoint of the defendant and the relationship with the claimant. When considering a claim based on a breach of a Convention right the analysis starts with the victim and the content and applicability of the right. It can also be argued that in tort the primary focus is not always individual justice, greater emphasis is often placed on the public good and legal certainty.

It appears now to be the case that the domestic courts are largely keeping separate claims brought under s.7 HRA and claims brought under the common law, rather than developing the common law, using the HRA or otherwise, to provide remedies for breaches of positive rights. Lord Hope in *Smith* expressed the view that 'the common law, with its own system of limitation periods and remedies, should be allowed to stand on its own feet side by side with the alternative remedy.'[98] He considered that there the case for preserving the separate systems was supported by the fact that any perceived shortfall in the common law that fall within the threshold for the application of a Convention right can now be dealt with in domestic law under the HRA[99]. Despite s.2 HRA, Lord Hope here expressed the clear view that private law claims in tort and claims under the HRA should be kept separate. There was no need to develop the common law in order to provide a remedy where a remedy could be provided under the HRA.

Given these differences, which go to adjudication and remedies, the question of using different courts to determine HRA claims seems an obvious one to consider. If the approach to adjudication is different, if the systems do have their own limitation periods and remedies, as per Lord Hope in *Smith*, then why not create and design a court tailored to HRA claims, in which expert specialist judges are able to develop how Convention rights and obligations owned against and owed by the UK should be interpreted domestically against public bodies, and how Convention rights should be interpreted using the principles of the Strasbourg court. Common law and Convention rights must be mindful of each other, must continue to share the same fundamental principles and values, but can be free to stand side by side providing alternative remedies.

[98] *Smith Chief Constable of Sussex* [2008] UKHL 50, [2009] 1 AC 225, [82] 275C
[99] *Ibid.*

Litigating human rights cases in the Administrative Court.

Similar questions arise when bringing a claim under the HRA in judicial review; are public law principles, and judicial review rules and procedures in the Administrative Courts suited to individual rights claims under the HRA?[100] Judicial review does not provide for a merits-based review of decisions, and there are limitations on disclosure, the use of evidence, including reluctance to allow for admission of expert evidence and for cross examination of witnesses. The awarding of damages is also a power rarely use by the Administrative Court in England and Wales limiting the awarding of just satisfaction. These issues will be considered further below.

Some argue that since the advent of the HRA there has been a 'reformation' or 're-invention' of English Administrative law that has been driven by a 'righting-thesis'.[101] The Administrative Court has been willing to adapt and develop the principle of proportionality in individual rights cases following (and even before) the enactment of the HRA, has shown a greater willingness to consider cases that raise political issues and to review decisions even where they are more political in nature. It is also the case that the Administrative Court in England and Wales has been more willing to look at the outcome of a decision and not stick rigidly to only consider the fairness or lawfulness on the process adopted to reach a decision. Hickman has written that 'Human rights Principles have transformed public law in the United Kingdom. The transformation began well before the [HRA], but the [HRA] represents a shift in gear'[102]. Others cast doubt on the extent of this change.[103] It is not the intention here to consider these debates in detail, although Hickman's argument that at least with regards to the extent to which human rights principles have been merged into existing public law doctrines, must be right and there has been a transformation, although its extent can be debated.

While there have been changes, it is not clear that the changes, or transformation, that have occurred are sufficient to ensure that individuals can use judicial review to fully protect and

[100] For an analysis of the change in judicial approach in reviews involving HRA claims see Jack Beatson "Human Rights and Judicial Technique" in Roger Masterman and Ian Leigh *The United Kingdom Statutory Bill of Rights: Constitutional and Comparative perspectives* (OUP, 2013) 163.
[101] See Thomas Poole "The Reformation of English Administrative Law" (2009) 68 *Cambridge Law Journal* 142; Michael Taggart "Re-inventing Administrative Law" in N. Bamforth and P. Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Hart, 2003) c. 12.
[102] See also Tom Hickman, *Public Law After the Human Rights Act*, (Hart, 2010), 1.
[103] See for example Jason Varuhas "The Reformation of English Administrative Law? "Rights", Rhetoric and Reality", (2013) CLJ 72(2) 369-413

vindicate their Convention rights. To the extent that there is a reluctance on the part of judges to adapt principles of public law to protect individual rights, and limits to which the rules and procedures encourage and enable it to happen, does this hinder the protection of rights and the furtherance of a differential constitutional model? If so, should HRA public law claims be brought in the proposed new specialist Human Rights Tribunals. Chapter Five will consider how in practice this could be achieved, and how as an alternative in some cases references could be made to the new specialist tribunals. Such a change is not without precedent, judicial review immigration and asylum cases were largely taken out of the Administrative Court and transferred to the Upper Tribunal by the Lord Chief Justice of England and Wales in 2013, exercising the powers conferred by section 18(6) and (7) of the Tribunals, Courts and Enforcement Act 2007 and in accordance with Part 1 Schedule 2 of the Constitutional Reform Act 2005.[104]

The *how in practice* a transfer could be achieved is not to be considered here, what is to be considered is whether there is evidence that such a move would be beneficial. The issues to be considered are the adjudicatory methods in judicial review, the use of proportionality, and the willingness to adjudicate on the outcome of a decision and not just the process in individual rights cases. It will be argued that public law principles are flexible, and the gears are already in place to allow for the courts in judicial review cases to operate within a differential constitutional model. The courts can decide the degree of due deference to be afforded to the executive in a case raising claims of violations of rights, and where they consider appropriate involve themselves in adjudicating claims raising policy issues, rights balancing and resource allocation. As Hickman has argued 'the building blocks for a coherent application of public law principles are already in place and, properly understood, provide all that is necessary to construct a coherent approach to public law after the Human Rights Act.'[105] The argument here is not that there is a need to radically reform public law principles, what is being questioned is whether those building blocks would be better constructed upon in a specialist court by expert judges, with bespoke and flexible procedural rules, including for example rules around disclosure, use of experts (including being on the Bench), more willingness to allow for the cross examination of witnesses, and the ability to act in a more inquisitorial way. In this way

[104] On 21 August 2013 the Lord Chief Justice of England and Wales issued a direction that from 1 November 2013 certain immigration and asylum judicial review claims would be transferred from the High Court to the Upper Tribunal.
[105] Tom Hickman *Public Law After the Human Rights Act,* (Hart, 2010) 98

rights adjudicatory methods in public law claims could be adjusted to meet to need to protect fundamental and Convention rights if they are transferred to a specialist tribunal.

Further, adjudication of claims under the s.6 and s.7 HRA by way of judicial review by a specialist tribunal would ensure clear(er) focus on such claims being a species of an illegality review, and for cases involving qualified rights applying a proportionality test under the qualified Convention rights, and not as a proportionality test as part of a heightened standard of review. As is argued by Leigh, Craig and Hickman[106] the HRA established new standards of *legality*, not new standards of *review*. Leigh argues that section 6(1) did not modify the *Wednesbury* standard of review, remarking that this 'would doubtless appear much clearer had the debate about incorporation never become entangled with common law grounds for review of discretion from *Brind* onwards'[107]. As with the review of the case law around the effect of the HRA on the common law, and the question of whether and to what extent the private common law claims and tort should develop and be moulded to incorporate Convention rights, similar debates arise in public law. It is suggested that to move away from the risk of (or return to) muddled thinking and the inconsistent attempts to mix and blend the common law civil liberties tradition with a positive rights jurisdiction, distinct and separate tribunals, albeit still part of the UK's overall legal system, should be used. They would create space for clarity, room for development, and crucially ensure the effective protection of fundamental rights. A specialist tribunal together with a differential constitutional model would leave to the tribunal what standard of review to apply when considering the legality of an act or decision by the executive or administrative branch of government, mindful of the court's constitutional competence, but also its role in protecting fundamental rights.

(i) Proportionality

The Administrative courts were generally reluctant to utilise the proportionality standard of review in Pre HRA cases, sticking instead more closely to applying a rationality test.[108] Since

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[106] I Leigh "Taking Rights Proportionally: judicial review, the Human Rights Act and Strasbourg" (2002) PL 265, P Craig *Administrative Law,* (6th ed, Sweet and Maxwell, 2009) 565-84, T Hickman "*Public Law After the Human Rights Ac*t, (Hart, 2010), 108-111.

[107] I Leigh "Taking Rights Proportionally: judicial review, the Human Rights Act and Strasbourg" (2002) *Public Law* 265, 283

[108] This is exemplified in *Smith and Grady v United Kingdom* (1999) 29 EHRR, the case concernin the banning of homosexuals in British armed forces and highlighted the difference between domestic and ECHR approach. But also see – Lord Diplock in *Council of Civil Service Unions v. Ministry for the Civil Service* [1985] AC 374, *R v. Secretary of State for the Home Department, ex parte* Leech *(No.2)* [1994] AC 374 and *R v. North East*

cases such as *Kennedy v The Charity Commission*[109], *Pham v. Secretary of State for the Home Department*[110] this reluctance has fallen away, and now in cases concerning fundamental rights a rationality review has given way to a proportionality standard of review. Elliott has commented that:

> [T]he courts have for some time been *implicitly* willing to go beyond rationality review when it comes to protecting individual rights and other highly-regarded values … [and] in recent years have seen proportionality emerge more *explicitly* from the shadows at common law … it is now generally acknowledged that the proportionality test can and does apply when rights and other highly-regarded values are in play at common law, and that it can do so without doing violence to constitutional principles. Indeed, that much has been clear since the inception of the HRA, The House of Lords' breakthrough case applying proportionality in a rights context having had at least as much to say about that doctrine's role at common law as under the Act.[111]

This suggests that the change to a willingness to use a proportionality standard of review is not just due to the HRA and applicable in HRA cases, but more generally has been a development of public law principles.[112] This then is a separate to the application of a proportionality legality review, and the use of proportionality as it applies to qualified Convention rights.

A good summary of the case law and current position of the domestic courts, albeit with no definitive answer, can be found in the Supreme Court case of *Keyu.*[113] In *Keyu* an issue for the Supreme Court was whether the more exacting standard of proportionality should now operate as a general ground of judicial review and/or as special protection in the field of fundamental rights at common law. The case concerned the decision not to hold a public inquiry into the deaths of unarmed civilians who were shot by members of the Scots Guard Patrol in the village of Batang Kali in Selangor in December 1948. At the time Selangor was a British Protected state. It was argued that a public inquiry was necessary to comply with Article 2, and/or

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Devon Health Authority, ex parte Coughlan [2001] QB 213. For a recent review of cases where legislation has been challenged as incompatible with human rights on proportionality grounds see Christopher Rowe "Challenges to legislation under the Human Rights Act" PL (2004) 293

[109] [2014] UKSC 20, [2015] AC 455

[110] [2015] UKSC 19, [2015] 1 WLR 1591

[111] Mark Elliott, "The Fundamental Rights at Common Law*"* in Mark Elliott and Kirsty Hughes (eds), *Common Law Constitutional Rights* 210-211

[112] See however Singh who highlights the changes to the approach of the courts to reviewing legislation on proportionality grounds where compatibility with Convention rights is in issue. He notes that the courts have been more willing to consider policy matters and quotes Lord Nicolls in *Wilson* as saying that the court may need enlightenment on the nature and extent of social problems" at which legislation is aimed, Rabinder Singh "The Impact of the Human Rights Act on Advocacy" in Roger Masterman and Ian Leigh *The United Kingdom's Statutory Bill of Rights*, 178-179

[113]*R (Keyu and others) v Secretary of State for Foreign and Commonwealth Affairs and another* [2105] UKSC 69, [2016] A.C 1355

customary international law and/or under the common law. The Supreme Court declined to provide a definitive answer to this fundamental question, finding it would need to be argued fully before a panel of nine justices, and it was not necessary to consider the matter in the case before the court as even if a proportionality test was applied the appellants' claim would fail.

Lord Neuberger's judgment on this issue (with which the other Justices agreed) was:

> The appellants raise the argument that the time has come to reconsider the basis on which the courts review decisions of the executive, and in particular that the traditional Wednesbury rationality basis for challenging executive decisions should be replaced by a more structured and principled challenge based on proportionality. The possibility of such a change was judicially canvassed for the first time in this jurisdiction by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 , 410E, and it has been mentioned by various judges in a number of subsequent cases—often with some enthusiasm... the appellants contend that the four-stage test identified by Lord Sumption and Lord Reed JJSC in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 … should now be applied in place of rationality in all domestic judicial review cases.
>
> …
>
> The move from rationality to proportionality, as urged by the appellants, would appear to have potentially profound and far reaching consequences, because it would involve the court considering the merits of the decision at issue: in particular, it would require the courts to consider the balance which the decision-maker has struck between competing interests (often a public interest against a private interest) and the weight to be accorded to each such interest... However, it is important to emphasise that it is no part of the appellants' case that the court would thereby displace the relevant member of the executive as the primary decision-maker … the domestic law may already be moving away to some extent from the irrationality test in some cases.
>
> [E]ven if the appellants' attack on rationality as the correct yardstick were to succeed, it may be that the position would be more nuanced than this cursory discussion of the appellants' argument might suggest. The answer to the question whether the court should approach a challenged decision by reference to proportionality rather than rationality may depend on the nature of the issue.[114]

After agreeing with Lord Neuberger, Lord Kerr went on to review the judgments of Lord Mance JSC in *Kennedy v Information Commissioner (Secretary of State for Justice*

[114] Paragraphs 131-134

intervening)[115], where Lord Mance said that the common law 'no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle'[116], he noted that 'the nature of judicial review in every case depends on the context'[117]. Lord Kerr concluded by reiterating that this was not the case to reach a final view but noting Lord Reed in *Pham*[118] that 'it is necessary to distinguish between proportionality as a general ground of review of administrative action, confining the exercise of power to means which are proportionate to the ends pursued, from proportionality as a basis for scrutinising justifications put forward for interferences with legal rights.' and went to say:

> Lord Neuberger PSC has suggested … that the appellants have contended that the four-stage test identified by Lord Sumption and Lord Reed JJSC in the Bank Mellat case … should now be applied in place of rationality in all domestic judicial review cases. If this is the appellants' position I question its feasibility. In the first instance there is no legislative objective and no interference with a fundamental right; secondly, it is difficult to see how the "least intrusive means" dimension could be worked into a proportionality exercise where the decision did not involve interfering with a right.
>
> I envisage a more loosely structured proportionality challenge where a fundamental right is not involved. As Lord Mance JSC said in *Kennedy [2015] AC 455* , para 54, this involves a testing of the decision in terms of its "suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages.[119]

The Court of Appeal in England and Wales rejected an argument, following *Keyu*, that proportionality was part of English domestic law, and re-affirmed that the common law test for judicial review was based on the underlying principle of rationality in the case of *Brown v Parole Board for England and Wales*[120]. It is worth noting however that in introducing the judgment Coulson LJ emphasised (in a critical way) that while the appeal was presented as raising a potentially important issue as to the correct test to be applied on a judicial review of a decision of the Parole Board, that on a proper analysis 'that issue is, at best, subsidiary to the main points in this appeal.' In the course of the judgment Coulson LJ noted that this argument had only been raised in the skeleton argument served in the appeal proceedings and 'even then obliquely.'[121] In reaching the view that a proportionality test did not apply in the instant case

[115] [2014] UKSC 20, [2015] AC 455, at [51]
[116] *Ibid.* 51
[117] *Ibid.* 54
[118] *Ibid.* 113
[119] *Ibid.* 281-282
[120] [2018] EWCA Civ 2024, [2018] 9 WLUK 246
[121] *Ibid.* 23

the court restricted itself to first reviewing judicial review claims against the parole board. As to whether the question of whether more generally the common law had adopted a test other than rationality for judicial review Coulson LJ said:

> I do not agree. On the contrary, there is the highest authority for the proposition that the basic test to be applied in domestic judicial review cases which involve neither EU law nor Convention rights remains that of rationality. Again the only modification is that, in cases involving fundamental rights, the reviewing court is required to consider the rationality of the original decision with "the most anxious scrutiny.[122]

After reviewing the case law[123], he concluded that 'these authorities spell out the simple proposition that, for now at any rate, the common law test for judicial review is based on the underlying principle of rationality. Whilst there is some support for adopting a proportionality test in particular cases concerned with fundamental rights (see for example *Kennedy*), there is a recognition that a more widespread change would require a major review by the Supreme Court and the necessary overruling of *Brind* and *Smith*."

A move from traditional *Wednesbury* rationality basis for challenging executive decisions and replacing it by a more structured and principled challenge based on proportionality would as Lord Neuberger suggests potentially have 'implications which are profound in constitutional terms and very wide in applicable scope'. Although Lord Kerr is undoubtedly right that these have been overestimated in the past. It is a change that could, again as Lord Neuberger identifies, involve the court considering the merits of the decision, would require the courts to consider the balance which the decision-maker has struck between competing interests and the weight to be accorded to each such interest. This is a step that is argued for here, as part of the differential constitutional model.

Before leaving the topic of public law and judicial review, there is one further discrete issue that needs to be addressed, the shift, or not, following the enactment of the HRA towards reviewing the outcome of a decision and whether it breaches Convention rights, rather than just the legality of the process by which the decision was reached.

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[122] *Ibid.* 54

[123] *R v Secretary of State for the Home Department ex parte Bugdaycay* [1987] AC 514, and Lord Bridge at page 531*, R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696, *R v Ministry of Defence, ex parte Smith* [1996] QB 517 and Lord Bingham at page 556, *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473, *Pham v Home Secretary* [2015] 1 WLR 1591, *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, and *R (Keyu & Others) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69

(ii) Merits based review: Outcome v process review.

In order for judicial review to act as a means of protecting individual rights it is important that the court consider whether the outcome of a decision-making process is compatible with Convention rights and not just review the process by which it was reached. Ordinarily in judicial review the court is not engaged in a merits review and as such the focus is on whether the decision under challenge was reached in a fair and lawful way, rather than whether the decision reached at the end of the process was the right (Convention compliant) decision. In cases involving fundamental (Convention) rights the court has shown some willingness to adapt and to consider whether a decision reached violated a fundamental right – and not just consider the manner in which it was reached.

This can cut both ways, so that if the ultimate decision is not in violation of rights, the fact the decision-making process failed to properly consider the rights in question will not necessarily mean a person's rights have been violated. In *Belfast City Council v Miss Behavin' Ltd*[124] the House of Lords said that 'it did not matter that the council could not show that it had fully considered the applicant's human rights before making its decision: it was enough that the decision which it ultimately took did not violate those rights.'[125] The case concerned the decision by Belfast City Council to refuse to issue a licence to the claimant who wanted to open a sex shop. In reaching its decision The House of Lords reversed the decision of the Court of Appeal in Northern Ireland. Baroness Hale in her judgment made reference to the difference between human rights adjudications and what she refers to as 'ordinary' judicial review, she said the following:

> The role of the court in human rights adjudications is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account.[126]

[124] [2007] UKHL 19; [2007] 1 WLR 1420

[125] Eschewing concern for the decision making process and whether rights were taken into account have been criticised by some. See Jack Beatson, Stephen Grosz, Tom Hickman, Rabinder Singh, Stephanie Palmer, *Human Rights: Judicial Protection in the United Kingdom* (Sweet and Maxwell, 2008) 3-120ff

[126] *Ibid.* 31

In 2009 the House of Lords confirmed its preference for the 'outcome not process approach' in *R (Nasseri) v Secretary of State for the Home Dept*[127], an immigration case. The case concerned an Afghanistan national who had initially made an application for asylum in Greece before then entering the UK illegally and making a further claim for asylum. The UK Immigration Service sought to return him to Greece, a safe country, for his asylum claim to be determined. Greece agreed, but the Claimant argued that his removal to Greece would breach his Article 3 rights as the Greek asylum determination process was not fair. This argument was rejected by the Secretary of State, and that rejection was the subject of the judicial review. The grounds for review included that legislation that deemed Greece to be a safe country was incompatible with Article 3 and a declaration of incompatibility was sought. This was accepted and a s.4 declaration made by the judge in the High Court, but reversed by the Court of Appeal. The House of Lords dismissed he appeal, and in doing so held that when a claimant sought judicial review of a decision on the basis that it violated a Convention right the court was not concerned with the quality of the decision making but with whether the claimants rights had or might be violated. In the course of giving judgment Lord Hoffman referred to the *dicta* in *R (SB) v Governors of Denbigh High School*[128] and the *Miss Behavin'*, and said[129]:

> It is understandable that a judge hearing an application for judicial review should think that he is undertaking a review of the Secretary of State's decision in accordance with normal principles of administrative law … reviewing the decision-making process rather than the merits of the decision. In such a case, the court is concerned with whether the Secretary of State gave proper consideration to relevant matters rather than whether she reached what the court would consider to be the right answer. But that is not the correct approach when the challenge is based upon an alleged infringement of a Convention right. In the *Denbigh High School case* … Lord Bingham of Cornhill said, in para 29:
>
> > "the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision making process, but on whether, in the case under consideration, the applicant s Convention rights have been violated."'

Lord Hoffman repeated his *dicta* in that case that in domestic judicial review, while the court is usually concerned with whether the decision-maker reached his/her decision in the right way rather than whether he/she got what the court might think to be the right answer, but that Article 9 of the Convention was concerned with substance and not procedure and confers no right to have a decision made in any particular way[130]. What matters is the result. He also noted 'the

[127] [2009], UKHL 23, [2010] 1 AC 1
[128] [2006] UKHL 15, [2007] 1 AC 100
[129] *Ibid.* 12
[130] *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 68

other side of the coin', which is when breach of a Convention right is in issue, an impeccable decision-making process will be of no avail if the decision reached violates Convention rights.[131]

Dickson is, rightly it is suggested, critical of the 'Shabina Begum principle' (referring to the *SB* decision in the House of Lords) because 'it strikes at the heart of the mission of the Human Rights Act, which is to inculcate an appreciation of human rights in all public authorities. Section 3(1) actually imposes a legal duty on *everyone* to read and give effect to *all* legislation in a way which is compatible with Convention rights'. Dickson argues that s.3 implies, at the very least, that 'Convention compliance must be deliberately, not accidentally, achieved.' He also questions the trumping of the usual process-driven approach in judicial review by an outcome-based approach when a human rights issue arises as in *Shabina Begum* and *Miss Behavin'*, and that this is not at all compelled by the wording of the HRA.[132] That said, the other side of the coin must surely be right, a decision made that breaches Convention rights, no matter how fair the process, must be found to be unlawful.

It was argued in *R (Skelton) v West Sussex Senior Coroner*[133] that whenever an application for judicial review includes a claim under the HRA the court is required to reach a merits-based decision and not decide the case on traditional public law grounds. The application concerned a challenge to the Coroner's decision that it was not arguable that there had been a substantive breach of the duty to protect life under Article 2 by the police, such that a Convention compliant inquest was not required. It was argued that it was for the court to determine for itself whether there had been an arguable breach, rather than review the decision of the Coroner on *Wednesbury* irrationality grounds.[134] The court concluded the authorities did not support the submissions made by the Claimant that whatever the context an issue involving whether there is a breach of a Convention right is always a hard-edged one of law where the court must answer a binary question. The court went on the find 'context is everything' and that while the standard of review should be one of heightened scrutiny, in this particular context a rationality challenge collapsed into a merits review because 'the answer to the question as posed is the same whether the route is through *Wednesbury* or an examination of the merits. If the court

[131] Lord Hofmann referred to *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, where the House of Lords found the decision reached by the Secretary of State infringed the Claimant's Article 8 rights.
[132] Brice Dickson, *Human Rights and the UK Supreme Cour*t (Oxford University Press, 2013), 45-46
[133] [2021] QB 525
[134] *Ibid* 66

considers that the arguabilty threshold is not reached the Coroner's decision stands irrespective of whether public law errors were committed on the road to that conclusion. If, on the other hand, the court considers that the arguability threshold is reached, the court will necessarily conclude that the Coroner's view was irrational.'[135] It therefore remains the case that a merits-based review is not the standard of review required for every case in which it is alleged there has been a breach of Convention rights.

(iii) Issues of Procedure

Linked to the questions around the adequacy of a review-based adjudication of Convention rights claims are the rules and procedures for judicial review, which are designed for a review based jurisdiction. If a merits-based method of adjudication for Convention cases was adopted this would very likely require more by way of disclosure, cross examination, and where necessary admission of expert evidence; ultimately the court would need to examine the facts more closely and reach its own factual conclusions. Likewise, if the court is to become more involved in issues of policy, or the balancing of rights, then it is likely to require a more generous approach to the participation of third-party intervenors. Under the current orthodox practice of the Administrative court all these procedural matters are more restricted, as is suited to a court of review. It will be argued that this orthodox practice should change for cases in the new HRTs. Each is considered in a little more detail below.

Disclosure

Defendants in judicial review proceedings are subject to a duty of candour; this is not a principle directed at disclosure but rather, as Hickman has described it, it is a principle 'that the courts developed because of the *absence* of disclosure in judicial review.'[136] This duty was described in *Quark Fishing* as imposing 'A very high duty on central government to assist the court with full and accurate explanations of all the facts relevant to the issues that the court must decide.'[137] The duty of candour does not however give rise to a duty to disclose documents, although the courts have said that exhibiting significant documents relevant to the decision should as a matter of good practice be exhibited to witness statements.[138] In this way disclosure, as opposed to a duty of candour, is not required, in contrast to private law civil

[135] *Ibid* 91
[136] T. Hickman, 'Candour Inside-Out: Disclosure in Judicial Review' U.K. Const. L. Blog 16 October 2023: https://ukconstitutionallaw.org/
[137] *Secretary of State for Foreign Affairs v Quark Fishing Ltd.* [2002] EWCA Civ 1409, per Laws LJ 5
[138] See per Lord Bingham *Tweed v Parades Commission of Northern Ireland* [2007] 1 AC 650.

claims. The rationale for this is that in judicial review the facts are usually not in issue or are only relevant to the context in which the decision under review was made.

The courts have recognised that this orthodox approach may not be appropriate in judicial reviews concerning compliance with Convention rights. In *Al-Sweady* the court said 'The position is different in many human rights cases brought under the ECHR because the cases tend to be fact specific' and 'will call for a careful and accurate evaluation of the facts.'[139] Additionally, where, exceptionally, cross examination of witnesses is permitted, the courts have recognised that it is likely that disclosure, and not just compliance with the duty of candour. will be required.[140]

Cross examination/oral evidence

The orthodox approach is that it is only in rare cases that cross-examination is permitted in judicial review[141]. Again in *Al-Sweedy*[142] the court exceptionally made orders permitting cross examination of witnesses, finding that this was necessary as there were questions of fact to be determined. In *Al-Sweedy* the court envisaged that in cases involving crucial factual disputes relating the engagement of Convention rights the need for cross examination of witnesses would be more likely. But it did not lay down any such rule. In *Gardner*[143] the court held that 'ultimately, whether cross examination is appropriate in a judicial review will depend on the issues raised by the claim in question, the extent of the factual disputes raised, and the conduct of the defendant in discharge of its duty of candour.'[144]

Expert evidence

In respect of expert evidence, again the orthodox view is that in a judicial review the court is reluctant to admit expert evidence. This contrasts with civil claims where expert evidence is

[139] *R (Al-Sweady) v The Secretary of State for Defence (No.2) 2010] HRLR 2*,[27] referencing Lord Bingham in *Tweed* at 264
[140] 'an important consequence of the orders for cross examination was that disclosure was needed to enable effective and proper cross-examination to take place' *Al-Sweady* 22
[141] See Practice Direction 54A para 10.3 'It will be rarely necessary in judicial review proceedings for the court to hear oral evidence'.
[142] [2009] EWHC 2387
[143] *R. (on the application of Gardner) v Secretary of State for Health and Social* [2022] 4 All E.R. 896 25
[144] *Ibid* 30.

admissible, with the permission of the court, if it is reasonably required to resolve the proceedings[145]. In *R (Law Society) v Lord Chancellor*[146] the Divisional Court said:

> It follows from the very nature of a claim for judicial review that expert evidence is seldom reasonably required in order to resolve it. That is because it is not the function of the court in deciding the claim to assess the merits of the decision of which judicial review is sought. The basic constitutional theory on which the jurisdiction rests confines the court to determine whether the decision was a lawful exercise of the relevant public function. To answer that question, it is seldom necessary or appropriate to consider any evidence which goes beyond the material which was before the decision-maker and evidence of the process by which the decision was taken - let alone any expert evidence.[147]

Expert opinion is clearly admissible when it was before the decision-maker, but not if it was not and has been provided after the decision was made.[148]. In *Gardner*[149] the Court posed the question 'Does the inclusion of the ECHR claims make any difference?' The conclusion reached was that all material relevant to a decision as to the intensity of review required (including expert evidence) could be relied upon, but that when determining whether the decision reached was within the State's margin of appreciation, account would be taken of what was actually available at the time the decision under challenge was reached.[150]

Varuhus has suggested that there has been a change in practice away from the orthodox approach to disclosure, cross examination and the admission of evidence in judicial reviews that involve a Convention right.[151] He argues that the orthodox account of judicial review procedure no longer accurately captures what takes place as a matter of practice in courts, nor procedural law. Courts in judicial review, he says, now increasingly determine disputed questions of fact[152], are more open to disclosure, oral evidence and expert evidence. He suggests that there are likely to be many reasons for this but a central reason is change to substantive law. The reasons he identifies for why rights have been a driver for change are that (i) HRA claims call for an examination of how the particular individual was treated, (ii) the

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[145] CPR 35.1
[146] [2019] 1 WLR 1649
[147] *Ibid.* 36
[148] *Gardner v SSHD* [2021] EWHC 2946 10
[149] *Ibid.*
[150] *Ibid.* 20-21
[151] Jason Varuhas "Evidence, Facts and the Changing Nature of Judicial Review", U.K. Const. L. Blog [16 June 2020], https://ukconstitutionallaw.org/
[152] For a detailed analysis of the increasingly role of factual assessment in public law see Paul Daly and Kseniya Kudischeve, "The Rise of Facts in Public Law" in Joe Tomlinson and Anne Carter (eds) *Facts in Public Law Adjudication* (Hart Publishing 2023).

need for a probing proportionality form of inquiry which is likely to be fact-specific, often requiring a court to decide where the balance should lie as between competing rights and interests (iii) courts may be required to re-consider and determine the facts underlying a decision (iv) an HRA claim may include a claim for damages, and (v) HRA claims are not claims for the exercise of a supervisory jurisdiction, which underpins the restrained approach in judicial review, they are instead claims based on individual rights requiring the courts to exercise objective judgement and determine for themselves the scope of a right and the lawfulness of any interference. Varuhas has identified and expressed one of the core arguments being relied upon here, that the adjudication of rights is different from judicial review and from ordinary common law civil claims and requires the courts to take a different approach, an approach that calls for bespoke procedural rules.

Third Party interventions[153]

In addition to procedural matters of disclosure, oral evidence and expert evidence, another important point of practice to consider is third party interventions. The court has the power in judicial review to grant permission to 'any person' to file evidence or make representations pursuant to CPR 54.17. In 2020 the Independent Review of Administrative Law considered that since 2000 there had been a 'significant' increase in use of intervention[154], most obviously in the House of Lords and Supreme Court, and that groups such as JUSTICE and Liberty had acquired 'repeat-player status.'[155] A concern raised was that in some cases it was questionable as to whether the numbers of interveners had been justified or helpful. The panel referenced *A (No 2)*[156] where there had been sixteen requests to intervene, and *Miller (No 1)*[157] where there had been ten interveners. The panel also quoted Lord Hoffmann in *E(A Child) v Chief Constable of Ulster*, where he had commented that some interveners merely repeated points

[153] Reference to third party interventions here differs from the context of an *amicus curiae*, where the court appoints an *amicus curiae* to assist the court in determining issues of law or fact. Here what is being considered is allowing representations by a non-party to provide a different perspective in the form of data or arguments on legal principles.

[154] See also Sangeeta Shah, Thomas Poole and Michael Blackwell *Rights, Interveners and the Law Lords* OJLS Vol. 34, No. 2 (2014) 295-324 reporting similar conclusion in respect of the increase in Third Party Interventions following the coming into force of the HRA. When looking at the period from January 1994 to September 2009 the authors found 7% of House of Lords cases for the period pre HRA involved third party interventions, which increased to 23% post, with the bulk of the rise being ascribed to human rights cases. 322

[155] The Independent Review of Administrative Law, Chair Lord Edward Faulks QC. Final report, published in March 2021 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf.

[156] [2005] UKHL 71

[157] [2017] UKSC 5

made by the parties and that in future he hoped that 'interveners will avoid unnecessarily taking up the time of the House in this way.' [158] Concerns about the use of the power to intervene as a lobbying tactic were also raised by the panel. But it is important to also acknowledge what Lord Hoffmann said in *E(A Child),* while critical of the intervention in the case at hand, he observed that the court was grateful to bodies who intervened and provided knowledge or a particular point of view that provided the House with 'a more rounded picture than it would otherwise have.'[159]

There are some commentators supportive of the increased use of interveners in judicial review and some more opposed[160]. Among the supporters are Arshi and O'Cinneide who consider that 'third party intervention can inject otherwise marginalised or absent perspectives, expertise and data into the decision-making process and this appears to be enriching and enabling the work of the courts', they argue that appropriate interventions should be 'viewed as a welcome tool of assistance, rather than treated as a suspicious Trojan horse for political activism by the back door.' [161] This is a position supported here, specifically in cases involving Convention rights where the courts will be assisted in undertaking their constitutional role in rights protection by input from and access to a wide spectrum of views and additional data. Sedley LJ has specifically acknowledged that in cases involving fundamental rights there is greater leeway for interventions, while making clear that he considered that third party interventions in private litigation would normally be confined to issues of public policy[162]. This is also an example of judicial recognition of the differences between the courts' procedural approach when adjudicating rights claims involving public bodies.

Those more critical do so on the grounds that involving third party interventions can lead the courts into policy-making. Harlow argues that 'courts are not surrogate legislatures' and it is not their place to make policy choices and that 'intervention cannot legitimate judicial

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[158] *E(A Child) v Chief Constable of Ulster* [2009] AC 536 3
[159] *Ibid.* 2
[160] Those more critical include Hannett, whose criticism include that 'there is a lack of conceptual clarity and an absence of clear rules as to the basis, rationale and permissibility of public interest interventions.' Sarah Hannett "Third party intervention: in the public interest? [2003] Public Law 128. The Courts are now however gradually clarifying the role interventions should play.
[161] Mona Arshi and Colm O'Cinneide, "Third Party Interventions: the Public Interest Reaffirmed" [2004] PL 69 -77, 69
[162] *Roe v Sheffield City Council* [2003] EWCA Civ 1 85 – 87. See also Baroness Hale "Who Guards the Guardians?" (2014) 3 C.J.I.C.L. 100 104 'Once a matter is in court, the more important the subject, the more difficult the issues, the more help we need to try and get the right answer.'

lawmaking." [163] These are valid concerns, but as articulated in Chapter Two judges can and should be trusted to make decisions as to when they are and when they are not the appropriate constitutional institution to adjudicate rights-based claims. It will be argued in Chapter Five that setting up specialist HRTs with bespoke rules and procedures will enable the creation of a method of adjudication suited to the determination of issues involving individual rights. For cases that will benefit from third party interventions these should be easily and cost effectively facilitated. The current costs rules for interveners in judicial review below the UK Supreme Court (the High Court and the Court of Appeal) arguably discourage interventions. The rules provide that the Parties to judicial review proceedings shall not be required to pay the intervener's costs, although the court may make such an order if it considers there are exceptional circumstances.[164] On an application by the applicant, defendant or interested party, the court must now order any intervener to pay any costs specified in the application where one of any four conditions is met: the intervener has acted in effect as the principal party; their evidence or representations have not been of significant assistance to the court; a significant part of their intervention related to matters not necessary for determination; or the intervener has behaved unreasonably. The Court does however have a discretion not to make such and order in exceptional circumstances. An intervener used to be able to seek a protective costs order[165], but protective costs orders were replaced with costs capping orders which are only available after the grant of permission and only to applicants for judicial review[166]. These provisions were introduced in part as it was considered costs risks might deter interventions that might disrupt proceedings, but in recognition of the need to avoid discouraging intervention that might be helpful to the court or benefit public interest the courts retained a discretion in exceptional circumstances would [167]. In the UK Supreme Court, the general rule provides that the Court may make such orders as it considers just in respect of the costs of any appeal or application.[168] Importantly, it states that orders for costs will not normally be made either in favour of or against interveners, but such orders may be made if the Court considers it just to do so. In particular, the rule notes that an order may be appropriate if an intervener

[163] Carol Harlow, "Public Law and Popular Justice" [2002] 65 MLR. 1-18 11
[164] Criminal Justice and Courts Act 2015 s.87
[165] Lord Woolf, Professor Sir Jeffrey Jowell, *et al De Smith's Judicial Review* (2nd Ed. Sweet and Maxwell, 2020) 2-066-2-069
[166] Criminal Justice and Courts Act 2015 s.88
[167] *White Book 2025, Volume 1, Section A, Part 46 para 46.15.1*
[168] Supreme Court Rules 2024/949 rule 53

has, in substance, acted as the sole or principal appellant or respondent[169]. In devising costs rules for HRTs, rules closer to those in the Supreme Court would be more appropriate.

Creating a new Tribunal would not only enable appropriate costs rules to be devised, but will also enable setting out clearly the purpose and role of third-party interventions, and any rules governing the granting of permission to intervene. It will be argued in Chapter 5 that the rules for interventions in specialist HRTs, including any costs rules, should be tailored to the case in hand and the tribunals should actively facilitate the involvement of third party interventions where the court may lack expertise, where there are matters of wider public interest, or where there are differing views that need to be considered.

CONCLUDING REMARKS

The framework and architecture of the HRA that scheduled to an Act of Parliament Convention rights was . It was beguilingly simple. It certainly provided an easy means by which to protect positive rights domestically, but this seemingly simple solution has given rise to some fundamental questions about the role of the common law in protecting positive rights, and how far it should be developed to protect them, or whether claims under the HRA should remain distinct from common law claims, and should become distinct from public law claims.

The conclusions reached are that there are good arguments for saying that the two systems require different adjudication approach and methods, and that there are good arguments for keeping the two systems separate, in summary these include (i) fear of distorting tort law and doing violence to some of its underling fundamental principles[170] (ii) good reasons for having specialist and expert judges responsible for developing a domestic positive rights jurisprudence in the UK, properly applying a margin of appreciation and (iii) the need for a procedure that provides for a substantive merits based review in public law.

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[169] *Ibid.*

[170] In *R (Jalloh) v. Secretary of State for the Home Department* [2020] UKSC 4, [2021] AC 262 Baroness Hale was right to refuse to align 'imprisonment' in the common law tort of 'false imprisonment' with 'deprivation of liberty' under Article 5 as to do so would restrict the meaning of imprisonment in the common law. The tort of false imprisonment is not the same the as the 'right to liberty under the HRA, they share the same fundamental principle, but they have different aims, different history's and operate in different ways.

Retaining the current rules and procedures of judicial review in HRA cases runs counter to a merits-based review and keeps HRA cases tied too closely to public law principles and a jurisdiction of review. Taking these cases out of the Administrative Court and transferring them to a specialist HRT would allow for these cases to be adjudicated within a process designed for the type of merits review they require. The explicit and clear development of a different adjudication method, and approach to human rights specific judicial review would then be entrusted to a specialist jurisdiction, with expert judges, subject of course to the appellate courts and ultimately the UK Supreme Court, with appropriate rules and procedures. The expert judges would be best placed to consider the difference in approach and fine tune the human rights method of adjudicating judicial review claims, including careful consideration of the issue left open by the Supreme Court in *Keyu,* namely whether a more exacting standard of proportionality should now operate as a general ground of judicial review and/or as special protection in the field of fundamental rights at common law. While this question will ultimately be for the Supreme Court to determine, having the views of judges in an expert human rights courts would be of benefit. Merely amending the existing rules (the CPR), with HRA claims continuing to be litigated in the ordinary courts, would not allow for the additional benefits of a specialist jurisdiction with expert judges and lawyers.

Using the "ordinary courts" and subjecting public bodies to the "ordinary law" may not be the appropriate, or most just way to adjudicate positive rights-based claims. The courts should arguably in rights cases give more weight to individual rights than to the "public good", the focus when adjudicating in rights cases should be on the harm caused to the victim of the violation, and not the interest of the public body. These are not matters that appear to have been thoroughly reviewed and considered before the HRA was enacted, intended as it was at the time to enable the development of the common law in a right's compliant way. Judges in the ordinary common law courts are used the concept of a residual liberty, they operate in a common law tradition under common law rules.

There are of course further questions to be asked concerning litigating rights claims. Should the adjudication process always be an adversarial one, should there be additional duties on state bodies in terms of disclosure and should rules of evidence and burdens and standards of proof apply in the same way to rights claims as they do to private law claims. Can the problems identified in this chapter be addressed by the creation of specialist HRTs with bespoke rules, bespoke costs provisions and bespoke powers?

The creation of HRTs would provide the opportunity to also consider what powers such tribunals should have – including for example the ability to give advisory opinions, and to have points referred to it where a case is being heard before a different court but a rights issue arises. Provision could be made for the use of specialist wing members adding additional expertise, potentially avoiding the need for experts to be instructed so keeping down costs. The new tribunals could, in the future, also be given jurisdiction over rights other than those in the Convention, for example social and economic rights.

The last two chapters will consider constitutional design; the next chapter will first consider how the creation new tribunals would address the problems that have been identified and what powers, rules and procedures would be required and then the final Chapter will consider where and how the new tribunals would fit within the UK's pluralistic, multi-layered constitution and existing court structures.

Chapter Five

The Specialist Human Rights Tribunals

Introduction

This chapter will consider how new specialist human rights tribunals would address the problems explored in the previous two chapters. The aim is also to illustrate how new specialist tribunals could be the constitutionally competent, and constitutionally legitimate expert body tasked with determining the scope and application of individual rights, particularly where executive and administrative acts or decisions are concerned.

The mechanism and means by which it is proposed the deficiencies would be solved, the strengths of the judicial branch of the constitution amplified, and the weaknesses addressed is by (i) introducing new and bespoke rules and procedures for the new tribunals, (ii) having specialist judges, expert in interpreting and applying positive rights, and (iii) providing for some additional powers, including the giving of advisory opinions, receiving references from other courts and pre legislative review of devolved legislation. In this way the aim is to address the deficiencies by means of structural change and creating specialism. For example, the difficulties created by inability to sue the UK state before the domestic courts will be ameliorated by changes to costs rules, so as to enable claims to be brought in a cost-effective way against a number of public bodies. The solution proposed is not to fashion a new cause of action that can be brought against the UK state domestically, or grapple with the thorny issue of what 'the state' means in British legal thinking. Other solutions proposed include rules of disclosure suited to rights adjudication, making the procedure more inquisitorial, placing the burden of proof on the public body to justify any rights infringement, and so create a mode of adjudication suited to a claim by an individual against the state, rather than as between private individuals; moving away from the Dicey model. Granting powers to give advisory opinions and accepting references from other courts will further the aim of developing a coherent, comprehensive domestic human rights jurisprudence, ensuring human rights continue to be 'sewn into the fabric' of domestic law, and nurture specialism. Encouraging third party interventions and creating a greater role for the Human Rights Commissions throughout the UK will strengthen and further legitimise the HRTs ability to reach decisions that involve

public policy, moral and ethical considerations, and resource allocation by broadening the views, opinions and data the tribunals consider.

This chapter is not intended to be a comprehensive blueprint for the new tribunals. Clearly detailed work empirical work would need to be done, including in particular on costs, together with a thorough consultative process before a set of rules could be produced. But what can be done, and what is intended here, is to set out at a broader level the character of the tribunals and how they would differ in approach to the ordinary common law courts, consistent with the arguments that have been made and a differential constitutional model.

Another important goal in setting up a new jurisdiction with new tribunals is transparency and recognition. In setting up new specialist HRTs there would be an important and open acknowledgment that the enactment of the HRA gave rise to domestic courts engaging in a different form of adjudication, a form of 'constitutional rights review' that had not previously existed domestically in the UK[1]. As was set out in Chapter One, there has been a tendency by some to argue that adding in positive rights would have a limited effect on the British Legal system; the common law was capable and did protect rights. It has been argued here however that there are differences, at times significant differences, when adjudicating positive rights and protecting rights by means of residual liberties. This should be acknowledged. The new tribunals need to be able to, and be acknowledged to be permitted to, deal with questions of policy and values, to the extent necessary to define the scope and content of often vague concepts of rights and to balance these against rights of the community and public interest. They should be empowered and encouraged when undertaking this task to reach decisions in accordance with the values and culture of the UK, taking a more active role in rights development and deciding how any margin of appreciation should apply in the UK. This would be particularly valuable with regards to, for example, freedom of expression, the scope of Article 8, and how Article 3 should be interpreted and applied to decisions concerning the securing of borders and deportations. Areas that have attracted a great deal of public debate about their content and how they apply to the UK. As set out and argued for in Chapter two, such an approach would engage the courts in an institutionally legitimate exercise, particularly

[1] Jack Beatson addressed the question as to whether there had been a revolution in legal reasoning following the enactment of the HRA, a question he answered in "Human Rights and Judicial Technique in Roger Masterman and Ian Leigh *The United Kingdom statutory Bill of Rights: constitutional and comparative perspectives* (OUP, 2013) 163. One of the reasons he gave for a different judicial technique in HRA cases was that 'The Convention is concerned with rights and not, as some see the common law, with interests or misuse of public power' 163

where claims concern administrative and executive actions and decisions. Further, in line with a model of differential constitutionalism the courts would be entrusted to determine when and to what degree they should embark on adjudication that involve matters of policy, resources, and morality.

The approach to be taken is to first consider what judges are doing when they are called upon to adjudicate on claims raising the protection of positive individual rights, and how this differs from private law claims. Having set this out, the procedures, rules and processes that would best assist with the task they are undertaking and the role they are performing when adjudicating positive rights claims will be considered. An important aim of the new tribunals is to ensure ease of access to expert judges, and this requires the setting up of a system which not only allows access for those with large financial resources and those with extremely limited financial resources. It is argued that it is primarily through a cost's regime, and a more developed domestic HRA damages jurisprudence that this can be achieved. The lack of development of a domestic human rights damages' jurisprudence is an area that it is argued needs to be rectified.

The second area to be explored will be the more jurisprudential, or the legal culture/tradition question. So, the mixed approach so far taken by the courts as to how, if indeed at all, positive rights in the Convention influence, amend or even override existing common law principles and causes of action. It is argued that a clear separate jurisdiction will bring clarity and enable the common law tradition of negative liberties, of righting wrongs between private parties, and of establishing liability based on a duty of care owed to develop alongside, but not distorted by, a positive rights jurisprudence under the Convention. There are those that argue for the complete separation of constitutional and private law, arguing for the private law to be a self-contained 'assemblage of trans-political, distinctive *legal* learning, insight method and craft' and fear a 'ruinous or corruption of private law by the more openly politicised, discursive methods ascribed to constitutional lawyers.'[2] While such complete separation is not being argued for here, some of the concerns of those that do are relevant. There is of course a need to maintain coherence in the law at the level of fundamental principles of rights, there will be times when the two jurisdictions will need to ensure a degree of consistency, but this does not

[2] Frank I. Michelman "The Interplay of Constitutional and Ordinary Jurisdiction" in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Elgar, 2001) 286.

require a merged and single approach to litigation, or to matters such as causation and foreseeability, or indeed remedies.

The chapter concludes with an overview of the tribunal system in the UK which provides the opportunity to explore why it is said that a tribunal, as opposed to a court, would better meet the difficulties identified and provide the type of adjudication method advocated. It will be said that HRTs, sitting in the Upper Tribunal would provide for the flexibility in terms of procedure, allow for a more inquisitorial process, for ease of access and speed. It would also provide for judges at the level of High Court judges, sitting if required with wing experts from relevant fields, which will ensure the authority and expertise required for such an important part of the UK's constitution, and would allow for the power to make s.4 declarations of incompatibility to be extended to the tribunals.

Turning first then to consider what judges are doing when they adjudicate on claims raising the protection of positive individual rights.

Rights adjudication

Beatson has recognised the different judicial technique involved in HRA adjudication, he refers to the Convention having created rights, and that this requires judges to 'refocus their enquires. They must consider the existence and extent of the relevant right, and whether it has been breached'.[3] This is the classic "two stage" process that is required in adjudicating rights. At the first stage the court determines whether a right is engaged and has been infringed, deciding whether, *prima facie*, the claim has been established. The second stage then considers possible justification for the infringement; the court determines whether the infringement is a justified one, whether the government/public body has rebutted this *prima facie* case by reference to the criteria for limiting or overriding the right. The first step concerns definition and scope - the interpretation of the right - and the second by contrast, involves considering the legitimacy and strength of the countervailing, conflicting public policy objective. At both stages the court is likely to need to engage in moral and political questions.[4] This differs from claims concerning private law claims or rights, where the courts engage with first establishing what duty or

[3]Jack Beatson "Human Rights and Judicial Technique in Roger Masterman and Ian Leigh *The United Kingdom statutory Bill of Rights: constitutional and comparative perspectives* (OUP, 2013) 164.
[4] Stephen Gardbaum "The Structure and Content of Constitutional Rights". in Tom Ginsburg and Rosalind Dixon (eds.), *Comparative Constitutional Law*, (Edward Elgar, 2011) 388

obligation was owed by the defendant, whether that has been breached and whether damage has been suffered as a result.

Human rights cases are different in nature to claims between private individuals as they concern "public goods" (in a broad sense), and they are cases that involve "un-equals" – the state and the private individual. It is not usually just the interests of the parties before the court that are in issue. There are considerations over and above, or that go wider than whether one person has injured the other in a blameworthy way. Indeed, there is not always a suffered loss, but rather a breach of a right, or a failure to allow a person to enjoy a right. Conversely, the body or person responsible for breaching the right is not always "blameworthy" (liable). The law of tort and contract holds a person responsible only for damage caused by their fault due to a breach of an obligation or duty owed. But concepts such as causation, duty of care, proximity are not, or at least are not always, applicable in rights cases. The necessity for a Claimant to establish "damage" in order to succeed in a claim in tort is problematic in rights-based cases[5] and Wright notes that it 'poses problems for the coherent development of the tort [of negligence] as claimants seek new forms of damage.'[6] As Nolan has said 'the very essence of the requirement of actionable damage limits the utility of negligence as a rights-vindication mechanism.'[7]

Famously, Lord Bingham in *Greenfield*[8] stated that the 'HRA is not a tort statute' and 'its objects are different and broader'. and in *Watkins*[9], a claim concerning the requirement to prove material damage in order to succeed in a claim for misfeasance in a public office, he stated that the 'primary role of tort is to provide monetary compensation for those who have suffered material damage rather than vindicate the rights of those who have not.'[10] These differences matter in adjudication. Wright has said that it has been suggested that the aims of tort law differ from the aims of human rights law and that while human rights can be protected to some degree by tort law, their functions differ. She is of the view that 'tort law rules may function as vehicles

[5] Jane Stapleton, "The Gist of Negligence: Part 1 Minimal actionable damage" (1988) 104 *Law Quarterly Review* 213, and Jane Stapleton, "The Gist of Negligence: Part 2 The relationship between damage and causation" (1988) 104 LQR 389
[6] Jane Wright, *Tort Law and Human Rights*, (Hart, 2017) 103
[7] Donal Nolan, "New Forms of Damage in Negligence" (2007) MLR 70(1) 59-88
[8] *R (on the application of Greenfield) v Secretary of State for the Homa Department* [2005] UKHL 14, [2005] 1 WLR 673 19
[9] *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395 9
[10] Jane Wright, *Tort Law and Human Rights*, (Hart, 2017), pp.27-34. See also J. Steele, 'Damages in Tort and under the Human Rights Act: Remedial of functional Separation', (2008) CLJ Vol 67(3) 606.

to secure the protection of human rights and they may in fact be shaped to ensure that human rights obligations are accommodated…[but] this does not mean that tort law is an empty vessel into which human rights obligations are poured.'[11] Some theorists, including Weinrib, are of the view that tort law should be understood 'only from an internal point of view; it is just tort law and, famously like love, private law has no goals.'[12] According to Weinrib, from the perspective of corrective justice the court's role is to rectify the injustice that has occurred by undoing it. In its role the court should exact the gain from the defendant and return it to the claimant, policy factors are extraneous and the notion of common good irrelevant[13]. Stevens would argue that 'it is no part of the judge's role to evaluate the policy factors that might argue in favour or against liability'. Stevens' view is that judges lack the 'technical competence to assess all of the reasons which could in theory be taken into account in reaching a decision. Judges are not economists or social scientists.'[14] A view this thesis in part disagrees with. Implicit in Stevens' analysis though is the rejection that the law of tort serves any purpose other than to be part of the body of private law.

The theorists that seek to provide a purely corrective account of private law are however criticised, including by Wright, who agrees with Cane that they oversimplify and misrepresent 'complex legal phenomena', and they are 'historically implausible.'[15] Wright argues that the cases in the law reports are full of decisions and discussions that concern policy considerations that are extraneous to the relationship between the litigating parties[16]. These debates demonstrate that there are significant differences, in terms of aims and approaches, between private law claims and human rights claims, difference which it is argued justifies a different approach and model of adjudication. Whatever the rights and wrongs, or correctness or otherwise, of the various theories of tort law, or ability or otherwise to describe an overarching theory of tort law, there is it is suggested a fundamental difference between adjudicating between two private persons or bodies in a private law claim, and a claim by an individual against the state that their human rights have been violated. In order to account fully for this

[11] *Ibid.*
[12] EJ Weinrib, *The Idea of Private Law* (Cambridge, Massachusetts, Harvard Press, 2006) 3
[13] Jane Wright ,*Tort Law and Human Rights*, (Hart, 2017) 28-29
[14] R Stevens, *Torts and Rights* (OUP, 2008) 309
[15] P Cane "Rights in Private Law" quoted by Wright in Jane Wright, *Tort Law and Human Rights*, (Hart, 2017), 29, n.53
[16] Jane Wright, *Tort Law and Human Rights*, (Hart, 2017) 29

fundamental difference a separate jurisdiction with the flexibility to adopt a different adjudication method ought to be carved out for human rights cases.

Model of Adjudication: Inquisitorial v Adversarial

One of the ways in which the different approach needed when adjudicating human rights-based claims could be achieved is to provide for a more inquisitorial rather than adversarial process. In human rights claims, where it is the state against the individual, the court is required at times to adopt a more proactive and flexible approach to the gathering and assessment of evidence, and to burdens and standards of proof. While overall a claimant before a new HRT must establish that their rights have been violated on the balance of probabilities, a specialist tribunal could adopt a differing approach to issues to be determined in the course of deciding the case and place the burden for rebutting a presumption of a violation on the state. This would provide greater protection for rights and mitigate against the power imbalance between the individual and the state. It would appear (although it is not explicit) that the ECtHR adopts a similar approach, 'conditioning' its approach to evidence and proof. In the Grand Chamber decision of *Nachover and Others v Belgium* the court noted that

> In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. [17]

It it proposed that a smiliar appraoch be adopted in the HRTs. Providing for differing, or flexible, burdens of proof in rights claims is not radically new or unknown in domestic law, for example it is already the case domestically that provision is made for different burdens of proof under the Equalities Act 2010, which specifies that, for any proceedings relating to a contravention of the Act, '[i]f there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred' unless A shows that they did not contravene the

[17] Application no 43577/98, 6 July 2005, 147.

provision[18]. It is made clear however that this burden does not apply to any offence under the Act[19].

The approach to disclosure could also be different and tailored to rights adjudication. In private law claims the duty of disclosure is to provide 'standard disclosure' which requires a party to disclose documents on which he or she relies, documents which adversely affect his or her own case or another party's case, documents which support another party's case and documents which he or she is required to disclose by a relevant practice direction. Disclosure is restricted to documents which are or have been within a party's control. In terms of evidence the parties decide on which witnesses to rely on, the court has no power to order a party (or non party) to litigation to produce witness evidence or call a particular witness[20]. These rules are designed for an adversarial private law system where the parties are on a more equal footing, and there are no wider duties owed.

In judicial review, as set out in Chapter Four, there are no disclosure rules as such, but rather there is the duty of candour. As has been discussed the HRA has had an impact on the approach to disclosure in the Administrative Court in England and Wales. Singh suggests that the procedural rules in judicial review proceedings have been modifed 'in order to allow the court to perform its role under the HRA to decide questions of proportionality'[21] and cites *Tweed v. Parades Commission for Norhtern Ireland*[22] where the Law Lords recognised there may be a need for fuller disclosure in HRA claims, but that disclosure Orders would be likely to remain exceptional even in proportionality cases[23].

In Coronial Courts in England and Wales (a more inquisitorial jurisdiction) there has been a move towards a duty of candour' in resepct of disclosure duties.[24] The Coroner additionally has the power to order to be produced 'any documents in the custody or under the control of

[18] S.136(3)
[19] S.136(5)
[20] This is different in Coroners Courts in England and Wales where it is the Coroner who has the power to decide on which witnesses are to be read and heard. Inquests are inquisitorial proceedings.
[21] Rabinder Singh "The Impact of the Human Rights Act on Advocacy" in Roger Masterman and Ian Leigh (eds) *The United Kingdom's Statutory Bill of Rights: constitutional and comparative perspectives* (Oxford University Press, 2013) 181-182 181
[22] [2007] 1 AC 650
[23] *Ibid* 2
[24] See Protocol: Principles guiding the Government's approach when it holds interested person status at an inquest https://assets.publishing.service.gov.uk/media/5e258ec240f0b62c52248094/guide-to-coroner-services-bereaved-people-jan-2020.pdf accessed 13 August 2024

the person which relate to a matter that is relevant to an inquest.'[25] whether or not they are 'Interprested Persons' to the Inquest.

New specialist HRTs could, and it is argued should, provide for disclosure rules more akin to those in Coroner's courts in England and Wales. This would be in recognition that in claims under the HRA it is an individual taking a claim against a public body, and it is the public body who is likely to be in possession of the documents necessary to assist the individual prove their rights have been violated. The expert judges in the new HRTs should be given the power to order further disclsoure where it is considered necessary, and order further witness evidence, making the process more investigatorial and ensuring that the judges have available to them all the information, views and data necessary to reach a decision. Using procedural rules in this way provides one of the means to meet some of the criticims and limitations identified, concerning the institutional appropriateness or competance of courts to reach decisions in cases involving matters of policy, resources, or balancing of individual rights with the rights of the community. It would also recognise the imbalance of power between the state and the individual and the difficult task individuals have in accessing information held by state bodies in order to argue their case. Giving judges case management powers over disclosure would provide a guard against fishing exercises.

Third Party intervention and instigation

In setting up new HRTs widening access to interest groups or bodies with specialist knowledge or expertise relevant to the matters in issue is also an important consideration. At the level of the UK Supreme Court the use of interveners is more common and more established. This recognises the fact that for a claim to be considered by the UK Supreme Court there is a requirement for matters of public importance to be raised[26]. Similarly, the Strasbourg Court allows for interveners, including by State Parties[27], the Council of Europe Commissioner on Human Rights[28] as well as other international institutions, national human rights institutions, and NGOs. If the new HRTs are to fulfil the role of developing the scope, content, application and balancing of positive rights argued for here, and if they are to apply Convention rights in a manner suited to the UK's particular legal tradition, and values, a similar regime for interested

[25] Schedule 5 Coroners and Justice Act 2009
[26] Loren Neudorf "Intervention at the UK Supreme Court", (2013) Cambridge Journal of International and Comparative Law, 2(1) 16-32
[27] Article 36(1)
[28] Article 36(3)

parties and intervenors as exists in the UK Supreme Court and Strasbourg could, and it is argued should, be adopted.

The HRA does provide for the Crown to intervene when the court is considering making a Declaration of incompatibly[29], and it includes specific powers and rules in respect of the Equality and Human Rights Commission, The Northern Ireland Human Rights Commission[30], and the Scottish Human Rights Commission[31], allowing for powers to either intervene or to institute proceedings. But did not otherwise address third party interventions more widely. The ability of the Commissions to intervene, or indeed initiate proceedings, is an important mechanism for the protection of rights and access to court. A mechanism that with the creation of specialist HRTs should be bolstered, or at least encouraged, with dialogue between the tribunals and Commissions aided, and potentially an ability for the Commissions to seek advisory opinions.

Looking specifically at the Equality and Human Rights Commission as an example, it has the power to provide legal advice, bring legal proceedings and intervene in legal proceedings brought by others, under the Equality Act 2006 it if appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function[32]. The Commission's ability to rely on Convention rights in judicial review proceedings as well as other types of proceedings is made explicit: 'The Commission may, in the course of legal proceedings for judicial review which it institutes or in which is intervenes rely on s.7(1)(b) of the Human Rights Act 1998'[33] and to do so the Commission need not be a victim or a potential victim of an unlawful act to which the proceedings relate, but may only act if there is or would be such a victim. These are powers that are to be welcomed, and the Commissions should be encouraged, and funded, to play a full and active role in the new HRTs.

In setting up the specialist tribunals the aim should be to create an adjudication model suited to third party intervention to increase access and the ability to make representations and provide evidence beyond the parties directly involved. Participation of interested parties, those other

[29] S.5
[30] Northern Ireland Act 1998, s.71(2A) and 71(2)(B), as amended by s.14 of the Justice and Security (NI) Act 2007 and Schedule 3 of the European Union Withdrawal (Agreement) Act 2020 – power to institute or intervene.
[31] Scottish Commission for Human Rights Act 2006, s. 14 – power to intervene only.
[32] s.28. and s.30.
[33] The Northern Ireland Act 1998 is in similar terms for the Northern Ireland Human Rights Commission

than the parties directly involved who have relevant evidence, expertise and opinions, can provide a wider range of views, and their participation ought to be facilitated and encouraged, especially where there is a need to undertake a balancing exercise[34]. The arguments against increased access to third parties were outlined in Chapter Four, but it is suggested that for the model of adjudication and type of jurisdiction envisioned here they would play a vital role. The creation of a specialist court would mitigate against some of the criticisms outlined. As Harlow has identified, currently the UK does not have a truly constitutional court and that in a:

> [S]pecialist constitutional court…there would be no logistical problem as [third party] representations could be received electronically and preserved as a dossier available for consultation by the court. The problem is that at present we do not possess a constitutional court and the unitary jurisdiction that we do have means that public interest and human rights matters can arise at any time and in any court, flowing across the boundary [between private and public law.[35]

Creating HRTs would create a jurisdiction in which the logistical problems could be avoided, and it would no longer be the case that human rights matters would (or at least would less often) arise at any time in any court and flow across the boundary between private law and public law. While not advocating for a constitutional court here, what is advocated for is a specialist jurisdiction where the presumption is that all rights cases are litigated, or transferred to, and where references are made to, with bespoke rules and procedures creating a model of adjudication suited to rights-based claims. It is argued that adopting rules to most efficiently and legitimately enable third party intervention in a specialist jurisdiction will go some way to meet the concerns rightly identified by Harlow with regards to the existing UK model. The procedure could allow for the creation of a repository of electronic representations, or additional data or expert reports, which could be accessed by the judges, as well as providing rules and guidance on when to permit intervention and by what means.

Consideration could also be given to the possibility of introducing additional powers or procedures to further enhance the domestic protection of human rights, for example the ability of the court or tribunal to give advisory decisions, and to receive and respond to questions from

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[34] Another impact of the HRA on advocacy identified by Singh is the increased use of third-party interventions, he points to the Working Party established by JUSITCE in 1996 chaired by Sir John Laws that recommended a 'more benevolent attitude' to third-party interveners in public interest cases. See Rabinder Singh "The Impact of the Human Rights Act on Advocacy" in Roger Masterman and Ian Leigh (eds) *The United Kingdom's Statutory Bill of Rights: constitutional and comparative perspectives* (OUP, 2013) 185. See also Lord Hoffmann in *E v Chief Constable of the RUC* [2008] UK HL 66; [2009] 1 AC 356, 2-3 where he said that interveners often add value, but care needs to be taken that they do not become an 'additional counsel for one of the Parties'.

[35] Carol Harlow "Public Law and Popular Justice" MLR 64 1 (2002) 1-18 17

other courts. This would give the widest possible access to an expert judiciary, assist in the development of a coherent and comprehensive domestic human rights jurisprudence and fully embed compliance with human rights. Consideration could also be given to other forms or settlement, for example formal mediation under the supervision of the tribunal, similar to the Friendly Settlement procedure available under Article 39 of the Convention[36]. Consideration should also be given to providing quick and cost-effective access to the human rights tribunals to determine quantum issues. As this thesis argues below, currently the jurisprudence for s.8 HRA damages is lacking and there is a need for the judiciary to give guidance on the principles and levels of awards that should be made under s.8 HRA.

A further advantage of a specialist tribunal with expert judges is an opportunity to address what is argued to be lack of development of a coherent and consistent domestic damages' jurisprudence under the HRA, and one that it appropriate for a first instance court providing relief, rather than a supranational court exercising a supervisory jurisdiction. As was argued in Chapter Three there are difficulties with the current mirroring approach being taken by the domestic courts. These include the lack of any clear detailed principles applied by the Strasbourg Court when awarding damages under Article 41 for the domestic courts to follow, as well as the domestic courts not only following the principles of Strasbourg but also its practice and case-law, including on the level of damages.

The lack of detailed principles was seen by the Law Commission back in October 2000 as not necessarily being problematic, as the core or main principle of full reparation was the same as in domestic law, it was then envisioned that the domestic courts would utilise existing practices when calculating measures of damages. This has not happened. The Law Commission said in October 2000:

> It is only the principles applied by the Strasburg court in relation to just satisfaction which are referred to specifically in Section 8(4). Principles are

[36] Pursuant to Art 39(1) and Rule 62(2) the Court will ask the Parties if a friendly settlement can be agreed when a case is communicated: "Guide to Friendly Settlements and Unilateral Declarations before the European Court of Human Rights" Produced by The European Human Rights Advocacy Centre, Middlesex University London, 2018. Mention should also be made the proposal by the Joint Committee on Human Rights to create a Human Rights Ombudsman. In 2002 the Committee launched an inquiry to explore whether a Human Rights Ombudsperson should be created, and whether this would improve how people enforce their rights out of court. This followed the Committee's previous work on enforcing human rights and scrutiny of the (then) Government's proposals to reform the HRA. A Human Rights Ombudsman was one of the reforms suggested and a consultation process was set up with a deadline of 23 June 2022 for responses and oral evidence was heard on 29 June 2022. The matter was not however taken any further forward.

> normally understood to refer to the basic objectives of the system as opposed to the application of those principles to assessing damages in individual cases.
> …
> The measure of damages [in Strasbourg case law] in individual cases is much less likely to be of direct value as guidance, in view of the variety of factors by which it may be influenced.
>
> Therefore, at least where the normal rules of domestic law are consistent with the results which would be reached by the Strasburg court, and with the terms of the HRA, the obligation of the domestic courts to have regard to Strasburg principles should lead to little difficulty in practise and should leave the domestic courts reasonably free to follow their existing practises as to evidence calculation and a measure of damages in individual cases[37]

A specialist jurisdiction would create the environment in which expert judges, with experience of presiding over HRA claims and who have been given the constitutional role of protecting rights, would be able to create a body of case law providing clear and comprehensive guidelines on the principles and practice to be adopted. For example, what evidence is required as to loss, what degree of certainty is required, and whether interest should be paid, as well as how to calculate the measure damages and what the scale of awards should be in domestic HRA cases. This is something that has not emerged despite the HRA now having been in force for over 20 years. There remain few domestic HRA guideline cases for damages awards and debate continues as to the extent to which case law of the ECtHR should be assiduously followed by domestic courts. The lack of detailed domestic practice, and guidelines as to scales of award, and closely tying the awards under the HRA to awards by Strasbourg under Article 41, has led to a low level of awards, which not only gives rise to concerns as the compliance with Article 13, but also has knock on effects to funding and access to court.

The domestic courts are awarding just satisfaction under Article 41 in a domestic setting, rather that providing an 'effective remedy' in compliance with Article 13[38] and the courts are struggling to find and apply a set of Strasbourg principles. There is evidence in some cases (for example *DSD*[39]) where common law principles and domestic level of damages are influencing the award of damages under s.8 HRA, despite some clear Supreme Court *dicta* seemingly prohibiting this approach. The picture is confused, and a wrong turn has been taken by

[37] *Damages under the Human Rights Act 1998,* Law Com 266/Scot Law Com 180 (2000) 4.8-4.11
[38] Commentators have observed that reference to Article 41 in s.8(4) is 'curious' given that Article 41 is concerned with situations where domestic law fails to make adequate provision for monetary relief: See Clayton and Tomlinson *The Law of Human Rights* (2nd ed. OUP, 2009) 21.58
[39] *DSD v Commissioner of the Police for the Metropolis* [2015] 1 WLR 1833

adopting the mirror approach. It is argued here that this wrong turn needs to be corrected and that this would be best and most efficiently achieved by the development of a truly domestic HRA damages jurisprudence created and carved out by expert judges in a specialist tribunal. It is rare for cases on damages to reach the level of the Supreme Court, it is the lower courts, and indeed parties during negotiations, that most often grapple with level of damages. Rules of Court for a Specialist Tribunal could provide for a specific procedure for parties to use for quantum only decisions. This could provide for a speedy and cost-effective procedure, with the option of decisions being made on the papers, and with decisions being published, to enable a degree of consistency to emerge and a body of decisions that could be used by parties seeking to reach negotiated settlements.

Turning to the question of the costs regime. Claims under the HRA will almost always involve a claim by an individual against a public body, immediately there is an imbalance as between the means of the claimant and the defendant. The aim of bringing a claim in many cases will not be to seek a high level of damages (even if available) but to vindicate the right concerned, and for many to prevent similar violations occurring in the future, whether concerning the individual claimant, or others in a similar position. A funding and costs regime focussed on the level of damages is arguably, at the very least ,not appropriate, and at worse operates as a barrier to access to court. The setting up of a specialist tribunal would provide an opportunity to create a funding and costs regime that is appropriate for claims under the HRA, claims that concern the protection of Convention rights and the holding of the executive and administrative acts to account. It is suggested that QOCS be extended to cover all HRA claims, that there should be a low-level court fee which is standard for all claims, and for some form of costs protection or costs capping for third party interventions. The Tribunal judges should be given strong case management powers to prevent abuse by parties leading to increasing costs unnecessarily, but also to ensure real and meaningful access to the tribunals. As has been said however, careful consideration by a body equipped to conduct the necessary empirical studies would be needed in order to design a costs regime.

Domestic development of Convention rights jurisprudence

It is being argued here that having a specialist tribunal would facilitate and encourage the development of a coherent and consistent domestic human rights jurisprudence, including on damages, tailored to the UK's constitutional arrangements, and the prevailing culture, and legal and political traditions of the UK. A tribunal with expert judges can clearly and consistently

develop domestic human rights jurisprudence, approaching the adjudication of rights-based cases based on seeking to uphold individual rights, where those rights have been violated.

Judges could also sit where deemed necessary or beneficial with non-judicial wing experts. Tribunals often sit as a panel, incorporating a legally qualified Tribunal Judge as well as panel members with specific areas of expertise[40]. A virtue of the European Model of constitutional courts has been said to be that 'members can be selected according to different criteria … in particular the most prestigious professionals can be chosen and a wider variety of backgrounds can be represented'[41]. HRT judges and panel or wing members, being recognised as specialists, with the explicit constitutional acceptance of the role they are to play in interpreting, applying and protecting rights will be crucial. A specialist tribunal would create a focus point for human rights jurisprudence, would ensure a consistent (or where necessary different) reading across of rights in different areas of law, so for example the interpretation and application of Article 5 in the police, prison, immigration, mental health and court of protection contexts. They could articulate how rights are to be balanced and developed where the interpretation and implantation of one right affects the rights of others. So, for example how decisions in Article 8 (right to privacy) cases fit alongside decisions concerning Article 10 (freedom of expression)[42], how the development of positive rights and obligations under Article 3 (prohibition on torture) fit with similar rights and duties under Article 2 (right to life)[43] and indeed in respect of asylum and immigration. In the same way that the ordinary common law courts decide new or novel claims in negligence by developing case law incrementally and in accordance with established principles, the HRTs would develop domestic human rights law.

The power to receive references from other courts on matters affecting the interpretation of rights would provide a mechanism for a coherent and consistent rights jurisprudence. An example of a such a power that already exists in the UK, is the power contained in s.28 Equality Act 2010, which allows for the referring of questions to an Employment Tribunal from any other court where a question arises about an "equality clause or rule". Where such references are made the court making the refence may stay the proceedings in the meantime, or the

[40] https://www.judiciary.uk/courts-and-tribunals/tribunals/about-the-tribunals/tribunals/ accessed 13 August 2024.
[41] Victor Ferreres Comella *Constitutional Courts and Democratic Values* (Yale University Press, 2009) 39
[42] See e.g. *Bloomberg LP v ZXC* [2022] UK SC 5, [2022] AC 1158, and *Von Hannover v Germany* [2012] EMLR 16
[43] See for example *Z v UK* (2002) 34 EHRR 3, Article 3 cases, where the positive obligation to protect Article 2 rights (*Osman v UK)* was applied.

referring court can strike out the claim and require it to be brought in the Employment Tribunal. The proposal here would be for a process of transfer, or alternatively a claim could be stayed in the ordinary courts while a reference is made to the HRT. Rules can be created to ensure that it is the expert judges sitting in the specialist HRTs that determine human rights claims or issues of interpretation. Expertise and consistency would develop in balancing of rights, both in respect of balancing a right against the public interest as well as between different rights. The HRT would have the power to decide whether, in order to decide a case or issue, it is necessary to involve third parties, one of the Human Rights Commissions, to appoint expert members or require additional disclosure or evidence.

Declarations of incompatibility

The new specialist tribunals should also be given the power to issue declarations of incompatibility under s.4 HRA. Currently it is only the higher courts in the UK that have this power and this does not include those tribunals that can properly be viewed as higher courts[44]. In the Final Report the IHRAR concluded that permitting the Tribunals classified as 'superior courts of record' and analogous tribunals, to issue declarations of incompatibility has 'some attraction in principle'[45]. It was noted that they have the same status as higher courts and were presided over by high court judges. In addition, it was said that giving the tribunals the power to make declarations would have the advantage of enabling declarations to be made within proceedings in those tribunals and thus enable a declaration to be made at an earlier stage in proceedings; it would avoid the need to bring parallel proceedings in order to seek a declaration of incompatibility or wait until the proceedings were subject to an appeal (if that were possible) before an appellate court. Such a reform would save costs and delay.[46]. This analysis would apply equally to the new HRTs proposed here. But in addition to the practical advantages, and the lack of a principled objection given the proposed status, it would also fit with the constitutional model and the specialism and expertise of the tribunals. A concern of the IHRAR in extending the powers to the 'higher' tribunals was that declarations of incompatibility would emanate from an increasing number of tribunals[47], this would be avoided with a specialist tribunal where the majority of HRA cases would be decided, and for those not started in the

[44] The Upper Tribunal, the Employment Appeals Tribunal, the Special Immigration Appeals Commission are all 'superior courts of record' and the Investigatory Powers Tribunal and Competition Appeal Tribunal, while not superior courts of record, can be viewed as analogous to one.
[45] 'While not recommending this option, we accept that it is one that could be further considered following wider consideration, Independent Human Rights Act Review', Final Report, December 2021, 179
[46] *Ibid.*178
[47] *Ibid.* 179

specialist tribunals the ability to make a refence would avoid excessive delay and costs as well as address the concern about the number of different tribunals issuing declarations.

Deciding which court or tribunal

This leads on the next obvious question to be considered. Creating new specialist tribunals will inevitably give rise to the question as to whether a claim should be brought in the specialist Human Rights Tribunals, or whether they should be brought in the ordinary common law courts, or indeed one of the other specialist tribunals or in the Administrative Court. New tribunals, with the appropriate costs' regime, and a developed remedies and damages jurisprudence would encourage litigants to use the specialist tribunals and a power to transfer out any claim better suited to the new tribunals could be provided for. While it is not being proposed that the new tribunals are prevented from determining claims which also involve the application of tort law, it is hoped that a specialist jurisdiction would reduce the need for claims being brought both under the HRA and in common law.

As with deciding whether to bring a claim in the administrative court, or civil court, there will be a need for an individual or the courts to decide whether a claim ought to be heard by the HRT, or in the Administrative Court, or an ordinary civil court. It is proposed that where an individual is claiming that their Convention rights have been, are being, or will be violated, and/or a s.4 declaration of incompatibility is being sought, then a claim must be started in the HRT. Where a person is defending a claim by relying on their Convention rights, it is suggested that it will be for the Parties to agree, or for the Court to decide at a preliminary hearing, which court should deal with the case. It is likely there would need to be a test applied (contained in Rules) to determine whether the case should be decided by the HRT; for example, a requirement for the matter to be one that 'substantially concerns a Convention right'. Such a procedure should not be difficult or complex to introduce, it is not unusual for Rules to provide for which court claims should be brought, although it is accepted there would be an inevitable bedding down process and a degree of satellite litigation. There already exists a power and procedure to transfer judicial review claims from the High Court or Court of Session to the Upper Tribunal[48] this could be utilised and amended to cater for the transfer of claims to the Human Rights Tribunal. Further there is already a procedure in private law claims to transfer cases

[48] CPR Part 54 (4)

between county courts and the High Court, and again a similar procedure could be put in place for transfers to and from a HRT.

There would however be a further issue to consider and resolve and that is whether it would be permissible to re litigate a claim in the specialist HRT where the matter had been considered and decided by, for example, the county court in England and Wales. As the specialist HRTs would be presided over by High Court judges, would a decision by a lower court that involved a human rights matter be final and binding, or could it be appealed or re litigated before the HRT? Similar issues, and some difficulties, have arisen in Canada where there are Human Rights Tribunals for each province, which consider complaints primarily concerning discrimination. The Canadian Supreme Court[49] has been called upon to address how human rights tribunals should exercise their discretion as to whether to hear human-rights related complaints if 'the substance of the complaint has already been dealt with in other proceedings.[50] While the situation in Canada is not equivalent to the position being advocated for here (in Canada the human rights tribunals are administrative and subject to judicial supervision[51]) Rules for the new HRTs could include a discretionary power to refuse to accept a claim where it has already been 'appropriately dealt with' (to borrow the wording from the section 45.1 of the Ontario Human rights Code[52]) by another court.

Having considered the procedure and rules that are being proposed for the new tribunals, the final section of this chapter looks at the existing tribunal system in and across the UK to which the new tribunals would be added.

The UK Tribunal system

The tribunal system in the UK dates back over 100 years and developed in a piecemeal way. The current Tribunal Service was set up in April 2006 following a White Paper published in

[49] *British Columbia Worker's Compensation Board v. Figliola* [2011] SCC 53 and *Penner v Niagara (Regional Police Services Board)* [2013] 2 S.C.R 125
[50] David Said "Navigating entangled terrain: The Supreme Court's impact and the dismissal of powers of human rights tribunals." (2023) Can Public Admin, 66, 409-425, 412
[51] *Ibid.* 411
[52] 'The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application'.

2004, that accepted recommendations made by Sir Andrew Leggatt[53]. The Tribunal Service is an executive agency which now sits under the Ministry of Justice (previously it was under the Department of Constitutional Affairs). Currently there are some tribunals that are UK wide, some that only sit in England and Wales, in Scotland and in Northern Ireland (reflecting what matters are reserved to the UK Parliament and what are not). To address the piecemeal way in which the tribunals in the UK had developed, and to introduce the Leggatt recommendations, the Tribunal and Courts and Enforcement Act 2007 ("TCEA") was passed. The intention of the TCEA was to create 'a new, simplified statutory framework for tribunals, bringing existing tribunal jurisdictions together and providing a structure for new jurisdictions and new appeal rights.[54] A key provision of the TCEA is section 2, which sets out the need for tribunals to be accessible, for proceedings to be handled quickly and efficiently, for 'members to be experts in the subject matter of, or law applied in cases in which they decide matters', and to develop 'innovative methods of resolving disputes' of the type that come before the tribunals. All of which would apply to the proposed new HRTs.

The TCEA created two new tribunals, the First-tier Tribunal and the Upper Tribunal. The Act also created a new judicial office, the Senior President of Tribunals. The TCEA provides for the membership of the tribunals, rights of appeal from the tribunals and the making of new Tribunal Procedure Rules. The Upper Tribunal – the Administrative Appeals Chamber - exercises a judicial review jurisdiction in certain circumstances. Sitting alongside the Administrative Appeals Chamber in the Upper Tribunal are the Tax and Chancery Chamber, the Immigration and Asylum Chamber and the Lands Chamber. An appeal from the Upper Tribunal can be made to either the Court of Appeal (England and Wales), the Court of Session (Scotland) or the Court of Appeal NI (Northern Ireland). There is in addition the Employment Appeals Tribunal ("EAT"), which is not part of the Upper Tribunal but sits at the same level. An appeal from the EAT can also be made to the Court of Appeal, the Court of Session or the Court of Appeal Northern Ireland. The Upper Tribunal is a superior court of record and hears appeals from a First Tier Tribunal on a point of law, for which permission is required.

[53] *Tribunal for Users: One system, One* service, which itself built on the Franks Committee: *Report of the Committee of Administrative Tribunals and Inquiries (1957)* <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-9299.1957.tb01316.x > accessed 2 July 2024

[54] See Explanatory Notes.

There is also a one very distinct Tribunal, which is not part of 'His Majesty's Court and Tribunal Service', and that is The Investigatory Power Tribunal ("IPT"), which was set up in 2000 under Regulation of Investigatory Powers Act 2000 ("RIPA")[55]. It is a UK wide tribunal and is concerned with security, and it is for this reason that it is separate from all other courts and tribunals. It is now possible (when previously it was not) to appeal a decision of the IPT to the Court of Appeal (England and Wales) or the Court of Session (Scotland), but not yet to the Court of Appeal Northern Ireland. It is however possible for an appeal that concerns Northern Ireland to be heard by either the Court of Appeal (England and Wales) or the Court of Session[56]. A decision by the IPT can be subject to an application to the ECtHR, indeed, it was set up initially to ensure that the UK complied with its obligations under Article 13 ECHR. It is presided over by High Court judges, and its other members are experienced lawyers. It has its own secretariat. The Tribunal's Rules are made by the Secretary of State, but the Tribunal is also entitled to, and does, determine its own practices and procedures. The Tribunal's powers are primarily investigatory, but it does also have an adjudicatory role hearing complaints under RIPA and claims under the HRA. It is likely that even with the establishment of HRTs, HRA claims raising matters of security would remain within the exclusive jurisdiction of the IPT.

The Tribunal has a number of unique characteristics, one of which is the power to order an investigation in respect of which the public body concerned has a duty to co-operate[57]. There are obvious and good reasons for the IPT being separate from other courts and tribunals and having many unique features. It does though provide an example of how setting up a tribunal allows for the tailoring of its design, procedure, and rules to best meet its constitutional role. While it is not proposed that the creation of a new HRT would impact on the work of the IPT, it could however be made possible to make a refence to the HRT on a matter of interpretation, for example.

It is informative to also consider the development of the Upper Tribunal's judicial review jurisdiction as it provides an example of the transfer of a judicial review jurisdiction from the high courts to a tribunal. The transfer was as part of the reforms introduced by the TCEA 2007 and granted a judicial review jurisdiction to the Upper Tribunal. This was a departure from the

[55] S.65. See https://investigatorypowerstribunal.org.uk/ accessed 2 July 2024
[56] See s.242 of the Investigatory Powers Act 2016 which amends the Regulation of Investigatory Powers Act 2000.
[57] See Regulation of Investigatory Powers Act 2000, s.65-69 and The Investigatory Powers Tribunal Rules 2018.

pre TCEA 2007 position where the judicial review jurisdiction resided exclusively with the High Court (the Administrative Court in England and Wales, the Judicial Review Court in Northern Ireland, and the Court of Session in Scotland), together of course with the related appellate courts. In respect of Scotland there is now the power (both mandatory and discretionary) to transfer applications made to the supervisory jurisdiction of the Court of Session from the Court of Session to the Upper Tribunal[58], and the Upper Tribunal's judicial review jurisdiction is to be the same as the Court of Session. A similar model could be adopted when transferring HRA claims out of the higher courts and to a new specialist HRT.

In its original enactment the TCEA 2007 required the High Court to transfer to the Upper Tribunal some judicial review claims (as directed by the Lord Chief Justice), and provided for a discretion to transfer other cases, save for those that concerned matters of immigration[59]. Discussions during the committee stages of the TCEA 2007 reveals government concern, and recognition of, the need for expertise and specialism of judges in certain types of cases. Consideration was given to what matters it would be appropriate to give the Upper Tribunal jurisdiction. Initially immigration matters were excluded, the reason for initially excluding immigration and asylum was due to sensitivities surrounding asylum and immigration cases. During the creation of the judicial review jurisdiction within the Upper Tribunal concern was raised about the need for a High Court judge to preside over applications for judicial review, but the possibility for, and advantages of, such a judge sitting alongside a specialist judge was recognised. Lord Kingsland said in the Grand Committee[60] with regards to the type and level of judge 'I see no difficulty in a High Court judge sitting with another judge who is an expert in a particularly complex technical area. That would be quite understandable.'[61]

This progression, and the progressive increase and expansion of the jurisdiction of Tribunals generally serves to demonstrate that the tribunal system is becoming an important and useful part the constitutional makeup of the UK. They can provide specialism and expertise, as well

[58] S.21
[59] See s.19 of original version of the TCEA 2007.
[60] https://hansard.parliament.uk/Lords/2006-12-13/debates/06121365000002/TribunalsCourtsAndEnforcementBill(HL)?highlight=upper%20tribunal%20immigration#contribution-06121394000002 accessed on 2 July 2024
[61] In 2009, faced with a backlog of immigration cases in the Administrative Court the change was made to include in the Upper Tribunal jurisdiction over immigration matters so that fresh claim immigration application would be heard by the Upper Tribunal. See s.53 of the Borders and Citizenship Act 2009, amending the Tribunal Courts and Enforcement Act 2007 and the Senior Courts Act 1981.

as authoritative judgments, and offer the potential to have High Court judges sitting alongside experts. All of which fits with what is being proposed here.

An advantage of situating the specialist HRTs within the structure of the Tribunal Service and as part of the Upper Tribunals is that the First Tier Tribunals include Health, Education and Social Care Chamber, the Mental Health Review Tribunal, and the Special Educational Needs Tribunal. Many of the subject matters of these tribunals are likely to raise human rights issues even where the claims are not ones brought under s.7 HRA. This is potentially where references to the HRTs (sitting in the Upper Tribunal) could prove to be a valuable means by which to ensure that domestic human rights jurisprudence is consistent and coherent – for example by ensuring that the interpretation of the right to liberty in the mental health field is consistent and compatible with the interpretation in the immigration field.

What the Tribunal system provides for then, is a structure within which particular and specialist cases can be either started in, or transferred to, a specialist tribunal. Creating a human rights jurisdiction within the tribunal system would allow for specialist HRTs to be relatively easily set up and situated within the existing court and tribunal architecture of the UK.

From this brief review of the history of the tribunal system it can be seen that a HRT, situated as part of the Upper Tribunal (in a similar way to the EAT), could provide both the seniority required of such an important court, as well as easy access to oversight by the higher courts in England and Wales, Scotland and Northern Ireland. The HRTs would sit in each of the three jurisdiction, ensuring that matters of devolution and the differences in the legal systems and laws of the three jurisdictions are catered for. For Wales, the HRT for England and Wales could be specifically constituted to sit with judges from Wales where matters concern legislation from the Welsh Parliament or raise particular issues for Wales (for example education or health). Further, in terms of the level and expertise of judges, once again the tribunal system allows for flexibility. What marks the tribunal system out from the ordinary courts is specialist expertise and flexibility. Both of which have been argued for here to be lacking in the current framework for the protection of rights domestically. A specialist judiciary (and indeed lawyers) working in a HRT would enable and ensure that when reaching decisions and making judgments they will be situated and anchored within a domestic human rights jurisprudence. Tribunals are also able to act inquisitorially. This allows for a more flexible approach to burdens of proof which may be more appropriate in cases concerning individual rights against public bodies.

Additionally, a Tribunal would if taking a more inquisitorial approach be able, for example, to direct additional disclosure be provided or evidence provided. MacDonald has commented that 'in the context of the duty of fairness, the Tribunal has a reasonable inquisitorial function to make its own inquiries in the context of full disclosure and discussion of all relevant issues at the hearing.[62] Indeed it is the duty of some tribunals to act inquisitorially when necessary to do justice. In *W v Gloucestershire CC, Marian Davies Chair of the Special Educational Needs Tribunal* the court said:

> Whatever the reason, it seems to me that if there was inadequate information, the tribunal should have taken steps to obtain it, if necessary adjourning to do so. Tribunals, so it seems to me, cannot proceed on a purely adversarial basis, but have a duty to act inquisitorially when the occasion arises by making sure they have the necessary basic information on which to decide the appeal before them, rather than rely entirely on evidence adduced by the parties.[63]

The importance of the specialist nature of tribunals was recognised by Lady Hale in *Gillies v Secretary of State for Work and Pensions*:

> Tribunals were once regarded with the deepest of suspicion, but they are now as essential part of our justice system. They are mostly there to secure justice between citizen and state in a wide variety of contexts…It has been recognised that tribunals can have an important advantage over courts of law. These are "cheapness, accessibility, freedom from technicality, expedition, and expert knowledge of their particular subject" …The Report of Sir Andrew Leggatt 's Review of Tribunals, Tribunals for Users and, One System, One Service (2001), para 1.11-1.13 suggests three tests of whether Tribunals rather than courts should decide cases. The first is participation: that users should be able to prepare and present their own cases effectively. The third is the need for expertise in the area of law involved: users should not have to explain to the tribunal what the law is. The second is the need to special expertise in the subject matter of the dispute:
>
> > "where the civil courts require the expert opinion on the facts of the case, they generally rely on the evidence produced by the parties – increasingly jointly-or on a court appointed assessor. Tribunals offer a different opportunity, by permitting decisions to be reached by a panel of people with a range of qualifications and expertise … users clearly feel that the greater the expertise make for better decisions." (para 1.12)
>
> Expertise on the panel not only improves decision-making and reduces the need for outside expertise, it also thereby increases the accessibility and user-friendliness of the proceedings.[64]

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[62] Ian A. MacDonald, *Immigration Law and Practice in the United Kingdom*, (7th Ed. Lexis Nexis, 2008), para 18.134

[63] [2001] EWHC admin 481, [2001] 6 WLUK 310, [15]

[64] [2006] UKHL 2, [2006] 1 WLR 781 at [36]

With regard to expertise, the Senior President has the duty[65] to have regard to the need for members to be expert in the subject matter of, or the law to be applied in, the tribunal. As suggested above the HRTs could sit with expert non judicial wing members where this is beneficial or necessary.

Concluding remarks

This Chapter has ranged widely and it is only possible to make broad proposals and identify issues to be considered when devising rules and procedures for the new tribunals. As has been said any new court system requires detailed consultation and empirical studies (particularly on costs). But, it has allowed, it is hoped, for an exploration as to how new HRTs could fulfil the role being advocated for. The intention here has been to first identify the differences between rights adjudication cases, and claims concerning private individuals and private rights, and how the differences justify the need for different rules, procedure and judicial approach. It has considered how new rules, procedure and a different judicial approach could address the problems litigating HRA claims set out in Chapters Three and Four.

This chapter has also set out an overview of the tribunal systems in the UK and the advantages of a tribunal over a court. All of the attributes of tribunals set out here, and the proposed nature and type of tribunal the specialist HRTs, are ones that would be advantageous when adjudicating human rights claims and would enable the HRTs to be part of a differential constitution and ensure the institutional competence of the tribunals to determine rights cases. When necessary wider participation could be allowed for through third part interventions, and additional expertise added to the judicial bench, enabling the courts to balance rights of individuals against the public interest and take into account wider policy and resource considerations, but ultimately effectively protecting individuals against the abuse of public power.

What is being proposed is however more than just a specialist forum for adjudicating rights, important and needed as this is, it is also for a constitutional body with ownership over rights interpretation, a constitutional institution recognised to be expert, and a constitutional body able to advise and provide opinions not only in respect of disputed cases, but in respect of proposed legislation. In this way it is a form of a constitutional court, but not one to rival the

[65] TCEA 2007 s 2(3)(c)

UK Supreme Court, although certainly one to assist it. The constitutional role of the new tribunals, including in pre legislative review of devolved legislation, will be more fully explored in the final chapter.

CHAPTER SIX

Constitutional Design

Introduction

The focus of this final chapter is constitutional design: the constitutional role the specialist tribunals would undertake and the relationship between the tribunals and the UK Supreme Court, the devolved Parliaments, the Westminster Parliament, the ordinary courts and the ECtHR. It will build on the litigation problems identified in Chapters Three and Four and the proposed solutions in Chapter Five, and will take into account the context, history and existing constitutional structure of rights protection in the UK as set out in Chapter One. It will reflect the theoretical arguments set out in Chapter Two and the concept of a differential constitutional model in which the courts are recognised to be the constitutional institution with the primary role of protecting individual rights.

In considering the specialist HRTs' constitutional role, the pluralistic, multi-layered and devolved nature of the UK's constitution needs to be considered. It will be recognised that the UK's constitution, court structures and devolution settlements are unique, and it will not be proposed that any existing models of courts with powers and responsibility for rights protection that exist within other constitutions or jurisdictions will be followed or copied. While an aim of the new specialist tribunals would be to provide a degree of consistency across the UK in the protection of rights, in compliance with the UK's international obligations under the ECHR, the creation of new tribunals also provides the opportunity to allow for some divergence in recognition of the different legal traditions, history and political, economic and social conditions that exist in the devolved nations that make up the UK.

As has been emphasised already, it is not being proposed that the role of the UK Supreme Court as the only UK court, and as the apex court with general and final appellate jurisdiction[1] will change. The intention is to create within the UK's existing constitution expert specialist tribunals, with bespoke procedures, rules and powers to adjudicate on rights-based claims and provide for additional pre legislative review of devolved legislation and be the constitutional body which primarily, and at first instance, considers and decides upon declarations of

[1] Save for criminal matters in Scotland.

incompatibility of Westminster legislation[2]. It is recognised that to create a court to rival the UK Supreme Court and remove from the UK's constitution a final appellate court with general and comprehensive jurisdiction would be to significantly alter the UK's constitutional model. Disturbing the hierarchical nature of the UK's court structure in such a way would require significant justification which has not been considered or provided for in this thesis. What is not being suggested is that the UK should create a full-blown, specialist, separate constitutional court, what is being suggested is that specialist rights tribunals are created.

At the time the HRA was enacted, the decision was taken not to create specialist courts but rather to enable the ordinary courts to adjudicate claims brought under the HRA. There is no specialist court, charged with interpreting and applying the rights contained in a "bill of rights" as would usually be found in jurisdictions with a written constitution. The HRA was joined onto an existing court structure and model that was designed for a jurisdiction without a written constitution; or maybe it would be better described as a court structure and model that developed under a different constitutional tradition, a common law tradition, with no written constitution or bill of rights. This adding in of a bill of rights to a common law parliamentary constitution has been suggested as having given rise to some difficulties in practice in litigating claims (Chapters Three and Four) and it has also been argued that it has led to a confusing, complex and at times contradictory domestic rights jurisprudence (Chapter Four). The common law and common law remedies are sometimes being developed in light of the rights in the HRA and sometimes not, judicial review sometimes involves a more merits-based adjudication, and sometimes not, a ground for judicial review sometimes includes a proportionality test for legality, and sometimes not, and with courts sometimes being able to determine some but not all matters relating to Convention rights and sometimes not. It has been argued that the current constitutional model and approach by the ordinary courts is not enabling the rights in the HRA to be articulated, developed and applied, nor to be fully realised and 'brought home'. The solution proposed are specialist tribunals designed to fit with the UK's unwritten constitution and pluralistic nature. In proposing this solution there is a need to consider how the UK's constitution should be redesigned to accommodate the new tribunals, which is the task of this chapter.

[2] And potentially in Northern Ireland the continued applicability of Acts of the Westminster Parliament in Northern Ireland under Art 2 of the Windsor Framework.

This chapter will first include a brief overview of some of the differing constitutional models in other jurisdictions. This is not however intended to be, nor is it, a comprehensive comparative study[3], which would be a large, albeit interesting, undertaking. Neither is it intended nor proposed that the UK follow any existing constitutional model or court structure. No attempt will be made here to deal in any detail with the arguments around weak form and strong form judicial review and any detailed comparison between the UK and America, or indeed any other jurisdiction in this regard[4]. Rather, this chapter will consider, as a point of analysis the central differences between an American model and the Kelsenian model of constitutional review and constitutional rights protection and consider some aspects of those types of courts and how they may be relevant to re designing the UK constitution to provide for new HRTs.

The second part of the chapter will focus on the relationships between the new specialist tribunals with the UK Supreme Court, with the existing courts, and with the devolution settlements (which have already been described in Chapter One). The question of where, and how new specialist tribunals would fit within the UK's current constitutional settlement will be addressed. This is not a straightforward matter. Detailed consideration would need to be given to the UK's complex devolution legislation and model, including the complexities created by Brexit and the Northern Ireland Protocol and Windsor Framework. This thesis will aim to identify the main factors to be considered but will not attempt to set out any detailed legislative plan as to how the new tribunals could be created, nor consider how politically the proposal is likely to be received. Detailed and wide consultation with a number of stake holders would need to take place if specialist tribunals were to be created, and careful and detailed analysis of devolution legislation and case law would be required. It is however argued that

[3] There is a wealth of academic literature on comparative constitutional law, see for example Francois Venter, *Constitutional Comparison: Japan, Germany, Canada and South Africa,* (Kluwer Law International, 1999), Vicki Jackson, Mark Tushnet *Comparative Constitutional Law* (New York Foundation Press, 2006),Tom Ginsburg, *Comparative Constitutional Design*, (Cambridge University Press, (2012), A.V. Dicey, J.W.F. Allison (ed), *Comparative Constitutionalism*, (OUP, 2013). See also on comparative constitutional courts: Andrew Harding and Peter Leyland (eds) *Constitutional Courts: a comparative study* (Wildy, Simmonds and Hill, 2009) and A Menon and M Schain (eds) *Comparative federalism: The European Union and the United States in comparative perspective* (OUP, 2007).

[4] For more on weak for and strong form judicial and the UK and American comparison see for example Mark Tushnet, *Weak Courts Strong Rights: judicial review and social welfare rights in comparative constitutional law*, (Princeton University Press, (2008)), Mark Tushnet "Weak-form Review: An Introduction" (2019), IJCL Vol.17(3) 807-810, see also Aileen Kavanagh "What's so Weak about weak-form review: the case of the UK Human Rights Act" (2015), IJCL, Vol.13(4) 1008-1039

despite the inevitable complexities, the constitutional re design being proposed would be worthwhile and would improve rights protection in the UK.

Constitutional Models and Constitutional Design

Constitutional design has often been the means used to find solutions to political conflict, or after major events (regime change or failure) but can also be used, as indeed it is proposed to be used here, to make changes to improve governance[5]. The process of constitutional design and the adoption of written constitutions around the world has occurred over time and in what can loosely be grouped into phases. Each new phase borrowed from other models 'while tailoring them to local conditions and introducing new innovations.'[6] The first phase occurred in the late eighteenth century, notably in the United States, France and Poland. Then came Latin America in the early 1800s, and then the third phase came in central and Eastern Europe[7]. Another distinct phase came with decolonisation and the gaining of independence for colonial countries and British overseas territories[8]. As a result of decolonisation there are many common law countries around the world that have written constitutions and Bills of Rights, although notably not the UK. Within this group there are various models of constitutional design and differing ways in which the power of constitutional review and rights protection are provided for. Of note is New Zealand. New Zealand gained independence from the UK in 1947, but unlike other countries including those in Africa, in The Caribbean, and Canada, it did not adopt a written Constitution. Like the UK, New Zealand is a Parliamentary democracy (as opposed to a Constitutional democracy), adhering to the principle of Parliamentary Sovereignty. In 1990 New Zealand adopted a written Bill of Rights – The New Zealand Bill of Rights Act[9]. As with the UK there was no change to the court structure and ordinary courts have the power to review legislation and the common law for compliance with the rights contained in the Bill of Rights, as well as adjudicating upon cases alleging a breach of rights contained in the Bill of Rights[10].

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[5] Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Design*, (Cambridge University Press, (2012)

[6] *Ibid.* 3-4

[7] John Ferejohn and Pasquale Pasquino "Constitutional Adjudication: Lessons from Europe" (2004-06) Texas Law Review Vol 82(7) 1671

[8] See generally, Stanley de Smith *The New Commonwealth and its Constitutions* (London, Stevens, 1964), Brian Simpson, *Human Rights and the End of Empire* (OUP, 2004)

[9] For an account of the passing of the New Zealand Bill of Rights see "Cross-Fertilisation of Constitutional Ideas: The Relationship between the UK Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990", in Roger Masterman and Ian Leigh (eds) *The United Kingdom's Statutory Bill of Rights: constitutional and comparative perspectives* (OUP, 2013), 252-254

[10] See Paul Rishworth *The New Zealand Bill of Rights* (Oxford University Press, 2003) and Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, 1995)

Models of judicial/constitutional review

Broadly speaking there are two institutional models that enable judicial review or constitutional review by courts. There is the American model that was part of the first phase referred to above, and second the Kelsenian model, which came later. Constitutional review in the context of these models primarily includes the review of ordinary legislation for compatibility with the written Constitution, but it can and does also include consideration of the compatibility of executive and administrative acts and decisions, and, where applicable, the ordinary common law, with the Constitution. The HRA and the Acts of devolution of course provide for both, assessment of the compatibility of legislation[11] as well as of acts, omissions and decisions by public bodies[12], and the application of the common law[13]. Arguably, the HRA, and the devolutions Acts, introduced in the UK for the first time a form of 'constitutional review' in respect of Convention rights distinct from administrative law. As Hickman has noted 'the distinction between constitutional law and administrative law is not one that is recognised by UK (or at least English lawyers) … But in other countries it is fundamental.'[14] The UK courts have different powers in terms of actions to take, or remedies available, depending on the type of law involved (so for example the courts cannot strike down a primary Act of the Westminster Parliament[15] but can a piece of secondary legislation and legislation of the devolved parliaments) and can develop the common law compatibly with Convention rights.

An important point of difference between the UK and other institutional constitutional models is the structure and hierarchy of the court system and the UK's unique version of a Supreme Court which could also be termed a constitutional court. Defining constitutional courts is not straightforward. The use of the term "constitutional court" can mean different things. It can mean a specialist court separate from the rest of the judiciary, such courts are common in Europe[16]. The term "constitutional court" can also be used to refer to courts that are not

[11] s.3. s.4 HRA and see also limitations on legislative powers by reference to the Convention in the devolution Acts: s.29 Scotland Act 1998, s.6 Northern Ireland Act 1998 and s.3 Wales Act 2017
[12] s.6 HRA
[13] s.6(3)(a) and s.7(1)(b) HRA
[14] Tom Hickman, *Public Law After the Human Rights Act* (Hart Publishing, 2010) 28
[15] But see currently the approach of the courts in Northern Ireland to Art 2 of the Windsor Framework in respect of disapplying Acts of the UK Parliament in Northern Ireland.
[16] 18 of the states of the European Union have specialist, separate, constitutional court Austria, Belgium, Bulgaria, The Czech Republic (Czechia), France, Germany, Hungry Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain, they are also common in post-communist Europe: see Victor Ferreres Comella, "The Rise of Specialized Constitutional Courts" in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Design*, (Cambridge University Press, Cambridge (2012) 265

organically detached[17] from ordinary courts but are specialised in constitutional law. A "constitutional court" can be understood to include special chambers within a Supreme Court created to deal with constitutional issues, examples here include some countries in Latin America, notably Costa Rica, El Salvador, Honduras, Nicaragua, Paraguay, and Venezuela[18]. In the American model[19] there is one Supreme Court which has the final say on both constitutional matters as well as ordinary law, which sits at the top of the hierarchy of the courts. Examples of countries which follow the American model in addition to the USA, are Canada, Ireland and India. In the American model the lower courts, (in the US, county, state or federal[20]) have the power to adjudicate on constitutional matters[21] and individual rights, but the Supreme Court has the final say.

In contrast to the American model, is the Kelsenian model (common in Europe) where there is a specialist constitutional court that sits outside of and separate to ordinary courts. In the Kelsenian model cases are usually referred to the constitutional court by the ordinary courts, and in some systems questions can be posed and referred to the court by political institutions. In some Kelsenian type models (including Germany) an individual can also make a complaint to the constitutional court[22]. Another point of difference between the two models is that in the American model review of legislation for constitutional compliance is only carried out in respect of the specific case before the court, by contrast the Kelsenian model allows for abstract review, and abstract questions to be posed. Examples of jurisdictions in Europe that have the Kelsenian model include Austria, Germany, France, Italy and Spain. Jurisdictions outside of Europe with the Kelsenian model include, South Africa, Chile and Colombia[23].

Another significant difference between the two models is how the process of judicial/constitutional review is perceived and characterised. In the American model judicial

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[17] *Idib.*
[18] see Victor Ferreres Comella, "The Rise of Specialized Constitutional Courts" in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Design*, (Cambridge University Press, Cambridge (2012) 265
[19] For an analysis of American Constitutionalism and the extent to which it is mainly based upon English ideas and the Rule of Law and the essential differences, see A.V. Dicey, J.W.F. Allison (ed), *Comparative Constitutionalism*, (Oxford University Press, 2013) 76-88
[20] Robert Kagan and Gregory Elinson "Constitutional Litigation in the United States", in Ralf Rogowski and Thomas Gawron *Constitutional Courts in Comparison*, (Berghahn Books, 2016)
[21] Additionally as the USA is a federal state, at the state level a judge may be called upon to determine whether a State law complies with the State's constitution, see *ibid*, n.15 84
[22] Victor Ferreres Comella, "The Rise of Specialized Constitutional Courts" Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Design*, (Cambridge University Press, Cambridge (2012) 267
[23] Paul Yowell, *Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning in judicial Review.* (Oxford: Hart Publishing, 2018) 2

review is very much a legalistic concept, the Supreme Court is an appellate common law court, the court relies on the evidence provided to the trial court or submitted as part of the appellate procedure. Judges are selected and eligible based on their judicial experience and legal knowledge[24]. By contrast in the Kelsenian model the court has an overt political and legislative function. Those that sit in the Constitutional court are drawn from the top ranks of legal academy and Parliamentary bodies are involved in the appointment process[25].

There are said to be advantages of specialism and of having constitutional courts separate from ordinary courts, especially in civil-law counties. Advantages of centralising constitutional review of legislation has been said by Comella to include enabling the court to concentrate 'all its time and energy on checking the validity of parliamentary enactments' as the judges are liberated from the task of ordinary adjudication and have 'more time to engage in a deep discussion of the fundamental issues involved.'[26] This argument however is primarily advanced as a result of the high workloads in civil-law countries, where appeals are very frequent, and the higher courts do not have any discretionary jurisdiction.[27] While similar problems are not so prevalent in common law countries where appellate courts have the power to control the cases they consider, different issues can arise where there is no separate specialist constitutional court. For example, there has been concern raised that the US Supreme Court focuses too much on constitutional matters and too little on other areas of law.[28] Posner has commented that 'with many areas of federal law becoming ever more complicated the number of non-constitutional cases that the Court decides has become too small to enable Justices to become or remain experts in these bodies of law.'[29] An expert court with some specific constitutional role (human rights protection) alongside a specific role in respect of ordinary law concerning human rights would appear to provide and combine the benefit of specialism with the need for breadth of knowledge, and would be a benefit of the specialist HRTs advocated for here.

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[24] On judicial selection see e.g. Robert Kagan and Gregory Elinson "Constitutional Litigation in the United States" in Ralf Rogowski and Thomas Gawron *Constitutional Courts in Comparison*, (Berghahn Books, 2016) 26

[25] For a discussion on academics and politicians sitting on Constitutional courts see Victor Ferreres Comella *Constitutional Courts and Democratic Values* (Yale University Press, 2009) 40-45

[26] *Ibid.* 36

[27] *Ibid.* 37

[28] See the Freund Committee and the Hruska Commission in the 1970s which called for a "Nationals Court of Appeals", referred to by Comella

[29] Richard Posner, "The Supreme Court 2004 Term- Forward: A Political Court" (2005) Harvard Law Review 79

There are a multitude of different constitutional models and constitutional courts around the world providing for the protection of individual rights and for constitutional review, each has been influenced by the political history and legal traditions of the particular country. While the various models roughly divide between those with a Kelsenian model and those with the American model, the division is not clear cut, and the categories are not homogenous. The division does not exactly coincide with whether there is a written constitution or not (e.g. Canada has a written constitution and the American model of constitutional review). Even the term "constitutional court" has no homogenous meaning, and can include organically separate courts, special chambers within a Supreme Court, or a Supreme Court with jurisdiction over ordinary law and constitutional law. There is no existing model that it is suggested the UK should move towards or adopt in creating specialist HRTs. Instead, what is suggested is unique to the UK. Specialist tribunals that fit with the UK's common law tradition that operate below the UK Supreme Court and within the plural multi-layered constitutional devolution settlements, and which continue to respect Westminster Parliamentary sovereignty.

What type of court would the new specialist tribunals be?

What is proposed is to introduce specialist rights tribunals that have some of the processes that could be said to be similar in some ways to the Kelsenian model, for example providing for the possibility of the issuing of advisory opinions and allowing for receipt of references from other courts concerning the scope, limit and application of a rights. But the tribunals would not have the constitutional powers of a Kelsenian court, which are considerable. Similarly, what is also not being proposed is a constitutional court with the power to strike down primary legislation which both the American Supreme Court, and Kelsenian courts have. In designing specialist domestic HRTs for the UK, it is of course not necessary to adopt one or other of the models, and the UK in many ways has a unique constitutional set up. As Ginsburg has said 'Constitution making is always, and always has been, comparatively informed; it involves a balance between borrowed models and local tailoring, between conventional choices and innovation.'[30] A country's legal and political history will of course inform its constitutional hue and design[31] and looking at the process and outcomes of constitutional building and history in

[30] Tom Ginsburg, *Comparative Constitutional Design*, (Cambridge University Press, (2012) 2
[31] See for example in France, J W F Allison (ed) "French Constitutionalism: The relation between French history and French constitutionalism" in *Comparative Constitutionalism* (Oxford University Press, 2013) 89-104

other jurisdictions can help inform ideas about any future shaping or re-modelling the UK's constitutional design, but it is also possible to be innovative, as is being suggested here.

Creating specialist HRTs with the powers and at the level being suggested would not be comparable with any other constitutional model[32] but would allow for more effective and efficient rights protection within the UK's already unique constitutional model. It would be a bespoke solution for the UK, intended to address the problems identified. The specialist HRTs would have more in common with constitutional courts, in terms of protecting a written "bill of rights", being the expert court entrusted with first instance pre legislative and post legislative review of devolved legislation and as the institutional body which will consider s.4 declarations of incompatibility with regards to Acts of the Westminster Parliament. But the tribunals would fall short of being separate constitutional courts. In essence what is proposed is domestic specialist tribunals that are given the specific power and jurisdiction to decide cases concerning the rights in the HRA (and any other bills of rights that are adopted), and that all cases – whether public or private law – are, in the first instance, determined by that tribunal, with its bespoke procedures and rules and expert judges. What is being proposed is a "specialist court" and not an apex "constitutional court" albeit the tribunals will exercise powers and operate within a jurisdiction more often associated with constitutional courts. Inevitably and necessarily of course the jurisdiction will traverse a wide area of law, but only where human rights are at the centre of the claim. The tribunals would act more akin to "constitutional courts" in respect of legislative acts of the devolved parliaments, but would, as all courts within the UK are, be constrained by Parliamentary Sovereignty in respect of Acts of the Westminster Parliament, and subject ultimately to the appellate jurisdiction of the UK Supreme Court.

As to where the specialist tribunals would sit within the court structure, as set out in Chapter Five they would be situated as part of the Upper Tribunal, and judges would predominantly be High Court judges, but with the option to constitute the judicial bench in different ways most suited to the case to be decided. What is not being proposed is a new branch, or division, of the existing High Courts (like for example the Chancery Division or indeed the Administrative Court). The reasons for this, as set out in the previous chapter, include the desirability of speed and ease of access for claimants, bespoke disclosure rules, bespoke rules of evidence, bespoke

[32] This thesis does not include any in depth review of human rights protection in other common law jurisdictions. The Canadian model is one in particular that would warrant closer consideration. In Canada there are Federal and Provincial Human Rights Tribunals which predominantly deal with discrimination claims.

costs rules, and the ability to adopt, where deemed appropriate, a more inquisitorial as opposed to adversarial process. Creating new human rights courts (as opposed to a tribunal) as a division of an existing High Court, with different procedural rules, costs rules and evidential rules would be cumbersome and (even more) complex, and risks failing to engender the specialism aimed for. Further, creating a specialist human rights court as part of the "high courts" in Scotland, if the Scottish Parliament chose to do so, would be more difficult; the divisions of the High Court that exist in England and Wales and Northern Ireland (so Family, Chancery and Kings Bench) do not exist, in Scotland, where the court structure is significantly different, comprising of the "supreme courts" – the Court of Session and High Court of Justiciary - and Sheriff Courts. The Court of Session, divided as it is between the Inner and Outer courts, is not divided strictly according to the area or category of law, at least not in the same way as the High Courts of England and Wales and Northern Ireland are.

If HRTs are to be created throughout the United Kingdom it will be important that there is a degree of similarity, as well as the opportunity for differences tailored to the needs and legal systems of the devolved nations. Devolution presents challenges as well as benefits. The devolution settlements and legislation is complex and navigating how the tribunals could be set up in Scotland and Northern Ireland in particular is not straightforward. While there will be no need to make any amendments to the Human Rights Act, save as to include the new tribunals in s.4(5)[33] to grant the power to make declarations of incompatibility, amendments would be needed to the Devolution Acts. In addition, some new powers for the new tribunals are proposed, and some changes to the roles of the existing courts to enable the courts and the new tribunals to fully play their part in what has been described as the differential constitutional model. In order for this model to fully operate and in order to fully realise the benefits some of the powers currently exercisable exclusively by the UK Supreme Court in respect of devolution matters, namely those that concern human rights, should first be considered by the new tribunals. It is accepted that this is likely to be controversial and will of course be a matter for the devolved parliaments to consider and decide and would require Acts of the UK Parliament granting the necessary power to the devolved parliaments to set up the tribunals and make any necessary amendments to the Acts of devolution.

[33] Section 4(5) defines the meaning of "court" in s.4 and so which courts have the power to issue declarations of incompatibility. Currently the courts include the UK Supreme Court, the Judicial Committee of the Privy Council, in Scotland the High Court of Justiciary (sitting otherwise than as the Court of Session), the High Court and Court of Appeal of England and Wales and of Northern Ireland and the Court of Protection.

How then would new specialist tribunals fit with the current UK pluralistic, multi-layered constitution? First, the jurisdiction and role of the Supreme Court will be considered to understand how specialist HRTs could legitimately operate in and across the UK and under the UK Supreme Court. Following that will be consideration of devolution.

Relationship with the UK Supreme Court

As set out in Chapter One the UK Supreme Court was established by the Constitutional Reform Act 2005 and replaced the Appellate Committee of the House of Lords and had transferred to it devolution jurisdiction from the Judicial Committee of the Privy Council[34]. The Supreme Court is the only UK court. It is legally separate from England and Wales and does not fall within the remit of the Lady Chief Justice of England and Wales[35] in her role as head of the judiciary of England and Wales[36], the head of the Scottish Judiciary is the Lord President of the Court of Session[37] and the head of the judiciary of Northern Ireland is the Lady Chief Justice of Northern Ireland[38].

It is proposed that with the creation of specialist HRTs the role of the UK Supreme Court will remain unchanged. What could be altered in a limited and specific way is the route and access for appealing to the UK Supreme Court. An appeal from the specialist tribunals could lie directly to the Supreme Court in cases concerning pre-enactment scrutiny of devolved legislation[39], if this power were to be granted, with the decision as to whether to include this power being left to the devolved parliaments. The UK Supreme Court currently has exclusive

[34] S.40(4) Constitutional Reform Act 2005. The UK Supreme Court is now the final appellate court for all civil and criminal matters arising in the three United Kingdom jurisdictions, save, importantly and significantly, for criminal matters in Scotland, where the Scottish High Court of Judiciary is the final appellate court. Some further explanation in terms of Scotland and is necessary here. An important effect of the Scotland Act 1998 and the Human rights Act 1998 was to make the position of Lord Advocate in Scotland, who is the primary law officer in Scotland and head of the Scottish prosecution service, a member of the Scottish executive. By virtue of s.57(3) of the Scotland Act, the Lord Advocate has no power to "make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights". But this does not apply to "an act of the Lord Advocate (a) in prosecuting any offence, or (b) in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland." This exclusion however has not wholly preserved the independence of Scottish criminal law, and challenges have been made to broader aspects of the Scottish criminal law and procedure on the basis on incompatibility with Convention rights. The Supreme Court does have jurisdiction over devolution and Convention issues arising in the Scottish criminal courts in this more limited way.

[35] The Current Lady Chief Justice of England and Wals is Dame Sue Carr

[36] https://www.judiciary.uk/about-the-judiciary/our-justice-system/the-supreme-court/

[37] Currently the Right Hon Lord Carloway

[38] Currently Dame Siobhan Keegan

[39] See Chapter Five.

jurisdiction where a reference is made by one of the Law Officers of Scotland[40], Northern Ireland[41] and Wales[42], or the UK, this could be altered to add in a layer below for consideration first by the specialist tribunals.

There are good reasons for questions as to compatibility of proposed devolved legislation of to first be considered by the specialist tribunals. The HRTs will have the specialist knowledge and expertise not only in human rights law generally, but each tribunal in the devolved nations will also have specialist knowledge and an understanding of the particular issues in the jurisdiction in which the case has arisen. A first instance hearing before these tribunals prior to consideration by the UK Supreme court will more likely result in robust decisions that correctly and consistently interpret and apply human rights law and devolution matters. But in addition, and importantly, a first instance decision would provide the UK Supreme Court with a first instance judgment and reasoning from specialist judges and would provide for arguments to have been fully aired and adjudicated on prior any appeal and determination by the UK Supreme Court. For references by the Law Officers of Scotland, Northern Ireland and Wales it is therefore proposed that these first go the devolved nations HRT, with an appeal thereafter directly to the UK Supreme Court. Here the "England and Wales" HRT would need to be constituted as a specialist Welsh tribunal. A direct appeal as of right to the UK Supreme Court thereafter would then ensure there was less delay in the matter being finally determined, recognising legitimate concerns in delaying the enactment of legislation passed by an elected institution. This may cause concern in the devolved nations, as it would bypass the existing

[40]s.32A Scotland Act 1998: The Advocate General, the Lord Advocate or the Attorney General may refer the question of whether a Bill or any provision of a Bill relates to a protected subject-matter to the Supreme Court for decision. s.33: The Advocate General, the Lord Advocate or the Attorney General may refer the question of whether a Bill or any provision of a Bill would be within the legislative competence of the Parliament to the Supreme Court for decision.

[41] Northern Ireland Act 1998: Schedule 10, paragraph 33: The Attorney General, the Advocate General for Northern Ireland, the Attorney General for Northern Ireland or the Advocate General for Scotland may require any court or tribunal to refer to the Supreme Court any devolution issue which has arisen in proceedings before it to which he is or they are a party.

[42] The Government of Wales Act 2006: Schedule 9, para 29-30. 29(1) The relevant officer may require any court or tribunal to refer to the Supreme Court any devolution issue which has arisen in any proceedings before it to which that person is a party. (2) In sub-paragraph (1) "the relevant officer" means— (a) in relation to proceedings in England and Wales, the Attorney General or the Counsel General, (b) in relation to proceedings in Scotland, the Advocate General for Scotland, and (c) in relation to proceedings in Northern Ireland, the Advocate General for Northern Ireland. 30(1) The Attorney General or the Counsel General may refer to the Supreme Court any devolution issue which is not the subject of proceedings. (2) Where a reference is made under sub-paragraph (1) by the Attorney General in relation to a devolution issue which relates to the proposed exercise of a function by the Welsh Ministers, the First Minister or the Counsel General—(a) the Attorney General must notify the Counsel General of that fact, and (b) the function must not be exercised by the Welsh Ministers, the First Minister or the Counsel General in the manner proposed during the period beginning with the receipt of the notification and ending with the reference being decided or otherwise disposed of.

appellate courts, so while it is argued there would be benefits, it would be have to be a matter for the devolved parliaments.

An additional way in which devolution could be enhanced is by giving the HRTs the power to issue advisory opinions; this is a power that could be utilised by both ordinary courts as well as by the Law Officers where concerns are raised in the devolved Parliaments as to whether a proposed bill or other legislative act may be unlawful due to incompatibility with Convention (or in the future other) rights. Again, any appeal to the Supreme Court would have the benefit of any advisory opinion as well as any judgment from the tribunals. More generally in terms of advisory opinions from the HRTs, if this power were to be granted, a similar power would also need to be granted to the UK Supreme Court, with any opinion of the UK Supreme Court taking precedent.

The new specialist tribunals and devolution

As has been set out the new tribunals would be located in each of the three *legal* jurisdictions of the UK within the Upper Tribunal. UK Primary legislation would create the power to set up the new tribunals to ensure there is no issues with regards to the competency of the Tribunals in respect of reserved matters. This legislation would have to be drafted with the involvement of the devolved parliaments and consented to by them. Having been granted the power to set up the specialist tribunals it would then be for Scotland and Northern Ireland to bring forward legislation to create the tribunals and issue the rules and procedures, these would be tailored and set up to function within and at the devolved level. For England and Wales, it is suggested that there would be a joint England and Wales Human Rights Tribunal given the shared legal jurisdiction; the rules and procedures for the tribunal would be passed by the Westminster Parliament but would include the option of the England and Wales Human Rights Tribunal sitting and being constituted as a "Welsh Human Rights Tribunal" when considering legislation passed by the Welsh Parliament or matters specific to Wales.

In considering how specialist HRTs could operate at the devolved level the focus below will be on Scotland. Some of the important differences in Northern Ireland (which is particularly complex) and Wales will then be highlighted, but space precludes more detailed analysis, and in any event as has already been stated the intention here is not to provide a detailed blueprint or legislative programme for the creation of the new tribunals for each jurisdiction. There are multiple ways in which the tribunals could be set up and moulded to fit within each jurisdiction.

Scotland:

Scotland has a distinct legal system from the rest of the UK, it has a separate jurisdiction, separate legal profession and importantly a very different court structure to that of England and Wales[43]. In setting up any new tribunal this different legal system and court structure will shape how a new tribunal would fit and interact within the Scottish legal system. Consideration will need to be given as to how to maximise the benefits of a specialist HRT, while respecting the existing hierarchy of the court structure.

How a Scottish HRT, at part of the Upper Tribunal, could be established under the current devolution settlement and would fit within the existing court structure is a complex, and sensitive, question and requires detailed consideration. The factors that need to be considered are (i) the distinct Scottish legal system (ii) human rights is neither a devolved or a reserved matter (it depends on the subject matter in issue) (iii) The HRA is a reserved (protected enactment) matter, (iv) the court system is a devolved matter, (vi) The Scotland Act is a protected enactment and (vii) the restrictions on the Scottish Parliament to legislate set out in s.29 and s.28 of the Scotland Act 1998. There would need to be cooperation between the Westminster and Scottish Parliament to enact new legislation required and to amend existing devolution legislation. Difficulties have already been encountered in Scotland when legislating for additional protections for human rights. An example that has already been given is the original United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill ("UNCRC Bill") passed in Scotland in March 2021 to incorporate the UN Convention on the Rights of the Child ("UNCRC") into Scotland. The Bill was the subject of a Reference by the Attorney General and Advocate General for Scotland[44]. The UK Supreme Court found that parts of the UNCRC Bill modified s.28(7) Scotland Act and so the Bill was out with the legislative competence of the Scottish Parliament. A revised and much paired down version of the UNCRC Bill was subsequently drafted and enacted in 2024.

One of the criticisms made in this thesis is the lack of the development of a body of domestic human rights jurisprudence by specialist judges. A weakness of the current system is the lack of a cohesive body of domestic law developed and applied by judges with specialist and expert knowledge of human rights law in courts designed to determine positive rights claims.

[43] C.M. Himsworth "Devolution and its jurisdictional Asymmetries" (2007) 70 MLR 31, 35-36

[44] Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [2021] UKSC 42, [2021] 1 WLR 5106

Currently judges in any of the UK's courts may be called upon to adjudicate a claim concerning a Convention right using existing court rules and procedures. Bespoke rules and procedures congruent with the adjudication of rights cases are, it is argued, required. How then to ensure that the identified weaknesses are addressed, the benefits realised, but the existing courts structures are respected. Below are suggestions, but of course there are many options as to how to fit a new tribunal into the Scottish legal system and court structure.

To be consistent with the arguments being made, it is suggested that the power of the Law Officers to refer Scottish devolution matters which concern human rights to the UK Supreme Court should first be to the specialist Scottish HRT. It is also suggested that thereafter the matter go straight to the UK Supreme Court (to avoid delay), but it is recognised this would be controversial. An even more difficult consideration is to determine the role of the specialist tribunal where the Court of Session or High Court of Judiciary decide to determine a devolution matter concerning human rights, where an appeal would then currently go to the UK Supreme Court. Here there would be no role for the specialist tribunal. In such cases, in order to benefit from the advantages of the expert tribunal but respect the existing status of the Scottish supreme courts, an option would be to include a specialist judge from the Scottish HRT on the bench for such cases. This would protect and respect the role of the existing courts but would make use of the specialist judges.

There is then the power of the tribunal to issue advisory opinions. It is suggested that this power is limited to the specialist HRT and the UK Supreme Court. Here is it suggested that the appellate courts below the UK Supreme Court would not be bound by the tribunal's advisory opinion, but that a decision to reject the advisory opinion would provide an automatic right to appeal to the UK Supreme Court. The advisory jurisdiction of the specialist tribunal is also a power that could be utilised by the Law Officers where concerns are raised in the devolved Parliaments as to whether a *proposed* bill or other legislative acts may be unlawful due to incompatibility with Convention (or in the future other) rights. Such a power and jurisdiction could meet the concern raised in the Lord Advocates Reference[45] about the use of the s.34 Schedule 6 power. This refence concerned a proposed bill legislating for a second Scottish Independence vote. The Presiding officer was asked to give a view as to whether passing

[45] Reference by the Lord Advocate of devolution issues under Paragraph 34 of Schedule 6 of the Scotland Act 1998 [2022] UKSC 31, [2022] 1 WLR 435

legislation for a second referendum was within the competency of the Scottish Parliament. The advice of the Lord Advocate was sought, who was unsure of whether the Scottish Parliament would be competent and so made a reference to the UK Supreme Court[46]. It was argued that the power to make a reference was being misused. The UK Supreme Court rejected this argument and went on to find the proposed legislation would be outside the competency of the Scottish Parliament[47]. In the future the specialist Scottish HRT could be asked to provide an advisory opinion in similar way to the Lord Advocate where an issue arises in respect of convention rights. The parties could apply to appeal a decision of the tribunal to the UK Supreme Court.

Further, the Lord Advocate, the Attorney General or the Advocate General may require any court to refer to the UK Supreme Court any devolution issue which has arisen in proceedings before it to which he is a party[48]. Where the matter is both a devolution issue and a human rights issue, the matter could first be referred to the Scottish HRT. In this way the HRT would be used as a "quasi constitutional court" for human rights devolution issues. But not for "ordinary" human rights claims.

While there would be no question (on an orthodox interpretation of the UK's parliamentary constitution) that the UK Parliament would have the power legislate for a HRT in Scotland, and amend the Scotland Act, some may argue that such legislation is problematic due to the terms of the Act of Union 1707. Article 19 of Treaty of Union protected the constitution of the Court of Session and College of Justice, including retaining the 'same Authority and Privileges as before the Union', but 'subject nevertheless to such Regulations for the better Administration of Justice as shall be made by the Parliament of Great Britain'. Arguably setting up the new tribunals as suggested alters the powers and privileges of the Court of Session and the College of Justice. There are two schools of thought as to the ability of the UK Parliament to amend the Act Of Union. The view of Dicey (orthodox view) is that the new Westminster Parliament created at the time of the union of England and Wales, and Scotland could alter the Articles of the Treaty of Union, and the Treaty of Union had no greater constitutional sanctity than any other piece of primary legislation. The English and Scottish Parliaments in effect abolished

[46] Schedule 6 para 33, Scotland Act 1998
[47] For a discussion on the potential implications of the decision on Scotland and Northern Ireland see Alan Eutace ""A Hidden Scotland"? The effect of the Independence Referendum Bill Reference on Northern Ireland" PL (2024) 487
[48] Scotland Act 1998, Schedule 6 para 33

themselves and created a new parliament to which the old parliaments delegated power, once the Acts of Union was passed sovereignty in its entirety passed to the new UK Parliament. The contrary view, as held by Defoe, was that the Treaty of Union had to be accepted as fundamental law as the Treaty is prior to the UK Parliament and must be superior to it. The Treaty created the UK Parliament and Parliament cannot have the power to alter its own foundation[49]. The Scotland Act 1998 said of the Acts of Union that 'The Union with Scotland Act 1706 and the Union with England Act 1707 have effect subject to this Act.'[50] This would suggest that the provisions of the Scotland Act take effect not withstanding any inconsistency with the Treaty of Union (the Scotland Act 1706 and the England Act 1707 having incorporated the terms of the Treaty of Union).

Whether the Dicey view or the Defoe view is preferred what is clear that the Treaty of Union sought to protect the separate and distinct court system of Scotland, and the separate and distinct Scots law, save that which was inconsistent with the Union. A question may arise, either legally, philosophically, or politically, as to whether creating a new tribunal with the power to scrutinise and adjudicate upon the legality of acts of the Scottish Legislature, and amending the role of the Court of Session for human rights cases 'reduces the Authority and Privileges of the Court of Session' and would see the UK Westminster Parliament interfering with the Scottish Court system. Whatever the correctness or otherwise of the arguments around the Act of Union, the decision as to whether to set up a new Scottish HRT, what role it should play and what powers it should have should rightly be left to the Scottish Parliament.

Northern Ireland.

As with Scotland, Northern Ireland has its own court separate legal system and court structure, although it is similar to that of England and Wales. There are clearly additional considerations and complications in Northern Ireland (over and above the legislative complexities that arise due to devolution), given its constitutional and political history, and following Brexit and the Windsor Framework agreement. Detailed and careful consideration as to how a Northern Ireland HRT would fit within the court structure and constitution in Northern Ireland would be needed in order to ensure the benefits of a specialist tribunal are realised, but the existing

[49] See Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in European Commonwealth* (Oxford University Press, 1999) 6, and see Paul Scott, *1707:the Union of Scotland and England* (Edinburgh Chambers, 1979), 62, quoting D.Defoe, *The History of the Union Between England and Scotland* (London,1786).
[50] s.37

structures are respected. As with Scotland while granting the power to set up a new tribunal in Northern Ireland would require passing an Act of the Westminster Parliament, the creation of the tribunal and the issuing of rules and procedures would be for the Northern Ireland Assembly. A Northern Ireland HRT would also need cross community support.

As a proposal, a specialist Northern Ireland HRT could operate in the way the CAJ suggested[51], so provide a specialist tribunal to adjudicate on human rights issues on appeal from the ordinary courts, could receive references from the ordinary courts but also allow for direct access by litigants in person. In order to preserve the current constitutional settlement an appeal from the tribunal would lie to the UK Supreme Court. Rules could be tailored to also ensure that the new tribunal worked closely with the Northern Ireland Human Rights Commission and the Equalities Commission for Northern Ireland, providing for example the Commissions with power to intervene in cases, to have locus to bring cases to the tribunal, and to make references for an opinion on the compatibility of any bills with Convention rights, the Belfast (Good Friday Agreement) and the Windsor Framework. As with Scotland it would be proposed that the powers of reference for devolution matters touching on human rights, and compatibility matters, would be to the new HRT. This would require amendment to the Northern Ireland Act 1998.

Given the status and important monitoring and compliance roles given to the Northern Ireland Human Rights and Equalities Commissions for Northern Ireland provision could also be made for the Commissions to be given an automatic right to intervene in any such reference. Similarly paragraphs 7 and 8 of Schedule 10 of the Northern Ireland Act would be amended to replace reference to the Court of Appeal with the HRT, where a devolution issue concerns human rights. Again, with an automatic right to intervene by the Northern Ireland Human Rights Commission and the Equalities Commission for Northern Ireland. It should also be remembered that there is a proposal for a Charter of Rights for the Island of Ireland, a proposal made by the Joint Committee of Northern Ireland Human Rights Commission and Irish Human Rights and Equality Commission, which if created would be a further potential source of rights[52], and also add another layer of complexity.

[51] As set out in Chapter One.
[52] < https://nihrc.org/about-us/joint-committee-nihrc-ihrec > accessed 2 July 2024

Wales

Setting up a new England and Wales HRT would be less constitutionally complex, as there is no separate court structure in Wales and there are only 6 independent tribunals[53], which are administered by the Welsh Tribunal Unit. It is not proposed that there is a Welsh specialist HRT administered by the Welsh Tribunal Unit, at least not initially[54]. A new HRT for Wales would most likely be one that was for England and Wales and so not considered a "Welsh tribunal" under s.59 Wales Act 2017[55]. However, as set out in Chapter One there are particular concerns in Wales with regards for example to protecting the Welsh culture and language, as well as particular economic conditions with parts of Wales being significantly disadvantaged. The Welsh Parliament also has legislative powers and there are good reasons for there to also be a specific Wales HRT. To that end what is proposed is that while there would be an "England and Wales Human Rights Tribunal" there would be the option and means by which it could be constituted as a specialist Welsh tribunal where matters affecting Wales and Welsh legislation are under consideration.

As with the other devolutions Acts, schedule 9 paragraphs 7,8 and 9 of the Wales Act 2017 would need to be amended to replace the court to which devolution matters concerning human rights to be referred to the England and Wales HRT, rather than the Court of Appeal or the High Court as currently provided for. The role of a HRT in respect of legislation passed by the Welsh government, and the power to issue advisory opinion, could mirror those as suggested for Scotland and (potentially) in Northern Ireland, but be considered by a tribunal specially constituted as a "Welsh tribunal".

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[53] Adjudication Panel, Agricultural Land Tribunal, Mental Health Review Tribunal, the Educational Tribunal, Residential Property Tribunal for Wales and the Welsh Language Tribunal. See s.59 Wales Act 2017

[54] The Law Commission report on Devolved Tribunals recommended an independent, unified tribunal system for Wales and that the "Welsh Tribunals" be replaced by a single First Tier Tribunal for Wales, which is then sub-divided into Chambers, and an Appeal Tribunal to hear appeals from the First Tier Tribunals. A response was provided by the Welsh Government in May 2022 in "Delivering Justice For Wales". https://www.gov.wales/sites/default/files/publications/2022-06/delivering-justice-for-wales-summary-may-2022.pdf accessed 2 July 224, which was supportive of the recommendations, and a White Paper was published in June 2023 to consult on the proposals for a 'modern system for Wales' devolved tribunals https://www.gov.wales/sites/default/files/pdf-versions/2024/2/4/1708593949/delivering-justice-for-wales-2024-progress-report.pdf accessed 2 July 224.

[55] This section lists those tribunals that are "Welsh Tribunals".

Relationship with the ECtHR

The ECtHR will remain, as long as the UK remains a member of the Convention, the institution ultimately responsible for the interpretation of Convention rights. However, it is right to acknowledge that changes at the level of the European Court mean that in future more reliance will be placed on national authorities for the compliance with Convention rights. Robert Spano, the President of the ECtHR from May 2020 to October 2022, set out in an article[56] his assessment that the ECtHR has moved from a phase of 'substantive embedding' to one of 'procedural embedding' suggesting a different role for the court going forward. In line with the principle of subsidiarity he sees the role of the Court now and in the future to be more concerned with ensuring that the national authorities have the right procedures and decision-making processes in place when implementing and applying Convention rights, rather than embedding the substance of Convention rights.[57] There will be, he considers, an increased emphasis on the need for effective domestic remedies. He argues that 'substantive embedding' has been top down, and this has been the subject of some criticism as the rights have been developed by international judges over and above national democratic political life. The rights have been 'created in isolation from the political community in which they belong'. Spano argues that the ECtHR is now moving into the 'age of subsidiarity' and a more bottom-up approach, 'empowering national rights holders and decision makers to take the lead on securing human rights.' If he is right, then the time seems right for the creation of the new specialist domestic HRTs being argued for here.

Aligned with this change in emphasis of the ECtHR are the explicit changes referred to in the introduction that have been introduced with the coming into force of Protocols 14 and 15. Protocol 15[58] has reenforced the principle of subsidiarity and the margin of appreciation and introduced the shorter four-month time limit for lodging an application. Protocol 14, which came into effect in June 2010, added a new admissibility criterion to Article 35 of 'suffering a significant disadvantage'.[59] These changes, and if Spano is correct the change in emphasis towards a more process-based review by the ECtHR, suggest that heavy reliance can no longer be placed on Strasbourg to be the primary body responsible for developing, defining, and

[56] Robert Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law,' (2018) HRLR Vol 18, Issue 3 473.
[57] For an analysis of this change in approach see Thomas Kleinlein "The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution", (2019) ICLQ 68(1) 91-110
[58] Agreed in 2013 but which only came fully into force in August 2021
[59] For admissibility criteria see "Practical Guide on Admissibility Criteria" < https://prd-echr.coe.int/documents/d/echr/Admissibility_guide_ENG updated 31 August 2023 > , accessed on 2 July 2024

limiting the rights in the Convention, as they apply in the UK, and the domestic courts should take a more leading role. It is suggested that the creation of new specialist HRT would fit with the changes being made the level of the ECtHR. The national authorities, and the domestic courts, are to be encouraged to develop the Convention rights, using the both the general Convention principles and the case law covering each convention right now clearly set out by the jurisprudence of the ECtHR, in ways that respect the culture and legal tradition of their countries and fully protect the rights in the Convention domestically. It is for this reason that the way in which the Supreme Court has articulated how the margin of appreciation should be applied by the domestic courts under the HRA[60] , analysed in Chapter Four, is of concern.

There is the possibility of the UK leaving the Convention system and revoking the HRA. Even if the HRA were to be repealed and/or the UK left the Convention system, assuming there would be in place some form of British Bill of Rights, then there would still be a role, an important role, for HRTs in the UK. The arguments made here would in the main also apply to any British Bill of Rights, indeed to any document that contained a list of positive rights. The same issues that arise in terms of adding these rights on to a civil libertarian, common law tradition, would arise. If there were a British Bill of Rights, the HRTs would be the courts responsible for the interpretation, application and enforcement of those rights, in the same way as it is being suggested they would be for Convention rights. Save of course there would be no role for the ECtHR and no need for any margin of appreciation if the UK left the Convention system.

Final concluding Remarks

One advantage of the UK's unwritten constitution is that it does allow for re modelling and amendment of the constitution and courts to be tailored to the needs, and legal traditions of the nations that make up the UK. In the field of human rights this is a strength. The intention here has not been, and could not be, to provide a detailed plan for the creation of HRTs. Nor has it included a detailed comparative review of constitutional courts and constitutional models. What has been proposed is unique to the UK, and the aim has been to identify weaknesses in human rights protection in the UK and propose a solution.

[60] See Chapter Three and the discussion of the *Elan-Cane* case, and see also the critical analysis of the UK Supreme Court's approach in Kacper Majewski "Mirroring the Margin" (2002) PL 2022, Oct, 553-561

At the heart of this thesis has been the protection of the individual from the abuse of government and executive power. Abuse of power by public bodies and officials when acting or failing to act in matters concerning the lives of individuals; acts and omissions of local authorities, health professionals, police, social workers. In this way it has been concerned with the nuts of bolts, with the everyday issues, but none less important for that. It has been less concerned with more "lofty" questions of law making, the workings of the legislature and its direct relationship with the judiciary. What has been argued for is the need for meaningful, effective access to independent tribunals to vindicate rights and for sufficient remedies to be speedily available. It has been suggested that this is currently lacking and bolting on a set of positive rights by enacting the HRA, while a significant step forward, has failed to 'bring rights home'. The deep-rooted tradition of residual liberties in the UK legal system has proved stubborn in the face of change; it has not allowed the space required for positive rights to be fully realised domestically. There also continues to be a perception by some that the rights in the Convention are foreign and are interpreted by foreign judges. Creating a domestic court presided over by UK judges may go some way to meet the concerns of some about the foreign nature of Convention rights and the role performed by foreign judges.

The intention throughout has deliberately been to keep grounded in practice, grounded in the reality of litigation and adjudication. But it has still required the consideration and application of constitutional theory and has offered a theory of differential constitutionalism as part of a collaborative constitution. It is hoped the thesis has achieved the objective of marrying theory and practice together to ensure a rounded and more complete response to the questions posed. Questions which are likely to remain and only increase in an ever-increasing complex society, where less and less of our everyday lives are untouched by the workings of government and public officials.

In bringing this thesis to a conclusion, it is to the future that the final remarks are addressed. This thesis has touched on the changes occurring at the level of the European Court of Human Rights and suggested that the European Court can no longer be relied upon to continue to develop the substance of rights. Its role is likely to move to reviewing the procedure and process by which rights are protected in member states, and not on the substance and contents of rights. This at a time when significant new challenges to rights are emerging, and challenges raised as to the extent and purpose of "human rights". These future challenges suggest a need for a dynamic, flexible, modern and expert rights adjudication system, which it is argued the new

tribunals would provide. The UK needs to be able to develop rights protection in new areas at speed, and in a way that fits with the values, priorities and traditions of the people that make up the UK. The UK courts should not wait for Strasbourg to determine the limit of rights; the UK does not need to wait for a European consensus to emerge and for the margin of appreciation to be determined. Specialist tribunals and expert courts should be entrusted to develop and apply rights considering the fast changing technological and environmental world. Similarly, Parliaments with strong executives cannot be solely entrusted to protect individuals against an ever-encroaching state making the case for a greater role for the courts to provide the necessary checks on the abuse of power and the protection of individual rights.

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