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SPECIAL CONFERENCE ISSUE
THE NEW ZEALAND BILL OF RIGHTS ACT

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
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NEW ZEALAND CENTRE FOR
PUBLIC LAW
TE WĀNANGA O NGĀ KAUPAPA TURE Ā IWI O AOTEAROA

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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THE NEW ZEALAND BILL OF RIGHTS ACT 1990 AND CONSTITUTIONAL PROPRIETY

Janet McLean*

In this paper the author explores the prospects for developing constitutional conventions in relation to the operation of the New Zealand Bill of Rights Act 1990. Drawing extensively on the United Kingdom experience of the Human Rights Act 1998 (UK), she argues that statements of human rights compatibility which accompany bills at introduction to Parliament should be used to trigger processes which achieve heightened scrutiny and to create a record of rights justification to which the courts may later refer.

This paper questions whether constitutional convention or constitutional propriety has a role to play in the operation of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act), what role it might play and the institutional changes that might need to be made in order to make it work more effectively. Constitutional convention has always been an indispensable part of our constitutional tradition. Indeed, I would go further and argue that it is indispensable to the effective working of every constitution that aims to limit arbitrary government. My argument is that the partial legal protection of human rights without the robust operation of constitutional convention has the potential to leave us worse off than before. I am not suggesting that the sky is about to fall but that we should think seriously about how to foster constitutional conventions in relation to the Bill of Rights Act. Under what conditions will constitutional convention be able and allowed to thrive?

* Professor, University of Auckland Faculty of Law. This is the written version of a paper which was given as a public lecture at Victoria University of Wellington on 30 August 2011. Thanks to Dean Tony Smith, Claudia Geiringer and Petra Butler for the invitation to speak on the occasion of the twenty-first birthday of the New Zealand Bill of Rights Act. Thanks also to Kim Scheppele for making norms the topic of the 2010 "Constitutional Law Schmooze" at Princeton University and for the participants at that event, to John Borrows, Hanna Lerner, Ben Keith, Paul Rishworth and Alan Ryan for helpful conversations, and to Gerry Mackie for teaching me a little about the science of norms. Max Harris's and Lucy Davidson's excellent work set me thinking. Thanks to Alistair Birchall for research assistance. All faults, errors and omissions are my own.

I was given my first introduction to constitutional law in 1983. At that time, constitutional law was not considered "real law". It was a "soft subject" understood (by the students at least) to lack the intellectual rigour of every other course in law school. Students who liked it were viewed with suspicion. This was largely based on the fact that there were scarcely any cases. I discovered later that these prejudices had a good scholarly pedigree. Austin had taught generations of British lawyers (and we counted ourselves as British for these purposes) that constitutional law is not "law properly understood" but rather a version of "positive morality".[1] Since then, both New Zealand and British constitutional law has become increasingly "juridified":[2] both jurisdictions have now enacted constitution acts and bills of rights, and there is much more case law. Constitutional law (now called "public law") has risen in status as a part of the discipline, as well as among law academics and students. It begins to look more like "real law". At the same time, constitutional conventions, which used to take up a few weeks of the curriculum, have been progressively relegated to a few hours, if that. We do not talk much about constitutional morality anymore and I cannot help but wonder whether we may have lost something. Can constitutional morality survive this shift (or partial shift) to law? There are a number of constitutional settings where the shift to law raises issues for the maintenance and survival of norms of constitutional propriety and, indeed, often requires their invention or reinvention (Crown obligations under the Treaty of Waitangi being one). In this paper I want to concentrate on the Human Rights Act 1998 (UK) and the (New Zealand) Bill of Rights Act. But first there are a couple of preliminaries.

I THE CONSTITUTIONAL STORY

Let me begin by focusing attention on the academic enterprise itself, and asking: how do we, as academic lawyers currently teach students about the constitution? In the past two decades, constitutional lawyers (myself included) have tended to emphasise what the British and New Zealand constitution does not have rather than what it does have. How do we communicate our constitutional tradition? One familiar way to tell the narrative is this: Parliament is supreme which means that it can make or unmake any law whatsoever; there is no division of powers but a fusion of powers; there are no higher law protections of individual rights; the Crown cannot be subject to coercive order; and there is no written constitution.

There is, however, another older, way of telling the same constitutional story. The doctrine of the supremacy of Parliament, understood in context, was intended to *limit* the powers of the King or

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1 John Austin *The Province of Jurisprudence Determined* (John Murray, London, 1832) at 242.

2 For a discussion of the term see Gunther Teubner "Juridification: Concepts, Aspects, Limits, Solutions" in Gunther Teubner (ed) *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (De Gruyter, New York, 1987) 3. Teubner contends that juridification "does not merely mean proliferation of law; it signifies a process in which the interventionist social state produces a new type of law, regulatory law": at 18.

Crown to act without Parliament (Bill of Rights 1688 (UK)).[3] "The King can do no wrong", as understood by Bracton, contains a normative component,[4] later adopted by Blackstone as: the King must not do wrongdoing and the law shall control his evil counsellors.[5] The "august dignity of the state or Crown" is not to be found in the Queen in Parliament but rather in the common law judges.[6] Declarations (meaning ordinary declaratory judgments of the Declaratory Judgments Act 1908 variety) are an effective remedy against government "not because [they] could be enforced but because [they] would be obeyed".[7] The United Kingdom and New Zealand do not lack for written constitutions, it is merely that, in Giovanni Sartori's words, their constitutions have been "written differently".[8]

The narratives we attach to the Human Rights Act (UK) and the Bill of Rights Act can also be told in these two different ways. Looked at in the first way the Bill of Rights Act: preserves parliamentary sovereignty; avoids any coercion against a sovereign Parliament; does not enjoy higher law entrenched status; and continues to make the judges subordinate to Parliament.[9]

The introduction to the White Paper to the bill of rights proposal, however, tells the second version of the story: the Bill is to act primarily as a guide for politicians and law makers; Parliament has long had the task of respecting rights and liberties and the enumeration of such rights and liberties will help Parliament to do so more effectively.[10] Of course, such an approach can be criticised as too sanguine. But it has more force when understood in the context of the second version of the constitutional story that has for centuries emphasised the need to constrain arbitrary

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3 Bill of Rights Act 1688 (UK) 1 Will & Mar c 2.

4 According to Bracton, "[t]he king must be under no man but under God and the law, because law makes the king. Let him therefore bestow upon the law what the law bestows upon him, namely rule and power, for there is no rex where will rules rather than lex": George E Woodbine (ed) *Bracton on the Laws and Customs of England* (Belknap Press, Cambridge, 1968) vol 2 at 33.

5 Blackstone built on Bracton's approach: "… as a king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments, and parliamentary impeachments, that no man shall dare to assist the crown in contradiction of the laws of the land": William Blackstone *Commentaries on the Laws of England: Book the First* (Clarendon Press, Oxford, 1765) at 237.

6 AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan & Co, London, 1959) at 394.

7 Ivor Jennings *The Law and the Constitution* (5th ed, University of London Press, London, 1967) at 132.

8 Giovanni Sartori "Constitutionalism: A Preliminary Discussion" (1962) 56 Am Pol Sci Rev 853 at 862.

9 See for example Stephen Gardbaum "The New Commonwealth Model of Constitutionalism" (2001) 49 Am J Comp L 707 which both uses and critiques the Constitution of the United States of America as the standard point of constitutional comparison.

10 See Department of Justice *A Bill of Rights for New Zealand: A White Paper* (1985).

government and – this is the important point – independently of where in the constitutional system the *legal* power resides, be it in the King, Parliament or even the judges. Legal power is moderated and constrained by constitutional convention.

This second version of the United Kingdom and New Zealand constitutional story regards the ends of constitutionalism as the limitation of arbitrary government; this is a telos shared with all constitutions properly so-called.[11] The constitution here is serving the same ends as the written constitutions of France, the United States and elsewhere. It aims to restrict arbitrary power, to limit government and to enhance liberty. In the British constitution it happens to have been constitutional convention that has performed much of this work. While constitutional convention has sometimes been associated with English exceptionalism, that is a distinction merely about means, not ends.[12]

The idea of the conventional constitution also has a long pedigree in our constitutional tradition. While most people tend to associate the idea with late nineteenth century Dicey, it long predates his work.[13] In the seventeenth century, Hobbes famously credited the sovereign with undivided legal power but he also devoted the whole of *Leviathan*'s thirtieth chapter to the positive morality or "duties of the sovereign".[14] Locke argued that the prerogative ought to be exercised on trust for the good of the people – although admittedly if the monarch could not be compelled to summon the legislature, the people could only appeal to Heaven.[15] In the eighteenth century, Burke argued that "discretionary powers vested in the monarch should be exercised on public principles and national grounds".[16] He emphasised that "powers are restricted not only by laws, but also by usages, positive rules of doctrine and practice".[17] Austin suggested that unconstitutional laws are subject to a moral sanction.[18] John Stuart Mill argued that what protects the people is "[t]he unwritten maxims of the Constitution – in other words, the positive political morality of the country".[19] It is these unwritten rules that limit the use of lawful powers. In the twentieth century Hart told us that such non-legal

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11 Sartori, above n 8, at 855.

12 At 853–855.

13 As Dicey acknowledges, he was relying directly on the earlier nineteenth century work of Freeman, but the idea is much older: see O Hood Phillips "Constitutional Conventions: Dicey's Predecessors" (1966) 29 MLR 137.

14 See Edwin Curley (ed) *Leviathan: With Selected Variants from the Latin Edition of 1668* (Hackett Publishing, Indianapolis, 1994) at 219–233.

15 John Locke *Two Treatises on Government* (Printed for R Butler, London, 1821) at 334.

16 Edmund Burke *The Works of the Right Honourable Edmund Burke* (Henry G Bohn, London, 1864) vol 2 at 331.

17 O Hood Phillips, above n 13, at 188, paraphrasing Burke.

18 John Austin, above n 1, at 281.

19 John Stuart Mill *Conditions on Representative Government* (Parker, Son and Bourn, London, 1861) at 87.

rules are rules nevertheless.[20] According to Hart, our very legal system is, at its foundation, based on norms, including norms of recognition and self-limitation.

What if we were to describe the Human Rights Act (UK) and the Bill of Rights Act as part of this second story? The constitution is about limiting power and in our tradition, legal power has always been moderated by constitutional convention. If the Human Rights Act (UK) and the Bill of Rights Act continue to allow Parliament legal power, that legal power continues to be moderated by constitutional propriety, or constitutional convention. It would be a perverse, unintended effect of a bill of rights, indeed, if we were to forget the crucial role that convention plays and has always played in the constitution, as our constitution becomes increasingly juridified.

But to anticipate the reader's scepticism, perhaps this traditional doctrine of self-restraint is more in the nature of a rhetorical device which is legitimacy conferring, rather than an effective constraint on political actors. Is this a case of British and post-colonial constitutional smugness? Many will be familiar with Stephen Sedley's famous article "The Sound of Silence: Constitutional Law Without a Constitution".[21] He argues that constitutional practices and usages can too easily degrade: the "is" too quickly becomes the "ought". There is something in this criticism. Undoubtedly we are not the same people as we were even three decades ago when I first had my introduction to constitutional law. We have grown up familiar with the insights of public choice theory – we know that voters, politicians, judges and even law professors act self-interestedly. We have come to doubt that politicians are capable of self-restraint. Perhaps believing that has sometimes made it so.

II HUMAN RIGHTS ACT 1998 (UK)

Let me try to confront any potential scepticism with an illustration of how constitutional conventions may have already played a part in the operation of the Human Rights Act (UK). I argue that convention has been developing in two areas – in relation to the use of s 19 ministerial statements of compatibility and in relation to ministerial responses to judicial declarations of incompatibility. I shall take these in turn and compare them with the New Zealand situation.

Section 19 of the Human Rights Act (UK) is the United Kingdom counterpart of s 7 of the Bill of Rights Act. It requires the minister introducing a Bill to the House to include a statement that the Bill is or is not compatible with the Human Rights Act. That statement becomes part of the explanatory memorandum and is meant to be, but is not always, supported by reasons.[22] Professor David Feldman, who in the early years of the Act was legal advisor to the House of Commons and

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20 HLA Hart *The Concept of Law* (2nd ed, Oxford University Press, New York, 1994).

21 Stephen Sedley "The Sound of Silence: Constitutional Law without a Constitution" (1994) 110 LQR 270.

22 The expectation is that the explanatory note should identify the rights affected and include some reasoning – though the practice has not been universal.

Lords' Joint Committee on Human Rights, has told us this involves an assessment of whether there is a 51 per cent chance of the statute being held compatible by the Court at Strasbourg.[23]

The first and striking thing about the conventional usage of s 19 in the United Kingdom is that it is considered a very serious thing indeed for a minister to seek to proceed with a Bill that may be incompatible with the European Convention on Human Rights.[24] Section 19 has been invoked in the United Kingdom in only two cases. One instance was very particular, is difficult to draw general lessons from and need not detain us.[25] The second involved the Communications Bill which later became the Communications Act 2003 (UK). A provision of the Bill prohibited political advertising if the advertiser was of a political nature, or if the ends or nature of the advertisement were political (including influencing the policy, political or legislative process). In an earlier Swiss case, involving a similar provision, the European Court of Human Rights had found a violation of art 10.[26] The ministerial statement under s 19 drew attention to that decision, and said that although the Minister was unable to make a statement of compatibility, the Government nevertheless wished to proceed with the Bill.[27] This was taken very seriously in the political process and triggered a heightened scrutiny. The Bill was considered by the Joint Committee on Human Rights three times as well as by a separate subject committee. Each time the committees considered the matter, they pressed the Government for further justification. In the end, the committees were satisfied that the Government had evinced no lack of respect for human rights and that the Bill could not have been worded less restrictively and have remained practicable. Effectively, they created a "record of rights justification". In Stephen Gardbaum's terms, this was not a case of the legislature having "rights misgivings", but rather of disagreeing about rights.[28] The Bill was duly enacted. The Government

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23 David Feldman "The Impact of Human Rights on the Legislative Process" (2004) 25 Stat LR 91 at 97–98. Cabinet Office *The Human Rights Act 1998 Guidance for Departments* (October 2000) at [36] is to the effect that, in order for a s 19(1)(a) statement to be made, the minister must be satisfied that "at a minimum the balance of argument supports the view that the provisions are compatible" and that the "provisions of the Bill will stand up to challenge on Convention grounds before the domestic courts and the Strasbourg Court." See also the discussion in Lord Anthony Lester "Parliamentary Scrutiny of Legislation under the Human Rights Act 1998" (2002) 4 EHRLR 432. Feldman notes that in Canada, the risk analysis is whether "there is a credible argument that can be advanced in court that a statute is compatible": at 98.

24 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953).

25 This instance concerned the failure of a Bill (which ultimately became the Local Government Act 1999 (UK)) to remedy s 2A of the Local Government Act 1986 (UK), which prohibited local governments from promoting "the acceptability of homosexuality as a pretended family relationship." David Feldman considered the use of a statement under s 19 in that instance as unnecessary and motivated by political – as opposed to legal – concerns: Feldman, above n 23, at 98–99.

26 *VgT Vereingegen Tierfabriken v Switzerland* (2001) 34 EHRR 159 (Grand Chamber, ECHR).

27 Pursuant to Human Rights Act 1998 (UK) s 19(1)(b).

28 Stephen Gardbaum "Reassessing the New Commonwealth Model of Constitutionalism" (2010) 8 ICON 167 at 179.

was successfully able to justify its argument to Parliament that the provision could not be more finely tailored.

One can see a constitutional convention *beginning* to emerge here. Its precise terms have not yet been fully articulated. It has both procedural and substantive elements. It restricts the invocation of s 19 to exceptional cases, triggering strict legislative scrutiny and a heightened burden of justification on government. Substantively, it requires engagement in explicit "margin of appreciation"-style arguments. A strong version would require the showing that there is a 51 per cent chance of the statute being held compatible by the Court at Strasbourg.

The fact that emerging practice has not yet been described by the political actors as the operation of constitutional convention is not evidence against the existence of such a convention. Constitutional conventions are, after all, commonly "articulated after the fact". As they usually operate, constitutional conventions perform a rather neat trick. They are said to represent deeply held and widely shared understandings – and yet such understandings are often only articulated at the moment at which they have been placed in doubt. What really tests the existence of a convention is a crisis. Often only at that point will political actors need to articulate the conventional position – that is the moment of invention, if you will. The important test for the recognition and confirmation of convention in relation to s 19 statements is how the next case of this type is handled and the use that is made of the Communications Act (UK) as a precedent within government and Parliament. The Joint Committee on Human Rights will likely have a critical role in articulating and enforcing the emerging convention. That will require the self-conscious exercise of old-fashioned statecraft.

A variety of other constitutional actors have a role in supporting the development and the solidification of such norms, including constitutional actors outside of Parliament. We can see an emerging role for the courts here too. The Judicial Committee of the House of Lords subsequently appeared to reward the United Kingdom legislature for its conscientious consideration of the issue when the Communications Act (UK) was eventually challenged in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*.[29] Impressed by the level and quality of parliamentary scrutiny that the provision had already received, the House of Lords found the disputed provision to be compatible with the European Convention after all. In this case, we can see that the s 19 process effectively provided an opportunity for feedback from Parliament to the courts and for the correction of any perceived over-dominance of the judiciary's views about rights.[30] As a consequence, Parliament's legitimacy as rights protector was also enhanced. In this way, the courts effectively reinforced the constitutional convention that robust scrutiny within

29 *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312.

30 Andrew Geddis "The Comparative Irrelevance of the NZBORA to Legislative Practice" (2009) 23 NZULR 466 at 472.

Parliament is required when a negative s 19 assessment is given and gave Parliament an incentive to follow this precedent in the future.

It was at first unclear whether the European Court of Human Rights at Strasbourg would take a similar approach. It has, in the past, condemned the United Kingdom Parliament's failure *explicitly* to consider human rights issues when enacting legislation (for example in the prisoners' voting rights case of *Hirst v United Kingdom (No 2)* – a case to which we shall return in a moment).[31] As it transpired, the Grand Chamber split nine to eight votes in favour of upholding the ban.[32] The Court divided on the question of how much the quality of the parliamentary and governmental consideration of the mater should bear on the Court's decision.[33] Of course, we need also to acknowledge that this is a transnational court and that factor may also shape its role, but it appears that the result here too was to reward the legislature for the quality of its deliberation about rights.

Now of course, I am not suggesting that the United Kingdom practice in relation to s 19 statements has been without error or defect. As may have been predicted, these processes have been much better at avoiding blatant breaches than at controlling the conferral of too extensive and potentially rights-infringing powers.[34] The Joint Committee on Human Rights regularly identifies Bills that have received positive ministerial statements of compatibility even though they contain potentially rights-affecting provisions. It does not seem to be the case, however, that the paucity of s 19 negative statements has been caused by a failure to call attention to statutory provisions that have been directly in breach of the European Convention jurisprudence.

The second example of a possible emerging new constitutional convention in the United Kingdom human rights context is in relation to the effect of judicial declarations of incompatibility. Under the Human Rights Act (UK), judges cannot invalidate a statute but are able to make a formal declaration that a statute is incompatible with the European Convention. In every case so far in which such a declaration has been made, the government in power has given a voluntary political undertaking to repair the constitutional defect identified by the judges – even though it has legal power to ignore such a declaration. Is this an example of a constitutional convention in the making and, if so, how would we describe it?

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31 *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 (Grand Chamber, ECHR).

32 *Animal Defenders International v United Kingdom* (48876/08) Grand Chamber, ECHR 22 April 2013.

33 See especially the 21 paragraphs devoted to assessing the quality of political debate in the leading majority opinion, and the joint dissenting opinion of Ziemele, Sajo, Kalaydjiera, Vucinic and de Gaetano JJ which takes a different approach at [4] and [9].

34 See Keith Ewing *Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law* (Oxford University Press, Oxford, 2010) cataloguing the vast expansion of police and surveillance powers under New Labour since the enactment of the Human Rights Act (UK).

Again it is likely that it will only be properly articulated the first time the United Kingdom decides not to follow a declaration of one of its own courts. Once again, it will likely require a crisis of some kind to test whether the convention exists and the standard of justification required before politicians choose not to repair the defect. The "best worst" outcome would be a convention stated in something like these terms: "though there is conventional understanding shared by all parties that we should act to repair a defect identified by the judges, this case is different because… [of new information, a new justification, new facts which we consider would alter the assessment of incompatibility by the Court]". The limited way in which such departures from convention are articulated will be an indication of how seriously politicians take their role as defenders of constitutional morality.

Of course, it is not just that "British people are clever and fine people who know how to go about in politics."[35] Institutions have supported the development of this convention too – not least the courts. The superior courts have been very strategic in the use of the discretion to grant declarations of incompatibility (particularly in the early days of the Human Rights Act (UK)). We should not be surprised at instances when they have preferred an interpretative remedy to a declaratory one – even when a declaratory ruling may have been more appropriate. Consider for example the controversial early case of *R v A (No 2)* (which successfully challenged a rape shield law that had been 20 years in the making).[36] The House of Lords did not make a declaration of incompatibility but rather gave a very strained interpretative ruling in order to give effect to the right. To do the former would have seriously risked ministerial inaction on a very early declaration of incompatibility. Political willingness to act on declarations of incompatibility needed to become an established practice before that was an institutional risk worth taking. Constitutional norm making is, after all, a long run game. These wider institutional issues are too often overlooked in the commentaries about the uses of ss 3 and 4 of the Human Rights Act (UK). This constitutional and institutional norm creation aspect of the United Kingdom judges' work – also a kind of statecraft – may be another important respect in which human rights have been "brought back home" in the Human Rights Act (UK).[37]

So far we have been discussing the constitutional proprieties surrounding substantive rulings on compatibility made by the United Kingdom's own superior domestic courts. Something like a constitutional crisis *has* arisen out of the European Court of Human Rights judgment in *Hirst v*

35 Sartori, above n 8, at 854.

36 *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45.

37 This allusion is to the White Paper: *Rights Brought Home: The Human Rights Bill* (White Paper CM3782, October 1997).

United Kingdom (No 2) and subsequent rulings in respect of prisoner voting rights.[38] The "crisis" is still on-going.

Perhaps I should reveal at the outset that I have difficulties with the Strasbourg Court's rulings about prisoners' voting rights. I also have difficulties with the relative absence of robust principles and criteria in its approach to monetary awards for rights breaches more generally which has encouraged certain rather speculative claims. While the Court has not so far actually granted monetary awards to disenfranchised prisoners (only costs), the threat of such awards has been a factor in the debate as we shall see.[39] At best the question of prisoner voting rights is one about which reasonable people may disagree – a point which the Court itself to some degree acknowledged. Levels of imprisonment and disenfranchisement vary widely across Europe, as do the length of electoral cycles. These variables bear complicated relationships to each other (complexities which the Court did not and ought to have explored). In *Hirst* itself the Court departed from its own previous rulings and followed Canadian and South African precedent instead. There are good arguments to be made that in these kinds of circumstances the Court should have been more cautious about the terms of its intervention, and more robust in indicating in advance the inappropriateness of monetary remedies for successful claimants.[40] My purpose here, however, is not to engage in the substance of those disagreements but rather to understand the constitutional practices that emerged *despite* intense disagreements about the substance.

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38 See for example *Hirst v United Kingdom (No 2)*, above n 31; *R (Pearson and Martinez) v Secretary of State for the Home Department* [2001] EWHC 239 (Admin), [2001] HRLR 39; *Frodl v Austria* (2011) 52 EHRR 5 (Grand Chamber, ECHR); *Greens and MT v The United Kingdom* (60041/08) Section IV, ECHR 23 November 2010; *Smith v Scott* [2007] CSIH 9, 2007 SLT 137; *R (Chester) v Secretary of State* [2009] EWHC 2923 (Admin), [2010] HRLR 6; *Traynor v Secretary of State for Scotland* [2007] CSOH 78; *R v Secretary of State, ex parte Tower and Walsh* [2007] NIQB 18. Reflecting the concern surrounding the issue, the Joint Committee on Human Rights noted in their 2007–2008 report (Joint Committee on Human Rights *Thirty First Report* (7 October 2008) at [58]) that:

> The European Court of Human Rights has given clear guidance that individuals' fundamental human rights, including the right to vote, are not contingent on their continuing to be "good citizens". Interferences with those rights can only be justified in accordance with the law. When considering whether to limit an individual's right to vote, proportionality requires a clear and close link to the specific conduct of the individual concerned. The Grand Chamber implies that this link should include some connection to the stability of the electoral system, the rule of law or the democratic settlement within a state. General breaches of any vague concept of civic duty are, in our view, unlikely to meet the standard of justification envisaged by the ECtHR.

39 See *Greens and MT v United Kingdom*, above n 38, where EUR$5000 was granted as costs (at [101]) but no monetary compensation for non-pecuniary damage was granted. The finding of a violation was viewed as constituting just satisfaction (at [98]).

40 See Janet McLean "Damages and Human Rights: A Changing Relationship Between Citizen and State?" (2009) 17 Annual Review of Law and Ethics 289.

At the time the legislation prohibiting prisoners from voting was enacted (or re-enacted) the legislation complied with the European Court's jurisprudence. The s 19 process of heightened justification was therefore not triggered. For various reasons, no superior United Kingdom court heard full argument on the substantive points before the case was taken to the European Court of Human Rights. The Grand Chamber, reversing the European Court's own earlier rulings, found that a blanket ban on prisoner voting was not compatible with the Convention. It said that the United Kingdom legislation needed to be more finely tuned.[41]

At first all went according to emerging practice. The then Labour Government responded to the Strasbourg ruling saying it would make changes to the legislation after it had consulted on the issue. Progress was slow. It did not change the law in time for the Scottish elections, provoking repeat litigation in the Scottish courts, and a declaration of incompatibility.[42] No changes were in place in time for the European, United Kingdom and English local body elections, or for the most recent Scottish elections. In the early months of the Conservative–Liberal Democrat Coalition, the English Court of Appeal was asked to rule on a remedy but declined.[43] At the same time as that case was being argued, the European Court of Human Rights heard another case from two United Kingdom prisoners.[44] This time the Strasbourg Court imposed a timetable on the United Kingdom to amend its legislation – to be enforced politically by the Committee of Ministers. By that time a swathe of applications from United Kingdom prisoners, including claims for damages, had begun to accumulate in the European Court of Human Rights.[45] The political response was immediate and

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41 *Hirst v United Kingdom (No 2)*, above n 31.

42 See *Smith v Scott*, above n 38.

43 In *R (Chester) v Secretary of State*, above n 38, the Court of Appeal declined to make an interpretative remedy, give what amounted to a legislative opinion or grant a declaration. The Court, while acknowledging the arguments made in respect of statutory disenfranchisement, noted that "the choices for government in amending or replacing ROPA s 3(1) are delicate and difficult, *and are by no means to be concluded, as it were cut and dried, by the law*" (emphasis added): at [34].

44 *Greens and MT*, above n 38.

45 The buildup of these claims and the apparent reticence of the Government to address the issue on political grounds led the Joint Committee on Human Rights to raise concerns. See Joint Human Rights Committee *Enhancing Parliament's role in relation to human rights judgments* (9 March 2010). The Committee notes (at [116]) that:

> It is now almost 5 years since the judgment of the Grand Chamber in *Hirst v UK*. The Government consultation was finally completed in September 2009. Since then, despite the imminent general election, the Government has not brought forward proposals for consideration by Parliament.

Further, the Committee went so far (at [117]) as to:

> … reiterate our view, often repeated, that the delay in this case has been unacceptable. So long as the Government continues to delay removal of the blanket ban on prisoner voting, it risks not only political embarrassment at the Council of Europe, but also the potentially significant cost of repeat litigation and any associated compensation.

heated. Prime Minister David Cameron declared himself to be "physically ill" at the prospect that prisoners should be given the right to vote because of decisions by the European Court of Human Rights.[46] By now there was public fury expressed in the popular press at the notion that prisoners should have the right to vote, or worse, to receive monetary compensation instead. The Lord Chancellor Kenneth Clarke held firm to constitutional principle, saying "I think the Prime Minister accepts like everyone else that Government complies with its legal obligations."[47]

Jack Straw and David Davis then tabled a non-binding motion urging ministers to defy the Strasbourg Court's ruling. Government ministers and even the Labour shadow Cabinet abstained. This in itself was recognition of the constitutional proprieties at stake. The motion was passed 234 votes to 22 on a free vote. Making clear that it disagreed with the Court's ruling, the Government subsequently announced that it would lift the voting ban for prisoners jailed for less than four years (considered to be the legal minimum required for compliance with the European Court's ruling) by October 2011 in accordance with the Strasbourg Court's timetable.[48]

The matter, however, did not end there. In the face of continuing and heated political controversy, the United Kingdom Government sought and was granted leave to intervene as a third party in the Grand Chamber hearing of *Scoppola v Italy (No 3)*, a case involving the voting rights of an Italian prisoner.[49] Not only did this move extend the deadline for United Kingdom compliance,[50] but it also gave the United Kingdom the opportunity to ask the Grand Chamber to reconsider the terms of its ruling in *Hirst*. States parties are unable to appeal to the European Court of Human Rights, so exercising a right of intervention is one of the limited avenues available to a government actively seeking to change the law. Despite the tabloid explanations of the result, the United

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Rejecting the suggestion that the removal of the franchise could be justified solely on the length of imprisonment, the Committee appeared to adopt the *Frodl*, above n 38, judgment to the effect that a judge should decide the question at sentencing – though Laws LJ in *Chester* rightly questioned whether *Frodl* properly interpreted the Grand Chamber's decision in *Hirst*, above n 31: *Chester*, above n 38, at [18] per Laws LJ.

46 Alex Alridge "Can 'Physically Ill' David Cameron Find a Cure for His European Law Allergy?" *The Guardian* (London, 6 May 2011).

47 Editorial "Britain's Mounting Fury over Sovereignty" *The Economist* (10 February 2011); Rosalind English "Withdrawal from the European Court of Human Rights is not a Legal Problem" *The Guardian* (London, 9 February 2011); Helen Mulholland and Patrick Wintour "UK Will Not Defy European Court on Prisoners' Votes, Says Kenneth Clarke" *The Guardian* (London, 9 February 2011).

48 Robert Winnett and Tom Whitehead "Prisoners to get right to vote after 140 years following European ruling" *The Telegraph* (London, 9 April 2009).

49 *Scoppola v Italy (No 3)* (126/05) Grand Chamber, ECHR 22 May 2012.

50 The new deadline was 23 November 2012, six months from the date of the ruling in *Scoppola*.

Kingdom gained more scope to determine its own rules by its intervention.[51] The controversy is ongoing. The Draft Voting Eligibility (Prisoners) Draft Bill has been introduced and is currently being scrutinised by a Joint Select Committee. At the same time we are awaiting judgment from the Supreme Court in *R (Chester) v Secretary of State for Justice* and *McGeogh v Lord President*, as well as judgment from the European Court of Human Rights on *Firth v United Kingdom*.

It is too early to articulate the substance of an emerging convention where the declaration of incompatibility is from the European Court of Human Rights – especially bearing in mind there is no explicit United Kingdom power to democratically override or even appeal such a ruling. What matters for my arguments about the emergence of constitutional conventions is that the voting rights issue has been treated as exceptional. It is striking how seriously the United Kingdom Government has taken its obligation to comply with human rights obligations. In effectively saying that "we strongly disagree on the substance but it is important to uphold the law", the Government is sending a signal to future governments about the seriousness with which judicial rulings should be regarded. Disagreement in itself is not enough reason to ignore a ruling. This is a very strong convention indeed and it is one that is both law-respecting and rights-respecting.

To anticipate whether a similar process might be adopted in the New Zealand context, we need to acknowledge that the institutional incentives for compliance with European Court rulings are stronger in Britain.[52] Both the United Kingdom and New Zealand governments have binding obligations at international law to protect and uphold the enumerated rights. Nothing turns on the force of the legal obligation. But many more cases are routinely brought from the United Kingdom to the European Court than from New Zealand to the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights.[53] And the European Convention purports to create a court remedy that is binding as a matter of international law. These factors do change incentives.

The United Kingdom human rights system is firmly situated within Europe. There is regular, systematic, reciprocal, comparative and public reporting of the United Kingdom's human rights performance. Breaches of human rights obligations pose a risk to the United Kingdom's political

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51 The United Kingdom's proposed compromise plan was to enfranchise only those prisoners serving less than four years with a discretion in the sentencing judge to disenfranchise individuals serving lesser sentences in particular circumstances. One reading of *Scoppola*, above n 49, is that prisoners serving three years or less only need be enfranchised, and that disenfranchisement would also be allowed for particular identified offences carrying short sentences.

52 As at 1 January 2011 the European Court of Human Rights had given 443 judgments involving the United Kingdom. There were 3411 judgments pending. See European Court of Human Rights "Country profiles" <www.echr.coe.int>.

53 Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976).

standing among its European neighbours. It might also be argued that it is in the United Kingdom's own foreign policy interests to comply and thus to assist in the project to integrate the former Eastern bloc and Turkey into the European human rights system. There are numerous reasons for the United Kingdom to follow the norms set by the Court here – reciprocity among the member states, shaming, information sharing and perhaps most importantly fulfilling the role of a model European actor. The United Kingdom is regarded as a model of best practice for the other 46 member states even if it has been criticised for the time it has sometimes taken to implement some of the European Court's judgments. There is also the possibility of the monetary damages that might be imposed by the European Court.

The operation of the Council of Europe's political organs, including the Committee of Ministers, in encouraging compliance is undoubtedly important. It oversees a range of other inspection and compliance mechanisms from the Venice Commission to the European Committee for the Prevention of Torture (the latter systematically assesses prison conditions among other things). Even so, the varying effectiveness of those mechanisms in the different member states also needs to be understood in light of constitutional practice and culture. These compliance mechanisms weigh heavily on the United Kingdom because of its status as a human rights-observing state.

The European Convention system is currently in crisis because of systematic non-implementation of the Court's judgments at the national level throughout member states. In 2008, 70 per cent of the Court's judgments concerned repetitive applications – a significant proportion of which concerned prison conditions in the former Soviet Bloc. By the end of 2009, 8,600 cases pending before Committee of Ministers concerned the late or non-execution of judgments – 80 per cent of which were repetitive cases.

There are two lessons that can be drawn from these figures. The first is that in all contexts human rights implementation ultimately depends on constitutional propriety and not on sanction or coercion. The second is that the European Court should itself pause to consider how much its own authority, legitimacy and sustainability depends on constitutional norms in the member states. At present, the Court does not operate with conventional constitutions in mind as the British domestic courts might be seen as doing. Arguably it ought to do so. If it tries to do too much too soon, it may do permanent damage to the European human rights system. Human rights protection and enhancement is a long term project. Positive steps have now been taken by the British-initiated Brighton Declaration of the Committee of Ministers of the Council of Europe. Among other things, it affirms that "national authorities are in principle better placed than an international court to evaluate local needs and conditions"[54] and it encourages the European Court to give greater prominence to, and to apply more consistently, the principles of subsidiarity and the margin of

54 Council of Europe *High Level Conference on The Future of European Court of Human Rights – Brighton Declaration* (2012) at [11].

appreciation.[55] An amendment to the preamble of the Convention itself is to follow.[56] All of these initiatives serve to demonstrate that strong norms of constitutional propriety and convention have been operating in the United Kingdom – even when there have been formidable political pressures in the opposite direction. In this, the political actors have been supported by various institutions, some of which are absent in New Zealand. But in other ways, the New Zealand scenario is simpler: there is not the complication of a "foreign court" regularly sitting in judgment of the government, Parliament or judiciary and hence the British tabloid caricature of "overbearing Europe" is absent. New Zealand too enjoys a reputation for being human rights respecting. I turn now to assess the prospects for similar constitutional conventions to emerge in relation to the Bill of Rights Act.

III THE BILL OF RIGHTS ACT

What about the New Zealand situation? Political practices surrounding the Bill of Rights Act have been variable and relatively unsystematic or transparent. There is not yet an established institutional sense of shared best practice and precedent. It is hard to derive from New Zealand practices any established custom or usage. It is that variability and absence of a systematic process of parliamentary justification, rather than a record of systematic non-compliance, that ought to cause us concern.

As at December 2011, there were 58 negative s 7 reports (including on prisoner voting rights).[57] Twenty-eight related to government Bills and 30 to non-government Bills. We need to pause to reflect on the constitutional propriety that is represented in these figures. In 28 cases, the government was prepared to proceed with a Bill which it openly acknowledged as limiting protected rights unreasonably in a way that could not be justified (it is government Bills with which I am particularly concerned). That is indeed a very serious thing for any democratically elected government to do. On the basis of these figures alone we should at least inquire whether something may be amiss in New Zealand's processes.

I do not want to be misunderstood. I realise that the frequency of negative s 7 reports may be taken as an indication of "the system working" and is to be preferred to the Attorney-General not giving negative reports at all. I applaud the transparency of reporting in New Zealand and the quality of reason-giving which is, on the whole, higher than in the United Kingdom – though it is very uneven in both places. Of course there are relatively benign reasons why so many Bills might be called inconsistent. Much more is done by way of primary legislation in New Zealand compared with the United Kingdom. The frequency of s 7 reports could also be due to the fact that the public policy justifications are not made until very late in the legislative process when the pressure to get a

55 At [12].

56 Almost certainly this British initiative was prompted by the prisoner voting controversy.

57 See Ministry of Justice "Section 7 reports" <www.courts.govt.nz>.

Bill into the legislative process may be at its greatest. I have personally witnessed many instances of legislation being made more rights-compliant prior to introduction.[58] In many cases, it may well be that the limitation on the right is indeed justified. As I said at the outset of this paper, I am not predicting that the sky is about to fall, but I am concerned about the establishment of customs and practices of constitutional propriety around these issues.

It is what follows a s 7 report with which I am primarily concerned. The import of a s 7 report is not being taken sufficiently seriously in the political process – at least not as an *institutional* matter. The current practice has the potential to impact on the development of constitutional convention and may also have corrosive flow-on effects. To repeat myself, it is a serious thing indeed for a government to proceed with a Bill that the government admits it cannot justify in rights terms.

I do not intend to embark on a detailed analysis of the treatment of s 7 reports here but shall rely on the work of others. The relative dearth of analysis in New Zealand is in part a consequence of the absence of institutional resources committed to monitoring current practice. At one extreme, Andrew Geddis argues that "the Bill of Rights has had little or no effect on Parliament's activities as a law-maker."[59] He reports conflicting views of whether there has been over- or under-reporting of inconsistent legislation under s 7, although he notes the increased frequency of s 7 reports since the National Party has formed the coalition government.[60] He argues that at least as far as the Electoral Finance Bill 2007 was concerned there was a clear case for giving a negative s 7 report and yet no such report was forthcoming.[61]

Paul Rishworth's more recent unpublished account assesses a longer period, is more systematic and more optimistic.[62] He suggests that legislators who refer to the fact of a s 7 report when debating the passage of a Bill generally do so in terms that engage with the merits of the Attorney-General's judgment. Members of Parliament often argue that the s 7 report is wrong, overstated or can be ameliorated. He finds evidence, then, of reasoned disagreement, and of rights arguments generally being given weight in the democratic debate – including in the subsequent repeal of the Electoral Finance Act. More worryingly, he fears that in relation to "law and order issues" a negative report "is becoming a badge of honour" and emblematic of the view that "criminals do not

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58 I witnessed this as a member of the Legislation Advisory Committee.

59 Geddis, above n 30, at 469–470.

60 At 474–475.

61 In *Boscawen v Attorney-General* [2009] NZCA 12, [2009] 2 NZLR 224 the Court of Appeal struck out an application for judicial review of the Attorney-General's failure to attach a s 7 certificate to the Electoral Finance Bill 2007 (130-1).

62 Paul Rishworth "The Bill of Rights and 'Rights Dialogue' in New Zealand: After 20 Years, What Counts as Success? (paper presented to University of Sydney Workshop on "Judicial Supremacy or Inter-Institutional Dialogue: Political Responses to Judicial Review", Sydney, May 2010).

have rights that government is prepared to respect." (And he says this has been the case whoever has been the government in power – writing in May 2010, he did not think that the situation had worsened since he first noticed the trend in 2005). His conclusion is that the parliamentary record is mixed.

Clearly there is room for different assessments of the current practice and these variations in assessment will likely depend on one's substantive views about the rights claims themselves. Of course people may properly disagree about the content of rights, including with a court or an Attorney-General's assessment of such rights. It is the quality of scrutiny and the articulation of disagreement about which I am mainly concerned. Part of the problem is that there is no parliamentary or other body that monitors that practice in any systematic way. Are we at risk of developing bad habits – especially where criminal law is concerned? Prevailing conditions have not favoured the development of rights-respecting conventions or usages which the different parties in Parliament would be prepared to uphold.

This highly variable practice must also have a flow-on corrosive effects. If an Attorney-General's own negative report on a government Bill is not systematically taken seriously (by triggering a process of heightened parliamentary scrutiny), and if an Attorney-General, the government's legal advisor, is prepared to vote for a Bill he or she certifies is not justified in a free and democratic society, what prospect is there that a judicial declaration of inconsistency would be respected by the political process? I have perhaps been too confident in the past that the New Zealand Parliament would amend law that a New Zealand court found to be inconsistent – with or without a formal declaration. Claudia Geiringer's excellent work on implied declarations of inconsistency has caused me to revisit these issues.[63] I now consider that I had previously under-estimated how much s 7 practices and the declaratory remedy may be linked. The seriousness with which a Parliament deals with a s 7 report will likely affect judicial behaviour in deciding whether to grant a declaration of inconsistency. Sir Ivor Jennings, writing in 1933, confidently suggested that declarations against the government are useful not because they could be enforced but because they would be obeyed.[64] He calls this the new post-Diceyan rule of law. A decision by Parliament to ignore an ordinary or a constitutional declaration would cause damage to these deeper constitutional underpinnings. Perhaps it is no wonder that judges have favoured informal indications of inconsistency. If nothing happens in response to a formal declaration, not even a process of heightened justification, then our constitutional tradition, long predating the Bill of Rights Act, is at risk of being eroded.

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63 Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613.

64 Jennings, above n 7, at 132.

Is it too late to create a constitutional convention about the significance of such a s 7 report and the high level of justification that should follow it? I do not think so. We quite frequently invent new constitutional conventions – such as those which now operate in relation to the legislative incorporation of Treaty of Waitangi deeds of settlement.[65] A first step would be to establish a special human rights select committee to consider systematically the human rights aspects of Bills. Such a committee would help establish a more robust, or at least a more systematic, process of justification, and would provide a forum for politicians apart from the Attorney-General to raise human rights arguments and give them the specific task of doing so. A human rights committee would be in addition to, rather than a substitute for, the subject-specific select committee. Geddis is perhaps wrong to presume that politicians will always be less rights-protecting than judges; certainly the Joint Committee on Human Rights has been prepared to go further than the British courts on occasion.[66] Admittedly, the New Zealand Parliament is a lot smaller than the United Kingdom House of Lords and House of Commons and has fewer people to draw on. Independent advisors could be used, as is also the practice in the United Kingdom. We should also consider whether it would be more effective if individual ministers were required to answer in Parliament for Bill of Rights Act compatibility rather than, or in addition to, the Attorney-General.[67] In that way variability in rights-respecting practices between departments and ministerial portfolios could be highlighted and best practice identified. Given our international reputation as one of the last holdouts against strong judicial review (according to Harvard Professor Mark Tushnet), New Zealand needs to take its Parliament more seriously.[68] This would help create a richer and better informed practice and also enhance Parliament's legitimacy as rights respecter and protector.

There is admittedly a paucity of wider institutions to support such a convention. For better and worse the opportunity for claimants to take a case to the United Nations Human Rights Committee is not the institutional equivalent of a Strasbourg appeal. It hears relatively few cases and even those tend to come from the relatively rights-respecting nations. There is a real problem of access to those processes from the least rights-respecting nations. Shaming cannot work effectively when the least rights-respecting nations are so sparsely represented. How to improve access to these international institutions is beyond the scope of this paper, and my expertise. It is a serious problem of which we should not lose sight.

The recommendation of a special human rights committee in Parliament may seem rather feeble. More might change if we who are lawyers begin to frame our constitutional law around

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65 See Janet McLean "New Public Management New Zealand Style" in Paul Craig and Adam Tomkins (eds) *The Executive and Public Law* (Oxford University Press, Oxford, 2006) 124 at 128.

66 See Geddis, above n 30.

67 I am grateful to Claudia Geiringer for this suggestion.

68 See Mark V Tushnet "New Forms of Judicial Review and the Persistence of Rights – And Democracy-Based Worries" (2003) 38 Wake Forest L Rev 813 at 815.

constitutional convention once more and tell our constitutional narratives in a different way. We might also consider whether there should be a free vote in Parliament whenever a s 7 report is issued.

I have deliberately not referred to the scholarly debate around democratic dialogue in this paper. While much of the material is interesting and canvasses similar ground, the dialogue debate has been affected by two problematic assumptions. First there is an academic fantasy that parliamentary debate is deliberative. Some of the most interesting work in social theory these days suggests that we follow norms not only after deliberation and balancing of costs and benefits, but even after a conscious decision to give priority to normative considerations. More often we follow norms simply out of habit: we instinctively fit new examples into our pre-existing contexts.[69] We can form good habits and we can form bad ones. The question then is how best to foster good habits and establish consistent good practice?

Too often, as well, the dialogue debate focuses on which institutions have ultimate power, and whether they get to use it. One standard criticism is to the effect that if Parliaments "obey" the courts, then the courts have achieved too much power and, where bills of rights are not entrenched, this power is being acquired by stealth. Before the Bill of Rights Act was enacted, Parliament's compliance with human rights and other constitutional norms did not depend on some muscular struggle between legislatures and courts. Parliament limited itself. We are in danger of adopting a kind of s 4 Bill of Rights anti-constitutionalism: "Parliament can do whatever it wants". That was never our constitutional tradition.

Constitutional norms ultimately exist in our belief that others will behave according to them and will expect us to do the same.[70] Austin knew this too – even as he denied such a thing as constitutional law. In his *Plea for a Constitution*, he said that any complex constitution depends for its survival on the sustenance of custom and usage to the point where it can become "in the ordinary run of the mill a more or less unreflective habit".[71] Constitutions are ultimately social rules grounded in practice.

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69 Cristina Bicchieri *The Grammar of Society: The Nature and Dynamics of Social Norms* (Cambridge University Press, Cambridge, 2006).

70 For an exploration of the development of societal norms, see Bicchieri, above n 69; Dan Kahan "Gentle Nudges vs Hard Shoves: Solving the Sticky Norms Problem" (2000) 67 U Chi L Rev 607; Jean Phillippe Plateau "Solidarity Norms and Institutions in Village Societies: Static and Dynamic Considerations" in Serge-Christophe Kolm and Jean Mercier Ythier (eds) *Handbook of the Economics of Giving, Altruism and Reciprocity* (Elsevier, Amsterdam, 2006) 819; Inger-Lise Lien "The Dynamics of Honor in Violence and Cultural Change: A Case from an Oslo Inner-city District" in Tor Aase (ed) *Tournaments of Power: Honour and Revenge in the Contemporary World* (Ashgate, Aldershot, 2002) 19; and Gardbaum, above n 28.

71 See Neil MacCormick and Ota Weinberger *An Institutional Theory of Law: New Approaches to Legal Positivism* (D Reidel, Dordrecht, 1986) at 182.

IV CONCLUSION

Let me end with a story of the importance of constitutional norms from a different context. A few years ago I was preparing a masters course at the University of Dundee on comparative human rights protection. I had planned a seminar on whether the same human rights standards were always appropriate in different legal systems, whether and when legislatures ought to be given a margin of appreciation and how carefully comparativists must proceed when we attempt to borrow from other rights-protection frameworks. As with most of my more successful teaching experiences, the seminar did not go as I had planned. I began by raising the issue of voting rights for prisoners. As I had anticipated, one student raised the standard objection that prisoners lose rights when they are incarcerated. Debate ensued about the relative merits of such an argument. But then, the discussion took an unexpected turn. A quiet student interjected. He suggested that prisoners as a whole should not have voting rights, but that opposition leaders ought to be able to stand for office either from prison after conviction, or perhaps only while their bribery charges are pending. After a pause, other students in the class from the developing world began nodding vigorously in agreement. This idea that democracy is best ensured by allowing prisoners to stand for office, (not the usual practice in Western countries) began to make a great deal of sense. In many countries the first thing one does when one gains power is to imprison political opponents, and in countries where bribery practices are the norm, it is not difficult to bring successful charges against such opponents. That example might help us reflect not only on the prisoners voting saga in the United Kingdom but also on broader, more important lessons.

Ultimately constitutional norms are all that matter. The old-fashioned, the obvious and the taken for granted may be more important than new legal inventions such as the Bill of Rights Act, which has only recently celebrated its twenty-first anniversary this year.