

Constitutional Rights without a Constitution: the Human Rights Act under Review

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ZENTRUM FÜR EUROPÄISCHE RECHTSPOLITIK
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**Constitutional Rights without a Constitution:
The Human Rights Act under Review**

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Editorial

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I. Introduction

In the landscape of European countries, the United Kingdom stands out for not having an entrenched written Constitution. Until recently, the protection of human rights was entrusted mainly to Parliament and to the common law tradition of civil liberties through the dialogue and, at times, tension between the two fundamental principles of the British Constitution: the principle of parliamentary sovereignty and the rule of law.¹ In 1998 a new age began: the Human Rights Act (HRA) was adopted to become the “cornerstone” of the new constitutional settlement designed by New Labour at the end of the last century² and a prominent means of human rights protection. It was the instrument incorporating the European Convention on Human Rights, and was also largely acknowledged as a Bill of Rights for the UK, embodying an original new model of commonwealth constitutionalism.³

The Act was intended to “bring rights home”, enabling those (private individuals and organizations) who may have suffered an infringement of their Convention rights by public authorities to have those rights enforced and claim their redress in domestic courts and not only by recourse to the European Court in Strasbourg. The HRA also provides national judges with the opportunity to contribute to the development of human rights jurisprudence in Europe by engaging in a dialogue with the Strasbourg Court. To these ends, the Act envisages a range of provisions formally consistent with the principle of parliamentary sovereignty.⁴ Under the Act, courts may employ effective interpretative instruments to ensure compatibility of legislation with Convention rights and

1 For an extensive account of human rights protection prior to the HRA and according to the common law tradition, see J. BEATSON, S. GROSZ, T. HICKMAN, R. SINGH, S. PALMER, *Human Rights: Judicial Protection in the United Kingdom*, London, 2008.

2 V. BOGDANOR, *The New British Constitution*, Oxford, 2009, in particular 50 ss.

3 This diverges from the “judicial supremacy” paradigm of the American-style judicial review, in so far that it leaves the last word in the field of human rights protection to the legislature rather than to the courts, which are not empowered under the Act to strike down legislation contrary to human rights. See S. GARDBAUM, *Reassessing the New Commonwealth Model of Constitutionalism*, in: *Int. Jnl. of Constitutional Law*, 2010, 167 ss.; Id., *How Successful and Distinctive is the Human Rights Act? An Expatriate Comparatist's Assessment*, in 74 M.L.R., 2011, 195 ss.

4 A principle which finds its traditional theorization in the well-known work of A.V. Dicey *Introduction to the Study of the Law of the Constitution*, London, 1885. On the relationship between the HRA, the principle of parliamentary sovereignty and the rule of law, see extensively: J.W.F. ALLISON, *The English Historical Constitution. Continuity, Change and European Effects*, Cambridge, 2007 e V. BOGDANOR, *The New British Constitution*, cit.

may pronounce a declaration of incompatibility whenever a compatible interpretation is not possible.

Throughout its relatively short life, the HRA has been the target of fierce criticism from the political milieu and sectors of the media, and its fate is currently under debate. In March 2011 the coalition government resulting from the 2010 general election appointed a Commission to investigate the future of the Act and the creation of a domestic Bill of Rights. The purpose of this article is to explore, in the light of the HRA framework and its applicative history, the terms of the current debate on a possible move from the HRA to a new home-grown instrument of human rights protection.

II. The HRA Operative Framework: an Overview

According to its long title, the HRA's main purpose is "to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights". To this end, the Act presents a complex set of operative provisions: the interpretative obligations under Section (s.) 2 requiring courts to take Strasbourg jurisprudence into account and s. 3 requiring public authorities to construe legislation and give it effect in a way which is compatible with Convention rights "so far as it is possible to do so"; the "declaration of incompatibility" instrument (s. 4); a duty of public authorities to act compatibly with the Convention rights under s. 6, which extends and enriches both the grounds and the powers of judicial review over public authority action;⁵ the provisions concerning standing and judicial remedies in ss. 7 and 8, which tend to reproduce at a national level the same parameters of protection found in Articles 34 (notion of victim) and 41 (just satisfaction) of the Convention system. In addition to these instruments of judicial control, the Act also provides the opportunity for an extrajudicial, political review of legislation. Section 19 of the Act requires any minister in charge of a Bill in either House of Parliament to make a

5 Most of the claims under s. 6 have been brought through the judicial review procedure, even though that is not the only way of enforcing Convention rights against public authorities. In more general terms, s. 7(1) provides that a person who is (or would be) a victim of an unlawful act can bring proceedings "in the appropriate court or tribunal" or rely upon the Convention right concerned "in any legal proceedings". In observance of the sovereignty of Parliament, according to s. 6(4) and (6), a "public authority" does not include either House of Parliament and an "act" does not include a failure to legislate or to adopt a remedial measure. 'Public authority' for the purposes of s. 6 does include 'a court or tribunal'. This has contributed to overcoming a merely vertical approach to Convention rights effects and to recognizing indirect horizontal effects in proceedings between private parties.

statement - before the Second Reading of the Bill, either to the effect that in his view the provisions of the Bill comply with the Convention rights ('a statement of compatibility') or to the effect that although he is not able to make a statement of compatibility, the government nevertheless wishes the House to proceed with the Bill. Section 19 statements have so far represented an opportunity for Parliament to engage in human rights debate in the course of the law-making process.⁶

Crucial to the HRA judicial control mechanism are the interpretative obligations in s. 2 and s. 3 and their interplay with s. 4 'declarations of incompatibility'.

Section 2(1) sets the terms of dialogue between domestic courts and Strasbourg, requiring that in determining a question which has arisen in connection with a Convention right, a court or tribunal must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights, any opinion or decision of the former Commission or decision of the Committee of Ministers, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen. According to s. 2 HRA and unlike s. 3 of the European Community Act 1972 with respect to the European Court of Justice's jurisprudence, Strasbourg case law is not binding but merely persuasive. The *ratio* of the provision can be clearly found in the parliamentary debates on the Human Rights Bill: s. 2(1) was conceived to allow domestic courts to develop their interpretative approach and contribute to the development of human rights law in Europe while keeping Strasbourg jurisprudence as a constant point of reference. Notwithstanding the terms of s. 2 and its source of inspiration, the House of Lords has until recently promoted a 'precedent-like approach'⁷ to the Strasbourg case law, according to which, in the absence of special circumstances,⁸ courts

6 Section 19 ministerial statements are not binding, nor have any persuasive authority, on the courts when considering compatibility of legislation: see *R v. A* [2002] 1 AC 45, para 69.

7 I. LEIGH, R. MASTERMAN, *Making Rights Real. The Human Rights Act in its First Decade*, Oxford, 2008, 66. This approach does not affect the doctrine of *stare decisis* since domestic lower courts are still bound to follow higher courts' precedents even if they conflict with later Strasbourg authority: see *Kay v. Lambeth LBC* [2006] UKHL 10.

8 "Special circumstances" were found to occur where decisions of the European Court compel a "conclusion fundamentally at odds with the distribution of powers under the British constitution": see *R (on the application of Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2002] 2 AC 295, para. 76, Lord Hoffmann; where the Strasbourg Court "has misunderstood or has been misinformed about some aspects of English Law", or has not had "all the help which was needed to form a conclusion": cfr. *R. v. Lyons (No. 3)* [2003] 1 AC

should follow any clear and constant jurisprudence of the European Court. Otherwise, it was said, the case may proceed to the Strasbourg Court, which is likely to follow its constant jurisprudence.⁹

A strict application of this approach (referred to as the ‘mirror principle’ because it requires domestic protection of rights to reflect the standards developed in the supranational context),¹⁰ has until recently discouraged a protection of Convention rights more generous than that developed in Strasbourg.¹¹ Recent case law seems to afford a more limited scope of application to this controversial approach¹² and rather to promote a more independent domestic jurisprudence. In the *re P case*, concerning the issue of adoption of children by unmarried couples, the Law Lords decisively endorsed a ‘margin of appreciation exception’¹³ affirming that domestic courts may develop an autonomous

976, para. 46, *R v. Spear and others* [2003] 1 AC 734, para. 12.

9 *Alconbury* cit., para. 26, Lord Slynn.

10 See Lord Nicholls in *R (on the application of Quark Fishing Ltd) v. Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, para 34; J. LEWIS, *The European Ceiling on Human Rights*, in P.L., 2007, 720 ss.

11 See Lord Bingham in the *Ullah case*; “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 [...] The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less”: *R v. Special Adjudicator, ex p Ullah* [2004] UKHL 26, para 20. This approach was endorsed as a corollary of the traditional principle according to which courts are bound to construe legislation in a way which does not put the United Kingdom in breach of its international obligations (Lord Hoffman in *In re P and others (AP) (Appellants) (Northern Ireland)* [2008] UKHL 38, para 35) but was also intended to shield the judiciary from the suspicion of excessive judicial activism: cfr. N. KRISCH, *The Open Architecture of European Human Rights Law*, 71 M.L.R., 2008, 183 ss, at 205; R. MASTERMAN, *Aspiration or foundation? The status of the Strasbourg jurisprudence and the ‘Convention rights’ in domestic law*, in H. FENWICK, G. PHILLIPSON and R. MASTERMAN (eds.), *Judicial Reasoning under the UK Human Rights Act*, Cambridge, 2007, 78 ss.

12 Commentators have criticized the ‘mirror approach’ as finding no foundation in the Convention, whose standards represent a “floor” not a “ceiling” for human rights protection throughout Europe, and as hampering the development of a domestic jurisprudence in the field of human rights: cfr. L. LEWIS, *The European Ceiling on Human Rights*, cit.; F. KLUG, H. WILDBORE, *Follow or lead? The Human Rights Act and the European Court of Human Rights*, in E.H.R.L.R., 2010, 621 ss. In the parliamentary debates leading to the adoption of the HRA it was clearly recognized that the European Convention constitutes a “floor of rights”: see *Hansard*, HL vol. 583, col. 510, November 18, 1997.

13 For earlier conflicting judicial references to this exception see M. AMOS, *The principle of comity and the relationship between British courts and the European Court of*

interpretative approach in fields in which the European Court has recognized member states a margin of appreciation.¹⁴ The Supreme Court, which succeeded the Appellate Committee in October 2009, seems willing to fully exploit the opportunities of dialogue with the Strasbourg Court which s. 2(1) HRA affords. In *R v. Horncastle*,¹⁵ a case concerning the admissibility of hearsay evidence, the Court departed from the approach of the European Court in *Al-Khawaja and Tahery v. United Kingdom*.¹⁶ The Supreme Court points out that giving the European Court “the opportunity to reconsider the particular aspect of the decision that is in issue”, is likely to help promote a “valuable dialogue” between them, as indeed happened with the Grand Chamber judgment delivered on 15 December 2011.¹⁷

S. 3 was intended by the promoters of the Act as a crucial feature of the HRA’s mechanism: a strong interpretative obligation which would have made a “declaration of incompatibility” a rare event, an instrument of last resort. The

Human Rights, in *Yearbook of European Law*, 2009, 503 ss., at 508 ss.

14 [2008] UKHL 38.

15 [2009] UKSC 14, conceding that “[t]he requirement ‘to take into account’ the Strasbourg jurisprudence will normally result in this court applying principles that are clearly established by the Strasbourg Court”, the Court also recognized that it can depart from Strasbourg jurisprudence, giving reasons for adopting such a course, in the rare instances where it “has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process”: [2008] UKHL 38, para 11.

16 Chamber judgment, 20 January 2009, (2009) 49 E.H.R.R. 1.

17 [2008] UKHL 38, para. 11. The Grand Chamber in its recent judgment has disagreed in part with the Chamber and held that “where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence does not automatically result in a breach of Article 6 § 1” (para 147), as long as there are sufficient counterbalancing factors and safeguards in place.

See also *Manchester City Council v. Pinnock* [2010] UKSC 45, in which the Supreme Court finally followed Strasbourg jurisprudence in the field of eviction guarantees, departing from a long conflicting line of *House of Lords* precedents, and nevertheless restated the persuasive nature of Strasbourg authority: “This court is not bound to follow every decision of the EurCtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the EurCtHR which is of value to the development of Convention law [...] Of course, we should usually follow a clear and constant line of decisions by the EurCtHR [...] But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber [...] Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line”: para 48.

provision requires that “So far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”. This obligation is binding on all public authorities (not only the judiciary) and applies to legislation whenever enacted, whether before or after the HRA.

In the judicial context, s. 3 has contributed to a further extension of the purposive approach to statutory construction over the more traditional literal approach. According to the principles developed in HRA case law, s. 3 allows courts to depart from the literal meaning of a provision and even to adopt a linguistically strained interpretation by reading in additional words or reading down words, if necessary, to render it compatible with Convention rights. What section 3 does not permit is adopting an interpretation which conflicts with a provision expressly limiting a Convention right, or which is inconsistent with a “fundamental feature” of the legislation to be interpreted.¹⁸ A compliant construction in these cases would cross the line between interpretation and amendment and would impinge on the sphere of competence of the legislator.¹⁹

Inconsistency with fundamental features of legislation is not the only criterion for discarding s. 3. Courts also tend to dismiss this remedy where such a course would come into conflict with the traditional restraints and limitations of the judicial role, and where it would entail decisions judges are not equipped for, or which go beyond their constitutional competence. For instance, courts decline to employ section 3(1) HRA where the resulting decision would: have financial and source allocation implications;²⁰ require the introduction of new procedures;²¹ imply extensive enquiry and wide public consultation and discussion;²² have wider ramifications in collateral normative areas which cannot be dealt with in the incremental “peacemeal fashion” of judicial law making,²³ or have the effect of bringing about a change in the relationship between institutional powers and their respective spheres of competence.²⁴ In

18 The current judicial approach to s. 3(1) has been defined by the House of Lords in the leading case *Ghaidan v. Godin-Mendoza* [2004] 2 AC 557. On this case see A. KAVANAGH, *Choosing between sections 3 and 4 of the Human Rights Act 1998: judicial reasoning after Ghaidan v. Mendoza*, in: H. FENWICK, G. PHILLIPSON and R. MASTERMAN (eds.), *Judicial Reasoning under the UK Human Rights Act*, cit., 114 ss.

19 *Ghaidan* cit., para 30 ss.

20 See *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291.

21 *Ibidem*.

22 See *Bellinger v. Bellinger* [2003] 2 AC 437, para 37.

23 *Ibidem*, para 45.

24 See *R (on the application of Anderson) v. Secretary of State for the Home Department* [2003] 1 AC 837.

all these instances courts will have to consider making a declaration under section 4 HRA, leaving the necessary steps to achieve compatibility to the other branches of government.

The judicial practice of the first HRA decade has confirmed the “declaration of incompatibility” as the last resort instrument that was originally intended. The Government document *Responding to human rights judgments*, published in September 2011, reports twenty-seven declarations of incompatibility since the Act came into force, nineteen of which have become final while eight more have been overturned on appeal.²⁵

The main features of this instrument of judicial control were designed in a way that preserves the traditional principle of parliamentary supremacy. In fact, under the HRA scheme, courts are not empowered to invalidate provisions of primary legislation incompatible with Convention rights, but only to issue a declaration of incompatibility,²⁶ which does not affect the validity, continuing operation or enforcement of the relevant provision and is not binding on the parties to the proceedings or on Parliament and Government.²⁷

The main effect of the declaration of incompatibility is to prompt Parliament and Government to act in order to remove the incompatibility by amending or repealing the provision at issue.²⁸ While such a declaration has no binding effect, Government has so far always enacted consequent remedial measures, suggesting that the option “whether” to intervene is a very costly one in

25 *Responding to human rights judgments. Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2010-2011*, September 2011, Cm 8162, updated on 8 August 2011.

26 The power to make declarations of incompatibility is accorded only to courts (‘higher courts’) specifically referred to in s. 4(5): the *House of Lords* (now the *Supreme Court*), the *Judicial Committee of the Privy Council*, the *Courts-Martial Appeal Court*, in Scotland, the *High Court of Justiciary* sitting otherwise than as a trial court or the *Court of Session*, in England and Wales or Northern Ireland, the *High Court* or the *Court of Appeal*, the *Court of Protection* in any matter being dealt with by the President of the Family Division, the Vice-Chancellor or a puisne judge of the High Court.

27 The lack of binding and coercive effect has led the Strasbourg Court to reject the argument endorsed by the United Kingdom that a declaration of incompatibility is an effective remedy which the individual applicant must pursue in order to satisfy the admissibility requirement of exhaustion of domestic remedies prescribed by art. 35 of the European Convention: see the ECtHR’s decision in *Hobbs v. United Kingdom*, 18 June 2002, the ECtHR’s judgment in *Burden and Burden v. United Kingdom*, 12 December 2006, paras. 30-40 at para 39 and the Grand Chamber’s decision in the *Burden* case, 29 April 2008, at para 41.

28 S. 10 and Schedule 2 provide for a fast-track procedure by which the executive can take remedial action.

political and institutional terms.²⁹

III. Merits and Limits of the Human Rights Act

The merits of the HRA are generally recognized, even by most of its original critics, who feared the Act would have transferred a considerable portion of power from the democratically elected branches of government to the judiciary; the experience of this last decade has assuaged such concerns.³⁰

With regard to the interaction between national and supranational systems of human rights protection, the Act has worked efficiently as an instrument of incorporation of the European Convention in the domestic order: Convention law is gradually permeating every field of legal interest and domestic jurisprudence has on various occasions been confirmed in Strasbourg case law even though it has sometimes given rise to conflicting approaches.³¹

At a national level, the HRA has introduced important innovations in the domestic constitutional order. The Act has added to the number of statutes which have been recognized a ‘constitutional status’ in so far as they condition the relationship between citizen and state in an overarching manner or the scope of what are now regarded as fundamental constitutional rights. The provisions of these statutes can be repealed or limited in their scope only by the express intention of Parliament (they are ‘immune’ from implied repeal).³²

29 See A. KAVANAGH, *Constitutional Review under the UK Human Rights Act*, Cambridge, 2009.

30 See C. GEARTY, *The Human Rights Act - An Academic Sceptic Changes his Mind but not his Heart*, in E.H.R.L.R., 2010, 582 ss. *Contra* K. D. EWING, *Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law*, Oxford, 2010. See also R. BELLAMY, *Political Constitutionalism and the Human Rights Act*, in *Int. Jnl. of Constitutional Law*, 2011, 86 ss., arguing that the HRA normative scheme and the judicial practice developing under the Act can be read as reinforcing relevant features of the political constitutionalism paradigm.

31 M. AMOS, *The Impact of the Human Rights Act on the United Kingdom's Performance before the European Court of Human Rights*, in P.L., 2007, 655 ss.; *Id.*, *The principle of comity and the relationship between British courts and the European Court of Human Rights*, *cit.*; N. BRATZA, *The relationship between the UK courts and Strasbourg*, in E.H.R.L.R., 2011, 505 ss. For a critical example of a diverging approach, see the Grand Chamber's judgment on 7 July 2011 in the case of *Al-Jedda v. United Kingdom* concerning the delicate context of the United Kingdom's participation in the Multi-National Force operations in Iraq.

32 *Cfr. Thoburn v. Sunderland City Council* [2003] QB 151, *cit.*, Laws LJ par. 62: “In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental...And

More importantly, the Act has affected the evolving meaning of the principles of the sovereignty of Parliament and the rule of law, and their mutual interaction. As Bogdanor says, the HRA while formally leaving intact the sovereignty of Parliament, has put “some pressure upon it”, and has enhanced the weight and relevance of the rule of law as a competitive constitutional principle.³³

The Act has introduced a judicial supervision of the acts of Parliament which endows courts with considerable means of control. A compliant construction under section 3 permits an immediately corrective intervention on a provision conflicting with fundamental rights. A declaration of incompatibility, though a weaker form of review than the American model, constitutes a statement of legal principles which Parliament and Government cannot ignore without endangering the balance of institutional powers and exposing the State to responsibilities at an international level. Such declarations have so far exerted decisive pressure on Government to adopt the remedial measures required to overcome Convention rights incompatibilities.³⁴

By confronting Government with the legal and principled restraints that the Convention rights impose on political action, these instruments have at times overexposed the judiciary in the context of public debate over critical political and social issues. More generally, the Human Rights Act, by entrusting courts with the responsibility to ensure the protection of Convention rights at a national level, has enriched their role and given it more visibility.

The HRA nevertheless suffers from certain limitations, which were in part implicit in its genesis and normative scheme. In particular, from the very beginning, the HRA presented an ambiguity in its underlying purposes and this ambiguity has cast its shadow throughout the applicative history of the Act.

In the political debate leading to the enactment of the HRA, the incorporation of the European Convention was regarded by its promoters as a first step towards the subsequent adoption of a new “home-grown” Bill of Rights.³⁵ This

from this a further insight follows. We should recognize a hierarchy of Acts of Parliament: as it were ‘ordinary’ statutes and ‘constitutional’ statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights”.

33 V. BOGDANOR, *op.cit.*, 74. On the relationship between the principle of parliamentary sovereignty and the rule of law in the HRA age see *Jackson v. Attorney-General* [2006] 1 AC 262.

34 On these aspects see extensively A. KAVANAGH, *Constitutional Review* cit.

35 See *A New Agenda for Democracy*, London, Labour Party, 1993 and *Bringing Rights Home*, London, Labour Party, 1996. See also the initiatives of Liberty and the Insti-

objective was later abandoned in the 1997 Labour Manifesto. Nevertheless, since its inception, the HRA has been promoted in academic³⁶ and judicial³⁷ circles as a domestic Charter of fundamental rights, i.e. a constitutional measure entrusting the courts with the mission to develop a national constitutional rights jurisprudence. The context of its adoption, the normative scheme and the applicative practice, show that the Act, whilst succeeding in its instrumental function of ensuring the domestic protection of Convention rights, fell short of adequately fulfilling this 'national vocation'.³⁸

From the first stages of its life, the HRA suffered from a lack of that popular involvement and understanding which a major constitutional measure is expected to enjoy. The public lack of knowledge and clarity regarding its purposes and operation has given rise to widespread misconceptions by the general public concerning its effects, especially on the administration of justice and the ability to ensure national security, and rendered the Act more vulnerable to repeated attacks by prominent political exponents hostile to the restraints that the Convention guarantees impose on political action, and by sectors of the media concerned that the HRA would work as a vehicle for extending privacy rights under art. 8 of the EHRC, while restricting their prerogatives and interests.³⁹

Furthermore, the normative scheme is not fully consistent with the purpose of endowing the United Kingdom with a Charter of fundamental rights. The range of rights protected is limited in comparison to more modern instruments of rights protection, reflecting the range covered by the 1950 European Convention and leaving out newly emergent rights such as the protection of personal data and environmental rights. The operative provisions of the Act seem mainly intended to give effect to Article 1 of the Convention (the obligation of contracting Parties to secure to everyone within their jurisdiction the freedoms and rights provided for in the Convention) and reproduce at a domestic level the same parameters of protection which the Strasbourg system ensures. Sections 7(7) and 8(4) are telling in this respect, the former prescribing the same criteria for standing as article 34 ECHR (criteria which are more restrictive than those developed by the courts in the context of judicial review proceed-

tute of Public Policy Research in F. KLUG, *A People's Charter: Liberty's Bill of Rights*, Liberty, 1991; A. LESTER et al., *A British Bill of Rights*, IPPR, 1991.

36 See in particular F. KLUG, *A Bill of Rights: Do We Need One or Do We Already Have One?*, in P.L., 2007, 701 ss.

37 See T. HICKMAN, *Public Law after the Human Rights Act*, Oxford, 2010, 40 ss.

38 S. SONELLI, *La tutela dei diritti fondamentali nell'ordinamento inglese: lo Human Rights Act 1998 e oltre*, Torino, 2010, 210 ss.

39 Cfr. M. AMOS, *Problems with the Human Rights Act 1998 and How to Remedy Them: is a Bill of Rights the Answer?*, in M.L.R., 2009, 883 ss.

ings), the latter referring to the criteria laid down in article 41 ECHR with regard to compensation.

Case law under the Act has confirmed and even reinforced the specular relationship between the national and the supranational levels of protection; until recently the ‘mirror principle’ not only prevailed in the application of section 2 limiting the opportunity for the development of a domestic jurisprudence on fundamental rights, but also inspired the interpretative approach to other provisions of the Act.⁴⁰ As has been recently asserted, “the first ten years of the Act undoubtedly witnessed the dominance of the international/pragmatic/remedial over the domestic/constitutional perspectives”.⁴¹

The solutions to these problems do not necessarily imply the replacement of the HRA with a new domestic instrument.⁴² They could be addressed through other means, such as promoting a better understanding of the HRA mechanism and effects, and enacting minor statutory reforms or amendments to the Act (for example, by extending the range of rights protected). Nonetheless, the political debate has moved in a different direction: that of resuming the project of a national Charter of Human Rights.

IV. The Political Debate Over a New Bill of Rights

The case for a new Bill of Rights was raised again in the political arena after the first years of HRA operation, in tones infused with nationalist rhetoric.⁴³

In a speech delivered at the Centre for Policy Studies in June 2006, David Cameron, at that time leader of the opposition, strongly criticized the HRA as having an adverse impact on tackling crime and terrorism and helping to “create a culture of rights without responsibilities”. He pledged to repeal the Act if the Conservative party won the next election, and to replace it with an entrenched British Bill of Rights, which would enshrine “the core values” of the national community and strike the proper balance between rights and responsibilities. In Cameron’s view, the existence of such a Bill of Rights would enhance the development of a domestic jurisprudence on human rights and “tend to lead the

40 Such as s. 8 HRA: see *Greenfield v. Secretary of State for the Home Department* [2005] 1 WLR 673.

41 T. HICKMAN, *Public Law*, cit., 30, although recognizing an increasing influence of the latter.

42 See M. AMOS, *Problems with the Human Rights Act 1998*, cit., 900 ss.

43 Cfr. C. HARVEY, *Taking the Next Step? Achieving another Bill of Rights?*, in E.H.R.L.R., 2011, 24 ss.

European Court of Human Rights to apply the ‘margin of appreciation’”.⁴⁴

In July 2007 the Labour Government published a Green Paper on constitutional reform, where a process of inclusive national debate was announced to consider the adoption of a written constitution and a Bill of Rights providing a “clearer articulation of British values”.⁴⁵

For their part, the Liberal Democrats restated their commitment to an “entrenched constitution” including a Bill of Rights that would build on the HRA and extend its scope of protection.⁴⁶

The Parliamentary Joint Committee on Human Rights⁴⁷ participated in the debate issuing a report in August 2009 in which the Committee favoured the adoption of a Bill of Rights which would add “more generously defined indigenous rights”⁴⁸ to the range guaranteed by the European Convention, and suggested the main features and content of a possible new instrument.⁴⁹

44 *Balancing freedom and security - a modern British Bill of Rights*, 26 June 2006: <<http://www.conservatives.com/News/Speeches/>>.

45 *The Governance of Britain* CM 7170, July 2007, par. 198. In the same year JUSTICE published a report which includes a comparative survey on human rights codifications and models of judicial review: *A British Bill of Rights. Informing the Debate*, London, JUSTICE, 2007.

46 *For the People, by the People Liberal Democrat Policy Paper* 83, 14, par. 4.2.4: <<http://www.libdems.org.uk/>>.

47 See *Joint Committee on Human Rights - Twenty Ninth Report of Session 2007-08, A Bill of Rights for the UK?*, HL 165-I/HC 150-I. The Joint Committee on Human Rights was established in the first parliamentary session of 2000 with the task of considering questions relating to human rights in the United Kingdom and more particularly, with the duty to review the Government proposals of *remedial orders* under s. 10 HRA. The Committee has included among its priorities the “legislative scrutiny” of proposed legislation, the formulation of reports on the issue of human rights protection, the review of Government action in response to domestic courts’ declarations of incompatibility or ECtHR’s decisions against the UK. On the JCHR’s role and activity see A. LESTER, *Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998*, in E.H.R.L.R., 2002, 432 ss.; F. KLUG, H. WILLDBORE, *Breaking New Ground: The Joint Committee on Human Rights and The Role of Parliament in Human Rights Compliance*, in E.H.R.L.R., 2007, 231 ss.

48 *Ibidem*, par. 56.

49 The JCHR’s proposal preserves most of the features of the ‘parliamentary model’ represented by the HRA, such as the ‘ordinary’ nature of the legislative instrument, the interpretative obligations, and the declaration of incompatibility (see chapter 7) while addressing its major limitations (lack of popular involvement and deliberation, limited range of rights protected, excessive specularity with the supranational system): see in particular chapters 4, 5, 6, 12.

The theme of “duties” was further discussed in the Green Paper *Rights and Responsibilities: developing our constitutional framework* published by the Ministry of Justice in March 2009. The document submits that duties are not given the same prominence as rights in the constitutional architecture and in the general public perception, and expresses the conviction that some responsibilities are so crucial to the functioning of society that they deserve an “elevated constitutional status”. The Green Paper also advocates the inclusion of new rights and principles (such as the principle of equality, principles of good administration, and children’s rights) and a range of welfare entitlements (to healthcare, housing, education). The document does not take a clear position on the legal status and the effects the Bill should have, restricting itself to outlining a number of possible options.⁵⁰

During the 2010 electoral campaign the Conservatives reiterated their will to repeal the HRA and replace it with a domestic Bill of Rights⁵¹, while Labour⁵² and the Liberal Democrats expressed their commitment to “protect” the HRA.⁵³

V. Towards a UK Bill of Rights?

As is well known, the general election of May 2010 led to a coalition Government of Conservatives and Liberal Democrats. The Parties tried to reconcile their divergent views on the future of human rights protection in their Programme for Government.⁵⁴ In this, the coalition announced the establishment of a Commission entrusted “to investigate the creation of a Bill of Rights that incorporates and builds on the obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British Liberties”, and affirmed the purpose of promoting “a better understanding of the true scope of these obligations and liberties”. The Commission was finally established on 18 March 2011.⁵⁵ It is made up of

50 *Rights and Responsibilities: developing our constitutional framework*, CM 7577, March 2009. See the response to the *Green Paper* by the *Equality and Human Rights Commission: HRA plus: Human Rights for 21st-century Britain*, London, EHRC, 2010.

51 *Conservative Party Manifesto 2010*, 79.

52 *The Labour Party Manifesto 2010*, 9:3.

53 *Liberal Democrat Manifesto 2010*, 94. The purpose of introducing an entrenched written Constitution was also restated in the document.

54 *The Coalition: our programme for government – Freedom, Fairness, Responsibility*, London, HMG, 2010, 11.

55 See *Ministerial Statement* HC Deb 18 March 2011 c 32WS.

nine members, seven of whom are from the Bar, and is almost equally divided between “Human Rights Act supporters” and “Human Rights Act sceptics”.⁵⁶

According to its terms of reference, the Commission has the task not only of investigating the feasibility of a Bill of Rights, but also of providing interim advice to the Government on possible reforms of the Strasbourg Court, ahead of and following the assumption by the United Kingdom of the Chairmanship of the Council of Europe from November 2011.⁵⁷ The Commission is expected to report back no later than the end of 2012.

To date, the Commission has advanced a number of considerations on the main objectives to be achieved and on its methods of work,⁵⁸ and has launched a programme of consultation.⁵⁹ In particular, the Commission has pointed out the need to ensure public engagement with its work, to recognize the common law heritage and its role in the context of human rights protection and to consider the respective roles that Parliament, Government and the Courts should

56 On the side of “HRA sceptics”: Jonathan Fisher QC, Martin Howe QC, Anthony Speaight QC, who have all contributed to the pamphlet of the Society of Conservative Lawyers *A Modern Bill of Rights* published in 2006 (see <<http://www.conservativelawyers.com/>>), and Michael Pinto-Duschinsky, President of the International Political Science Association’s research committee on political finance and political corruption and author of the pamphlet *Bringing Rights Back Home. Making human rights compatible with parliamentary democracy in the UK*, Policy Exchange, 2011, discussing the hypothesis of withdrawal from the jurisdiction of the European Court of Human Rights. On the side of “HRA supporters”: Lady Helena Kennedy QC, chair of the Justice Council, Lord Lester of Herne Hill QC, generally recognized as one of the main “authors” of the HRA, and Philippe Sands QC, Professor of Law and Director of the Centre on International Courts and Tribunals at University College London. The other members of the Commission are Sir Leigh Lewis, chair of the Commission and former Permanent Secretary to the Department of Work and Pensions, and David Edward QC, Professor Emeritus of the University of Edinburgh and former Judge of the Court of First Instance and the European Court of Justice.

57 The interim advice was published on 8 September 2011. See the Commission’s website: <<http://www.justice.gov.uk/about/cbr/index.htm/>>.

58 See *Minutes of the meeting of the Commission on a Bill of Rights*, 6 May 2011 on the Commission’s website.

59 This consultation programme will involve the general public, interested organizations, the judiciary, and devolved institutions: see the Commission’s website. To this end, the Commission has issued a discussion paper, *Do we need a Bill of Rights?*. The paper has attracted numerous responses, including: University of Cambridge Centre of Public Law: *Submission to Commission on a Bill of Rights*, November 2011; Equality and Human Rights Commission, *The case for the Human Rights Act*, November 2011, which underlines the need to uphold the principle of “non-regression” (with regard to the HRA mechanism, range of rights and level of protection) in any future process of adopting a UK Bill of Rights.

play in that field. The Commission has also underlined the need to evaluate fully the implications of the devolution settlements in its work and to consult with the devolved institutions. As for the possible content of a new Bill of Rights, the Commission points out the need to consider whether a different balance of existing rights could or should be achieved (significantly mentioning Articles 8 and 10 ECHR), whether the range of protected rights could or should be updated and expanded by including in any UK Bill of Rights additional rights (such as the right to jury trial, habeas corpus, a right to equal protection of the law, a right to administrative justice) and whether responsibilities, besides rights, should be included in the terms of the Bill.

Since its announcement in the coalition program, the establishment of the Commission has caused a considerable debate among commentators. It has been argued that such an initiative does not enjoy sufficient popular interest and support while protracted uncertainty on the future of the HRA is likely to have a “chilling effect” on its implementation.⁶⁰ This problem is exacerbated by the recent continuous assaults the Act and the European Court itself have been undergoing from the media and exponents of the Government.⁶¹ The divergency in its members ideological and political provenance has raised further diffidence regarding the Commission’s ability to work.⁶² In two audiences before the *Political and Constitutional Reform Select Committee*, the members of the Commission endeavoured to reassure the public on their real will to work together without prejudice on the object of their mandate.

Admittedly, several of the issues the Commission will have to deal with are

60 A. DONALD, *A Bill of Rights for the UK? Why the process matters*, in E.H.R.L.R., 2010, 459 ss., 459 and 460. See also D. ERDOS, *Smoke but No Fire? The Politics of a ‘British Bill of Rights’*, in 81 *The Political Quarterly*, 2010, 188 ss., written before the general election, discussing the different options the main political parties face with regard to human rights policy, and focusing on the “constitutional smoke” option where “both parties’ utility have, and continue to be, best served by promoting lengthy and inconclusive public debate on these issues, followed by, at most, relatively cosmetic change”: at 188.

61 See N. BRATZA, *The relationship between the UK courts and Strasbourg*, cit. See also the current debate on prisoners’ right to vote: S. BRIANT, *Dialogue, diplomacy and defiance: prisoners’ voting rights at home and in Strasbourg*, in E.H.R.L.R. 2011, 243 ss.

62 The Commission has been described as “deadlocked from the start”, as not having a “snowball’s chance in hell of coming to an agreed conclusion”: A. TRAVIS, P. WINTOUR, *Deadlock likely on commission pondering a British bill of rights*, in *The Guardian*, 18 March 2011: <<http://www.guardian.co.uk/law/2011/mar/18/deadlock-bill-of-rights-commission/>>; R. SMITH, *The state of human rights*, 10 June 2011: <<http://www.newlawjournal.co.uk/>>.

exacting and complex. The terms of reference say nothing about the place a possible Bill of Rights should take in the existing constitutional framework, nor do they contemplate the process of creating a Bill of Rights as part of a wider process of constitutional renewal.⁶³ The issue of the relationship between a UK Bill of Rights and the various international human rights instruments binding the United Kingdom will have to be addressed, especially as far as the content is concerned.⁶⁴

The implications of a Charter of Rights on devolution settlements are also critical, as a report by JUSTICE, one of the most eminent organizations in the field of human rights, has recently pointed out.⁶⁵ The HRA applies in the different devolved components of the United Kingdom. Specific provisions of the devolution statutes prevent their legislative institutions from modifying it.⁶⁶ Moreover, both legislative and executive devolved institutions are bound to act in a way which is compatible with Convention rights.⁶⁷ Thus, the HRA and the devolution statutes concur in ensuring the protection of human rights in the United Kingdom: the range of rights protected is the same in the individual components of the UK, as are many of the mechanism's features.⁶⁸ This implies that the adoption of a new UK Bill of Rights in place of the HRA or in addition to it, would also require amendments to the devolution statutes, a course which would be likely to require the consent of the devolved Assemblies.⁶⁹

The relationship between human rights legislation and devolution is particularly delicate with regard to Northern Ireland. Firstly, the UK Bill of Rights debate may hinder or stall the ongoing process toward the adoption of a specific Bill of Rights for Northern Ireland required by the Belfast (Good Friday) Agreement (GFA) of April 1998, with the effect of breaching the obligations arising from that instrument.⁷⁰ Secondly, a Charter of Rights aimed at repre-

63 As the Liberal Democrats have always intended. See also R. GORDON, *Repairing British Politics: a Blueprint for Constitutional Change*, Oxford, 2010.

64 Cfr. Philippe Sands, in *Corrected Transcript of Oral Evidence to be published as HC 1049-ii*.

65 *Devolution and Human Rights*, London, JUSTICE, February 2010. See also C. HARVEY, *Taking the Next Step?*, cit., 39 ss.

66 Schedule 4 SA, s. 7(1)(b) NIA "entrenched enactments".

67 S. 29(2)(d) e 57(2) SA; s. 6(2)(c) e 24(1)(a) NIA; s. 94 e 81(1) GWA 2006. Section 21(1) HRA defines the Acts of the Scottish Parliament and the Acts of the Parliament of Northern Ireland as "subordinate legislation", and as such liable to be disapplied by courts if incompatible with Convention rights.

68 Cfr. *Devolution and Human Rights*, cit., para 14 ss.

69 Ibidem.

70 The GFA is not only a peace agreement between rival factions but also a bilateral

senting the whole United Kingdom may inflame nationalist feelings in Northern Ireland. Likewise, a UK Bill of Rights may antagonize nationalist feelings that already exist in Scotland.⁷¹

As the JUSTICE report points out, the HRA has been accepted without particular difficulties in the devolution context, partly because it “reflects wider international and regional human rights standards that all the communities can agree to be bound by”.⁷² The politics of incorporating a supranational instrument through the HRA has had a ‘neutralizing’ effect on nationalist feelings while at the same time ensuring a common framework of rights acting as a point of reference for the new devolved institutions.⁷³

The formulation and adoption of a Bill of Rights implies a process of national identity definition;⁷⁴ this process is particularly delicate for the United

treaty between the United Kingdom and the Republic of Ireland. The Agreement requires the creation of a Northern Ireland Human Rights Commission (NIHRC) whose competences include the duty to advise the Secretary of State on the content of a Bill of Rights for Northern Ireland “to reflect the particular circumstances of Northern Ireland”: see s. 69(7) of the Northern Ireland Act giving effect to the GFA. The established NIHRC produced its report on 10 December 2008 after years of lengthy consultations throughout the country. Most of the NIHRC’s recommendations have been rejected by the Northern Ireland Office on the basis that the rights proposed were not specific to the circumstances of Northern Ireland and might be better addressed as part of the debate over a UK Bill of Rights. By contrast, the Irish Government has stated that the UK obligations towards the Republic of Ireland under the GFA imply the adoption of a specific Northern Ireland Bill of Rights: see *Devolution and Human Rights*, cit., para 84 ss. On the NIHRC’s work see C. HARVEY, D. RUSSELL, *A new beginning for human rights protection in Northern Ireland?*, in E.H.R.L.R. 2009, 748 ss.

71 *Devolution and Human Rights*, at para 97 ss. On the diversity of national identities in the UK see the monographic issue *The Politics of Britishness*, no. 63(2) *Parliamentary Affairs*, 2010, 223 ss.

72 *Devolution and Human Rights*, cit., para 102. In its conclusion, the Report expresses serious concerns about the consequences of abandoning the point of equilibrium the HRA represents: “The HRA works, and at present the devolution framework has also been successful. Amendments to the HRA or legislating for a bill of rights would be dangerous and risky – to the protection of rights, to the constitution of the UK, and to the Union itself”: *op. cit.*, para 112.

73 As acknowledged in the same context of the parliamentary debates leading to the adoption of the HRA: see *Select Committee of the House of Lords on A Bill of Rights*, 1978, HL Paper n. 176, 30 ss.

74 Cfr. *Joint Committee on Human Rights*, cit., para 15. For a critical assessment of alternative models of constitutional design in societies divided by competing nationalisms see A. SCHWARTZ, *Patriotism or integrity? Constitutional community in divided societies*, in O.J.L.S., 2011, 503 ss.

Kingdom. It will be necessary to give serious consideration to the issues and implications involved and evaluate whether the project can achieve the degree of political and popular consensus indispensable to render a new Bill of Rights an instrument of cohesion rather than an instrument of divergence among the national communities involved.

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