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## The Human Rights Act 1998 – Future Prospects

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### **Abstract.**

It is now over fifteen years since the Human Rights Act was enacted in November 1998. Although in legal terms it is difficult to argue with the proposition that the Act is working in an effective manner, in political terms the Act remains one of the most highly debated pieces of legislation on the UK statute books. In recent years there have been numerous calls for the repeal of the Act, and for its replacement with a ‘UK Bill of Rights’. Such calls led to the establishment of a Commission on a Bill of Rights, which issued its final report in December 2012. Little progress has since been made on the issue. One notable occurrence however was the introduction of the Human Rights Act 1998 (Repeal and Substitution) Bill, a Private Member’s Bill which was eventually withdrawn in March 2013. This article seeks to assess the current situation regarding the bill of rights debate, and ultimately the question of the future prospects of the Human Rights Act, an issue of immense legal significance. Overall, it will be questioned whether the enactment of a UK Bill of Rights would constitute an improvement on the current position under the Human Rights Act.

## **The Human Rights Act 1998 – Future Prospects.**

**Ronagh J.A. McQuigg.\***

The Human Rights Act 1998 is undoubtedly one of the most contentious pieces of legislation on the UK statute books. Although many regard the Act as providing essential protection for the rights of individuals, it is also viewed in certain quarters as ‘a rogues’ charter’. Indeed, there have been strong calls for the repeal of the Act, and for its replacement with what is commonly referred to as a ‘UK Bill of Rights’. The debate surrounding this issue culminated in the establishment of a Commission on a Bill of Rights, which issued its final report in December 2012.<sup>1</sup> Little progress has since been made on the issue of a bill of rights. One notable occurrence however was the introduction of the Human Rights Act 1998 (Repeal and Substitution) Bill, a Private Member’s Bill which was eventually withdrawn in March 2013. This article seeks to analyse the current situation regarding the bill of rights debate in the UK and the future prospects for the Human Rights Act. Overall, it will be questioned whether the enactment of a UK Bill of Rights would constitute an improvement on the current position under the Human Rights Act.

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<sup>1</sup> *The Commission on a Bill of Rights’ Report – A UK Bill of Rights? – The Choice Before Us*, 18 December 2012

## **The Political Context.**

The result of the general election of 2010 - a Coalition government consisting of the Conservative and Liberal Democrat Parties - gave rise to a particularly problematic situation as regards the question of the future of the Human Rights Act. The Conservative Party manifesto had contained a pledge to 'replace the Human Rights Act with a UK Bill of Rights'. The Liberal Democrats however had stated in their manifesto that they would 'ensure that everyone has the same protections under the law by protecting the Human Rights Act'. After some delay, a compromise position was adopted, whereby a Commission was established in March 2011 with the mandate *inter alia* of investigating 'the creation of a UK Bill of Rights that incorporates and builds on (the UK's) obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extends...liberties.' It is notable that, even from the outset, this process suffered from a remarkable amount of incoherency. Essentially, the primary reason for addressing the question of a UK Bill of Rights at that juncture was the Conservative Party's belief that the Human Rights Act should be replaced. However, the Commission's mandate was to investigate the creation of a UK Bill of Rights to incorporate and build upon the UK's obligations under the European Convention and ensure that these rights remain part of UK law. According to this mandate, proposing a weaker instrument than the Human Rights Act was not an option. Therefore, there was never any possibility that the Commission's deliberations could produce a solution to the perceived problem.

## **The Report of the Commission on a Bill of Rights.**

During the course of its deliberations, the Committee produced two consultation papers. On each occasion approximately a quarter of respondents supported a UK Bill of Rights; just under half opposed such a Bill; with the remainder being neither clearly for or against.<sup>2</sup> The majority of those who opposed a UK Bill of Rights did so on the basis that the UK already has a bill of rights, in the form of the Human Rights Act. Many of the respondents who shared this view were of the opinion that the Act is working well and that it is ‘an effective and sophisticated piece of legislation’.<sup>3</sup> In particular, there was ‘considerable suspicion among many respondents that the call for a UK Bill of Rights from some political parties and politicians (was) motivated by a desire to reduce existing human rights protection’.<sup>4</sup> In Scotland, Wales and Northern Ireland, calls for a UK Bill of Rights were ‘generally perceived to be emanating from England only and there was little if any criticism of the European Court of Human Rights or of the Convention.’<sup>5</sup>

The Commission presented its final report on 18 December 2012. In its report the Commission stated that there was ‘no doubt that the arguments that have been put to us against a UK Bill of Rights are substantial.’<sup>6</sup> Nevertheless, despite the relatively low

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<sup>2</sup> *The Commission on a Bill of Rights’ Report – A UK Bill of Rights? – The Choice Before Us*, 18 December 2012, Volume 1, p 14

<sup>3</sup> *Ibid*, p 14

<sup>4</sup> *Ibid*, p 15

<sup>5</sup> *Ibid*, pp 18-19

<sup>6</sup> *Ibid*, p 26

levels of support for a Bill of Rights, seven of the Commission's nine members were of the view that there was a strong argument in favour of a Bill of Rights to incorporate and build upon the UK's obligations under the European Convention. The primary reason for the support of the majority of the Commission for a Bill of Rights was a perceived 'lack of public understanding and "ownership" of the Human Rights Act'.<sup>7</sup> For the members of the Commission who supported a UK Bill of Rights, it would therefore be 'desirable in principle if such a Bill was written in language which reflected the distinctive history and heritage of the countries within the United Kingdom', as the 'key argument' in favour of a Bill of Rights was 'the need to create greater public ownership of a UK Bill of Rights than currently attaches to the Human Rights Act'.<sup>8</sup>

### **Would a UK Bill of Rights improve on the Human Rights Act?**

Two members of the Commission – Baroness Kennedy of The Shaws and Philippe Sands – were however of the view that the time was not ripe for the conclusion to be reached that a new UK Bill of Rights should be enacted. Their primary reason for disagreeing with the approach of the majority was the fact that the majority had failed to identify any actual shortcomings in the Human Rights Act or in its application by the judiciary. Essentially the problem which the majority of the Commission perceived to exist was not with the Act itself, but with the way in which it is viewed by certain sections of the public. Indeed, from a legal perspective, the Act is working in an

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<sup>7</sup> Ibid, p 28

<sup>8</sup> Ibid, p 30

effective manner. As Harvey comments, the Human Rights Act ‘has been carefully and steadily absorbed into the legal system of the UK and a strong case can be made for its retention and the security of its place in the constitutional order.’<sup>9</sup>

It is true that the Human Rights Act has not reached ‘the iconic status of the American or South African bills of rights’.<sup>10</sup> However, to hope that the Act would attain such a status was perhaps too lofty an aspiration. The Constitution of the United States was drawn up in the wake of the American Declaration of Independence, which declared the separation of the 13 colonies from Great Britain. Given this context, it is unsurprising that the US Constitution, and the rights contained therein, carry great symbolic importance. Likewise, the bill of rights found in the South African Constitution was drawn up following the end of apartheid. Given the history of the widespread human rights abuses which occurred in South Africa, it is again unsurprising that the South African bill of rights now holds an iconic status. The Human Rights Act was enacted in a very different context to either of these examples. It seems that it is rather more difficult for bills of rights drawn up in less turbulent circumstances to catch the imagination of the public. The New Zealand Bill of Rights Act of 1990 is a case in point. This Act was passed, not because of the occurrence of any prominent human rights abuses, but rather due to the impetus produced largely by the then Prime Minister, Geoffrey Palmer. The New Zealand Act is similar in many ways to the UK’s Human Rights Act. In particular, section 6 of the New Zealand statute places an obligation on the courts to interpret

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<sup>9</sup> C Harvey ‘Taking the next step? Achieving another Bill of Rights’ (2011) *European Human Rights Law Review* 24 at 25

<sup>10</sup> F Klug ‘A Bill of Rights: what for?’ in C Bryant, *Towards a New Constitutional Settlement* (London: The Smith Institute, 2007) 130 at 139

legislation consistently with a set of rights, within certain limits, in a manner similar to that of section 3 of the Human Rights Act. There was no cross-party political support for the New Zealand Act, and the attitudes of the general public were apathetic at best. It cannot be said that the Bill of Rights Act has ever reached iconic status in New Zealand however, 24 years after its inception, the Act is still in existence and proposals were in fact made to strengthen its provisions.<sup>11</sup> Human rights instruments do not need to be iconic documents in order to survive and to be effective in protecting rights.

In addition, given the constitutional context of the UK, it is unsurprising that the Human Rights Act has not gained an iconic status. The UK's constitutional structure is based on a liberal ideology. The attitude to rights which was traditionally adopted was that of negative liberties ensuring individual freedoms. Bills of rights do not fit well with such an approach, and indeed the Human Rights Act represented a substantial departure from such an ideology. Interestingly, New Zealand has a very similar constitutional context to that of the UK and, as discussed above, its bill of rights has not attained an iconic status either. Australia, another common law jurisdiction which again shares a similar constitutional heritage, does not have a bill of rights at the federal level. Essentially, to expect that a human rights instrument will achieve symbolic status in a country with a constitutional history such as that of the UK is perhaps to be overly optimistic.

Another reason why the Human Rights Act has not achieved iconic status may be due to its own operative mechanisms. The American and South African bills of rights

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<sup>11</sup> New Zealand Bill of Rights Amendment Bill 2010



both accord the respective judiciaries the power to strike down legislation which is incompatible with the rights contained therein. It is not suggested that the Human Rights Act should be amended to allow the UK judges to do likewise. Indeed, affording the judiciary such a power would be seen as anathema to many in the political sphere, and as contrary to the doctrine of parliamentary sovereignty which is the bedrock of the constitutional order of the UK. However, the fact that the US and South African judiciaries have the power to strike down legislation which is incompatible with human rights standards gives the respective bills of rights something of a dramatic flourish, which is significantly more likely to catch the imagination of the public than is the declaration of incompatibility mechanism found in section 4 of the Human Rights Act. Of course, that is not to denigrate this mechanism in any way. Indeed, the respondents to the Commission's consultations were widely of the view that section 4 of the Human Rights Act is operating in a successful manner, and the majority of the Commission was of the opinion that a similar mechanism should be utilised in a UK Bill of Rights. However, the very fact that this mechanism had to be created in order to address the difficulty of how to reconcile a human rights instrument with the constitutional context of the UK adds weight to the proposition that it may be immensely difficult for the Human Rights Act (or indeed any UK Bill of Rights) to achieve a status equivalent to that of the US or South African bills of rights.

However, the fact that the Human Rights Act has not achieved iconic status does not mean that it has insufficient support. It seems that levels of opposition to the Human Rights Act have in fact been significantly overestimated. According to the findings of

the Commission's consultations, it appears that any 'ownership' issue is limited to certain parts of England, and does not therefore create a difficulty in the majority of the UK. In a separate paper produced by the two members of the Commission who did not support a UK Bill of Rights, it is stated that the consultations demonstrated in fact that there was 'overwhelming support to retain the system established by the Human Rights Act'.<sup>12</sup> Indeed 96 per cent of participants were of the view that the Human Rights Act should be retained.<sup>13</sup> This paper proceeded to state that,

it is abundantly clear that there is no 'ownership' issue in Northern Ireland, Wales and Scotland (or, it would appear, across large parts of England), where the existing arrangements under the Human Rights Act and the European Convention on Human Rights are not merely tolerated but strongly supported.<sup>14</sup>

It seems that rather than attempting to create a new UK Bill of Rights with all the attendant difficulties, a better and more straightforward solution would be to carry out education campaigns regarding the Human Rights Act in the parts of England where an 'ownership' problem is deemed to exist. This would constitute a more logical approach than that of attempting to produce a UK Bill of Rights when there is clear opposition to such a measure among some sections of the population, particularly in the devolved nations. If the key argument for a UK Bill of Rights is a lack of 'ownership' of the Human Rights Act, the fact that only 25 per cent of the respondents to the Commission's

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<sup>12</sup> Baroness Kennedy of The Shaws and P Sands, 'In Defence of Rights' in *The Commission on a Bill of Rights' Report – A UK Bill of Rights? – The Choice Before Us*, 18 December 2012, Volume 1, 221 at 225.

<sup>13</sup> *Ibid*, p 225

<sup>14</sup> *Ibid*, p 226

consultations were in favour of a Bill of Rights does not lead one to believe that a Bill of Rights would engender any greater sense of ‘ownership’ than has the Human Rights Act.

The Commission itself stated in its report that there was

a strong strand in response to our consultations that even if there were, and are, problems or perceived problems with the Human Rights Act, or its adjudication by the courts, these have largely been caused by a lack of public education, and could be addressed accordingly.<sup>15</sup>

For example, the British Institute of Human Rights commented in its response to the consultation that,

rather than reinventing the wheel with a Bill of Rights, we believe the Commission should focus on recommending the need for an appropriate and accessible programme for public education on human rights and the (Human Rights Act) to show that the law works and is working well.<sup>16</sup>

In addition, as regards the elements of the public among whom an ‘ownership’ problem is deemed to exist, it is arguable that negative attitudes may be linked to the concept of ‘human rights’, as opposed to the Human Rights *Act* specifically. A proportion of members of the public may well be of the opinion that ‘human rights’ create advantages for the ‘undeserving’ in society, such as terrorist suspects. However, it is likely that a large percentage of the general public do not actually have a high level of substantive knowledge of the Human Rights Act itself, such as precisely what rights are

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<sup>15</sup> *The Commission on a Bill of Rights’ Report – A UK Bill of Rights? – The Choice Before Us*, above n 1, p 16

<sup>16</sup> *Ibid*, p 29

contained therein. According to the Bill of Rights Commission's report, the primary purpose of a UK Bill of Rights would essentially be to change the wording of the rights currently contained in the Human Rights Act to make them more reflective of 'the distinctive history and heritage of the countries within the United Kingdom.'<sup>17</sup> However, if it is the case that the majority of the public are unaware of precisely what their rights are, let alone how these rights are currently expressed, how will changing the wording have any effect whatsoever? Conversely, if the public *are* aware of the content of their rights under the Human Rights Act, the assumption that 'cosmetic' changes to the wording of these rights will somehow create a greater degree of public 'ownership' of the rights in question verges on constituting an insult to the intelligence of the general public. Of course, other problematic questions also arise, such as how does one distil 'the distinctive history and heritage' of the UK, for the purposes of a UK Bill of Rights, from the different heritages of the various nations within the UK? Even if this task is accomplished, how does one then go about drafting a Bill of Rights that is reflective of this 'distinctive history and heritage'?

Given that the consultation carried out by the Commission found that there is in fact very considerable opposition to a UK Bill of Rights, the obvious question that arises is why then did the majority of the Commission support such a Bill of Rights? In their separate paper, Baroness Kennedy and Philippe Sands commented that,

in the course of our deliberations it became evident that a number of (Commission members) would like the United Kingdom to withdraw from the European

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<sup>17</sup> Ibid, p 30

Convention....(T)he unambiguous expression of such views offered openly in the course of our deliberations has made it clear to us that for some of our colleagues a UK Bill of Rights is a means towards withdrawal from the European Convention.<sup>18</sup>

Two of the other Commission members, Lord Faulks and Jonathan Fisher produced a separate paper entitled ‘Unfinished Business’ in which they stated that, ‘there are strong arguments that the cause of human rights, both in the UK and internationally, would be better served by withdrawal from the Convention and the enactment of a domestic Bill of Rights’.<sup>19</sup> There is undoubtedly a section of the Conservative Party which believes strongly that the UK should leave the Convention, due to decisions of the European Court on issues such as prisoners’ voting rights.<sup>20</sup> Under article 65 of the European Convention, the UK could denounce its adherence to the Convention after giving six months notice of its intention to do so. However, it is debatable whether such a development would ever constitute a politically viable option. Given the high levels of support for the Human Rights Act which the Bill of Rights Commission found in its consultations, it is very doubtful whether such a move would prove to be popular among the public. Also, it is likely that leaving the Convention would make the UK the subject of potentially damaging criticism on an international level, and to allegations of insufficient respect for human rights standards.

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<sup>18</sup> Baroness Kennedy and P Sands, above n 12, pp 226-227

<sup>19</sup> Lord Faulks and J Fisher ‘Unfinished Business’ in *The Commission on a Bill of Rights’ Report – A UK Bill of Rights? – The Choice Before Us*, 18 December 2012, Volume 1, 182 at 189

<sup>20</sup> For example, *Hirst v the United Kingdom (No. 2)*, app. no. 74025/01, 6 October 2005; *Greens and M.T. v the United Kingdom*, app. nos. 60041/08 and 60054/08, 11 April 2011

## **The Human Rights Act 1998 (Repeal and Substitution) Bill.**

In 2012 Fenwick remarked that, ‘The appetite of a number of senior Conservatives for repeal of the (Human Rights Act) and diminution of Strasbourg influence appears undiminished, even enhanced, in the context of the Coalition.’<sup>21</sup> This fact is clearly illustrated by the introduction of the Human Rights Act 1998 (Repeal and Substitution) Bill by Charlie Elphicke, the Conservative Member of Parliament for Dover and Deal. The Bill was also supported by 11 other Conservative MPs. Although the Bill was later withdrawn, an examination of its contents is nevertheless instructive as the Bill demonstrates the level of opposition among certain sections of the Conservative Party to the Human Rights Act.

Section 16 of the Bill stated that, ‘The Human Rights Act 1998 is repealed’, while under section 17, no provision of the European Convention, judgment of the European Court, opinion or decision of the European Commission of Human Rights or decision of the Committee of Ministers taken under the Convention would be regarded as binding on any person or on any public authority. As regards what would be put in the place of the Human Rights Act, the Bill set out a catalogue of rights (referred to in the Bill as ‘UK rights’) and also a very limited number of responsibilities. The operative mechanisms of the Bill contained strong similarities to those of the Human Rights Act, which reflects the

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<sup>21</sup> H Fenwick ‘Replacing the Human Rights Act with a British Bill of Rights: Creating greater Parliamentary autonomy on human rights matters?’ in N Kang-Riou, J Milner and S Nayak (eds) *Confronting the Human Rights Act: Contemporary Themes and Perspectives* (London: Routledge, 2012) 291 at 325

finding of the Bill of Rights Commission that the mechanisms contained in the Act are working effectively.

Section 2(1) of the Bill stated that when determining a question which has arisen in connection with a UK right, a court ‘may take account of’ judgments of the courts in Australia, Canada, New Zealand, the United States of America or any country having a common law-based judicial system; the European Court of Human Rights; or a court in any other jurisdiction which may be relevant to the UK right under consideration. This provision contained similarities to section 2(1) of the Human Rights Act, which states that the courts ‘must take into account’ the judgments of the European Court. However, under the Bill, although the UK judiciary would be permitted to take account of the judgments of the courts listed, there would be no actual obligation to do so. Also, and most obviously, the proposed section 2(1) potentially covered the jurisprudence of all courts outside of the UK, with no especial position being afforded to the jurisprudence of the European Court.

Section 2(2) of the Bill stated that,

A court or tribunal determining a question which has arisen in connection with a UK right shall take into account all the facts and circumstances of the case, including the conduct of the person seeking to assert the UK right (including his adherence to the responsibilities set out in Article 23 of Schedule 1) and whether it is fair, equitable and in the interests of justice for such UK right to be applied in relation to the question at hand.

This provision sought to link the entitlement to rights to the exercise of responsibilities, and envisages situations in which courts may decide that a right should not be applied, essentially due to the conduct of the person seeking to rely on the right. It is however doubtful whether such a provision would ever receive sufficient support to be enacted, given that the majority of respondents to the consultations carried out by the Bill of Rights Commission indicated that they were of the view that rights should not be linked to the exercise of responsibilities. It is also doubtful whether the courts would apply a somewhat vaguely drafted provision such as this in a manner as to prevent individuals from relying on rights, as such an approach would be contrary to internationally accepted human rights principles. No guidance was given on how the courts should take into account the conduct of the person seeking to assert the right, and it is difficult to imagine that there would be a great many cases in which the courts would hold that it would be unfair to apply a right. From a purely pragmatic perspective therefore, it is unlikely that such a provision would make any great difference to the outcomes of cases. Nevertheless, from a theoretical perspective, linking the entitlement to rights with conduct in this manner strikes at the very heart of the foundations of human rights in a deeply troubling manner.

As in the Human Rights Act, section 3 of the Bill related to the interpretation of legislation by the courts. Section 3(1) stated that, ‘When reading and giving effect to legislation in light of the UK rights, the words and sentences of legislation must be construed in accordance with their ordinary and natural meaning.’ Section 3(2) provided that, ‘Where the meaning of legislation arrived at in accordance with subsection (1) is



ambiguous, it may be presumed that a possible meaning that is compatible with the UK rights was intended, unless the contrary intention appears.’ The Bill therefore adopted a much more restrictive approach as to the interpretation of statutes in accordance with rights than does section 3(1) of the Human Rights Act, which states that, ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.’ A fairly liberal approach has been taken by the courts to section 3(1), with the seminal case on interpretation being that of *Ghaidan v Godin-Mendoza*.<sup>22</sup> However, under section 3(1) of the Bill, legislative provisions would have to be construed in accordance with their ordinary meaning, with the question of a possible rights-consistent interpretation only arising if there is ambiguity. Indeed, this is the approach that the UK courts currently take towards the provisions of international treaties that are not incorporated into domestic law. It seems somewhat odd that so-called ‘UK rights’ would not be afforded a higher status under the Bill. Section 4 of the Bill contains a declaration of incompatibility mechanism, which is very similar to that found in section 4 of the Human Rights Act. It is however likely that this mechanism would be used much more frequently by the courts under the Bill than is currently the case under the Human Rights Act, due to the extremely limited circumstances in which section 3(2) could be used. If a declaration of incompatibility is issued, it is up to Parliament to decide whether the legislation in question should be amended to make it compatible with rights, as opposed to the courts simply applying a rights-consistent interpretation using the interpretative

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<sup>22</sup> [2004] UKHL 30

obligation. Therefore, the Bill would decrease the role of the courts, relative to Parliament, as regards human rights issues.

Section 7(1) of the Bill stated that, ‘It is unlawful for a public authority to act in a way which could not reasonably be regarded, in all the facts and circumstances of the case, as compatible with the UK rights.’ This provision would raise the threshold for a finding of unlawfulness from that which is currently applied by the courts under section 6(1) of the Human Rights Act, which states that, ‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right.’ Indeed the reference to reasonableness brings to mind the *Wednesbury*<sup>23</sup> standard which is applied in judicial review cases which do not involve the Human Rights Act. Section 8 of the Bill provided a right of action for breach of the duty on public authorities which is broadly similar to that contained in section 7 of the Human Rights Act. Section 9(1) of the Bill stated that,

In relation to any act of a public authority which the court finds is unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate, unless the act was reasonable with regard to all the circumstances, including a reasonable understanding of primary or subordinate legislation applying to the public authority concerned.

The equivalent provision of the Human Rights Act is found in section 8(1), which states, ‘In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.’ It is notable that the caveat placed on

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<sup>23</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corpn.* [1948] 1 KB 223

section 9(1) of the Bill appears to be superfluous. Section 9(1) would only come into operation if a court has already found that a public authority has acted in a way which could not reasonably be regarded as compatible with the UK rights, and that the public authority in question was not caused to act in such a manner by provisions of primary or subordinate legislation.<sup>24</sup> It would seem peculiar if the court then decided that the actions of the public authority were in fact reasonable for the purposes of section 9(1).

Section 11 of the Bill contained a power for Ministers of the Crown to take remedial action in respect of legislation declared under section 4 to be incompatible with UK rights. This mechanism is broadly similar to that found in section 10 of the Human Rights Act. Sections 13 and 14 of the Bill contained particular provisions relating to freedom of expression and freedom of thought, conscience and religion which are almost identical to those found in sections 12 and 13 of the Human Rights Act. Section 15 of the Bill would place an obligation on a Minister of the Crown who is introducing legislation to make either a statement that the provisions of the legislation are compatible with the UK rights, or a statement that the government nevertheless wishes to proceed with the legislation in the event of incompatibility. This procedure is identical to that of the making of statements of compatibility with the Convention rights under section 19 of the Human Rights Act.

The rights and responsibilities themselves were found in Schedule 1 to the Bill. The rights listed were heavily based on those found in the European Convention, and

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<sup>24</sup> Section 7(2) of the Human Rights Act 1998 (Repeal and Substitution) Bill 2013

indeed the wording used was for the large part identical to that of the Convention rights. The differences between the rights in the Bill and the Convention rights tended to be related to issues which have been discussed by the media in the UK in recent times. For example, two provisos were added to the right to free elections, whereby this right ‘shall not entitle a person to vote in an election if that person is in detention under the sentence of a court handed down for a criminal offence’,<sup>25</sup> and ‘shall not entitle a person to vote in an election if they are not a British citizen.’<sup>26</sup> Article 18 of the Schedule would afford British citizens a right to challenge extradition. However under article 22(2), ‘No person who is not a British citizen may rely on any Article in this Schedule to delay, hinder or avoid deportation or other removal from the United Kingdom.’ Article 22(3) stated that,

A public authority may take such action in relation to a person as it believes to be appropriate in the interests of national security or public safety if it reasonably believes that there is a clear and present danger to national security or public safety presented any that person; but such action shall not include deprivation of life...or torture or inhuman or degrading treatment or punishment (though, for the avoidance of doubt, such action may include extradition or other removal from the United Kingdom).

Article 16(1) provided that,

In a dwelling, a person...has the right to use force against someone for the purpose of defending himself or others from violence or a sexual crime or for protecting property from crime, where he believes the person he uses force

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<sup>25</sup> Article 15(2) of Schedule 1 to the Human Rights Act 1998 (Repeal and Substitution) Bill 2013

<sup>26</sup> Article 15(3) of Schedule 1 to the Human Rights Act 1998 (Repeal and Substitution) Bill 2013

against is in or entering the dwelling as a trespasser; but the force used must not be grossly disproportionate in the circumstances that he believes exist.

However, article 16(2) stated that, 'This Article applies in England and Wales only.' It certainly seems that affording a right to persons in only particular parts of the UK would be problematic, given the fact that human rights are based upon the principle of universality!

A short list of responsibilities was found in article 23. The duties encompassed were obeying the law; rendering civil or military service when this is required for the country's defence; supporting, nurturing and protecting one's children; respecting and upholding basic public order; seeking to support oneself without recourse to a public authority; and rendering help to other persons who are in need of assistance, where reasonable and to the best of one's ability. Overall, very little attention was given to the concept of responsibilities in the Bill. Although it is a much repeated argument that rights should 'go hand in hand' with responsibilities, linking the two concepts is in practice problematic. One of the reasons for this difficulty is that the very essence of human rights is that rights are afforded to individuals simply by virtue of the fact that they are human beings. The virtuosity or otherwise of their conduct is irrelevant. Attempting therefore to link the entitlement of an individual to human rights to the exercise of responsibilities is, at the most basic level, incompatible with the principles which form the very foundation of the human rights discourse. Thus when those seeking to connect rights with responsibilities actually attempt to draft a legislative instrument in this vein, it seems that the product tends to be simply a bill of rights with very few

meaningful references to the concept of responsibilities. For example, a Charter of Rights and Responsibilities Act was passed in the Australian state of Victoria in 2006. However, although the term ‘responsibilities’ is included in the title of the legislation, there is very little reference to the concept of ‘responsibilities’ in the Charter’s substantive provisions.

The Human Rights Act 1998 (Repeal and Substitution) Bill was withdrawn following the second reading debate in March 2013. Nevertheless, the very fact that such a detailed Private Member’s Bill was introduced is evidence in itself of the deep dissatisfaction within certain sections of the Conservative Party regarding the incorporation of the Convention rights into domestic law by the Human Rights Act. Although there are great similarities between the Bill and the existing Human Rights Act, there are nevertheless aspects of the Bill which are deeply problematic, such as the inclusion of provisions which are in direct conflict with cases of the European Court, such the decisions in *Chahal* and *Hirst*. In the Parliamentary debate on the Bill, Elphicke commented that it was drafted ‘in such a way as to leave it open to the Executive to decide whether they wished to remain party to the Convention or to withdraw from it altogether.’<sup>27</sup> However, the enactment of provisions which directly conflict with jurisprudence of the European Court would in fact make the UK’s continued membership of the European Convention untenable.

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<sup>27</sup> Parliamentary Debates, House of Commons, 1 March 2013, column 578

## **Future Prospects.**

The question of a UK Bill of Rights remains in a state of uncertainty. Although there is a strong element of the Conservative Party which would wish to repeal the Human Rights Act, the hands of the Conservatives are tied by the fact that they are in a Coalition government with a party which has the stated aim of protecting the Act. Although the Bill of Rights Commission's report was in favour of a UK Bill of Rights, this recommendation was made on the understanding that such an instrument would incorporate the UK's existing obligations under the European Convention, and that it would provide no less protection than is contained in the current Human Rights Act. During debate on the Human Rights Act 1998 (Repeal and Substitution) Bill, the Minister for Policing and Justice stated that, 'the Government remain committed to the European Convention on Human Rights and to ensuring that those rights continue to be enshrined in UK law.'<sup>28</sup> Therefore a UK Bill of Rights which contains *less* than the current level of protection is not an option.

Equally it seems that a Bill of Rights containing *more* than the current level of protection is not an option either. Given the current levels of Conservative opposition to the Act as it stands, it is very unlikely that sufficient support would be found for adding to or strengthening the existing catalogue of rights. In addition, from a purely pragmatic perspective, it is difficult to imagine firm conclusions being reached as to what any additional rights should actually be. As Klug comments, the Human Rights Act already

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<sup>28</sup> Parliamentary Debates, House of Commons, 1 March 2013, column 626

includes ‘all the standard rights present in bills of rights the world over.’<sup>29</sup> There was certainly no agreement among the respondents to the Commission’s consultations who gave their views on this issue. Indeed, the Bill of Rights Commission itself was unable to reach agreement on the possible content of a UK Bill of Rights. In their separate paper, Baroness Kennedy and Philippe Sands commented that,

We find it difficult to imagine how agreement could be reached on the idea of a UK Bill of Rights, even in principle, when views are so polarised as to what such an instrument might contain. In our view, it would be preferable for form to follow substance, and for any move as to whether there should be a new UK Bill of Rights...to await a time when there is a reasonable degree of consensus as to what such a Bill might contain.<sup>30</sup>

It is difficult to disagree with this statement. There seems to be little point in deciding that there should be a UK Bill of Rights and then attempting to find rights, additional to those found in the European Convention, which garner a sufficient degree of public support to merit inclusion, essentially with the sole purpose of justifying the creation of a Bill of Rights.

Even the comments of the members of the Commission who supported a UK Bill of Rights give the impression that they thought it unlikely that any moves would be made on the issue in the near future. All of the Commission’s members recognised that, ‘To come to pass successfully a UK Bill of Rights would have to respect the different

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<sup>29</sup> F Klug ‘A Bill of Rights: Do we need one or do we already have one?’ [2007] *Public Law* 701 at 718

<sup>30</sup> Baroness Kennedy and P Sands, above n 12, p 228



political and legal traditions within all of the countries of the UK, and to command public confidence beyond party politics and ideology.’<sup>31</sup> Given the current lack of support for a UK Bill of Rights particularly within the devolved nations, as demonstrated by the results of the Commission’s consultations, it seems extremely unlikely that such a consensus could in reality be attained in the near future, if at all. All of the members of the Commission were of the view that any future debate on the issue must be sensitive to issues of devolution. In particular, it would be essential to await the outcome of the independence referendum in Scotland before making any final decisions on the creation of a UK Bill of Rights. The Minister for Policing and Justice later commented in the course of Parliamentary debates that ‘it is difficult to fault the logic of that conclusion, which provides a persuasive reason as to why now is not the time to embark on wholesale changes to the human rights framework.’<sup>32</sup>

## **Conclusion.**

In conclusion therefore, it is highly probable that the Human Rights Act will continue in its present form, at least for the foreseeable future. It has been stated by the Bill of Rights Commission, and accepted by the Government, that steps should not be taken as regards any UK Bill of Rights until after the referendum on Scottish independence. Even beyond the referendum, it is doubtful whether a UK Bill of Rights will come to fruition. According to the Commission’s report, the key argument for the

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<sup>31</sup>*The Commission on a Bill of Rights’ Report – A UK Bill of Rights? – The Choice Before Us*, above n 1, p 28

<sup>32</sup> Parliamentary Debates, House of Commons, 1 March 2013, col. 636, Damian Green

creation of a UK Bill of Rights is a perceived lack of public ‘ownership’ of the Human Rights Act. However, the Commission’s consultations found that there is in fact no widespread problem of this nature, and that any such ‘ownership’ issue is restricted to certain parts of England. It seems that the implementation of education campaigns on the Human Rights Act in the areas in question would constitute a more logical approach than attempting to enact a UK Bill of Rights Act, particularly when the Commission found that there is substantial opposition to such a measure. Even if there were an ‘ownership’ problem, it is unlikely that the type of Bill of Rights suggested by the Commission, based primarily on changing the wording of the Convention rights, would ameliorate the situation.

Nevertheless, despite the fact that the Government’s official position is that it remains committed to the rights contained in the European Convention and to ensuring that those rights remain enshrined in UK law, there are sections of the Conservative Party which are strongly opposed to the continued incorporation of the Convention rights. The strength of this opposition may be seen in the introduction of the Human Rights Act 1998 (Repeal and Substitution) Bill. However, the key point is that the cause of the rules which are perceived as problematic is not the Human Rights Act, but rather the case law of the European Court, which would be binding on the UK regardless of the existence of the Act. If the objection is to the decisions of the Court in cases such as *Chahal* and *Hirst*, the replacement of the Human Rights Act with a UK Bill of Rights will never provide a solution.