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Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?

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Recently there has been much discussion of the prospect of replacing, or supplementing, the Human Rights Act 1998 (HRA) with a British bill of rights. The Government, opposition Conservative Party and others have published detailed plans and research reports. Whilst there has been some limited examination of the alleged failures of the HRA in providing effective legal protection for human rights, the debate has not been accompanied by a thorough examination of these types of problems with the HRA, free from political criticisms. Drawing on research concerning aspects of the HRA carried out over the past ten years, it is possible to identify concrete problems which have prevented the HRA from meeting the objectives originally set for it. But given the limitations of the present debate, future plans do not adequately address many of these problems making it uncertain how effective any new bill of rights will actually be.

INTRODUCTION

In its relatively short life[1], the Human Rights Act 1998 (HRA) has been the target of fierce criticism stemming from, amongst others, government ministers, opposition leaders, members of parliament and elements of the media. Until recently, the thrust of such remarks was fairly clear. Most centred around the belief that the implementation of the HRA was a threat to public safety. For example, following the attack on the World Trade Centre in New York, on 11 September 2001, David Blunkett, Home Secretary at the time, warned the judiciary to stop applying the HRA in ways which 'thwarted the government's plans.'[2] In his opinion, '[f]reedom springs not from any abstract legal process, but from political action.'[3] Iain Duncan Smith, then leader of the Conservative Party, pressed for changes to the HRA to allow the deportation of those who were promoting terrorism claiming that the HRA was 'proving an obstacle to protecting the lives of British citizens'.[4] And following the bombings in London on 7 July 2005, Charles Clarke, Home Secretary at the time, complained that a consequence of the HRA was that 'our

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1 The HRA received the Royal Assent on 9 November 1998 and came fully into force on 2 October 2000.
2 *The Guardian* 9 October 2001.
3 *ibid.*
4 *The Guardian* 11 October 2001.

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most senior judiciary are taking decisions of deep concern to the security of our society without any responsibility for that security.'[5]

In more recent times, government ministers have been less overtly critical. Jack Straw, the current Lord Chancellor and Minister for Justice, is now responsible for the HRA. As the Home Secretary who successfully steered the Human Rights Bill onto the statute book, his criticisms are few although he did complain in an interview with *The Daily Mail* in December 2008 that some judges have been too nervous about deporting terrorist suspects, and that he was frustrated by some of the judgments which have encouraged voters to conclude that the HRA is a 'villain's charter'.[6] By contrast, David Cameron, leader of the Opposition Conservative Party, has since June 2006 promised to repeal the HRA and replace it with a bill of rights. This position was originally held because the HRA has 'introduced a culture that has inhibited law enforcement and the supervision of convicted criminals' and blocked the deportation of terrorist suspects.[7] More recently the Conservative Party has also voiced its belief that the HRA has failed to protect against the erosion of historic liberties and may have even provided a 'veneer of respectability'.[8]

But despite the silence, it is still possible to detect some negativity towards the HRA in government, although it is now much more opaque. In October 2007 the Lord Chancellor, in the consultation paper *The Governance of Britain*, announced plans for a British Bill of Rights and Duties describing the HRA as a 'first, but substantial step towards a formal statement of rights'.[9] And in March 2009, he published *Rights and Responsibilities: Developing our Constitutional Framework*[10], the long awaited consultation paper on the proposed Bill of Rights. Criticism of the HRA in both documents is thin. There is a concern that rights have become 'commoditised' demonstrated by those who assert their rights in a selfish way without regard to the rights of others.[11] The absence of responsibilities from the HRA is also a matter for concern. The Government believes that 'any Bill of Rights and Responsibilities should seek to articulate what we owe, as much as what we expect.'[12] In its view, '[r]esponsibilities and rights are equally necessary for a healthy democracy.'[13] It is also obviously troubled by a perceived lack of knowledge and respect for the HRA. In a speech the Lord Chancellor has pointed out that the HRA has been the subject of 'myth, misunderstanding and misapplication'[14] and implicit in the consultation paper is the suggestion that building

5 P. Wintour and T. Branigan, 'Clarke blames judges for confusion on rights' *The Guardian* 4 July 2006, 10.
6 B. Brogan, 'Greedy lawyers, terrorists we can't kick out, and why we must change this charter for villains, by Jack Straw' *The Daily Mail* 8 December 2008, 8.
7 David Cameron, speech at the Centre for Policy Studies, 26 June 2006 as reported in W. Woodward, 'Cameron promises UK bill of rights to replace Human Rights Act' *The Guardian* 26 June 2006, 10.
8 A. Travis, 'Cameron pledges bill to restore British freedoms' *The Guardian* 28 February 2009, 11.
9 *The Governance of Britain* Cm 7170 (2007) at [205].
10 Cm 7577 (2009).
11 *ibid* at [2.15].
12 *ibid* at [2.18].
13 *ibid.*
14 'Towards a Bill of Rights and Responsibilities' 21 January 2008.

respect for the HRA is key, even if that has to come partnered with promotion of individual responsibilities.

There is now considerable interest in a British Bill of Rights. In addition to the initiatives of the two main political parties, the leading human rights organisation JUSTICE has published a lengthy report[15], and the Parliamentary Joint Committee on Human Rights has also published a report.[16] To date, very few have commented negatively on the proposals but there may be cause for concern.[17] Often government plans in other areas appear to be incompatible with creating a new and effective bill of rights. Only recently the government was vigorously pursuing in Parliament plans for 42 days detention without charge for suspected terrorists.[18] But most importantly of all, any proposed process of law reform should follow a rigorous path. At no point in the present debate has the government, or anyone else, fully articulated what is actually wrong with the HRA. The purpose of this article is to attempt to fill this gap and also to reach a conclusion as to whether or not the problems with the HRA are such that the only viable solution is to replace it, or supplement it, with a bill of rights.

As already discussed, the HRA has been on the statute book for over ten years and during this time many criticisms have been made of it not only by the government and opposition but also by academics, NGOs and international institutions. This body of work constitutes a rich source to draw upon in order to assess the HRA. However, in this process it is important to attempt to separate out the completely neutral criticisms, and appreciate that on many issues political bias may be present. Human rights law, as the above discussion illustrates, is inherently political and the political persuasions of its critics inevitably enters the critique. On many issues there are two or more opposing viewpoints. For example, the debate over whether or not the HRA has struck the correct balance between Parliament, the executive and the courts is ongoing, and not likely to be resolved anytime soon.[19] Questions such as the utility of human rights law per se[20] and the many critical examinations of substantive human rights law, as determined by the domestic courts, also fall into this category including the belief that some court judgments, in particular those concerning Article 3 of the European Convention

15 JUSTICE Constitution Committee, *A British Bill of Rights: Informing the Debate* (London: JUSTICE, 2007)

16 *A Bill of Rights for the UK?* HL 165 (2008), HC 150 (2008).

17 One example is F. Klug, 'A Bill of Rights: Do We Need One or Do we Already Have One?' [2007] PL 201.

18 The plans were dropped by the Government on 13 October 2008 following rejection by the House of Lords. However, the Home Secretary announced that the plan is now held 'in reserve' to be re-introduced to Parliament if there is a terrorist emergency.

19 Some viewpoints on this issue include: R. Clayton, 'Judicial deference and "democratic dialogue": the legitimacy of judicial intervention under the Human Rights Act 1998' [2004] PL 33; J. Alder, 'The sublime and the beautiful: incommensurability and human rights' [2006] PL 697; D. Nicol, 'Law and politics after the Human Rights Act' [2006] PL 722; and T. Hickman, 'The Courts and Politics after the Human Rights Act: A Comment' [2008] PL 84. The Conservative Party's position was outlined in a speech by Nick Herbert MP, 'Rights without responsibilities – a decade of the Human Rights Act' 24 November 2008, available at http://www.conservatives.com/News/Speeches/2008/11/Nick_Herbert_Rights_without_responsibilities_-_a_decade_of_the_Human_Rights_Act.aspx (last visited 30 July 2009).

20 See for example J. Laws, 'The limitations of human rights' [1998] PL 254.

on Human Rights (ECHR) and deportation, have led to public safety being put at risk.

The intention in writing this article is to examine those criticisms of the HRA, free from political bias, which constitute genuine problems. To this end, the problems with the HRA outlined in the paragraphs below concern issues where there has been an overwhelming weight of critique and/or there has been a contribution to that critique by an external arbiter, such as the European Court of Human Rights (ECtHR), or a United Nations (UN) body. Also included are problems where the facts simply speak for themselves such as the observation that there is at present very little respect for the HRA in government or elsewhere. All of the problems discussed relate to the failure of the HRA to fully achieve its intended objectives. The simplest measure here would be to see the HRA as means to improve the legal protection of human rights. But at the time the Human Rights Bill was introduced to Parliament, often this objective was obscured by talk of 'bringing rights home' – the opportunity to enforce rights under the European Convention on Human Rights (ECHR) in British courts 'rather than having to incur the cost and delay of taking a case to the European Human Rights Commission and Court in Strasbourg.'[21] Nevertheless, there was some discussion of the bigger picture. Lord Irvine, Lord Chancellor at the time, provided the best yardstick during the Committee debate on the Human Rights Bill in the House of Lords and it is against this objective which the HRA has been measured:

> [W]e want to provide as much protection as possible for the rights of individuals against the misuse of power by the state within the framework of a Bill which preserves Parliamentary sovereignty.[22]

THE PROBLEMS WITH THE HUMAN RIGHTS ACT

From academic research, the research of NGOs and international institutions, the work of the Parliamentary Joint Committee on Human Rights and simple observation, it is possible to identify eight major problems with the HRA which impact on its effectiveness each time it is applied, or potentially applied, or concern particular features of the HRA, or its interpretation by the courts, which whilst not having an overarching influence, still inhibit its effectiveness where applicable.

Knowledge of the HRA

The first problem is knowledge. Those who need to know about the HRA, or should know about it, do not know about it or do not have a full enough knowledge. This includes public authorities, those exercising a public function, victims,

21 *Rights Brought Home: The Human Rights Bill* Cm 3782 (1997) 1.
22 HL Deb vol 583 col 808 24 November 1997.

(2009) 72(6) MLR 883–908

potential victims and their advisers and the general public. This fact is supported by considerable research. In January 2008 the Ministry of Justice published the *Human Rights Insight Project*[23] conducted by its previous incarnation, the Department for Constitutional Affairs (DCA), from December 2004 to May 2006 to provide an evidence base for human rights policy development. There were a number of key findings relating to the HRA. In particular, 'the term 'human rights' has mainly positive associations . . . but there is little understanding of the application of human rights/the HRA to normal life/public service delivery.' Furthermore, the 'general public perception is that there is a need for a law to protect human rights in the UK, but that too many people – especially asylum seekers and immigrants – take advantage of the HRA.' And finally '[k]ey human rights principles such as respect, dignity, equality and fairness are highly valued, both in relation to public service delivery and more widely, but are not generally associated with human rights/the HRA.'[24]

Throughout the report there are a number of more detailed insights, in particular the qualitative and quantitative research commissioned from external research agencies. In October 2005 MORI interviewed 1,965 adults from across Great Britain.[25] This revealed that public awareness of human rights and the HRA was high although there was low understanding of what the Act is and does. 'There is a lack of clarity about what the Human Rights Act means in a UK context, and what people can expect it to cover regarding their treatment by public services.' 57 percent agreed that too many people take advantage of the HRA, those groups listed including asylum seekers and refugees, foreigners and immigrants, and criminals and lawyers. However, 84 percent agreed that it was important to have a law which dealt with human rights in Britain. Research conducted in relation to providers of public services was also not positive. Reference was made to a report commissioned by the Institute for Public Policy Research[26] which revealed that there was a lack of understanding within public authorities about their legal responsibilities under the HRA. 'There had been no active policy to connect human rights compliance with improvements in public services and there appeared to be little understanding that the HRA articles are based on principles such as dignity and respect, fairness, involvement in decision-making and equality.'[27]

The problem has also been recognised by government and the Joint Committee on Human Rights. The Joint Committee has observed that 'there clearly exists

23 (London: Ministry of Justice, 2008).
24 *ibid* iii.
25 MORI, *A quantitative survey of public awareness and attitudes towards human rights, the HRA and its underlying principles* (London: MORI, 2005).
26 F. Butler, *Improving Public Services: Using a human rights approach* (London: IPPR, 2005).
27 *ibid* 55. Other studies supporting these findings include: J. Watson, *Something for Everyone: The impact of the Human Rights Act and the need for a Human Rights Commission* (London: British Institute for Human Rights, 2002); Economic and Social Research Council, *Human Rights, a tool for change* (ESRC: Swindon, 2007); Audit Commission, *Human Rights: Improving Public Service Delivery* (London: Audit Commission, 2003); F. Butler *Human Rights: Who Needs Them? Using human rights in the voluntary sector* (London: IPPR, 2004); Public Law Project, *The Impact of the Human Rights Act on Judicial Review* (London: Public Law Project, 2003); J. Croft, *Whitehall and the Human Rights Act 1998: The First Year* (London: The Constitution Unit, 2002).

a widely held public perception that the Human Rights Act protects only the undeserving, such as criminals and terrorists, at the expense of the law abiding majority.'[28] In its 2006 *Review of the Implementation of the Human Rights Act*[29] the DCA stated that the HRA had been widely misunderstood by the public and had been misapplied in a number of settings. Furthermore, deficiencies 'in training and guidance have led to an imbalance whereby too much attention has been paid to individual rights at the expense of the wider community.' This process has been fuelled 'by a number of damaging myths about human rights which have taken root in the popular imagination.'[30] The Lord Chancellor has recently confirmed such concerns, and stated his view that a Bill of Rights 'could give people a clearer idea of what we can expect from the state and from each other'.[31]

Respect for the HRA

Closely linked to the first problem, the second problem is that there is an obvious lack of respect for the HRA throughout elements of the media and amongst prominent political and public figures which, building upon a lack of knowledge, is very likely to have engendered and entrenched disrespect for the HRA amongst public authorities and the general public. As the Lord Chancellor has noted, the HRA has not 'become an iconic statement of liberty as in the US, or with the South African Bill of Rights.'[32] A lack of respect for a law such as the HRA is problematic in that those who should know about it, such as public authorities, may be reluctant to find out about, or even obey, such a disrespected law. The reluctance to acquire further knowledge about the HRA, which a climate of disrespect may encourage, also helps to perpetuate the many myths and inaccuracies which surround it. As the Equality and Human Rights Commission has noted in its recent report following its human rights inquiry:

> The combination of lack of leadership and inaccurate reporting creates confusion and inhibits the development of human rights policy and practice amongst some public bodies . . . It can lead to the trivialisation and inflation of human rights, and can diminish people's understanding of their human rights.[33]

28 *The Human Rights Act: the DCA and Home Office Reviews* HC 1716 (2006), HL 278 (2006) at [75].
29 Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* DCA 38/06.
30 *ibid* 1. Similar conclusions were reached in an internal Home Office Review which has not been published but was referred to in the Joint Committee's Report, *The Human Rights Act: the DCA and Home Office Reviews* n 28 above at [100]–[105].
31 'Modernising the Magna Carta' George Washington University, Washington DC, 13 February 2008 at www.justice.gov.uk/news/sp130208.htm (last visited 10 August 2009). See also the Lord Chancellor's Mackenzie Stuart Lecture, University of Cambridge, Faculty of Law, 25 October 2007 at www.justice.gov.uk/news/sp251007.htm (last visited 10 August 2009).
32 'Towards a Bill of Rights and Responsibility' 21 January 2008 at www.justice.gov.uk/news/sp210108.htm (last visited 10 August 2009).
33 Equality and Human Rights Commission, *Human Rights Inquiry Report* (EHRC: London, 2009) 147, see also chapter 4.

(2009) 72(6) MLR 883–908

Whilst there has been no research carried out specifically concerning feelings of respect for the HRA, separate from knowledge, it is possible to find a number of examples of media and public figures displaying disrespectful attitudes. Concerned that the introduction of legal protection for human rights would result in the development of a law of privacy and thereby restrictions on press freedom, a number of national newspapers campaigned vigorously against the Human Rights Bill as it proceeded through Parliament[34] and many remain openly opposed to it.[35] In December 2008 Paul Dacre, editor of *The Daily Mail*, complained in his speech to the Society of Editors of the 'wretched Human Rights Act' which has led to a judge made privacy law.[36] Editorial comments in *The Daily Mail* frequently call for the repeal of the HRA[37] and editorials in *The Sun*, the national daily newspaper with the highest circulation,[38] are similar. In June 2009, reporting on the House of Lords' control orders judgment in *AF*[39] it was observed in an editorial in *The Sun*, that '[t]errorists don't operate within the law. But as a civilised society we must. If that leaves us wide open to mass murder, our law must be at fault. It is. It's called the Human Rights Act.'[40]

As already touched upon, from very early in the life of the HRA there are also a number of examples of prominent public and political figures referring to the HRA in disrespectful terms. In February 2000, Lord McCluskey, a Scottish judge, wrote of it as a 'field day for crackpots, a pain in the neck for judges and legislators, and a goldmine for lawyers'.[41] In September 2002 it was revealed that Prince Charles had written to Lord Irvine, the Lord Chancellor at the time, on the threat the HRA posed to a 'sane, civilised and ordered existence'.[42] In February 2003 David Blunkett, then Home Secretary, in response to a HRA judgment declared '[f]rankly, I'm fed up with having to deal with a situation where parliament debates issues and the judges overturn them.'[43] In August 2004 David Davis, shadow home secretary at the time, announced that he would set up a commission to look at the reform, replacement or repeal of the HRA stating '[t]he HRA has spawned too many spurious rights – it has fuelled a compensation culture out of all sense and proportion. And all too often, it seems to give criminals more rights than the victims of crime. This has to stop. Our society needs more discipline, decent values

34 Newspapers opposed to the Bill included the top two for circulation at the time, *The Sun*, and *The Daily Mail*. UK newspapers are not subject to the requirement of 'due impartiality' which is imposed on the UK broadcast media by the Communications Act 2003, s 320.

35 See further J. Petley, 'Podsnappery; or Why British Newspapers Support Fagging' (2006) 3 *International Journal of Communications Ethics* 42 and *Human Rights Inquiry Report* n 33 above 94.

36 Available at http://www.societyofeditors.co.uk/page-view.php?pagename=TheSOELecture2008 (last visited 5 August 2009). The Master of the Rolls, Sir Anthony Clarke, responded to these accusations in a memorandum submitted to the Committee for Culture, Media and Sport during its current inquiry into Press Standards, Privacy and Libel.

37 See for example 'Another human rights victory for terrorism' *The Daily Mail* 3 November 2008, 12 and 'The terrorists' friend' *The Daily Mail* 1 November 2007, 14.

38 Circulation for May 2009, as reported by the Audit Bureau of Circulation, was 2,984,103.

39 *Secretary of State for the Home Department* v *AF* [2009] UKHL 28.

40 Editorial, *The Sun* 11 June 2009, 8.

41 Lord McCluskey, 'The Law Laid Bare Part 1: Trojan Horse at the Gates of our Courtrooms' *Scotland on Sunday* 6 February 2000, 12.

42 R. Jay and D. Hughes, 'Defiant Charles Stands up to Labour' *The Daily Mail* 26 September 2002, 1.

43 J. Rozenberg, 'Judges prepare for battle with Blunkett' *The Daily Telegraph* 21 February 2003.

and respect.'[44] In August 2005 the Prime Minister, Tony Blair warned that he was ready to amend the HRA to ensure that new arrangements for deportation could go ahead as the 'rules of the game are changing'.[45] And in June 2006, David Cameron, Leader of the Conservative Party, described the HRA as 'practically an invitation for terrorists and would-be terrorists to come to Britain'.[46]

The climate of disrespect which often surrounds the HRA has not escaped the notice of external monitoring bodies. In his 2004 report on the UK, the Council of Europe's Commissioner for Human Rights commented that the 'United Kingdom has not been immune . . . to a tendency increasingly discernable across Europe to consider human rights as excessively restricting the effective administration of justice and the protection of the public interest'. In particular, he was struck

> by the frequency with which I heard calls for the need to rebalance rights protection, which, it was argued, had shifted too far in favour of the individual to the detriment of the community. Criminal justice, asylum and the prevention of terrorism have been particular targets of such rhetoric, and a series of measures have been introduced in respect of them which, often on the very limit of what the respect for human rights allows, occasionally overstep this mark.[47]

The range of rights protected

The next three problems concern the actual design of the HRA rather than the culture of knowledge and respect surrounding it. The first concerns the range of rights protected. The HRA only gives further effect to a very limited and outdated range of human rights contained in the ECHR, Protocol No 1 to the ECHR and Protocol No 6 to the ECHR.[48] Predominantly these are civil and political rights and, as compared to a modern human rights instrument such as the Charter of Fundamental Rights of the European Union,[49] the range of rights protected is very poor, particularly the exclusion of economic, social and cultural rights. This fact has been commented upon by a number of external human rights monitoring bodies. As part of its consideration of the United Kingdom's fifth periodic report under the International Covenant on Civil and Political Rights in 2001, the United Nations Human Rights Committee welcomed the entry into force of the HRA.[50] However, as a principal subject of concern it noted that the UK, whilst having incorporated many Covenant rights into its domestic legal order through the HRA, had failed to accord the same level of protection to other Covenant rights.[51] The observations of other UN treaty

44 S. Hall, 'Tories' human rights vow backfires' *The Guardian* 24 August 2004, 4.
45 A. Travis, 'Jordan deal to test anti-terror powers' *The Guardian* 11 August 2005, 8.
46 W. Woodward and A. Travis, 'Human Rights Act: Cameron's call to repeal legislation would not end deportation battles, say ministers' *The Guardian* 27 June 2006, 10.
47 *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom* Comm DH (2005) 6, Strasbourg, 8 June 2005 at [3].
48 Excluding Arts 1, 13, and 15 of the ECHR and Arts 3 and 4 of Protocol No 6.
49 2000/C 364/01.
50 UN Human Rights Committee Concluding Observations: United Kingdom CCPR/CO/73/UK; CCPR/CO/73/UKOT, 6 December 2001 at [3].
51 *ibid* at [7].

(2009) 72(6) MLR 883–908

monitoring bodies have been similar[52] as have been the observations from the Council of Europe. In its Third Report on the UK, the European Commission against Racism and Intolerance stated that although the HRA gives further effect to the ECHR, it does not provide a general superseding guarantee against discrimination.[53] The Conservative Party has also frequently noted its disappointment that the HRA does not protect the right to trial by jury[54] and 'rights to government information and protection of personal data.'[55]

Whilst there are a number of human rights 'missing' from the HRA, in the opinion of many commentators[56] it is the absence of economic, social and cultural rights which presents the gravest problem, not only because it is not possible for individual victims to bring such claims before the domestic courts. As the British Institute of Human Rights has pointed out, the incorporation of such rights can play an additional role forming 'an essential step in efforts to galvanise popular support for the human rights protection system in the UK.'[57] This view is also supported by the extensive consultations carried out by the Northern Ireland Human Rights Commission over the last ten years concerning the future Bill of Rights for Northern Ireland. In its 2006 submission to the Northern Ireland Bill of Rights Forum[58] it stated that its consultation process highlighted deficiencies in existing human rights protections and that a strong case could be made for the inclusion in the bill of rights of rights additional to those contained in the HRA.[59] In 2008 the Forum recommended a much larger range of substantive rights to be included in the Bill of Rights than that contained in the HRA and a more detailed explanation of rights. New rights were recommended such as the right to: culture, language and

52 See for example Committee Against Torture, *Conclusions and Recommendations: United Kingdom* CAT/C/CR/33/3, 10 December 2004 at [3(b)]; Committee on the Rights of the Child, *Concluding Observations:*
United Kingdom CRC/C/15/Add.188, 9 October 2002 at [8]; Committee on Economic, Social and Cultural Rights, *Concluding Observations: United Kingdom* E/C.12/1/Add.79, 5 June 2002; Committee on the Elimination of Discrimination Against Women, *Concluding Observations: United Kingdom* A/54/38, 25 June 1999; and Committee on the Elimination of Racial Discrimination, *Concluding Observations: United Kingdom* CERD/C/63/CO/11, 10 December 2003 at [22].

53 European Commission against Racism and Intolerance, *Third Report on the United Kingdom* CRI (2005) 27 at [5].

54 Conservative Party, *It's time to fight back – How a Conservative Government will tackle Britain's crime crisis* (London: Conservative Party, 2007) at [2.8] available at www.conservatives.com/pdf/britainscrimecrisis.pdf (last visited 10 August 2009).

55 N. Herbert, n 19 above.

56 See for example G. Van Bueren, 'Including the excluded: the case for an economic, social and cultural Human Rights Act' [2002] PL 456 and K. Ewing, 'Social rights and constitutional law' [1999] PL 104.

57 British Institute of Human Rights, *Response to the UK Government's draft 5th periodic report under the ICESCR* (London: BIHR, 2007) 2 available at http://www.bihr.org.uk/documents/policy/bihr-response-to-the-governments-draft-periodic-report (last visited 5 August 2009).

58 The Forum was established to formulate recommendations to the Northern Ireland Human Rights Commission as it fulfils its statutory duty in providing advice to the Secretary of State on a future Bill of Rights for Northern Ireland. It had 28 members, 14 from the five main political parties and 14 from sections of civic society.

59 Available from the Commission's website http://www.nihrc.org/index.php?page=subresources&category.id=26&from=3&resources.id=81&search_content=&Itemid=61 (last visited 5 August 2009).

identity; an adequate standard of living; the highest attainable standard of health; housing; sustainable environment; work; and social security.[60]

The declaration of incompatibility

Fundamental features of the design of the HRA have also been the subject of criticism. The importance of the principle of the sovereignty of Parliament in British constitutional law means that it is not possible under the HRA for courts, having found an Act of Parliament incompatible with Convention rights, to 'strike it down' or invalidate it in any way. Under section 4 all that a court may do is issue a 'declaration of incompatibility' which does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given, and is not binding on the parties to the proceedings in which it is made.[61] It remains for a government minister, if he or she considers there are compelling reasons, to make by order such amendments to the legislation as considered necessary to remove the incompatibility.[62] From the start, this solution was seen to be the only viable option:

> To make a provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament. There is no evidence to suggest that they desire this power, nor that the public wish them to have it. Certainly this Government has no mandate for any such change.[63]

However, whilst parliamentarians, members of the executive, courts and pragmatic commentators on the HRA have almost universally not questioned the declaration of incompatibility, the remedy has been the subject of comment by external institutions. Particularly serious is the opinion of the European Court of Human Rights (ECtHR). In a number of applications, the Court has held that the declaration of incompatibility is not an effective remedy firstly 'because a declaration was not binding on the parties to the proceedings in which it was made'; and secondly, 'because a declaration provided the appropriate minister with a power, not a duty, to amend the offending legislation by order so as to make it compatible with the Convention.'[64] As the declaration of incompatibility is not considered to be an effective remedy, it is not a domestic remedy which must be exhausted in accordance with Article 35 of the ECHR prior to an application being brought to the ECtHR. Therefore, where the incompatibility lies in an Act of Parliament, and the only realistic remedy at the domestic level is a declaration of incompatibility, in the view of the ECtHR there is no need for the applicant to air his or her complaint at the domestic level first thereby

60 Bill of Rights Forum, *Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland* (Belfast: BIRF, 2008) available at www.billofrightsforum.org (last visited 5 August 2009).
61 Human Rights Act 1998, s 4(6).
62 Human Rights Act 1998, s 10(2).
63 *Rights Brought Home* n 21 above at [2.13]. See further M. Amos, *Human Rights Law* (Oxford: Hart, 2006) 131–141.
64 *Burden and Burden* v *United Kingdom* (dec), (Application No 13378/05, December 12, 2006) at [37].

(2009) 72(6) MLR 883–908

defeating one of the main purposes of the HRA, to bring rights home, and adding to the number of applications against the UK declared admissible.[65]

The Joint Committee on Human Rights has drawn attention to additional problems. In a small number of cases 'the time taken to consider a response to the relevant declaration of incompatibility has been significantly longer than six months.'[66] And it does not consider that the guidance in the DCA publication *Human Rights: Human Lives* provides enough 'detailed guidance on the application of the HRA and the Convention in order to allow departmental officials to respond effectively to declarations of incompatibility.' In its view much more specific guidance is required to guide departments in responding promptly and adequately to declarations of incompatibility.'[67]

The test for standing

The final problem with the design of the HRA concerns the test for standing. Under section 7(1) of the HRA only the victims of acts incompatible with Convention rights may bring proceedings under the HRA or rely on the Convention rights in other legal proceedings. The victim test, modelled on Article 34 of the ECHR, is narrower than the sufficient interest test which must be satisfied in order to bring an application for judicial review.[68] Interest groups are able to bring claims under the HRA only if they themselves are the victims of an unlawful act, although it is still possible for them to provide support to victims who bring claims. This was a much debated issue during the parliamentary debates on the Human Rights Bill and a number of unsuccessful attempts were made by opposition parties to amend the Bill so that the sufficient interest test applied. The primary concern was that 'a whole host of interest groups . . . will be denied access to the courts. Consequently, a great many of the disadvantaged in our society, who have until now been protected by those interest groups, will be denied access to the courts'.[69]

Since the HRA came into force there has been no detailed research concerning the impact of the victim test on the effective protection of human rights.[70] However, there are indications that section 7 presents some difficulties to potential HRA litigation. Shami Chakrabarti, director of the human rights organisation Liberty, has observed that 'the combination of the victim test and current cost arrangements present a considerable bar to the bringing of public interest litigation with a human rights flavour'.[71] Furthermore, research by the Institute for

65 See further Joint Committee on Human Rights, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human* Rights HC 728 (2007) HL 128 (2007) at [110]–[111] and M. Amos, 'The Impact of the Human Rights Act on the United Kingdom's Performance before the European Court of Human Rights' [2007] PL 655.

66 *ibid* at [114].

67 *ibid* at [121].

68 See HRA, s 7(3). See further, M. Amos, *Human Rights Law* n 63 above 28–35.

69 Edward Garnier MP, HC Deb vol 314 col 1065 24 June 1998.

70 There was some early commentary: J. Miles, 'Standing under the Human Rights Act 1998: Theories of Rights Enforcement and the Nature of Public Adjudication' (2000) 59 CLJ 133; J. Marriott and D. Nicol, 'The Human Rights Act, Representative Standing and the Victim Culture' [1998] EHRLR 730.

71 S. Chakrabarti, J. Stephens and C. Gallagher, 'Whose Cost the Public Interest?' [2003] PL 697,710.

Public Policy Research concerning the difficulties experienced with the HRA by voluntary sector organisations working on social justice issues[72] demonstrates that although it might be possible for an organisation to support an individual's litigation, this is not without difficulties:

> Litigation requires participation by the individual concerned in a process which is likely to be intimidating, confusing and stressful involving re-living the experiences complained of for a second time. This is true for many individuals who are parties to court cases but exacerbated for those who are socially excluded, inarticulate and vulnerable.[73]

There is also considerable evidence that the human rights afforded legal protection by the HRA are still being violated. For example, the British Institute of Human Rights, in its 2002 report *Something for Everyone*,[74] reported a number of instances after the coming into force of the HRA where there were obvious violations of the Convention rights of children, disabled people, older people, refugees and asylum seekers. '[T]heir evidence showed many examples of continuing individual violations with too many consistent patterns emerging for these simply to be isolated incidents.'[75] The Joint Committee on Human Rights, in its 2007 report *The Human Rights of Older People in Healthcare*[76] documented the many ongoing violations of the human rights of older people and, in its 2008 report *A Life Like Any Other? Human Rights of Adults with Learning Disabilities*[77] the violations of the human rights of adults with learning disabilities. And, at the recent Convention on Modern Liberty, a dominant theme was the erosions of liberty and human rights which have taken place whilst the HRA has been in force.[78] But, as Lord Bingham has pointed out, 'judges are not, in any ordinary sense, legislators: they cannot rule on claims that litigants do not chose to bring before them.'[79] Taking all of these facts into account, it is possible that the section 7 victim test, combined with the limited availability of legal aid and the prospect of an adverse costs order, is preventing some important HRA claims from being brought before the courts.[80]

Proportionality and deference

The final three problems with the HRA concern its interpretation and application by the judiciary. The first is the judicial approach to the meaning and application of the principle of proportionality. When determining whether or not there

72 F. Butler, *Human Rights: Who Needs Them? Using human rights in the voluntary sector* (London: IPPR, 2004).
73 *ibid* 60.
74 n 27 above.
75 *ibid* 78.
76 HC 378 (2007), HL 156 (2007).
77 HC 73 (2008), HL 40 (2008).
78 See, for example, the speech of S. Chakrabarti available at http://www.modernliberty.net/read/transcripts/shami-chakrabartis-keynote (last visited 5 August 2009).
79 Lord Bingham, 'Judges possess the weapon to challenge surveillance' *The Guardian* 17 February 2009, 30.
80 See further R. Clayton, 'Public interest litigation, costs and the role of legal aid' [2006] PL 429.

has been a violation of Convention rights, the majority of Convention rights are drafted in a way which requires courts, and other decision makers, to determine whether or not the interference is proportionate when measured against a specified interest such as the prevention of crime or the protection of the rights and freedoms of others. Unused to dealing with this principle, more accustomed to traditional grounds of judicial review, and anxious to avoid 'merits review', there has been a tendency on the part of some judges to avoid engaging in a full proportionality analysis, such as would be engaged in by the ECtHR considering a similar question. Deference, the judicial practice of affording weight to the decision of the primary decision maker when determining the proportionality of an interference with Convention rights, has also been common.[81]

In some judgments, the reluctance to engage in a full proportionality analysis, has resulted in courts not deciding for themselves whether there has been a disproportionate interference with Convention rights. For example, in *Begum*[82] the question was whether a school's decision that the claimant not attend school unless she wore the correct uniform was incompatible with Article 9 (freedom of religion) and Article 2 of Protocol No 1 (right to education). The Court of Appeal did not determine the proportionality of the interference for itself but found for the claimant, concluding that the school had not taken the correct approach to resolving an issue raised under Article 9. Such an approach has been expressly rejected by the ECtHR. For example, in *Hirst* v *United Kingdom*[83] the Grand Chamber of the ECtHR considered the blanket ban on convicted prisoners voting in elections. The Divisional Court had considered the question under the HRA and, affording considerable deference to Parliament, found no violation of Article 3 of Protocol No 1 (free elections). Although the Grand Chamber held that Contracting States must be afforded a wide margin of appreciation in this sphere,[84] it was not impressed with the approach of the UK institutions, finding that there was no evidence that Parliament had 'ever sought to weigh the competing interests or to assess the proportionality of a blanket ban'[85] and that the Divisional Court, as it saw this as a matter for Parliament and not the national courts, also did not undertake any assessment of the proportionality of the measure itself.[86] It concluded that the restriction fell outside any acceptable margin of appreciation and was incompatible with Article 3 of Protocol No 1.

There has also been considerable academic criticism. In 2003 Jowell stated that there was

> no reason why courts should not acknowledge the shortcomings of their own institutional capacity to decide some of these matters. However, a realistic sense of their own limitations should not lead them to disparage their own legitimacy, or to deny their

81 See generally the observations of Lords Nicholls in *A* v *Secretary of State for the Home Department (No 1)* [2004] UKHL 56; [2005] AC 68 at [80] and R. A. Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 MLR 859.

82 *R (Begum)* v *Headteacher and Governors of Denbigh High School* [2005] EWCA Civ 199; [2005] 1 WLR 3373. See also *Belfast City Council* v *Miss Behavin' Limited* [2005] NICA 35.

83 *Hirst* v *United Kingdom* Application no 74025/01, 6 October 2005, Grand Chamber.

84 *ibid* at [60].

85 *ibid* at [79].

86 *ibid* at [80].

> own authority, on account alone of their lack of accountability to the electorate. Nor should they ever yield their principal function under the Human Rights Act, which is to guard democratic rights against the unnecessary intrusion of the popular will.[87]

In 2005 Lord Steyn warned that

> [t]here are powerful policy reasons why courts should never abdicate their democratic and constitutional responsibilities. The truth is that even democratic governments sometimes flagrantly abuse their powers and need to face open and effective justice.[88]

But it is also important to note that the judicial approach to determining proportionality is no longer as it was and clarification has been provided by three judgments of the House of Lords – *Huang*,[89] *Begum*[90] and *Miss Behavin' Limited*.[91] It has been held that giving weight to the judgment of the primary decision maker is not aptly described as deference but as 'performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice.'[92] However, according appropriate weight to the judgment of the primary decision maker does not absolve the court, or immigration adjudicator, from determining whether or not the interference with Convention rights is proportionate.[93] But despite these developments, there is still some judicial practice to suggest that courts interpreting and applying the HRA can be overly deferential to the primary decision maker, particularly in the area of anti-terrorism. In 2008 Poole, assessing four anti-terror judgments, concluded that the judgments 'tend to be responsive to government claims that the exceptional nature of the terrorist threat demands special rules and a different attitude from judges who interpret them and review their application . . . they do seem willing to accommodate executive needs by recognising a broad area of largely untrammelled executive discretion.'[94]

The principle of comity

British judges interpreting and applying the HRA are also responsible for the problem of 'comity' with the judgments of the ECtHR. Building on the directive

87 J. Jowell 'Judicial deference: servility, civility or institutional capacity?' [2003] PL 592, 601.
88 Lord Steyn 'Deference: a tangled story' [2005] PL 346, 351. See also K. Ewing, 'The futility of the Human Rights Act' [2004] PL 829; I. Leigh, 'Taking rights proportionately: judicial review, the Human Rights Act and Strasbourg' [2002] PL 265; and Lord Steyn, 'Democracy, the rule of law and the role of judges' [2006] EHRLR 243. Cf S. Atrill, 'Keeping the executive in the picture: a reply to Professor Leigh' [2003] PL 41.
89 *Huang* v *Secretary of State for the Home Department and Kashmiri* v *Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 WLR 581
90 *R (Begum)* v *Headteacher and Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100.
91 *Belfast City Council* v *Miss Behavin' Limited* [2007] UKHL 19; [2007] 1 WLR 1420.
92 *Huang* n 89 above at [16].
93 *ibid* at [16] and [20].
94 T. Poole, 'Courts and conditions of uncertainty in "times of crisis"' [2008] PL 234, 238.

(2009) 72(6) MLR 883–908

contained in section 2 of the HRA, which provides that a court or tribunal determining a question which has arisen in connection with a Convention right, must take into account these judgments whenever made or given, so far as relevant, ECtHR case law is now essentially considered binding on domestic courts. Absent a 'strong reason', it must always be followed.[95] The disadvantages for the effective protection of human rights in the UK are numerous which is why inflexible application of the principle is considered to be a problem, even though there are also some advantages in maintaining a link to an external arbiter.[96]

In instances where the British courts might have preferred a more generous interpretation of the Convention rights, this has been prevented by a particular judgment, or body of case law, from the ECtHR. One example is *N* v *SSHD*[97] which presented a difficult political issue – should an individual be able to resist deportation from the UK to Uganda on Article 3 grounds because she had advanced HIV/AIDS. All of their Lordships were careful to point out that they were only applying the Strasbourg case law, and would not be diverted by their 'sympathy' for the appellant.[98] Close adherence to Strasbourg jurisprudence also means that the British judicial mind has not been sufficiently exercised in relation to difficult Convention rights questions which have a particular British flavour – issues that have not ever been considered by the Strasbourg institutions and are unlikely to be considered.[99] The ECtHR is also missing out on the contribution to the interpretation and development of Convention standards which could be made by the British judiciary. Legal certainty at the domestic level may suffer as a result of the ECtHR's view of the Convention as a living instrument the meaning of which may change over time. There is also a problem with Strasbourg case law itself as it can be unclear, confusing and admitting of many possible interpretations. Whilst uncertainty is a problem in itself, it is even more of a problem when a domestic court, placing its own interpretation on unclear case law, then treats it as binding, effectively masking the process which is actually taking place.[100]

When the principle of comity is combined with the doctrine of precedent, considerable confusion can be caused as demonstrated in a series of cases concerning the application of Article 8 (the right to respect for home) to proceedings for

95 *R* v *Special Adjudicator, ex p Ullah* [2004] UKHL 26; [2004] 2 AC 323 at [20] per Lord Bingham See also *R (S)* v *Chief Constable of South Yorkshire* [2004] UKHL 39; [2004] 1 WLR 2196 and *N* v *Secretary of State for the Home Department* [2005] UKHL 31; [2005] 2 AC 296.

96 See further M. Amos 'The Principle of Comity and the Relationship between British Courts and the European Court of Human Rights' In P. Eeckhout and T. Tridimas, *Yearbook of European Law* 2009 (Oxford: Clarendon, 2010) forthcoming.

97 n 95 above.

98 See also *R (Countryside Alliance)* v *Her Majesty's Attorney General* [2007] UKHL 52; [2008] 1 AC 719.

99 See, for example, *R (Limbuela)* v *Secretary of State for the Home Department* [2005] UKHL 66; [2006] 1 AC 396.

100 One example is the House of Lords' judgment in *Ullah* n 95 above where following a review of the same ECtHR case law, the Court of Appeal had reached the opposite conclusion. See further E. Wicks, 'Taking Account of Strasbourg? The British Judiciary's Approach to Interpreting Convention Rights' (2005) 11 EPL 405, 419–423 and Lord Hoffmann, 'The Universality of Human Rights' Judicial Studies Board Annual Lecture 19 March 2009, available at http://www.jsboard.co.uk/aboutus/annuallectures.htm (last visited 5 August 2009).

possession. In *Qazi*[101] a majority of the House of Lords held that there was no need for a court to consider whether or not the making of an order for possession was proportionate, as the statutory scheme provided by Parliament had already struck the correct balance and the right to possession was automatic. Shortly after in *Connors*,[102] a case involving the same issue, the ECtHR reached the opposite conclusion. Following some confusion in the lower courts, in *Kay*[103] the House of Lords confirmed that the rules of precedent continued to apply and that *Qazi* was binding on the lower courts. Nevertheless, a majority concluded it was to be slightly modified in light of the judgment of the ECtHR in *Connors*. Shortly after the situation arose again when in *McCann*[104] the ECtHR endorsed the reasoning of the minority in *Kay*, causing even more confusion in the lower courts. In *Doherty*[105] the House of Lords again confirmed the doctrine of precedent but held that the reasoning of the majority in *Kay* had to be adjusted to take account of the judgment in *McCann*.[106]

Finally, whilst comity with the ECtHR has done much to keep alive hopes for a British Bill of Rights, the flipside is that it has also played a part in preventing the HRA from ever becoming one. It is a common perception, as already discussed, that there is no widespread sense of public ownership of the HRA.[107] High profile judicial decisions under the HRA are generally seen by certain elements of the media as something required of our judges by 'Europe'. Headlines such as 'Scotland's most evil killers in freedom Bid; fears over European law on human rights'[108] and 'European law gives refuge to terrorism suspects'[109] are fairly common place. As the Lord Chancellor has noted, '[i]f you read certain newspapers you might be forgiven for thinking that human rights were an alien imposition foisted upon us by "the other"'.[110]

The meaning of public authority

The final problem with the HRA stems from the judicial interpretation of section 6 of the HRA which provides that it is only unlawful for 'public authorities' to act in a way which is incompatible with Convention rights. No comprehensive definition of public authority is provided in the HRA although section 6(3) provides that a

101 *Harrow London Borough Council* v *Qazi* [2003] UKHL 43; [2004] AC 983.
102 *Connors* v *United Kingdom* (2005) 40 EHRR 9.
103 *Kay* v *Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465.
104 *McCann* v *United Kingdom* (2008) 47 EHRR 40.
105 *Doherty* v *Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367.
106 See further I. Loveland, 'A tale of two trespassers: reconsidering the impact of the Human Rights Act on rights of residence in rented housing: Part I' [2009] EHRLR 148 and 'Part II' in Issue 4 [2009] EHRLR.
107 See further F. Klug, 'A Bill of Rights: Do We Need One or Do We Already Have One?' [2007] PL 701, 713. On the practice of comity, see Amos, n 96 above. J. Lewis, 'The European Ceiling on Human Rights' [2007] PL 720; and R. Masterman, 'Section 2(1) of the Human Rights Act 1998: binding domestic courts to Strasbourg?' [2004] PL 725, 736.
108 *The Sunday Mail* 24 February 2002, 25.
109 *The Financial Times* 11 October 2001, 9.
110 Mackenzie Stuart Lecture n 31 above. See also Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* DCA 38/06.

public authority includes 'any person certain of whose functions are functions of a public nature'.[111] Whilst there has been little controversy concerning the judicial definition of the first class of 'core' public authority, there has been considerable criticism of the judicial approach to the meaning of the second class of respondent: 'functional' public authorities – those bodies which are only bound by the HRA in respect of their public acts, not their private ones. The essence of the complaint is that the judiciary have adopted an unduly narrow approach to the meaning of 'function of a public nature' culminating in a majority of the House of Lords deciding in *YL*[112] that a privately owned care home, when providing accommodation and care to a resident pursuant to arrangements made with a local authority under sections 21 and 26 of the National Assistance Act 1948, was not performing a function of a public nature for the purposes of section 6 of the HRA.

Whilst there is some academic support for the narrowness of the approach of the House of Lords[113], there are also those who have criticised the approach. In 2007 Landau observed that the judgment of the majority in *YL* 'licences the washing away of human rights law through contracting out, thereby removing the protection of proportionality inherent in Convention law and often lacking in domestic private law.'[114] The British Institute of Human Rights, responding to the judgment in *YL*, stated that

> [b]y exempting private care homes from the Human Rights Act when they house people under contract to a local authority, the House of Lords has undermined the fabric of human rights protection in the UK. Hundreds of thousands of older people and disabled people are placed by their local authorities in private and voluntary sector care homes, and they all stand to lose from this decision.[115]

And the Joint Committee on Human Rights has published two reports on the issue[116] where it has stated that the gap in protection had immediate practical implications as in an 'environment where many services previously delivered by public authorities are being privatised or contracted out to private suppliers, the law is out of step with reality.'[117]

In addition, the test has caused confusion for the public and private sectors. In 2003 the Audit Commission noted that public bodies were experiencing

111 See further, M. Amos, *Human Rights Law* n 63 above 35–53.

112 *YL* v *Birmingham City Council* [2007] UKHL 27; [2008] 1 AC 95.

113 D. Oliver, 'The frontiers of the State: public authorities and public functions under the Human Rights Act' [2000] PL 476; D. Oliver, 'Functions of a public nature under the Human Rights Act' [2004] PL 329; H. Quane, 'The Strasbourg jurisprudence and the meaning of a 'public authority' under the Human Rights Act' [2006] PL106.

114 J. Landau, 'Functional public authorities after YL' [2007] PL 630. See also C. M. Donnelly, 'Leonard Cheshire Again and Beyond: Private Contractors, Contract and section 6(3)(b) of the Human Rights Act' [2005] PL 785; M. Sunkin, 'Pushing Forward the Frontiers of Human Rights Protection: The Meaning of Public Authority under the Human Rights Act' [2004] PL 643.

115 BIHR, 'Our response to the House of Lords decision in *YL v Birmingham City Council*' (London: BIHR, 2007). See also JUSTICE, *A British Bill of Rights: Informing the Debate* n 15 above, 60 and F. Butler, *Human Rights: Who Needs Them* n 27 above 28–29.

116 *The Meaning of Public Authority under the Human Rights Act* HC 410 (2007) HL 77 (2007) and *The Meaning of Public Authority under the Human Rights Act* HC 382 (2004) HL 39 (2004).

117 *The Meaning of Public Authority under the Human Rights Act* (2007) *ibid.*

considerable difficulty with the scope of the HRA, compounded by the emerging case law.[118] The Joint Committee stated in its 2007 report that the issue had become very legalistic and that specialist legal advice was required to determine whether or not a body should be considered a functional public authority for the purposes of the HRA. In the opinion of the Committee, this represented 'a serious failure to achieve the aspiration of a human rights culture in which Convention rights are secured for individuals without the need for formal legal proceedings or the involvement of legal advisers.'[119]

POSSIBLE REMEDIES

If it is accepted that these are the major problems with the HRA, the next question is what can be done to remedy these? If the objective remains 'to provide as much protection as possible for the rights of individuals against the misuse of power by the state',[120] is it necessary to start again with a new British bill of rights? Or can a more piecemeal approach be taken? With the appropriate political will, including the allocation of sufficient resources, it is clear that some of the problems outlined in the preceding paragraphs could possibly be easily remedied. For example, the first step in improving and expanding knowledge about the HRA would be to devote sufficient funds to various education and training campaigns tailored for different levels such as the general public, secondary schools and public authorities. This task is made slightly easier by the existence, since 1 October 2007, of the Equality and Human Rights Commission which is obliged by section 9(1) of the Equality Act 2006 to: (a) promote the understanding of the importance of human rights; (b) encourage good practice in relation to human rights; (c) promote awareness, understanding and protection of human rights; and (d) encourage public authorities to comply with section 6 of the HRA.[121] The Government has made clear that it now sees education about human rights as falling solely within the Commission's remit and recently informed the Joint Committee that in this area there is 'only so much that can be achieved from within a Government department'.[122] But such is the scale of the problem, that the provision of sufficient earmarked resources, in addition to those the Commission already has, would be imperative.

Other problems could be remedied with relatively minor statutory reforms and there are already two precedents. In response to the almost universal criticism of the approach taken by the courts to the interpretation of 'function of a public nature', in July 2008, at the instigation of the Government, Parliament passed section 145 of the Health and Social Care Act 2008. This provides that a person who provides accommodation, together with nursing or personal care, in a care home

118 Audit Commission, *Human Rights: Improving Public Service Delivery* n 27 above at [26].
119 n 117 above at [27].
120 n 22 above.
121 In the Equality Act 2006, s 9(2) 'human rights' is defined as: (a) the Convention rights within the meaning given by section 1 of the Human Rights Act 1998; and (b) other human rights.
122 Joint Committee on Human Rights, *Government Response to the Committee's Sixth Report of Session 2007-08* HC 526 (2008), HL 103 (2008) at [2].

for an individual under the relevant statutory provisions, is to be taken for the purposes of section 6 of the HRA, to be exercising a function of a public nature in doing so. While this still leaves the position of private providers of other traditionally 'public' services unclear, this has provided clarification for operators of care homes, addressed the gap in protection and reversed the judgment of a majority of the House of Lords in *YL*.[123] There is scope for further statutory reform, along the lines suggested by the Joint Committee on Human Rights, to ensure that there remain no gaps in protection where public services are contracted to the private sector.[124]

The second statutory reform instigated by government has addressed the narrowness of the test for standing in section 7 of the HRA. Section 30 of the Equality Act 2006, which was passed by Parliament in February 2006, exempts the Equality and Human Rights Commission from the test for standing set out in section 7. Pursuant to section 30(1), the Commission has the capacity to institute legal proceedings, if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function. Section 30(3) provides that in the course of legal proceedings for judicial review which it institutes, it may rely on section 7(1)(b) of the HRA (breach of Convention rights) and it need not be a victim or potential victim of the unlawful act to which the proceedings relate. To date the Commission has not yet instituted proceedings under the HRA although in June 2008 a threat was made by Trevor Phillips, the Commission's Chair, to immediately launch a legal challenge under the HRA if the government managed to successfully steer through Parliament its plan to extend the pre-charge detention limit to 42 days.[125] Having made this concession to a specialist human rights body, there is the possibility of taking reform a step further, and replacing the victim test with a test of 'sufficient interest' similar to that which an applicant for judicial review must satisfy pursuant to section 31(3) of the Supreme Court Act 1981,[126] thereby making it possible for other specialist organisations to bring claims directly under the HRA.

In relation to the interpretation and application of the HRA by the judiciary, there are indications that there has been a change in judicial attitude in relation to the most serious problems, obviating the need for any other kind of remedial intervention. The clarification to the principles of proportionality and deference provided by the judgments of the House of Lords in *Huang*,[127] *Begum*[128] and *Miss Behavin' Limited*[129] has already been discussed, and as the judiciary becomes more

123 *YL* v *Birmingham City Council* [2007] UKHL 27; [2008] 1 AC 95.

124 See further Joint Committee on Human Rights, *Legislative Scrutiny: Health and Social Care Bill* HC 303 (2008) HL 46 (2008) at [1.12]. Clarification in the area of social housing has recently been provided by the judgment of the Court of Appeal in *R (Weaver)* v *London & Quadrant Housing Trust* [2009] EWCA Civ 587.

125 A. Travis and P. Wintour, 'Rights body threatens to bring legal challenge on 42-day detention' *The Guardian* 10 June 2008, 12.

126 'No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.'

127 *Huang* v *Secretary of State for the Home Department and Kashmiri* v *Secretary of State for the Home Department* n 89 above.

128 *R (Begum)* v *Headteacher and Governors of Denbigh High School* n 90 above.

129 *Belfast City Council* v *Miss Behavin' Limited* n 91 above.

confident in the role assigned to it by the HRA, and with the establishment of the new Supreme Court in October 2009, it is possible that these developments will continue, and be built upon, even in the area of anti-terror law.

The judgment of the House of Lords in *In Re P*,[130] has established an important new exception to the principle of comity. Lord Hoffmann held that where relevant Strasbourg authority states that the question is within the margin of appreciation, 'it is for the court in the United Kingdom to interpret articles 8 and 14 and to apply the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the United Kingdom.'[131] Baroness Hale reached a similar conclusion stating that if the matter was 'within the margin of appreciation which Strasbourg would allow to us, then we have to form our own judgment.'[132] And Lord Mance also concluded that where the ECtHR had determined that a matter fell within the margin of appreciation, it was a matter for national authorities, stating '[u]nder the 1998 Act, United Kingdom authorities (legislators and courts) have domestically to address the impact of the domestically enacted Convention rights in the particular context of the United Kingdom.'[133] Such an approach allows British courts to reach their own interpretation of Convention rights, whether that be more generous, or less generous, where there is a signal from ECtHR jurisprudence that the issue is one which engages a Contracting State's margin of appreciation and preserves the many advantages of maintaining a link to Strasbourg and more than 50 years of considered human rights law jurisprudence.[134]

But solutions to the remaining problems with the HRA would not be so straightforward. Whilst there are a number of blueprints for the way in which rights additional to those given further effect by the HRA could be drafted, ranging from the various Protocols to the ECHR itself to the European Social Charter, reaching a consensus on which rights to include would be very difficult. There is already a debate concerning the justiciability of economic and social rights in the domestic context.[135] And there is disagreement over whether rights such as the 'right to trial by jury' come within the accepted definition of a human right or contribute in any positive way to the fairness of a defendant's trial.[136] There are also considerable difficulties presented by reform of the declaration of incompatibility. Absent a new constitutional settlement resulting in a limitation on the sovereignty of Parliament in relation to Convention rights as well as directly effective EC law, it is difficult to imagine a better mechanism for dealing with the relationship between Convention rights and Acts of Parliament. However, improvements could be made. The ECtHR has signalled that it is possible that at some future date, 'evidence of a long-standing and established practice of

130 [2008] UKHL 38; [2008] 3 WLR 76.
131 At [37]–[38]. See also Lord Hoffmann, 'The Universality of Human Rights' Judicial Studies Board Annual Lecture n 100 above.
132 n 130 above at [120].
133 *ibid* at [129]. See also the observations of Lord Hope at [50].
134 See further, M. Amos, 'The principle of comity and the relationship between British courts and the European Court of Human Rights' n 96 above.
135 See further Joint Committee on Human Rights, *A Bill of Rights for the UK?* n 16 above at [147]–[198].
136 See further, *ibid* at [123]–[127].

ministers giving effect to the courts' declarations of incompatibility might be sufficient to persuade the Court of the effectiveness of the procedure'.[137] The Government could also give consideration to the observations of the Joint Committee and respond to declarations of incompatibility more promptly whilst providing more detailed guidance to departmental officials to equip them to respond effectively.[138]

However, the most difficult problem to be addressed concerns the climate of respect surrounding the HRA, created and perpetuated by political and public figures and the media. The prospects for building respect for the HRA were very limited from the outset. Unlike many other countries where the introduction of a bill or rights has followed many years of consultation involving all sections of society,[139] no serious consultation process was conducted in relation to the design of the HRA. The new Labour government was elected on 1 May 1997 and the White Paper, *Rights Brought Home*[140] setting out the basic elements of the HRA, and bearing a very strong resemblance to the Labour Party consultation document, *Bringing Rights Home*,[141] was published five months later. Just over a year later, on 9 November 1998, the HRA, little altered from the parliamentary process, received the Royal Assent. This is in sharp contrast to the process followed in drawing up the Canadian Charter, as described below by Penner:

> During nationally televised hearings of a joint parliamentary committee, over 1,000 individuals and 300 groups petitioned for changes and additions and the Committee, after 60 days of hearings, successfully proposed to Parliament some 65 substantial amendments to the Government draft ... the judges gave it real substance because the people took it up. And this may well be the most important lesson to be learned from the Canadian experience. A minimalist bill of rights passed quietly, purely as a parliamentary measure without popular backing and substantial consensus, may not be given its full weight by a cautious judiciary.[142]

Despite the poor start, it may have been possible to build respect over time had the government and opposition championed the HRA. But, as already discussed, this did not occur. A further opportunity was presented when Gordon Brown became Prime Minister in June 2007. However, a week later in *The Governance of Britain*[143] plans for a new Bill of Rights and Duties were announced and the HRA downgraded to a 'first, but substantial step towards a formal statement of rights'.[144]

137 *Burden and Burden* v *United Kingdom* (dec) (Application No 13378/05, 12 December 2006) at [59].
138 See further Joint Committee on Human Rights, *A Bill of Rights for the UK?* n 16 above at [224]–[229].
139 See for example: A. Penner, 'The Canadian experience with the Charter of Rights: are there lessons for the United Kingdom?' [1996] PL 104; A. Smith, 'The drafting process of a Bill of Rights for Northern Ireland' [2004] PL 526; and K. Asmal, 'Designing a bill of rights for a diverse society' [2007] EHRLR 597.
140 *Rights Brought Home* n 21 above.
141 J. Straw and P. Boateng, *Bringing rights home: Labour's plans to incorporate the European Convention on Human Rights into UK law* (London: Labour Party, 1996).
142 A. Penner n 139 above, 107. See also Joint Committee on Human Rights *A Bill of Rights for the UK?* n 16 above at [304]–[354].
143 n 9 above.
144 *ibid* at [205].

Four months later the Prime Minister gave an important speech on liberty without mentioning the HRA.[145] This chain of events, combined with the fact that elements of the media remain hostile to the HRA, makes it seem very difficult, if not impossible, to build respect for the HRA as it stands. But this does not necessarily mean that the HRA must be replaced with a bill of rights. An alternative route would be for the Government to initiate a broad consultation process on how the HRA is working, with a view to making reforms in light of the findings. Such a task could be delegated to the Law Commission, the Equality and Human Rights Commission or a body specially established for the task similar to the Northern Ireland Bill of Rights Forum. It would be important to include media representatives and be genuinely open to suggestions as to the way forward, even in relation to matters such as an Act of Parliament to replace, what is perceived by some to be, the present unsatisfactory 'judge made' privacy law. Properly conducted, and combined with positive leadership on human rights, such a process might go some way towards filling the vacuum created at the very start and garnering much needed consensus.[146]

THE FUTURE

With a general election to be held prior to May 2010, hypothesising what might be done to remedy the problems with the HRA outlined in this article is now almost a redundant activity. Both the Government and Conservative Party have released details of their plans for the HRA and the legal protection of human rights at the domestic level. In its consultation paper *Rights and Responsibilities: Developing our Constitutional Framework*[147] the Government has undertaken not to resile from the HRA in any way.[148] Its plans for reform focus predominantly upon building respect for the HRA and the concept of human rights, with the addition of responsibilities. It goes about this in three ways. First, the consultation paper itself is very detailed – far more so than the White Paper which accompanied the HRA. There is a genuine attempt to explain why the legal protection of human rights is important: '[g]uarantees of individual human rights developed not just in the sense of providing freedom from government interference or authority, but also in the sense of freedom to act to fulfil one's potential'.[149] There are also observations concerning the dangers of majority rule: '[h]uman rights instruments, containing positive guarantees and balancing mechanisms, protect against the risk that majority or collective interests will be allowed to override the basic rights of certain individuals.'[150]

145 25 October 2007, University of Westminster. The Prime Minister did mention the HRA briefly during his speech to mark the 60th anniversary of the Universal Declaration of Human Rights, Lancaster House, London, 10 December 2008.
146 As suggested by the Equality and Human Rights Commission, *Human Rights Inquiry Report* n 33 above 144.
147 n 10 above.
148 *ibid* at [4.24].
149 *ibid* at [3.6].
150 *ibid* at [3.9].

(2009) 72(6) MLR 883–908

Second, by suggesting that a statement of responsibilities should accompany any statement of rights, the Government is attempting to make the idea of rights more attractive while also explaining in more detail the responsibilities already inherent in the legal system without making any changes to the HRA. As Michael Wills MP, Minister of State for the Ministry of Justice, has stated:

> It is very important that any legislation in this area is owned by the British people as a whole otherwise you get the sorts of problems that we have been having – problems of misunderstanding – and the more that people are encouraged to believe that these rights are proportionate, they are accompanied for the most part by responsibilities, the greater degree of ownership.[151]

Third, this is clearly a consultation process and this is a consultation document. The Government has indicated that it is open to suggestion and debate on many of these questions – perhaps the debate, resulting in consensus, that never preceded the HRA. It has noted in correspondence with the Joint Committee its intention:

> . . . to carry out a thorough consultation process going, we hope, far beyond the views of constitutional experts . . . A key aim of the public engagement process will be to target those harder-to-reach constituencies who stand to benefit most from our work . . . We want to work as closely as may be with everyone who has an interest in this matter. It is not a proper subject for 'quick wins' or party based spinning. Indeed, we expect the results of this exercise to last well into the future. If that is to be the case, we would hope to take opposition parties with us and we will endeavour to do that as the process goes on.[152]

However, it is questionable how successful these efforts to build respect will be. *Rights and Responsibilities* is obviously not designed to be a document accessible to the general public and it is not accompanied by a shorter, plain English version. It is not supported by web based resources and no attempt is made to engage directly with young people. It is not ideal that the consultation is being conducted by the Government itself rather than an independent body such as the EHRC. The budget for the consultation exercise is not clear. All that has been stated is that the Bill of Rights and Responsibilities is part of the broader Governance of Britain programme and the costs of the consultation process will be met from the resources allocated for the wider programme.[153] The time frame has been estimated to start from the date of publication of the Green Paper and run for several months.[154] But any legislation as a result would not be brought forward before the next general election.[155] Clearly the process followed will not meet the standards set in Canada, South Africa, or Northern Ireland. There is also a question mark over how open to consultation on some issues the Government really is. Throughout the consultation paper it is possible to find examples where the

151 Joint Committee on Human Rights, *A Bill of Rights for the UK? Volume II Oral and Written Evidence* HC 150 (2008) HL 165 (2008) Ev 83. See also *Rights and Responsibilities* n 10 above at [2.18] and [2.53].
152 *ibid* Ev 179.
153 *ibid* Ev 183.
154 *ibid.*
155 *Rights and Responsibilities* n 10 above at [5.3].

Government has already indicated that a particular issue is not really up for debate. For example, it 'is satisfied' that there is no case for extending the jurisdiction of the courts over decisions which have a direct effect on resource allocation.[156] And in drawing up a new Bill of Rights and Responsibilities 'the Government would not seek to create new and individually enforceable legal rights in addition to the array of legal protections already available.'[157] There is also no discussion in the document concerning plans for improving education and training about rights or responsibilities. Once the consultation exercise is completed, it would appear that the Government still sees this as something for the EHRC to do, within the course of its existing duties.

In addition to building respect, the government has also undertaken in its consultation paper to consult on expanding the range of rights presently protected by the HRA, a significant concession since the publication of *The Governance of Britain*. However, it is clear throughout that a generally applicable model of directly legally enforceable rights or responsibilities would not be the most appropriate model for a future Bill of Rights and Responsibilities.[158] New rights might include the rights of victims;[159] an accessible and straightforward statement concerning equality;[160] and principles of good administration.[161] However, it remains opposed to the prospect of economic, social and cultural rights carrying the same status in domestic law as the civil and political rights in the HRA.[162] Added to the new rights will be a statement of responsibilities including matters such as 'treating National Health Service and other public-sector staff with respect; safeguarding and promoting the wellbeing of children in our care; living within our environmental limits for the sake of future generations; participating in civic society through voting and jury service; reporting crimes and co-operating with the prosecution agencies; as well as more general duties such as paying taxes and obeying the law'.[163]

There is little or no reference in the consultation paper to the other problems with the HRA discussed in this article. The Government is considering separately whether the definition of public authority should be clarified.[164] There is no suggestion that changes will be made to broaden the standing requirement or to reform the declaration of incompatibility mechanism; 'it is the Government's clear view that Parliamentary sovereignty must remain as the cornerstone of the UK constitution.'[165]

The plans the Conservative Party has for the HRA should it form a government following the next general election are not as clear. In contrast to the government's promise not to resile from the HRA, it has undertaken on a number of occasions to repeal it and replace it with a British Bill of Rights. However, details of its contents, how it would be drafted and promoted, whether it would deal with the problems with the HRA outlined in this article, and what would happen

156 *ibid* at [4.27].
157 *ibid* at [3.52].
158 *ibid* at [4.25].
159 *ibid* at [3.17]–[3.23].
160 *ibid* at [3.38].
161 *ibid* at [3.46].
162 *ibid* at [3.52].
163 *ibid* at [2.26].
164 *ibid* at [4.23].
165 *ibid* at [4.27].

(2009) 72(6) MLR 883–908

to the HRA in the interim are very vague. There are indications that some consultation process would occur in drawing up the Bill:

> we would be able to have a public debate about what further rights might be added and whether any limitations within the Convention might be lifted . . . During this process, we would need to ask ourselves important questions. Which rights need greater protection than the Convention currently affords? How do we ensure that the State can protect the rights of its citizens against the new threats in the modern world?[166]

As for the range of rights, the Bill would not extend to the protection of socio-economic or environmental rights. Nick Herbert MP, former Shadow Secretary of State for Justice, has stated that it seemed 'highly unlikely that such rights could be justiciable, even if they should be' and that such an extension of rights would be a 'serious mistake'.[167] However, the range of rights to be included would be different to those given further effect by the HRA as the Bill of Rights would 'better tailor, but also strengthen, the protection of our core rights' and possibly include the right to trial by jury, habeas corpus with strict limits on the time people can be held without charge, and the protection of Parliament against the intrusion of the executive.[168] Responsibilities would also be included.[169]

With the repeal of the HRA promised, it is fairly clear that the Conservatives would break the link required by the HRA with the ECtHR although remain a party to the ECHR. '[W]e aim for a settlement that restrains the influence of Strasbourg case law, and truly allows the development of a distinctive British jurisprudence on human rights.'[170] But it is not entirely clear what would replace sections 3 and 4 of the HRA and what would be the exact relationship between Parliament, the judiciary and executive. There are indications that the Conservatives see their new Bill of Rights not as a legal instrument at all but as something declaratory for Parliament to follow:

> [W]e want a British Bill of Rights and Responsibilities to help us restore the place of Parliament and repair the separation of powers. Parliament should be deciding the great issues of the day. We should not be asking the judiciary to define our rights: in a democracy it must be for the people, and their representatives, to create a framework of rights.[171]

Even if declaratory, the Conservatives would like their Bill of Rights to send a strong message:

> [w]e want a British Bill of Rights to bring greater clarity, to aid Parliament in drawing up laws and issuing guidance, preventing judge-made law and helping those public servants on the frontline who have to take difficult decisions. We want greater clarity to limit the spread of bad practice and address the rights culture by introducing common sense into decisions by public authorities.[172]

However, no details of an education and training campaign are given.

166 Herbert, n 19 above.
167 *ibid.*
168 A. Travis, 'Cameron pledges bill to restore British freedoms' *The Guardian* 28 February 2009, 11.
169 n 19 above.
170 *ibid.*
171 *ibid.*
172 *ibid.*

CONCLUSION

Although in recent times the tenor of the debate about the HRA has moved slightly from virulent criticism towards more constructive suggestions from both the Government and Conservative Party that the HRA should be supplemented, or replaced, with a British bill of rights, the new debate has not been accompanied by a proper examination of the problems with the HRA, in particular, in what ways it has failed to meet the objective set for it by Lord Irvine, more than 11 years ago: 'to provide as much protection as possible for the rights of individuals against the misuse of power by the state'.[173] Political criticisms, rather than legal ones, still predominate such as the Government's suggestion that rights have become 'commoditised' demonstrated by those who assert their rights in a selfish way without regard to the rights of others[174] and the view, held by many, that the existence of the HRA constitutes a further threat to public safety.

But whilst there has not been, and is not likely to be, a comprehensive process of law reform accompanying the repeal, or supplementation of the HRA, over the last ten years much research has been done on different aspects of the Act which provides an important evidence base for identifying many of the problems with it, separate from the political critique. As discussed, this research demonstrates that the climate of knowledge and respect surrounding the HRA is problematic. The limited range of rights to which it offers legal protection is inadequate when compared to human rights instruments more modern than the ECHR, particularly the absence of economic, social and cultural rights. Two fundamental features of its design, the declaration of incompatibility and the test for standing in section 7 have impacted on its effectiveness as a measure to provide as much protection as possible. And its interpretation and application by the judiciary has also led to some problems, particularly in the areas of proportionality and deference, the relationship between domestic courts and the ECtHR and the meaning of public authority and function of a public nature.

Once these problems are identified and examined in more detail, it appears that many are not without a possible solution. However, both the government and opposition have chosen to press ahead with their respective plans for a British bill of rights rather than address the problems with the HRA directly. It is accepted that properly done, such a reforming measure could be a useful solution to the problems with the HRA identified in this article, if the original objective is kept in sight. However, from the details released by both political parties to date, it appears that the plans fall far short of what is necessary to deal with all of the problems outlined. In particular, it is not clear that the consultation exercises to be engaged in by either party, in drawing up a bill of rights, will meet the benchmark set by many other countries and thereby ensure future respect, legitimacy and endurance for the resulting instrument, whatever form it might take. It is suggested that for such a measure to have the best possible start, the debate needs to move away from political point scoring and focus much more upon the objective of securing now, and for the future, the most effective legal protection of human rights at the domestic level.

173 n 22 above.
174 n 10 above at [2.15].

(2009) 72(6) MLR 883–908