Articles

Bringing Rights *More* Home: Can a Home-grown UK Bill of Rights Lessen the Influence of the European Court of Human Rights?

By Sarah Lambrecht[*]

Abstract

This article focuses on the strategy to replace the UK Human Rights Act 1998 (HRA) with a home-grown Bill of Rights to lessen the influence of the European Court of Human Rights' case law. Without attempting to disregard the national-specific elements, the discussion of these questions is very relevant for all States confronted with the influence of Strasbourg. The tension between coherence, efficiency and autonomy is overarching. The article therefore approaches the issue not only from an outsider's perspective but also, where relevant, from a comparative constitutional law perspective. Both perspectives seem to be largely absent from the current (academic) debate. Firstly, this article analyzes the current relationship between the UK Supreme Court and the Strasbourg Court, which reveals that the judicial arguments in support of a mirror principle are not so much based on section 2(1) HRA, as they are, in the domestic courts' relationship with Strasbourg, on concerns about international obligations, hierarchy, effectiveness of the Strasbourg Court, coherence and efficiency. Internally, judicial arguments are founded on concerns about separation of powers, limited jurisdiction, and accustomedness to the precedent system. In the second part, this article focuses on the potential impact of a home-grown Bill of Rights on the current relationship between both courts; concluding that a home-grown Bill of Rights will most likely cause domestic courts to receive less latitude by Strasbourg and will not absolve domestic judges from the duty of taking into account the Strasbourg case law.

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A. Introduction: The UK Bill of Rights Debate

I. Cross-Party Consensus on Need for a Home-Grown Bill of Rights

For the first time, there "exists an unusual cross-party consensus about the need for a 'British Bill of Rights.' "[1] In their 2010 Manifesto, the Labour Party committed to setting up "an All Party Commission to chart a course to a Written Constitution."[2] Cameron already proposed in 2006 a British Bill of Rights and Responsibilities, followed in 2010 by the Conservative Party's Manifesto stating that they "will replace the Human Rights Act with a UK Bill of Rights."[3] In their 2010 Manifesto, the Liberal Democrats continued their longstanding campaign for a written constitution including a Bill of Rights to "entrench the rights presently enshrined in the European Convention in the British constitutional framework."[4]

The drafting of a Bill of Rights was originally considered by the Labour Party to be the second stage in a two-stage process.[5] In their 1997 Manifesto, Labour committed to the first stage of "bringing rights home"[6] through incorporating the European Convention on

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[1] JOINT COMMITTEE ON HUMAN RIGHTS, A BILL OF RIGHTS FOR THE UK?, 2007–08, H.L. 165-I, H.C. 150-1, at 7 (U.K.), *available at* http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf. *See also* PARLIAMENT & CONSTITUTION CENTRE & HOME AFFAIRS SECTION, BACKGROUND TO PROPOSALS FOR A BRITISH BILL OF RIGHTS AND DUTIES, SN/PC/04559 (2009), *available at* http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-04559.pdf (providing an overview of each party's proposal for a British Bill of Rights).

[2] LABOUR PARTY, THE LABOUR PARTY MANIFESTO 2010: A FUTURE FAIR FOR ALL 9:3 (2010), *available at* http://www2.labour.org.uk/uploads/TheLabourPartyManifesto-2010.pdf.

[3] CONSERVATIVE PARTY, INVITATION TO JOIN THE GOVERNMENT OF BRITAIN: THE CONSERVATIVE MANIFESTO 79 (2010), a*vailable at* http://www.conservatives.com/~/media/Files/Activist%20Centre/Press%20and%20Policy/Manifestos/Manifesto 2010. *See also* David Cameron, Speech at the Centre for Policy Studies: Balancing Freedom and Security—A Modern British Bill of Rights (June 26, 2006), *available at* http://www.britishpoliticalspeech.org/speech-archive.htm?speech=293 (proposing a British Bill of Rights as necessary to provide balance between security and protection of individual freedom).

[4] LIBERAL DEMOCRAT PARTY, POLICY PAPER 83: FOR THE PEOPLE, BY THE PEOPLE 4.2.4 (2007). *See also* LIBERAL DEMOCRAT PARTY, LIBERAL DEMOCRAT MANIFESTO: BUILD A FAIRER BRITAIN 93–94 (2010), *available at* http://network.libdems.org.uk/manifesto2010/libdem_manifesto_2010.pdf (proposing a Freedom Bill to protect civil liberties).

[5] *See* NATIONAL EXECUTIVE COMM., A NEW AGENDA FOR DEMOCRACY: LABOUR'S PROPOSALS FOR CONSTITUTIONAL REFORM (1993); Francesca Klug, *A Bill of Rights: What For?*, *in* TOWARDS A NEW CONSTITUTIONAL SETTLEMENT 130–33 (Christopher Bryant ed., 2007).

[6] HOME OFFICE, RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL (1997), *available at* http://www.archive.official-documents.co.uk/document/hoffice/rights/rights.htm.

Human Rights[7] (Convention) into UK law,[8] which resulted in the Human Rights Act 1998[9] (HRA). This approach was considered to be "quicker, less complicated, and less politically controversial" than the immediate drafting of a Bill of Rights.[10] Labour abandoned drafting plans until 2007, when an unusual cross-party consensus arose.[11] This timing was not coincidental: Mid-2006 the "sustained onslaught from the press" on the HRA "reached a crescendo."[12] Both Labour and Conservatives "sought to outdo each other in attacking the Human Rights Act."[13] Blair ordered "a review looking specifically at problems with the implementation of the HRA"[14] and Cameron promised to replace the HRA with a home-grown Bill of Rights.[15] In 2007, the Joint Committee on Human Rights announced they would inquire into a British Bill of Rights,[16] resulting in a report that recommended its adoption.[17]

[7] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter Convention].

[8] *See* LABOUR PARTY, LABOUR PARTY MANIFESTO 1997: NEW LABOUR BECAUSE BRITAIN DESERVES BETTER (1997) ("We will by statute incorporate the European Convention on Human Rights into UK law to bring these rights home and allow our people access to them in their national courts.").

[9] Human Rights Act, 1998, c. 42 (U.K.).

[10] Samantha Besson, *The Reception Process in Ireland and the United Kingdom, in* A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 31, 40 (Helen Keller & Alec Stone Sweet eds., 2008).

[11] *See* David Feldman, *Extending the Role of the Courts: The Human Rights Act 1998*, 30 PARLIAMENTARY HIST. 65, 83–84 (2011) (describing the Labour and Conservative disenchantment with the HRA in the early 2000s).

[12] ROBERT HAZELL, TOWARDS A NEW CONSTITUTIONAL SETTLEMENT: AN AGENDA FOR GORDON BROWN'S FIRST 100 DAYS AND BEYOND 31 (2007). *See also* JOINT COMMITTEE ON HUMAN RIGHTS, THE HUMAN RIGHTS ACT: THE DCA AND HOME OFFICE REVIEWS, 2005–06, H.L. 278, H.C. 1716, at 3, 7 (U.K.), *available at* http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/278.pdf (describing the controversy surrounding the HRA in May 2006).

[13] HAZELL, *supra* note 12, at 31.

[14] DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, REVIEW OF THE IMPLEMENTATION OF THE HUMAN RIGHTS ACT 3 (2006).

[15] *See* Cameron, *supra* note 3 (proposing a British Bill of Rights in a speech before the Centre for Policy Studies).

[16] Press Notice No. 38, Joint Committee on Human Rights, A British Bill of Rights (May 22, 2007), *available at* http://www.parliament.uk/business/committees/committees-archive/joint-committee-on-human-rights/jchrpn38-220507/.

[17] JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 1.

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II. Commission on a Bill of Rights

In the manifestos for the subsequent 2010 elections, all three parties supported a home-grown Bill of Rights, although with clearly diverging positions.[18] The Labour Party committed anew to the HRA—explicitly stating that they would not repeal it[19]—and to shaping a written constitution.[20] The Liberal Democrats similarly stated they would protect the HRA and introduce a written constitution, although they steered away from the language of a "UK Bill of Rights" to signal an alternative policy to the Conservative Party.[21] Given that the Conservative Party wanted to repeal the HRA to replace it with a UK Bill of Rights.[22] The election resulted in a hung parliament: No party was able to command majority in the House of Commons and the Conservative Party formed a Coalition Government with the Liberal Democrats.

Following their Government Program,[23] a Commission on a Bill of Rights was established in March 2011. The Commission was created, according to Deputy Prime Minister Clegg, because "the two coalition parties in this Government do not see eye to eye on [the issue of the HRA's repeal]."[24] The Commission received a mandate reflecting such a compromise. Firstly, it was tasked to "investigate the creation of a UK Bill of Rights that incorporates and builds on all [the] obligations under the [Convention]" and, secondly, to "provide interim advice to the Government on the on-going Interlaken process to reform the Strasbourg court ahead of and following the UK's Chairmanship of the Council of Europe."[25] The Commission, chaired by Leigh Lewis, counted eight members nominated in equal part by the coalition parties. The Commission held two consultation rounds in 2011–12 following discussion papers, enquiring amongst others about the necessity, content and

[18] *See* ALICE DONALD ET AL., THE UK AND THE EUROPEAN COURT OF HUMAN RIGHTS 26 (EQUALITY AND HUMAN RIGHTS COMMISSION 2012), *available at* http://www.equalityhumanrights.com/uploaded_files/research/83._european_court_of_human_rights.pdf (noting the coalition parties' "divergent positions on human rights").

[19] 490 PARL. DEB., H.C. (2009) 38 (U.K.) (comments of J. Straw).

[20] LABOUR PARTY, *supra* note 2, at 3.

[21] Francesca Klug, *'Solidity or Wind?' What's on the Menu in the Bill of Rights Debate?*, 80 POL. Q. 420 (2009).

[22] *See* CONSERVATIVE PARTY, *supra* note 3, at 79 ("To protect our freedoms from state encroachment and encourage greater social responsibility, we will replace the Human Rights Act with a UK Bill of Rights.").

[23] *See* HM GOVERNMENT, THE COALITION: OUR PROGRAMME FOR GOVERNMENT 11 (2010), *available at* http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_187876.pdf (proposing to establish a "Commission to investigate the creation of a British Bill of Rights").

[24] 526 PARL. DEB., H.C. (2011) 876 (U.K).

[25] COMM'N ON A BILL OF RIGHTS, A UK BILL OF RIGHTS?: THE CHOICE BEFORE US, 1, at 5 (2012), *available at* http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf.

territorial application of a potential UK Bill of Rights and its relationship with the HRA and the Convention.[26] These papers generated over a thousand responses from individuals and organizations.[27] The Commission also published the minutes of its meetings and seminars on its website. In closure, the Commission published a vast report in December 2012, which reflected the very diverse and often-conflicting opinions of its members.[28]

III. Proposal: A Home-Grown Bill of Rights to Shield Strasbourg's Influence

In this article, I will focus on one of the main proposals put forward in the current UK Bill of Rights debate, namely to replace the HRA with a home-grown Bill of Rights for the purpose of lessening the influence of the European Court of Human Rights' case law (Strasbourg Court).[29] It is important to emphasize that I only intend to analyze the potential this strategy has to meet its purpose, without entering into the debate on the general desirability of a home-grown Bill of Rights in the UK.[30] Currently, this proposal is endorsed by the Conservative Party, the biggest party in the UK.

Proposals for a home-grown Bill of Rights can be framed within two general trends in Europe at the national level: A trend towards increasing Europeanization[31] and a trend towards a strong emphasis on subsidiarity and the further development of the margin of appreciation doctrine.[32] The second trend is often based on skepticism and a counter-

[26] COMM'N ON A BILL OF RIGHTS, DISCUSSION PAPER: DO WE NEED A UK BILL OF RIGHTS? (2011), *available at* http://www.justice.gov.uk/downloads/about/cbr/cbr-discussion-paper.pdf; COMM'N ON A BILL OF RIGHTS, SECOND CONSULTATION (2012), *available at* http://www.justice.gov.uk/downloads/about/cbr/second-consultation/cbr-second-consultation.pdf.

[27] COMM'N ON A BILL OF RIGHTS, *supra* note 25, at 8.

[28] *Id.*

[29] *See id.* at 16, 25 (summarizing proposals for the replacment of the HRA with a Bill of Rights); 467 PARL. DEB., H.C. (2007) 218 (U.K.) (comments of Nick Herbert); MICHAEL PINTO-DUSCHINSKY, BRINGING RIGHTS BACK HOME: MAKING HUMAN RIGHTS COMPATIBLE WITH PARLIAMENTARY DEMOCRACY IN THE UK 60 (2011), *available at* http://www.policyexchange.org.uk/images/publications/bringing%20rights%20back%20home%20-%20feb%2011.pdf; Cameron, *supra* note 3; Nick Herbert, Shadow Sec'y of State for Justice, Lecture at the British Library: Rights without Responsibilities—A Decade of the Human Rights Act (Nov. 24, 2008), *available at* http://bihr.org.uk/sites/default/files/081124%20Rights%20without%20responsibilities%20FINAL.pdf.

[30] For a discussion on the desirability of a UK Bill of Rights, see COMM'N ON A BILL OF RIGHTS, *supra* note 25, at 131–44.

[31] *See generally* A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS (Helen Keller & Alec Stone Sweet eds., 2008).

[32] Leonard Hoffman, Judicial Studies Board Annual Lecture: The Universality of Human Rights 27 (Mar. 19, 2009), *available at* http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf; Mary Arden, Is the Convention Ours?, Address in the Dialogue Between Judges 2010 Symposium (Jan. 2010), *in* DIALOGUE BETWEEN JUDGES: THE CONVENTION IS YOURS 22, 27–28 (ECtHR ed., 2010),

reaction to the first trend.[33] In the UK, with the HRA rights being duplicates of the Convention rights, there exists a strong connection between the national layer of rights protection and the Convention system. This structure has assisted in the flow through of the Convention system. This intended "Strasbourg" Europeanization has had a severe backlash on the perception of the HRA. One of the persistent critiques is the inadequacy of the HRA to shield the nation from the influence of the European Court of Human Rights' case law. Criticism is mainly directed towards the judgment *Hirst (No. 2)*[34] concerning an absolute ban on prisoners' voting rights and judgments such as *Omar Othman*[35] and *Chahal*,[36] which prevented extradition to Jordan and deportation to India. Protesting against the ECtHR judgment, the House of Commons adopted almost unanimously a motion that confirmed the absolute ban on prisoners' voting rights.[37] Replacing the HRA with a home-grown Bill of Rights is thus raised as a solution to alter the current dynamic between the national and European layer of rights protection.[38] As will become clear in Part C, the strategy to reduce the influence of the Strasbourg Court is also intertwined with a more general strategy to lessen judicial interference in government policy-making and re-strengthen the doctrine of parliamentary sovereignty,[39] which has been limited by the HRA, not formally, but in substance.[40] This second strategy does not form the core of this article, but will be integrated where relevant.

The question thus arises if a home-grown Bill of Rights will be more effective at lessening the influence of the Strasbourg Court's case law than a duplicate of the Convention rights. This question is analyzed in a setting where the UK remains within the Convention system. A far more drastic and controversial option, namely a withdrawal from the Convention by the UK, to ensure a decrease or altogether disappearance of influence of the Strasbourg

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available at http://echr.coe.int/Documents/Dialogue_2010_ENG.pdf; David Cameron, Speech before the Council of Europe on the European Court of Human Rights (Jan. 25, 2012).

[33]Sarah Lambrecht, *The Attitude of Four Supreme Courts Towards the European Court of Human Rights: Strasbourg has Spoken . . .*, *in* LE JUGE EN DROIT EUROPÉEN ET INTERNATIONAL/THE JUDGE IN EUROPEAN AND INTERNATIONAL LAW 301, 324 (Samantha Besson & Andreas R. Ziegler eds., 2013); *see also* Nico Krisch, *The Open Architecture of European Human Rights Law*, 7 MOD. L. REV. 183, 184 (2008).

[34] Hirst v. United Kingdom (No. 2), ECHR App. No. 74025/01, 2005-IX EUR. CT. H.R. 187 (2005).

[35] Othman v. United Kingdom, ECHR App. No. 8139/09, 2012-I EUR. CT. H.R. 159 (2012).

[36] Chahal v. United Kingdom, ECHR App. No. 22414/93 (Nov. 15, 1996), http://hudoc.echr.coe.int/.

[37] ISOBEL WHITE, PRISONERS' VOTING RIGHTS (2013).

[38] When using the term "European layer/level" in the article, I am referring to the Convention and its interpretation by the Strasbourg Court.

[39] Iain Cameron, *Competing Rights?*, *in* THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE EU AFTER LISBON 181, 190–91 (Sybe de Vries et al. eds., 2013).

[40] AILEEN KAVANAGH, CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT 310–37 (2009).

Court's case law, has however been raised recently as a possibility by several Conservatives, including Cameron.[41] In Part B, the article analyzes the current relationship between the UK Supreme Court and the Strasbourg Court. Part C focuses on the potential impact of a home-grown Bill of Rights on the relationship between both courts. Without attempting to disregard the national-specific elements, the discussion of these questions is very relevant for all States confronted with the influence of Strasbourg. The tension between coherence, efficiency and autonomy is overarching. I therefore approach the issue not only from an outsider's perspective but also, where relevant, from a comparative constitutional law perspective. Both perspectives seem to be largely absent from the current (academic) debate.

B. Strasbourg's Influence on the UK Supreme Court

I. Participation Through the Human Rights Act

Prior to the HRA, the classic dualist approach of the UK to international law caused the Convention rights to possess no immediate validity in the domestic law. Although the Convention was considered to be relevant for UK judges, for instance as an aid to statutory interpretation or as a part of common law,[42] their level of participation in the (national and European) rights debate remained limited. The HRA was put in place to have a participatory effect on the national and European level.[43] Firstly, the HRA enabled national judges to participate at the European level by making "a distinctively British contribution to the development of the case law of human rights in Europe."[44] Secondly, the Act was introduced to allow UK judges to participate at the national level in the (European) human rights debate to avoid a costly and timely diversion via the Strasbourg Court.[45] The

[41] *See, e.g.*, James Kirkupp, *Britain May Need to Withdraw from European Convention on Human Rights, Says Cameron*, THE TELEGRAPH (Sept. 29, 2013), http://www.telegraph.co.uk/news/politics/conservative/10342403/Britain-may-need-to-withdraw-from-European-Convention-on-Human-Rights-says-Cameron.html (quoting David Cameron as as saying he was willing to consider the option of withdrawl from the ECHR); Theresa May, Home Secretary, Speech at Conservative Party Conference: On Public Safety (Sept. 30, 2013), *available at* http://www.conservativepartyconference.org.uk/Speeches/2013_Theresa_May.aspx ("And it's why the Conservative position is clear—if leaving the European Convention is what it takes to fix our human rights laws, that is what we should do.").

[42] *See* Andrew Clapham, *The European Convention on Human Rights in the British Courts: Problems Associated with the Incorporation of International Human Rights*, *in* PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES 95, 95–117 (Philip Alston ed., 1999).

[43] *See* Conor Gearty, *The Human Rights Act: An Academic Sceptic Changes His Mind but Not His Heart*, EUR. HUM. RTS. L. REV. 582, 587–88 (2010).

[44] HOME OFFICE, *supra* note 6, at para. 1.14.

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establishment of the HRA created a unique situation: The domestic rights are mere duplicates[46] by reference[47] of the Convention rights, which creates automatically a very strong connection between both layers of rights protection and raises the question on how to interact with the Strasbourg Court even more prominently.

II. Section 2(1) HRA: Obligation to Take Account of Strasbourg

The HRA, in its section 2(1), provides an explicit rule on how UK courts should interact with the Strasbourg case law; it obliges domestic courts to take into account the Strasbourg case law, in so far as it is relevant when considering a Convention right.[48] Section 2(1) HRA thus emphasizes the strong connection between both layers by forming an explicit bridge between them.[49] How much flexibility should be afforded to the UK judges caused a lot of discussion during the parliamentary debates. An amendment was introduced to change the wording to "shall be bound by"[50] to prevent the HRA from becoming a "domestic Bill of

[45] *See id.* at paras. 1.18–.19 ("We therefore believe that the time has come to enable people to enforce their Convention rights against the State in the British courts, rather than having to incur the delays and expense which are involved in taking a case to the European Human Rights Commission and Court . . . .").

[46] This term being less misleading and confusing than "incorporation." *See* R v. Lyons, [2002] UKHL 44, [2003] 1 A.C. 976 [27] (appeal taken from Eng.) ("Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the metaphor of incorporate may be misleading. It is not the treaty but the statute which forms part of English law."); *In re* McKerr, [2004] UKHL 12, [2004] 1 W.L.R. 807 [65] (appeal taken from N. Ir.) ("Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor."); *In re* P, [2008] UKHL 38, [2009] 1 A.C. 173 [33] (appeal taken from N. Ir.) (" 'Convention rights' within the meaning of the 1998 Act are domestic and not international rights."); 512 PARL. DEB., H.L. (1997) 512 (U.K.) (comments of Lord Kingsland); Jonathan Lewis, *The European Ceiling on Human Rights*, PUB. L. 720, 724–25 (2007); Jane Wright, *Interpreting Section 2 of the Human Rights Act 1998: Towards an Indigenous Jurisprudence of Human Rights*, PUB. L. 595, 599 (2009).

[47] Human Rights Act, 1998, c. 42, § 1 (U.K.) ("In this Act 'the Convention rights' means the rights and fundamental freedoms set out in—(a) Articles 2 to 12 and 14 of the Convention, (b) Articles 1 to 3 of the First Protocol, and (c) Article 1 of the Thirteenth Protocol.").

[48] *See* Elizabeth Wicks, *Taking Account of Strasbourg?: The British Judiciary's Approach to Interpreting Convention Rights*, 11 EUR. PUB. L. 405, 426 (2005).

[49] Human Rights Act § 2(1)

> A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, (b) opinion of the Commission given in a report adopted under Article 31 of the Convention, (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or (d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

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Rights and not a proper incorporation of international rights,"[51] and to provide judges with greater guidance.[52] This amendment was rejected by the government, because such an amendment would "certainly [go] further . . . than the convention itself requires,"[53] since the Convention (Article 46) only obliges the UK to abide by the final judgment of the Strasbourg Court to which it is party.[54] Furthermore, according to Lord Irvine, this amendment would put "the courts in some kind of straitjacket where flexibility is what is required. . . . [UK] courts must be free to try to give a lead to Europe as well as to be led."[55] A weaker connection with the Strasbourg case law was also proposed: To leave out "must" and insert "may."[56] In the end, the amendment was withdrawn, since the Minister confirmed that sufficient flexibility would exist through the use of the term "must take into account."[57]

III. Section 2(1) HRA: Interpretation by the UK Supreme Court

Section 2(1) HRA obliges the courts to take account of Strasbourg, but does not require them to follow its case law. This explicit rule therefore provides the judges with "the flexibility and discretion that they require in developing human rights law."[58] As a consequence, Lord Kirkhill stated during the parliamentary debates:

> Even the most extreme ultra-nationalist or ultimate anti-European should also welcome the Bill. For this time, we do not give away any of our national sovereign powers to European institutions. Instead, we grant powers to the British courts which the European Commission and the European Court of Human Rights in Strasbourg already have.[59]

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[50] 583 PARL. DEB., H.L. (1997) 512 (U.K.).

[51] *Id. See also* 584 PARL. DEB., H.L. (1998) 1268 (U.K.) (comments of Lord Kingsland).

[52] 583 PARL. DEB., H.L. (1997) 512–15 (U.K.).

[53] *Id.* at 514 (comments of Lord Irvine).

[54] *Id.* at 512. *See also* 584 PARL. DEB., H.L. (1998) 1268–69 (U.K.) (comments of Lord Lester).

[55] 583, PARL. DEB., H.L. (1997) 515 (U.K.). *See also* 584 PARL. DEB., H.L. (1998) 1269 (U.K.) (comments of Lord Lester).

[56] *See* 313 PARL. DEB., H.L. (1998) 388 (U.K.).

[57] *See id.* at 413.

[58] 584 PARL. DEB., H.L. (1998) 1271 (U.K.) (comments of Lord Irvine).

[59] 582 PARL. DEB., H.L. (1997) 1263 (U.K.).

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In spite of this statement, some think of the HRA as a "symbol of European domination, because it infiltrates the European human rights convention into our domestic law"[60] and consider "high profile judicial decisions under the HRA . . . as something required of our judges by 'Europe.' "[61]

1. The Human Rights Act As a Strasbourg Mirror

This sentiment has been amplified by the *mirror principle*[62] often applied by domestic courts when "taking into account" the Strasbourg Court's case law when interpreting section 2(1) HRA. The principle implies that "the ambit of application of the [HRA] should mirror that of the Convention."[63] The mirror principle was first expressed by Lord Slynn in *Alconbury*[64]:

> Although the Human Rights Act 1998 does not provide that a national court is bound by [the decisions of the Strasbourg Court] it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant case law of the European Court of Human Rights.[65]

Lord Bingham, perhaps primary advocate of this principle,[66] famously equalized the floor and ceiling of the domestic rights protection in the HRA to Strasbourg's standard in *Ullah*[67]:

> [Lord Slynn's statement in *Alconbury* (para. 26)] reflects the fact that the Convention is an international

[60] Geoffrey Bindman, *Britain Should Be Proud of the Human Rights Act—and Protect It*, THE GUARDIAN (August 29, 2011), http://www.theguardian.com/commentisfree/2011/aug/29/human-rights-act-protect. *See also* JESSE NORMAN & PETER OBORNE, CHURCHILL'S LEGACY: THE CONSERVATIVE CASE FOR THE HUMAN RIGHTS ACT 32–34 (2009).

[61] Merris Amos, *Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?*, 72 MOD. L. REV. 883, 898 (2009). *See also* JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 1, at para. 45.

[62] This term was coined by Jonathan Lewis when referring to R v. *Ex parte* Quark Fishing Ltd., [2005] UKHL 57, [2006] 1 A.C. 529 [34] (appeal taken from Eng.). *See* Lewis, *supra* note 46, at 720.

[63] *In re* McCaughey, [2011] UKSC 20, [2012] 1 A.C. 725 [59] (appeal taken from N. Ir.).

[64] R (Alconbury Devs. Ltd.) v. Sec'y of State for the Env't, Transp. & the Regions, [2001] UKHL 23, [2003] 2 A.C. 295.

[65] *Id.* at para. 26.

[66] *See* Lewis, *supra* note 46, at 726.

[67] R (Ullah) v. Special Adjudicator, [2004] UKHL 26, [2004] 2 A.C. 323 (appeal taken from Eng.).

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> instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg case law as it evolves over time: no more, but certainly no less.[68]

In this paragraph Lord Bingham ties together many arguments in support of his well-known conclusion: "[N]o more, but certainly no less."[69] Because the influence of Strasbourg is most strongly felt when courts apply this principle, the reasons for the mirror principle are examined. The arguments on which the mirror principle is founded, however, seem to be mainly grounded on concerns about international obligations, hierarchy, coherence, efficiency, separation of powers, and lack of jurisdiction, rather than on section 2(1) HRA.

1.1. "No more"[70]: Limited Jurisdiction

Lord Bingham firstly emphasizes in *Ullah* that it is not up to the national courts to provide more generous rights than provided by Strasbourg's interpretation of the Convention. Lord Hope subscribed to this view in *Ambrose*:

> Parliament never intended to give the courts of this country the power to give a more generous scope to those rights than that which was to be found in the case law of the Strasbourg court. To do so would have the effect of changing them from Convention rights,

[68] *Id.* at para. 20.

[69] *Id.*

[70] *Id. See also* Ambrose v. Harris, [2011] UKSC 43, [2011] 1 W.L.R. 2435 [16–20], [86].

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> based on the treaty obligation, into free-standing rights of the court's own creation.[71]

Thus according to Lord Hope:

> [I]t is for the Strasbourg court, not for [UK judges], to decide whether its case law is out of touch with modern conditions and to determine what further extensions, if any, are needed to the rights guaranteed by the Convention. We must take its case law as we find it, not as we would like it to be.[72]

His statements not only touched on the issue of the appropriate role of the judiciary in rights protection, but also on the distinction between two alike layers of rights. Masterman argues that Lord Hope takes this position to guard himself against accusations of excessive activism or acting without sufficient legal authority.[73]

Recently, however, Baroness Hale admitted that the case *Re G* changed her position on the Supreme Court's relationship with the legislator. Now she considers "that it is more a question of respect for the balances recently struck by the legislature than a question of the extent of our powers."[74] This reticence is out of respect is motivated by the fact that an aggrieved complainant can always go to Strasbourg if she disagrees with the Supreme Court, and that the UK cannot.[75]

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[71] *Ambrose* [2011] UKSC 43, [19]. *See also* McGowan v. B, [2011] UKSC 54, [2011] 1 W.L.R. 3121 [77], [97] (appeal taken from Scot.); R (Animal Defenders Int'l) v. Sec'y of State for Culture, Media & Sport, [2008] UKHL 15, [2008] 1 A.C. 1312 [53] (appeal taken from Eng.); R (Gentle) v. Prime Minister, [2008] UKHL 20, [2008] 1 A.C. 1356 [56] (appeal taken from Eng.).

[72] N v. Sec'y of State for the Home Dep., [2005] UKHL 31, [2005] 2 A.C. 296 [25] (appeal taken from Eng.).

[73] *See* Roger Masterman, *Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the 'Convention Rights' in Domestic Law*, *in* JUDICIAL REASONING UNDER THE UK HUMAN RIGHTS ACT 57, 77–78 (Helen Fenwick et al. eds., 2007).

[74] Brenda Hale, *Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?*, 12 HUM. RTS. L. REV. 65, 76 (2012).

[75] *See infra* text between note 96 and note 105.

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1.2. "No more, certainly no less"[76]: Need for Uniform Meaning of Convention Rights Across Europe

As explained in the previous part, Lord Bingham stated that the duty of national courts is limited to keeping pace with the Strasbourg case law as it evolves over time ("no more"). He also equalized floor ("no less") and ceiling ("no more") of fundamental rights protection under the HRA through linking the statement that "the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court" with the obligation in section 6 HRA, which makes it unlawful for a public authority, including a court, to act incompatible with a Convention right.[77] He concluded with the argument that "the meaning of the Convention should be uniform throughout the states party to it."[78] Rather than section 2(1) HRA, this argument appears founded in concerns about coherence and hierarchy. As stated in the parliamentary debates: "The word 'must' in this context clearly means that the courts must take into account the case law. . . . They do not mean that there has to be uniform case law."[79]

Criticisms can be voiced against this argument. Firstly, the Convention intends to ensure "a uniform *minimum* standard of human rights protection,"[80] which does not stand in the way of a higher standard by filling in the margin of appreciation or extending the rights protection.[81] Furthermore, domestic courts are not interpreting the Convention as such,

[76] R (Ullah) v. Special Adjudicator, [2004] UKHL 26, [2004] 2 A.C. 323 [20] (appeal taken from Eng.).

[77] *Id.*

[78] *Id. See also* Al-Skeini v. Sec'y of State for Def., [2007] UKHL 26, [2008] 1 A.C. 153 [105] (appeal taken from Eng.) (Lord Brown affirming Lord Bingham's judgment in *Ullah*); R v. *Ex parte* LS, [2004] UKHL 39, [2004] 1 W.L.R. 2196 [27] (appeal taken from Eng.)(same); Huang v. Sec'y of State for the Home Dep., [2007] UKHL 11, [2007] 2 A.C. 167 [18] (appeal taken from Eng.) (same); R (Animal Defenders Int'l) v. Sec'y of State for Culture, Media & Sport, [2008] UKHL 15, [2008] 1 A.C. 1312 [37], [53] (appeal taken from Eng.) (same); *In re* P, [2008] UKHL 38, [2009] 1 A.C. 173 [36] (appeal taken from N. Ir.) ("Other reasons for following Strasbourg are ordinary respect for the decision of a foreign court on the same point and the general desirability of a uniform interpretation of the Convention in all Member States."); R (A) v. B, [2009] UKSC 12, [2010] 2 A.C. 1 [30] (appeal taken from Eng.) (declining to go beyond the jurisprudence of the Strasbourg Court); R (Smith) v. Sec'y of State for Defence, [2010] UKSC 29, [2011] 1 A.C. 1 [147] (appeal taken from Eng.) ("My second principal reason for not holding the UK's armed forces abroad to be within the state's article 1 jurisdiction is that this would be to go further than the ECtHR has yet gone, . . ."); Rabone v. Pennine Care NHS Found. Trust, [2012] UKSC 2, [2012] 2 A.C. 72 [113] (appeal taken from Eng.) ("[I]t is for Strasbourg alone definitively to interpret the Convention and determine what rights are guaranteed by it and 'the meaning of the Convention should be uniform throughout the states party to it.' ").

[79] 313 PARL. DEB., H.C. (6th ser.) (1998) 402 (U.K.) (statement of G. Hoon).

[80] Jean-Paul Costa, *On the Legitimacy of the European Court of Human Rights' Judgments*, 7 EUR. CONST. L.R. 173, 177 (2011) (emphasis added); *see also* Mary Arden, *Peaceful or Problematic? The Relationship Between National Supreme Courts and Supranational Courts in Europe*, 1 Y.B. OF EUR. L. 3, 14 (2010).

[81] *See* Janneke Gerards, *Samenloop van Nationale en Europese Grondrechtenbepalingen*, 3 TIJDSCHRIFT VOOR CONSTITUTIONEEL RECHT [TvCR] 224, 249 (2010); Lewis, *supra* note 46, at 737; Francesca Klug, *Follow or lead? The*

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but the domestic duplications[82] of the rights in the Convention. They could not be interpreting the Convention rights in a non-uniform way.[83] The meaning of Convention rights and the Convention's internal consistency would thus not be affected by the interpretation of its HRA counterpart.[84] No argument is given as to why both the domestic level and the European level should uphold the same uniformity or rights protection.[85]

1.3. "Certainly no less"[86]

The motivation for not offering less protection than Strasbourg is grounded on several concerns. For Lord Slynn in *Alconbury* the incentive was to avoid a conviction by the Strasbourg Court.[87] This approach helps to optimize efficiency (no detour to Strasbourg) in a fundamentally complex system and also works from a pragmatic standpoint[88] as a conflict resolution strategy without forgetting to draw a "constitutional red line."[89] Secondly, Lord Bingham noted in *Kay* that the effectiveness of the Convention depends on the loyal acceptance by Member States of the principles laid down by the Strasbourg Court as highest judicial authority on the interpretation of the Convention rights.[90] Another argument was advanced by Lord Hoffman in *AF*.[91] According to him, the domestic law does

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Human Rights Act and the European Court of Human Rights, 6 EUR. HUM. RTS. L.R. 621, 625 (2010); Colin Warbrick, *The European Convention on Human Rights and the Human Rights Act: The View from the Outside*, *in* JUDICIAL REASONING UNDER THE UK HUMAN RIGHTS ACT, 25, 29–31 (Helen Fenwick, Gavin Phillipson & Roger Masterman eds., 2007).

[82] *See supra* note 46 and accompanying text; *In re* McCaughey, [2011] UKSC 20, [2012] 1 A.C. 725 [75] (appeal taken from N. Ir.).

[83] *See* Lewis, *supra* note 46, at 736; Merris Amos, *The Principle of Comity and the Relationship Between British Courts and the European Court of Human Rights*, 28 Y.B. OF EUR. L. 503, 514–15 (2009); Tom Rainsbury, *Their Lordships' Timorous Souls*, 1 UCL HUM. RTS. REV. 32, 34 (2008); Gerards, *supra* note 78, at 247; Hale, *supra* note 74, at 69; Alexander Irvine, *A British Interpretation of Convention Rights*, 2012 PUB. L. 237, 251 (2012).

[84] *See* Gerards, *supra* note 81, at 247.

[85] *See* Rainsbury, *supra* note 83, at 37.

[86] R (Ullah) v. Special Adjudicator, [2004] UKHL 26, [2004] 2 A.C. 323 [20] (appeal taken from Eng.).

[87] *See* R (Alconbury Devs. Ltd.) v. Sec'y of State for Env't, Transp & the Regions, [2001] UKHL 23, [2003] 2 A.C. 295 [26]; *see also* R (Amin) v. Sec'y of State for Home Dep't, [2003] UKHL 51, [2004] 1 A.C. 653 [44] (appeal taken from Eng.).

[88] *See* Gerards, *supra* note 81, at 232–33.

[89] Only following Strasbourg "in absence of special circumstances." Wim Voermans, *Protection of European Human Rights by Highest Courts in Europe. The Art of Triangulation*, *in* HUMAN RIGHTS PROTECTION IN THE EUROPEAN LEGAL ORDER: THE INTERACTION BETWEEN THE EUROPEAN AND THE NATIONAL COURTS, 365, 375–77 (Patricia Popelier, Catherine Van de Heyning & Piet Van Nuffel eds., 2011).

[90] *See* Kay v. London Borough of Lambeth, [2006] UKHL 10, [2006] 2 A.C. 465 [28] (appeal taken from Eng.).

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provide leeway to prefer a different view than Strasbourg. But rejecting a (Grand Chamber) judgment (against the UK) would put the UK in breach of its international obligation, which it accepted when acceding to the Convention.[92] Since he could see no advantage in this, he concluded that the Lordships should submit to the Strasbourg Court, even when they considered the decision to be wrong.[93] Exceptionally, the Lordships are not willing to do so, like in *Horncastle*.[94] According to Lord Irvine, parliament implicitly approved that domestic courts would sometimes reach an outcome which might be a breach of an international obligation by contemplating that domestic courts would not always follow Strasbourg.[95]

1.4. "Certainly no more":[96] *Avoiding the Greater Danger of No State Appeal*

In *Al-Skeini*, Lord Brown famously spun Lord Bingham's conclusion in *Ullah*: "I would respectfully suggest that last sentence could as well have ended: [N]o less, but certainly no more."[97] According to him, there exists greater danger in the national court construing the Convention too generously in favor of the applicant rather than too narrowly, since only the applicant (but not the State) can have the decision corrected in Strasbourg.[98] However, this argument is not unanimously accepted[99] and can be criticized on a number of grounds. It starts from the presumption that providing a more generous protection in favor of the applicant is a non-correctable mistake. This goes against the intentions of the HRA and the Convention system.[100] The HRA intended to "bring rights home" and allow domestic courts to actively participate at the national and European level in the human rights doctrine.[101] In

[91] *See* Sec'y of State for Home Dep't v. AF, [2009] UKHL 28, [2010] 2 A.C. 269 [70] (appeal taken from Eng.).

[92] Similarly, former Dutch Strasbourg Judge Martens: Caroline Lindo, *Onze Straatsburgse rechter over het EVRM*, 15 NEDERLANDS JURISTENBLAD [NJB] 465, 470 (1991).

[93] *See id.*

[94] *See* R v. Horncastle, [2009] UKSC 14, [2010] 2 A.C. 373 (appeal taken from Eng.). Responding to Al-Khawaja v. United Kingdom, ECHR App. Nos. 26766/05 and 22228/06, (Jan. 20, 2009), http://hudoc.echr.coe.int/.

[95] *See* Irvine, *supra* note 83, at 245.

[96] Al-Skeini v. Sec'y of State for Def., [2007] UKHL 26, [2008] 1 A.C. 153 [106] (appeal taken from Eng.).

[97] *Id.* (discussing the reach of Art 1 ECHR); *see also* Rabone v. Pennine Care NHS Trust, [2012] UKSC 2, [2012] 2 A.C. 72 [112–13] (appeal taken from Eng.); Ambrose v. Harris, [2011] UKSC 43, [19] (appeal taken from Scot.).

[98] *See id.*; Sec'y of State for Home Dept. v. JJ, [2007] UKHL 45, [2008] 1 A.C. 385 [106] (appeal taken from Eng.); Hale, *supra* note74, at 76; Philip Sales, *Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine*, 2 PUB. L. 253, 263 (2012).

[99] *See In re* P, [2008] UKHL 38, [2009] A.C. 173 [50] (appeal taken from N. Ir.); Ambrose v. Harris, [2011] UKSC 43, [126–30] (appeal taken from Scot.).

[100] *See also* Masterman, *supra* notes 73, 78.

[101] *See supra* notes42–45 and accompanying text.

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the Convention system, States are free to develop an enhanced rights protection.[102] The Strasbourg Court only offers a subsidiary "final European supervision"[103] and often rights issues will not (yet) have been resolved at the Strasbourg Court.[104] Such a proposition is also founded on a hierarchical view, where the Strasbourg Court is considered to be at the top of a pyramidal system of rights protection offering *the* standard, rather than an important supranational final control system for the protection of individuals against infringements of their fundamental rights.[105]

2. The UK Supreme Court Moving Beyond the Mirror Principle

There are, though, occasions where Strasbourg case law is hard or inappropriate to simply mirror: Either because it offers a margin of appreciation, it has not yet defined the content of a right, or its judgment is unclear. Sometimes Strasbourg case law can be mirrored, but a domestic court nevertheless deviates from it because the Strasbourg Court failed to understand national law or the impact of its judgment on the domestic legal system, or because the domestic court wanted to provide a broader protection than the Strasbourg Court.[106] These occasions cause the participatory and sheltering effect to intersect and allow for the development of a domestic human rights doctrine and an inter-court dialogue.

2.1. Inapplicable to Mirror Strasbourg: The Margin of Appreciation Exception

The mirror principle has been significantly eroded by the margin of appreciation exception. The concept of the margin of appreciation[107] in the case law of the Strasbourg Court ensues from its subsidiary nature.[108] As a transnational device,[109] it provides a "national

[102] *See* Roger Masterman, *Taking the Strasbourg Jurisprudence into Account: Developing a "Municipal Law of Human Rights" Under the Human Rights Act*, 54 INT'L & COMP. L.Q. 907, 911 (2005); Sibrand Karel Martens, *Incorporating the European Convention: The Role of the Judiciary*, [1998] EUR. HUM. RTS. L.R. 5, 14 (1998).

[103] Costa, *supra* note 80, 179–80.

[104] *See* Ambrose v. Harris, [2011] UKSC 43 [129] (appeal taken from Scot.).

[105] *See* Gerards, *supra* note 81, at 250.

[106] *See* EM v. Sec'y of State for Home Dep't Appellate Comm., [2008] UKHL 64, [2009] 1 A.C. 1198 (appeal taken from Eng.); Ex Parte Adam, [2005] UKHL 66, [2006] 1 A.C. 396 (appeal taken from Eng.); Hale, *supra* note 74, at 71–72; Klug, *supra* note 81, at 627.

[107] For the structural concept, see GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 80–119 (2007).

[108] *See* Rolv Ryssdal, *The Coming of Age of the European Convention of Human Rights*, 18 EUR. HUM. RTS. L.R., 24 (1996); Costa *supra* note 80, 179–80; Warbrick, *supra* note 81, at 30.

[109] *See* STEVEN GREER, THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 34 (2000); Letsas, *supra* note 107, at 90.

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executive, administrative and judicial discretion"[110] when balancing rights and legitimate interests. Some Lordships have stated that the mirror principle has no application when dealing with a case that falls within the margin of appreciation; the desirability of a uniform interpretation of the Convention in all the Member States cannot be binding when Strasbourg has deliberately declined to lay down a uniform interpretation.[111] In such cases, UK courts need to form their own judgment.[112] Given this discretion, UK courts actually show less deference to Strasbourg than sometimes claimed.[113] The amount of deference depends on the position the judge is willing to take within the State's distribution of powers, rather than on the existence of a home-grown bill of rights. For example, the Belgian Constitutional Court has never determined to limit this national discretion. It merely limits itself to stating that the lawmaker or the government *has* a margin of appreciation while referring to the relevant Strasbourg case law.[114] Unlike the Belgian Constitutional Court, the UK Supreme Court *does* distinguish between the margin of appreciation afforded to states by Strasbourg and its domestic counterpart: The discretionary area of judgment the court accords to Parliament when reviewing legislation under the HRA.[115]

This approach has a clear participatory and sheltering effect by providing a clear domestic judgment. Strasbourg would need to overturn the domestic judgment if it disagreed with it, rather than merely forming its own decision. Further, the Strasbourg Court has signaled that it would need strong reasons to differ from a comprehensive and convincing conclusion reached by superior national courts based on the relevant Convention case law and its principles.[116]

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[110] Greer, *supra* note 109, at 32.

[111] *See In re* P, [2008] UKHL 38, [2009] 1 A.C. 173 [31–36, 118, 126–29] (appeal taken from N. Ir.); R (Begum) v. Headteacher and Governors of Denbigh High School, [2006] UKHL 15, [2007] 1 AC. 100 [63] (appeal taken from Eng.); AXA Gen. Ins. Ltd. V. Lord Advocate, [2011] UKSC 46, [2012] 1 A.C. 868 [32] (appeal taken from Scot.); Hale, *supra* note 74, at 76.

[112] *See In re* P, [2008] UKHL 38, [2009] 1 A.C. 173 [120] (appeal taken from N. Ir.).

[113] *See* Dominic Grieve, Attorney General: European Convention on Human Rights—Current Challenges, (Oct., 24 2010), https://www.gov.uk/government/speeches/european-convention-on-human-rights-current-challenges.

[114] *See* Cour d' Arbitrage [CC] [Constitutional Court] decision no. 152/2005, Oct. 5, 2005 [B.5] (Belg.); Cour Constitutionnelle [CC] [Constitutional Court] decision no. 20/2011, Feb. 3, 2011 [para B.7] (Belg.); Cour Constitutionnelle [CC] [Constitutional Court] decision no. 96/2011, May 31, 2011 [B.11] (Belg.).

[115] *See Ex Parte* Kebeline, [1999] UKHL 43, [2000] 2 A.C. 326 (appeal taken from Eng.); Ghaidan v. Godin-Mendoza, [2004] UKHL 30, [2004] 2 A.C. 557 [23] (appeal taken from Eng.); AXA Gen. Ins. Ltd. v. Lord Advocate, [2011] UKSC 46, [2012] 1 A.C. 868 [131, 134] (appeal taken from Scot.).

[116] *See infra* note 200 and accompanying text.

2.2. Unable to Mirror Strasbourg: No Clear and Constant Case Law

The mirror principle also does not apply when there is no clear and constant case law of the Strasbourg Court.[117] For instance, when more recent decisions of the Strasbourg Court are inconsistent with older decisions,[118] or "where there has been no precise ruling on the matter."[119] This occurred in *Doherty* where the Lordships declined to follow the relevant Strasbourg case law until Strasbourg developed principles on which they could rely for general application.[120] In *Ambrose*, Lord Kerr emphasized in a dissenting opinion the importance of an inter-court dialogue in such situations:

> If the much vaunted dialogue between national courts and Strasbourg is to mean anything, we should surely not feel inhibited from saying what we believe Strasbourg ought to find in relation to those arguments. Better that than shelter behind the fact that Strasbourg has so far not spoken and use it as a pretext for refusing to give effect to a right that is otherwise undeniable.[121]

2.3. Inappropriate to Mirror Strasbourg: Clear and Consistent Case Law. . . [122]

In *Pinnock* the Supreme Court unanimously stated:

> This Court is not bound to follow every decision of the EurCtHR. Not only would it be impractical to do so: [I]t would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the EurCtHR which is of value to the development of Convention law (see e g [*Horncastle*]). Of course, we should usually follow a clear and

[117] *See* R (Alconbury Devs. Ltd.) v. Sec'y of State for Env't, Transp & the Regions, [2001] UKHL 23, [2003] 2 A.C. 295 [26]; R (Ullah) v. Special Adjudicator, [2004] UKHL 26, [2004] 2 A.C. 323 [20] (appeal taken from Eng.); R (Quila) v. Sec'y of State for Home Dept., [2011] UKSC 45, [2012] 1 A.C. 621 [43] (appeal taken from Eng.);Hale, *supra* note 74, at 70; Arden, *supra* note 32, at 25.

[118] *See* R (Quila) v. Sec'y of State for Home Dept., [2011] UKSC 45, [2012] 1 A.C. 621 [43] (appeal taken from Eng.).

[119] 583 Parl. Deb., H.L. (5th ser.) (1997) 514 (U.K.) (statement of Lord Irvine); Irvine, *supra* note 83, at 242.

[120] *See* Doherty v. Birmingham, [2008] UKHL 57, [2009] 1 A.C. 367 [20] (appeal taken from Eng.).

[121] Ambrose v. Harris, [2011] UKSC 43, [128–30] (appeal taken from Scot.); *see also* Irvine, *supra* note 83, at 249–50; Rabone v. Pennine Care NHS Trust, [2012] UKSC 2, [2012] 2 A.C. 72 [112] (appeal taken from Eng.).

[122] *See* R (Alconbury Devs. Ltd.) v. Sec'y of State for Env't, Transp & the Regions, [2001] UKHL 23, [2003] 2 A.C. 295 [26].

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> constant line of decisions by the EurCtHR: [*Ullah*]. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. . . . Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.[123]

The UK Supreme Court thus considers it to be inappropriate to mirror Strasbourg in at least two situations.

a) . . . But the Strasbourg Court Misunderstood the Domestic Legal Context

Even when Strasbourg case law can be mirrored, a domestic court can nevertheless choose to deviate from it because it failed to understand national law or the impact of its judgment on the domestic legal system.[124] In *Spear*,[125] the House of Lords chose not to follow the Strasbourg Chamber in *Morris*,[126] because it had materially misunderstood the domestic legal context in which courts martial were held. Subsequently, in *Cooper*, the Grand Chamber revised its earlier case law and followed the House of Lords.[127] This is, according to Bratza, a good example of a situation in which "the Strasbourg Court has shown itself to be receptive to arguments by the higher courts that it has misunderstood national law or given insufficient weight to national traditions or practices."[128] In *Lyons*, Lord Hoffman confirmed that a domestic court "may wish to give a judgment which invites the ECtHR to reconsider the question . . . . There is room for dialogue on such matters."[129]

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[123] Manchester City Council v. Pinnock, [2010] UKSC 45, [2011] 2 A.C. 104 [48] (appeal taken from Eng.).

[124] *See* Cadder v. Advocate, [2010] UKSC 43 [45]; R. v. Lyons, [2002] UKHL 44, [2003] 1 A.C. 976 [46] (appeal taken from Eng.); *see also* Arden, note 32, at 25.

[125] *See* R. v. Boyd, [2002] UKHL 31, [2003] 1 A.C. 734 (appeal taken from Eng.).

[126] *See* Morris v. United Kingdom, ECHR App. No. 38784/97, 2002-I EUR. CT. H.R (2002).

[127] *See* Cooper v. United Kingdom, ECHR App. No. 48843/99, 2003-XII EUR. CT. H.R. (2003).

[128] Nicolas Bratza, *The Relationship Between the UK Courts and Strasbourg*, [2011] EUR. HUM. RTS. L.R. 505, 509 (2011). As was Osman v. United Kingdom, ECHR App. No. 23452/94, 1998-VIII EUR. CT. H.R (1998), which was corrected by Z v. United Kingdom, ECHR App. No. 29392/95, 2001-V EUR. CT. H.R (2001).

[129] R. v. Lyons, [2002] UKHL 44, [2003] 1 A.C. 976 [46] (appeal taken from Eng.).

More recently, in *Horncastle*, the Supreme Court disagreed with the conclusion made by Strasbourg on the fairness of relying on hearsay evidence[130] because Strasbourg misunderstood the domestic legal context, while emphasizing its participatory function:

> There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court.[131]

This plea for a valuable dialogue was answered by the Strasbourg Grand Chamber in *Al-Khawaja*.[132] According to Bratza, "it was, in part, in order to enable the criticisms of that judgment to be examined that the Panel of the Grand Chamber accepted the request of the respondent Government to refer the case to the Grand Chamber."[133] He emphasized that this was to his mind a good example of judicial dialogue.[134]

Despite this, the Lordships seem less tempted to question a final decision by the Strasbourg Grand Chamber in which the UK was a party or a "clear and constant" line of chamber decisions, even when they consider it to be wrong.[135] In *AF*, Lord Hoffman said that he "can see no advantage"[136] in rejecting such a decision since this "would almost certainly put this country in breach of the international obligation which it accepted when

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[130] *See* Al-Khawaja v. United Kingdom, ECHR App. Nos. 26766/05 and 22228/06, (Jan. 20, 2009), http://hudoc.echr.coe.int/.

[131] R v. Horncastle, [2009] UKSC 14, [2010] 2 A.C. 373 [10–11] (appeal taken from Eng.).

[132] *See* Al-Khawaja v. United Kingdom, ECHR App. Nos. 26766/05 and 22228/06, (Jan. 20, 2009), http://hudoc.echr.coe.int/.

[133] *Id.*, at para. 2 (Concurring opinion Jugde Bratza).

[134] *Id.*; *see also* House of Lords, House of Commons, Oral Evidence Taken Before the Joint Committee on Human Rights, *Human Rights Judgments* 6 (2011-12), http://www.parliament.uk/documents/joint-committees/human-rights/JCHR_Transcript_13_March_2012_UNCORRECTED.pdf.

[135] Hale, *supra* note 74, at 76.

[136] Sec'y of State for Home Dep't v. AF, [2009] UKHL 28, [2010] 2 A.C. 269 [70] (appeal taken from Eng.).

it acceded to the Convention."[137] Thus, Lord Roger concluded: "Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: . . . Strasbourg has spoken, the case is closed."[138] Recently, though, the UK Supreme Court's President, Lord Neuberger, emphasized that the court is not subservient to Strasbourg, but in a dialogue position: "A case might arise where we might feel that Strasbourg really had gone wrong and our only way to make our point would be not to follow their decision and to hope that Strasbourg might change its mind."[139]

b) . . . But Inconsistent with Fundamental Substantial or Procedural Law

In *Pinnock*, the UK Supreme Court considers secondly that the inconsistency of Strasbourg case law with a fundamental substantive or procedural aspect of the UK law is a reason not to follow this case law.[140] As well as this, Lord Hoffman has considerable doubts whether the Strasbourg Court should be followed if it "compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution."[141] Even though this has not yet been invoked by the Supreme Court, the UK courts hereby follow the example of several other European countries that have created a constitutional red line. The German Constitutional Court famously did this in the *Gorgülü* case.[142] The French courts did something similar during the years after the *Poitrimol* case, where the Strasbourg Court found the loss of the right of appeal for an accused who fails to appear in person to be a violation of the right to a fair trial. They drew the constitutional red line on violating a fundamental constitutional principle or a constitutional norm such as the effectiveness of the judiciary and refused to apply *Poitrimol* until there was prospect of a legislative

[137] *Id.*

[138] *Id.*, at para. 98, 108; *see also* Lord Brian Kerr, *The Modest Underworker of Strasbourg?*, Clifford Chance Lecture (Jan. 25, 2012), *available at* http://www.supremecourt.gov.uk/docs/speech_120125.pdf.

[139] Owen Bowcott, *Senior Judge Warns over Deportation of Terror Suspects to Torture States*, THE GUARDIAN (Mar. 4, 2013), http://www.theguardian.com/law/2013/mar/05/lord-neuberger-deportation-terror-suspects.

[140] Manchester City Council v. Pinnock, [2010] UKSC 45, [2011] 2 A.C. 104 [48] (appeal taken from Eng.); *see also* Sales, *supra* note 98, at 256–257.

[141] R (Alconbury Devs. Ltd.) v. Sec'y of State for Env't, Transp & the Regions, [2001] UKHL 23, [2003] 2 A.C. 295 [76]; *see also* R (Animal Defenders Int'l) v. Sec'y of State for Culture, Media and Sport, [2008] UKHL 15, [2008] 1 A.C. 1312 [44–45] (appeal taken from Eng.).

[142] *See* Bundesverfassungsgericht [BVerfGE - Federal Constitutional Court], Case No. 2 BvR 1481/04, 2004 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 3407 (Oct. 14, 2004), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/list.py?Gericht=bgh&Art=en; *see also* Krisch, *supra* note 33, at 183–84; Frank Hoffmeister, *Germany: Status of European Convention on Human Rights in Domestic Law*, 4 INT'L J. OF CONST. L. 722, 722–31 (2006).

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amendment and two subsequent Grand Chamber judgments.[143] Krisch describes similar limitations in Austria and Spain.[144]

2.4. Unnecessary to Mirror Strasbourg: Greater Protection Through Common Law

The HRA also allows domestic courts "to provide greater protection through the common law than that which is guaranteed by the Convention."[145] This does not directly lessen the influence of the Strasbourg Court, but it can create an "upward influence" where "domestic case law can aid the development of Convention rights at the Strasbourg level."[146] As Masterman describes, currently both traditions are operating in tandem.[147] This "tandem-functioning" can be seen in the *Daly* case. Here, the House of Lords judged that a blanket policy that requires the absence of prisoners when their legally privileged correspondence is examined is a violation of the common law right to legal professional correspondence of the prisoner, while at the same time recognizing that the same conclusion would be reached by reliance on Article 8 ECHR.[148]

IV. Conclusion

Section 2(1) HRA instructs UK courts to absorb the findings of the Strasbourg Court, as well as invites them to develop their own domestic fundamental rights doctrine.[149] UK courts can depart from the Strasbourg case law when they consider it to be unclear, inadequate or inconsiderate of their national specificities.[150] When they accompany such a departure with developed and convincing arguments, it is not unthinkable that Strasbourg will follow their reasoning and further legitimize it.[151] It is clear that the Strasbourg Court pays very

[143] *See* Poitrimol v. France, ECHR App. No. 14032/88, A277-A EUR. CT. H.R. (1993); Omar v. France, ECHR App. No. 24767/94, 1998-V EUR. CT. H.R 82 (1998); Guérin v. France, ECHR App. No. 25201/94, 1998-V EUR. CT. H.R. 82 (1998); Régis De Gouttes, *Le Juge Judiciaire Français et la Convention Européenne des Droits de l'Homme: Avancées et Réticences*, *in* QUELLE EUROPE POUR LES DROITS DE L'HOMME?, 217, 232–34 (Paul Tavernier ed., 1996); Sibrand Karel Martens, *Het Europees Hof voor de Rechten van de Mens en de Nationale Rechter*, 25 NJCM-BULLETIN 753, 758 (2000).

[144] *See* Krisch, *supra* note 33.

[145] Al Rawi v. Sec. Serv., [2011] UKSC 34, [2012] 1 A.C. 531 [68] (appeal taken from Eng.).

[146] Masterman, *supra* note 102, at 926.

[147] *Id.*, at 925.

[148] *See Ex Parte* Daly, [2001] UKHL 26, [2001] 2 A.C. 532 [23].

[149] Wicks, *supra* note 48, at 425–26.

[150] According to Lord Irvine UK courts even have a constitutional duty to do so: Irvine, *supra* note 83, at83 248.

[151] Similarly, Report to the Joint Committee on Human Rights on the Government Response to Human Rights Judgments, *Responding to Human Rights Judgments* 9 (2011–12), *available at*

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close attention to the UK human rights case law and has been influenced by the UK courts' interpretation of the Convention rights.[152] UK courts closely analyze the case law of the Strasbourg Court and, when considered necessary, elaborately state why they are not willing to follow it. This method creates a unique possibility for a court system quite new in the European human rights debate[153] to establish a two-way flow of arguments. The same rights vocabulary on the national and European level makes this flow smoother. That said, the tendency to follow the Strasbourg case law very strictly seems to be, according to Lord Phillips and Lord Judge, more connected to the accustomedness in the common law system of working on the basis of precedent, rather than a misinterpretation of section 2(1) HRA. Both jurists have stated that they should perhaps be more flexible in the future towards Strasbourg judgments.[154]

C. The Introduction of a Home-Grown Bill of Rights

I. Potential Shielding Effect

When looking at the proposals for a home-grown Bill of Rights, it is critical to be aware of "the different currents which are driving this debate, many of which are largely incompatible with each other."[155] Nine (non-exhaustive) hypothetical options were outlined by the Commission on a Bill of Rights, amongst which was the proposal to repeal the HRA and replace it with a home-grown Bill of Rights.[156] Such a document could, firstly, contain additional, distinctively British, rights, which are not protected by the Convention—such as the right to trial by jury (except in Scotland),[157] the (common law) right of access to court[158] and administrative justice[159]—to give it its desired "home-

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217308/responding-human-rights-judgments.pdf.

[152] *See id.*; Bratza, *supra* note 128, at 512.

[153] Although the Convention had already been used to some extent by judges in the UK prior to the HRA, see Clapham, *supra* note 42, at 95–117.

[154] JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 151, at 8-9. *See also* Irvine, *supra* note 83, at 246-247.

[155] FRANCESCA KLUG AND HELEN WILDBORE, RESPONSE ON COMMISSION ON A BILL OF RIGHTS DISCUSSION PAPER: 'DO WE NEED A UK BILL OF RIGHTS?' 5, 2011, *available at* http://www2.lse.ac.uk/humanRights/articlesAndTranscripts/2011/HRFCBoRDiscussion.pdf.

[156] COMM'N ON A BILL OF RIGHTS, MINUTES OF THE MEETING OF THE COMMISSION ON A BILL OF RIGHTS (Dec. 14, 2011), *available at* http://www.justice.gov.uk/downloads/about/cbr/meeting-minutes-141211.pdf.

[157] MINISTRY OF JUSTICE, RIGHTS AND RESPONSIBILITIES: DEVELOPING OUR CONSTITUTIONAL FRAMEWORK 35-37 (2009), *available at* http://www.official-documents.gov.uk/document/cm75/7577/7577.pdf.

[158] JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 1, at para. 130.

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grown" character.[160] Also, constitutionalizing other fundamental rights would expand the rights protection offered by a Bill of Rights.[161] Domestically, if these rights are made enforceable, they will strengthen and broaden the check the judiciary has on Parliament and the executive, although this seems to be a concern for those in favor of replacing the HRA with a home-grown Bill of Rights. On the European level, adding rights will not reduce the influence of the Strasbourg case law even if it would put more focus on the domestic rights case law; the Strasbourg Court will still exercise its supervision role. Rather, it could have the opposite effect, since these rights could contribute to a future European consensus that would lead to a smaller margin of appreciation.[162] Domestically enhanced or additional rights also increase the possibility for conflict with the standard Convention rights,[163] since they could interfere with other (Convention) rights.[164]

Furthermore, this Bill of Rights could re-cast rights in a more "British" way[165] and define them in clearer and more precise terms.[166] Modifying the language could only reduce the influence of Strasbourg when the language of the rights would be irreconcilable with the Strasbourg case law; UK judges would opt to put this case law aside. Thus, this would create an open inter-court conflict. The creation of divergence between a home-grown Bill of Rights and the Convention will, though, in general decrease the ability to shelter. If the

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[159] COMM'N A BILL OF RIGHTS, *supra* note 156, at 8, 12; Dominic Grieve, *Can the Bill of Rights do Better than the Human Rights Act?*, HONOURABLE SOCIETY OF THE MIDDLE TEMPLE HALL (Nov. 30, 2009), *available at* http://www.dominicgrieve.org.uk/news/can-bill-rights-do-better-human-rights-act.

[160] VERNON BOGDANOR, HUMAN RIGHTS AND THE NEW BRITISH CONSTITUTION (2009), *available at* http://www.justice.org.uk/data/files/resources/170/Human-Rights-and-the-New-British-Constitution.pdf.

[161] COMM'N ON A BILL OF RIGHTS, *supra* note 156.

[162] The Strasbourg Court lets its case law be influenced by the fundamental rights practices of national states. *See, e.g.* Janneke Gerards, *Rechtsvinding door het Europees Hof voor de Rechten van de Mens [Judicial Construction by the European Court of Human Rights]*, 31 NJCM-BULLETIN 93, 116 (2006), *available at* https://openaccess.leidenuniv.nl/bitstream/handle/1887/13058/rechtsvinding%20door%20het%20europees%20hof%20voor%20de%20rechten%20van%20de%20m.pdf?sequence=2.

[163] UNIV. CAMBRIDGE CTR. PUBL. LAW, RESPONSE TO COMMISSION ON A BILL OF RIGHTS DISCUSSION PAPER: DO WE NEED A UK BILL OF RIGHTS? 3 (2011), *available at* http://www.law.cam.ac.uk/faculty-resources/10009406.pdf.

[164] *E.g.*, the absolute constitutional right to the confidentiality of mail conflicting with positive obligations in Strasbourg case law: Cour d'arbitrage [Constitutional Court] application no 202/2004, Dec. 21, 2004, http://www.const-court.be (Belg.).

[165] COMM'N ON A BILL OF RIGHTS, *supra* note 156, at 10.

[166] Cameron, *supra* note 3. *See also* Herbert, *supra* note 29; SECRETARY OF STATE FOR JUSTICE AND LORD CHANCELLOR, THE GOVERNANCE OF BRITAIN, para. 210 (2007), *available at* http://www.official-documents.gov.uk/document/cm71/7170/7170.pdf; 462 PARL. DEB., H.C. (6th ser.) (2007) 820 (U.K.) (statement of David Cameron).

UK courts take less account of the Convention, the margin of appreciation given to them will be reduced and starting successful dialogue will be more difficult.[167]

In addition, provisions could be introduced that qualified or limited rights (e.g. relating to "responsibilities")[168] or that set out a balance between rights.[169] When the State enjoys a margin of appreciation, such a "rebalancing" or "prioritization" will not affect the influence of Strasbourg but rather that of the UK judiciary.[170] The strategy to reduce the influence of the Strasbourg Court is thus also intertwined with the strategy to lessen judicial interference in government policy-making.[171] Both of these strategies are grounded in the aim to re-strengthen the doctrine of parliamentary sovereignty, which has been limited by the HRA not in formal terms, but in substance.[172] It is, though, highly unlikely that this prioritization would broaden the national margin of appreciation given by Strasbourg and thus strengthen the doctrine of parliamentary sovereignty in substance, as hoped.[173]

Lastly, a home-grown Bill of Rights could alter or remove the explicit rule of section 2(1) HRA on how UK courts should interact with the Strasbourg case law. The issue is that it will be difficult to change the words in a way that would cause them to create more leeway and less influence of Strasbourg. Especially if the wording of the home-grown Bill of Rights would be similar, it would be only logical to take account of Strasbourg's case law.[174] For instance, the section 2(1) HRA's obligation is no more stringent than the German Federal Constitutional Courts' obligation for German courts. Even though Germany, like the UK, upholds a dualist approach towards international law, the German Federal Constitutional Court stated that German courts have a duty to take account (*Berücksichtigungspflicht*) of the Convention and the relevant case law since they are bound by the rule of law (Article

[167] *See infra* text between note 199 and note 202, on margin of appreciation, *and infra* the text between note 193 and note 198, on judicial dialogue.

[168] JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 1, at 69-71; COMMISSION ON A BILL OF RIGHTS, *supra* note 156, at 8.

[169] COMM'N ON A BILL OF RIGHTS, *supra* note 156, at 10; Herbert, *supra* note 29; Grieve, *supra* note 159; Cameron, supra note 3.

[170] Dominic Grieve, *It's the Interpretation of the Human Rights Act that's the Problem - Not the ECHR Itself*, CONSERVATIVE HOME PLATFORM (Apr. 14, 2009), *available at* http://www.conservativehome.com/platform/2009/04/dominic-grieve-2.html.

[171] Iain Cameron, *Competing Rights?*, *in* THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE EU AFTER LISBON 181, 190-91 (Stefan Vogenauer ed., 2013).

[172] KAVANAGH, *supra* note 40, at 310-337.

[173] PINTO-DUSCHINSKY, *supra* note 29, at 60.

[174] R v. Horncastle, [2009] UKSC 14, [2010] 2 A.C. 373 [10–11] (appeal taken from Eng.).

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20(3) Basic Law).[175] Although the German Federal Constitutional Court rarely refers to the Strasbourg Court,[176] it does take into account its case law to harmonize the constitutional and convention rights and to avoid a conviction by the Strasbourg Court.[177] Even separating the content of domestic human rights law completely from the Convention and its case law would not *per se* lessen Strasbourg's influence. Such an approach would not only create a smaller margin of appreciation for domestic courts,[178] but it would also make it more difficult to engage in a judicial dialogue to uphold the domestic interpretation.[179] Such a separation would, moreover, not impact the reasons offered by the Lordships to not offer less protection than Strasbourg.[180]

II. Potential Impact on Mirror Principle

Subsequently, it is crucial to assess the impact of a home-grown Bill of Rights on the application of the mirror principle. If the arguments to apply a mirror principle would still be viable after the enactment of a home-grown Bill of Rights, the possibilities for shielding Strasbourg's influence will be limited.

1. Distinction Between Two Layers of Rights

Currently, there exists great confusion on the proper distinction between Convention rights in the HRA and the Convention. Not only are they two similar layers of rights protection, but there is also no distinction in vocabulary. This lack of distinction has, firstly, been the ground for certain judges not to go beyond Strasbourg.[181] If a Bill of Rights is created, there would be a clearer distinction between the two layers of rights, even though they would likely overlap.[182] But, it is doubtful that the leeway given to the domestic courts

[175] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1481/04, paras. 47, 62-63 (Oct. 14, 2004), http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104.html; Hoffmeister, *supra* note 142.

[176] Lambrecht, *supra* note 33.

[177] Rainer Arnold, *Germany: The Federal Constitutional Court of Germany in the Context of the European Integration,* in HUMAN RIGHTS PROTECTION IN THE EUROPEAN LEGAL ORDER: THE INTERACTION BETWEEN THE EUROPEAN AND THE NATIONAL COURTS 237, 257-59 (Patricia Popelier, Catherine Van de Heyning & Piet Van Nuffel eds., 2011).

[178] *See infra* text between note 199 and note 202.

[179] *See infra* text between note 193 and note 198.

[180] *See supra* text between note 86 and note95.

[181] *See supra* text between note 70 and note 75; Ambrose, [2011] UKSC 43, [19] (U.K.); McGowan, [2011] UKSC 54, [77, 97] (U.K.).

[182] Grieve, *supra* note 159.

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by Parliament would increase.[183] When creating a new Bill of Rights, the Parliament will have to be very clear on what sort of mandate it desires for the domestic courts. Otherwise, the current "obvious tension between the courts giving effect to the HRA as a constitutional instrument and avoiding the charge of excessive judicial activism"[184] will simply be transposed. Even though this will not lessen the influence of Strasbourg—its *European minimum standard*[185] will still need to be taken into account—it will put more focus on the domestic fundamental rights case law.

Secondly, according to Lord Bingham, "the meaning of the Convention should be uniform throughout the states party to it."[186] A clearer distinction between the two layers of rights might dissolve the foundation of the argument[187] and lift the self-imposed judicial restraint of "no more."[188] Lester and Beattie thus hope that UK judges will stop to regard the Strasbourg case law as a cage on human rights protection in the UK, since this will strengthen the case for a British Bill of Rights.[189] That said, the issue of concurrence of domestic rights and Convention rights will remain (and become more complex) with a home-grown Bill of Rights.

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[183] Prime Minister David Cameron, Rebuilding Trust in Politics at University of East London (Feb. 8, 2010); Herbert, *supra* note 29; Klug, *supra* note 21, at 422.

[184] Richard Clayton, *Judicial Deference and "Democratic Dialogue": The Legitimacy of Judicial Intervention Under the Human Rights Act 1998*, PUB. L. 33, 34 (2004).

[185] Costa, *supra* note 80, at 177; M.S.S. v. Belgium and Greece, ECHR App. No. 30696/09, 53 EUR. CT. H.R. 2 (2011) (concurring opinion of Judge Villiger) (referring to Handyside v U.K., ECHR App. No. 5493/72, 1 EUR. H.R. REP. 737, para. 48, (1976)).

[186] *Id.* Affirmed by Al-Skeini, [2007] UKHL 26 [105] (U.K.), http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.htm; LS, [2004] UKHL 39 [27] (U.K.), http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040722/york-1.htm; Huang, [2007] UKHL 11 [18] (U.K.), http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070321/huang%20-1.htm; Animal Defenders, [2008] UKHL 15 [37, 53] (U.K.), http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080312/animal-1.htm; P, [2008] UKHL 38 [36] (U.K.), http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080618/inrep.pdf; A, [2009] UKSC 12 [30] (U.K.), http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0020_Judgment.pdf; Smith, [2010] UKSC 29 [147] (U.K.), http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0103_Judgment.pdf; Rabone, [2012] UKSC 2 [113] (U.K.), http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0140_Judgment.pdf; *a contrario* Animal Defenders, [2008] UKHL 15 [44] (U.K.), http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080312/animal-1.htm. *See supra* text to note 46.

[187] *See supra* text between note 82 and note 85.

[188] JOINT COMM. ON HUMAN RIGHTS, A BILL OF RIGHTS FOR THE UK?, 2007-8, H.C. 150-II, at 144 (U.K.), http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165ii.pdf.

[189] Anthony Lester and Kate Beattie, *Human rights and the British Constitution,* in THE CHANGING CONSTITUTION 59, 77 (Jeffrey Jowell & Dawn Oliver eds., 2007).

2. Going Below the European Minimum Standard

Finding a justification for going below the *European minimum standard* will remain problematic even if the domestic obligation of section 6 HRA[190] were to be removed. This becomes apparent when re-examining the arguments for not providing less protection than Strasbourg.[191] The judicial arguments in support of following the European minimum standard reveal that they are not so much based on the text of section 2(1) HRA or section 6 HRA as they are on concerns about international obligations, risk of convictions, effectiveness of the Strasbourg Court, legitimacy, and efficiency. Such concerns will remain when a home-grown Bill of Rights is enacted: They reflect the overarching tension between coherence, efficiency and autonomy. [192]

3. Judicial Dialogue Between the UK Supreme Court and Strasbourg

When the UK Supreme Court considers it inappropriate to apply the mirror principle, it has a unique opportunity to participate in the European human rights debate while shielding certain aspects of the UK legal system.[193] Such a dialogue through judgments[194] is naturally much more fluid when judges speak the same rights language. Creating a shielding effect through dialogue in the UK will be harder when the advantage of a similar vocabulary is erased by a home-grown bill of rights. Currently, the UK Supreme Court is able to engage in a direct "constructive dialogue"[195] or "active coordination"[196] with the Strasbourg court on the correct interpretation of the Convention rights in the UK domestic legal context. The Strasbourg Court is forced to respond to the voiced critiques, which are based on the same catalog of rights.[197] The more differences in rights vocabulary at the different levels, the more a Court runs the risk of instigating an unsuccessful judicial dialogue. Also, the practical reality described by Lord Phillips—that when the Grand Chamber has clearly considered an issue and decided it, not following this decision would most likely entail

[190] *Id.* Section 6 HRA makes it unlawful for a public authority, including a court, to act incompatible with a Convention right.

[191] *See supra* text between note 86 and note 95.

[192] *E.g.*, in relation to Germany: Arnold, *supra* note 177, at 257-259.

[193] *See supra* text between note 122 and note 144.

[194] *See* Arden, *supra* note 80, at 4.

[195] Pinnock, [2011] UKSC 6, para. 48 (U.K.), http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd021114/lyons-1.htm.

[196] Catherine Van de Heyning, *No Place Like Home: Discretionary Space for the Domestic Protection of Fundamental Rights,* in HUMAN RIGHTS PROTECTION IN THE EUROPEAN LEGAL ORDER: THE INTERACTION BETWEEN THE EUROPEAN AND THE NATIONAL COURTS 65, 95 (Patricia Popelier, Catherine Van de Heyning & Piet Van Nuffel eds., 2011).

[197] *See also* Arden, *supra* note 80, at 9.

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many litigants going to Strasbourg and being awarded compensations—will remain the same with a home-grown Bill of Rights.[198]

III. Potential Impact on Margin of Appreciation

One of the benefits of introducing a home-grown Bill of Rights, according to its proponents, is that this would broaden the margin of appreciation given by Strasbourg.[199] In contrast, recent case law has shown that taking greater account of the Convention and the Strasbourg case law causes the Strasbourg Court to provide a wider margin towards the reasoning of the highest domestic courts, and thus creates more leeway—rather than less.[200] Consequently, taking greater account of the Convention and the Strasbourg case law, rather than having a clear and codified British Bill of Rights, causes Strasbourg to provide a broader margin towards the reasoning of the highest domestic courts.

Having a clear and codified British Bill of Rights will only tend the European Court of Human Rights to apply the "margin of appreciation" if it is accompanied with a more rigorous application of the fundamental rights in this Bill of Rights. Comparative research on rights versus security cases showed that courts in Germany apply a more rigorous scrutiny of the proportionality principle compared to the Strasbourg Court and the UK. Even when British courts apply the proportionality principle—instead of a broad brush balancing approach—they appear to be more forgiving of government assertions (with the exception of France).[201] According to the research, "the decisive factor in determining the importance of proportionality and the approach of courts in human rights versus security cases across jurisdictions is the existence of a domestic charter of rights."[202] Jurisdictions that rely on the Convention, like the UK, are less consistent and rigorous in their

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[198] *Id.* at 4-5. *See also* Bratza, *supra* note 128 and P, [2008] UKHL 38, [36] (U.K.), http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080618/inrep.pdf.

[199] 464 PARL. DEB., H.C. (6th ser.) (2007) 76 (U.K.) (Statement of Herbert); 467 PARL. DEB., H.C. (6th ser.) (2007) 218 (U.K.) (Statement of Herbert); Cameron, *supra* note 3; Grieve, *supra* note 170.

[200] Dean Spielmann, *Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?* 23-24 (CELS Working Paper Series, 2012) *available at* http://www.cels.law.cam.ac.uk/cels_lunchtime_seminars/Spielmann%20-%20margin%20of%20appreciation%20cover.pdf; *Z a.o. v. UK,* ECHR App. No. 29392/95, 2001-V EUR. CT. H.R. 103, para. 101; *Roche v. UK*, ECHR App. No. 32555/96, 42 EUR. CT. H.R. 30, para. 120 (2005); *A a.o. v. UK*, ECHR App. No. 3455/05, 49 EUR. H.R. REP. 29, para. 174 (2009); *MGN Limited v. UK*, ECHR App. No. 39401/04, 2011 EUR. CT. H.R. 66, para. 150; *Palomo Sanchez a.o. v. Spain*, ECHR App. Nos. 28955/06, 28957/06 and 28964/06, para. 57 (Sept. 12, 2011); *Axel Springer AG v. Germany*, ECHR App. No. 39954/08, para. 88 (Feb. 7, 2012); *von Hannover v. Germany (No. 2)*, ECHR App. Nos. 40660/08 and 60641/08, para. 107 (Feb. 7, 2012).

[201] BENJAMIN GOOLD, LIORA LAZARUS and GABRIEL SWINEY, PUBLIC PROTECTION, PROPORTIONALITY, AND THE SEARCH FOR BALANCE (2007).

[202] *Id.* at iii.

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application of proportionality to rights versus security cases than courts with a domestic charter of rights, such as Germany and Spain. When this application would be even more weakened, it is likely to increase the scrutiny by Strasbourg than decrease it.

D. Conclusion

Currently, an unusual cross-party consensus exists in the UK on the need for a home-grown Bill of Rights, although all three main parties have diverging views on its content and format. One of the main aims of the discussed proposal is changing the relationship between the national and European layer of rights protection. Repealing the HRA and enacting a home-grown Bill of Rights would lessen the influence of the Strasbourg Court.

Section 2(1) HRA currently regulates the relationship between UK courts and the Strasbourg Court. Even though section 2(1) HRA only obliges the domestic courts to take into account the Strasbourg Court, domestic courts interpret the Strasbourg case law in general according to the mirror principle. The judicial arguments in support of a mirror principle reveal that they are not so much based on the text of section 2(1) HRA, as they are, in the domestic courts' relationship with Strasbourg, on concerns about international obligations, hierarchy, effectiveness of the Strasbourg Court, coherence of fundamental rights protection, and efficiency. Internally, they are founded on concerns about separation of powers, limited jurisdiction, and accustomedness to the precedent system. Furthermore, the analysis of the case law shows that the mirror principle does not imply an absolute convergence with Strasbourg. The UK Supreme Court has judged that it can move beyond or away from Strasbourg case law in certain circumstances, for example when a matter falls within the margin of appreciation or Strasbourg misunderstood the domestic context.

A home-grown Bill of Rights might shield the influence of the Strasbourg Court by containing "specified" or "rebalanced" rights, but only when these rights would be irreconcilable with Strasbourg case law and the domestic courts would agree to put this case law aside. This is not unthinkable, but it would create an open inter-court conflict. That said, in general the creation of divergence between a home-grown Bill of Rights and the Convention diminishes the ability to shelter. When domestic courts take less account of the Convention, the margin of appreciation given by Strasbourg shrinks and engaging in a successful dialogue will be more difficult. Introducing a home-grown Bill of Rights would create a clearer distinction between the national and European layer of rights protection and thus enable the strong connection between both layers to be loosened. Nevertheless, the judicial arguments for not going below the European minimum standard would remain. In conclusion, a home-grown Bill of Rights will most likely cause domestic courts to receive less latitude by Strasbourg and will not absolve domestic judges from the duty of taking into account the Strasbourg case law.

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