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Comment on the UK Bill of Rights Debate: Is the UK Human Rights Act 1998 a Bill of Rights?

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"A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." This quote by James Madison, one of the US Founding Fathers, in the Federalist Paper No. 51 highlights the importance of separation of powers within a state, but it can as well be understood as pointing towards the necessity of a Bill of Rights, one significant "auxiliary precaution" in the constitutional framework having the main purpose of protecting the individual against the tyranny of the majority.

In the following essay I will argue that the UK Human Rights Act (HRA) 1998 is not only such an auxiliary precaution tool against a potentially oppressive government, but also fulfils all other constitutive elements of a Bill of Rights. From a constitutional point of view, there might be arguments against such a classification as a Bill of Rights, but if we take into account the *raison d'être* of any Bill of Rights, the fundamental protection of human rights, combined with the acknowledgement of the particular UK traditions of parliamentary sovereignty and unwritten constitution, we should not put such arguments of form above content.

In order to address the question carefully, I will break it down into different sections. Firstly, I will discuss different definitions of Bills of Rights and their constitutive elements, creating my own definition in the end, as the answer to the question itself is dependent on how we define a Bill of Rights. Secondly, I will touch upon the history and origins of the HRA, its strong connection to the international framework of human rights protection, and I will address arguments pointing in favour as well as against such a categorisation as a Bill of Rights. Consequently, I will demonstrate how the HRA fulfils all constitutive elements of a Bill of Rights at least to some extent.

In a third step and conclusion I will differentiate between a substantive/formal level, a legal/constitutional level, a political level, a comparative level and a teleological level of analysis, with the aim of reaching a more nuanced conclusion about the classification of the HRA as a Bill of Rights.

Constitutive elements and definitions of Bills of Rights

The difficulty at the very core of the question of whether the HRA can be classified as a Bill of Rights[1] is connected to the conundrum that there seems to be no exhaustive list of elements such a Bill of Right must contain and, furthermore, that there seems to be no definition on which all legal scholars can agree. In the light of this controversy I will proceed by firstly excluding two commonly mentioned elements and by secondly bringing together elements of Alston's and Klug's definitions of Bills of Rights.

[1] The Commission on a Bill of Rights, established in order to make a recommendation regarding the ongoing debate in the UK about the repeal of the HRA and a UK Bill of Rights, dedicates one chapter in its final report *"A UK Bill of Rights? The Choice before us*" (2012) to the question of what constitutes a Bill of Rights, but does not address the question of whether the HRA itself can already be seen as one.

By tackling the Herculean task of establishing an exhaustive list of constitutive elements of a Bill of Rights, one immediately discovers a highly disputed feature: the necessity of legislative entrenchment within the framework of the constitution. It is often argued that Bills of Rights must be subject to special protection and hence that they can be only overridden or changed under special circumstances and by special procedures like for instance a special majority in parliament[2] or a referendum. A supporter of this very narrow and exclusive definition has an easy task and can immediately stop at this point by negating any Bill of Right status to the HRA, which is an unentrenched ordinary Act of Parliament[3] and can therefore be easily repealed at any time.[4] However, in my opinion it is more reasonable - in the light of the UK's tradition of an unwritten constitution and parliamentary sovereignty[5] - to adopt a broader definition which allows for entrenched or unentrenched Bills of Rights.

Connected to the narrow definition is another form of entrenchment, judicial entrenchment, which presupposes a model of separation of powers where courts have the power to strike down legislation which is in violation of the granted fundamental rights.[6] In accordance with the UK legal tradition of parliamentary sovereignty, Parliament has the last word also on the matter of fundamental rights. The HRA managed on the one hand to strengthen judicial review by awarding more powers to the courts, but on the other hand it was drafted with the intention to preserve parliamentary sovereignty and hence as a so called dialogue-model[7] with the inherent purpose of finding a balance between democracy and rights protection by unelected and unaccountable judges. The considerable list of arguments against judicial strike-down power and judicial supremacy ranges from Ewing & Gearty's[8] or Allan's[9] reproach that Bills of Rights are undemocratic, to Waldron's[10] rejection of strong judicial review and his view that parliament is better suited to resolve reasonable disagreements about rights.[11] Given that the legitimacy of the concept of judicial entrenchment in the form of judicial strike-down power is so disputed, should it not be excluded as a constitutive element of a Bill of Rights?

Accordingly, the expert in the field of comparative analysis of Bills of Rights, Philip Alston, dissects three broadly defined main features from the big pool of definitions without paying primary attention to the element of judicial entrenchment: the protection of particularly important human rights, the binding nature upon governments in connection with difficulties of overriding them and some form of redress in case of a violation.[12] Klug identifies similar features: Bills of Rights protect broadly defined rights, which are somehow part of a higher law and, due to the open-ended character of these values, interpretation of the rights becomes crucial and is usually undertaken by the courts.[13] Another, commonly recognised element is the identification of

[2] Germany: two-thirds majority for amendments regarding the Basic Law; the *right to dignity* is protected against any changes by the *eternity clause* of Article 79 (3) Basic Law. US: two-thirds majority in both houses in connection with the federalist requirement of approval of three-quarters of its states.

[3] The *New Zealand Bill of Rights Act 1990* is also an ordinary Act of Parliament.

[4] The argument of high political costs of such a repeal is a matter of politics and not of constitutional theory; it should nevertheless not be ignored.

[5] See *Dicey*, Introduction to the Study of the Law of the Constitution (1893).

[6] The US strike-down power is not anchored in the US Bill of Rights, but was "usurped" by the Supreme Court itself in one of the early cases *Marbury v Madison*, 5 U.S. 137 (1803).

[7] Also described as "the parliamentary bill of rights model", see: *Hiebert*, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) MLR 69 (1), p.7.

[8] *Ewing & Gearty*, The Struggle for Civil Liberties (2000).

[9] *Allan*, 'Bills of Rights and Judicial Power – A Liberal's Quandary' (1996), OJLS 16(2), p. 352.

[10] *Waldron*, 'The Core of the Case Against Judicial Review' (2006), Yale LJ 115, p. 1360.

[11] He contrasts the poorly argued US-abortion case *Roe v. Wade*, 410 U.S. 113 (1973) with the successful debate about the liberalisation of abortion law in the UK Parliament (1960s), *ibid*. pp. 1383, 1349.

[12] *Alston*, Promoting Human Rights Through Bills of Rights (1999), p. 11.

[13] *Klug*, 'Solidity or Wind? What's on the Menu in the Bill of Rights Debate?' (2009), Pol Q 80 (3), p. 420 and *Klug*, 'The Human Rights Act – a "third way" or "third wave" Bill of Rights' (2001), EHRLR (4), p. 370.

mainly individuals[14] as rights-holders and primarily the state[15] as the rights-upholder.

To sum up, by uniting the different elements discussed, I would define a Bill of Rights as a legal document, outlining shared values, in the rank of a higher law, which can be entrenched or unentrenched and which as the most important element of all gives a set[16] of legally enforceable fundamental rights to the individual against the state by granting access to the courts and by awarding some form of redress in the case of a violation of these rights.

In the next section I will show that the HRA fulfils all these constitutive elements at least to some degree.

The HRA: history, origins and constitutive elements of a Bill of Rights

Unlike most other traditional Bills of Rights, the HRA was not born out of revolution, civil war, decolonisation or any other particular conflict situation, but was a product of deliberation[17] and reform of the status quo.[18] The protected fundamental rights under the HRA are not of domestic origin, as the HRA incorporates a regional human rights treaty of the Council of Europe, the European Convention on Human Rights (ECHR)[19]. Although the UK government was bound to the ECHR from the moment of its ratification under an international law obligation, the Convention rights themselves could not be claimed in domestic courts. The UK belongs to the dualist tradition and it therefore requires some form of transformation of an international treaty into the domestic legal system in order to make it internally applicable.[20]

This "foreign origin"[21] of the HRA is often used as an argument against awarding it a Bill of Rights status: the rights are not of domestic origin and a foreign court in Strasbourg, not the House of Lords or since 2009 the Supreme Court of the UK, has the last word on determining the scope and limits of the protected rights. In response to this argument it has already been acknowledged that the HRA is not a traditional Bill of Rights, but one representative of the new "dialogue-model Bill of Rights"[22], a "third wave Bill of Rights"[23] or "new Commonwealth model of constitutionalism"[24]. Moreover, the source and roots of the HRA might be the ECHR as an international human rights treaty, but through an Act of Parliament these rights became part of the domestic legal system and are even more importantly interpreted by UK judges.[25] According to section 2 HRA, the UK courts are not bound by the case-law of the European Court of Human Rights (ECtHR) in Strasbourg when interpreting the rights under the HRA; they merely have to "take into account"[26] Strasbourg jurisprudence. This was interpreted at the beginning more restrictively by Lord Bingham in *Ullah*[27] as "*no more, but certainly no less*", but later in *Horncastle*[28] the Supreme Court stated that it is possible under exceptional circumstances to depart from the ECtHR

[14] Sometimes also minority rights.
[15] For horizontality see *Young*, 'Mapping horizontal effect' (2011) pp. 16-47.
[16] This set of rights usually includes civil and political rights; it might contain socio-economic, cultural or group rights.
[17] The HRA was part of New Labour's constitutional reform; see the White Paper "*Rights Brought Home: The Human Rights Bill"* and *Ewing & Gearty*, 'Rocky foundations for Labour's new rights' (1997), EHRLR 2, p. 146.
[18] The long history of UK rights protection in a nutshell: Magna Carta (1215), Petition of Right (1628), Habeas Corpus Act (1679), Bill of Rights (1689), Act of Settlement (1701).
[19] The first country to ratify the ECHR was the UK in 1951.
[20] With the exception of the supranational European Union law.
[21] It is often forgotten that the UDHR and the ECHR were drafted with significant participation of the UK – see *Klug*, 'Solidity or Wind?' (2009), p. 420.
[22] For a critical review on the dialogue-model *Young*, 'Is dialogue working under the HRA 1998?' (2011), PL, pp. 773-800.
[23] *Klug*, 'The Human Rights Act' (2001), p. 370.
[24] *Gardbaum*, 'How successful and distinctive is the Human Rights Act?' (2011), MLR 74 (2), p. 195. The *Canadian Charter of Rights and Freedoms* (1980) derived most of its rights from the *International Covenant on Civil and Political Rights (ICCPR)*, an international treaty as well.
[25] *Klug*, 'A bill of rights: do we need one or do we already have one?' (2007), PL, p. 707.
[26] It is also for pragmatic reasons to decide cases in accordance with the ECtHR, because an applicant would otherwise win the case in Strasbourg after the exhaustion of domestic remedies.
[27] *R (Ullah) v Special Adjudicator* [2004] UKHL26, para 20.
[28] *R v Horncastle and others* [2009] UKSC 14.

case-law.[29] For all these reasons I do not regard the argument of "foreign rights" and a "foreign court" as bullet-proof evidence against a Bill of Rights.

Furthermore, I will highlight some features inherent in the structure of the HRA that point in favour of the Bill of Rights assumption.

Firstly, although the HRA was enacted as an ordinary Act of Parliament, section 3 delegates interpretative power to the courts to read all past and future legislation, "if possible"[30], in a way that makes it compatible with the Convention rights. Therefore the HRA, even if unentrenched, became to some degree part of a higher law as all other statutes have to comply with its provisions.

Secondly and connectedly, section 6 binds public authorities to act compatibly with Convention rights, which is another feature of a Bill of Rights: the courts have, in case of a presumed rights violation, the already mentioned option of interpretation under section 3 in combination with damages (a form of redress), or can alternatively (sometimes seen as a "last resort"[31]) make a declaration of incompatibility. Despite the fact that a declaration of incompatibility does not have any impact on the validity of the legislation in question and the executive is not legally bound by it, the usual response until today - with the one exception of the legislation on prisoners' voting rights[32] - is an amendment of the provision concerned, a commitment to amend or the change of the offending practice.[33] This "over-compliance"[34] might be categorised as coming close to quasi-judicial strike-down power or at least it contributes to a "culture of rights" or "culture of justification"[35].

Other elements of the HRA-system favouring dialogue between the different branches are section 19, a minister's statement of compatibility before the introduction of a new Bill and the permanently established Joint Committee on Human Rights in Parliament.

In conclusion, the HRA contains all constitutive elements of a Bill of Rights at least to some extent and should therefore be categorised as a Bill of Rights.

Conclusion: levels of analysis

Firstly, at a substantive law level the HRA protects broadly defined fundamental rights, which are to be interpreted, as it is common in for Bills of Rights, in form of judicial review by the courts. At a formal level the HRA is unentrenched and has its roots in an international human rights treaty, but fulfils nevertheless elements of a Bill of Right to some extent as argued above.

Secondly, at a legal/constitutional level, the HRA is an ordinary Act of Parliament, but must be seen as a dialogue-model in order to preserve the UK's tradition of parliamentary sovereignty.

Thirdly, at a political level, the answer to the question of whether the HRA is already seen as a Bill of Rights has implications on the ongoing debate by the Conservative Party about repealing the HRA and creating a new British or UK Bill of Rights. In my opinion, this option would only make sense in two case-scenarios: either by adding new rights to the status quo in the form of an ECHR-plus/HRA-plus[36]or by cutting all bonds with the ECHR and by consequently withdrawing from the ECHR and the Council of Europe.

Fourthly, at a comparative level, cross-fertilisation led to a "new Commonwealth model of constitutionalism" – a new form of Bill of Rights - with the UK drawing

[29] *Fenwick*, 'Replacing the Human Rights Act with a British Bill of Rights' (2012), p. 305 and *O'Cinneide*, Human Rights in the UK Constitution (2012), p. 38.

[30] Even in cases of unambiguity of a statutory provision, the courts can give it a different, rights-compatible meaning; limits to the courts in their interpretative powers are going against "*fundamental features of the legislative scheme*", they must "*go with the grain*" of the legislation and not require "*legislative deliberation*"; see *Ghaidan v Godin-Mendoza* [2004] UKHL 30 and *Kavanagh*, Constitutional Review under the UK Human Rights Act (2009), pp. 53, 101, 107.

[31] *R v A (No. 2)* [2001] UKHL 25, para 44.

[32] *Smith v Scott* [2007] CSIH 9.

[33] *Klug*, 'A bill of rights' (2007), p. 708.

[34] *Gardbaum*, 'How successful and distinctive is the HRA?' (2011), p. 204.

[35] *O'Cinneide*, Human Rights in the UK Constitution (2012), p. 15.

[36] *Joint Committee on Human Rights*, 'A Bill of Rights for the UK?'(2008), p. 19.

inspiration from Canada and New Zealand and becoming itself the role model for Australian states.[37]

Fifthly, at a teleological level, in my opinion the most important under the presumption that the *raison d'être* of any Bill of Rights is the fundamental protection of human rights, the HRA led to a "culture of rights" and helped to protect vulnerable and marginalised groups within society, who need these human rights the most. Three successful examples are the protection of foreign nationals from being indefinitely detained in Belmarsh prison without charge or trial,[38] the protection of asylum seekers against inhuman and degrading treatment,[39] and the protection of homosexuals tenants against discrimination on grounds of their sexual orientation.[40]

On this basis the HRA has to be seen as a new and particular form of Bill of Rights; in the words of Lord Steyn *"our Bill of Rights"*[41].

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[37] *Sisley*, 'Inspired by the Human Rights Act. The Victorian Charter of Human Rights and Responsibilities' (2012), p. 85.
[38] *A and others v Secretary of State for the Home Department* [2004] UKHL 56.
[39] *R (Limbuela and others) v Secretary of State for the Home Department* [2005] UKHL 66.
[40] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.
[41] *Lord Steyn*, 'Democracy, the rule of law and the role of judges' (2006), EHRLR (3), p. 246.

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