

LA LEY DE DERECHOS HUMANOS 1998: LA IMPLEMENTACIÓN
DE LA CONVENCIÓN EUROPEA DE DERECHO HUMANOS EN
EL SISTEMA LEGAL BRITÁNICO

THE HUMAN RIGHTS ACT 1998: THE IMPLEMENTATION OF THE
EUROPEAN CONVENTION OF HUMAN RIGHTS INTO THE UK
LEGAL SYSTEM

Actualidad Jurídica Iberoamericana, núm. 4, febrero 2016, pp. 373 - 390.

Fecha entrega: 13/12/2015
Fecha aceptación: 15/01/2016

SALVADOR JESÚS TORMO PRUÑONOSA
Colaborador del IDIBE
Salvador.J.Tormo@gmail.com

RESUMEN: El propósito de este trabajo es proporcionar una visión de cómo la Ley de Derechos Humanos 1998 implementa en el Sistema Legal Inglés la Convención Europea de Derechos Humanos de 1950. Nos centraremos principalmente en los derechos garantizados por la Convención Europea, las principales provisiones de la Ley de Derechos Humanos 1998 y su impacto en el Sistema Legal Inglés. Además, valoraremos la extensión de la implementación de la Convención Europea en el Sistema Legal de Reino Unido. Como consecuencia, observaremos que la Ley de Derechos Humanos no es una Carta de Derechos pero es el primer paso en la dirección correcta. Finalmente, intentaremos examinar el futuro de la Ley de Derechos Humanos.

PALABRAS CLAVE: Consejo de Europa, Convención Europea de Derechos Humanos, Tribunal Europeo de Derechos Humanos, Ley de Derechos Humanos 1998, implementación, derechos, Sistema Legal de Reino Unido.

ABSTRACT: The purpose of this paper is to provide an insight of how the Human Rights Act 1998 implements into the English Legal System the European Convention of Human Rights of 1950. We will mainly focus on the rights guaranteed by the European Convention, the principal provisions of the Human Rights Act 1998 and its impact on the English Legal System. Furthermore, we will assess to what extent has been the European Convention implemented into the UK Legal System. As a consequence, we will observe that the Human Rights Act is not a Bill of Rights but it is the first step in the right direction. Finally, we will try to look into the future of the Human Rights Act.

KEY WORDS: Council of Europe, European Convention of Human Rights, European Court of Human Rights, Human Rights Act 1998, implementation, rights, UK Legal System.

TABLE OF CONTENTS: I. INTRODUCTION.- II. THE EUROPEAN CONVENTION OF HUMAN RIGHTS.- 1. The Council of Europe.- 2. The European Court of Human Rights.- 3. Nature of the rights provided by the European Convention of Human Rights.- III. THE HUMAN RIGHTS ACT 1998.- 1. The application of HRA, section 2: Taking European Court of Human Rights decisions into account.- 2. The application of HRA, sections 3 & 4: Interpreting in a compatible way and the declaration of incompatibility.- 3. The application of HRA, section 6: Vertical and Horizontal effect in the HRA.- IV. CONCLUSIONS & LOOK TO THE FUTURE.

I. INTRODUCTION.

In United Kingdom the general rule¹ is that treaties must be transformed into national law by Act of Parliament before they can create any obligation or right enforceable in domestic courts². The UK refused for many years to transform the European Convention of Human Rights and Fundamental Freedoms (hereinafter, the "ECHR") into domestic law³ and hence it was not applied by national courts⁴. Therefore, prior to the Human Rights Act 1998 (hereinafter, the "HRA"), citizens who alleged that their rights under the ECHR had been breached could only bring a case at the International Level before the European Court of Human Rights⁵ (hereinafter, the "ECtHR"). If

¹ According to DIXON, M.: *Textbook on international law*, Oxford University Press, Oxford, 2013 the only limited exceptions to the general rule (treaties must be transformed into national law) are treaties of cession or those pertaining to the conduct of war.

² WARBRICK, C.: *The Governance of Britain*, International and Comparative Law Quarterly, 2008, Volume 57, pp. 209-217. In addition, see the following courts decisions: *International Tin Council Case (J.H. Rayner (Mincing Lane Ltd v. Department of Trade and Industry) [1990] 2 AC 418*, United Kingdom House of Lords) where creditors brought an action against the International Tin Council after it could not pay its debts. Creditors argued that the treaty, which was not incorporated into the national law of the UK, allows them to bring an action against the States parties, rather than against the International Tin Council. The court rejected the creditors' argument; *R. V Secretary of State for the home department*, [2006] 2 AC 220; *Maclaine Watson v Dept. Of Trade (1990) 2. A.C. 418 at 500: Campaign for Nuclear Disarmament V. Primer Minister [2002] EWHC 277*.

³ Pursuant to article 1 ECHR, Contracting States undertake to "secure" the freedoms and rights in the ECHR to everyone in their Jurisdiction. However, this article does not require a Contracting State to incorporate the ECHR into its Domestic Legal System. In this regard, see HARRIS, D. J., O'BOYLE, M., BATES, E. & BUCKLEY, C.: *Law of the European Convention on Human Rights*, Oxford University Press, Oxford, 2014, p. 26. See also *Observer and Guardian v UK A 216 (1991); 14 EHRR 153 PC*.

Notwithstanding, according to BLACKBURN, R. & POLAKIEWICZ, J.: *Fundamental Rights in Europe: The ECHR and its Member States 1950-2000*, Oxford University Press, Oxford New York, 2001, p. 683, nowadays, the ECHR has been implemented into the legislation of all parties.

⁴ ELLIOT, C. & QUINN, F.: *English legal system*, Pearson, Edinburgh, 2013, p. 305.

⁵ DIXON, M., MCCORQUODALE, R. & WILLIAMS, S.: *Case & Materials on International Law*, Oxford University Press, Oxford, 2011, p. 120.

they succeeded there, the UK had to amend whatever rule of municipal law which had caused the problem⁶. However, the lack, until 1998, of a written Bill of Rights does not mean that UK did not protect the Human Rights⁷. First of all, as with any other international treaty, domestic courts could take ECHR into account to interpret UK legislation⁸, and suppose that the British Parliament did not legislate against to the ECHR. Secondly, rights have been understood as part of the unwritten constitution which has led the Common Law during decades. Most importantly, the English legal system was based on the presumption that subjects are free to do whatever is not specifically unlawful⁹ ("negative concept or rights")¹⁰.

The HRA meant a significant change in the British Legal System because it incorporated the ECHR into UK providing a clear legal basis for human rights challenges and made enforceable human rights recognised in the HRA in domestic courts.

II. THE EUROPEAN CONVENTION OF HUMAN RIGHTS.

The ECHR was signed in 1950, ratified by UK in 1951 and it came into force in 1953. It was drafted¹¹ by the Council of Europe (not to be confused with the European Council) which was established after the Second World War when ten States tried to unite to promote democracy and prevent wars¹².

⁶An example of this is *Malone v The United Kingdom*, ECHR 2 Aug. 1984, where the European Court of Human Rights unanimously held that there had been a breach of the article 8 of the ECHR due to the violation of Malone's private life and correspondence. As a consequence, UK brought new legislation in this field.

⁷ MALLESON, K. & MOULES, R.: *The legal system*, Oxford University Press, Oxford 2010, p. 36.

⁸ For instance, see *Waddington v Miah* (1974) 1 WLR 683, where the House of Lords supported its interpretation of s.34 of the Immigration Act 1971 could not be understood as having retrospective effect in the art. 7 of the ECHR. See more in: WALLINGTON, P.: *The European Convention on Human Rights and English Law*, The Cambridge Law Journal, 1975, Volume 34, pp. 9-11.

⁹ For example, in *Malone v Metropolitan Police Commissioner* (1979) 1 CH 344 there was no law which banned the Government or its agencies to tap citizens' phone. Therefore, although Mr. Malone was able to prove that his phone had been tapped without any lawful authority, his action failed.

¹⁰According to MALLESON, K. & MOULES, R.: *The legal system*, cit., p. 36, this approach has historically served the UK to guarantee reasonably well the respect of human rights.

¹¹ The UK placed a central role in drafting the Convention. Please, see: DONALD, A. GORDON, J. & LEACH, P.: *The UK and the European Court of Human Rights*, Equality and Human Rights Commission Research report 83, 2012.

¹² The Preamble to the ECHR seems to refer to this States when it says "European Countries which are likeminded and have a common heritage of political tradition, ideals, freedom and the rule of the law".

The adoption of a European Convention came from three factors. It was a first regional reply to the horrors committed in the WW II. Secondly, it was considered that the best way to ensure Germany would be a force for peace, in partnership with other European States, was through integration and institutionalization of shared values. Finally, ECHR responded to the desire of bringing the non-Communist countries of Europe together "within a common ideological framework" (STEYNER, H.

1. The Council of Europe¹³.

The two main decision-making bodies of The Council of Europe are the Parliamentary Assembly and the Committee of Ministers¹⁴. The Committee of Ministers¹⁵ is the guardian of the Values by which the Council operates¹⁶. Moreover, it monitors the compliance of Contracting States with their obligations under the ECHR, adopts recommendations and considers applications by new Member States.¹⁷ While, the Parliamentary Assembly¹⁸ main roles are to recommend, give opinions about, pass decisions and monitor State's compliance with Council of Europe policies¹⁹.

2. The European Court of Human Rights.

The ECtHR is an international full-time court which rules applications alleging breaches of rights established in the ECHR. Section II of the ECHR establishes the operation of the ECtHR and its procedures. Pursuant to article 20, the number of Judges in ECtHR must be equal the number of parties²⁰. Any citizen or contracting State claiming to be a victim of a violation of the ECHR may appeal directly to the court in Strasbourg²¹.

J., ALSTON, P. & GOODMAN, R.: *International Human Rights in Context*, Oxford University Press, Oxford New York, 2008, p. 933).

¹³ In addition to be responsible for the ECHR, the Council of Europe is an inter-governmental organization which ensures the correct application of over 200 other treaties on a wide range of topics. For example, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or the European Social Charter.

¹⁴ Other key institutions are the Congress of Regional and Local Authorities, the Conference of International Non-Governmental Organizations and the Secretariat.

¹⁵ It is formed of the Ministers of Foreign Affairs of each Member State. Furthermore, there are observers to the Committee of Ministers (the Holy See, Japan, Canada, Mexico and US).

¹⁶ SMITH, R.K.M.: *Textbook on International Human Rights*, Oxford University Press, Oxford New York, 2010, p. 100.

¹⁷ Currently, Belarus is a State Candidate.

¹⁸ It is composed of a group of representatives from the national parliament of each State. Between two and eighteen per State depending on its population. More information in A. DONALD, A., GORDON J. AND LEACH, P.: *The UK and the European Court of Human Rights*, cit., p. 11. Moreover, there are also observers to the Parliamentary Assembly (Canada, Israel and Mexico).

¹⁹ GREER, S.: *Europe*, in MOECKLI, D., SHAH, S. & SIVAKUMARAN, S.: *International Human Rights Law*, Oxford University Press, Oxford, 2010, p. 419. Furthermore, the Parliamentary Assembly also elects judges of the ECtHR from a list of three candidates nominated by each State, the European Commissioner for Human Rights, The Secretary General and Deputy Secretary-General of the Council of Europe.

²⁰ Consequently, there are forty-seven judges in October 2015.

²¹ In interpreting the Convention, the ECtHR has used two important principles: principle of proportionality – which means that if a right is breached, the extent of that violation may not be bigger than is indispensable to reach the legitimate purpose (an exhaustive definition of proportionality can be found in *De Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others*, (1998), UKPC 30) - and the "margin of appreciation" – which allows for some differences in States approach, provided the fundamental rights are comply with. In this regard, see *Handyside v UK*, 1976 [Application no. 5493/72](#) (related to art. 10 of ECHR and margin

Cases are admissible only if the appellant has exhausted all domestic remedies and appeal no more than six months²² after the final national decisions. The ECtHR will also refuse any appeal which is clearly ill-founded or outside of the Scope of the Convention²³.

Moreover, the contracting States undertake to abide by the Strasbourg Jurisprudence in any case to which they are parties²⁴. Notwithstanding, a court judgement is “*essentially declaratory*”²⁵.

3. Nature of the rights provided by the ECHR.

The Convention and the subsequent extensions to its content through several protocols ensured that the most significant political and civic rights were to be protected and respected²⁶. The elementary obligation is found in art. 1, wherein the Contracting States “shall secure to everyone²⁷ within their jurisdiction the rights and freedoms”. Notwithstanding, rights under ECHR are not all the same. It can be distinguished three types of Convention

of appreciation) and *Sabin v Turkey*, 2005 [Application no. 44774/98](#) (concerned with art. 9 of ECHR and margin of appreciation) -.

²² This period will be reduced to four months when all Member States have ratified Protocol 15. In October 2015, totally number of ratifications are 22. This reform arises from the huge amount of cases delivered to the ECtHR – in 2011 it had a backlog of 120, 000 cases. -. See: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=213&CM=8&DF=13/10/2015&CL=ENG> .

²³ The Court’s Jurisdiction is a relevant procedural issue which cannot be examined here. See *Bankovic and other v. Belgium and Others ECtHR*, *Application no. 52207/99*, *Grand Chamber*, 12 December 2001 where the ECtHR thought about the meaning of the words “within their jurisdiction” and if acts of the Contracting States outside their territories can constitute an exercise of jurisdiction by them. See also *Issa and Others v. Turkey*, *ECtHR*, *Application no. 31821/96* where the Court considered the concept of the “Jurisdiction” pursuant to the article 1 of the ECHR. In this case, six Iraqi national suffered unlawful arrest, detention and killing as a consequence of the Turkish military activity in the Northern Irak.

²⁴ The binding force of the ECtHR decisions in United Kingdom will be examined below. More information about the implementation of judgements of the European Court of Human Rights can be found in ABDELGAWAD, L.: *the execution of Judgements of the European Court of Human Rights*, Council of Europe, Publishing Editions du Conseil de l’Europe, Human rights files, 2008, No. 19. Available at: [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19\(2008\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19(2008).pdf). (Accessed 8 October 2015).

²⁵ In *Marckx v Belgium (1979) Application no. 6833/74* the Court stated that a Strasbourg decision “cannot by itself annul or repeal” incompatible municipal law or domestic court decisions.

²⁶ MARSON, J.: *Business Law*, Oxford University Press, Oxford p. 26. In fact, according to this scholar, the ECHR was based on the United Nations’ Universal Declaration on Human Rights. Notwithstanding, it should be note that the ECHR and its Protocols do not cover several important rights such as the right to self-determination or the economic, social and cultural rights (REHMAN, J.: *International Human Rights Law*, Pearson, Edinburgh Gate, 2010, p.185).

²⁷ Parties must protect the human rights or any national, national of another contracting State or a national of a third country within their jurisdiction. For example, in *Berrehab v Netherlands (1989) 11 EHRR 322* the Court held that the rights of a resident Moroccan were breached.

Rights²⁸:

- *Absolute rights* (e.g. freedom from torture or inhuman or degrading treatment -art. 3-²⁹) which cannot be balanced with any public interest and cannot be restricted in any circumstances including emergency's or times of war.
- *Limited rights* (e.g. some rights included in the right to a fair trial -art. 6-³⁰) which can be restricted or derogated in times of war or emergency³¹ and may be limited by provisions contained within the article.
- *Qualified rights* (e.g. freedom of expression -art. 10-³²) which require a

²⁸ We must be aware that the classification of a right in one of the three categories is not always easy. For instance, the British Ministry of Justice considers that the right to life (article 2) is a limited right because "There are certain very limited circumstances where it is acceptable for the state to take away someone's life, e.g. If a police officer acts justifiably in self-defence" (MINISTRY OF JUSTICE: *Making sense of Human Rights*, p. 6, Available at: <https://www.justice.gov.uk/downloads/human-rights/human-rights-making-sense-human-rights.pdf> (Accessed 2 October 2015). This view is shared by some scholars (WAGNER, A.: *Article 2/Right to life*, (web blog), Available at: <http://ukhumanrightsblog.com/incorporated-rights/articles-index/article-2-right-to-life/> (Accessed 3 October 2015) and GIBSON, B. (ed.): *Human Rights and the Courts: Bringing Justice Home*, Waterside Press, Winchester, 1999, p.34). However, other commentators such as KEENAN, S. & ALLEN, V.: *Business Law*, Pearson, Edinburgh, 2013, p. 38 hold that it is an absolute right.

²⁹ States cannot derogate prohibition of torture under any circumstances. Threats to national security, public interest of society or emergency situations do not allow to the State to derogate this article. Furthermore, identity or actions of a person do not justify a breach of the art.3. In *Chahal v The United Kingdom*, 1996, *Application no. 22414/93*, the ECtHR held that the protection provided by the article 3 of ECHR cannot be derogate independent on the activities of an individual (i.e. terrorism) even if they are dangerous or undesirable for a State. The ECtHR confirmed it in *Saadi v Italy*, 2008, *Application no. 37201/06*. See also JAYAWICKRAMA, N.: *The judicial application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press, Cambridge, 2002, p. 329.

Torture is characterised by the intentional infliction of an intensive physical or mental pain with a specific purpose such as obtaining information. When the treatment has not got purpose or enough intensity, it will be classed as inhuman or degrading. However, the assessment of this minimum is relatively (see *Tekin v. Turkey judgment of 9 June 1998, ECHR 1998-IV, §52*). An excellent overview about article 3 can be found in REIDY, A.: *A guide to the implementation of Article 3 of the European Convention on Human Rights*, Human rights handbooks, Germany, Council of Europe, 2003, No. 6.

³⁰ The right to a fair trial includes the right to a fair and public hearing within a reasonable time by an independent and impartial court established by law, the right to be presumed innocent until proved guilty in a criminal offence and several rights in case of being charge with a criminal offence. A detailed study can be found in MOLE, N. & HARBY, C.: *A guide to the implementation of Article 6 of the European Convention on Human Rights*, Human rights handbooks, Germany, Council of Europe, 2006, No. 3.

³¹ For instance, UK entered a derogation to art. 5 (3) which was confirmed as lawful by the ECtHR in *Brannigan and McBride v UK ECHR series A (1993) No. 258 B*. In this case, two people were detained without a trial because they were terrorist suspects. The Government suspended the art. 5(3) – everyone arrested shall be brought promptly before a judge – due to the need of defending the society. The court confirmed Government performance.

³² Freedom of expression can be restricted on several grounds as the rights of the others or national security. The restrictions may be justified under art. 10 (2) or 17 ECHR. See *Le Pen v. France, 2010*

balance between the need of the community or the State and the rights of the individual. Interference with this kind of rights is permissible only if: 1) There is a clear legal basis for the interference, 2) the action seeks to reach a legitimate purpose and 3) the interference is needed in a democratic society³³.

III. THE HUMAN RIGHTS ACT 1998.

The HRA³⁴, which came into force on 2 October 2000, makes the ECHR (and its first protocol) part of UK legislation. "Convention rights" are those rights arising under the ECHR that are set out in s. 1 of the HRA and established in Schedule I, subject to several other provisions³⁵. An adequate analysis of the HRA requires taking the following aspects into account:

1. The application of HRA, section 2: Taking European Court of Human Rights decisions into account.

Under s. 2, domestic courts have to take any relevant Strasbourg jurisprudence into account. This means that domestic courts are not bound by decisions of the ECtHR but these decisions cannot be completely rejected. It seems that the Courts must follow Strasbourg case law where is possible³⁶ unless there are enough reasons to depart from an ECtHR

Application No. 18788/09.

Freedom of expression includes freedom to hold opinions, freedom to impart information and ideas – which is the principal indicator of a democratic government (see *Handyside v. the United Kingdom*, Appl. No. 5493/72, Series A no. 24) - and freedom to receive information and ideas. Moreover, pursuant to the ECtHR, freedom of press is also protected by article 10 (*Autronic AG v. Switzerland*, Appl. No. 12726/87, Series A no. 178). It should be note that "expression" is not limited to words but it also refers to images (*Müller and Others v. Switzerland*, Appl. No. 10737/84, Series A no. 133), pictures (*Chorberr v. Austria*, Appl. No. 13308/87, Series A no. 266- B) and actions which express an idea or give information. Furthermore, art. 10 also protects the form in which information and ideas are expressed (*Oberschlick v. Austria*, Appl. No. 11662/85, Series A no. 204) such as radio broadcasts (*Groppera Radio AG and Others v. Switzerland*, Appl. No. 10890/84, Series A no. 173), painting (*Müller and Others v. Switzerland*, Appl. No. 10737/84, Series A no. 133), films (*Otto-Preminger Institut v. Austria*, Appl. No. 13470/87, Series A no. 295-A) or printed documents (*Handyside v. the United Kingdom*, Appl. No. 5493/72, Series A no. 24).

An excellent approach to the freedom of expression can be found in MACOVEI, M.: *A guide to the implementation of Article 10 of the European Convention on Human Rights*, Human rights handbooks, Germany, Council of Europe, 2004, No. 2.

³³ MINISTRY OF JUSTICE, *Making sense of Human Rights*, cit., p. 5.

³⁴ The HRA is supplemented by fourteen Protocols, all of which remain in force, except Protocol 10 which has been replaced by Protocol 11.

³⁵ FELDMAN, D.: *Monism, Dualism and Constitutional Legitimacy*, 20 Australian Yearbook of International Law, 1999.

³⁶ It seems to be the Lord Slynn opinion made in *R (Alconbury Developments Ltd) v Secretary of State for the Environment (May 9 2001)* [2001] 2 WLR 1389. Lord Rogers seems to be more forceful when

decision. For example, in *R v Horncastle*³⁷ the Supreme Court did not follow the ECtHR judgement in *Al-Khawaja and Tahery v UK*³⁸ on whether the UK hearsay rule of criminal evidence was according to the ECHR³⁹.

Furthermore, in *Kay v LLBC*⁴⁰ the House of the Lords stated that if a decision of a municipal court seemed to be inconsistent with a later decision of Strasbourg Court, courts remained bound by the system of precedent and they have to follow the higher court decision⁴¹.

2. The application of HRA, sections 3 & 4: Interpreting in a compatible way and the declaration of incompatibility.

By section 3, the municipal courts must interpret all legislation 'so far as possible' in a way that is compatible with the ECHR. However, there are limits: if a Convention interpretation is against to a "fundamental feature" of the primary legislation⁴² (not in case of secondary incompatible legislation, where the courts have to interpret it according to ECHR, even if this requires ignoring that legislation)⁴³, it will not possible a compatible interpretation and

asserted "Strasbourg has spoken, the case is closed" in *Secretary of a State for the Home Department v AF (No.3)*, (2009), UKHL 28.

³⁷ *R v Horncastle and others* (2009) UKSC 14

³⁸ *Al-Khawaja and Tahery v the United Kingdom*, applications nos. [26766/05](#) and [22228/06](#).

³⁹ In this case, Lord Philips stated that there are "rare occasions where the Court concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstance it is open to this court to decline to follow the Strasbourg decision".

See also, *R v Spear, Hastie and Others* [2002] UKHL 31, where the Court declined to follow the Strasbourg decision in *Case of Morris v United Kingdom*, Application no. [38784/97](#) on the basis that Strasbourg did not know how the system worked. Interestingly, in *Cooper v United Kingdom*, Application no. [48843/99](#) the ECtHR asserted that the *R v Spear* decision was right.

⁴⁰ *Kay v Lamberth London Borough Council* (2006) UKHL 10

⁴¹ This position is shared by GIBSON, B. (ed.): *Human Rights and the Courts: Bringing Justice Home*, cit., p.54 and it can be found in other judgements such as *Leeds City Council v Price* (2006) UKHL 10. Notwithstanding, it should be noted, according to DIXON, M., MCCORQUODALE, R. & WILLIAMS, S.: *Case & Materials on International Law*, cit., p. 121: "One narrow exception to this principle recognised by the Lords was where the domestic decision predated the HRA and would no longer survive following the introduction of the Act".

⁴² In *Ghaidan (Appellant) v. Godin-Mendoza (FC) (Respondent)* (2004) UKHL 30, the Court used s. 3 of HRA to reinterpret The Rent Act 1997 Schedule I, Paragraph II. Despite the fact that legislation only gave survivorship rights to couples formed by husband and wife, the Court also recognised the rights to same-sex couples. This decision showed that the Court is willing to depart from domestic legislation. However, the Court clearly asserted that if the legislation run against a "fundamental feature", they will not depart from primary legislation. In this regard, see **R (Hooper) v Work and Pensions Secretary** [2005] UKHL 29.

⁴³ DAVIS, H. (dir.): *Humans Rights Law*, Oxford University Press, Oxford New York, 2007, p. 61. However, pursuant to S.3 (2) (c) if primary legislation prevents removal of the incompatibility of subordinate legislation the court has to follow the national rule even if it is a clear violation of the Convention.

hence the higher courts may make a "declaration of incompatibility"⁴⁴. By s.4 such declaration does not affect the validity of the law⁴⁵ and there is no legal obligation on the Government to take a remedial action⁴⁶. For instance⁴⁷, in *ITR GmbH v SSHD*⁴⁸ the Court held that the penalty scheme established in the Immigration and Asylum Act 1999 was incompatible with art. 6 of the Convention due to the fixed nature of the fine was incompatible with the right to a penalty established by an independent court⁴⁹.

3. The application of HRA, section 6: Vertical and Horizontal effect in the HRA.

Pursuant to s. 6, it is unlawful for public authorities (central and local governments, the police, the NHS, the Courts but exclude the Parliament) to act against the Convention⁵⁰. Therefore, it is clear that individual citizens can enforce Convention Rights against the State ("vertical effect"). For instance, *R v CCGC*⁵¹ where the police prevented twenty-seven anti-war protestors to attend to a lawful demonstration. The court held unanimously that the police have breached the applicants Convention Rights⁵². Furthermore, s. 6(3) (b) extends the vertical effect of the HRA to any private body if it performs "*functions of a public nature*"⁵³ which is a question that must be

⁴⁴ It should be noted that only the Higher courts (neither magistrate's court nor the Crown Court) are able to make this declaration of incompatibility. Section 4 (5) has a full list of all UK courts with that power. For instance, the Supreme Court, the High Court or the Court of Appeal in England and Wales or North Ireland.

⁴⁵ These two sections suppose that the Courts have no power to overrule a statute, thereby retaining parliamentary sovereignty. Notwithstanding, the White Paper ("Bringing Rights Home") which preceded the HRA 1998 asserted that if an Act is declared incompatible, the Parliament would amend it quickly.

⁴⁶ However, Ministers will be able to amend the offending legislation by a fast-track procedure which allows avoiding the full parliamentary process (s. 10).

See more in: EQUALITY AND HUMAN RIGHTS COMMISSION, *The case for the Human Rights Act: Part 1 of 3 responses to the commission on a bill of rights: HRA plus not minus*. Available at: http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/bor_full.pdf. (Accessed on 12 October 2015)

⁴⁷ More examples can be found in FARRELL, M.: *Declarations of incompatibility made under section 4 of the Human Rights Act 1998, 2006*. Available at: <http://www.ucc.ie/law/docs/UK-Declarations-of-Incompatibility-Michael-Farrell.pdf> (Accessed on 5 October of 2005).

⁴⁸ *International Transport Roth GmbH v Secretary of State for the Home Department EWCA Civ 158*.

⁴⁹ As a consequence, the scheme was amended by the Nationality, Immigration and Asylum Act 2002.

⁵⁰ Unless their action is required by primary legislation which cannot be interpreted in a way to be compatible with the Convention.

⁵¹ *R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary (2007) 2 All ER 529*

⁵² However, in *Austin and another v Commissioner of Police of the Metropoli, 2009 UKHL 5*, the Court dismissed the claim. According to the Court, despite the fact that there was a deprivation of liberty – the claimants could not leave Oxford Circus during seven hours after a demonstration due to a false detention –, this was an issue of proportionality or degree of intensity. The court (taking the background into account) decided that the police actuation had been reasonably.

⁵³ More information in WEBLEY, L. & SAMUELS, H.: *Complete Public Law: Text, Cases, and Materials*,

decided on a case by case basis. One key decision of the Court in this topic was *Wallbank* (2003)⁵⁴ where the Court held that the Parochial Church Council – an essential part of the Church of England – was not a public core authority because it acted on the interest of the church and not the public interest and Parliament did not intend to the Church of England lose the right of claiming under the ECHR⁵⁵.

S. 6 and 7 only allow bringing actions against public authorities and not against citizens or any private body (“horizontal effect”)⁵⁶. However, academic opinion has debated as to whether use the provisions of the Act between private parties⁵⁷. Furthermore, Courts are reluctant to engage directly with this issue. Consequently, this field is characterised by the lack of clarity and uncertainty. Most of scholars agree that a citizen may not use the breach of the HRA as a cause of his action, but he may use the HRA to interpret laws which are in force and to extend rights which are recognised by common law⁵⁸. It seems that courts have asserted this limited form of horizontal effect. In *Douglas v Hello! (2001)*⁵⁹, wedding pictures of M. Douglas and C. Z. Jones were publicized without their authorization by the magazine Hello. Although the legal proceedings were between private parties, the

Oxford University Press, Oxford, 2015, pp. 467- 488.

⁵⁴ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* (2003) All ER 121.

⁵⁵ It should be noted that if an organization is classified as a core public authority, it cannot bring actions under the ECHR as a victim (s. 7 HRA and art. 34 ECHR).

Another key decision in this issue was *YL v Birmingham City Council* (2007) UKHL 27, (2008) 1 AC95, (2007) All ER 957 where a private company called Southern Cross Healthcare Ltd whose main activity was the provision of care and accommodation was not regarded as a public authority. Moreover, this decision shows the factors to be taken into account to determine if a body performs “functions of a public nature” such as if the body is exercising statutory power or the body is providing public services. See also, *Poplar Housing and Regeneration Community Association Ltd. Donobue* (2001) 4 All ER 604 or in contrast to *Wallbank* (2003), *Heather v Leonard Cheshire Foundation* (2002) 2 All ER 936.

⁵⁶ The horizontal effect is an issue which requires an exhaustive analysis. More detailed study can be found in: YOUNG, A. L.: *Horizontality and the Human Rights Act* in ZIEGLER, K. S. (ed.): *Human Rights and Private Law: Privacy as Autonomy*, Studies of the Oxford Institute of European and Comparative Law, Volume 5, pp. 35-51.

⁵⁷ An overview about the divided academic opinion can be found in *Horizontal Effect of Human Rights Act*. Available at: <http://www.lawteacher.net/free-law-essays/constitutional-law/horizontal-effect-of-human-rights-act-constitutional-law-essay.php>. (Accessed 4th October 2015).

⁵⁸ This is called “indirect effect”. This view is shared by DAVIS, H. (dir.), *Humans Rights Law*, cit., p. 83; MARSON, J.: *Business Law*, cit., p. 28 and HOFFMAN, D. & ROWE, J.: *Human Rights in the UK: An introduction to Human Rights Act 1998*, Pearson, Edinburgh, 2010, pp. 81-83.

This position seems to be hold in *Campbell v MGN Ltd* [2004] UKHL 22 where the Court stated: “The 1998 Act does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties Convention rights”.

⁵⁹ *Douglas v Hello! Ltd* (2001) 2 WLR 992. See also, *A v B sub nom Garry Flitcroft v Mirror Group Newspapers* (2002) EWCA Civ 337 (where the Court after balancing the freedom of expression and the claimants’ right to privacy dismissed the claim) and *Mosley v News Group Newspapers Ltd* (2008) EMRL 20.

Court considered the ECHR relevant to the case due to the HRA⁶⁰.

IV. CONCLUSION & LOOK TO THE FUTURE.

The HRA has had a relevant impact in the English legal system and has contributed to develop a more constitutionalized political system. Thanks to the HRA, citizens can enforce the rights recognised in ECHR before national courts (although appeals to Strasbourg are still possible as last resource) instead of bringing directly a case to Strasbourg. It allows saving money and time. In addition, the HRA has allowed avoiding conflicts between national and international law and reducing problems of bringing domestic law into line with the ECHR. However, HRA is only the first step in the right direction, provisions such as taking Strasbourg decisions into account (s.2), interpreting domestic law 'as far as possible' in a compatible way with the ECHR (s.3) or declarations of incompatibility (s.4) show that the HRA does not fully implement the ECHR into the UK legal system. Furthermore, The HRA has not entrenched the Convention Right in the UK legal system⁶¹. Therefore, the courts cannot strike down any legislation which does not comply with the Convention⁶² and it is easier that the HRA could be amended or derogated by the Parliament. For that reason, some commentators emphasize the need of a Bill of Rights in the UK.

It should be noted that it is difficult to guess the future of the HRA. The courts have taken the approach that it is for themselves to consider if a government decision was proportionate and necessary to achieve one of more legitimate purposes or not⁶³. This process of judicial review had caused relevant political tension between the judiciary and executive. As a consequence, Tony Blair (2003) and David Cameron (2006) considered to repeal the HRA. Nowadays, the UK government is promising a human rights reform which consists of a repeal of the HRA and its replacement by a Bill of Rights⁶⁴. Furthermore, according to DZEHTSIAROU & LOCK⁶⁵, if during the

⁶⁰ See also *Compsey v WWB Devon Clays* (2005) EWCA Civ. 932 and *R (on the application of Al-Skeini) v Secretary of State for Justice* (2007) UKHL 26

⁶¹ Notwithstanding, it should be noted that in *Thoburn v Sunderland City Council* (2002) EWHC 195, Lord Justice stated that the HRA was a constitutional act which could only be repealed by express provision of an Act of Parliament. According to ELLIOT, C. & QUINN, F. *English Legal System*, cit., p. 304, this could be described as a "soft" form of entrenchment.

⁶² However, in other countries such as Germany, Spain or United States, rights and freedoms are enshrined in a written Constitution and hence the Constitutional Courts are able to invalidate primary legislation which is incompatible with those rights.

⁶³ See Lord Steyn arguments in *Daly Regina v. Secretary of State For The Home Department, Ex Parte Daly*, [2001] UKHL 26

⁶⁴ See The Conservative Party Manifesto 2015. Available at: <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf> (Accessed on 10th October 2015)

passage of the Bill of Rights, the UK government does not engage with the Council of Europe, a withdrawal from the ECHR could become a reality. We should be on the lookout for Conservative Party movements because a withdrawal of the ECHR could have huge consequences in the membership of the European Union. Although EU treaties do not require to being party to the ECHR, in practice, the ECHR is used to evaluate if a candidate State complies with the article 49 of Treaty of European Union (“respect of human rights”). As a consequence, a withdrawal of the ECHR would mean a breach of UK European Obligations and hence a continued membership in the European Union might not be possible⁶⁶.

V. BIBLIOGRAPHY.

5.1. Books & Academic Journals.

ABDELGAWAD, L.: *the execution of Judgements of the European Court of Human Rights*, Council of Europe, Publishing Editions du Conseil de l'Europe, Human rights files, 2008, No. 19. Available at:

[http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19\(2008\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19(2008).pdf). (Accessed 8 October 2015).

ADAMS, A.: *Law for Business Students*, Pearson Education Limited, Edinburgh Gate, 2014.

BLACKBURN, R. AND POLAKIEWICZ, J.: *Fundamental Rights in Europe: The ECHR and its Member States 1950-2000*, Oxford University Press, Oxford New York, 2001.

COLLINS, H.: *On the (In)compatibility of Human Rights Discourse and Private Law*, LSE Law, Society and Economy Working Papers 7/2012

DAVID, H. (dir.): *Humans Rights Law*, Oxford University Press, Oxford New York, 2007.

DIXON, M., MCCORQUODALE, R. & WILLIAMS S.: *Case & Materials on International Law*, Oxford University Press, Oxford, 2011.

⁶⁵ See DZEHTSIAROU, K. & LOCK, T. (ed.): *The legal implications of a repeal of the Human Rights Act 1998 and withdrawal from the European Convention on Human Rights*, 2015. Available at: <http://poseidon01.ssrn.com/delivery.php?ID=618009031125122081126101081104123123117011052016042090064105002010124070088003025092041039044052007031061095094026002124118010008053029080082116089001007115028103071079015066068111106025111026027123096086104108013123090089019001107102077069117093092&EXT=pdf> (Accessed 7th October 2015).

⁶⁶ Ibid. p. 31.

DIXON, M., *Textbook on international law*, Oxford University Press, Oxford, 2013.

DONALD, A., GORDON, J. AND LEACH, P.: *The UK and the European Court of Human Rights*, Equality and Human Rights Commission Research Report 83, 2012.

DZEHTSIAROU, K. & LOCK, T. (ed.): *The legal implications of a repeal of the Human Rights Act 1998 and withdrawal from the European Convention on Human Rights*, 2015. Available at:

<http://poseidon01.ssrn.com/delivery.php?ID=618009031125122081126101081104123123117011052016042090064105002010124070088003025092041039044052007031061095094026002124118010008053029080082116089001007115028103071079015066068111106025111026027123096086104108013123090089019001107102077069117093092&EXT=pdf> (Accessed 7th October 2015).

ELLIOT, C. AND QUINN, F.: *English legal system*, Pearson, Edinburgh, 2013.

EQUALITY AND HUMAN RIGHTS COMMISSION: *The case for the Human Rights Act: Part 1 of 3 responses to the commission on a bill of rights: HRA plus not minus*. Available at:

http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/bor_full.pdf. (Accessed on 12 October 2015).

FARRELL, M.: *Declarations of incompatibility made under section 4 of the Human Rights Act 1998*, 2006. Available at:

<http://www.ucc.ie/law/docs/UK-Declarations-of-Incompatibility-Michael-Farrell.pdf> (Accessed on 5 October of 2005).

FEDMAND, D.: *Monism, Dualism and Constitutional Legitimacy*, 20 Australian Yearbook of International Law, 1999

GIBSON, B. (ed.): *Human Rights and the Courts: Bringing Justice Home*, Waterside Press, Winchester, 1999

HARRIS, D. J., O'BOYLE, M., BATES, E. & BUCKLEY, C.: *Law of the European Convention on Human Rights*, Oxford University Press, Oxford, 2014, p. 26.

HOFFMAN, D. & ROWE, J.: *Human Rights in the UK: An introduction to Human Rights Act 1998*, Pearson, Edinburgh, 2010.

JAYAWICKRAMA, N.: *The judicial application of Human Rights Law: National*,

Regional and International Jurisprudence, Cambridge University Press, Cambridge, 2002, p 329.

JUDGE, S.: *Business Law*, Palgrave Macmillan, Great Britain, 2009

KAVANAGH, A.: *The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998*, Oxford Journal of Legal Studies, Vol. 24, No. 2 (2004), pp. 259–285

KEENAN, S. & ALLEN, V.: *Business Law*, Pearson, Edinburgh, 2013

MACINTYRE, E.: *Business Law*, Pearson Education Limited, Edinburgh Gate, 2012

MACOVEI, M.: *A guide to the implementation of Article 10 of the European Convention on Human Rights*, Human rights handbooks, Germany, Council of Europe, 2004, No. 2.

MALLESON, K. AND MOULES, R., *The legal system*, Oxford, Oxford University Press, 2010

MARSON, J.: *Business Law*, Oxford University Press, Oxford, p. 26.

MINISTRY OF JUSTICE: *Making sense of Human Rights*, p. 5. Available at: <https://www.justice.gov.uk/downloads/human-rights/human-rights-making-sense-human-rights.pdf> (Accessed 2 October 2015).

MOLE, N. & HARBY, C.: *A guide to the implementation of Article 6 of the European Convention on Human Rights*, Human rights handbooks, Germany, Council of Europe, 2006, No. 3.

PARKER, G.: *Planning and Rights: Some Repercussions of the Human Rights Act 1998 for the UK*, Planning Practice & Research, Vol. 16, No. 1, pp. 5–8, 2001

REHMAN, J.: *International Human Rights Law*, Pearson, Edinburgh Gate, 2010

REIDY, A.: *A guide to the implementation of Article 3 of the European Convention on Human Rights*, Human rights handbooks, Germany, Council of Europe, 2003, No. 6.

SMITH, R.K.M.: *Textbook on International Human Rights*, Oxford University Press, Oxford New York, 2010.

STEYNER, H. J., ALSTON, P. & GOODMAN, R.: *International Human Rights in*

Context, Oxford University Press, Oxford New York, 2008

WAGNER, A.: *Article 2/Right to life*, (web blog), Available at: <http://ukhumanrightsblog.com/incorporated-rights/articles-index/article-2-right-to-life/> Accessed 3 October 2015).

WALLINGTON, P.: *The European Convention on Human Rights and English Law*, The Cambridge Law Journal, 1975, Volume 34, pp 9-11.

WARBRICK, C.: *The Governance of Britain*, International and Comparative Law Quarterly 2008, Volume 57, pp. 209-217

WEBLEY, L/ & SAMUELS, H.: *Complete Public Law: Text, Cases, and Materials*, Oxford, Oxford University Press, 2015

YOUNG, A. L.: *Horizontality and the Human Rights Act* in ZIEGLER. K. S. (ed.): *Human Rights and Private Law: Privacy as Autonomy*, Studies of the Oxford Institute of European and Comparative Law, Volume 5

5.2. Table of cases

European Court of Human Rights

- A v B sub norm Garry Flitcroft v Mirror Group Newspapers (2002) EWCA Civ 337
- Al-Khawaja and Tahery v the United Kingdom, applications nos. [26766/05](#) and [22228/06](#).
- Autronic AG v. Switzerland, Appl. No. 12726/87, Series A no. 178
- Bankovic and other v. Belgium and Others ECtHR, Application no. 52207/99, Grand Chamber, 12 December 2001
- Brannigan and McBride v UK ECHR series A (1993) No. 258 B
- Chahal v The United Kingdom, 1996, Application no. [22414/93](#)
- Chorherr v. Austria, Appl. No. 13308/87, Series A no. 266- B
- Cooper v United Kingdom, Application no. [48843/99](#)
- Groppera Radio AG and Others v. Switzerland, Appl. No. 10890/84, Series A no. 173
- Handyside v. the United Kingdom, 1976 Appl. No. 5493/72, Series A no. 24
- Issa and Others v. Turkey, ECtHR, Application no. 31821/96
- Le Pen v. France, 2010 Application No. 18788/09.
- Malone v The United Kingdom, ECHR 2 Aug. 1984
- Marckx v Belgium (1979) Application no. [6833/74](#)

- Morris v United Kingdom, Application no. [38784/97](#)
- Müller and Others v. Switzerland, Appl. No. 10737/84, Series A no. 133
- Oberschlick v. Austria, Appl. No. 11662/85, Series A no. 204
- Observer and Guardian v UK A 216 (1991); 14 EHRR 153 PC
- Otto-Preminger Institut v. Austria, Appl. No. 13470/87, Series A no. 295-A
- Saadi v Italy, 2008, *Application no. [37201/06](#)*
- **Sahin v Turkey, 2005 [Application no. 44774/98](#)**
- Tekin v. Turkey judgment of 9 June 1998, ECHR 1998-IV, §52.
- Vogt v. Germany, Appl. No. 17851/91, Series A no. 323

UK courts.

- A v B sub nom Garry Flitcroft v Mirror Group Newspapers Ltd (2002) All ER 545
- A-G for Canada v A-G for Ontario (1937)
- Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank (2003) All ER 1213
- Austin and another v Commissioner of Police of the Metropoli, 2009 UKHL 5
- AY Bank (in liquidation) v Bosnia & Herzegovina (2006)
- Berrehab v Netherlands (1989) 11 EHRR 322
- Campaign for Nuclear Disarmament V. Prime Minister [2002] EWHC 2777
- Campbell v MGN Ltd (2004) UKHL 22
- Compsey v WWB Devon Clays (2005) EWCA Civ. 932
- Daly Regina v. Secretary of State for The Home Department, Ex Parte Daly, (2001) UKHL 26
- De Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others, (1998), UKPC 30.
- Douglas v Hello! Ltd (2001) 2 WLR 992.
- Ghaidan (Appellant) v. Godin-Mendoza (FC) (Respondent) (2004) UKHL 30
- Handyside v. the United Kingdom, Appl. No. 5493/72, Series A
- Heather v Leonard Cheshire Foundation (2002) 2 All ER 936.
- International Tin Council Case (J.H. Rayner (Mincing Lane Ltd v. Department of Trade and Industry) (1990) 2 AC 418, United Kingdom House of Lords).
- International Transport Roth GmbH v Secretary of State for the Home Department EWCA Civ 158.

- Kay v Lamberth London Borough Council (2006) UKHL 10
- Leeds City Council v Price (2006) UKHL 10
- Maclaine Watson v Dept. Of Trade (1990) 2. A.C. 418 at 500 HL
- Malone v Metropolitan Police Commissioner (1979)1 CH 344
- McNair (1928) 9 B. Y.I.L. 59.
- Mosley v News Group Newspapers Ltd (2008) EMRL 20.
- Poplar Housing and Regeneration Community Association Ltd. Donohue (2001) 4 All ER 604
- Porter v. Freudenberg (1915) 1. K. B. 857
- Q and others, (R on the application of) v the Secretary of State for the Home Department [2003] EWCA Civ 364
- R (Alconbury Developments Ltd) v Secretary of State for the Environment (May 9 2001) [2001] 2 WLR 1389.
- R (on the application of Al-Skeini) v Secretary of State for Justice (2007) UKHL 26
- R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary (2007) 2 All ER 529
- R v Horncastle and others (2009) UKSC 14
- R v Spear, Hastie and Others (2002) UKHL 31
- R. V Secretary of State for the home department, (2006) 2 AC 220
- Salomon v Commissioners of customs and excise (1967) 2 Q.B. 116. Court of Appeal
- Secretary of a State for the Home Department v AF (No.3), (2009), UKHL 28.
- The Parlement Belge (1878-1879) 4. P.D. 129. Probate, Divorce and Admiralty Division;
- Thoburn v Suderland City Council (2002) EWHC 195
- Waddinton v Miah (1974) 1 WLR 683
- YL v Birmingham City Council (2007) UKHL 27, (2008) 1 AC95, (2007) All ER 95