



Rebalancing the British Constitution

The future for human rights law

Jim McConalogue

CIVITAS

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Author

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Summary

Practical guidance

- The repeal of the Human Rights Act (HRA) is now well overdue, given its detrimental impact on the UK constitution.
- The UK must withdraw from the jurisdiction of the European Court of Human Rights (ECtHR) in Strasbourg.
- By giving up jurisdiction, we would cease to be a signatory to the European Convention on Human Rights (ECHR).
- Parliament and the courts would continue to be respectful of the rights entailed in the Convention. This would symbolise the UK's continuing recognition of the basic aspirational standards set out in the Convention as a basic moral code that may be used to guide decision-making.
- Given the need to avoid the dangers of judicial overreach in several areas, the UK should seek to reform the Supreme Court in London into the final appellate court for human rights law.

Introduction

- The Conservative government's commitment to 'update' the Human Rights Act provides it with a window of opportunity to finally repeal the Act and withdraw from the jurisdiction of the European Court of Human Rights.

- As a result of many years of campaigning by lawyers, judges, international rights activists and pressure groups, the 1998 Act led to vitally important changes including the enabling of judicial supremacy within the UK constitution.
- Against the novelties of the Human Rights Act and the haste of incorporating vastly expansive Strasbourg court jurisprudence, Britain's unwritten constitution has been severely eroded.
- The glaring contradiction between the government withdrawing from an EU legal architecture while seeking to enhance a complementing Council of Europe rights-based system is currently mismatched and in the future, will become unmanageable.
- It is increasingly claimed that we need a codified constitution with the Human Rights Act at its heart after Brexit but that has entirely missed the 'politics of our age'. The public desire after Brexit is to have a stronger democratic process in which applicable rights and laws are derived from a strongly contested debate within the democratic public sphere; they are no longer there to be administered by a foreign court and unchallengeable by the public or left practically unamendable by parliament.
- It is time for all parties to move beyond the old Hobson's choice of the Human Rights Act or a Bill of Rights and to accept the principles of responsible government.

Parliamentary democracy

- The enactment of the Human Rights Act and its practice over the last 22 years has unbalanced the Westminster constitution, encouraging a fervent judicialisation of

politics, with negative consequences for parliamentary democracy.

- The theoretical assumptions that ‘declarations of incompatibility’ would enable parliament to decide on rights issues, in practice enabled only courts to decide – with only one declaration resisted by parliament in the entire process.
- By abolishing the Human Rights Act, political disagreements on rights by majority-decision would enable a respectful discourse by taking of votes on rights issues and remaining equally respectful of individual opinion for making specific choices. Legislation by a parliament enjoys a greater sense of democratic legitimacy than decisions made by judicial review.

Judicial supremacy

- The incorporation of the Convention, through the Act, created a questionable new role for British judges in determining policy outcomes.
- Britain has been handed down the tenth highest number of Strasbourg court judgements and appears willing to contemplate the gradual emergence of a court with the equivalent jurisdiction throughout Europe of that enjoyed by the US Supreme Court, but without the consent of its electorate.
- Over almost 60 years, the UK has received a greater number of judgements (547) than Albania (79), Denmark (51), Ireland (36), Norway (48), Spain (167), Montenegro (50) and Malta (89) put together.
- The Human Rights Act is said to be ‘an integral part’ of the British constitution, because on paper it claims to

check unwieldy executive power and yet in practice, it emboldened a new source of judicial authority of rights, far removed and insulated from the electorate, regular public debate and decision-making in parliament.

- Past comments of a former Law Lord and other academics on the development of the UK ‘towards becoming a true constitutional state’ in which ‘the coming into force of the Human Rights Act 1998 ... was a landmark’ could be made more manageable by navigating the obstacle of that Act and reinventing a legitimate British rights moral code for the twenty-first century.
- Convention rights unpicked the British historical tradition of ‘shared rights provision’ because the Act has meant that the constitution must now lean towards the judicial power of the common law courts – in defence to foreign rights charters – in deciding what constitutes rights.
- For much of the Act’s history, the national court deference to the Strasbourg court had been made clear by the practices of the judges through the ‘mirror principle’, interpreted by the Law Lords as ‘Strasbourg has spoken, the case is closed.’
- Radical common lawyer arguments at home rely heavily upon the implementation of the Human Rights Act and the continued incorporation and application of Convention rights, as bolstering the supremacy of judges and judge-made law in the UK Constitution.

The power of the executive to govern and protect

- Former Prime Ministerial and Home Secretary speeches pledged to scrap the Act and potentially withdraw from the Convention but political circumstances appeared

to prohibit those essential changes. A Conservative government with an 80-seat majority is now conceivably better placed to finally deliver that legislative aim.

- The deportation of Abu Qatada and the Strasbourg court's continued moving of the goalposts under the Human Rights Act allowed the Court to establish new, unprecedented legal grounds on which it blocked his deportation.
- Even under the emergency of post-2001 terror threats, the requirement for national security and the detaining of foreign terrorist suspects had been forfeited under the Human Rights Act, notably in the *Belmarsh* ruling.
- The challenge to the principle of ministerial responsibility – as an essential part of Britain's democratic civilisation – remains at odds with the fervent judicialisation of politics and rights under the Human Rights Act.
- The legitimising of Convention rights, through the Human Rights Act, to enable 'lawfare' and the ongoing legal investigations into, and litigation against, Britain soldiers must come to an end.
- The capacity to govern and protect the nation state must, in modern times, operate in the face of serious ambiguity because of the Act.

Sovereignty and the restoration of British human rights

- Under the UK constitution, electors and governments look to parliamentary sovereignty as a stabilising force in which the laws of the government-in-parliament are binding upon the UK and could be set aside by no body other than parliament.

- When the doctrine of legislative supremacy is set aside, so is the stability afforded by that sovereignty doctrine.
- The protracted proceedings in the Abu Hamza case, much of which followed the Strasbourg court's intervention, shines a light on the rights of terrorists in relation to society's right to national security and the future assumption that a legislature would be able to provide a more appropriate balance.
- To reassert its practical sovereignty against a fervent judicialisation of rights, parliament should, having now legislated to repeal the European Communities Act (ECA) 1972 and remove EU fundamental rights obligations, now choose to also alter its human rights obligations under the Human Rights Act.
- The Human Rights Act contains provisions which enabled a direct judicial confrontation with parliament over prisoner voting rights (in the *Hirst* judgement) and enabled judges to give greater weight to the rights of offenders, while simultaneously endangering the most fundamental of rights of others in society.
- The historic assumptions therefore that whoever commanded a majority in the House of Commons wielded a considerable degree of executive power is now part-constrained by absurd obligations put in place and supported by hasty reforms of a post-1997 Labour administration generation, gripped by neo-liberal assumptions of unqualified rights.

Reclaiming democracy and deliberation as the foundation for future rights

- The openness to politics as the foundation of rights entails the rejection of them as constitutionally entrenched and politically immovable.
- The Human Rights Act 1998 was an abdication of legislative responsibility – the product of the political class of 1998, fearing the process of debate and argument on rights.
- The treatment of the Convention by the Strasbourg court as a ‘living instrument’ has allowed the court to make new law beyond the text of the Convention, and beyond the parliament’s intentions in legislating for the Act. It is a situation which requires withdrawing from the Convention altogether.
- To have marginalised entire sections of society from rights-questions under the Act – which has often included marginalising the majority of voters – in the consenting to, and making of rights (as a matter ‘not for them’), is a judgement on which the disregarded majorities have taken great offence.

Introduction

A significant window of opportunity has been opened by the current Conservative government in setting out its election manifesto of December 2019 a series of reforms reflecting constitutional developments within the past four governments, including:

- That after Brexit we need to look at the broader aspects of our constitution;
- There is a need to focus on the relationship between the government, parliament and the courts;
- A pledge to update the Human Rights Act (HRA) and administrative law to ensure that there is a proper balance between the rights of individuals, national security and effective government;
- A pledge to ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ‘ensuring that it is not abused to conduct politics by another means’ or to create needless delays;
- In the first year, it would be incumbent upon the government to set up a Constitution, Democracy & Rights Commission that will examine these issues in depth and come up with proposals to restore trust in our institutions and in how our democracy operates.¹

To differing degrees, those five pledges reflected not only the zeitgeist of the government's policy commitments but are pertinent to the central theme of this book which more explicitly focuses on the necessary repeal of the Human Rights Act 1998 – complete with the ability of the UK to finally withdraw from the jurisdiction of the European Court of Human Rights (ECtHR). As with most UK rights reforms, such a move has never essentially been about eroding people's fundamental rights. To the contrary, the UK has a long tradition of respect for rights that precedes the Human Rights Act 1998, and the European Convention. The UK history of protecting human rights dates back over 800 years to Magna Carta, and well before that date.²

On the occasion of the Queen's Speech on 14th December 2019, held rapidly after the 2019 general election, the Conservative government's commitment to: establish the Commission to examine the broader aspects of the constitution and develop reforms to restore trust in our institutions, as well as repeal the failed Fixed-term Parliaments Act were all reaffirmed. It went as far as to give careful consideration to the composition and focus of the Commission.³ Furthermore, as part of the negotiated EU withdrawal agreement, the government's written commitment to only be respectful of the European Convention in the associated 'Political Declaration' (rather than remain 'obliging') seems indicative of future potential changes to the Human Rights Act, if not the binding nature of the Convention.⁴

The tensions between the government and the legal profession following the announcement of the Commission were obvious from the beginning. In the 2019 Christmas period that followed the election, both senior judicial figures and peers had warned Boris Johnson against interference

with the independence of the judiciary. In the pledged Commission, they expressed concern over the government's plans to overhaul their role in the constitution. Simon Davis, President of the Law Society of England and Wales notably suggested that the scope of the new commission needed to safeguard the 'delicate balance that underpins our unwritten constitution'. Davis rightly went on to say that 'We must preserve and protect these principles at all costs'. An essential part of his statement addressed an underlying problem:

Our court system and our judges are there so the law laid down by parliament can be interpreted. In a mature democracy, it is crucial that the independence of this process is maintained.⁵

And yet, independence has not been maintained. The very fact that judges merely interpret the law laid down by parliament has been undermined by the statutory incorporation of European Convention rights. An independent judiciary is no longer independent when it makes major policy and political decisions, no matter how much it might enjoy such an overstated power within the current UK constitution. Claims to 'the independence of our judiciary' had long fallen by the wayside, so the very claim that they 'must be safeguarded in this review'⁶ would be better expressed as a theoretical judicial independence which needs to be restored in practice. Some of those intervening in the announcement of a Commission allege the government is attempting thereby to politicise the judiciary; the evidence to date however suggests that through the Human Rights Act, many leading judicial authorities and academics have themselves chosen to politicise the role of judges. The system must therefore be stabilised by the executive and parliament to return the judiciary to its former independence.

It has become patently clear that the Human Rights Act, incorporating the Convention, as well as the Strasbourg court and its expansive European-style judicial interpretation have all contributed towards significant political failures and an ongoing detrimental impact on the UK constitution. It has damaged the essence of our parliamentary democracy and sovereignty. It exerts a constant threat of judicial supremacy justified under a rapidly evolving Strasbourg jurisprudence. It enables the erosion of executive power as those in charge of governing, protecting and defending the national interest. It is a politically offensive piece of legislation which supplants the well overdue domestic need to reinvigorate our own national British human rights ‘moral code’, including the capacity to politically debate and settle those rights for ourselves – that is, not to have them imposed from above. On rights questions, Britain must urgently put its house in order.

The Human Rights Act and the Convention: what do they mean?

The Human Rights Act 1998 contains ‘the fundamental rights and freedoms that everyone in the UK is entitled to.’ It incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic British law.⁷ The Act itself begins with the introductory words ‘...to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights.’⁸ On the face of it, as the former Law Lord, Baron Hoffmann stated, the text of the Convention:

...seems to me a perfectly serviceable abstract statement of the rights which individuals in a civilised society should enjoy.⁹

The values which it expresses have deep roots in our national history and culture.¹⁰ It continues to secure rights which the former justice of the UK Supreme Court, Lord Sumption indicated, would almost universally be regarded as the foundation of any functioning civil society.¹¹ The former justice minister, now Foreign Secretary, Dominic Raab, once commented that:

For all the contentious debate about human rights, few argue against the common-sense list of rights set out in the text of the European convention on human rights.¹²

Equally, as one of Britain's leading human rights barristers Geoffrey Robertson QC once conceded, the Convention's Euro-prosaic language is typically uninspiring and is absent of the kind of preamble that roots it in any kind of British history or experience.¹³ The Human Rights Act came into force in the UK in October 2000. The Act sets out 'human rights' in a series of 'Articles', all of which are taken from the Convention and are commonly known as 'the Convention Rights', including the following:¹⁴

- Article 2: Right to life
- Article 3: Freedom from torture and inhuman or degrading treatment
- Article 4: Freedom from slavery and forced labour
- Article 5: Right to liberty and security
- Article 6: Right to a fair trial
- Article 7: No punishment without law
- Article 8: Respect for your private and family life, home and correspondence
- Article 9: Freedom of thought, belief and religion

- Article 10: Freedom of expression
- Article 11: Freedom of assembly and association
- Article 12: Right to marry and start a family
- Article 14: Protection from discrimination in respect of these rights and freedoms
- Protocol 1, Article 1: Right to peaceful enjoyment of your property
- Protocol 1, Article 2: Right to education
- Protocol 1, Article 3: Right to participate in free elections
- Protocol 13, Article 1: Abolition of the death penalty

The Act therefore made the Convention ‘a part of the law of the land’.¹⁵ The Act secures the rights of the Convention within the UK jurisdiction. When a person’s rights are violated, it seeks to ensure that they are able to access effective remedy. An important part of this is the reassurance a person can take their case to court to seek a judgment.

By incorporating the rights set out in the European Convention into domestic British law, an individual who claims their human rights have been breached are therefore able to take their case to a British court – rather than having to seek justice from the European Court of Human Rights in Strasbourg.¹⁶ The Convention provides for an international court in Strasbourg to decide whether in any particular case the UK, and all other signatory states, had complied with its duty to accord the Convention rights. Individuals in a state could therefore petition the court with a complaint that their rights had been violated.¹⁷ It also imposes a direct requirement upon the courts, police, local authorities, hospitals, publicly funded schools, and several other bodies, carrying out public functions to respect and protect those

human rights.¹⁸ Under Article 46(1) of the Convention, the UK is obliged to implement judgments of the Strasbourg court in any case to which it is a party.¹⁹

The Act also meant that parliament would always need to ensure that new Acts of Parliament are compatible with the rights set out in the European Convention on Human Rights. As one political consultant, Michael Pinto-Duschinsky put it, the provisions of the Convention came to control and limit all other laws.²⁰ A tension in that commitment reflects that parliament is sovereign and can still pass laws which are incompatible. When adopting the Act, the political framers insisted – at least, on paper – on preserving parliament’s final say on the legality of legislation.²¹ The courts are bound to interpret laws in a way which are compatible with Convention rights.²² The Act enabled the courts to take a more active role which fell under their new duty to interpret all legislation, where it was possible to do so, so that it conformed to the Convention.²³

As the former President of the Supreme Court, Lady Hale suggested, the Act does not supersede the protection of human rights under the common law, nor create a discrete body of law based upon the judgments of the European court. Human rights continue to be protected by UK domestic law, interpreted and developed in accordance with the Human Rights Act when appropriate.²⁴ Lady Hale, in common with Lord Reed (now the current president of the Supreme Court), acknowledge the tendency has been that where the existing common law or statute falls short of what is required to meet Convention requirements, the courts could then respond by developing the common law or interpreting the relevant statute in the light not only of Strasbourg judgments but also other common law jurisdictions.²⁵

The historical development: understanding the intentions of the European Convention and the Human Rights Act

In the post-war British political settlement, Britain had been instrumental in creating the Council of Europe in 1949 but was also one of the first countries to ratify the Council's European Convention on Human Rights in 1951 under Atlee's Labour government.²⁶ The Convention was then drafted under the auspices of the Council of Europe in 1950, just five years after the end of World War II.²⁷ Despite Britain being central to developing the Council of Europe, the nation's fundamental attitude towards European integration had not changed. They did not welcome the idea of European unity – the political class at the time insisted upon very strict limits towards the scale of British involvement in European organisations.²⁸ It was because of Britain's involvement that the Council of Europe itself was mainly an intergovernmental rather than a supranational organisation.²⁹ Among its provisions was the establishment of a European Court of Human Rights sitting in Strasbourg together with a preliminary tribunal known as the European Commission of Human Rights.³⁰

The suggestion however that the Convention might somehow be understood as an exclusively British creation is in the words of Dominic Raab, '...overegging the pudding or rewriting history.'³¹ After all, the negotiation of the Convention witnessed an interesting debate between the common law and civil law traditions, evidenced from the travaux préparatoires of the Convention. The Convention which arose out of those negotiations essentially reflects the compromise between those two very different traditions and approaches.³²

Since the 1950s and 1960s, activists, politicians, judges and lawyers continued to seek a more binding domestic human

rights agenda, despite commitments already existing at an international level.³³ The UK judiciary gradually and continuously expanded the basis for judicial review of administrative acts.³⁴ Previously, individuals claiming that the government or authorities had breached their fundamental rights were required to make a claim before the Strasbourg court. The judges' elevation in the constitution notably began during this time through the introduction of a new cultural generation of judges serving in the Court of Appeal and on the Judicial Committee of the House of Lords³⁵ – which is the predecessor to the Supreme Court. Instead of the deference to parliament and ministers, the judges held that citizens in their view had 'certain rights'. They saw it as their role to protect those rights even when it was clear they conflicted with ministers or parliament itself. Aware of developments in jurisprudence coming from Europe, the British judges became 'increasingly restive.'³⁶

Under international law, the UK has been bound by the Convention since 1953 when it came into force. Individuals in the UK have been able to exercise the right to take cases to the European Court of Human Rights in Strasbourg since 1966. Under Harold Wilson's Labour government, British citizens had been granted the right to appeal directly to the court.³⁷ It is reported by Michael Pinto-Duschinsky that there was no recorded discussion of this decision in either the Cabinet or any cabinet committee.³⁸ The late political scientist Anthony King commented that, in the passage of time after 1966 – when individual citizens were allowed to petition the European Commission on Human Rights – a significant number of petitions were brought against the British government.³⁹ The decisions of the Strasbourg court were not then binding. However, even where the government was not required to comply with decisions at

Strasbourg, it did so to meet its international obligations, thereby introducing changes which would bring UK law into line with those court judgements.⁴⁰ It was only a period of time before judges and politicians began to ask why Britain did not have a Human Rights Act of its own, given the Strasbourg court judgements were being taken so seriously by the national courts.⁴¹

The subsequent Human Rights Bill – to incorporate the Convention into UK law – was introduced into parliament in 1997. The Labour Party's proposals in the 1997 manifesto had highlighted the incorporation of the European Convention on Human Rights into UK law.⁴² In the first parliamentary session, the government provided for that incorporation of the Convention. It thereby reinforced the 'new juridical dimension of the British Constitution'.⁴³ Over time, the exercise of that judicial power has expanded at the expense of legislative and executive powers and seems likely to continue along this path.⁴⁴

For the purposes of judges, Lord Neuberger (again, a former president of the Supreme Court) remarked that before the Human Rights Act had come into force, the Convention was not part of domestic law, so decisions of the UK courts were made without taking the Convention or the Strasbourg jurisprudence into account.⁴⁵ They did provide general guidance as to what was going on internationally. Under the Act, when it came to statutes, judges must now try to interpret them to ensure they were compliant with the Convention, and when they can't, then the judges cannot simply overrule them. The judge must declare them incompatible with the Convention,⁴⁶ leaving it (in theory) for parliament to deal with the issue at hand. The 1998 Act enjoins all UK courts to 'have regard to' decisions of the Strasbourg court.

As a result of many years of campaigning by lawyers, international rights activists and pressure groups,⁴⁷ the Act led to vitally important changes for the courts, including that it has made the rights set out in the Convention into rights in UK law. Judges no longer need to rely solely on the common law as they have a clear European-level statement in the Convention of what the rights entail and the circumstances in which they may be qualified or taken away. The Act requires that, so far as it is possible to do so, both primary and secondary legislation should be read and given effect compatibly with the Convention rights.⁴⁸ The judges are therefore no longer searching only for the intention of the legislature in interpreting the law but for a way of reading its words which is compatible with the Convention rights if at all possible. The Act does not technically allow judges to ‘strike down’ provisions in statute which cannot be read compatibly with the Convention rights, but they can declare that they are incompatible.⁴⁹ This is said to be a neat way of reconciling the protection of fundamental rights with the sovereignty of parliament, although in practice this can be contested. Both government and parliament are given a ‘clear message’ that the judges think the law to be in breach of the UK’s international obligations under the Convention.⁵⁰

The impact on the ‘Unwritten Constitution’

Against the novelties of the Human Rights Act and the haste of incorporating vastly expansive Strasbourg court jurisprudence, Britain’s unwritten constitution has been severely eroded. The incorporation of Luxembourg and Strasbourg fundamental rights charters – notably, the EU Charter of Fundamental Rights and the Council of Europe’s European Convention on Human Rights – into the UK context has posed specific but serious challenges.

Unlike many other modern states, Britain in retaining self-government and flexibility did not historically have, or desire, a codified, rights-based constitution. Instead, it enjoyed an unwritten one, formed merely from Acts of Parliament, court judgements and conventions.⁵¹ In itself, this has not prevented groups of leading academics and judges from desiring a more codified UK Bill of Rights, if not fully written constitution.

The UK continues to defer to Acts of Parliament, custom and conventions in setting out the structure of government and its relationship with its citizens – it cannot defer to a single document of rights in this task as no such binding document exists.⁵² The UK shares in common with New Zealand and Israel this nearly unique circumstance among modern states: the non-adoption of a constitutional document. British constitutional orthodoxy reflects that there is no ‘fundamental law’ that parliament cannot alter or abrogate at will.⁵³ It contrasts well with the US model, with its emphasis on a central, written constitution. As Professor of Constitutional Law at King’s College London, Robert Blackburn QC, identifies, the British constitution comprises an accumulated practice of conventions, laws and customs which have evolved over considerable periods of time, notably after the Glorious Revolution and the Bill of Rights (1689) marked the supremacy of parliament over the Crown.⁵⁴ The merits of the constitution remaining simple and flexible can be better expressed as one which is partly written in Acts of Parliament and court judgements, meaning it is a ‘partly written but wholly uncoded’ constitution.

A direct and unfortunate consequence of introducing the Human Rights Act’s powers of judicial review has been the partial diminution of valuable historical customs. The previous significance assigned to customs and conventions

which enabled the cooperative-but-separated institutions of state to work together has been subverted.⁵⁵ Those unwritten rules of UK institutions had been vital to the politics and operation of government. The well-meaning hopes and aspirations of the Human Rights Act, namely, to incorporate into UK law the rights guaranteed under the European Convention have overridden those 'British conventions' to the extent that the electorate look now to the judiciary, not legislators, for the remaking and remedying of rights in contemporary society.

Completing Brexit: exiting judge-made, rights-based Europe

The glaring contradiction between the UK government withdrawing from a European Union legal architecture while occasionally seeking to enhance a complementing European rights-based system is currently mismatched and for the future, will become unmanageable. The impact will be further compounded by the continued pursuit of a doctrine encouraging European-wide legal integration which has become deeply unpopular with the electorate. The controversial issues that are in question – including providing prisoners with the vote, or providing justice to those affected by the Troubles in Northern Ireland – are matters of serious public concern; and yet fundamental political questions have been reassigned over 22 years by many successive governments to the jurisdiction of a foreign court. The parallels in the built-up public resentment over the degree of European government in relation to the Brexit question are patently obvious and it remains to be seen how long the rights question will continue to be overlooked. Moreover, as the legal philosopher Professor Jeffrey Goldsworthy said, if we are to accept a fundamental change

in that elevation of judicial power in the UK's constitutional position, it would almost certainly need to be effected by the public or at least the elected MPs, not merely the legal elites of academics and judges.⁵⁶

The Brexit process continues to imply the repeal of the Human Rights Act. The UK is however being presented with the contrary proposition by politicians, senior academics and judges: that because of Brexit, the Human Rights Act becomes even more central and forms the central part of a future codified UK constitution.⁵⁷ Interestingly, the Brexit debates have already highlighted a small-scale desire among activists, academics, radical lawyers, and a niche grouping of parliamentarians for a new written constitution, mostly (but not all) from within a vocal but narrow political caucus who passionately wished to remain inside the EU and often as a vehicle for saving EU codified rights within our domestic constitutional boundaries. While Professor Vernon Bogdanor has argued in *Beyond Brexit: Towards a British Constitution* that the European Communities Act 1972 entrenched European law into the British constitution, it must surely be seen on a straightforward reading that Brexit will now largely disentrench this law and policy. Throughout EU membership, the European Communities Act had strengthened the courts at the expense of parliament – and therefore its electors – as well as the executive.

Under EU withdrawal, a Brexit process, by its very nature, will 'resettle' its legislative competences in a strengthened parliament and the executive at the expense of fervent interpretations of foreign charters by the judges. It is perhaps more of a resettlement, than a restoration, because as Bogdanor rightly acknowledges, the UK is not going backwards (for example, governing power is asymmetrically devolved to the nations and delegates policy

to elected mayors) and a return to pre-1973 seems unlikely.⁵⁸ Powers are being resettled, not restored as such.⁵⁹ By taking back control, parliament is resettling those powers from the European Union; an essential part of this is that parliament and the government will take back control of their decision-making capacities from the national and Luxembourg courts.

However, Bogdanor heavily qualifies the return of powers in the EU withdrawal process by suggesting the Human Rights Act, for example, has already undermined the sovereignty of parliament and has elevated the principle of the rule of law into the constitution. The Brexit process for Bogdanor will be complicated, he suggests, because of the long period of constitutional reform which began with Tony Blair's government in 1997 and continued with coalition government in 2010. At its heart, the Human Rights Act required government and all other public bodies to comply with the Convention rights. The constitutional reforms since 1997, with the Human Rights Act at its heart, means the UK has gradually transformed its constitution into a new, codified one of a multinational state.

The difficulty is in his assumption that those reforms and recent Acts of Parliament should be viewed as entrenched. By traducing the kind of thinking that Brexit will return the sovereignty of parliament as going against the trends of the last 45 years⁶⁰ seems to ignore entirely what the Brexit process has achieved. The EU withdrawal process has repealed the European Communities Act with the EU (Withdrawal) Act 2018. In that Act, it has entirely undone that cosy consensus in which a process of rights-instruction was said to be 'done and settled'. The Human Rights Act continues to present major challenges, as do so many of the sticky-plaster ad hoc deals of devolution – while those supposedly major fudge

constitutional acts of the Fixed-term Parliaments Act 2011 and the European Union Act 2011 are due to be repealed, neither lasting a decade on the statute book. Arguably, the errors laid within all those items of legislation is their careless oversight of fundamental principle: that the British constitution is uncodified, customary and rests on the principle of parliamentary sovereignty.⁶¹

Bogdanor and many others have argued that Brexit strengthens the necessity of a codified constitution, with the Human Rights Act at its heart. It seems more evident that EU withdrawal has now weakened the case for a codified constitution and the Human Rights Act because the Brexit vote in 2016 and subsequent government policy has meant a rejection of EU judicial interference and fundamental rights charters – including the EU Charter of Fundamental Rights, which is now taken out of UK law by the Withdrawal Act. The Convention, much like the Charter itself, did not simply translate into supplying rights for ordinary citizens. The way in which the Convention has set about prioritising the rights of terrorists or safeguarding compensation for criminals above and beyond public safety, national security and considerations of the public purse appeared wholly unjustifiable. For example, as early as 1994, the Strasbourg court decided that the killing of three IRA suspects in Gibraltar in 1988 by members of the British security forces was a violation of the right to life under the Convention.⁶² Although Bogdanor also finds that referendums and devolution settlements produce uncertainty which also needs to be managed, he directs considerable attention to a much-needed codified constitution based on there being no agreed understanding on what our rights should be or how they should be protected.⁶³ He critiques the majoritarian tendency as finding it difficult to accommodate rights against

the state, while ignoring that the contested nature of rights meant that they were at least subject to a democratic political process, which the Convention has disturbingly subverted.

It can be acknowledged, as Bogdanor recognises in earlier literature, that the balance between parliamentary sovereignty and European-wide fundamental rights provision, or more generally the rule of law, has become more pertinent, if not controversial, since the Human Rights Act 1998 was passed, incorporating the Convention.⁶⁴ The European Convention did give individuals the right to complain of breaches of their Convention rights. The Human Rights Act in 1998 then meant it was possible to enforce 'foreign' Convention-rights in the domestic courts, not only in Strasbourg.⁶⁵ In content, there are many similarities between the EU Charter of Fundamental Rights and the European Convention on Human Rights. Prospective EU members are asked to sign up to the European Convention although there is no explicit request or obligation for current EU members.⁶⁶ The Act allowed that subordinate legislation in the UK not compatible with the Convention's fundamental rights could be quashed or disapplied. Primary legislation such as Acts of Parliament which were not compatible with Convention rights remained in force but the High Court would only issue a 'declaration of incompatibility' where ministers would be expected to remedy or make amendments to remedy the Act in order to remove the incompatibility.⁶⁷ Nevertheless, all but one of the court's declarations – on prisoners voting rights – has been followed by a legal remedy in legislation.⁶⁸

No matter how much we seek to burnish Britain's rights credentials in creating and ratifying the Convention – which are a true and unalterable historical part of the picture – they do not acknowledge how those rights were safeguarded in

practice. In some cases, Convention rights only benefited smaller less-deserving groups at great cost and in other cases, some highly dangerous individuals were granted excessive liberties at great expense to the wider interests of society and the guarantees of national security. In fact, Bogdanor's assumption seems to rest on the notion that it is 'universally recognized in Britain that there should be such rights.'⁶⁹ Except it isn't. The universal recognition that the British people should have such a kind of European government, complete with the rights doctrines of the courts at Strasbourg and Luxembourg, is no longer accepted.

It is claimed that we need a codified constitution with the Human Rights Act after Brexit because the Withdrawal Act has meant our rights will only be protected by parliament. 'But parliament cannot provide a legal remedy,' says Bogdanor.⁷⁰ But that surely is the point: the Brexit process has demanded rights and laws be formed out of politics, not of judicial actors without any electoral legitimacy. The desire after Brexit is to have a stronger democratic process in which applicable rights and laws are derived from a strongly contested debate within the democratic public sphere; they are no longer there to be administered by a foreign court and unchallengeable by the public, or left practically unamendable by parliament. Bogdanor also views the fact that judges now lose power to disapply legislation contravening human rights under the EU Charter of Fundamental Rights as necessarily marking the beginning of a troubled journey; to the contrary, for many across the UK, it is to be welcomed and the unfinished Brexit process may well seek the removal of the effects of Strasbourg-originating rights entailed in the Human Rights Act's structure. Such a step could well be viewed as significant for British society in reformulating what it means to be a self-governing democracy.

As for the crucial restoration of political decision-making that comes with the Brexit process, Bogdanor is seemingly critical of the political rights-making process by MPs, and views judges rather than legislators as being entrusted with this vital function of protecting rights.⁷¹ It also seems to rest upon an assumed but unevidenced success of the EU Charter – which itself had a troubled history, as central to the rejected EU constitutional experiment – and a recommendation that we should therefore ‘continue with the model of the Charter after Brexit’.⁷² Neither the Charter, nor the Convention are models of success in rights-making in the UK constitutional context: the Charter was subject to a promise of an opt-out (by Tony Blair) when it was first brought forward with the Lisbon Treaty before being subsequently judged ‘directly effective’ in the UK context,⁷³ while the Convention is subject to frequent calls for a UK derogation,⁷⁴ if not outright removal by former ministers.

Not only is Britain’s drift towards a codified constitution significantly contested – if not, opposed by electoral majorities – but any suggested movement towards a European-style rights-based state is now significantly in question. Britain has reversed its position towards the European Union’s own Court of Justice as well as Charter of Fundamental Rights – which the UK once believed itself to have opted out of – and yet is simultaneously honouring a commitment to all the vast majority of rights entailed within it. Through the backdoor, the UK is honouring the Convention rights while claiming to leave the EU Charter. Article 52(3) of the EU Charter further provides that where the Charter contains rights which correspond to rights guaranteed by the Convention, ‘...the meaning and scope of those rights shall be the same as those laid down by the said Convention.’⁷⁵ So, if the UK government choose to honour the rights contained within

the Convention, claimable through the Human Rights Act, then is that not a perversion of the government's own Brexit strategy to continue to respect the same rights available in other European rights-based texts?

Since the UK is dropping the Charter because it remains objectionable to the government on the grounds of its overbearing nature on UK domestic rights-based affairs – then so, equally must the Convention in the same light. After all, the Joint Committee on Human Rights report considering post-Brexit rights focuses on some contrasts of the EU Charter of Fundamental Rights with the directly enforceable Convention rights, making clear the powers available to the UK through the Convention:

- By contrast with the European Court of Human Rights, where individuals have the rights to bring cases to it concerning the Convention, the EU's Court of Justice (CJEU) is not a court of individual petition. This restricts the right of access by individuals.⁷⁶
- While all the rights contained in the Convention may be enforced against the UK government by individuals in national courts via the Human Rights Act, some of the rights in the Charter are only defined as 'principles'. This includes certain economic and social rights which are not directly enforceable by individuals in national courts.⁷⁷
- Although judgments of the EU Court of Justice are legally binding on all EU Member States and rights under the EU Charter have stronger enforcement mechanisms, it is also worth acknowledging that they have a narrower reach than the Convention.⁷⁸

Gordon Anthony, Professor of Public Law at Queen's University Belfast, was cited in a House of Lords' EU

Committee report, 'The UK, the EU and a British Bill of Rights', on this issue, claiming:

The primary strength of the ECHR under the Human Rights Act is that it has a much broader reach than the EU Charter. Under Section 6 of the Human Rights Act [and Section 24 of the Northern Ireland Act] whenever public bodies make any decision they are bound by the provisions of the Convention. That is not the case with the Charter. The Charter applies only whenever public bodies make decisions within the realm of EU law.⁷⁹

In evaluating the Human Rights Act, incorporating the Convention, the question is not essentially whether one is for or against human rights, but whether the Act is a constitutional change which helps us protect rights without unacceptable side-effects for fundamental constitutional principles.⁸⁰ As the former Home Secretary, Theresa May, said before the EU referendum in 2016, human rights were not invented in 1950 and by leaving the Convention, Great Britain – the country of Magna Carta, parliamentary democracy and the fairest courts in the world – could protect human rights ourselves in a way that doesn't jeopardise national security or bind the hands of parliament.⁸¹

Moving beyond Hobson's choice of the Human Rights Act or a Bill of Rights: the acceptance of responsible government

Since it was the Labour party that brought the Act into effect, the party has, with some occasional reservations, broadly supported it. Nonetheless, the tensions in introducing the Human Rights Act while claiming to protect sovereignty, reflected in the comments of several Labour Home Secretaries, were embodied in the Labour administration's incompatibility of constitutional principle as a whole. The

Labour Party is largely supportive of the Act and yet its vision and principles on UK constitutional change lacked coherence. The then Lord Chancellor, Lord Irvine, conceded to the House of Lords in 2002 the government did not have an overarching approach to the constitution. Committed to 'pragmatism based on principle', Lord Irvine pledged the principles of Westminster supremacy, a democracy with different centres of power and 'where individuals enjoy greater rights', while devising solutions to problems on their own terms. The incompatibility if not conflict, between the principles was clear.⁸² Neither should questions over repeal be considered in terms of party point-scoring: the Conservatives have at regular periods since the mid-2000s called for the repeal of the Act and to be replaced with a Bill of Rights and the last Labour government itself encountered severe challenges with how the Strasbourg court operated, by not implementing prisoner voting, nor the controversial Abu Qatada judgment.⁸³ In 2007, the Labour government had begun to consult on building on the Human Rights Act to create a Bill of Rights – which was, after all, the original ambition of those who advocated for the Act.

In a contrast of political parties, while the Conservative Party as a whole has remained sceptical of the Act, both its vision and official manifesto pledges and Prime Ministerial speeches to change or repeal the Act have lacked coherence. For the 22 years since its enactment, ten years of which it has entered government – in Coalition, then minority, then majority governments – no amendment or repeal has taken place. However, the desire to repeal the Act has been a major policy of Conservative MPs and the party as a whole for almost as long as the Act has been in effect; the Act coming into force in October 2000, with the Conservatives pledging reform or repeal before the mid-2000s.⁸⁴ In the past

fifteen years, for example, David Cameron was explicit in 2006 that the Conservative Party would repeal the Human Rights Act and replace it with a 'modern Bill of Rights'.⁸⁵ The 2010 election manifesto under Cameron's leadership was committed to '...replace the Human Rights Act with a UK Bill of Rights'.⁸⁶ After the 2015 general election, he then said that repeal of the Act would be brought forward rapidly. The Conservative party had pledged in their 2015 manifesto to abolish the Act and replace it with a Bill of Rights in order to:

...break the formal link between British courts and the European Court of Human Rights and make our [the UK] Supreme Court the ultimate arbiter of human rights matters.⁸⁷

The 2017 manifesto under Theresa May's premiership set aside the issue by holding that the Act would not be repealed and replaced '...while the process of the UK's exit from the European Union is underway'.⁸⁸ The 2019 manifesto reflected, as discussed above, the intention that:

We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government.⁸⁹

The surest way to 'update' the Act would be to restore effective balance in the constitution by repeal of its obligations but to forego any further commitments to Convention rights. In regular reports, the current Conservative government continues to maintain that the Council of Europe and the Convention have a leading role in the promotion and protection of human rights, democracy and the rule of law in wider Europe. Domestically, throughout Theresa May and Boris Johnson's Conservative-led governments, the UK has (so far) remained 'committed to membership of the

ECHR and will remain a party to the ECHR after we have left the EU.⁹⁰

In recent years, the government have welcomed the adoption of the Copenhagen Declaration (in April 2018) carrying forward a reform process of the Strasbourg court, giving clear credit to the Brighton Declaration under the UK government's Chairmanship in 2012.⁹¹ The government's existing objective therefore appears to be to 'strengthen the Court and the Convention system'. Ministers have therefore sought to improve the court's efficiency in light of a large but potentially unsurprising backlog of pending applications. The government's case for reform seems further reflected in ensuring that it can focus on the most important cases before it, underpinned by the principle of subsidiarity.⁹² While the day-to-day, governmental management of the relationship with the court is to be expected, the case for wholesale policy reform now appears undeniable.

In the negotiations over an EU withdrawal deal, the most recent copy of the 'Political Declaration' of October 2019, setting out the UK-EU framework for the future relationship, accompanying the withdrawal agreement, specifies:

The future relationship should incorporate the United Kingdom's continued commitment to respect the framework of the European Convention on Human Rights (ECHR), while the Union and its Member States will remain bound by the Charter of Fundamental Rights of the European Union, which reaffirms the rights as they result in particular from the ECHR.⁹³

Under those obligations, it could still easily be expected that the UK repeal the Human Rights Act, withdraw from the jurisdiction of the Strasbourg court and as signatories from the Convention while nonetheless continuing to commit to respect the documented rights of the European Convention.

In the UK context, the continued case for judicial supremacy made possible through the Act lacks any sense of constitutional legitimacy. The Human Rights Act has increased judicial activism and extended the realm of the courts, but parliament claims to retain ultimate authority and could rein in the courts if it chose to.⁹⁴ Neither on that basis therefore can there be a British Bill of Rights – it would also suffer from an equal lack of constitutional legitimacy. We already have ample laws that protect our rights. A homegrown grand declaration would therefore serve no useful purpose and, because of its inevitable vagueness, it would create new openings for judicial supremacism.⁹⁵ The United Kingdom has long resisted the idea of adopting a judicially reviewable bill of rights, which historically has been considered inconsistent with the core constitutional principle of parliamentary sovereignty.⁹⁶ Those who have sought to avoid repealing the Human Rights Act as a potentially simpler way of answering to the difficulties have advocated either a Bill of Rights and on some occasions, called for changes of a more political nature in the appointments of judges. Both would deeply politicise the judiciary, transform the nature of the legal process, if not discredit the independence of the judges.⁹⁷ In any case, it remains highly feasible and practicable for countries with long, historic traditions of democracy and the rule of law under a Westminster system to prevail without a judicially enforced bill of rights (Australia) or a weaker statutory bill of rights (New Zealand) or without supervision by an international court (such as in Australia, Canada, New Zealand).⁹⁸

There is an alternative to both the Human Rights Act or a UK Bill of Rights: ministers could simply move forward with a policy of responsible government by abolishing

the Act which has caused so much difficulty for the UK constitutional, political and legal landscape. This necessarily implies the withdrawal from the jurisdiction of the European Court of Human Rights, ceasing to be a signatory to the Convention, while continuing to respect the rights entailed in the Convention – this would leave open a symbolic recognition of basic aspirational standards to guide decision-making. This would also leave open the way for judicial reform so as to avoid the dangers of the past in judicial overreach in several areas, in which the UK could conceivably seek to reform the Supreme Court in London into a genuine final appellate court for human rights law.

At this juncture in British political history, the legitimate requirement to put a brake on handing over all questions of social order to the law and the courts is patently obvious – after all, law cannot be a substitute for most aspects of moral, social and political order in modern society. The lawyer's difficulty, for Lord Sumption, is that they see the expansion of law's domain – and the jurisdiction of the courts – as simply flowing from the rule of law. But he challenges such a notion because the rule of law does not mean that every human conundrum and every moral dilemma can be complemented by a legal solution. Only on some occasions might it be viewed as reasonable to impose a legal solution, not least since law-making tends to displace other forms of social order. This is clearly not to deny the highly significant impact of the rule of law as a force for good.⁹⁹ A contrasting juridical tendency has been particularly marked in the United States, where it was first noticed by the French political scientist Alexis de Tocqueville as early as the 1830s, when he wrote: 'Scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question.'¹⁰⁰ The British political tradition did not

stem from the US position in its distribution of political power – favourable as some elements of it may be to some judges and rights activists. The subsequent struggle therefore to incorporate Convention rights into the British system is characterised by a cumbersome bind upon the inner-workings of its parliamentary democracy.

1.

Taking back parliamentary democracy

At its core, the Human Rights Act inhibits some of the essential features of parliamentary democracy. Parliamentary democracy is a form of democracy that operates through a popularly elected deliberative assembly, establishing a link between government and the governed. It is a kind of democracy which is a system of representative and responsible government. It balances on the one hand popular participation with elite rule on the other. In this process, government becomes accountable not directly to the people in general but to their elected representatives.¹ As the only popularly elected institution in UK central government, parliament forms the centre of the democratic process. Parliament is able to ensure representative government because its dominant chamber, the House of Commons, is elected. MPs are therefore tasked to represent their constituencies; the House of Commons as a whole serves as the debating chamber of the nation.² By debate in parliament, the institution maintains a form of deliberative democracy. It is a kind of democracy in which the public interest is decided through debate, discussion and argument amongst elected representatives and citizens.³

The enactment of the Human Rights Act and its practice over the last 20 years has unbalanced the Westminster

constitution, encouraging courts to play an over-sized role in public life, with negative consequences for the rule of law, for the separation of powers and for the integrity of parliamentary democracy.⁴ In a democratic context, judges have a leading – albeit shared – role in protecting core human rights. The Act enables the judiciary, within the UK and at the European Court of Human Rights in Strasbourg, to expand the concept of ‘rights’ to such an extent that their judgements now often undermine parliamentary democracy and with it, the very promise of human rights due to British nationals. National judges and those in Strasbourg have grown so political in their sphere of decision-making that they have undermined the sovereignty of parliament – and its electorate as a whole – on a whole spectrum of rights-based policies, which sit far outside the text and original intentions of the European Convention.⁵

The concerns that have arisen about the Convention are often far less about the objection to the documented list of rights but more with its interpretation and application, vastly extended well beyond what the original drafters desired. The former justice minister, now Foreign Secretary, Dominic Raab felt that such an outcome had been partly the result of judicial legislation by the Strasbourg court, but it has been compounded by the design and structure of the Human Rights Act.⁶

Parliament’s authority has effectively waned because the political sphere has had EU-level (via the EU Charter of Fundamental Rights) and Strasbourg court fundamental rights schemes (via the Convention) incorporated into it. The historical UK constitution only made sense to its constituent parts – and importantly, acceptable to its people – if the power of government was presented as legally separate but politically contingent upon its capacity to determine

and respect fundamental rights.⁷ Through the introduction of Convention-led fundamental rights schemes protected by the courts, the judges have accrued for themselves a constitutional pre-eminence, part-entrenched in codes of written and legal form. As such, those legal rights are expressed as unchallengeable and unamendable instruments above ordinary, parliamentary politics in distinction to the historically precedented protection afforded by parliament and the common law.

By incorporating hard-edged Convention rights into the constitution, and whose sense of political contestation have now been abandoned, ministers and parliament must face up to the challenge as they are already doing with the EU withdrawal process. By legislating in 1998 to create a situation which has led to the elevation of the judiciary as a rights-adjudicating court system, electors and MPs are faced with the dilution of the domestic legislature as a rights-providing institution. The deep political claims are often made by academics and leading judges as to the constitutional and legal entrenchment of the Convention rights themselves, irrespective of political and electoral legitimacy. When this is combined with the disappearing consensus between the arms of state and the absence of electoral consent in protecting rights, such deep entrenchment has progressed this continued legislative decline and judicial advance in the UK,⁸ unsettling parliament's ability to respectfully decide on rights issues.

'Declarations of incompatibility' as holding coercive force

If a national court does find that UK legislation is incompatible with Convention rights, this does not directly affect the validity of the legislation.⁹ In theory, it is then up to parliament to decide whether to amend the

relevant legislation. The Act provides certain mechanisms whereby amendments can be made by a remedial order. If a Minister sees fit to act, he or she might seek to make an order to amend the existing legislation so as to remove an incompatibility, which has been recognised by the courts. Despite parliament's theoretical powers, the declaration has a coercive force in that all but one of the court's declarations to date – on the matter of prisoner voting rights – has been followed by a legal remedy in legislation.¹⁰

Since the Human Rights Act 1998 (HRA) came into force on 2 October 2000 until the end of July 2019, 42 declarations of incompatibility have been made.¹¹ There is no official database of declarations of incompatibility, but a simple summary of all declarations shows of those 42 declarations of incompatibility:

- 10 have been overturned on appeal (and there is no scope for further appeal);
- 5 related to provisions that had already been amended by primary legislation at the time of the declaration;
- 2 are currently subject to appeal;
- 6 have been addressed by remedial order;
- 11 have been addressed by later primary or secondary legislation (other than by remedial order);
- 1 has been addressed by various measures;
- 2 the government has notified parliament that it is proposing to address by remedial order;
- 5 are under consideration.¹²

Under the Human Rights Act (section 3), laws must be given effect in a way that is compatible with the Convention

rights. If a higher court finds that legislation is incompatible with a Convention right, it may make a declaration of incompatibility (under section 4). It is expressed that such a declaration constitutes only 'a notification' to parliament that the legislation is incompatible with the Convention rights.¹³ To those who devised the legislation and the government that brought the Act into effect, the declaration allegedly respects the supremacy of parliament in the making of the law. Therefore, it is often defended by its promoters given that under that legislation, there is no legal obligation on the government to take remedial action following a declaration of incompatibility. The practice is closer to a spirit of judicial coercion, in which as the Supreme Court has itself stated:

Although a declaration of incompatibility does not place any legal obligation on the government to amend or repeal legislation, it sends a clear message to legislators that they should change the law to make it compatible with the human rights set out in the Convention.¹⁴

The 'clear message' therefore made it difficult, if not near-impossible, for a government to oppose or rebut any declaration made. However, there is also no obligation on parliament to accept any remedial measures the government may then propose. By its nature, the Human Rights Act conflicts with parliamentary democracy, by strongly obliging parliament and government to amend the law, simply because the court alone declares it to be incompatible with Convention rights. The declaration of incompatibility places a near unchallengeable pressure on one party in a political debate to establish legal justice and encourage judges to bring forward their own policy interpretations. While parliament need not change the law and the court might be incorrect in their judgement about the merits of the

legislation,¹⁵ the ability of parliament and the executive to respond on a policy matter already reduced to points of law (rather than assess fairness, morality or justice in society) will always favour the courts.

The extent to which the Human Rights Act has empowered domestic courts in relation to the executive and legislature has split judicial opinion: some judges are relaxed about the change, others delighted, and some remain concerned.¹⁶ However, a plurality of judicial opinion is no cause for resignation over the issue when parliamentary democracy is at stake. To claim that the UK model of democracy is a transactional cost worth paying to protect human rights from abuse is to ignore that the Act remains unnecessary to protect human rights since its key achievement has been to advance the policy preferences of judges, thereby undermining the rule of law and parliamentary democracy,¹⁷ and with it, the constitutional legitimacy of the UK's rights regime.

If we are to accept that the 'dirty little secret' of contemporary jurisprudence is its 'discomfort with democracy' – cited by Jeremy Waldron and David Green in a quote from Roberto Unger¹⁸ – then it seems appropriate to address that dirty secret: the device of the Human Rights Act, subject to expansive interpretations by judges, is incompatible with UK democratic standards relying on a parliament to make law, to guarantee public accountability, political legitimacy and maintain the equality of all before the law. Parliament is after all better placed than the courts to make law. The elevation of fundamental rights has weakened UK parliamentary politics and Westminster sovereignty and it does so because it rests on the constitutional entrenchment of rights-based documents over time. However, that subsidiary concern itself overlooks the settling of a broader question of the political legitimacy of rights.

In order of intensity, the UK legal and political system has veered between:

- Centuries of non-entrenched parliament-provided and common law rights;
- Then, over 22 years of statutorily entrenched European Convention-rights (under the Human Rights Act) but which are enforced by judicial review;
- Then, 46 years of entrenched directly effective ECJ rights brought in under the European Communities Act and founded on the Luxembourg court's case law, through to;
- Directly effective entrenched EU rights founded on a constitutional EU Charter of Fundamental Rights since the Lisbon Treaty of 2009 gave full effect to that Charter.¹⁹

Nonetheless, in these UK approaches to rights, the Human Rights Act continues to represent the '...most significant redistribution of political power in the UK since 1911, if not 1688 when the Bill of Rights defended proceedings in parliament which ought not to be questioned in any court.'²⁰ Parliament is stringently bound, not simply by individual court judgements and the controversies entailed in those rulings but by the unwieldy processes brought forward under the Human Rights Act. For example, in parliament, the Joint Committee on Human Rights consisting of twelve members, appointed from both the House of Commons and the House of Lords, must currently examine matters consistent with that Act, relating to human rights in the UK.²¹ The Committee's work is devoted to scrutinising every government Bill for its compatibility with human rights, including the rights under the Convention, protected in UK law by the Human Rights Act 1998, as well as common law fundamental rights and liberties and the human rights

contained in other international obligations of the UK. This scrutiny of Bills also includes consideration of whether the Bill ‘presents an opportunity’ to enhance human rights in the UK.²² The Committee are also required to report to parliament on any remedial order made under the Human Rights Act 1998. Remedial orders thereby seek to correct breaches of human rights, identified by either domestic courts or the European Court of Human Rights, between UK law and the Convention.²³ At issue in the Human Rights Act however is the tension between the claims to parliamentary authority and sovereignty on the one hand, and, on the other, the widespread belief, embodied in the European convention, that a number of fundamental human rights should be regarded as inviolable and should on no account be violated.²⁴

Parliament-provided rights cannot become entrenched in the same way as Convention rights are under the Act, because rights should be deferred to a forum of contested politics in which they are pursued as amendable. Rights can be qualified. That means, rights are subject to politics. They should be enacted only when there is the necessity to convince a parliamentary majority. It is more reasonable to resolve political disagreements on rights by majority-decision because it both:

- (i) respects differences of opinion, not demanding any individual’s opinion is suppressed, by taking a vote and;
- (ii) it counts each individual equally, by being respectful of each person’s opinion for deciding on a specific choice.

So, legislation by a parliament enjoys a greater sense of democratic legitimacy than decisions made by judicial review, on the foundation that it provides an observable kind of approximation of majority decision-making procedure among all citizens.²⁵

Parliament has therefore come to play second fiddle in the rights-making process. The modern shift to foreign charters adjudicated upon by the courts system explains the shift from a UK individual's previous access to common law and parliament-provided rights toward their access to claimable European rights due to them in a national court. It explains how rights have been displaced from a stage in which they are parliament-provided to one in which they are increasingly provided by courts. Britain has also moved from a consensual system in which rights cause acts to be reviewed by parliament to an internally antagonistic constitutional system in which rights enable acts to be reviewed in courts.²⁶ Contemporary statements of the 'entrenchment' of rights fail to address the ultimate and broader question of political legitimacy of those rights – and the role parliament and voters' play in providing that legitimacy.

Successive governments have insisted they can have both a healthy model of parliamentary democracy while continuing to unquestionably insist on its international obligations under the Human Rights Act and European Communities Act. In both cases, significant parts of the electorate have been sceptical of those continuing obligations and the inability to challenge decisions flowing from those commitments. The banner of parliamentary democracy rests on the only popularly elected institution in UK central government, namely, the parliament as forming the centre of the democratic process, in which voters have genuine input through regular elections. Parliament is therefore only able to ensure representative government because MPs in the House of Commons as a whole serve as the democratic cockpit of the nation in the delivery of some agreed-upon common goods. Its sanctity as a chamber of reasonable debate

is nullified when it foregoes that obligation for some other superior set of international rights, laws and obligations. By debate in parliament, it is the purpose of that institution to maintain a deliberative democracy, not fence off debate on rights matters where society disagrees through agreeing a pre-ordained set of internationally-sanctioned rights. It becomes difficult to see what kind of democracy exists where it is decided in the public interest that debate, discussion and argument amongst elected representatives and citizens are no longer needed to decide on which fundamental rights and laws should be prioritised and maintained. By considering a policy of abolishing the Act which has caused so many grave difficulties for parliamentary democracy, the UK could then finally withdraw from the jurisdiction of the European Court of Human Rights, cease to be a signatory to the Convention, while continuing to respect the aspirational and symbolic rights entailed in the Convention.

2.

Reversing judicial supremacy and the 'constitutional shocks' of Strasbourg jurisprudence

In the historical context of the past two hundred years, as British society and government moved from a form of regulation by custom to one by the judiciary and the law, the Human Rights Act has become another sure reminder of the failures of fervent judicialisation. Until the 19th century, Lord Sumption says, 'most human interactions were governed by custom and convention', whereas now 'law penetrates every corner of human life'.¹ We need only to focus on the number of statutes and regulations that now govern us, as well as the 'the relentless output of judgments of the courts'. Reviewing the countless questions over which judges now have jurisdiction, Sumption observes that even '...special areas that were once thought to be outside the purview of the courts, such as foreign policy, the conduct of overseas military operations and the other prerogative powers of the state, have all one by one yielded to the power of the judges'. An essential contemporary aspect of the challenge is that the Human Rights Act 1998 '...has opened up vast new areas to judicial regulation'.² Professor Finniss shows concern that such law-making is taking responsibility for the future, even though legislatures are far more suited

to the task than appellate courts.³ After all, law and rights do not inhabit a world of their own.⁴

The incorporation of the Convention created 'a new role for British judges in determining policy outcomes.' By giving the courts an increased constitutional role, they had moved from the edges of political decision-making to a more central position while enhancing the tension between the executive and the judiciary.⁵ The courts are empowered to look to the jurisprudence of the European Court of Human Rights and can develop it.⁶ Senior British judges had to be trained for the specific purpose⁷ – they were all being asked to conduct new tasks which previous judiciaries had held would not be achievable, nor desirable. The great majority of Britain's judges have on the most part 'simply wanted to judge', not seeking legal ambition but as lawyers, applying and trying to make sense of the law, therefore not as legal innovators.⁸

Judicial activism has been built in to the Human Rights Act legal process by asking national courts to 'take account' of the decisions of the Strasbourg court. The commitment 'to take account of' became in practice an obligation to apply the Strasbourg decision. Lord Judge views the difference in opinion between judges in specific interpretation (particularly s.2(1) of the Act). This section provides that our courts 'must take into account' the decisions of the court in Strasbourg. In Lord Judge's words, 'to take account of the decisions of the European Court does not mean that you are required to apply or follow them.' In one critical comment, Lord Judge found:

... the Strasbourg Court is not superior to our Supreme Court. It is not, and it is important to emphasise, that it has never been granted the kind of authority granted to the Supreme Court in the United States of America, authority, let it be emphasised, which is well established in the constitutional

arrangements of that country. Nevertheless, although not in any sense a Supreme Court of Europe, which, I repeat, does not consist of a federation of states as the United States of America does, by using the concept of a 'living instrument', the Court appears to be assuming, or seeking to assume the same mantle.⁹

Since the 1970s, when the 'living instrument' doctrine was introduced, it has been questioned but continued to be interpreted by the Supreme Court to hold that the Convention should not be set in stone. The Convention should be directly read in accordance with prevailing standards, as when its core provisions were accepted in the 1950s, and that it should keep pace with emerging 'common' European standards.¹⁰ So, one common method in which rights protection is expanded upon under the Convention, and to follow the views of Lord Sumption and Professor Jeffrey Goldsworthy, is through the interpretation of 'living constitutionalism'.¹¹ Where judges interpret the original meaning of a right, they can give it a more expansive meaning which they find is more consistent with evolving social values. The authority they possess to act in this manner is a 'self-conferred one'. Given the wider global context of ever-increasing expansion of judicial review of legislative and executive acts, those expansionist interpretations pose a challenge to regular, democratic decision-making. Democratic decisions can then become subject to override by national judges and broader European, if not, global judicial consensus about the content and shaping of rights.¹²

The outcome of the above deliberations by Lord Judge rests with him calling for s2(1) of the 1998 Act to be amended.¹³ He thought any amendment could reflect that 'the obligation 'to take account' of the decisions of the Strasbourg court should not mean that our Supreme Court was required to follow or

apply those decisions. He suggested amendment to reflect that in this jurisdiction, the Supreme Court is, at the very least, a court of equal standing with the Strasbourg court. Lord Judge's proposed changes meant the courts could then be directed to Article 46.1, so that parties to the Convention 'undertake to abide by the final judgment of the court in any case to which they are parties'. This would mean that the application of the law to remedy a fault found by Strasbourg would be delayed until a British case raising the same point reached the court.

This assessment led Judge to conclude a profound concern about the long-term impact of the Strasbourg court problem on our constitution, marking a 'democratic deficit'.¹⁴ Given parliament is sovereign, it can overrule, through the legislative process, any decision of our Supreme Court. He expressed that parliament need not take measures in its domestic legal order to put an end to the violations found by the European Court, but under the current jurisdiction of the court, it is difficult to see how this view can still be held as entirely accurate. Parliament has acceded to change domestic law at almost every turn.

For Lord Judge, Britain appeared to be on the cusp of preparing '...to contemplate the gradual emergence of a court with the equivalent jurisdiction throughout Europe of that enjoyed by the Supreme Court in the United States of America':

My personal belief is that parliamentary sovereignty on these issues should not be exported, and we should beware of the danger of even an indirect importation of the slightest obligation on Parliament to comply with the orders and directions of any court, let alone a foreign court. Ultimately, this is a political, not a judicial, question. In the meantime, the House of Commons is answerable to the electorate,

and our judiciary will continue to apply properly enacted legislation.¹⁵

Those warnings were appropriate and relevant to the interaction of the UK legal system with the Strasbourg court but left unanswered the question of whether the parliament continued to accept as 'obligation' to comply with the directions of a foreign court. Between 1959-2018, of the 47 Council of Europe signatory states, the UK has had a specific experience of Strasbourg judgement violations.¹⁶ Although it is of a fundamentally different order of the thousands of Convention violations in Turkey, Russia and Italy, the UK has experienced the tenth highest in the total number of judgements received. The UK has received a greater number of judgements (547) than Albania (79), Denmark (51), Ireland (36), Norway (48), Spain (167), Montenegro (50) and Malta (89) put together. The 315 UK violations at the court reflected UK judgements on the right to a fair trial (93), the right to private and family life (70) and the right to liberty and security (69). Other judgements also existed in relation to prohibiting discrimination (44), the right to effective remedy (34), on the length of proceedings (30) as well as on the lack of effective investigation (20), on inhuman or degrading treatment (17) and on freedom of expression (12).¹⁷ The UK in each case is obliged to implement judgements of the European Court in any case to which it is a party.

Check upon executive power, or simply judicial supremacy?

The Human Rights Act is referred to by the civil liberties organisation Liberty as 'an integral part' of the British constitution, not only because it impacts on many areas of UK law and on the actions of all public bodies but it acts as a crucial check on executive power.¹⁸ However, a

natural consequence of enabling an Act that empowers the judiciary in its constitutional role has meant that the UK has introduced a constitutional device which on paper claims to check unwieldy executive power. In practice, it emboldens a new source of judicial authority of rights, far removed and insulated from the electorate, regular public debate and decision-making in parliament.

As Professor Goldsworthy has pointed out, the temptation has been to illustrate that the expansion of judicial review of administrative action has improved the fairness of administrative decision-making, it enables the judges to check abuses of power and yet the outcomes and by-products have been of a different category. It enables a hugely expensive litigation industry and a form of judicial supremacy in which judges seek to replace administrative decisions with ones they simply believe to be better.¹⁹

Section 3(1) of the Act appeared on paper to limit the powers of the court; statutes can only be interpreted in a manner compatible with Convention rights 'so far as possible'. However, in practice, parliament has given the judiciary carte blanche to determine when it is impossible to interpret statutes in a manner compatible with Convention rights. The wording of section 3(1) is so vague as to provide no clear outline of the limits of possibility. It is the judiciary and not parliament that determine how far human rights will be protected.²⁰

Architect of the Human Rights Act, Lord Irvine remarked in 2003 that we are 'on a constitutional journey' that in time 'will leave parliamentary sovereignty behind altogether'. He had become concerned during an earlier period in June 1996 when he organised a debate in the House of Lords, in the hope of discouraging judicial supremacism. As it happened, he became Lord Chancellor in 1997 and the White Paper

that preceded the legislation reaffirmed that judges could not invalidate Acts of Parliament. Despite those efforts, the guidance did not stop judicial supremacists from using the Act to extend their power.²¹ Politically, the UK constitution does not allow judges to cherry pick supposedly deeper underlying moral principles of the rule of law to diminish the role of parliamentary decision-making and with it, the selective weakening of MPs to represent the electorate. They have not constitutionally had the power conferred upon them and are not likely to at any future point; but in practice, the past incorporation of both EU Charter- and Strasbourg court rulings into the UK constitution has enabled the judiciary to at least attempt to achieve such powers.²²

Once stripped back from party messaging, those favouring the incorporation of the Convention through the Act, it might be held, effectively wanted UK citizens to be able to enforce Strasbourg rights through British courts. Understood in this light, it was never a case of 'bringing rights back home' but more 'introducing foreign rights back home'. This is the unspoken narrative behind the original Labour party manifesto commitment in 1997. The government's White Paper 'Rights Brought Home' was a misstatement of the constitutional change happening at that time – they were Strasbourg-originating rights being brought into the national courts.

The barrister and Sometime Fellow of St John's College, Cambridge, Michael Arnheim, indicates that a more disquieting reason for the UK domestic courts' tendency to adopt the Strasbourg message is that a 'politically correct' approach – resting on their view of socially evolving values – happens to chime with the individual political views of a number of the domestic judges.²³ The traditional juridical view that judges are politically neutral has always carried

with it a depth of political naivety. The idea that judges can be politically neutral in all cases has never strictly been true. This is complicated by the issue that most human rights cases have a political dimension. The 'political correctness' approach, unfortunately tends to breed judicial activism, or even judicial supremacism.²⁴

In their 2018 report, the Joint Committee on Human Rights cautiously referred to the passing of the Human Rights Act leading to increasing UK judges' involvement in public policy matters, particularly where human rights cases have previously been determined by judges in Strasbourg. Nonetheless, the increased involvement of the judiciary has led to its elevation in the constitutional architecture. As the Committee makes clear, where a decision interferes with human rights, it is the court that needs to consider whether that decision was proportionate, with reference to the reasons for making it and the extent of the interference with the human right in question.²⁵

Whereas the Committee seem to wrongly suggest that the courts show a degree of deference to the proper role for government in decision-making, and being reluctant to simply replace a decision-making role, it still begs the question: who made those courts sole guardian of the constitution or even sole guardian of rights? That was not the primary function of the Supreme Court even though it increasingly recognises its role as such. Whereas the Act tasked the courts (under sections 3 and 4) with interpreting the law in a way that is compatible with human rights, so far as it is possible to do so – and where it is not possible to do so, to make declarations of incompatibility – it makes the rights-judgement, rights-protection and rights-evaluation almost entirely a responsibility for the courts. The parliament becomes a passive receiver of decisions already made by

judges. After a declaration of incompatibility, parliament may then consider whether it wishes to amend the law,²⁶ which may seem to theoretically allow it to (re)consider, but in practice, it is obliged by the judiciary.

In a lecture in 2005, the late Lord Steyn (a Law Lord) declared that:

In the development of our country towards becoming a true constitutional state the coming into force of the Human Rights Act 1998 ... was a landmark... By the Human Rights Act Parliament transformed our country into a rights-based democracy. By the 1998 Act Parliament made the judiciary the guardians of the ethical values of our bill of rights.²⁷

The incorporation of a fundamental law is new to the British constitutional experience, often overriding ordinary political processes of decision-making.²⁸ Bogdanor and many others clearly refer to Lord Steyn's comments as demonstrating a good indication that the Human Rights Act could prove the first step on the tortuous journey towards a codified constitution.²⁹ But first steps are not set in stone and that tortuous journey could be made more manageable by navigating the obstacle of the offending legislation and reinventing legitimate British rights for the twenty-first century.

Conceding the equality of all before the law?

In spite of all the insistence that the Human Rights Act represents a package of consolidated human rights accessible to all, the broader injustice of how those rights were selectively practiced by a few powerful pressure group-style cases in the courts had often been overlooked. The Act has served to enable the exercise of unqualified rights promoted by select campaigners and political groups who by short

circuiting the political process (as they were legally entitled to) thereby undermined the fundamental feature of liberal democracy: the equality of all before the law.

The case of the murdered headmaster Philip Lawrence was a specific case in which prioritising the right to a family life under Article 8 preceded all other vital considerations of society and its stability and security. Article 8 of the Convention is by itself a routine provision:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.³⁰

However, as Philip Lawrence's widow Frances commented at the time, 'I feel I can't survive this'. She said, 'I'm unutterably depressed that the Human Rights Act has failed to encompass the rights of my family to lead a safe, secure and happy life'.³¹ She was referring to the case of Learco Chindamo, then a violent, truanting 15-year-old, who stabbed Mr Lawrence as he tried to stop the bullying of a younger boy.³² When he ended his 12-year sentence, it would have served in the public interest that he be automatically deported to his father's homeland, Italy. The Asylum and Immigration Tribunal were concerned it would breach his human rights to be sent to Italy. The tribunal ruled that the Chindamo, then as a 26-year-old should not be deported.³³ The Home Office had tried to obtain a ruling that

Chindamo would be deported at the end of his sentence. But Chindamo's lawyers overturned that view, referencing both EU immigration law (of 2004) and the Human Rights Act.³⁴ So, although the case also fell to reliance on EU freedom of movement law, namely, the Citizens' Directive 2004, the European Convention as the backbone of the Human Rights Act, also played a part.³⁵

Article 8 of the Convention essentially formed a part of the argument because it specifies (as above) that every citizen has the right of respect for private and family life. However, one has only to look over Article 8(2) above to find that very obvious exceptions could be made to the right as '...necessary in a democratic society in the interests of ...public safety', but which are seemingly disregarded. Chindamo was born in Italy, but his family had been in the UK for many years. The tribunal felt that sending him to Italy just because that was the country of his birth would have infringed his rights for a life with his family. Although in this case, it was not the Human Rights Act which ultimately upended the Home Office's deportation objectives, it would have been invoked had the 2004 Directive not already protected him.³⁶

Hundreds of foreign criminals in the past have avoided UK deportation because it would infringe their human rights, particularly in the period preceding 2015-16. Article 8 has been at the centre of those claims. The 'mission creep' under Article 8 suggested that provision – originally designed as a protection against the surveillance state in totalitarian regimes – has been developed by the court into a principle of personal autonomy. The Strasbourg court acts on this principle to cover anything that intrudes upon an individual's personal autonomy.³⁷

Several high-profile cases of murderers, rapists and paedophiles, won permission to stay in the UK because

their families live there.³⁸ The number of convicts who used the European Convention to evade deportation fell radically following Theresa May's staunch reforms as Home Secretary. The role of Article 8 in safeguarding a family life was subsequently challenged as not being 'absolute' in its force. May's 2014 policy of 'deport first, appeal later' system for foreign criminals coincided, for example, in not only ending the significant increases from 2006 but a fall in those who won their human rights appeals from 356 in 2012/13 to 11 in 2015.³⁹

The data indeed shows a dramatic reduction in criminals avoiding deportation since the government's reforms were first initiated. The Home Office reported a significant decrease in the number of challenges since they introduced the 'deport first, appeal later' provision, effectively meaning that foreign national offenders could be removed earlier.⁴⁰ They removed a record 5,810 foreign national offenders in 2015/16. But the government continued to leave undone (at that time) the pledge of replacing the Human Rights Act with a British Bill of Rights, hampered earlier on by its efforts by governing in coalition with the Liberal Democrats. During the 2016-19 period, the political debates in the Brexit process then consumed the time and energy of parties, parliament and political leaders, only further marginalising the Conservative government's ability to consider the repeal of, or changes to, the Human Rights Act. Advocates of the Act have always been eager to emphasise a fall in the number of Strasbourg court rulings over a specific period of time – very rarely do they show the (mis)interpretations caused by the Act leading to an enduring and damaging effect on the justice system, once thought of as protecting the equality of all before the law.

Convention rights: unpicking the historic tradition of 'shared rights provision'

The Human Rights Act has unsettled the UK constitution by delegitimising Britain's own devices of fundamental rights provision. The creation of rights-provision previously rested on the historically precedented basis that the executive, the legislature and the judiciary enjoyed a balanced constitution.⁴¹ That balance enabled a shared responsibility for that rights provision. Under the traditional Westminster model, a form of respectful rights-making exists between the branches of the state, including parliament, in exercising a shared responsibility for rights.⁴² It is a peculiar mistake in British constitutional thought to assume that before the legislation was enacted human rights were not adequately protected. Prior to the Act's coming into force, the UK, like other similar common law countries, had a long record of securing rights, and otherwise governing effectively through the channels of parliamentary democracy. In this scheme, courts had a vital but specific and more narrow function, which the incorporation of the Convention has now subverted.⁴³ Radical common lawyers and rights-based theorists have therefore narrowly and wrongly overemphasised an advance in judicial power as leading and finalising what constitutes rights in democracy, which disregards the role of the electorate and of intra-state agreement in coming to provide political settlement on rights issues.

Some recent constitutional studies have even criticised the false choice between the legislature and the judiciary in protecting rights. One constitutional study by Professor Murray Hunt (Visiting Professor in Human Rights Law) and other academics at the University of Oxford holds that the choice between either one as the guardian of fundamental rights is being misplaced and increasingly rejected.⁴⁴ In place

of that old dichotomy, they argue there is now a consensus that all branches of the state – including the executive, the legislature and the judiciary – have a shared responsibility for the provision and realisation of fundamental rights.⁴⁵ This shared deferral might be reconsidered given that such a consensus in making rights is not a new one – it is a neat historical accompaniment to what parliament's authority had previously reflected.

Parliament's authority is derived from an essential compromise between state and legal officials in which the provision of fundamental rights by the executive, the legislature and the judiciary are to be protected. However, under the Human Rights Act, and to a broader extent the Constitutional Reform Act 2005, and throughout much of the history of UK-EU legal integration since the 1970s, that ability to compromise was abandoned in favour of handing many rights questions over to the courts.⁴⁶ By choosing again to acknowledge the role of politics, rather than the singular 'say so' of the judges, we might again be able to observe the broader assumption that the law of the legislature (statute) should not be seen as a unitary person with a single will but shared democratic consensus emerging out of a broad plurality of proposals,⁴⁷ not to be navigated around. The Act, through Convention rights, effectively resists a kind of long-lasting political settlement which acknowledges the plurality of opinion within the state and broader spectrum of views in society.⁴⁸

The Act has effectively meant that the British constitution must now tend towards the judicial power of the common law courts – in deference to foreign rights charters – as characterising what constitutes rights. British legal theorists in the shadow of the late influential US legal philosopher, Ronald Dworkin, have erroneously tended to see courts

as the main provider of rights consistent with protecting minorities; legislatures, on the other hand, they assume, act only in the interests of majorities. It becomes a theoretical mask for ignoring the reasons for the opinion favoured by the majority.⁴⁹ This has been pursued to the extent that impassioned rights-based approaches have often viewed rights as above politics. Consensus, inter-relationships and comity between the branches of government and the political community are never given any genuine attention. Vernon Bogdanor attributes an enhanced dialogue between the judiciary, parliament and government as arising from the provision of rights through the Human Rights Act,⁵⁰ but the dialogue never transpired.⁵¹ Moreover, the shared deferral and consensus well predated that 1998 Act. In so doing, Bogdanor has tended to disregard the role of that 'shared responsibility' or even 'consensus'. Furthermore, in practice, the enhanced dialogue for the provision of rights in fact broke down further (and was therefore not enhanced) after the Human Rights Act and other associated legislation. Arguably, any dialogue between the judicial, legislative and executive bodies has been in constant decline since the UK's incorporation into the then European Communities in 1973, exacerbated by the legal separatism of the Human Rights Act after 2000.

Under the terms of the Human Rights Act, the transfer of fundamental rights provision as historically subject to 'shared deferral' moves over to a tightly legally defined power. The shared deferral is, quite perceptibly, absent and there is a greater singular deferral to the courts. It would be incorrect to assume however that the Act is the main way in which our rights are now secured or protected. As Professor Richard Ekins (Associate Professor of Law at the University of Oxford) and Graham Gee (Professor of Public

Law at the University of Sheffield) indicate, human rights are primarily secured through the vast body of ordinary law, whether common law or statute, for which parliament has responsibility.⁵² That transfer of rights-making power however reflects the change in the meaning and strength of fundamental rights. The Europeanisation of the rights-making process suggests a more narrowly defined (less distributed) power, mainly centred on court-provided rights. In that realm, the politics of popular, elected representatives in parliament is increasingly disassociated from the content of rights. The courts trump parliament.

The place of parliament in the Human Rights Act could not be feasibly understood as enabling shared rights provision. Professor Janet Hiebert at Queen's University (Canada) has considered that the Act represents an ambitious model for rights protection that views the scrutiny of rights taking place at four institutional stages, three of which are oriented around the legislative process.⁵³ Parliament is certainly given a central role in the legislation, as Hiebert suggests, but one in which (in my view) its purpose is of accepting subservience to judicial, then executive power:

1. The first of these four stages, a form of pre-legislative review, was introduced by a new ministerial reporting requirement in section 19 to inform parliament of whether a Bill is either compatible with Convention rights or that the minister is unable to claim compatibility. This has led to regular assessments by ministers, government lawyers and policy officials of whether legislative initiatives are consistent with Convention rights before introduction in the House of Commons. However, the primary function is therefore of an executive assessment, not one from parliament at all.

2. The second stage, parliamentary rights review, enables a unique parliamentary rights committee, namely, the Joint Committee on Human Rights (discussed above), to review legislation from a rights perspective. In turn, it provides parliament with reports on the details and reasons behind the minister's claim that a bill is consistent with the Convention rights. The committee has no official legislative veto as such and in power terms, its parliamentary value lays in constraining the minister, not scrutinising judicial overreach in constructing UK rights.
3. In judicial review, the third stage, there was an inflated new authority for judges to consider whether legislation is consistent with Convention rights. If judges find that legislation is inconsistent with Convention rights, judicial remedy can occur through an interpretation under section 3. Judges may desire altering the scope or effects of legislation through a judicial interpretation that hopes to enable legislation to be made compatible with Convention rights. Alternatively, judges may prefer to make a more explicit judgement by declaring that the legislation is not compatible with Convention rights under section 4. Such a third stage is therefore judicial, concerned almost solely with judicial review, with no executive or parliamentary responsibilities whatsoever.
4. The fourth stage concerns a legislative process for implementing a legal remedy in section 10 and exposes the political framers' expectations that parliament would regularly comply with domestic and European Court rulings on incompatibility.⁵⁴ This has also, in practice, grown to be an oddity since parliament has no effective power as remedial legislation is devised almost solely by

the executive, as ordered by the court. It is only voted on by parliament and in that case, MPs voting down an order in toto can negatively imply that they object to human rights more broadly (thus appearing illiberal), so they do not. Again, because the UK polity does not originate from this juridical tradition, a parliamentary actor that challenges a court ruling is viewed as highly unorthodox.

Professor Janet Hiebert's reasonable assumption that the law has authorised an ambiguous kind of parliamentary-centred model of rights protection, however, in practice turned out to be uniquely different. Given that the court-centric design of the Human Rights Act marginalised other institutions in the constitution, it subsequently became both ambiguous and impossible to separate out parliament's ability to remedy the 'incompatibility' concerns from claims that the system marked an affront to its sovereignty.

The judicial power is now far more elevated in its powers throughout the modern constitution. The radical theory of national common law constitutionalism⁵⁵ most clearly set out by Professor TRS Allan (a Professor of Jurisprudence and Public Law at Pembroke College, Cambridge) in his book, 'The Sovereignty of Law: Freedom, Constitution and Common Law', directly seeks to overstate the primacy of a national fundamental rights architecture at the expense of the doctrine of parliamentary sovereignty.⁵⁶ The UK historical constitutional context in which the provision of fundamental rights by the courts is subordinate to the political provisions provided by parliament is incompatible with today's rights-based theories of domestic, radical common law judges and constitutional theorists.⁵⁷ Such modern theories view the Human Rights Act as reaffirming

the common law constitution.⁵⁸ The common law argument accepts the supremacy of the judges through guaranteeing Strasbourg-level fundamental rights and the waning of parliamentary authority.

The radical theory of common law constitutionalism seeks to affirm the primacy and sovereignty of a national common law, court-decided, entrenched fundamental rights architecture and a displacement, if not rejection, of the doctrine of parliamentary sovereignty.⁵⁹ Allan goes as far as to suggest that courts should only make a declaration of incompatibility – which therefore involved parliament – in the last resort and only when it is ‘truly impossible’ for judges to interpret a provision consistently with the Convention.⁶⁰ In this view, it is left for the courts to decide on fundamental rights issues. In this context, repealing the Human Rights Act would help resettle the balance of the constitution, even if parliament would need to guarantee the courts would not simply recreate the substance of the Act through the creation of novel common law rights.⁶¹

In similarity to EU membership, parliament’s sovereignty has become practically unsettled under the Convention because the rights it entails has led to a strong synthesising of national judicial powers within the Strasbourg court architecture at the expense of marginalising the domestic legislature.⁶² The claim to a check on the abuse of power by the executive can often be an unreliable one since the judiciary grows overly-zealous in its decision-making but the parliament – which is intended to really check the executive in the democratic political process – has been marginalised. It cannot be made legitimate for the UK variant of democracy to create a body of law that develops independent of democratic choice while remaining protected in practice and at all costs against any amendment by the parliament.⁶³

The Strasbourg system reflects courts narrowly and specifically adjudicating on a wide-ranging, vague, abstract set of rights. By contrast with EU law, Lord Neuberger describes Convention rights as being more wide-ranging both in terms of the issues which are covered and in terms of the nature of the role of the UK courts.⁶⁴ The Convention sets out a number of fundamental rights in fairly short form, and it is left for the judges to develop and sometimes to update those rights. Furthermore, if any human rights point is raised in a case before a UK court, Lord Neuberger assures that the court has to decide the point: however difficult the point of human rights law is, it is for the domestic court to decide it, and only then can the issue be taken to the Strasbourg court. However, when those national judges are therefore called on to decide a human rights law point, Neuberger concedes they ‘...will always look to see whether the Strasbourg court has had anything to say on the topic.’⁶⁵ So, although judges are not bound by a decision of the Strasbourg court on a human rights point, it does ‘always look’ in their direction for a response on a ‘human rights law point’.⁶⁶

Beverley McLachlin, former Chief Justice of Canada (2000-2017)⁶⁷ and Professor Grégoire Webber (Canada Research Chair in Public Law and Philosophy of Law at Queen’s University) and Professor Richard Ekins (Associate Professor of Law at the University of Oxford)⁶⁸ have all maintained in the recent literature that the legislature has a responsibility to uphold and realise rights. It is a responsibility shared, McLachlin rightly says, by all branches of government and, for some rights, it is a responsibility for which the legislature is particularly suited, including the rights to health care and education, where multiple organisational challenges are ‘complex’ and require ‘large expenditures of public money’. It has been well argued in other constitutional arguments

by Murray Hunt and other academics that all branches of government have a responsibility towards rights.⁶⁹ The court and parliament may better complement one another than oppose each other in the protection, promotion, and realisation of human rights.⁷⁰ Professors Richard Ekins and Grégoire Webber and others have all explained how legislative and judicial action can be complementary in the protection of human rights.⁷¹ When judges fall to the position of enforcing vague standards of human rights, however, they are exposed to pressure to reach results that are politically popular or reflect broader and powerful constituencies. This can be contrasted with the judges being asked to enforce specific norms already set out in legislated rights where they both withstand public criticism and reduce their decisions to the requirements of law.⁷² Further reforms to the constitution should reflect that judges cannot simply act from an imagined secure position of supposedly pitting itself against the majority.

There are many reasons why legislative decisions about rights are often more probable to be correct than judicial decisions. As Lord Sumption has argued, an understanding of rights may be constrained by the rights of others or some collective interest.⁷³ Single interest pressure groups, whose motivations lay behind a significant amount of public law litigation in the UK and US, have no interest in policy areas other than their own.⁷⁴ Given that it appears impossible to afford a hearing to every interest affected, a number of consequences follow. A judge may produce a result which because of its unexpected consequences is unworkable or ineffective.⁷⁵ A judge may end up making guesses about facts of which he has no sufficient knowledge. The judge may also reformulate the issue so as to make it a one-dimensional question of law in which the only relevant

interests appear to be those of the parties before the court, with a decision being necessarily made on an excessively simplified basis.⁷⁶ Where rights must be balanced against the rights and interests of others in society, it is far more reasonable for the legislature, not an appellate court, to attempt to resolve the competing arguments.

The 'mirror' principle: Strasbourg has spoken, the case is closed

The national court deference to the Strasbourg court is made clear by the practices of the judges, particularly through the 'mirror principle'. In the case of *Ullah* in June 2004 – a case concerning the right to freedom of thought, conscience and religion guaranteed by Article 9 of the Convention – Lord Bingham notably said:

The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.⁷⁷

Bingham also clarified in *Ullah* a uniform interpretation:

...the correct interpretation of [the Convention] can be authoritatively expounded only by the Strasbourg court... the meaning of the Convention should be uniform throughout the states party to it.

It is a rule which had been accepted in the courts but more recently, Lord Justice Laws (and several others) saw it as a mistake. For Laws, essentially section 2 of the 1998 Act enjoins no subservience to the Strasbourg jurisprudence, it was only to be '[taken] into account'. He found Lord Bingham's reference to 'the correct interpretation' of the Convention, and the statement that it is in the hands of the Strasbourg court to imply that there is such uniformity: a single correct interpretation, a universal jurisprudence,

across the boundaries of the signatory states. He found that principle to be a mistake. Laws also critiqued an adherence to the Strasbourg court as gravely undermining the autonomous development of human rights law by the common law courts.⁷⁸ The 'taking into account' of Strasbourg jurisprudence, in practice however developed into both a uniform application as well as a subservience to that body of law. The Human Rights Act architect Lord Irvine even later condemned the so-called 'mirror principle' of 'no more and no less' as contrary to the Human Rights Act.⁷⁹

Law professor at Durham University Roger Masterman explained that since *Ullah* was decided by the House of Lords in 2004, the core assumption of the principle, that the domestic law of human rights should in content and scope mirror its Strasbourg counterpart, had come to 'exercise a controlling and pervasive influence over the application, and meanings of, the Convention rights applied under the HRA.'⁸⁰

In one case in the House of Lords in 2009, three suspected terrorists were subject to control orders involving significant restriction of liberty. A control order was first made against them under the Prevention of Terrorism Act 2005 on the basis that the Secretary of State had reasonable grounds for suspecting that an appellant was, or had been, involved in terrorism-related activity. The issue raised by their appeals was whether, in each case, the procedure that resulted in the making of the control order satisfied the appellant's right to a fair hearing guaranteed by Article 6 of the Convention in conjunction with the Act. Each maintained that their right was violated by reason of the reliance by the judge making the order upon material received in closed hearing – the nature of which was not disclosed to the appellant. The judges allowed the appeals but extraordinarily, one Law Lord, Lord Rodger of Earlsferry said:

Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentorum locutum, iudicium finitum* – Strasbourg has spoken, the case is closed.⁸¹

Baroness Hale even termed the mirror principle in *Ullah* as suggesting ‘a position of deference’⁸² to the Strasbourg court, although later indications are that national courts attempted to move away from the principle.

When the European Convention is buttressed by home-grown judicial supremacy

In terms of the Act’s impacts on the courts, although the requirements of the Human Rights Act can openly conflict with traditional common law precepts,⁸³ they can often be viewed in common law judgements as supportive of the Act. A radical common law constitutionalist approach in Britain has provided a rationale for the abandonment of parliamentary supremacy and offers instead a theory of a judge-made constitution. That common law radicalism asserts that parliament’s sovereignty is to be treated as a product of, or controlled by, judge-made common law.⁸⁴ In the law court system itself and legal constitutionalist circles, the meaning of parliament’s legislative supremacy has in the past two decades been widely questioned by common law constitutionalist radicals, including at the highest level by government ministers.⁸⁵

Senior judges such as Lord Steyn maintain that ‘...the supremacy of Parliament is still the general principle of our constitution. The judges created this principle...’ (Lord Steyn (*R v Secretary of State for the Home Department, ex parte Pierson* [1998])). In *R (Jackson) v Attorney General*, the case which decided whether the Hunting Act 2004 was a valid Act of parliament, Lord Hope had said:

The rule of law enforced by the courts is the ultimate controlling factor upon which our constitution is based ...the courts have a part to play in defining the limits of Parliamentary sovereignty.

As previously described, it is no accident that Lord Steyn viewed the Human Rights Act as a landmark in the UK becoming a truly constitutional state. Lord Hope further stated:

Step by step, gradually but surely, the English principle of the absolute sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.... The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based...' (*Jackson v Attorney General* [2006]).

The radical common law tradition holds parliamentary sovereignty is founded on a common law foundation⁸⁶ – and this has a strong relationship with the proposition that parliamentary sovereignty is being restricted by human rights (incorporated Convention rights) through the Human Rights Act.

The contemporary radical view of the common law mistakenly asserts that legislative supremacy in the British constitution is understood as a rule of the common law,⁸⁷ which was created and may be altered by the courts. It assumes that the judges become superior to parliament.⁸⁸ This 'minority' view held among a 'small handful of judges'⁸⁹ explicitly asserts, however incorrectly, the power of the courts in making parliament sovereign. Radical common law interpretation however fails to see that ultimate parliamentary sovereignty has not ever historically been comprehensively understood as deriving from the creation of that legal system.⁹⁰ What they have steadily relied

upon is the implementation of the Act and the continued incorporation and application of Convention rights, as bolstering their supremacy in the UK Constitution.

This radical view of the common law ought to be deeply scrutinised because it unseats some long-established features of the constitution. The law of judges is emphatically not a substitute for politics. The radicalism of some judges has misinterpreted the historical foundation of parliament and its sovereignty as having singular common law roots (although the courts have *some* historic role in the creation of parliament's sovereignty). Moreover, political decisions in a parliamentary democracy ought to be made by representatives who can be removed⁹¹ – members of the judiciary are not authorised in this manner.

Parliamentary sovereignty can be strongly diluted by fundamental rights provision when it falls to judicial supremacy to make broader policy decisions. The challenge of common law constitutionalism to parliament as a provider of fundamental rights is best answered by the political constitutionalist model. The very mechanisms through which the people authorise their political and legal representatives and hold them to account – which comprise the fundamental rules of the UK constitution and its rights – must be carefully protected against the limitations imposed by the Human Rights Act.

If British society and government does gradually decide to move from a form of regulation by convention and moral and political customs to one by the judiciary and the law, and step by step to a society formed around a written and codified constitution, the Human Rights Act will be looked back on as one of those immense commitments to the fervent judicialisation of a European-style, rights-based British state. Not only has the Brexit vote disturbed that

uncertain journey, but there is a realignment of thinking which suggests the grand visions of global and European integration of norms and laws in which the morality of customs and conventions are being replaced with judge-made decisions and law penetrating every corner of human life is no longer sacrosanct as once believed. The Human Rights Act opened British society up to vast new areas to judicial regulation and – in tandem with the post-1997 constitutional reforms – a society draped in a costly litigation industry, where law is called upon to supposedly solve nearly all disagreements.

The opportunity therefore is open for ministers to move forward with a view to abolishing the Act which has caused so much difficulty for the UK constitutional, political and legal landscape. This necessarily implies the withdrawal from the jurisdiction of the European Court of Human Rights and ceasing to be a signatory to the Convention. Such a move would enable the UK to continue to respect the rights entailed in the Convention, as a symbolic recognition of basic aspirational standards to guide decision-making. This would leave open the way for judicial reform so as to avoid the dangers of the past in which judicial overreach occurs in several policy areas. The UK could then conceivably seek to reform the Supreme Court in London into a genuine final appellate court for human rights law.

3.

Rekindling the power of the executive to govern and protect

UK government ministers, we are often told, sit at the centre of British government. In legal terms, they are claimed to be the most powerful figures in government. Every Secretary of State heads a government department and is vested with important legal powers, with departments tasked to assist carrying out the policies that he or she has made. The political realities of how those legal powers have been exercised over the past 47 years has meant the capacity to consider and determine policy has passed to multiple, fragmented actors, a part of which included for example the institutions of the European Union, the cumbersome civil service structure but another part which derives from the European Convention. One conclusion that flows from this observation is that the Secretaries of State are no longer ‘principals’ as such in making policy and law, but rather ‘agents’ of that network of actors, including the civil service, EU institutions, foreign courts and the elevated role of the Supreme Court in modern times. Nonetheless, government and parliament have legislated for that distribution of political power; and both have a responsibility to change that distribution when things go wrong and as they see necessary.

Ministers are fundamentally impacted upon not simply by individual rulings and the controversies entailed in

those rulings but by the unwieldy processes brought forward under the Act. For example, section 19 requires any Minister who is in charge of a Bill to lay a statement (before the Second Reading of the Bill) which says that in the Minister's view the Bill is either compatible with rights under the Convention – or that it is incompatible but that the government still desires proceeding with the Bill. Ministers and the civil service are therefore obliged to consider from the outset the binding human rights implications of their proposed legislation before it is introduced to parliament.¹ As another significant example, if a court has found UK legislation to be incompatible with human rights, this does not affect the validity of the legislation. But under Sections 10 and Schedule 2 of the Human Rights Act, ministers are provided with an important mechanism whereby amendments can be made by a remedial order. So if a Minister considers there are compelling reasons, she can make an order to amend legislation in order to remove an incompatibility recognised by the courts.² (Prime) Ministers are rarely given the opportunity to resist any finding and in the past, only on rare occasions, have had sufficient political capital to rebut a finding under the Convention.

The appeal of the European Convention to many lawyers, as Sumption notes, is that it establishes their and the judges law above and beyond the reach of parliament and the people. In this way, international human rights law aims to limit – and often succeeds in frustrating – democratic self-government.³ In spite of the Convention rights, facilitated through the Act, the UK has often achieved its final result, despite the layers of obstructions presented by Strasbourg judgements. The government enabled the deportation of Abu Qatada and removal of other terror suspects who posed a risk to the safety of the country and whose presence would

not be conducive to the public good.⁴ They also achieved the extradition of Abu Hamza to the US where he has been convicted of serious terrorist charges.⁵ The government has frequently ensured the removal of people who pose a threat to this country to keep our citizens safe, albeit not without significant delay, costs to the taxpayer and legal obstructions.

Having made several sceptical speeches and soundings about the operation of the Human Rights Act during the Coalition government period,⁶ David Cameron as Prime Minister continued to maintain the position of scrapping the Act, pledging to:

...reform our relationship with the ECHR by scrapping Labour's Human Rights Act and introducing a new British Bill of Rights. The consultation we will publish will set out our plan to remain consistent with the founding principles of the Convention, whilst restoring the proper role of UK courts and our Parliament.⁷

The holding of the EU referendum put aside any government capacity to urgently reform human rights laws for over three and a half years since that date. A crucial error in that policy has been the separation of European Convention rights questions from the EU withdrawal process. When Theresa May as Home Secretary spoke only weeks before the EU referendum in 2016 – broadly in favour of remaining in the European Union – her position on the Convention was distinctly critical. As Home Secretary, it had become very clear that:

...the case for remaining a signatory of the European Convention on Human Rights – which means Britain is subject to the jurisdiction of the European Court of Human Rights – is not clear.

As May drew contrasts, the emphasis was not on the European Union but the Convention which had delayed for years the extradition of Abu Hamza, and almost stopped the deportation of Abu Qatada. She directed almost all her attentions to the failings of the European Convention.⁸ The Convention, in her words:

...can bind the hands of Parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals – and does nothing to change the attitudes of governments like Russia's when it comes to human rights.⁹

So, if we genuinely wanted to reform human rights laws, May held (at that time) it wasn't the EU we should leave but the Convention and the jurisdiction of its court. Although Theresa May took a far tougher line on the Convention than others before her, both as Home Secretary and Prime Minister, the argument for repeal of the Act remained but political circumstances once again appeared to prohibit the essential changes. A Conservative government with an 80-seat majority is now conceivably better placed to finally deliver that legislative aim.

After all, the little discussed issue in evaluating the impact of the Human Rights Act has often been the office and governing capacity of Prime Ministerial power. The party leader who can command a majority in the House of Commons is invited to become Prime Minister and can therefore exercise significant power through his or her party's majority in the House. They are the most fundamental person in government. They hold powers by convention – but exercise no statutory powers. The Prime Minister establishes their reputation as party leader but also by for example, attending international summits on

the global stage, although they often demonstrate uniquely different leadership qualities. Although Human Rights Act legal obligations do not fall technically with the PM, the cases of *Belmarsh*, *Hirst* and the Qatada affair all separately embarrassed, if not humiliated Home Secretaries and the sitting Prime Ministers when a breach of Convention rights was ruled by the courts. They deliver shocks to a constitutional system unused to court's ruling on significant policy issues. Their sense of legislative initiative, their standing, the national reputation and the setting of the agenda is undermined. They no longer appear at the apex of government (nor even of their own party), more a consensual middle-manager of international obligations. The excessive financial and administrative resources of government deployed by the Prime Minister and Home Secretary – which Theresa May herself denounced after the Qatada affair – have been wasted when considered against the disadvantages to justice and the British taxpayer.

The deportation of Abu Qatada, the Strasbourg court and the continued moving of the goalposts

Following the lengthy drawn out process of the Abu Qatada affair – the Convention having blocked the individual's deportation over years – the then Home Secretary Theresa May had herself referred to keeping all options on the table to deal with the 'crazy interpretation of our human rights laws', including withdrawal from the European Convention, to prevent any repeat of the Abu Qatada affair.¹⁰ His removal took 12 years at a cost of over £1.7m in legal fees. He had been described by judges as a 'truly dangerous individual... at the centre in the United Kingdom of terrorist activities associated with al-Qaeda'.¹¹

Theresa May as Home Secretary (at that time) specifically

isolated the role of the Strasbourg court in her analysis. That court had ruled that the deportation of Abu Qatada from the UK to Jordan would be a violation of Article 6, that is his right to a fair trial. The radical Islamist cleric should have been sent back from the UK to Jordan much earlier, but the Court had moved the goalposts by establishing new, unprecedented legal grounds for blocking his deportation. The court held that evidence obtained under torture could not be used.

There were then continued pledges to make it harder for foreign national criminals to avoid deportation through 'spurious appeals' but ultimately, as long as the Human Rights Act remained in place, so the situations continued to arise. May continued to make clear her view that the Human Rights Act should be scrapped, albeit during her premiership consumed by Brexit saw no repeal or amendment of the Act. May had kept all options on the table, including withdrawal from the Convention altogether.

Abu Qatada (full name, Omar Mahmoud Othman) was a Jordanian national who was repeatedly imprisoned and released in the UK under anti-terrorism laws but was never charged with any crime and was eventually deported back to Jordan in July 2013.¹² The key parts of the Convention which had prevented his earlier deportation revolved around the judgement by the court referring to a violation of Article 6 – his right to a fair trial, given the real risk of the admission of evidence obtained by torture at his retrial.¹³ He had arrived in the UK in 1993 and made a successful application for asylum, in particular on the basis that he had been detained and tortured by the Jordanian authorities in 1988 and 1990-1. He was recognised as a refugee in 1994, being granted leave to remain until June 1998.¹⁴

While his subsequent application for indefinite leave to

remain was pending, he was detained in October 2002. He was later released on bail and made subject to a control order. While his appeal against that control order was still pending, in August 2005 he was served with a notice of intention to deport him to Jordan.¹⁵

Qatada appealed against that decision. He had been convicted in Jordan (in his absence) of involvement in two terrorist conspiracies in 1999 and 2000. It was alleged by the Jordanian authorities that Qatada had sent encouragement from the UK to his followers in Jordan and that that had incited them to plant the bombs. He claimed that, if deported, he would be retried, which would put him at risk of torture and a grossly unfair trial.

The UK Special Immigration Appeals Commission (SIAC) dismissed his appeal, holding in particular that he would be protected against torture and ill-treatment by the agreement negotiated between the UK and Jordan. The Commission also found that the retrial would not be in total denial of his right to a fair trial. However, the English Court of Appeal partially granted Qatada's appeal. It found that there was a risk that torture evidence would be used against him if he were returned to Jordan and therefore to deny him justice in breach of Article 6 of the European Convention.¹⁶

Later, on 18 February 2009 the House of Lords upheld the Special Immigration Appeals Commission's earlier findings. They found that the diplomatic assurances would protect Qatada from being tortured. Given the applicant's allegations that he would be at real risk of ill-treatment if deported to Jordan, his application was lodged with the European Court of Human Rights on 11 February 2009. On Article 6 specifically, the European Court agreed with the English Court of Appeal that the use of evidence obtained by torture during a criminal trial would amount to a flagrant

denial of justice. Torture and the use of torture evidence were banned under international law. So, in the absence of any assurance by Jordan that the torture evidence would not be used against him, the Court therefore concluded that his deportation to Jordan to be retried would give rise to a flagrant denial of justice in violation of Article 6.¹⁷

Following his effective deportation in the summer of 2013, the circumstance ended in 2014 with Qatada being released from prison after being found not guilty of terrorism offences by a court in Jordan. Judges said there was 'insufficient evidence' to convict him of planning a thwarted terrorist plot against tourists and diplomats during Jordan's Millennium celebrations.¹⁸ He was not allowed back to the UK as the courts agreed he was a threat to security.

After his deportation, the Home Secretary made clear that successive governments sought to deport Qatada since 2001 and that the long delays and significant costs were down to the complex layers of appeal rights that were available to him, and real problems with our human rights laws.¹⁹ Having succeeded in deporting Qatada by respecting the rule of law at each and every stage of the process, the only choice open to Qatada in the end was through challenging May's decision through judicial review or 'conceding that the game was up'.²⁰ Given the Home Secretary's agreement reached with the Jordanian government in March that year, he accepted the inevitable. That mutual assistance treaty with Jordan had certain guarantees on fair trials and yet, the government already had assurances about Qatada's treatment in Jordan which had been upheld in the courts.²¹

May recounted how in February the previous year, the European Court of Human Rights

...moved the goalposts and declared that his deportation would be unlawful because of the risk that evidence obtained

through the mistreatment of others might be used against him. That was the first time ever Strasbourg had blocked a deportation on that basis.²²

Given the novel expansionist interpretation of the Convention, the Home Secretary assured ‘...we have to do something about the crazy interpretation of our human rights laws.’

The Coalition government, to its credit, managed to address some concerns over appeal rights. Through the Crime and Courts Act 2013, the government legislated for the principle that in national security cases individuals should be able to appeal only following deportation to their home country, except in cases where there is a risk of serious, irreversible harm. The subsequent Immigration Bill made it easier to remove foreign nationals, making it harder for them to prolong their stay with spurious appeals. The government were already taking action to address the misinterpretation of Article 8 of the European Convention – the right to a private and family life – and had achieved some reforms to the way in which the European Court works through the Brighton Declaration. It would however be a mistake to assert that such reforms have in any way impacted on the structure and obligations of the Human Rights Act or the underlying Convention, nor do they address future probable adverse Strasbourg judgements or declarations of incompatibility in the national courts.

However, May insisted the problems caused by the Human Rights Act and the European Court in Strasbourg remained, so the reforms to alter the human rights law remain a burning issue. We remain obliged, in May’s words, to:

...remember that Qatada would have been deported long ago had the European Court not moved the goalposts by

establishing new, unprecedented legal grounds on which it blocked his deportation.

The Home Secretary went on:

I have made clear my view that in the end the Human Rights Act must be scrapped. We must also consider our relationship with the European Court very carefully, and I believe that all options—including withdrawing from the convention altogether—should remain on the table...²³

Given the advice of recent and past Home Secretaries and Prime Minister's in removing the Act and (in some cases) withdrawing from the jurisdiction of the Court, it is incumbent upon the current government to review and publicly justify why this legislation should remain on the statute books (or not) as a matter of public accountability and as a principle of good government for the future.

The Belmarsh judgement, terrorism and national security

The requirement for national security and the detaining of foreign terrorist suspects has been forfeited under human rights law. The waning of this principle was illustrated in the House of Lords (then the UK's highest court), when the Law Lords ruled in the *Belmarsh* case in 2004,²⁴ 'the flagship case of the modern British human-rights-law movement'.²⁵ The government was seeking anti-terror measures but the House of Lords ruled (by an eight to one majority) in favour of appeals by nine detainees.²⁶ The Law Lords said the anti-terror laws were incompatible with the European Convention. The indefinite detention without trial at Belmarsh and Woodhill high security prisons was unlawful under the convention. The detainees had taken their case to the House of Lords after the Court of Appeal ruled in favour of the Home Office's powers to hold them without limit or charge.²⁷

Following the 9/11 terrorist attacks in the US in 2001, the government enacted the Anti-Terrorism Crime and Security Act 2001, which provided for indefinite detention of foreign nationals suspected of being involved in terrorism and who could not, for legal or political reasons, be repatriated to their countries of origin. For that anti-terror legislation to be compatible with the European Convention, the government derogated from its obligation to protect the right to liberty and security under Convention Article 5(1)(f) on the grounds that there was a state of emergency. A number of foreign nationals, known as the 'Belmarsh detainees', were detained indefinitely under the anti-terror law and could not be deported.²⁸ The Belmarsh prisoners challenged their detention and the validity of the government's derogation.

The nine detainees were certified by the Home Secretary under section 21 of the anti-terrorism legislation and were detained under that Act. All were foreign (non-UK) nationals. None had been the subject of any criminal charge.²⁹ In none of their cases was a criminal trial in prospect. All challenged the lawfulness of their detention.³⁰ They all contended that such detention was inconsistent with UK obligations under the European Convention, incorporated by the Human Rights Act.³¹ In their case, they alleged the UK was not legally entitled to derogate from those obligations. Even if it was, its derogation was inconsistent with the European Convention and so ineffectual to justify their detention. In other words, the law under which they had been detained was incompatible with the Convention.³²

The broader UK legal and national security context had been framed by events on 11 September 2001 when terrorists launched concerted attacks in New York, Washington DC and Pennsylvania. They were 'atrocities on an unprecedented scale' as Lord Bingham accepted in the case, causing many

deaths. The UK was particularly prominent in their support for the United States and its military response to Al-Qaeda, the organisation identified as responsible for those attacks.³³ Before and after 11 September Usama bin Laden, guiding Al Qaeda, made threats specifically directed against the United Kingdom and its people. The (Labour) government of the day reacted to the events of 11 September through Part 4 of the Anti-terrorism, Crime and Security Act 2001 and legislating for the Human Rights Act 'Derogation Order'.³⁴ So, the government had itself necessarily opted out of part of the European Convention which protected the right to a fair trial in order to bring in anti-terrorism legislation as a response to the 11 September attacks in the US. Any foreign national suspected of links with terrorism could then be detained or could opt to be deported.³⁵

In December 2004, the House of Lords accepted the government's position that there was a public emergency threatening the life of the nation which could justify the derogation but found the measure disproportionate and discriminatory. Foreign national terror suspects posed no greater risk than national ones. The Lords found the government to be in breach of Articles 5 and 14 of the European Convention. In practice, the judges interfered in a highly charged national security context by making a quashing order of the Derogation Order.³⁶ It found section 23 – setting out the conditions of detention – in the Anti-terrorism, Crime and Security Act 2001 to be incompatible³⁷ with Articles 5 and 14 of the European Convention insofar as it was disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status. Professor Finnis has argued that the increasing steps made towards proportionality analysis in recent years introduces

arbitrary law-making into constitutional adjudication.³⁸ Sir Noel Malcolm has separately referred to that doctrine of proportionality as having '...an outward appearance of objectivity and universality' which '...its use in practice turns out to be 'fluid ...or even, to be honest, gaseous'.'³⁹

In the *Belmarsh* ruling, as Lord Bingham indicated on the right of personal freedom, Article 5(1) of the Convention prescribes:

- (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
- (f) the lawful arrest or detention of...a person against whom action is being taken with a view to deportation.⁴⁰

In addition to Article 5 concerns, the detainees had also complained that in providing for the detention of suspected international terrorists who were not UK nationals but not for the detention of suspected international terrorists who were UK nationals, section 23 had unlawfully discriminated against them as non-UK nationals in breach of Article 14 of the European Convention.⁴¹

That Article on the 'Prohibition of discrimination' provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.⁴²

They were certified as 'suspected international terrorists' and yet the judges viewed the legislation as a disproportionate interference with liberty and equality and unlawfully discriminated against foreigners because British terror

suspects thought to pose a similar risk cannot be locked up without charge or trial. The then attorney-general, Lord Goldsmith, who made the broadly justifiable case for the Labour government, had made reference to the judges as 'undemocratic' and needing to defer to the will of elected representatives.⁴³ Policing minister, Hazel Blears, held that ministers who authorised detentions had seen intelligence data which the Law Lords did not and it was a matter for parliament to decide, in line with the European convention.⁴⁴

The decision created a significant conflict between the judiciary and the executive. The critical situation was compounded by a further subsequent development. The government introduced a Terrorism Bill with new provisions to replace the previously challenged parts under the 2001 legislation. Those provisions in the Terrorism Act, detailing the basis for control orders on suspected individuals was also undermined by the courts, with the House of Lords finding 18-hour curfews constituting a deprivation of liberty. The courts did so by safeguarding their liberty under Article 5 of the Convention.⁴⁵

Yet, 'national security' and 'the public interest' actually refer to the human rights of thousands or even millions of individuals in society. In such cases, the prevention of the government from detaining or deporting potentially dangerous individuals may result in the violation of the individual rights to liberty or even to life of thousands of law-abiding citizens.⁴⁶ This picture cannot be altered because while the Act remains in force, the UK remains tied to an evolving system of law whose development rests with the court standing entirely outside its own political institutions.⁴⁷ If the UK chose to repeal that Act, of course, the situation could be changed.

The challenge to the principle of ministerial accountability

At the heart of the British constitutional system is the principle of ministerial accountability. It is the responsibility of parliament, rather than the judiciary, to pass legislation and check the misuse of executive power, particularly since parliament's authority derives from the balance of settled opinions, interests and rights of the nation as a whole.⁴⁸ In short, ministers who are drawn from parliament can be more effectively held to account by it because governments and MPs are removable by voters at general elections. Unlike that of the courts, parliamentary decision-making involves an ongoing contestation of issues and concerns, outside parliament itself, within the two Houses, and in committees.⁴⁹ It is an essential part of Britain's democratic civilisation which is at odds with the overbearing judicialisation of politics through the Human Rights Act. Making law is about taking responsibility for persons answerable for the new laws to their subjects. As such, Professor Finnis maintains the design of legislatures is superior to the procedures of appellate courts in discharging this function.⁵⁰

The different phases of incorporating the Convention rights post-1998 have presented different challenges to ministerial accountability, none of which have been fundamentally resolved. The early articulation by Lord Bingham of the 'mirror principle' (as discussed in chapter 2), enabled the UK courts to understand Convention rights in the same way that the European Court understood them. It conformed to the objective of the Act and became a vehicle for minimising domestic judicial discretion. Professor Richard Ekins suggests the principle was later qualified in the Act's latter 10 years to enable judges to freely use the legislation to impose obligations on government and on parliament which go well beyond the standards imposed by the European court. The

later expansion of judicial discretion however to go beyond Strasbourg rulings is a clear and voluntary misuse of the wording and responsibilities detailed in the legislation.⁵¹ In that later sense, judges have undermined settled law and intervened as they sought fit in political debate, no longer to simply comply with international obligations but to further advance their own views, occasionally with extravagant new rights.⁵² UK judges are reaching decisions, Lord Hoffman has suggested, which would have clearly astonished those who agreed to our accession to the Convention in 1950.⁵³

This well-established trend towards expansionist interpretation by national judges in relation to the European Court is a major distortion of the Human Rights Act, compounding the damage that Act does to the constitution. It is not, as some suggest, merely a milestone in the UK courts healthy contribution to European rights jurisprudence but is a grave example of our courts misusing the Act to change the law or to coerce the political authorities by advancing the judges' own views on policy matters.⁵⁴ Under the legislation, the courts adopted a vastly expansive approach in their power of interpretation to the extent that they add or subtract words, or change meanings, to make a provision consistent with protected rights, irrespective of it being at odds with parliament's intended meaning.⁵⁵ As Professor Jeffrey Goldsworthy has argued, the court's construe the Act as providing that power to them.

The oversight in some of the judicial interpretation relating to every Convention state's right to govern and protect is in part a product of the Strasbourg court's inability to comprehend the democratic determination of rights within states. When Lord Sumption considered the *Hirst* judgement on prisoner voting – in which the court had ruled, on spurious grounds, that a blanket ban on prisoners,

right to vote was contrary to the Convention – he argued that when the judiciary moves beyond cases of real oppression, we leave the realm of universal consensus and enter that of legitimate political contestation where issues ought to be resolved politically.⁵⁶ The UK's own illustration had been provided by a significantly contested issue about the right of convicted UK prisoners to vote in elections. This policy has been part of UK statute law, as Lord Sumption claims, '...since the inception of our democracy in the nineteenth century and has been regularly reviewed and re-enacted since.'⁵⁷ It enjoys the majority of public support. However, what is patently clear to Sumption is that '...it has nothing to do with the oppression of vulnerable minorities.'

Yet in two cases on the right of prisoners to vote, *Hirst v United Kingdom* and *Scoppola v Italy* – the first of which will be discussed in detail in the following section – the European Court has held that the UK's automatic disenfranchisement of convicted prisoners is contrary to the Convention. In both cases, Sumption argues, the Court's reasoning illustrated its '...limited interest in the democratic credentials of such policies.' In the first, '... they declined to accept the argument based on democratic legitimacy on the ground that parliament cannot have devoted enough thought' to the prisoner voting policy. In the second, they disregarded the policy on the ground that '...the issue was a matter of law for the court, and implicitly, therefore, not a matter for democratic determination at all.' Lord Sumption emphasises that judgement since to claim it is a question of law is simply to point out the problem.⁵⁸ The Strasbourg court directed the UK government to bring forward legislative proposals in six months intended to amend the law. That requirement is said to have no legal basis whatsoever in the Convention.⁵⁹ Despite its disorderly

ruling, the government then brought forward legislative proposals which the parliament then declined to approve.⁶⁰ But that tension between the government and parliament embodies the tension between a weak executive and the ill-conceived judgements of the Strasbourg court on policy matters outside their competence.

The Convention legitimising 'lawfare': taking British soldiers to court

In the field of defence and security, concerns for lawfare on the battlefield have impacted upon the UK's ability to protect. The extension of the Convention to armed conflict and tactics on the battlefield has made extensive litigation against British soldiers inevitable. It has risked promoting a culture of risk aversion in the military. In Afghanistan, it has impacted on the British military's authority to detain enemy combatants and also to work with the Afghan government and NATO allies.⁶¹ It was never truly intended that those soldiers making military decisions on the battlefields of Iraq and Afghanistan would become subject to the wording of the Convention and that area had been rightly left for the law of armed conflict, including international humanitarian law.⁶² This situation has created multiple injustices for the armed forces which ought to be urgently addressed by the current government.

It is consistent then that the government has been clear in its briefings on the Queen's Speech in December 2019 that they remain:

...strongly opposed to our Service personnel and veterans being subject to the threat of vexatious litigation in the form of repeated investigations and potential prosecution arising from historical military operations many years after the events in question.⁶³

As part of that commitment, the government insists it:

...will tackle the inappropriate application of the Human Rights Act to issues that occurred before it came into force.

The inappropriateness of the application of the Human Rights Act in the field of armed conflict must therefore be managed to reflect the government's commitment, both through abolishing the Act and the ongoing interpretation of the Convention. Richard Ekins and Julie Marionneau of the Judicial Power Project (at Policy Exchange) have gone some way to address those Human Rights Act-related concerns by addressing:⁶⁴

- The legal investigations into British soldiers and veterans in the aftermath of operations is concerning, particularly for those caught up in investigations, sometimes decades after their service.
- Soldiers who served decades ago in Northern Ireland (notably, soldier-scholar General Sir Frank Kitson) remain significantly exposed to legal risk, despite having served and sacrificed for their country.
- Military practices abroad have been subject to challenge in UK courts, as well in the European Court to the degree that enemy combatants and others have challenged key operational decisions of UK forces while they are in the field, in relation to detention, and also the use of force.
- Legal challenges have been brought forward through the Convention, incorporated into UK law by way of the Human Rights Act – and via the law of tort.
- In this process, European human rights law and the law of tort displaces the law of armed conflict which UK forces follow.

Given the increasing instability and insecurity in the Middle East and the potential for troop deployments required abroad, the UK could conceivably bring forward the policy position to remove the Act in the interests of defence and security. As recent as October 2016, Michael Fallon, as Defence Secretary made a joint announcement with the then Prime Minister Theresa May that the government proposed to protect the armed forces from persistent legal claims by introducing a presumption to derogate from the Convention in future overseas operations. The case for the derogation was at least in some part promoted by the Defence department effectively seeking protection from those legal claims.

The last time the UK had derogated from the Convention, in the immediate aftermath of the events of 9/11 in 2001, it was to enable the detention of foreign nationals who were suspected terrorists but could not be deported.⁶⁵ As discussed previously in relation to the *Belmarsh* decision, that derogation was subsequently found by both the Judicial Committee of the House of Lords and the European Court to be incompatible with the Convention because, although both courts accepted that there was a public emergency threatening the life of the nation, the measures taken were said to be disproportionate in that they discriminated unjustifiably between nationals and non-nationals (the threat from terrorism came from both).⁶⁶

In addressing the judicialisation of war, Policy Exchange's Judicial Power Project recommended that the government should derogate from the European Convention,⁶⁷ as Fallon had suggested. The Strasbourg court had misinterpreted the Convention, improperly extending it to apply to military action outside the territory of member states. This has enabled the Convention to govern the conduct of the

UK's armed forces in overseas armed conflict. Such action should instead be governed exclusively by international humanitarian law, designed to reconcile military reality and humanitarian concerns. Although the position did not ultimately change in 2016, the government was therefore correct in its assumption to consider addressing the extension of the Convention by derogating from Article 15,⁶⁸ to secure the military effectiveness of UK operations.

The capacity to govern and protect the nation state has, in several ways, operated in the face of serious ambiguity. The hasty decision under the Labour administration to authorise judicial review, while also constraining the scope of judicial remedies by withholding a power to invalidate inconsistent legislation – on Professor Hiebert's analysis – has, in one sense, introduced a 'serious ambiguity' about the function of the Human Rights Act. In addition, it leaves open the question as to '...where political legitimacy resides for resolving institutional disagreements about how rights appropriately guide or constrain legislation.'⁶⁹ One type of ambiguity rests with how institutional actors understand the role of that Act. One might assume that rights protection occurs primarily through judicial review, either by authorising the judiciary to engage in interpretive techniques that force legislative compliance, or by identifying rights constraints that parliament is expected to address by enacting remedial measures. Others have assumed that rights protection happens through changed political practices, mainly by the executive, and parliament in an active role of identifying how rights are implicated in proposed legislation, increasing intra-institutional deliberation about justification, and bringing about pressure to implement relevant amendments. A further type of ambiguity occurs with respect to political actors' responsibilities in a declaration, as judicially

interpreted.⁷⁰ The ambiguity lays with how the different arms of government have understood the function of the Human Rights Act. Although the Act elevates the judiciary in the constitutional architecture, the simmering battle between the executive and the legislature and the courts on where legitimacy resides for resolving disagreements on rights and legislation continues to proceed (in my view) without clarification, let alone a conclusion.

Given the rich rewards for the legal profession and the benefits of power to the judges under the Act, government ministers who continue to sit at the centre of British government must resist the strong degree of pressure upon them to maintain the status quo and address the long-term challenges and rights ambiguity in our constitutional landscape. Is there not a Secretary of State, heading a government department and vested with fundamental legal powers, that has not felt regrettably obliged to wave through a Convention-right judicial decision (either in Department or in Cabinet) which was likely to amend legislation they otherwise claim to be in charge of? In the governing executive, they are acutely aware of the political realities of how those legal powers are exercised – and that the capacity to consider and determine policy has passed to multiple actors, including those deriving from the national and Strasbourg courts, adjudicating on Convention rights. If the Secretaries of State are no longer to be considered ‘principals’ in making policy and law, but rather ‘agents’ of a broader, broken circus of actors, it is essential to acknowledge that both government and parliament have legislated for that distribution of political power – and it is ministers through parliament who have the responsibility to change that distribution of power when things go wrong. A starting point to that process would necessarily entail

the abolition of the offending Act because of the burdens it imposes along with our extraction from the jurisdiction of the European Court of Human Rights. By ceasing to be a binding signatory to the Convention, while continuing to respect its aspirational and symbolic rights, the UK might finally begin to put its house in order.

4.

Sovereignty and the restoration of British human rights

Under the UK constitution, electors and governments look to parliamentary sovereignty as a stabilising force in which the laws of the government-in-parliament are binding upon the UK and could be set aside by no body other than parliament. Parliament has also accepted the European Communities Act, the Human Rights Act, devolution arrangements and the creation of the Supreme Court, all of which has qualified the sovereignty doctrine in different ways. In each of those acts, parliament accepts its practical – but not theoretical – sovereignty is diminished but the stability afforded by that sovereignty doctrine has thereby waned. The historic assumptions therefore that whoever commanded a majority in the House of Commons wielded a considerable degree of executive power is now constrained and part-checked. At the heart of this constraint is the deference of the UK polity to a foreign human rights charter adjudicated upon by both national judges (themselves beholden to the novelty of Strasbourg jurisprudence) and ultimately, the jurisdiction of a foreign court. The UK constitution which once reflected the Prime Minister and Cabinet came to form the ‘core executive’ of UK government powers, with the inner-workings of government now severely constrained.

It had always been clear from the Human Rights Act’s

beginning that the need to incorporate the rights entailed in the Convention preceded any discussion of sovereignty for the then Labour government in bringing forward the legislation. The then Home Secretary, Jack Straw, told the House of Commons (on Second Reading of the Bill):

Having decided that we should incorporate the convention, the most fundamental question that we faced was how to do that in a manner that strengthened, and did not undermine, the sovereignty of Parliament.¹

The short-termism, haste and desire to put wider international legal obligations beyond domestic concerns and the centuries-old doctrine of parliamentary sovereignty has haunted successive governments ever since. On the 10th anniversary of the Act, Shadow (Conservative) Justice Secretary, Nick Herbert marked the occasion by suggesting that:

...legislation has been a gift to lawyers, an encouragement for undeserving litigants and a burden on frontline public servants who struggle to decide what the law is in practice.²

The promoters of the Act often allege it preserves the doctrine of parliamentary sovereignty specifically because parliament alone can still decide whether or not to repeal or amend the incompatible legislation in question. Before Brexit, the Act's stated respect for parliamentary sovereignty was once compared with the more binding nature of the European Communities Act 1972 which previously allowed EU law to override UK law if it conflicted with directly enforceable EU law. Nonetheless, the Human Rights Act required the judges to construe all legislation to make it compatible with the European Convention of Human Rights, which itself was a Convention drawn up by the Council of Europe.³ Its effect was to bring 'the language of rights into the British constitution'.⁴

It might be suggested, in line with Herbert Hart's view, that the UK constitution works on the basis of a 'rule of recognition': 'What the Crown in Parliament enacts is law'. It is a fundamental 'rule of recognition' in the UK legal system because it states the conditions any legal rule must satisfy in order for that rule to impose obligations as valid law.⁵ However, in the current UK constitutional context, there remain substantive attempts by British constitutional theorists and judges to describe the advanced, modern, political state architecture as eliminating the existence of the rule of recognition. On Bogdanor's argument in *The New British Constitution*, we must draw a distinction between the old, traditional view of parliamentary sovereignty and a transition toward popular sovereignty, in which he finds that there is a new British constitution with the Human Rights Act at its heart.⁶ That arrangement also reflects our obligations under EU membership since 1973, Scottish, Welsh, Northern Irish and regional devolution and the alleged formation of a quasi-federal (rather than unitary) state, with a reformed House of Lords as primary features of the new constitution.

In the view of rights-based theorists such as Vernon Bogdanor, parliamentary sovereignty is questionably being consigned to history, the next step being a central written constitution. The rule of recognition has been swept away. It is being pushed aside on Bogdanor's primary argument because the Human Rights Act has created a 'cornerstone' of a new constitution, by giving more power to courts vis-a-vis parliament, thereby displacing the old principle of parliamentary sovereignty, the major underpinning of the 'old' constitution.

The reason why judicial decisions on human right issues invoke so many deep and emotive reactions is that it

revolves around the sovereignty upon which the principles of government, law and society rest. The Act altered the basis on which rights would be subsequently understood in Britain.⁷ Rights would no longer be ‘inductions’ or ‘generalizations’ – as the Victorian constitutionalist Albert Dicey once put it – but derived from principles of the constitution, set out as written, detailed rights found within the European convention,⁸ even though on paper, it claimed to formally preserve parliament.⁹ As the barrister Michael Arnheim suggests, the claim to protect parliamentary sovereignty was vastly mismatched by the growing and ongoing dissatisfaction with judicial decisions on human rights issues, which subsequently developed into the call for a ‘UK Bill of Rights’.¹⁰ No cases over the past ten years invoked such widespread claims to injustice in Human Rights Act-based judicial decision-making than the public debate relating to Abu Qatada and Abu Hamza.

The case of Abu Hamza: rights compromised, sovereignty diminished

Abu Hamza al-Masri was found guilty of supporting terrorism by a court in New York and sentenced to life in prison in 2015. He is a radical cleric who came to England in 1979. In 1987, Hamza moved to Afghanistan and met with the founder of the Afghan mujahideen¹¹ and in the following years, he lost an eye and both his hands.¹² He returned to the UK in 1993 for treatment. But within two years he had left Britain again to support Bosnian Muslims during the break-up of the former Yugoslavia.¹³

He became a leading figure in the British Islamist scene. He was spending more and more of his time preaching while disseminating leaflets calling for jihad against corrupt Middle East regimes. In 1997, he arrived at Finsbury

Park Mosque.¹⁴ Scotland Yard had been questioning him on suspicion of alleged bomb plots in Yemen.¹⁵ On the first anniversary of the 9/11 attacks, he co-organised a conference at the mosque praising the hijackers. In 2003, police then raided the Mosque as part of an investigation into an alleged plot to produce ricin poison. Hamza was not arrested in connection with that probe and despite being denied a base, he preached outside its gates every Friday.¹⁶

By 2004, the US had named Abu Hamza a 'terrorist facilitator with a global reach'. He was arrested pending extradition. Five months later, he was charged with 15 UK offences¹⁷ associated with his sermons and terror handbooks found at his home. He was convicted on 11 counts and was jailed for seven years. The US authorities continued to pursue his extradition. In August 2008, the European Court ruled that he should not be extradited until they heard his case, with the protracted legal case lasting until 10 April 2012. The Strasbourg court then ruled his extradition was lawful, before Hamza's final extradition in September 2012.¹⁸ Following an eight-year legal battle, he was finally extradited.¹⁹

He then went on trial in New York accused of offences including plotting to set up a terror camp in rural Oregon, intending to provide support for terrorists in Afghanistan and in connection with the 1998 Yemen attack.²⁰ He denied all the charges but was found guilty in 2014.²¹ The protracted proceedings, much of which followed the Strasbourg court's intervention shines a light on the rights of terrorists in relation to society's right to national security and the future assumption that a legislature would be able to provide a more appropriate balance.

Reasserting practical sovereignty against fervent judicialisation of the constitution

There remains the concern, as Lord Neuberger suggests, that judges should ensure that principles from the Strasbourg court should not undermine the essential characteristics of our constitutional system, based on the common law and parliamentary sovereignty.²² Over many years, MPs, officials and judges adapted ‘theoretical’ notions of parliamentary sovereignty as being only marginally limited by EU membership and the incorporation of the Convention into UK law. Theoretical legal analysis assumed parliament, for example, retained its capacity to repeal the ECA 1972, even though for 47 years it did not. Under the terms of withdrawal and repeal of the ECA, parliament is learning again to assert its practical sovereignty. In that sense, the British constitution is undergoing a period of resettlement in the light of its powers being returned. The same might be said of the incorporation of the European Convention, even though parliament claimed on paper to explicitly preserve its capacity to pass or reject legislation that was inconsistent with the Convention.²³ Again, it was a theoretical claim. It retained an ultimate right which it refused to endorse or practice in political reality. Parliament may however choose, in light of having now legislated to repeal the ECA 1972 and remove the imposition of EU fundamental rights obligations, now choose to also alter its human rights obligations under the Human Rights Act. To do so, at some stage, it must exercise that same ‘practical’ sovereignty, not repeat its theoretical, paper-based assumptions that it simply claims to possess such authority.

The supposed irreversibility of the Act might be viewed as the legislation having cemented in place an overly-zealous human rights culture among the political elites in

Westminster and Whitehall which cannot now be derogated or withdrawn from. As with the European Communities Act, the Human Rights Act embodied a respect for theoretical sovereignty, a token respect for where decisions should ideally be made, which did not match up to its claim to interpret or determine its own practical sovereignty. It is frequently overlooked that following the passage of the Act, the two Houses of Parliament created a Joint Committee on Human Rights. It considers human rights as well as the functions of remedial orders. In addition to reporting to the House of Commons on legislation with implications for human rights, this effort has ‘helped contribute to a human rights culture in government’ and awareness in parliament.²⁴ When other observers view that far-reaching human rights culture as forming a consensus, it might be better understood as having made it difficult for parliament to evaluate and properly review the Act’s provisions for the future.

A reassertion of practical sovereignty will certainly become more feasible, particularly to ensure consistency with the EU withdrawal process and given the existing respectful references to the Convention within the ‘Political Declaration’. Given that the Convention is a treaty under international law, its authority essentially derives from the consent of the states that have signed up to it.²⁵ Parliament should in theory take into account the UK’s obligations in relation to international law when it legislates, but in practice the courts would not hold an Act void on the basis that it conflicts with principles of international law.²⁶ In law, both the treaty and decisions of the European Court do not form a part of UK law – they are binding in the sense that they are obligations under the system of international law. British judges are required only to take decision of the Court into consideration, and not as an express requirement.²⁷ It is difficult to understand other

than through a culture of judicial activism how an Act of parliament promoting dialogue between parliament and the courts therefore turned into a binding judicial obligation, preceding all other considerations of state duties towards public welfare and security.

The *Hirst* judgement: prisoner voting rights and the battle for 'rights-making' sovereignty

The Human Rights Act contains provisions which enabled a direct judicial confrontation with parliament over prisoner voting rights and enabled judges to give weight to the lesser rights of offenders, while simultaneously endangering the most fundamental of rights of others in society.²⁸ In 2005, the Strasbourg court ruled that the UK was in breach of Article 3 of Protocol No 1 of the Convention in relation to prisoner voting rights.²⁹ The issue continued without conclusive resolution for over a decade. In December 2017, the UK government eventually provided a proposal that the Council of Europe has said that, if implemented, were sufficient to signify compliance with the 2005 ruling. The Council thereby finally closed the case in September 2018.³⁰

The ban under UK law had meant that prisoners serving a custodial sentence after conviction could not vote in any elections. The existing provisions were set out in Section 3 of the Representation of the People Act 1983.³¹ The intentional and almost universally accepted disenfranchisement of prisoners in Great Britain dates back to the Forfeiture Act 1870,³² (which the government informed the Court of in this case), stemming in part from the notion of 'civic death'.³³ So, the 1870 Act effectively denied offenders their rights of citizenship.

In 2001, that ban was challenged by three convicted prisoners.³⁴ The UK courts rejected the challenge and the prisoner, John Hirst, then took his case to the European

Court. Hirst himself had killed his landlady, pleading guilty in 1980 to manslaughter on the grounds of diminished responsibility, and subsequently sentenced to life imprisonment.³⁵ On 6 October 2005, in the case of *Hirst v United Kingdom (No 2)*, the Court ruled that the UK's current ban on all serving prisoners from voting, as defined by the 1983 Act, contravenes Article 3 of Protocol No 1 of the Convention. That Protocol provides that signatory states should '...hold free elections ... under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'³⁶ At its centre, the Court ruling held that the UK's blanket ban on prisoner voting was indiscriminate and disproportionate.

The political debate that followed is the clearest UK example of the Strasbourg court significantly overstepping its proper role and encroaching upon parliament's authority and sovereignty. The court did so by misinterpreting human rights since the European Court's interpretation of Article 3 of Protocol No 1 went well beyond the original drafters' intentions.³⁷ A number of constitutional and political authorities, including Jonathan Fisher QC, Martin Howe QC, Anthony Speaight QC, and Dominic Raab MP, David Davis MP and Jack Straw MP later told one parliamentary committee that the European Court, in interpreting the Article 3, Protocol 1, as providing a right to vote, had ignored the intention of its original drafters.³⁸

The 2005 Labour government considered the existing ban on prisoners voting was appropriate but was also eager to meet its obligations under international law to remedy the supposed challenge to Article 3.³⁹ Having held two consultations, it failed to bring forward any final proposals before the 2010 General Election.⁴⁰ The Coalition government of 2010-15 published draft legislation but effectively got

no further forward. Under the Conservative government of 2015, David Cameron assured that the blanket ban would not be changed while he remained Prime Minister, albeit constructive efforts were made to resolve the issue by ministers and through the ongoing efforts of the Joint Committee on the draft voting Eligibility (Prisoners) Bill.⁴¹

Under Theresa May's minority government in 2017, some limited proposals were brought forward to allow prisoners on temporary licence to vote, which the Council of Europe welcomed and accepted as a compromise that would address the criticisms raised by the *Hirst (No 2)* judgement.⁴² The government implemented the proposed administrative changes by the end of 2018, with the Council of Europe confirming the case was closed that year.⁴³ The government has become well aware that such administrative amendments involved no changes to the original Representation of the People Act 1983, thereby short-circuiting parliament's involvement. To that extent, no effective 'settlement' was achieved to manage the effects of Strasbourg jurisprudence and the implications of the legislation. Furthermore, neither the past nor current government settled the UK's relationship with the Convention for the future, to prevent further challenges being made.

Noteworthy in the original *Hirst* ruling had been that the powerful 'joint dissenting opinion of five of the Strasbourg judges' (Wildhaber, Costa, Lorenzen, Kovler and Jebens) held several critical arguments – in disagreement with the twelve-judge majority.⁴⁴ The dissenters were 'not able to agree with the conclusion of the majority that there has been a violation of Article 3 of Protocol No. 1', in their view, simply because convicted prisoners under UK legislation are prevented from voting while serving their sentence. Article 3 of Protocol No. 1 'does not prescribe what aims

may justify restrictions of the protected rights', meaning the 'restrictions cannot in our opinion be limited to the lists set out' in the ruling.⁴⁵ The Convention institutions in their case-law have to date:

...been very careful not to challenge the aims relied on by the respondent Government to justify the restriction of a right under the Convention.... This has been the case ...of restrictions on the right to vote.⁴⁶

The dissenting judges had no difficulty in accepting that:

...the restriction of prisoners' right to vote under the United Kingdom legislation was legitimate for the purposes of preventing crime, punishing offenders and enhancing civic responsibility and respect for the rule of law, as submitted by the respondent Government.⁴⁷

The majority had in any case accepted that the restriction in question served legitimate aims.⁴⁸ The Court had consistently held in its case-law that the states had a wide 'margin of appreciation' in this sphere – that margin has been defined, as Sir Noel Malcolm later indicated, as some expectation of '... an act of self-restraint on the part of the Court, which could perfectly well step in to scrutinise every aspect of the state's decision-making, but chooses to stand back and accept some of it as given.'⁴⁹ The Court had even accepted that the relevant criteria may vary according to historical and political factors peculiar to each state.

In the dissenting view, Article 3 of Protocol No. 1 cannot be considered to preclude restrictions on the right to vote that are of a general character, provided that they are not arbitrary and do not affect 'the free expression of the opinion of the people', for example, through the conditions of age, nationality, or residence. Unlike the majority, the dissenters did not find that a general restriction on prisoners' right

to vote should in principle be judged differently, and the case-law of the Convention institutions did not support any other conclusion.⁵⁰ Nor did they find that:

...such a decision needs to be taken by a judge in each individual case. On the contrary, it is obviously compatible with the guarantee of the right to vote to let the legislature decide such issues in the abstract.⁵¹

Where the majority concluded that a general restriction on voting for persons serving a prison sentence must be seen as falling outside any acceptable margin of appreciation, the dissenting opinion found this difficult to reconcile with the declared intention to adhere to the Court's consistent case-law. Article 3 of Protocol No. 1 left open a wide margin of appreciation to the states in determining their electoral system.⁵² They suggested 'the lack of precision in the wording of that Article' and the 'sensitive political assessments' involved a need for caution. Unless restrictions impaired the very essence of the right to vote or were arbitrary, they would need to be 'weighty reasons' to justify incompatibility.⁵³

On the 'margin of appreciation' identified by the dissenting opinion,⁵⁴ the observation was made over a decade ago in a lecture by Lord Hoffman entitled 'The Universality of Human Rights' that the specific problem was not precisely the text of the Convention, or the Human Rights Act itself but the role of the Court:

In practice, the Court has not taken the doctrine of the margin of appreciation nearly far enough. It has been unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States. It considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe....

The problem is the Court; and the right of individual petition, which enables the Court to intervene in the details and nuances of the domestic laws of Member States. We remain an independent nation with its own legal system, evolved over centuries of constitutional struggle and pragmatic change. I do not suggest belief that the United Kingdom's legal system is perfect but I do argue that detailed decisions about how it could be improved should be made in London, either by our democratic institutions or by judicial bodies which ... are integral with our own society and respected as such.⁵⁵

In theory, then, the Strasbourg court has to a limited extent recognised the fact that while human rights are universal at the level of abstraction, they are national at the level of application. It has achieved this by the doctrine of the 'margin of appreciation'.⁵⁶ According to Lord Hoffman, the Strasbourg court must consider it:

...a matter of constitutional competence [as to] whether they have the right to intervene in matters on which member states of the Council of Europe have not surrendered their sovereign powers. Even if the Strasbourg judges were omniscient, knowing the true interests of the people of the United Kingdom better than we do ourselves, it would still be constitutionally inappropriate for decisions of the kind ... to be made by a foreign court.⁵⁷

The dissenting judges found in the earlier *Hirst* judgement the Court's reasoning in some cases emphasised its role in developing human rights and the necessity to maintain a dynamic and evolutive approach in its interpretation of the Convention. Tellingly, they found the reality of the situation had been that the majority conclusion is in fact based on a 'dynamic and evolutive' interpretation of Article 3 of Protocol No 1.

For the dissenting opinion, it was essential:

... to bear in mind that the Court is not a legislator and should be careful not to assume legislative functions. An 'evolutive' or 'dynamic' interpretation should have a sufficient basis in changing conditions in the societies of the Contracting States, including an emerging consensus as to the standards to be achieved. We fail to see that this is so in the present case.

After all, John Hirst's original application regarding the right to vote should have gone no further than the national Divisional Court in 2001 – which was refused, and he was also refused permission to appeal. As Lord Justice Kennedy concluded then, the issue of where the UK positioned itself on the prisoner voting rights matter '...is plainly a matter for parliament not for the courts.'⁵⁸ The *Hirst* judgement in the European Court reflected, after all, that some eighteen countries out of the forty-five contracting states had no restrictions on prisoners' right to vote. On the other hand, as the UK government pointed out,⁵⁹ in some thirteen states, prisoners were not able to vote. The finding of the majority, in the words of the dissenters, created legislative problems not only for states with a general ban such as the UK. As the majority have considered that it is not the role of the Court to indicate what, if any, restrictions on the right of serving prisoners to vote would be compatible with the Convention, the judgment implied that all states with such restrictions would face difficult assessments as to whether their legislation complies with the requirements of the Convention.

Their conclusion is that the legislation in Europe shows that there is little consensus about whether or not prisoners should have the right to vote.⁶⁰ In fact, the majority of member states have some restrictions, although some have blanket

and some limited restrictions. In short, the UK legislation cannot be claimed to be in disharmony with some common European standard.

Furthermore, the majority attached importance to an alleged lack of evidence that the Westminster parliament ‘... has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote’ (see paragraph 79 of the judgment). It is, however, undisputed that a multi-party Speaker’s Conference on Electoral Law in 1968 unanimously recommended that a convicted person should not be entitled to vote.⁶¹ The majority of the Court have held – as did the Chamber – that no importance could be attached to parliament’s earlier debate on prisoner votes as:

...it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards.

The dissenters disagreed with this objection as it was ‘not for the Court to prescribe the way in which national legislatures carry out their legislative functions.’ It must be assumed, they thought, that the legislation in question reflected national political, social and cultural values.⁶²

So, it was, in their dissenting opinion, ‘... difficult to see in what circumstances restrictions on voting rights would be acceptable, if not in the case of persons sentenced to life imprisonment.’ Generally speaking, the Court’s judgment concentrates above all on finding the British legislation incompatible with the Convention in the abstract. Since restrictions on the right to vote continue to be compatible, in their view, it would seem obvious that the deprivation of the right to vote for the most serious offences such as

murder or manslaughter, is not excluded in the future. Taking into account the sensitive political character of this issue, the diversity of the legal systems within the states and the lack of a sufficiently clear basis for such a right in Article 3 of Protocol No. 1, they could not accept that it was for the Court to impose on national legal systems an obligation either to abolish disenfranchisement for prisoners or to allow it only to a very limited extent.⁶³

In short, the Strasbourg court held in its first decision in 2005 that parliament cannot have thought properly about the human rights implications. In its second decision on prisoner voting, in 2012, the House of Commons had by then debated the 2005 decision and affirmed its original view – on which Strasbourg then said it was a question of law, and not for parliament at all.⁶⁴ Yet this highly idealised model of rights protection embodies a deep ambiguity about the expectation of parliament's responsibility to pass remedial measures. This ambiguity is a direct consequence of a political attempt to construct a rights project that emphasises a juridical approach for interpreting liberal constitutional values and subsequently expects a political willingness to enact remedies.⁶⁵ This tortuous ambiguity – invited to the UK's door by the Human Rights Act – is particularly clear in political responses to judicial rulings that the UK's comprehensive ban on prisoners' voting is inconsistent with European Court rulings.⁶⁶ How should the UK respond to the Court's usurpation of the Convention? In response to those questions, Lord Sumption makes clear that he hopes for a change of heart on the part of judges, domestic and European, and sees some signs that this is underway. He does conclude however that if there is no significant change, then the UK should withdraw.⁶⁷

The restoration of a British human rights regime

In Britain's past constitutional history, it has been unnecessary to hold one sole arm of government as essential to recognising the rule of parliament's 'rights-making' sovereignty, when the executive, the legislature, the judiciary and the electorate must each play their part in upholding the rule. It is important to restate the relevance of the broader UK unwritten constitution given that the radical common lawyer approach and those promoting a renewed, rights-based constitutional state order, some of which is formed out of interpretations of the Human Rights Act, has tended to marginalise those who exercise political power. It hinders MPs in their ability to review and amend rights as they cannot hold to account through political institutions, namely, parliament. It remains dismissive of that which is 'political', characterised by divisive debate, conflict and disagreement. Judicial reasoning of Convention-amended rights can therefore seem 'offensive' to the many, as it denies them the moral equality of persons which can be validated under democratic debate. Legalistic approaches give far too much weight to judicially enforceable limits on the legislature which fail to recognise the deeper politics of rights claims, nor see that law is neither separate nor superior to politics.⁶⁸ Current approaches have overlooked the primary role of political life in the often adversarial British political system and political party competition, along with the use of majorities to provide settlement and agreement, as more defining features of the political constitution.⁶⁹

The centrality of the UK constitution in its deference to politics⁷⁰ is a fundamental point because at the heart of UK parliamentary democracy is the capacity of voters at free and fair general elections to elect their chosen representatives to the elective part of Westminster, the House of Commons.

They thereby choose to have MPs decide on the laws and fundamental rights by which they are to be governed. In pursuance of that task, electors primarily affirm that fundamental choice of political candidate within the wider political system. In affirming their democratic freedom of choice within the political system, they choose their representatives and the major rights and laws which will affect their everyday lives, and ultimately answer the question of who governs the UK. To forfeit that consent which ought to be given to rights is to undermine the democratic and moral foundation of rights. It is their power as voters to send to Westminster an elected representative (and therefore perhaps remove an incumbent one) to make law in accordance with their general wishes, not in line with a remote and unqualified set of Convention-rights. To continue to move away from that political system through an antagonistic order of judicial review is a historic mistake.

The sovereignty of a bounded territory and the laws and rights under which a people live is matter of concern for that entire society, not one class or section of it. If under the UK constitution, electors and governments are set to continue to look to parliamentary sovereignty as a stabilising force in which the laws of the government-in-parliament are binding upon the UK and could be set aside by no body other than parliament, MPs must clearly not forego that basic obligation because some wider set of rights under the European Communities Act or the Human Rights Act seem (apparently) more suited or ideal to the interests of the people. Parliament must accept the practical – not merely theoretical – part it plays in ensuring sovereignty and stability is no longer diminished by its well-meaning, altruistic international obligations. When the doctrine of legislative supremacy is set aside, so is the stability afforded by that sovereignty doctrine.

The historic assumptions therefore that whoever commanded a majority in the House of Commons wielded a considerable degree of executive power is now part-constrained by absurd obligations put in place and supported by hasty reforms of a post-1997 Labour administration generation, gripped by neo-liberal assumptions of unqualified rights. At the heart of the constraint they imposed upon the nation is the deep-seated deference of the UK polity to a highly misinterpreted human rights charter and ultimately, the jurisdiction of a foreign court. Without any fundamental change to the ambit of the Act, the UK constitution which once reflected the Prime Minister and Cabinet standing at the 'core executive' of government, will face a future in which the inner-workings of government continue to remain severely constrained.

5.

Reclaiming democracy and deliberation – the foundation for future rights

European Convention rights should never have been considered to be pre-political or above politics, but, instead, ought to be deeply embedded in the morality of the political process. It is consistent with an account of politics provided by legal philosopher, Professor Jeremy Waldron, that such fundamental rights are subject to the ‘circumstances of politics’.¹ That process involves both the recognition of a plurality of perspectives on common problems which leads to pervasive disagreement. A legitimate process also requires the recognition of the need to make decisions that address the fact that there is a plurality.² Rights need to be protected but on the basis that they have a constitutive collective dimension, defended as common goods of a political community, rather than self-serving individual entitlements. In practice, Europeanised schemes of fundamental rights, such as the now-controversial Article 8 claims have been decided upon without sufficient political legitimacy and consent of voters. This is why parliament, being more accountable, makes better work of rights provision. It can provide remedy and balance in line with the consent of the governed. Democracy itself requires

that, in order to govern, we incorporate a great number of voices into the decision-making process, thereby taking into account the multiple views on rights, a number of sources of information and different analyses of policies.

The openness to politics as the moral foundation of rights entails the rejection of them as constitutionally entrenched and politically immovable. The arguments for protecting fundamental rights by legal entrenchment in the Human Rights Act pre-empts future political action of the community and other arms of government without providing genuine public justification. By removing rights from politics, it attaches only legal significance and views them as politically non-negotiable, irreversible, unamendable and non-reviewable. The constitutional entrenchment of Convention rights alienates their content from the political context and, alongside a strong form of judicial review, fosters a detrimental judicial culture of rights. As Professor Keith Ewing once described, the Act represents ‘an unprecedented transfer of political power from the executive and legislature to the judiciary and a fundamental re-structuring of our ‘political constitution’’.³ The courts have even come to hold a general suspicion of the political process and political reasoning within public decision-making.⁴

The deference to Britain’s ‘political constitution’ – at odds with the requirements of the Human Rights Act – would be much more justifiable since the UK reasonably disagrees about the qualifications of those many rights, such as on the balance between liberty and security. Where those rights include the liberties of terrorists in respect of their family life, or the criminalising of British soldiers in pursuit of their military duties, people disagree on the deeper substantive outcomes, or common good,⁵ that a society committed

to democratic ideals should achieve. The democratic parliamentary process is more legitimate than the judicial process at resolving these disagreements, and it offers an effective mechanism for upholding the key constitutional goods of individual rights and the rule of law.⁶

By contrast, the Human Rights Act was an abdication of legislative responsibility – the product of the political class of 1998, and fearing the process of debate and argument on rights, it chose to simply replicate the provisions of a treaty.⁷ The shift away from politics can be explained as the displacement of a political respectability between the executive, the legislature and the judiciary as being responsible for fundamental rights provision.⁸ In its place, a strengthened judicial power is elevated in contrast to the executive and legislature and becomes more narrowly responsible for fundamental rights provision on political matters. Judicial decisions under the Act are often made with disregard to the plurality of opinions across society on a given issue.

The protection of deliberative democracy from the judicial advances of the Human Rights Act applies equally to its protection from a homegrown declaration of rights. Both subvert essential political features of deliberative democracy by introducing inarguable, immovable, inviolable legal rights. The UK has long considered a Bill of Rights as unnecessary and conflicting with the constitutional principle of parliamentary sovereignty. This view derives from the assumption that a Bill of Rights required a judicial remedy to set aside inconsistent legislation. Such a judicial power contradicted the idea that parliament was the final arbiter on the legality of legislation. Professor Janet Hiebert's assumption is that the Act differs significantly from a Bill of Rights functions because it represents a politically-oriented

bill of rights, embodying the optimistic ideals of facilitating proactive rights protection through more rights-oriented legislative processes and relying on political willingness to enact remedies.⁹ However, in practice, the assumptions that the legislature would participate, did not result. The assumed 'dialogue' process and the relationships between legislature, executive and judiciary and the Strasbourg court did not assume a working relationship, rather sharp shocks to one another's sphere of competence.

Under the Coalition government, the underwhelming UK Bill of Rights Commission had been established in 2012 to look into the creation of such a Bill that built upon the UK obligations under the Convention and which protected liberties. The idea had been to present the Bill as a device to replace the Human Rights Act which carried some appeal (at that time) to Conservative MPs. It was never made precisely clear whether the Bill would supplant, rather than supplement the Convention.¹⁰ Anthony King, for example, saw the pledged replacement of the Act as presumably enshrining broadly the same rights as the original European declaration but not drawing on Strasbourg jurisprudence.¹¹ It left open the question that individuals in Britain would still have the right to appeal to Strasbourg unless the UK withdrew its participation from the Court and the Declaration.

The observation that in recent decades, Britain painstakingly strives towards liberal passive acceptance and foreign deference in its judicial decision-making is well recorded. A difficult moment in the life of the fruitless Commission on a Bill of Rights was a comment by a Norwegian academic who had led a review of human rights law in Norway. Guglielmo Verdirame, Professor of International Law at King's College London, carefully

noted that when the Norwegian expert was asked whether Norway was also considering Britain's practical solution of transferring the Convention into a domestic statute, he explained that Norway would not pursue that practice. Instead, he insisted, the Norwegian Supreme Court would remain:

...robust in adjudicating human rights cases under the Norwegian constitution rather than referring automatically to the Convention and the jurisprudence of the European Court of Human Rights.¹²

The observation applies to Norway as it does to Germany, France, Italy and Spain but not the UK. It is a flaw in the device of the Human Rights Act, as Verdirame suggests, that it hoped to bring the UK constitutionally closer to Europe in a manner that was both un-British and un-European.¹³ The most overlooked element in the construction of the Act was not so much the willing absorption of Convention rights into the body of common law rights but the failure to have restated the supremacy of the Bill of Rights of 1689 – the one only genuine record of rights due to all British persons – above and beyond all those charters, adjudicated upon by foreign courts.¹⁴

As the director of Civitas, David Green argues, many public decisions are perpetually contestable and are best handled by finding a mutual accommodation between the rival parties, not by one side seeking victory over the other. This is why the convention that one parliament cannot bind a successor is wise. It leaves open the possibility of rapidly correcting errors and injustices. Courts do not function in this way. There are winners and losers, and rulings today are binding precedents for the future.¹⁵ In the controversial *Nicklinson* case in the Supreme Court,¹⁶ Lady Hale and

Lord Kerr were seeking to bring into question the suicide legislation and demand the legalisation of assisted suicide, despite the matter not having been properly debated. Professor Ekins emphasised the poor assessment of the relevant moral questions, including the sanctity of life and the impact on the dignity of the disabled or elderly, in contrast to the cautious, wide-ranging debate that followed in both Houses of Parliament,¹⁷ at odds with the singular one-dimensionality of their judicial view. Judicial trial in this context is an incompetent method of reforming law incrementally, likely denying those affected a fair chance of making their voice heard in society's debate on the subject.¹⁸

'Living instrument': The Convention and the expanded interpretation of rights

Deliberative democracy has been neatly avoided by courts – in acting like legislatures – by making claims to be capable of interpreting rights in line with society's evolving values. The Strasbourg court has declared itself entitled to read the Convention as what it calls a 'living instrument'.¹⁹ It does so by interpreting the Convention in the light of evolving social conceptions. As Lord Sumption indicates, the living instrument model translates, in practice, into the Strasbourg court developing the Convention by a process of analogy, so as to reflect its own view of what rights are required in a modern democracy. This approach, suggests Sumption, has transformed the Convention from 'the safeguard against despotism' as originally intended, into a template for many aspects of the domestic legal order, including the recognition of many new rights which cannot be found in the language of the treaty. A good example is the steady expansion of the scope of Article 8.²⁰

For example, in the European Court case of *Sylvie Beghal v UK* in 2019, Ms Beghal – the wife of a convicted Al Qaeda terrorist (Djamel Beghal who had been imprisoned for plotting to blow up the American embassy in Paris) – found the court ruled that when she was stopped at an airport under UK legislation,²¹ it had been unlawful. It was said that powers under Schedule 7 of the Terrorism Act 2000 at that time were ‘not in accordance with the law’ and that the stop was therefore in breach of Article 8 of the Convention.²²

The circumstances revolved around a situation in which Ms Beghal was stopped at East Midlands Airport while returning to Leicester after a visit to her husband in a French prison. The mother of three alleged she was detained without reasonable suspicion, violating her right to private and family life.²³ Beghal was stopped under Schedule 7 of the Terrorism Act on arrival at the airport in 2011. She would not answer any questions until her lawyer arrived. That refusal to answer questions under Schedule 7 is considered a criminal offence to which no defence is allowed in law.²⁴ She was subsequently prosecuted for refusing to answer questions and appealed her case through the courts in the UK to the European Court of Human Rights. Her claims had previously been rejected by the High Court and Supreme Court, but the European Court of Human Rights eventually ruled in her favour.

It is worth recalling that, even the Strasbourg court had detailed the relevance of Schedule 7 of the Terrorism Act 2000 in the UK which empowers police, immigration officers and designated customs officers to stop, examine and search passengers at ports, airports and international rail terminals. The Act details that no prior authorisation is required for the use of Schedule 7 and the power to stop and question may be exercised without suspicion of involvement

in terrorism. However, questioning must be for the purpose of determining whether the person appears to be concerned or to have been concerned in the commission, preparation or instigation of acts of terrorism. So, if someone fails to co-operate, he or she is deemed to have committed a criminal offence and could face up to three months in prison, a fine or both.²⁵

Lord Carlile of Berriew, who was the independent reviewer of terrorism legislation from 2001 to 2011, later remarked that Schedule 7 was absolutely essential ‘to the protection of the public in the UK and to national security.’ While he said it had to be used carefully and proportionately, as recognised when the law was later amended in 2014, he remained very surprised that this case resulted in such a ruling, particularly given the factual background. He feared ‘...we have to put this down to a questionable decision by the ECHR.’²⁶

Furthermore, in a separate case, the incorporation and subsequent interpretations of the Article 8 Convention right via the Human Rights Act – which includes the mirroring of Strasbourg jurisprudence in applying the law – has, for example, benefited the case of Iraqi Kurd, Aso Mohammed Ibrahim, an asylum-seeker who left a girl dying under the wheels of his car when he fled the scene. He was jailed for four months after knocking down Amy Houston in Blackburn in 2003.²⁷ After authorities moved to deport him, senior immigration judges ruled he could remain in the UK. With previous criminal convictions and having not held a driving licence, he then went on to meet a British woman and they had two children. He was due to be deported but was able to stay in the UK in December 2009 after arguing that, because he now had two children since being freed from prison, he had a right to a family life under the Human

Rights Act.²⁸ Ibrahim's lawyers argued sending him back to Iraq would breach Article 8 of the Convention, which guarantees his right to a private and family life with his children.²⁹

A final appeal by the UK Border Agency to have him deported was rejected by the judges. The father of the young girl added after the trial:

How can he say he's deprived of his right to a family life? The only person deprived of a family life is me. Amy was my only family.... They are obsessed with the rights of others from Pakistan, Afghanistan and Iraq. Where are my human rights?³⁰

The disproportionate elevation of rights in relation to the competing rights of a democratic society necessarily flows from the expansive interpretations of Convention rights by the courts. At that time, the Prime Minister David Cameron was under political pressure for breaking a personal pledge to scrap the Human Rights Act. The Conservative promise that the Human Rights Act would be replaced by a British Bill of Rights never materialised under the politics of Coalition government, seemingly opposed by the junior partner, the Liberal Democrats. The father of the young girl further remarked on the case at the time:

This decision shows the Human Rights Act to be nothing more than a charter for thieves, killers, terrorists and illegal immigrants. ... The law does need to be changed so that it properly represents everyone – not just this awful minority who ruin people's lives.³¹

We are subject to increasingly elastic interpretations of Article 8 rights to family life which appear to override the very clear public interest in deporting serious foreign criminals. It is legitimate, for example, that where the government

believe there is a real risk of torture to an individual, they should not be deported, but the right to family life is an inherently qualified one and must be balanced against the rights of others. That balance, which should properly be decided and rest within the bounds of parliament, has been tipped too heavily and notably toward the courts.³² Many of these extensions through Strasbourg jurisprudence are not warranted by the language of the Convention, nor necessary. Sumption finds they are commonly extensions of the text which rest on the sole authority of the judges. The effect of this on outcomes, in his view, is that several major contentious issues, previously regarded as questions for political debate, or for administrative discretion or formed around social convention are now transformed into questions of law to be resolved by an international judicial tribunal.³³

Neither can it be justified as protecting the 'rule of law' because the power to extend by analogy the scope of Convention rights so as to broaden its subject-matter is not obviously reconcilable with the rule of law. It is a power which no national judge could ever seek to claim in relation to a domestic statute, even in a common law system. It is, in Sumption's words, 'potentially subjective, unpredictable and unclear',³⁴ and fundamentally far removed from the political arena in the name of necessary judicial action.

The Strasbourg court's own approach produces 'a significant democratic deficit' in vital areas of social policy. It therefore stumbles into a particular challenge given the 'inherently political character' of many of the subjects it decides on. Sumption puts significant emphasis on how most of the human rights recognised by the Convention are already conditioned by exceptions in which the national law or policy complained of was understood to be 'necessary

in a democratic society' or worded similarly. The case-law of the Strasbourg court even provides in-depth guidance on how those conditions ought to be applied. Sumption's point seems to be that the consideration of those conditions are clear questions of policy. They are inherently political questions. The very inclusion of those conditions in the Convention removes them from the arena of legitimate political debate, by transforming them into questions of law 'for judges'.³⁵

Through the 'living instrument' doctrine, courts make legislatures of themselves. The treatment of the Convention by the Court as a living instrument allows the court to make new law beyond the text of the Convention, and beyond the parliament's intentions in legislating for the Human Rights Act.³⁶ It is a situation which cannot be reversed, short of withdrawing from the Convention altogether. The suggestion by advocates of the Act that this is a democratic process and a sovereign parliament may transfer part of its legislative power to other bodies which are not answerable even indirectly to the electorate by no means makes it a democratic process, simply because parliament has done it.³⁷ After all, democracy requires in some form, a kind of collective decision-making in which decisions are made for a society or a group, respectful of the equality of persons involved, in order to reach those decisions but which are subsequently binding upon all members within that society.

It is difficult to recognise how the Act now conforms to a parliamentary democratic model of rights, government and society. The Strasbourg court has transformed the Convention by conceiving of it as a living instrument, a conception that confirms Sumption's analysis of the Convention as now a source of law, which is inconsistent

with the claim that it asserts truly fundamental rights. As with Lord Hoffmann before him, Sumption argues the Strasbourg court has unilaterally departed from what was agreed by the signatory states such that its case law 'is, in reality, a form of non-consensual legislation'. The judicial adjudication over international rights might have been reasonable, Sumption suggests, if truly confined to terms agreed by signatory states, which aimed to identify a narrow, specific set of wrongs that no state should commit. That is now a distant reality from the practice of both British and European human rights law.³⁸

Bringing rights and democracy 'back home'

Through the extreme case of modern common law constitutionalism, ministers and MPs are faced not only with the constant demands imposed by the Act and the case-law of the European Court but a much broader judicial trend resorting to fundamental rights, declared by judges, as an instrument of social control. The most negative outcome of that approach is the democratic political process, which many recognise is no longer the decisive, deliberative and resolving force for good over a wide spectrum of social policy. Many are now highly critical if not contemptuous of the political process. There is frequently a hidden desire by some groups to maintain a strongly judicialized approach to law making that removes politics from its sphere.³⁹

The laws and policies in a democracy can only be said to be legitimate to the extent that they are publicly justifiable to the individuals within that society. They are justifiable on the basis of them being a result of a reasonable debate among equals. Political authority, more broadly, does not exist where it can't be justified to each person it claims to bind, even among those who are mistaken.⁴⁰ There is

one significant element of maintaining democracy which therefore relies on each person engaging in a process of deliberation, each equally being able to contribute towards that process. The equality of the contribution they can make to a decision-making process in society is especially important in cases of disagreement.

Politics, not judicial reasoning, is a far better way of resolving questions of social and welfare policies. Ordinary classical liberal doctrine – in line with John Stuart Mill's thinking – espouses that democracy has the feature of ensuring decision-makers take into account the interest, rights and opinions of most people in society when making and settling their decisions. In Sumption's view, the indispensable function of democratic politics is to reconcile seemingly irreconcilable interests and opinions, by producing a result which it may be that few people would have chosen as their preferred option, but which the majority can live with. Political parties, unified only by a common aspiration to win elections, are most appropriately placed to respond to changes in public sentiment, in the interest of winning or retaining power, mediating between those in power and the public⁴¹ from which they derive their legitimacy. Through politics, they promote compromise between a sufficiently wide range of viewpoints to enable a programme of government to be taken forward.⁴²

There is such a breadth of reasonable disagreement in society that there can be no moral basis for constraining majority-based political procedures by strong judicial review.⁴³ Given that disagreement, majoritarian decision-making cannot be subordinated to any specific account of rights unless we are able to also maintain that it remains open to reasonable objection.⁴⁴ This is a difficulty for international rights and Human Rights Act advocates as well as the courts

who remain suspicious of majorities that control democratic legislatures and would rather some fundamental rights, with a higher status of law,⁴⁵ be presented as immovable and unobjectionable with the force of law.

If correctly deployed, the Human Rights Act could potentially have facilitated democratic dialogue. That dialogue would have enabled courts to perform their proper correcting function to protect rights from abuse, whilst enabling the legislature to authoritatively determine contestable issues surrounding the extent to which human rights should be protected alongside other rights, interests and goals of a particular society.⁴⁶ The reality of the past 22 years has been very different.

The 'dialogue' culture that was expected to flow from the court's power to issue declarations of incompatibility has never been truly evidenced. On paper, declarations reflected a respect for parliamentary sovereignty by making parliament the final arbiter on whether a statute should be changed in any way in response to a declaration.⁴⁷ The dialogue between courts and parliament based on that analysis, without simply imposing their views with the force of law, never formally developed. Professor Jeffrey Goldsworthy argues that if that were a genuine process, there should be a record of occasions in which parliament had contested or disagreed with the courts. The outcome so far has reflected all but one of the courts declarations – on prisoners voting rights – being followed by a legal remedy in legislation.⁴⁸

The theoretical claims to the preservation of parliamentary sovereignty ought to be balanced against the practical realities – which is that the UK has adopted the strongest kind of judicial review. For those various reasons, parliament is not able to respond in the spirit of a 'dialogue' culture and

the judicial review is as close to final, as might be expected under a written constitutional order. Britain has no such order but has inherited all the inconveniences and setbacks associated with it. Aileen Kavanagh has previously argued that the declaration under the Act resembles a judicial strike-down power because parliament has no real choice of leaving the law unchanged.⁴⁹ In a separate context, Lord Sumption has also referred to the courts as having a 'strike down' power in relation to the Convention.⁵⁰

Early commentators portrayed the Human Rights Act (HRA) as not necessarily threatening the demise of Britain's 'political constitution'⁵¹ but over time, it did precisely that. It was once held that the Act need not be taken as handing over supremacy for rights adjudication from the legislature to the courts. While it might be thought in theory that section 3 and rights-based judicial review generally can be assimilated to a system of 'weak' review (whereby courts would defer to legislative 'scope,' as determined by parliament, yet restricted in their independent determinations to the judicial 'sphere' of the fair conduct of the case at hand), it has in practice reinforced judicial deference by giving it a stronger statutory basis. Section 3.1 specifically encouraged judges to develop the meaning of legislation beyond reasonable limits and meant parliament had no genuine recourse short of repeal.⁵² The legislation eventually came to undermine political constitutionalism, since the judiciary acted in ways that many did not predict.⁵³

The essential deference to politics in the constitution by removing the offending legislation also remedies the omission of the role of parliamentary majorities in making parliamentary authority contingent upon rights. It is often identified in the literature that fundamental rights expressed as pre-political features, have the effect of constraining

public reasoning and parliamentary settlement and enable a limit on parliamentary majority rule.⁵⁴ Majority rule is the basic principle of democracy.⁵⁵ The proposition that the provision of fundamental rights constitutes a primary function of the state, to be exercised within the framework of the constitution, through the action of its democratically elected parliament presents an insurmountable problem for common-law and Human Rights Act advocate theory in general. Westminster majoritarianism provides a representative and democratically accountable foundation⁵⁶ for a system of rights – a court aggrandising its jurisdiction through a moralising, poorly-interpreted Convention simply does not provide that legitimacy.

Convention rights, as exercised under the Act, have been considered to be above politics, decided by courts and outside the political process. It is a conception of rights which is resistant to the recognition of a plurality of perspectives on rights – and how those rights are qualified – which has led to ongoing disagreement. It also flies in the face of recognising a legitimate process which identifies the need to make decisions that address the very possibility that there is a plurality, since national and Strasbourg courts can make no such claim to that plurality of opinion among individuals and groups in modern society. It is further inconsistent with multiple notions of UK democracy which rest on elected authorities incorporating a great number of voices into the decision-making process, thereby taking into account electoral wishes, multiple views and information on rights. The contemporary British tradition – subject to changes under the EU withdrawal process – has meant that Europeanised schemes of fundamental rights were decided upon without sufficient political legitimacy and consent of voters. Parliament, in dealing with the broad spectrum

of public opinion, as an elected institution and as being more publicly accountable for its decisions to the citizens, can often make better work of rights provision. It does so through remedying and balancing interests and rights in line with the consent of the governed.⁵⁷

Rights under the Act seem less publicly justifiable to the individuals within that society since they have ceased to result from a reasonable debate among equals. To marginalise sections of society – which can often include the majority of people – in the making of rights is a matter on which that disregarded group may continue to take great political offence. There is more broadly an absence of political authority, because such imposed rights can no longer be justified to each person it claims to bind, even among those who are claimed to be mistaken. Since there is little, or at least, a questionable moral basis for constraining majority-based political procedures by enabling strong judicial review, all disagreement on rights has been fenced off. The form of judicial review as occurs under the Human Rights Act only enables a court-decided account of rights because it closes off the institutional capacity to remain open to reasonable objection. Our historical UK constitutional design never truly absorbed a review mechanism which marginalised majorities or the democratic legislature – as a basis for legitimate decision-making – and yet still chose to elevate some other system of fundamental rights, with a higher status of law.

Conclusion

The practical legal and political implications raised so far have gone further than a technical analysis of the Act – whose repeal is now well overdue. This analysis has identified the significant impact on the changing UK constitution. To manage the repeal process, there would be a need for several other changes to complement the abolition of the offending legislation, including:

- The UK should necessarily withdraw from the jurisdiction of the European Court of Human Rights in Strasbourg.
- By giving up jurisdiction, we would cease to be a signatory to the Convention by international treaty.
- Parliament and the courts would continue to be respectful of the rights entailed in the Convention. This would symbolise the UK's continuing recognition of the simple aspirational standards set out in the Convention as a basic moral code that may be used to guide decision-making.
- Given the need to avoid the dangers of judicial overreach in several areas, the UK should seek to reform the Supreme Court in London into the final appellate court for human rights law.
- To amend the essential aspects of devolution legislation – specifically for Scotland and Northern Ireland – so changes would apply equally to all nations.

The Act, the Convention, the Strasbourg court and expansive European-style, judicial interpretation have all contributed towards the huge failures and critical impacts in the constitution. On the essence of our parliamentary democracy and sovereignty, the threats of judicial supremacy justified under Strasbourg jurisprudence, the weakened executive power of those in charge to govern and protect and in order to reinvigorate British human rights and the capacity to debate and disagree on those rights, Britain must put its house in order. Not for the first time has the UK conjoined with a project of deeper European integration on the basis of a healthy, collaborative, associative status justified as neighbourly political participation only to find it is binding upon its institutions, cumbersome and dominating over nation-states in its force and unwieldy in its authority over the UK constitution in particular. Both through the European Communities and also under the European Convention, our constitutional landscape has been torn apart by an absorption into a broader political project rather than being linked by an association status. A significant degree of attribution in much of the advocacy literature has already been made of the European Convention of Human Rights as deriving from Sir Winston Churchill's legacy – and indeed, David Maxwell Fyfe (later Lord Chancellor Kilmuir) evidently drafted parts.¹ On the same token, past political leaders can barely be held to account, nor speak, for present challenges of judicial supremacy in the UK constitution. The Convention of Churchill and David Maxwell-Fyfe only ever expressed a text which would have allowed cases to be brought under it involving the UK by the member states which had ratified the Convention, rather than by an individual. Only after 1966 did the UK enjoy a Convention which allowed a right of individual petition

where the Member State accepted had accepted that right. And only after 1998 did the right of individual petition become mandatory for all of the countries that had ratified the Convention. Neither Churchill, nor Maxwell-Fyfe can speak for that current circumstance but as Lord Hoffmann said of 'the right of individual petition', it not only became a mechanism to enable the Court to intervene in the nuanced domestic laws of states but was previously optional until 1998 but then became compulsory – producing floods of petitions which overwhelmed the Court itself.²

The warnings have been issued. As early as 1930, Churchill set out his European political thinking when he advised, 'We are with Europe, but not of it. We are interested and associated, but not absorbed.' The nature of that associated status – and therefore 'not absorbed' into the continental model – continues to pose a significant challenge in European-wide political projects as much as our participation in judicial and legally integrating European institutions. In this vein, there remains a recognised need among many, including Dominic Raab to:

...restore some credibility to human rights, which many people in this country increasingly view as dirty words—an industry or bandwagon for lawyers, rather than a tradition to take pride in.³

Notes

Introduction

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Conclusion

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The Human Rights Act 1998 is claimed by its advocates to contain fundamental rights that everyone in the UK is entitled to, by incorporating the rights set out in the European Convention on Human Rights into domestic British law. But as Jim McConalogue writes, its 22-year history now testifies to a lawyer's charter which disregards the fundamental rights of many people in society and has enabled judicial supremacy to unsettle the UK constitution.

The Act is publicly justified as 'an integral part' of the British constitution and yet in practice, it emboldens a judicial supremacy of rights, far removed and insulated from the electorate. Innumerable court cases continue to permit Convention rights of often dangerous individuals – including detained terror offenders – to supersede the rights of all others in society in safeguarding their public safety and national security. The capacity to govern and protect the nation state operates in the face of serious ambiguity because of the Act.

The further continued glaring contradiction between a policy of withdrawing from an EU legal architecture while seeking to enhance a complementing European Convention rights-based system is now inconsistent and for the future, will become unmanageable. The repeal of the Human Rights Act is now well overdue, given its detrimental impact on the UK constitution.

A post-Brexit politics which requires a stronger democratic process in which applicable rights and laws derive from a strongly contested domestic public sphere means 'rights questions' can no longer be simply administered by a foreign court, or remain unchallengeable by the public or be left practically unamendable by parliament.

The opportunity to rebalance the constitution, to take back parliamentary democracy and to reverse the judicial supremacy and overreach of the Strasbourg court is viable and achievable. That decision will provide for a rekindling of the power of the executive to govern and protect, while demonstrating a respect for sovereignty and the restoration of a genuine British human rights moral code. The foundation for future rights must lay with society reclaiming democracy and deliberation as the basis for deciding those rights.

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