HUMAN RIGHTS

Should it go or should it stay? The coming of age of the Human Rights Act 1998, or time to say goodbye?

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Introduction

This year marks the twenty-fifth anniversary of the *Coventry Law Journal* and it is time to look back over the last 25 years to explore the law and the legal landscape as reported by various articles and other pieces published in the *Journal* over this period. Although there have been many fundamental events and changes during this period, the area of human rights and their protection has dominated both the law and the content of the *Journal*. In particular, this period has seen the passing and coming into force of the Human Rights Act 1998, the copious case law under the Act, and various calls for reform and abolition of the Act by successive governments.

With that in mind, this article will revisit an article written by your author in 2001 in the second issue of the sixth volume of the Journal.[1] The article examined the UK's record before the European Court of Human Rights at a time when the UK's Human Rights Act 1998 was just coming into force – in October 2000. In that sense, it was both looking back at our record before the Act, and forward, in guessing how human rights protection might be enhanced by the passing of the Act and the incorporation of European Convention rights and principles into domestic law.

The article was very critical of our traditional method of protecting human rights. It chronicled a large number of defeats before the European Court of Human Rights, and attached blame for this record to a number of factors. These included: parliamentary sovereignty; the refusal or inability of the courts to develop the domestic law in order to accommodate certain human rights claims; the granting of excessive discretion to the executive; undue judicial deference and, most importantly, the unavailability of international and European principles of human rights in the adjudication of human rights disputes. The article concluded that the passing of the Act should enhance our record before the European Court and provide a system for rights protection that would be fit for purpose in the twenty-first century. However, it warned that such success would only come if both law-makers and judges were prepared to embrace the true spirit of the Convention rights and the principles of adjudication employed by the European Court of Human Rights.

Now, twenty one years later, we are in the middle of the latest plan to reform the Human Rights Act, and either replace it with a British Bill of Rights, or to reform the Act. Ostensibly, this is so that our legal system and the domestic courts are less reliant on the jurisprudence of the Strasbourg Court, and free to adopt more traditional principles of rights and justice. Such reforms are in response to concerns that the European method gives too much weight to individual freedom, often at the expense of wider social justice and interests; and that the European Court has become too powerful in laying down judgments that gainsay our efforts to balance human rights with wider individual or social interests.

This article will revisit the piece written in 2001 to re-iterate the points it made about our traditional system and how it had failed to ensure that we met our international obligations to recognise and protect human rights in the United Kingdom. The article will then highlight certain developments in our legal system since the passing and coming into operation of the Act, including those that enhanced the enjoyment of Convention, and common law, rights since the Act came into force. The article will then

[1] Steve Foster 'The protection of human rights in domestic law and the European Court of Human Rights' (2001) 6(2) Cov. Law J 1.

attempt to appraise the workings of the Act in the last 21 years, and examine whether the concerns over its scope, and the influence of the European Court, have been borne out.

Finally, the article will argue that the Human Rights Act, in its present form, has served both the interests of human rights protection and international law compliance on the one hand, and our constitutional arrangements and principles on the other. This will include a warning that the repeal or substantial reform of the Act would return us to the unsatisfactory state of affairs presented by the original article.

The position before the Human Rights Act 1998

As explained in the original article, with no constitutional or higher law as such, and no formal bill of rights, individuals had to rely on the common law, statute and public opinion to safeguard their civil liberties. Under this system, the enjoyment of civil liberties was governed by the principle of residual liberty: we are free to do anything that the law does not forbid.[2] In addition, the rights of individuals were (and still are) bolstered by statutory provisions that either provide specific protection of civil liberties,[3] or which temper the restriction of civil liberty that has otherwise been authorised by the law.[4] The courts developed a human rights jurisprudence that assumed that Parliament did not intend to interfere with certain fundamental rights,[5] and subjected any *prima facie* lawful interference to a more intense judicial review.[6] More specifically, albeit to a limited degree, domestic law embraced the rights, and to a certain extent the case law, of the European Convention on Human Rights (1950),[7] and the Convention was allowed to be used in cases of statutory ambiguity[8], or where the Convention was needed to develop uncertain common law.[9] Also, the courts eventually, after some initial reticence,[10] started referring to the case law of the European Court of Human Rights when determining rights issues in domestic law.[11]

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[2] See McGarry VC in Malone v Metropolitan Police Commissioner [1979] Ch 344, at 366E.

[3] In addition to the Human Rights Act 1998, various legislation provides protection against discrimination: The Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1988. See also the Sex Discrimination (Gender Reassignment) Regulations 1999. These provisions have since been consolidated into the Equality Act 2010.

[4] For example, the Police and Criminal Evidence Act 1984 contains a variety of safeguards against arbitrary use of the police powers contained in the Act. See also s.4 of the Obscene Publications Act 1959, which provides a public good defence to a charge of publishing obscene material.

[5] See *Chester v Bateson* [1920] 1KB 829; *Raymond v Honey* [1983] 1 AC 1 and *R v Secretary of State for the Home Department Ex parte O'Brien and Simms* [1999] 3 All ER 400 on the citizen's right of access to the courts.

[6] See *R v Ministry of Defence Ex parte Smith* [1996] 1 All ER 257.

[7] Even before October 2000, the courts have begun to consider some cases in the light of the Human Rights Act 1998. See *R v X; R v Y; R v Z* (*The Times*, May 23, 2000). In that case, the Court of Appeal held that the case, considering whether the admissibility of evidence gathered by means of telephone intercepts, should be dealt with as if the Act was in force. This was because any appeal would be heard after October 2.

[8] *R v Secretary of State for the Home Department Ex parte Brind* [1991] AC 696.

[9] *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109; *R v Chief Metropolitan Magistrate ex p Choudhury* [1991] 1 QB 429; and *Derbyshire CC v Times Newspapers* [1993] AC 534.

[10] See *R v Morrissey and Staines (The Times,* May 1, 1997, and the High Court decision in *Camelot v Centaur Communications (The Times,* July 17, 1997)

[11] See the Court of Appeal decision in *Camelot v Centaur Communications* [1998] 1 All ER 251. See also the decision of the High Court in *R v DPP Ex parte Kebeline* (*The Times,* March 31, 1999). In that case the High Court held that the DPP, in considering whether to authorize prosecutions under ss.16 A and 16B of the Prevention of Terrorism (Temporary Provisions) Act 1989, should have taken into account the fact that the provisions were contrary to Article 6 of the Convention, and that anyone charged under them would bring a successful application before the European Court. The decision was overturned by the House of Lords on the more general ground that the Director's decisions were not generally amenable to judicial review: [1999] 4 All ER 801.

Yet the article noted that despite the existence and application of these constitutional techniques, the domestic arrangements for securing civil liberties continued to come under fire.[12] Thus, the United Kingdom government had been repeatedly brought before the European Commission and Court of Human Rights to defend, mostly unsuccessfully, domestic laws and practices that violated the Convention rights of individuals within their jurisdiction. As a consequence, the Act had been introduced primarily to meet the government's responsibilities under the Convention and so to offer a human rights protection equivalent to the one provided by the European Court.[13]

The article then provided an analysis of the case law of the European Court involving the United Kingdom government, revealing not only the deficiencies of our domestic system of protecting civil liberties, but providing domestic authorities with an insight into the philosophy of a human rights protection which they needed to embrace with the passing of the Act. The article detailed the cases lost by the United Kingdom government since 1966 (when the European Court was seized with jurisdiction to hear individual cases), and 2001 (when the article was written), dealing with cases that had initially been decided under the traditional method. It then placed those cases into two broad categories: those where there was held to be a violation because the human right in question was not recognised in domestic law, and those where the right, although recognised, was given insufficient weight or recognition by the law or its application. With respect to those cases where there was no equivalent domestic law right, it examined the inability of domestic law to formulate a distinct law of privacy; the injustice of which was exposed by both the domestic courts,[14] and by the European Court of Human Rights.[15] Then, within that second broad category the article examined a number of cases where the government was held accountable for what, it was submitted, were the natural consequences of its human rights arrangements: the interference of liberty via the granting of excessive executive discretion,[16] and the violation of the rights of minority and other vulnerable groups, such as prisoners and sexual minorities.[17] Then, with respect to the balancing of rights, the article examined a number of cases where the lack of proportionality in the balancing exercise led to defeats before the European Court in areas such as freedom of expression,[18] and the right to private life.[19]

The article then drew several conclusions relating to the arrangements for protecting human rights, and the United Kingdom government's record before the European Court of Human Rights. With regard to the UK's constitutional and legal arrangements for protecting human rights, they were described at best as a genuine but inconsistent attempt to protect fundamental rights, but at worst, leaving individual rights vulnerable to the doctrine of parliamentary sovereignty, to the inconsistency of judicial activism and to the threat of majority public opinion.

The United Kingdom's record before the European Court of Human Rights was then explained on one of two accounts. On the one hand, there was clear evidence of the lack an effective domestic 'filtering' system. Had domestic law possessed a constitutional mechanism to deal with human rights cases then

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[12] See Richard Gordon and Wilmott-Smith (eds), *Human Rights in the United Kingdom* (Clarendon 1996); Michael Zander, *A Bill of Rights?* (Sweet and Maxwell 1997 4th ed); and Singh, *The Future of Human Rights in the United Kingdom* (Hart 1997) chapters 1 and 2.

[13] *Bringing Rights Home: Labour's Plans to incorporate the ECHR into UK law*.

[14] *Kaye v Robertson* [1991] FSR 63.

[15] *Malone v United Kingdom* (1984) 7 EHRR 14 and *Wainwright v United Kingdom* (2007) 44 EHRR 40.

[16] Particularly with respect to life sentences: *Stafford v United Kingdom* (2022) 38 EHRR 32.

[17] For prisoners' rights, see *Golder v United Kingdom* (1975) 1 EHRR 124 (prisoners' access to the courts), and *Campbell and Fell v United Kingdom* (1984) 7 EHHR 165 (prisoners' disciplinary rights); and *Dudgeon v United Kingdom* (1982) 4 EHRR 149 (discrimination against homosexuals), and *Goodwin v United Kingdom* (2002) 35 EHRR 18 (discrimination against transsexuals).

[18] *Sunday Times v United Kingdom* (1979) 2 EHRR 245; and *Observer and Guardian v United Kingdom* (1991) 14 EHRR153,

[19] *Smith ad Grady v United Kingdom* (2000) 29 EHRR 413; and *ADT v United Kingdom* (2001) 31 EHRR 33.

the European Court would not have been required to pronounce upon the compatibility of our law with the Convention on so many occasions. If, it was argued, the domestic arrangements *are* sound then although in the absence of a domestic constitutional court cases will be *tested* in the formal arena of Strasbourg, the majority of those cases should be defended successfully. The evidence did not support this and it was clear that in certain areas the government and the domestic system is continually open to challenge as being incompatible with the Convention and other instruments of international human rights law.

The article pointed out that notwithstanding the development of a human rights jurisprudence in domestic law, it was clear that a number of laws and practices continued to be in violation of the European Convention.[20] It was also noted that our judiciary had shown a reluctance to interfere in certain areas and with certain decisions, and that it was by no means certain that judges, armed with the doctrine of proportionality and other human rights norms, would be any more generous to certain human rights claims than they have in the past. However, your author stated that what the Act should bring is a more consistent and coherent system of human rights protection, leading to the development of human rights previously unrecognised in domestic law and a reasonably consistent application of human rights law to human rights disputes. Nevertheless, for this to happen it was not sufficient merely to equip them with the tools of European and international human rights law. For the Act to succeed in practice all departments of government, including the judges, have to fully understand and appreciate those 'European' principles and the general principles of human rights protection.[21]

Protecting human rights under the Human Rights Act 1998

So what changes, and challenges, did the Act bring; and have the concerns raised by the ant-Human Rights Act lobby been realised and proved? It is inevitable that because bills of rights (or in our case our Human Rights Act) appear to put rights first, many will question whether individual rights should have an enhanced status over and above other individual rights and social claims. Equally, they ask whether judges should have the power to question parliamentary or executive acts that are alleged to be incompatible with such fundamental rights. These dilemmas are particularly acute in the United Kingdom where the British Constitution and the traditional common law system of rights protection are subject to the doctrine of parliamentary sovereignty, thus limiting the constitutional role of the judges.

The passing of the Human Rights Act 1998, thus, raised a number of constitutional arguments from those who felt that the traditional system would be replaced by one allowing judges to employ European human rights principles that would undermine national sovereignty and the general public good. It is argued here that these fears were largely groundless, principally because of the method of incorporation of the European Convention on Human Rights chosen under the 1998 Act. Nonetheless, as some of the Act's provisions were intended to shift the balance of power from government and Parliament to the courts, the Act raised genuine constitutional concerns.

The main constitutional arguments revolved around the new powers of the courts to resolve human rights disputes by going beyond its traditional constitutional role of simply applying the law, and instead allowing them to judge the merits and reasonableness of particular laws and practices. This included the courts' power, under s.2 of the Act, to consider the case law of the European Convention and to apply the doctrines of necessity and proportionality when judging the compatibility of legislative or

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[20] A comprehensive account of such laws and practices were available at that time by examining the audit carried out by Francesca Klug, Keir Stammer and Stuart Weir, *The Three Pillars of Liberty* (Routledge 1996), 296-304.

[21] See Clements and Young, Human Rights: Changing the Culture; Campbell, Human Rights: A Culture of Controversy; Hunt, The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession; and Young, The Politics of the Human Rights Act, all in (1999) 26 *Journal of Law and Society*. See also Adjoin, Human Rights Theory and the Human Rights Debate (1995) 58 *Modern Law Review,* 17.

other acts that infringe the applicant's Convention rights. The Act thus allowed the courts to adopt the principle of proportionality that had been rejected as part of the common law powers of review.[22]

Despite this power, in practice the courts have been prepared to offer decision-makers, including Parliament, a great degree of discretion in balancing rights with wider social interests. For example, in *R v Countryside Alliance v Attorney General*,[23] the House of Lords held that the ban on hunting with hounds by the Hunting Act 2004 was not incompatible with the hunters' Convention rights, stressing that the provision had been passed by a democratically elected Parliament who felt that there were sound moral grounds for the ban. However, the Act would be futile if it did not allow the courts to challenge legislation that conflicted with the basic values of the Convention. Thus, in *A and others v Secretary of State for the Home Department*,[24] in deciding that the detention of foreign nationals was a disproportionate response to the threat of terrorism and not strictly required by the exigencies of the situation, Lord Bingham stressed that the traditional *Wednesbury* approach was no longer appropriate, and the domestic courts themselves had to form a judgment whether a Convention right was breached. Further, given the importance of article 5, judicial control of the executive's interference with individual liberty was essential and the courts were not precluded by any doctrine of deference from scrutinizing such issues.[25]

Similar constitutional concerns were raised regarding the courts' powers under s.3 of the Act to interpret both primary and secondary legislation 'so far as is possible' in a way that is compatible with Convention rights. A robust approach was taken by the House of Lords in *R v A (Complainant's Sexual History),*[26] where the House of Lords held that the interpretative obligation under s.3 applied even where there was no ambiguity, and placed a duty on the court to strive to find a possible interpretation compatible with Convention rights. This case met with fierce criticism from those who felt that Parliament had already struck the necessary balance in the legislation, and was perhaps the most controversial decision under that provision.[27]

Under s.4 of the Act the court have the power to declare primary and secondary legislation incompatible with Convention rights. This, of course, was a novel power for domestic courts brought up on the doctrine of parliamentary sovereignty. However, this power has been used with a good deal of caution and the courts have shown some reluctance to question primary legislation passed by the democratically

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[22] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696. In *R (Daly) v Secretary of State for the Home Department* [2002] 1 AC 532 Lord Steyn held that there was a material difference between '*Wednesbury*' review and proportionality, the latter requiring the reviewing court to assess the balance that the decision-maker had struck, and requiring attention to be directed to the relevant weight accorded to the various interests. Further, any limitation of the right had to be necessary in a democratic society, in the sense of meeting a pressing social need and being truly proportionate to any legitimate aim being pursued. Despite this, Lord Steyn did not believe that there had been a shift to merits review

[23] [2007] 3 WLR 922.

[24] [2005] 2 AC 68

[25] The decision was upheld by the decision of the Grand Chamber of the European Court in *A v United Kingdom*, (2009) 49 EHRR 29, which might, of course, vindicate the lack of trust in the Court by the anti-Human Rights Act lobbyists.

[26] [2002] 1 AC 45

[27] However, in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] 2 WLR 1546, Lord Woolf CJ warned that s.3 does not entitle the courts to legislate, and that a court should not radically alter a statute in order to achieve compatibility. Further, in *Re S and W* [2002] 2 AC 291, the House of Lords stressed that the 1998 Act maintained the constitutional boundary between the interpretation of statutes and the passing and repeal of legislation, and that a meaning that departed substantially from a fundamental feature of an Act of Parliament was likely to have crossed the boundary. See also *Bellinger v Bellinger* [2003] 2 AC 467 the House of Lords held that it was not possible to use s.3 to interpret the words 'man and woman' to include a person who had undergone gender reassignment, so as to comply with the decision of the European Court in *Goodwin v United Kingdom* (2002) 35 EHRR 18.

elected Parliament.[28] Nevertheless, the courts have been prepared to issue such declarations where the law appears to be in clear conflict with a decision of the European Court, or contravenes the fundamental values of the Convention. Thus in *A and others v Secretary of State for the Home Department* (above), the House of Lords held that detention provisions, above, were not justified under article 15 of the Convention, which allows derogation in times of war or other emergency threatening the life of the nation. The decision was seen by many as being in breach of the separation of powers by not offering the government and Parliament appropriate deference on matters of national security and public safety. However, the decision was confirmed by the European Court,[29] such consistency of course being the main aim of the Act and indeed membership of the Council of Europe.

Sections 2-4 no doubt increased the courts' powers to provide redress for human rights violations, but it should not be forgotten that this power has been bestowed by Parliament itself, who through the Act has expressed an intention that the court's constitutional powers be extended in this area. Thus, in *A*, above, Lord Bingham rejected any assertion that the court's interference would be undemocratic, noting that the courts had been given a wholly democratic mandate by Parliament. Further, the Act has been carefully constructed so as to avoid any direct conflict with the doctrine of parliamentary sovereignty. Thus, the courts have no power to strike down any incompatible primary legislation, or secondary legislation clearly authorised by primary legislation. The ultimate legislative power is thus still vested in Parliament and it still has the power to pass new legislation, correcting the court's interpretation.[30]

Therefore, although the new doctrines of necessity and proportionality depart from the more restrictive traditional grounds of review, there is evidence that the courts are willing to display a good deal of judicial deference where they feel that a matter is better resolved by a government official or by Parliament itself. Despite that, it is argued that such powers are constitutional in a more general sense because in most jurisdictions it is accepted that the courts' constitutional role includes the power to strike down legislative and executive acts that conflict with fundamental constitutional rights.[31]

The 1998 Act has no doubt extended the power of the courts in the area of human rights protection, and such powers raised and still raise constitutional concerns, particularly as many believe that our law has become too heavily influenced by the Convention and the Strasbourg Court. However, given the scope and content of the Act, in particular its retention of parliamentary sovereignty, it would be wrong to allege that these new powers are unconstitutional, or that the Act and the Convention influence is in desperate need of reform. The Act was passed for the specific purpose of giving effect to the rights and principles of the European Convention. Thus, unless the courts deliberately or clearly seek to go beyond that remit, these powers should be viewed as entirely constitutional, and necessary for a method of rights protection that is fit for purpose and sufficiently compatible with international human rights law. From the evidence thus far, the courts have taken a moderate stance, and the fact that they have on occasion challenged laws and practices that have become established in domestic law, should not lead us to the conclusion that European principles are distorting our legal system and legal values.

Reforming the Human Rights Act

As noted above, the system used under the Human Rights Act has never threatened the doctrine of parliamentary (and executive) sovereignty; certainly not to the extent that the European Communities Act 1972 did. Nevertheless, the power of the domestic courts to employ Convention principles, and

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[28] See, for example, *R v Shayler* [2002] 2 WLR 754, where the House of Lords held that the Official Secrets Act 1989 was compatible with article 10 of the Convention despite the absence of a public interest defence, and *R v DPP, ex parte Pretty and another* [2002] 1 AC 800, where the House of Lords held that s.2(1) of the Suicide Act 1961 was not incompatible with Article 8 of the European Convention.
[29] *A v United Kingdom* (2009) 49 EHRR 29.
[30] Thus, following the Supreme Court's decision in *HM Treasury v Ahmed and others* [2010] 2 AC 534 – that freezing orders were contrary to individuals' due process rights – Parliament enacted the Terrorist Asset Freezing (Temporary Provisions) Act 2010 to retrospectively validate such orders
[31] Steve Foster, 'The rule of law in modern times: not a Priti sight' (2021) 26(2) Cov. Law J 1.

their duty to at least take into account the decisions of the European Court of Human Rights,[32] caused concern that the Act was disturbing our traditional separation of powers and the proper constitutional role of our judges. More specifically, it was feared that the Act had replaced our own notions of rights and justice with those imposed by the European order.

Consequently, since the passing of the Human Rights Act 1998, there have been many attempts by consecutive governments to reform or repeal the Act and return to the common law system of rights protection.[33] These proposals have been spurred by either landmark decisions of the domestic courts or the European Court of Human Rights,[34] or the more general desire to free the state and the law from the strict principles and supervision of the European Convention and the European Court.[35] In either case, the proposals desired to give power back to our courts, and of course, to the government, to devise and maintain our own human rights principles based on traditional British notions of justice.[36]

Thus, despite the long battle to introduce a Bill of Rights into our legal system, and our eventual 'incorporation' of Convention rights via the Human Rights Act 1998, there has been much discussion as to the efficacy of the Human Rights Act 1998. Some of these discussions have centred (rather disingenuously) on the *strengthening* of the Act's provisions and ambit and have called for the extension of rights' protection in the United Kingdom. In addition, there have been attempts to reduce the Act's impact, centred on whether the Act has been successful in securing a fair balance between human rights and the more general interests such as national security, public safety and the prevention of crime. Specifically, there has been concern over the European Court's stance on the protection of the rights of those suspected of terrorism, and who are being threatened with deportation and extradition.[37]

Before examining the most recent plans to challenge the 1998 Act, let us consider the rationale behind the wish to return to our own common law system. As seen above, before the Act our common law method of rights protection was found wanting because there were insufficient means to challenge government acts and parliamentary legislation.[38] This was largely due to the feeling that it would be unconstitutional for our courts to question parliamentary legislation or government autonomy beyond asking whether it was within the relevant legal powers.[39] The Act allowed the courts to consider the proportionality of administrative action,[40] and to declare legislation incompatible with Convention rights,[41] and thus the *balance* between rights and state power had altered. Now, rights were to be given an enhanced status and it was more difficult to justify any interference with these rights;[42] and often

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[32] Under s.2 of the Act.
[33] For example, proposals were included both in the 2010 general election manifesto and the Coalition Agreement, which committed the government to establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights. The Commission commenced work on 18 March 2011 under the chairmanship of Sir Leigh Lewis. Its final report entitled *A UK Bill of Rights: the Choice Before Us*, was published on 18 December 2012.
[34] Most notably the decision of the House of Lords in *A v Secretary of State for the Home Department*, n. *. (Detention without trial), and the European Court's decisions in *Othman v United Kingdom* (2012) 55 EHRR 1 (deportation and fair trials) and *Hirst v United Kingdom (No. 2)* (2006) 42 EHRR 41 (prisoner voting rights).
[35] In particular, to allow the domestic courts to ignore European ideals of proportionality and necessity and decisions of the European Court, and instead to apply 'British' standards of justice.
[36] Steve Foster, 'Repealing the Human Rights Act: no not delay, just don't do it' (2015) 20 (1) *Coventry Law Journal* 9.
[37] John Hyde 'Tory manifesto pledges end to human rights 'mission creep'' Law Society Gazette, 14 April 2015.
[38] Steve Foster 'The Protection of Human Rights in Domestic Law: Learning Lessons from the European Court of Human Rights' [2002] 53 (2) NIQL 232.
[39] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.
[40] This was effected by s.2 of the Act, which states that the domestic courts must take into account the decisions of the European Court of Human Rights, which, of course, employs the doctrine of proportionality when assessing whether an interference is 'necessary in a democratic society'.
[41] Section 4 of the Human Rights Act 1998.
[42] See Lord Steyn in *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL26.

impossible to do so without breaching international law.[43] Thus, many have welcomed a return to a system where rights are enjoyed alongside appropriate duties of rights holders to obey the law and respect the rights of others, and where the courts were to pay more respect to parliament and government.[44]

The Joint Committees Proposals for a British Bill of Rights

One possible reform was to replace the Act with a domestic Bill of Rights, which would more reflect "British values' and allow the introduction of a *more appropriate* bill of rights and responsibilities for the citizen. Thus, in its Green Paper on Constitutional Reform,[45] the government conceded that repealing the 1998 Act would prevent citizens from exercising their fundamental rights in British courts and lead to lengthy delays while individuals appealed to Strasbourg.[46] However, it stressed that the Act should not necessarily be regarded as the last word on the subject and that a Bill of Rights and Duties could give people a clear idea of what we can expect both from public authorities and from each other. Specifically, it could provide recognition that human rights come with responsibilities and must be exercised in a way that respects the human rights of others.[47] Consequently, the possibility of a bill of rights for the UK, including introducing a constitutionally entrenched bill of rights re-surfaced,[48] and it is in this context it is pertinent to look at the recommendations of the Joint Committee.

The Joint Committee of Human Rights was commissioned to investigate a British Bill of Rights and made the following recommendations.[49] First, the Committee concluded that despite its consideration of the arguments against a Bill of Rights, there was considerable scope for a Bill of Rights to add to what is already in the Human Rights Act 1998. In particular, the Committee saw it as necessary to enhance the rights of vulnerable and marginalised groups such as asylum seekers and children in custody. However, it stressed that any bill of rights should not in any way weaken the existing machinery contained in the Act for the protection of Convention rights and sought an assurance from the Justice Secretary that there was nothing in the government's plans to weaken the Act.

The Committee expressed some concern that the Green Paper had linked fundamental human rights with citizenship, portraying the idea that such rights only belonged to UK citizens rather than to all individual human beings within the jurisdiction of the UK. Equally, the Committee felt that the term "British' bill of rights would not only isolate non-citizens, but would also cause dissent from UK citizens who would not consider themselves British, but as Irish or Scottish etc. Nevertheless, the Committee recognized that a domestic bill of rights could and should provide the opportunity to reflect particular values that are fundamental to a particular nation sate, such as the UK. It concluded, therefore, that a UK Bill of Rights would constitute an accurate description of a document that sought to express the state's national identity and definition.

The Committee also agreed that a UK Bill of Rights should have a preamble, which sets out the purpose of having a UK Bill of Rights and the values which are considered fundamental in UK society; the content of which the government should research and consult on. In its Outline of a UK Bill of Rights (included in Annex 1 of the Report) the preamble reads as follows:

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[43] This is the case where the right in question is absolute, such as the right to be free from torture and inhuman or degrading treatment or punishment, in Article 3 of the Convention.
[44] The government often referred to this switch as the ‘mission creep’ of the Human Rights Act and the case law of the European Court of Human Rights. See ‘Lord Sumption criticises ‘mission creep’ of European Convention on Human Rights’ *Scottish News,* 5 June 2019.
[45] *The Governance of Britain 2006-2007* (CM. 7170).
[46] Ibid, at para 207.
[47] Ibid, 208-210.
[48] See Klug, A Bill of Rights: do we need one or do we already have one? [2007] PL 701.
[49] *A Bill of Rights for the UK?* 10 August 2008. HL Paper 165-1; HC 150-1

> This Bill of Rights and Freedoms is adopted to give lasting effect to the values which the people of the United Kingdom consider to be fundamental.

The preamble then listed the rule of law, liberty, democracy, fairness and civic duty as those values. The outline then includes an interpretative clause, requiring anybody interpreting the bill to strive to achieve its purpose and to give practical effect to the fundamental values that underpin it. Specifically, the Committee recommended the classification of rights into Civil and Political Rights, Fair Process Rights, Economic and Social Rights, Democratic Rights and the Rights of Particular Groups, and the inclusion of a (qualified) right to trial by jury and a right to administrative justice. In addition, it recommended giving better effect to the UN Conventions on the Rights of the Child and on the Rights of Persons with Disabilities.

With respect to the relationship between parliament, the executive and the courts, the Committee felt that a Bill of Rights with the power of the courts to override Acts of Parliament would be at odds with the UK's traditional constitutional structure. So too the Committee was against the idea of entrenching the Bill of Rights from further amendment save by special procedure. It felt that the existing arrangements for rights' protection contained in the Human Rights Act were the most appropriate and democratic.

It is pertinent to note, especially in the light of the most recent proposals for reform, that the Committee firmly rejected the idea that a UK Bill of Rights be called either a Bill of Rights and *Duties* or a Bill of Rights and *Responsibilities*. In its view, a Bill of Rights was not the place to impose general obligations on the individual to obey the law. Further, the enjoyment of human rights could not be made contingent on the fulfilment of responsibilities; the limitations on the enjoyment of human rights - including the respect of the rights of others - had already been built into the Convention rights.

Finally, the Committee recommended that any process for reform must build on the Human Rights Act without weakening it as well as supplementing the European Convention protection and be in accordance with universal human rights standards. In addition, it should protect the weak and vulnerable against the strong and powerful; be aspirational and forward-looking; apply to the whole of the UK and to all people within the UK; provide strong legal protection for human rights; and enhance the role of parliament in the protection of human rights.

Cameron's proposals

Needless to say, the Joint Committee's proposals were rejected or ignored; this was not what the government wanted and subsequent proposals concentrated on the reduction of the Act's scope and the power of the European Court to influence our legal and constitutional order.

Before the 2010 election, the Conservative government promised to repeal the Human Rights Act 1998 and replace it with a British Bill of Rights and Responsibilities, and after the election, the Prime Minister appointed Michael Gove as the new Minister of Justice, providing him with the mandate to repeal the Act.[50] The details of this repeal and any new provisions for protecting human rights were unclear, but it was apparent from the manifesto that the main aim was to reduce the domestic law's reliance on European law and principles – most significantly the jurisprudence of the European Court of Human Rights. Accordingly, it tentatively suggested that the domestic courts should no longer have to rely on the case law of the European Court,[51] and that the UK Supreme Court should instead have the 'final say' on human rights matters.

More significantly, the government wished to introduce a *British* Bill of Rights *and Responsibilities*, not only entrenching essential principles of British justice and tradition, but also encompassing

[50] Coleman, C 'Human Rights Law is Gove's big challenge' BBC news: bbc.co.uk/news 15 May 2015.
[51] As is currently required by s.2 of the Human Rights Act 1998.

corresponding duties on individuals that would act as conditions of their entitlement.[52] Previous governments had been warned against such a proposal, yet the Cameron government was set on a departure from a Convention compliant system of recognising rights and a return to a more traditional process, by which rights are protected by common law and traditional constitutional principles. The government withdrew the repeal of the Act from the Queen's speech on their legislative programme, instead delaying any legislative plans, perhaps for a year, to allow time to draw up a Draft Bill and, possibly, to allow consultation.[53]

The Conservative Party Manifesto made these promises with respect to repealing current human rights law:

> We have stopped prisoners from having the vote, and have deported suspected terrorists such as Abu Qatada, despite all the problems created by Labour's human rights laws. The next Conservative Government will scrap the Human Rights Act, and introduce a British Bill of Rights. This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK.[54]

Further on it states

> We will…introduce a British Bill of Rights which will restore common sense to the application of human rights in the UK. The Bill will remain faithful to the basic principles of human rights, which we signed up to in the original European Convention on Human Rights. It will protect basic rights, like the right to a fair trial, and the right to life, which are an essential part of a modern democratic society. But it will reverse the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society. Among other things the Bill will stop terrorists and other serious foreign criminals who pose a threat to our society from using spurious human rights arguments to prevent deportation. 55

The Joint Committee on Human Rights had of course warned against a concept of a 'British' Bill of rights' as it would alienate non British residents and fails to comply with the international and universal nature of human rights.[56] These warnings were ignored by the government, as were many other concerns about the constitutional ramifications of such a Bill.[57] As to content, presumably the Bill would have included rights similar to the ECHR and included reference to other values such as the rule of law, the right to judicial and administrative justice. However, it would likely adjust certain rights by, for example, diluting the right to private and family life in cases involving deportation or extradition; a major concern of this and subsequent governments, as expressed in its election manifesto, above.[58]

The Bill was also made specific reference to *responsibilities* with respect to qualified and conditional rights, ensuring that the enjoyment of these rights will be dependent on the right holder carrying out their responsibilities to society and other rights' holders. Such a proposal would have to comply with Convention standards of rights' restriction, unless the government was proposing to free itself from European human right law. In any case, the Convention already accommodates restrictions on human

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[52] See Helen Fenwick, 'Protecting Human Rights in the UK – Conservative Plans post-2015 (2015) 74 *Student Law Review* 3.
[53] Coates, S 'Government delays the introduction of a British Bill of Rights' *The Times,* 27 May 2015 (Online edition).
[54] Conservative Party Manifesto 2015, at page 60.
[55] *Ibid*, at page 73.
[56] '*A Bill of rights for the UK*?' Report of the Joint Committee of Human Rights, 10 August 2008, HL Paper 165-1; HC 150-1.
[57] Ross, T 'How the Human Rights Act escaped the Tory Axe' *Daily Telegraph*, 30 May 2015
[58] Already, s.19 of the Immigration Act 2014 dictates to the courts the factors it must take into account, including their weight when considering expulsion from the UK under the Nationality, Immigration and Asylum Act 2002.

rights to facilitate compliance with the law and the rights of others. It does not, however, in general, expressly limit the enjoyment of any rights by insisting on compliance with responsibilities, as this concept is inconsistent with fundamental rights.[59]

What was unclear was whether the domestic courts would be able to even consider ECHR case law; interpret legislation in conformity with the ECHR as well as the new British Bill of Rights; or declare legislation incompatible with the new Bill of Rights. It was also unclear whether the Bill would allow the domestic courts to employ the principles of legality and proportionality when balancing and interpreting rights. If that was not the case, that would have led to multiple applications to the European Court; unless the government wished to free itself from European human rights law. The proposals also ignored the fact that the courts can and do depart from European case law when there is no clear line of authority from the ECHR which binds domestic law (as in the admissibility of hearsay evidence).[60] Further, the domestic courts have made it clear that they have the power and duty to interpret and apply Convention rights, and their limitations, as domestic rights (the right to die).[61] Thus, the domestic courts have often chosen to follow the wide margin of appreciation offered by the European Court to justify their refusal to interfere with parliamentary and executive actions (right to die, control of assemblies).[62]

The government, of course, hoped that the Supreme Court would offer due deference and respect to the executive and legislative bodies where in the past the European Court has refused to extend the margin of appreciation to those bodies (for example, in cases concerning stop and search,[63] and admissibility of torture evidence abroad.[64] However, many of the defeats to legislation and executive acts have come from the British courts, applying traditional principles to cases involving detention without trial,[65] admissibility of torture evidence in domestic proceedings,[66] and freedom of information.[67] All governments thus need to ask whether the domestic courts, including the Supreme Court, will become compliant, or in contrast react to any attempted curtailment of their judicial powers.

The above proposals to abolish the Human Rights Act 1998 placed our relationship with international and European human right law in jeopardy. To secure the proposals' complete success, we would have had to re-think our relationship with the Council of Europe as well as our standing in the international community. But is it all worth it? Are the concerns over European human rights law and the power of the European Court of Human Rights justified; particularly given the fact that the Council is already considering changes to those powers in the light of general concerns over the Convention and adherence to the doctrine of subsidiarity? With that question in mind, let us consider the most recent proposals for reform.

The most recent proposal for reform: the Gross Review and beyond

Turning to the latest government proposals, an independent review panel was asked to examine the relationship between domestic courts and the European Court, and the impact of the HRA on the relationship between the judiciary, the executive and the legislature.[68] This, as with the above proposals,

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[59] The sole exception to this, is article 10, relating to freedom of expression, where that right is expressly stated to be subject to *duties and responsibilities*.
[60] *R v Horncastle* [2009] UKSC 14, approved by the European Court of Human Rights in *Horncastle v United Kingdom*, judgment of the European Court of Human Rights, 16 December 2014.
[61] *Nicklinson v Ministry of Justice and others* [2014] UKSC 38.
[62] See *Nicklinson*, above, note 29 and *Austin v MPC* [2009] 1 AC 564.
[63] *R (Gillan) v MPC* [2006] 2 AC 307; overturned by the European Court in *Gillan v United Kingdom* (2010) 52 EHRR 45
[64] *Othman (Qatada) v United Kingdom*, (2012) 55 EHRR 1
[65] *A v Secretary of State for the Home Department* [2005] 2 AC 68
[66] *A v Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221
[67] *Kennedy v Charity Commission* [2014] UKSC 20
[68] Launched by the Ministry of Justice to consider how the Human Rights Act is working in practice and whether any change is needed: https://www.gov.uk/guidance/independent-human-rights-act-review

caused fears that domestic courts would diverge more from European Court of Human Right's rulings and the Act's central provisions.[69] In particular, the review considered whether to update the law to remind judges that they are not bound by the European Court's rulings. Lord Pannick suggested to the Review Panel that s.2 of the Act be amended so that after the words 'must take into account', the words 'but shall not be bound by' be inserted. This, of course assumes that the domestic courts will be more willing to defer to Parliament and the government than the European Court,[70] but in any case it attracts the possibility that UK human rights law would fall short of the standards laid down in the Convention and by the European Court of Human Rights. This was the situation before the Act was passed,[71] and the proposals present a further risk that government is allowed to act outside the constraints imposed by international standards of human rights and the notion of the rule of law. Lord Pannick attempts to argue that often decisions of the European Court are followed despite them having little relevance on matters in the UK. However, the government is more concerned with cases that *do* have relevance, but where the European Court imposes liability on the state where Parliament and the courts, if left to its own devices, would, or might, choose not to impose such liability.[72]

The independent review reported in December 2021, and was accompanied by the Ministry of Justice's consultation paper on the reform of the Act and its replacement with a modern Bill of Rights.[73] The review courted strong criticism from a coalition of charities, trade unions and other groups, who fear that it is a threat to freedom and justice,[74] and the Ministry's plans have attracted similar criticisms.[75] Defending the Act, the group claimed that while every system could be improved, and protecting rights and freedoms for all is a balancing act, the Act is a proportionate and well-drafted protection for the fundamental liberties and responsibilities of everyone in this country.

At the same time as the release of the consultation paper, the Policy Exchange released its findings on the Act's reform, outlining why the Act needed to be reformed and the best methods by which to achieve this.[76] In a foreword to the paper, Lord Sumption outlines his concerns about the Human Rights Act, the European Convention and the role of the European Court of Human Rights. In his Lordship's view, in terms of our constitution, the Act gives rise to three main problems. The first is that it treats broad areas of public policy as questions of law, and not as proper matters for political debate or democratic input. The second major problem is, in his view, the role of the Strasbourg court: adopting an analytical method at odds with the way that international treaties are normally interpreted, and treating the Convention as a "living instrument". Thirdly, the Strasbourg court has gratuitously expanded the geographical and the temporal range of the Convention well beyond anything that was envisaged when it was made or the Human Rights Act passed.[77] Most worryingly, Lord Sumption notes that in practice the Convention has had most influence in the countries which are least in need of an international system

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[69] Henry Zeffman, 'UK judges not bound by human rights rulings' *The Times*, 21 June 2021, 6.
[70] See Steve Foster, 'Finally, a Bill of Rights for the UK?' (2008) 13(2) *Coventry Law Journal* 8.
[71] Foster n. 68.
[72] One example cited in minutes of a meeting between police chiefs and the panel on 13 April is the Supreme Court ruling in *Commissioner of Police of the Metropolis v DSD* [2018] UKSC where it was held that the police were liable under Article 3 of the Convention for not investigating allegations of rape made by two women. A long line of domestic authority had provided immunity to the police with respect to the investigation of crime, but such authority had to be re-examined in the light of European Court case law: *Osman v United Kingdom* (1998) 29 EHRR 245.
[73] Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights – a consultation to reform the Human Rights Act 1998, December 2021.
[74] Haroon Siddique 'More than 220 groups criticise UK review of Human Rights Act' *The Guardian*, 22 July 2021
[75] Rajeev Syal, 'Raab's human rights proposals condemned as 'blatant power grab'' The Guardian, 14 December 2021. In the article, Martha Spurrier, the director of the human rights group Liberty, is reported as saying that the was a blatant, unashamed power grab from a government that wants to put themselves above the law.
[76] Policy Exchange: Richard Ekins and John Larkin QC, 'How and Why to Amend the Human Rights Act 1998' December 11 2021.
[77] 'How and Why to Amend the Human Rights Act 1998' December 11 2021, foreward, 5-6

of rights protection (presumably the United Kingdom leads this list), and very little influence on those which routinely disregard human rights.[78] This of course is typical of the rhetoric aimed at the Act and the Convention itself, and of the national arrogance towards international human rights.[79]

It is clear, therefore, that the present government is hell bent on tilting the balance back in favour of parliamentary and government autonomy, and we should all be concerned with the impact of that on human rights and the rule of law. This is made more worrying by further attempts to restrict or abolish judicial and legal review of certain executive action. For example, the Overseas Operations (Service Personnel and Veterans) Act 2021 makes provision about legal proceedings in connection with operations of the armed forces outside the British Islands, creating a presumption against prosecution of armed service personnel with respect to alleged conduct during overseas operations.[80] The provision is in conflict with decisions of the domestic courts in this area,[81] and will lead to a clash with the European Court of Human Rights.[82]

A further concern is that now Brexit has been achieved, the government feels that it is now free from the constraints and principles of the European Union, and indeed the remainder of the international arena. This will leave the UK isolated on many human rights and justice issues, adding credence to the argument that the UK constitution is incapable of maintaining the rule of law and acceptable standards of rights protection. Thus, it has been reported that not one European country has decided to support the UK government's controversial asylum plans, with the UN criticising the proposals as so damaging that they risked Britain's "global credibility".[83] Despite the government's membership of the Council of Europe, there is clear evidence that the government is prepared to stand alone on many fundamental issues. The recent ratification of Protocol No. 15 of the European Convention (recognising the subsidiarity of the Convention machinery to domestic enforcement), gives rise to further concern that the UK government in particular will welcome and apply a wide margin of appreciation in the recognition and enforcement of human rights.[84] Together with the proposed reform of the Human Rights Act, above, and the reform of judicial review, below, the government's *modus operandi* with respect to following legal and other advice and following international law and the rule of law in general is casting severe doubts as to the fitness for purpose of our constitutional arrangements.

Conclusions and recommendations

With a combination of foresight, hindsight, and an examination of 21 years of case law under, and proposed reforms of, the Human Rights Act, your author's conclusion is that the Human Rights Act should stay, principally in its current form. The reasons for this conclusion are based mainly on the desire to maintain the highest level of rights' protection within an already precarious constitution,[85] but there are other more pragmatic reasons. Not least of which is that the Act accommodates the arguments

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[78] Ibid, 7

[79] Whatever the merits of the government's proposals and the Policy Exchange's suggestions, it is of great concern that a former Justice of the Supreme Court should take such a negative attitude towards the Convention and the role of the independent judiciary in securing human rights and controlling executive and parliamentary measures which seek to restrict them.

[80] Sections 1-5 of the Act.

[81] Smith v Ministry of Defence [2013] UKSC 41.

[82] See the European Court's decision in Al-Skeini and others v United Kingdom (20110 53 EHRR 18.

[83] Mark Townsend, 'EU countries snub Priti Patel's plans to return asylum seekers', The Guardian, 9 May 2021

[84] Council of Europe, Treaty Series 213, Protocol No 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms. The Protocol, which entered into force on August 1, 2021, stresses (in Article 1) that the Convention machinery is subservient to the national system of protecting human rights by inserting after the existing preamble: "…the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention," Also, article 4 reduces the time limit for applications from 6 to 4 months.

[85] See Steve Foster 'The Rule of Law in Modern Times: not a Priti sight' (2022) 26(2) Cov. Law J 1

of both sides – for an enhanced protection of human rights than seen before the passing of the Act, and the retention of parliamentary sovereignty, government autonomy and the limited role of the courts (domestic and European) when balancing individual rights with wider social interests.

First, there was ample evidence that the UK's pre-Act method of protecting human rights, with the presence of parliamentary sovereignty and the vulnerability of unpopular and minority rights, together with its lack of sound human rights principles, was unsatisfactory and failed to comply with our human rights obligations in international law. A return to this method would lead to an inevitable clash with our commitments to the European Convention, together with a rise in the number of applications made to the European Court. It would also, inevitably, result in a restriction of effective legal remedies for human rights violations of those who might otherwise be excluded from protection because they were felt unworthy of being rights holders. The Human Rights Act provides a framework for the equal enjoyment of fundamental rights *for all* and a retreat to the traditional system, and to undue deference to Parliament and the executive, would leave many individuals' right susceptible arbitrary interference.

Second, it must be stressed that the system used by the Act and the Convention – that certain rights are absolute, but that other can be interfered with when necessary and proportionate – accommodates restrictions on rights that are necessary to protect social values and other individual rights. It is a popular myth that bills of rights or international treaties do not allow restrictions on individual behaviour; allowing individuals to act irrespective of others' rights. That of course is nonsense: convicted, and sometimes suspected criminals are punished within the law, as are those who abuse their rights of private life, free speech or general liberty. The Human Rights Act has never interfered with that principle, but it does attempt to restrict interferences with *fundamental* rights by insisting that the basic principles of legality and proportionality are followed. Thus, the Convention does not prohibit individuals being sent to prison and thereby being subjected to hardship and loss of liberty, but it insists that any such imprisonment follows a fair trial by an independent court (as opposed to the decision of the executive), that the sentence be proportionate and the conditions of imprisonment be humane. Bills of Rights and treaties do not outlaw restrictions on basic liberty (freedom to do as you choose), but control the methods and manner of interfering with *fundamental* human rights – the right to life, private life, freedom from torture and inhumane and degrading treatment.

Third, as stated above, both the European Convention machinery and the Human Rights Act preserve the autonomy and features of each state's constitutional and legal order. The European Court of Human Rights has made it clear that the Convention machinery is subsidiary to the domestic protection of human rights, and this is evident in its application of the margin of appreciation, and the most recent Protocol No. 15, which underlines the principle of subsidiarity in the Convention's order. The fact that on occasions (much less than in the pre-Act period) the Court has found UK law and judicial practice out of line with the Convention does not contradict this basic concept. Equally, the Human Rights Act 1998 preserves all of our constitutional fundamentals: parliamentary sovereignty, executive autonomy and the limited role of our judiciary. The Act is careful to preserve the right of Parliament to pass and retain laws in breach of Convention rights, and the right to judicially review parliamentary and executive acts is limited by that reality. Parliament has the ultimate say in how the balance between the enjoyment of rights and social and other interests is to be struck. However, to concede to judicial rulings that find such law in breach of the Convention accords with diplomatic and common sense; to do otherwise risks the government being in breach of its obligations in international law, and further applications and defeats in Strasbourg.

Fourth, there is increasing evidence that the Convention machinery and the European Court has become less interventionist, and more tolerant of each state's prerogative to strike the balance itself. This is accommodated in the words of Protocol No. 15, above, and is evident in the areas such as prisoner

voting rights,[86] the imposition of whole life sentences,[87] hearsay evidence,[88] and restrictions on peaceful assemblies.[89] In other words, the level of interference with national sovereignty that concern politicians and the public is far less impactful as the suggested reasons for reforming the Act. True, there are cases where the Convention jurisprudence has made us reform our law, or the domestic courts' interpretation of human rights. The development of various elements of the common law of privacy is perhaps the best example; but no one denies the need for such development, although they may disagree on the balance taken by the European Court in that area. Equally, the Court's jurisprudence on the use of torture evidence, and the balancing of deportees' rights with immigration and deportation policies, have naturally led to allegations of human rights legislation skewing the balance between individual rights and wider social policy. Yet such jurisprudence reflects the Council of Europe's commitment to principles of equality and human dignity that form the basis of the Convention, our membership of the Council of Europe and, of course, the UK's constitution. To argue for reform of our human rights law on the basis of a handful of Strasbourg Court decisions displays a worrying failure to appreciate the wider benefits of the Convention and the Human Rights Act. More specifically, to attempt to draft exemptions from the Act, for example to prohibit or limit actions in respect of human rights violations committed by our armed forces abroad, undermines both our commitment to equal rights and justice, and risks unnecessary conflict with the Strasbourg Court.

Fifthly, an examination of the domestic courts' post-Act jurisprudence fails to reveal the 'mission creep' that the Strasbourg machinery has been accused of. Although the domestic courts have used European principles to challenge practices of detention without trial, restrictions on the right to a fair trial, and restrictions on the rights of homosexuals and transsexuals, such decisions have upheld fundamental principles of justice, dignity and equality. These are surely part of the set of traditional British values which many wish to see replacing the principles of the European order. Indeed some of these decisions have been achieved by using traditional common law values; and there is no guarantee that the domestic courts will relax their challenge to such laws simply because they were told to do so in a government paper.

Finally, we need to ask - can we afford to do without the Human Rights Act in its present form, and can the UK constitution survive another attack on human rights, the rule of law and the compatibility of our law with international and European law? In a constitution without entrenched human rights, or the constitutional right of the courts to override the acts of a sovereign parliament (executive), the Human Rights Act and our membership of the Council of Europe have proved fundamental in restraining government and providing real and consistent remedies for those whose rights have been violated. To provide another break from international standards and control, after Brexit, may well sound the death knell for human rights and constitutionalism in our constitution. That should be resisted on any account.

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[86] *Scoppola v Italy No 3,* judgment of the Grand Chamber, 22 May 2012, Application No. 126/05
[87] *Hutchinson v United Kingdom* (Application no. 57592/08), judgment of the Grand Chamber, 17 January 2017
[88] *Al Khawara and Tahery v United Kingdom, Appication Nos.* 26766/05 and 22228/06, judgment of the Grand Chamber 15 December 2011.
[89] *Austin v United Kingdom* (2012) ECHR 459