ARTICLES

HUMAN RIGHTS

Reforming the Human Rights Act 1998 and the Bill of Rights Bill 2022

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Introduction

In previous issues of this journal we have chronicled the Government's recent plans to reform or repeal the Human Rights Act 1998 (HRA) and replace it with a British Bill of Rights. These articles included a detailed appraisal of the Independent Human Rights Act Review (IHRAR) and its potential,[1] and a retrospective of the United Kingdom's Human Rights record before the passing of the HRA in an effort to convince the reader that reform or repeal was neither necessary nor desirable.[2]

In the short period between those articles being published a great deal has happened; both generally in terms of our constitution, and specifically with further movement on the future of the HRA. Whether the former developments will mark the end of, or rather accelerate the plans for a Bill of Rights, will remain to be seen. Whatever happens in the next six or twelve months, we are bound to return to the proposals and the possibility of introducing changes whereby our system of protecting human rights is less reliant on the rights in the European Convention of Human Rights 1950 (ECHR) and the case law of the European Court of Human Rights (ECtHR). At the very least too much discussion has taken place in the last two years over the role and status of human rights in our legal system and constitution, and the relationship between the courts and the executive and Parliament, for the idea of reconstructing our framework for human rights to disappear.

This article will provide the reader with a critical review of these proposals, including what has happened most recently with respect to the government's ideas for reform, together with the political and academic reaction and opposition to such proposals. It will then examine the government's recent Bill of Rights Bill 2020, which before the summer recess proceeded through a rather distracted Parliament, in order to examine its central provisions and then allow us to imagine what a British Bill of Rights might look like. Finally, the article will offer reflections on the proposals, the Bill, and the debate about the appropriateness of retaining Convention rights and principles. In particular, it will examine the power of the ECtHR, and the question of whether the domestic judiciary has become too involved with political and moral considerations after the passing of the 1998 Act and the influence that the European Court has had on human rights adjudication.[3]

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[1] Steve Foster, 'Long in the making: the ''Gross Review'' and Conservative Party policy on the reform of human rights law' (2021) 26 (1) Cov. Law J 17.

[2] Steve Foster, 'Should it go or should it stay? The coming of age of the Human Rights Act 1998, or time to say goodbye?' (2022) 26 (2) Cov. Law J 23.

[3] At the time of writing there are ongoing political and legal developments relating to this issue. including the Government's response to the Joint Committee on Human Rights Report - *Human Rights Act Reform: Government Response to the Committee's Thirteenth Report of Session 2021-22* - HC 608 (Session 2022-23) 14 July 2022, and the Committee's *Call for Evidence - Legislative Scrutiny: Bill of Rights Bill, 14 July 2022.*

The Independent Human Rights Act Review

The IHRAR was the Government's initial response to its electoral commitment to 'update' the HRA. The then Justice Secretary, Mr. Robert Buckland, in contrast to the bellicosity and triumphalism elsewhere across Whitehall, took a modest approach to reform. In addition to retaining the UK's membership of the ECHR, which implied that the Convention's substantive rights were now settled, the Review's terms of reference (ToR) gave no sense that the word 'update' could be extended to include the possibility that the HRA might be repealed, let alone replaced by a new Bill of Rights. Perceptions of moderation are endorsed by the IHRAR itself, which emphasises that its ToR, expressed in neutral language, neither begged questions nor suggested predetermined answers.

However, hopes that the Government might continue to take a considered and informed approach to reform were dashed in the weeks following the delivery of the Review's final report to Mr. Buckland's successor, Mr. Dominic Raab, in October 2021.[4] Under his stewardship, the Ministry of Justice opted for a radically different approach to updating the HRA, strongly influenced by the new Justice Secretary's own thinking.[5] This culminated in the publication on 14 December 2021 of a separate Consultation Paper (hereafter 'CP').[6] Continued movement along the IHRAR's preferred direction of travel had encountered a major roadblock. Its passenger – domestic rights protection - was unceremoniously pulled from the vehicle and hurriedly bundled into another, which set off in a new direction. A signpost marked its route: 'Home-grown, British Bill of Rights – this way'.

Reactions to the CP were decidedly 'mixed'. Whilst broadly welcomed by Policy Exchange,[7] Professor Tom Hickman spoke for many when he expressed puzzlement over the Government's determination to dismiss the IHRAR.[8] Hickman calculated that twenty-one of the twenty-nine questions that structured the CP fell outside the Review's ToR and were not therefore considered by it. This was still more troubling given the Review's membership (including its 'formidable' chair, Sir Peter Gross), the depth of its research, and the detail in which its findings were presented.[9] The CP – in Professor Hickman's words 'sketchy and half-baked' - inevitably suffered by comparison. Unperturbed, the Government proceeded with its consultation exercise, eventually extended to 19 April 2022. According to its Consultation Response (hereafter 'CR'),[10] hundreds of stakeholders were invited to ten consultation events, along with several meetings hosted by ministers themselves. A total of 12,873 responses were received.[11] The Ministry then drafted a Bill of Rights Bill, included in the Queen's Speech to "…restore the balance of power between the legislature

[4] Ministry of Justice *The Independent Human Rights Act Review,* December 2021, CP 586.
[5] Shortly before entering Parliament in 2010, Mr. Raab cemented his standing on the libertarian wing of the Conservative Party by publishing *The Assault On Liberty*, a personal and highly polemical account of the evolution of human rights law in both Britain and Europe. From even the briefest of readings, especially Chapters 5-7, one can detect the book's influence on current Government policy.
[6] Ministry of Justice *Human Rights Act Reform: A Modern Bill of* Rights, December 2021, CP 588.
[7] See Richard Ekins, *Thoughts on a Modern Bill of Rights*, Policy Exchange (2022), para. 6.
[8] 'A UK Bill of Rights?' *London Review of Books*, Volume 44, Number 6, 24 March 2022.
[9] The Panel had thirty-eight initial conversations with interested parties, who made over 150 responses. It also conducted fourteen 'Roundtables' and seven online 'Roadshows', along with various conversations with Strasbourg, German and Irish judges. Unsurprisingly, its report is substantial; running to over 400 pages along with additional information set out in no fewer than eleven appendices.
[10] Ministry of Justice *Human Rights Act Reform: A Modern Bill of Rights – Consultation Response* June 2022, CP 704.
[11] Ibid, paras. 3-5.

and the courts". It was formally introduced in the House of Commons one month later on 22 June.

Progressive critics dismissed the Bill as '…part of a wider No. 10-led strategy to focus on…divisive issues in the hope of shoring up support among socially conservative voters'.[12] Yet, there was also cross-party Parliamentary criticism of Mr. Raab's refusal to publish a draft Bill to facilitate pre-legislative scrutiny, including from Sir Bob Neill, the Conservative Chair of the Commons' Justice Select Committee.[13] Whilst the Government seems confident that it can rely on its Commons' majority to push the Bill on to the statute book,[14] it seems wise to have introduced it to MPs, thereby bringing into play s.2 of the Parliament Act 1911.[15] As peers go on to scrutinise its details, reflecting no doubt on the meaning and implications of the word 'update', the Government might have need of it.

Pause for thought

The IHRAR offers the most comprehensive assessment of the HRA yet undertaken. Consequently, we should pause to reflect on its analyses and the recommendations flowing from them, Its ToR fell under two heads. The first concerned s.2 HRA, which when determining questions arising from Convention rights, requires domestic courts to take into account ECtHR case law. As part of a drive to promote greater 'public ownership' of human rights, the Review proposed to amend s.2(1) to better develop domestic human rights jurisprudence.[16] This would have required domestic courts to first apply UK statute, common and case law before, should it be necessary, looking to the ECHR itself.[17] This is relatively uncontentious: giving effect to Convention rights by the HRA was not intended to replace our legal order with the ECHR and the jurisprudence of the European Court. Critically, and despite the 'myth-making' surrounding this issue, neither was this the intention of the ECHR, which to this day plays a subsidiary role in resolving human rights questions. ECHR rights and principles guide the passing, interpretation and application of domestic law ensuring as far as possible, compatibility with ECHR law, although – again a point of great importance - under s.3 of the HRA as it stands, domestic law is persuaded to find compatibility with ECHR law in ways which were unimaginable before the Act was passed. The reason for that of course was to avoid potential conflict with decisions of the Strasbourg Court, an objective that will still be relevant even if the Bill becomes law, as the Government currently has no plans to leave the Convention.

[12] Peter Walker, 'The Queen's speech 2022: what is in it and what it means', *Guardian*, 22 May 2022.
[13] Rajeev Syal, 'Raab urged to let Parliament scrutinise Human Rights Act replacement', *Guardian*, 21 June 2022.
[14] The largest of any government since Mr. Blair's second ministry in 2001 and the largest of any Conservative government since Lady Thatcher's third in 1987.
[15] This, of course provides that a Bill sent up to the House of Lords by the House of Commons could become law despite the Lords not approving the Bill.
[16] Former Supreme Court Justice, Lord Carnwath, is critical of the Review on this point.
[17] See the indicative draft clause at CP 586 Chapter 2, para. 199. The IHRAR acknowledges the Supreme Court's judgments in *Osborn v Parole Board* [2013] UKSC 61, [2014] AC 1115 and *Kennedy v Information Commissioner* [2014] UKSC 20; [2015] AC 455, which it believes should be given statutory effect. These decisions reflect the need to apply and interpret domestic law in the resolution of the dispute before the court, rather than resolving it by recourse to Convention rights. Thus, in *Kennedy*, it was stressed that despite the relevance of Article 10 rights, it did not follow that the relevant section should be remoulded by the courts to provide such rights. In view of the clarity of the absolute exemption in the Act, the focus would be on the 2011 Act.

The IHRAR also expressed confidence that under an amended s.2(1), any risk domestic courts might 'race ahead' of Strasbourg would be countered by judicial restraint.[18] Developments to the *Ullah* doctrine play their part in this.[19] This doctrine represents the 'mirror' principle, that decisions of the domestic courts should so far as possible, mirror the decisions of the ECtHR, and that the courts should, in the absence of special circumstances, follow any clear and constant Strasbourg jurisprudence. This pragmatic approach avoids potential conflicts with and subsequent appeals to Strasbourg, although other decisions have stressed that the rights in the HRA are not simply ECHR rights, but can be interpreted as domestic rights.[20] No other changes to s.2, however, were recommended. Instead, the Review concluded that in interpreting s.2, judges have acted with appropriate restraint. This is reiterated in the related evaluation of the *domestic* margin of appreciation.[21] In rejecting the use of statutory guidelines to 'police' this margin, the majority argued that for the most part domestic courts '…have developed a careful and cautious approach…(and) have shown proper consideration of their role and those of Parliament and the Government'.[22] On a related matter, it regrets that neither the high standing of UK judges in Strasbourg nor the latter's receptiveness to their thinking are sufficiently appreciated by domestic audiences.[23] For this reason, at Chapter 4 it recommends that the current judicial dialogue between the two continues to develop 'organically', i.e. without political intervention.[24] Of course, such dialogue between the Convention authorities and the UK, and the principle of subsidiarity in general, is accommodated by the admissibility procedure (including the new Protocol No. 15) and the margin of appreciation provided to Member States, and has been a constant topic of discussion with Member States since the Brighton Declaration.[25]

Secondly, the ToR required consideration of the HRA's impact on the UK's 'constitutional balance'. Its conclusion – summarised at para. 7 - reflect the majority's view that no substantive case exists either for repeal or *major* amendment of the key sections, there being little to no evidence that the courts are misusing either s.3,[26] or s.4.[27] The Panel agreed that early interpretations of s.3 had resulted in judicial overreach, most obviously in *R v A (No.*

[18] Per Lord Reed in *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10; [2020] 2 WLR 857. For example, in *R (Anderson and Taylor) v Secretary of State for the Home Department* [2202] 1 WLR 1143, it was held by the Court of Appeal that it would be wrong to find the Home Secretary's power to set tariffs for mandatory life sentences incompatible with the ECHR whilst the European Court found it acceptable. Subsequently, the House of Lords declared that power incompatible after the European Court had found it in breach of Article 6 ECHR: [2002] 3 WLR 1800.

[19] The *Ullah* doctrine had been reiterated recently in *R (AB) v Secretary of State for Justice* [2021] UKSC 28, where the Supreme Court held that in the absence of a clear ruling from Strasbourg, the solitary confinement of young persons in detention could not automatically constitute inhuman and degrading treatment within Article 3 ECHR.

[20] See *R (Nicklinson) v Ministry of Justice* [2015] UKSC 38, where it was stressed that the Court was not bound to follow the Strasbourg decisions on assisted suicide; although ultimately it did in granting judicial deference to Parliament in this area.

[21] CP 586, para. 29.

[22] Ibid, para. 31. This is more commonly referred to as judicial deference.

[23] Ibid., para. 38.

[24] Ibid, para. 35.

[25] European Court of Human Rights: *High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration*, 19/20 April 2012.

[26] Ibid, Chapter 5, para. 79. In only 24 cases have the courts used s. 3 to interpret legislation compatibly with Convention rights, ibid, para. 67.

[27] Ibid, para. 68. In particular, the majority rejected Policy Exchange's contention that the courts had ignored Lord Steyn's warning in *Ghaidan,* reiterated by Lord Neuberger PSC in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, that s.4 should be used only in exceptional circumstances. They paid particular attention to the fact that from 2000-20, only 28 unappealed declarations were made by the courts in respect of legislation in force at the time they were made: a yearly average of 1.4.

2).[28] In this case the House of Lords managed to add to the words of a statute – s. 41 of the Youth Justice and Criminal Evidence Act 1999 – so as to allow a defendant to use evidence of a victim's previous sexual behaviour and to thus enhance his right to a fair trial. Whilst the majority of their Lordships were accused of judicial legislation, it should be remembered that the alternative was to declare the provision incompatible under s.4 HRA, leaving Parliament to face the uncomfortable reality that its law was probably inconsistent with Article 6. Further, the IHRAR felt that the *Ghaidan*[29] guidelines subsequently brought both stability and a proper balance. These are based on the idea that possible interpretations of domestic statutes must comply with the intention and policy of the Act itself. Thus, in *Ghaidan*, the House of Lords held that the relevant provision of the 1977 Rent Act could be interpreted to comply with the HRA; as such an interpretation was consistent with the underlying social policy of providing security of tenure.[30]

Consequently, s.3 required a simple amendment, as per the modified s. 2(1)) to clarify the order of interpretive priority: the court first applying the normal principles of interpretation and only referring to s.3 should these fail to remove the incompatibility.[31] Similarly, the majority felt that s.4 was wholly consistent with the court's historical discretion to grant declaratory relief. Hence, its only proposal was for a discretionary power enabling the courts to make 'ex gratia' payments following a declaration of incompatibility,[32] to provide the complainant with a remedy for the loss suffered. Finally, the IHRAR rejected suggestions for repealing or modifying s.19 HRA.[33] Other recommendations included amending s.14 HRA to enable the court to suspend quashing orders following successful challenges to designated derogation orders; a similar provision being recommended for the quashing of subordinate legislation. A database was also recommended, detailing the use of quashing powers.[34] Finally, the Review recommended a minor amendment to s.10, preventing ministers from issuing remedial orders that amend the HRA itself. The Review did criticise some aspects of the current arrangements, notably the concept of extra-territoriality in ECtHR jurisprudence:

> The current position of the HRA's extra-territorial application is unsatisfactory, reflecting the troubling expansion of the Convention's application. The territorial scope of the Convention ought to be addressed by a national conversation…together with Governmental discussions in the Council of Europe, augmented by judicial dialogue between UK Courts and the ECtHR.[35]

In similar vein, it added that '…the temporal application of the HRA is (also) now uncertain and unsatisfactory. Clarity is needed. The temporal scope of the Convention ought to be addressed at a political level by the UK and the other Convention states.'[36] Tellingly,

[28] [2001] UKHL 25, [2002] 1 AC 45.
[29] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 577.
[30] This was not possible with respect to the Matrimonial Cause Act 1971 which allowed marriage between a 'man and a woman' and which it was argued validated marriages entered into by transsexuals with a person of the same biological sex. Such an interpretation would have conflicted with the fundamental purpose of the Act: *Bellinger v Bellinger* [2003] 2 AC 467.
[31] CP 586, Chapter 5, para. 186
[32] Ibid, para. 205.
[33] Ibid, paras 158 and 161.Section 19 requires ministers to make a declaration of compatibility or incompatibility of any legislation introduced to Parliament.
[34] Ibid., Chapter 8, paras 80, 85-6
[35] Ibid, para. 4.
[36] Ibid.

however, it warned against seeking easy answers through unilaterally amending domestic human rights law.[37]

Its main criticism, however, was the strong perception among sections of public opinion that the HRA lacked legitimacy and relevance.[38] It added that such perceptions do not reflect reality and should be challenged and dispelled.[39] Consequently, despite falling outside its ToR, it strongly recommended the rolling out of a programme of civic education – with the active support of all three Branches of State - designed to improve public understanding of human rights.[40] It is striking therefore that the Review's two most important recommendations would not have required major reforms to the HRA itself. This reflected the majority's conviction that the HRA has been an overall success.[41] Further, the arguments for repeal to – either extend current protections or return to pre-1998 arrangements – were rejected on the grounds that no evidence of any depth of support was provided for either.[42] The Review was particularly opposed to a reliance on common law protection alone, noting that '…the UK's current approach and the Human Rights Act, stands fairly in comparison with the best developing global practice in human rights protection'.[43] Finally – a point of the greatest significance - the IHRAR emphasised that for as long as the UK retains its membership of the ECHR, the national interest lies in consistent decision-making between UK courts and Strasbourg. Any other position would raise the prospect of the UK breaching its international obligations, thereby defeating the HRA's primary purpose: 'bringing rights home'.[44]

Four threats and a case for change

As noted above, the Review's findings cut little ice with a Ministry of Justice now firmly under new management. Although not universally welcomed in right-wing circles, the Government committed itself instead to replacing the HRA with a Bill of Rights.[45] Section 2 of the Bill places into domestic law what the Government calls the 'fundamental rights' protected under the HRA. These are set out in Schedule 1 and described as 'Convention rights'. Its case for change is rooted in the assertion that these 'fundamental rights' are under threat - not from the Government but, irony of ironies, from human rights law.

Four, broad claims are made in support of this position. Firstly, human rights law has encouraged a 'rights culture', detaching rights from the ethos of civic and personal responsibility. Secondly, it has impacted adversely on public service delivery, causing confusion, uncertainty and risk aversion among officials. This threat is associated with a third - the compromised ability of government to protect the public. Three problems in particular are highlighted in the CP. The first follows the 'Threat to Life' notification, per ECtHR judgments in *Osman v United Kingdom,*[46] and *Z v United Kingdom.*[47] In these cases,

[37] Ministry of Justice *The Independent Human Rights Act Review – Executive Summary*, December 2021, CP 587, para. 85
[38] CP 586, Chapter 1, paras. 47-8.
[39] Ibid, para. 49.
[40] Ibid, paras 54 and 57.
[41] CP 587, para. 9.
[42] CP 586, Chapter 2, para. 19
[43] Ibid, para. 22.
[44] Ibid, para. 32.
[45] See, for example, Richard Ekins and John Larkin QC, *Human Rights Law Reform – How and Why to Amend the Human Rights Act 1998* (Policy Exchange, 2021), especially at para. 2
[46] (2000) 29 EHRR 245.
[47] (2002) 34 EHRR 3.

the ECtHR held that a State had, through its national authorities, a positive obligation to protect the life of those within its jurisdiction from threats from other private individuals, disturbing in the process legal immunities granted to various public bodies when carrying out their public functions.[48] The second is the extension of the territorial scope of the ECHR following *Al-Skeini and others v United Kingdom.*[49] In this case, the ECtHR held that a jurisdictional link existed between the United Kingdom and Iraqi civilians killed by British soldiers during security operations in Iraq. This allowed it to find a breach of Article 2 ECHR on the grounds that the UK had failed to conduct an independent and effective investigation into the deaths of relatives of five of the six applicants. The third and final problem concerns the difficulties, arising largely from Article 8 ECHR, barring the deportation of foreign national offenders (FNOs)[50]. Whilst Parliament had legislated to guide the courts in interpreting Article 8,[51] this had failed to prioritise 'public interest considerations' in deportation cases.

The fourth and final threat is the inability of elected politicians to remedy these problems. Several cases are listed in this respect, including *P v Cheshire West and Chester Council; P and Q v Surrey County Council.*[52] In this case, the Supreme Court attempted to lay down the criteria for determining whether the living arrangements made for mentally incapacitated people amounted to a deprivation of their liberty under Article 5 ECHR, a task which many regarded as outwith the Court's constitutional and practical competence. The CP also argues that even when judgments are in the government's favour, time and scarce resources have been consumed contesting them. On this point, it refers to Lord Reed's comments in *R (SC and others) v Secretary of State for Work and Pensions,*[53] criticising welfare organisations for bringing political cases to court. In this respect, it must be noted that some human rights claims inevitably raise social and economic issues, given that the enjoyment of civil and political rights, such as the right to private life and freedom from inhuman and degrading treatment, are informed by the values of economic and social rights. In such cases, it is essential that someone draws the boundaries of entitlement and although that is done initially by law-makers, the courts must play a role in ensuring that human rights law and principles (whether from the ECHR or elsewhere) are respected. Lord Reed's comments are acceptable and understandable if they reflect the need for judicial deference in these areas, but that does not justify taking away the courts' jurisdiction to adjudicate on such cases.

A 'Living Instrument'

The principle source of these threats is the ECtHR's 'living instrument' doctrine, all too evident in judgments such as *Othman v United Kingdom,*[54] and *Hirst v The United Kingdom* (No. 2).[55] Whilst the CP acknowledges that such judgments are few in number, it points to their 'qualitative' dimension, straying as they do into ultra-sensitive policy areas. Not for the first time, however, the Government's analysis struggles to withstand close scrutiny. For

[48] See *Hill v Chief Constable of West Yorkshire* [1990] 1 WLR 946 (police immunity) and *X (Minors) v Bedfordshire CC* [1995] 2 AC 693 (immunity for social services).
[49] (2011) 53 EHRR 18, overturning the decision of the House of Lords in *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 46.
[50] From April 2008 to June 2021 28 per cent of deportation cases involving foreign nationals were successfully appealed. Of the latter, 40 per cent were allowed on human rights grounds alone.
[51] Most obviously, the Immigration Act 2014 s. 19, which added Part 5A to the Nationality, Immigration and Asylum Act 2002: the new ss. 117B-C being particularly significant in restricting the courts' ability to block deportations on human rights grounds.
[52] [2014] UKSC 19.
[53] [2021] UKSC 26.
[54] (2012) 55 EHRR 1.
[55] [2004] 38 EHRR 40.

example, the *Othman* ruling in Strasbourg represented no more than a difference of opinion with our courts with respect to the application of Article 6 ECHR when a foreign court was in danger of using torture evidence during a criminal trial. The domestic courts felt that the use of such evidence would not, inevitably, lead to a violation of Article 6,[56] and the Strasbourg Court felt otherwise. In other words, the domestic courts had already embarked on an inquiry as to the acceptability of such evidence, as it had done previously with respect to its use in domestic proceedings.[57] The Government's main cause for concern in these cases is, therefore, that it agreed with the Supreme Court, and lost the case in Strasbourg. Similarly, in *Hirst,* although the European Court and Grand Chamber were not prepared to provide an unlimited margin of appreciation to the UK with respect to prisoner voting rights, both the Court and the Council of Europe were at pains to point out that the State's main obligation was to consider a less disproportionate and less arbitrary alternative.

The Government asserts that the problems arising from ECtHR doctrine have been amplified by the HRA, especially ss.2-3. Whilst recognising the retreat from the 'maximalism' of *Ullah*[58], s. 2 remains ripe for reform on grounds of: ambiguity, over-reliance on Strasbourg case law and blocking the development of domestic human rights jurisprudence (assuming that it is no more generous). The CP is even more critical of s.3, responsible for granting the courts a 'broad licence' to re-write domestic law, even in cases where Parliament's intentions are clear.[59] The HRA is also criticised for failing to provide a 'positive steer' on how the court should locate the public interest in human rights cases, a criticism already noted in the area of deportation. The Government is particularly concerned that too many judgments disregard the irresponsible behaviour of claimants. Accordingly, remedial action requires the imposition of statutory guidance when interpreting limited and qualified rights and, in some instances, awarding remedies. We shall see below that the real intention here is simply to stop altogether claims from those the Government regards as 'undeserving'.

Repeal and replace: what a modern Bill of Rights looks like (apparently)

This, then, is the basis of the claim that only through 'repeal and replace' can domestic human rights law be redirected to its proper purpose. Reform proposals are set out in Chapter 4 of the CP. While these have been superseded by the publication of the Bill, this section follows that Chapter's structure: helpful in tracking the evolution of Government's thinking.

Human rights, the common law and the role of the UKSC

The HRA is repealed at para. 2 of Schedule 5 of the Bill. Whilst the substantive rights it protects are retained, they will be in future interpreted and applied under very different arrangements. The first aspect of these is a strengthened role for the common law, complemented by provisions reinforcing the supremacy of the Supreme Court. Here, the Government's proposals go much further than those of the IHRAR, effectively 'de-coupling' Convention rights from Strasbourg case law. The key provisions are found at s.1(3) and s.1(2)(a), read alongside s.3(1). These affirm that ECtHR case law neither forms part of domestic law nor impacts upon Parliament's ability to legislate and, further, that the Supreme Court has judicial authority over questions involving Convention rights. Strasbourg's authority is further reduced by s.24, which specifies, firstly, that no account

[56] *R (Othman) v Secretary of State for the Home Department* [2010] 2 AC 110.
[57] *A v Secretary of State for the Home Department (No. 2)* [2010] UKSC.
[58] *R v Special Adjudicator ex parte Ullah* [2004] UKHL 26, [2004] 2 AC 323
[59] This is despite accepting that the 'high water mark' of judicial expansionism occurred in *R v A (No. 2)* [2001] UKHL 25, a case that is now two decades old.

can be taken of interim measures when determining Convention rights and obligations, and, secondly, that the court cannot have regard to such measures when granting relief. This was introduced following the ECtHR's intervention on 14 June 2022 to halt the deportation of an asylum seeker to Rwanda. The hysteria over that judgment is, of course, all the more remarkable since the ECtHR had merely halted the deportation until the applicants received the decision of the domestic courts at a full judicial review hearing.[60] The importance of common law developments in rights protection is also re-emphasised at s.3(2)(b)-(c).

As anticipated by the IHRAR, by introducing these provisions the Government runs the risk that the domestic courts will be as, or even more rights-friendly than Strasbourg. However it obviously wishes for the best of both worlds: domestic courts ignoring Strasbourg case law when it conflicts with domestic law, and a return to a compliant judiciary who will follow Parliament's will and not use human rights principles to contort the strict meaning of the law. We will see later that whilst it may be twenty years too late for that, other provisions of the Bill might still allow the Government to neuter the judiciary and get its way regardless. Further, the court is required to comply with s.9, which states that Article 6 ECHR rights can be secured by a limited right to a jury trial. This provision is part of a long line of proposals to include the 'British' right of trial by jury in the more general European right to a fair trial. It is an obvious attempt to 'trump' the ECtHR's judgment in *Taxquet v, Belgium*,[61] which suggested that a defendant was entitled to question the basis on which a lay tribunal had come to its decision of guilt. The practical benefit of this provision seems limited, as the jury system in the United Kingdom has never, in general, been in question. In any case, the section's inclusion is difficult to reconcile with ministerial distrust of jury acquittals in recent public order cases.

Similarly, at s.4 the court must give 'great weight'[62] to the importance of protecting the right to free speech,[63] though not freedom of expression more widely defined.[64] This significantly amends s.12(4) HRA, which states that the courts must have particular regard to freedom of expression, but which has had little effect on elevating the Article 10 right when in conflict with other rights.[65] Freedom of speech is already protected by s.12 HRA, and journalistic sources are protected under s.10 of the Contempt of Court Act 1981, in line with Strasbourg case law.[66] Nevertheless, the augmentation of press freedom is welcome, even though it clashes with the Government's idea that human rights often conflict with crime prevention and detection. In particular, the Government has been concerned with the development of a domestic law of privacy at the expense of free speech and press freedom,[67] although there is no specific mention of this in the Bill. On the face of it, the obvious beneficiary will be the print media; the obvious losers, those seeking to use Article 8 ECHR to protect their right to a private life and confidentiality of personal information. The print media also benefits from s.22, which largely replicates the current s.12(2)-(3), which provides

[60] *NSK v United Kingdom* (application no. 28774/22).
[61] [2010] ECHR 1806, (2012) 54 EHRR 26.
[62] With the exception of criminal proceedings: s. 4(3).
[63] Defined in the Bill as '…a right to impact ideas, opinions or information be means of speech, writing or images'. Fulfilling the same goals by peaceful protest, for example, is not according to the Government an equally precious liberty and not meritorious of the same level of protection.
[64] CP 704, para. 45.
[65] See *Douglas v Hello! Magazine* [2001] 2 WLR 992 and *Re S (Publicity)*[2005] 1 AC 593
[66] *Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Goodwin v United Kingdom* (2002) 35 EHRR 18.
[67] See the recent Supreme Court decision in *Bloomberg v ZXC* [2022] UKSC 5, which provides a starting point of expectation of privacy in cases where individuals are under police investigation, but have yet to be charged.

protection to those defending privacy and other cases by making it difficult for the courts to make orders in the defendant's absence, and to award interim injunctions pending full trial.[68]

Fundamental rights

The CP argues that focus on fundamental rights is blurred by two types of claim: the trivial and the undeserving.[69] The first is addressed at s.15(1), which requires judicial permission before human rights cases can proceed. Under s.15(3), this can be granted only where the claimant has suffered significant disadvantage from an unlawful act, a provision that is similar to the new admissibility criteria, under Protocol No 15, that applies to applications to Strasbourg.[70] When interpreting this provision, the court must satisfy itself that the ECtHR would agree that the 'significant disadvantage' test has been met.[71] Whilst cases can proceed where significant disadvantage is absent, '…reasons of wholly exceptional public interest' must exist. The effect is that Convention rights can be breached without an effective domestic remedy, something with implications for rights protected by Article 13, which provides that everyone is entitled to an effective remedy including facilitating claims for breach of their Convention rights: this applying whether the eventual claim is successful or not. The restrictions on admissibility must also be read alongside s.14, which will be evaluated below. Finally, whereas the Government originally intended to complement the 'permissions stage' by reforming s.8(3) HRA, ultimately it opted instead to reform the arrangements for awarding damages.[72]

Other provisions aimed at fundamental rights can be found at s.5(1), which restrict the court's ability to create positive obligations. Thus, post-commencement, Convention rights cannot be interpreted to require public authorities to comply with a 'positive obligation': defined at s.5(7) as an obligation to do any act. Further, the court must give great weight to avoiding existing ('pre-commencement') interpretations if compliance has any one of five consequences, e.g. impacting on the ability of public authorities to perform their functions or requiring them to conduct an inquiry or investigation to a particularly high standard.[73] This refers to a number of decisions of both the ECtHR and the domestic courts, which impose an obligation on a public authority to secure the ECHR rights of individuals, and thus negate claims of immunity in such cases. Sadly, this proposal seems clearly aimed at (re)granting immunities to public authorities (the police, and possibly social service providers) who can currently be sued under the HRA for failing to protect victims from threats to their life, or inhuman and degrading treatment.[74] Such institutions are already provided with a good deal of deference and flexibility in carrying out their duties, and cases

[68] Such orders should not be granted before trial unless the claimant is 'likely to succeed' at full trial*: Cream Holdings v Banjaree* [2005] 1 AC 253.
[69] We consider this below when examining the changes to the law on remedies. It has also expressed specific disapproval of the recent European Court of Human Rights decision in *ML v Slovakia,* Application No 34159/17, where the Court held that the press had interfered with a deceased priest's Article 8 rights in irresponsibly reporting on true allegations of historical sexual abuse.
[70] It should be stressed, however, that the admissibility procedure under the ECHR exists on the understanding that the ECHR process is subsidiary to domestic protection; it does not thus go without saying that domestic law must apply the same standard of admissibility at the leave stage.
[71] The CR (at para. 53) explains that 'The permission stage will be partly modelled on, and expressly linked to the jurisprudence under, the Strasbourg Court's admissibility criterion on 'significant harm'.
[72] CP 704, para. 60.
[73] The full list is set out at s.5(2).
[74] See the Supreme Court decision in *DSD v Commissioner of the Police for the Metropolis* [2018] UKSC 11, which found the police liable under the HRA (Art. 3 ECHR) for failing to properly investigate allegations of rape and sexual assault.

against them rarely succeed, unless there is evidence of systemic failure.[75] Re-instating these immunities will, it is argued, deprive victims of an effective remedy for systemic failures and encourage negligent practice among public authorities. We shall see below that proposals to prevent human rights from being used to bring claims on overseas military operations can be criticised on similar grounds, and will hardly be popular with the families of armed personnel who have brought claims under the Act.[76]

Preventing the incremental expansion of rights

The majority of the Bill's measures fall under this head. Primarily, the Government changed its original position and decided to scrap s.3 HRA completely. The need for this U-turn is unclear. Whilst it is true that the Act allows the courts a wider power to interpret away conflicts with ECHR rights, this was always subject to Parliament's right to re-legislate in clearer terms. In addition, s.3 cannot be used to simply make legislation 'better' or more compatible with ECHR rights. Thus, before s.3 can be used, the court must be satisfied that a specific provision of the legislation appears to be incompatible.[77] It is significant therefore, that Parliament chose to exercise this in very limited circumstances, accepting in the vast majority of cases that the interpretation was needed to secure fair trials, the presumption of innocence, and same-sex rights. Be that as it may, however, in future the '….courts will no longer have additional interpretive powers to change the interpretation of legislation to make it compatible with the Convention rights'.[78] In this way, the Bill aims to ensure that domestic courts cannot interpret laws in ways that were never intended by Parliament. Thus, our courts will revert to traditional principles of interpretation that respect parliamentary, in reality executive, sovereignty. The CR acknowledges this has implications for existing interpretations made under s.3. Consequently, s.40 empowers ministers to preserve via subordinate legislation interpretations that are '…an established part of the legislative scheme'.[79]

It will be interesting to discover in due course which interpretations meet this criterion. The devolved assemblies will also note that the removal of s.3 will not apply to legislation under the devolution acts. As a result, declarations of incompatibility[80] become the court's only means of challenging primary legislation incompatible with Convention rights.[81] In the CP, the Government had also considered making declarations the sole option for responding to rights-incompatible subordinate legislation. Eventually, this was rejected in favour of giving the court the *option* at s.10(1)(b)(ii) of declaring any item of subordinate legislation incompatible rather than invalidating or disapplying it. This measure obviously ignores the potential for interpretation offered by traditional principles of statutory interpretation and common law development, yet the Government fully intends that the courts will respect their new restrictive constitutional remit.

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[75] See, for example, the decisions in *Osman,* above and *Van Colle v Chief Constable of Hertfordshire* [2008] 3 WLR 593 (approved in the European Court).
[76] *Smith v Ministry of Defence* [2013] UKSC 41.
[77] See the recent High Court decision in *R (on the application of Friends of the Earth Ltd) v Secretary of State for the Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin), where it was held, obiter, that s.3(1) did not allow a court to adopt an interpretation of a provision in order to be more conducive to or more effective for the protection of an ECHR right, or, in this case, to minimise climate change impact.
[78] CP 704, para. 70.
[79] Ibid, para. 71.
[80] Now provided for by s. 10 of the Bill.
[81] For reasons that will become clear below, this provision should be read alongside s. 7.

The Government also rejected the IHRAR's recommendations for a separate regime of suspended and prospective-only quashing orders,[82] and clarification of the scope of remedial orders.[83] However, it is the refusal to re-introduce s.19 HRA that catches the eye. In future, ministers will no longer have to make compatibility statements. The CR criticises current arrangements for being simplistic and failing to '…encourage innovative and creative policy making'.[84] This conclusion seems rather odd, in that in both practice and in theory s.19 had little impact as such statements were not legally enforceable and were made very rarely. Equally, the additional political 'cover' provided to ministers when introducing legislation likely to breach Convention rights is all too apparent.

The language of both the CP and CR presents repeal as a means of empowering the domestic courts.[85] Yet, it is clear that the latter will be prevented from taking advantage of their new-found discretion. If a domestic human rights jurisprudence develops, it will do so under executive direction, as the following examples covering some of the Bill's most important provisions hopefully illustrate. A general duty of deference is created under s.1(2)(c), which requires the court to give 'great weight' to the principle that Parliament should take '…decisions on different policy aims, different Convention rights and the Convention rights of different people': a duty amplified at s.7. More specific duties are contained in s.3. Under s.3(2)(a) the courts must have particular regard to the text of the Convention, with the option of using the *travaux preparatoires* as an interpretive aid. This limits the prospect of a domestic 'living instrument' doctrine. This is complemented by s. 3(3-4). With the exception of free speech, the court can expand current protection under Convention rights only where it has no reasonable doubt that the ECtHR would concur. The implications for the separation of powers and the independence of the judiciary is, of course considerable, particularly under a constitution that sets no formal restrictions on the power of Parliament to pass law, and where the executive dominates Parliament.

Section 3(2)(c) is more significant still. This requires the court to comply with several duties under ss.4-8. The provisions of some of these – s.4 ('Freedom of speech') and s.5 ('Positive obligations') – have been considered above. The restrictions imposed by s.6 ('Public protection') are particularly interesting since, as the CR acknowledges, they were not included in the consultation.[86] In future, when considering the rights of convicted prisoners, '…the court must give the greatest possible weight to the importance of reducing the risk (they pose) to the public', especially with respect to decisions not to release them or move them to a particular part of a prison, e.g. a separation centre.[87] This flies in the face of the jurisprudence of the ECHR, which has stressed that restrictions on Convention rights must meet the requirements of legality and necessity laid down in the ECHR itself.[88] It further reverses the long struggle for prisoners' rights witnessed from the 1980s, which reflected the case law of the Strasbourg Court and the development of administrative justice in the British Constitution.

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[82] Provision already existing in the Judicial Review and Courts Act 2022.
[83] The use by Ministers of the power to issue remedial orders is exercisable only where there are 'compelling reasons' for doing so: see s. 26(2)-(4).
[84] CP 704, para. 88
[85] This can be seen for example, in s. 1(2)(a), s. 3(1), s. 1(2)(b), s. 1(3) and s. 3(3)(b).
[86] CP 704, para. 16
[87] This duty does not apply, however, to the rights in Articles 2, 3, 4(1) and 7
[88] See *Golder v United Kingdom* (1975) 1 EHRR 524; although the Court has accepted that the enjoyment of prisoners' right can be restricted by the ordinary and reasonable requirements of imprisonment, for example visiting rights: *Boyle and Rice v United Kingdom* (1988) 10 EHRR 425.

Section 8 focuses on the deportation of FNOs. Two new tests apply whenever a case concerns the compatibility of legislation with Article 8 ECHR. Under s.8(2), when considering the impact on a qualifying member of the deportee's family, the court cannot find incompatibility unless it considers that the legislation would result in '…manifest harm…that is so extreme that the harm would override the otherwise paramount public interest in removing (the) P(erson) from…the United Kingdom.' The term 'extreme' must be interpreted as both exceptional and overwhelming, and either incapable of being significantly mitigated or otherwise irreversible. The second (additional) test applies when the court is considering the meaning of extreme harm in relation to family members other than qualifying children. Here, the test can be met '…only (in) the most compelling circumstances' where it is impossible for the court to reasonably conclude that the harm caused is sufficient to outweigh the public interest in the deportation. With remarkable understatement, the Government describes these tests as 'a high constitutional ceiling'.[89] Thus, under s.20(2) the court must dismiss deportation appeals unless it believes that the deprivation of the right to a fair trial would be so fundamental as to amount to a nullification. Similarly, under s. 20(3) where a deportation decision has been informed by an assurance, the court must, one, presume that ministerial assessments of that assurance are correct and, two, treat the assurance as determinative and accordingly dismiss the appeal. The court can rule that this threshold has not been met only when it cannot reasonably conclude that the assurance would prevent a fundamental breach of Article 6 amounting, once again, to a nullification. This is an astonishing rejection of due process, and again flies in the face of clear Strasbourg jurisprudence that insists that executive assurances cannot be regarded as final in assessing whether there is a risk to an individual's human rights being breached.[90]

In this way, s.8 fulfils the Government's pledge to make it harder for FNOs to frustrate deportation processes, making it easier to deport them whilst simultaneously restricting the circumstances in which their right to family life would trump the need to remove them. This will mean – so the Government promised earlier - that under future immigration laws, to evade removal an FNO would have to prove that a child or dependent would come to overwhelming, unavoidable harm if they were deported. This, it was argued, will curb the abuse of the system that has seen those convicted of hurting their own partners and children evade removal by claiming it would breach their right to family life in the UK.

Yet, as noted above, domestic legislation already exhorts the courts to give limited weight to such claims, possibly in breach of the separation of powers and certainly at risk of violating ECHR rights. Further, the threshold of overwhelming, unavoidable harm will almost certainly breach our obligations under the ECHR; because it will not allow a suitable balancing act to take place. In addition, it must not be forgotten that the overwhelming number of claims in these cases are already rejected by the courts on the grounds that they are outweighed by the public interest in deportation or extradition. Nevertheless, the government may wish to further reduce the courts' powers to prevent deportations for reasons of preserving the rights to family life, particular after the recent decision of the Supreme Court in *HA (Iraq) v Secretary of State for the Home Department.*[91] In this case, it was stressed that although the court had to recognise that the threshold for the level of harshness justifiable in the context of the public interest in the deportation of foreign criminals was highly elevated, it could still take into account factors such as the rehabilitation of the offender. Further, in order to prove "undue harshness" it was not

[89] CP 704, para. 114
[90] *Chahal v United Kingdom* (1997) 3 EHRR 413
[91] [2022] UKSC 22.

necessary to show a degree of harshness going beyond that which would necessarily be experienced by any child faced with the deportation of a parent.

We explained earlier that the power to issue declarations of incompatibility must be read alongside the new s.7. In the CP, the Government argued that the HRA had failed to guide the courts in interpreting qualified and limited rights, i.e. where Convention rights had to be balanced against public policy considerations, other Convention rights and the rights of different groups. This claim is simply untrue, as several judgments have clarified where that balance lies and what principles can be used to elucidate the court's reasoning in such decisions.[92] The confusion, of course, is essentially caused by the Government's disturbing refusal to accept, or even read, the jurisprudence, on the basis that the courts should not involve themselves with matters of weight, degree and balance. Section 7 applies when considerations concerning the compatibility with the Convention of a primary law (or the act of a public authority in accordance with it), involve one or more of the three 'balance' questions listed above. Accordingly, the court must regard Parliament as having decided that merely in passing it, the primary law strikes an appropriate balance, whilst simultaneously giving the greatest possible weight to the principle set out in s.1(2)(c), i.e. that decisions about how such a balance should be struck are properly made by Parliament. In the language of the CR: the '…courts should give deference to… (Parliament's) view'.[93] Such warnings, are of course, unwritten rules of most constitutions, imploring the judiciary to carry out its role (and power to question and quash legislative acts) in a manner that is mindful of the democratic role of law-makers and the executive. However, in a constitution that lacks an entrenched legal power of judges to question legislative acts (and executive acts that are clearly bestowed by Parliament), this provision effectively sounds the death knell for judicial review.

We turn now to the court's *powers* in human rights cases, beginning with its power to rule that public authorities have acted incompatibility with Convention rights.[94] The CP makes clear that public authorities deserve greater protection when giving effect to or enforcing incompatible subordinate legislation in those cases where primary legislation prevents the removal of the incompatibility. This is achieved in s.12(2)(b)(ii), which extends the arrangements under s.6(2)(b) HRA. These currently provide that it is not unlawful for a public authority to act in a way which is incompatible with a Convention right if, one, it could not have acted differently in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights; and, two, it was acting so as to give effect to or to enforce those provisions. The other change, at s.12(5), is to the definition of 'act', which excludes interpretations of legislation. However, to reiterate, the greatest protection is at s.1(2)(b) and s.3(2)(a), which remove '…the UK courts' power to interpret legislation in ways that are not in line with the ordinary meaning of words and the overall purpose of the statute'.[95] The effect of this provision is to give greater power for public authorities to transgress ECHR rights, in the knowledge that the domestic courts will not strain the language of legislation allowing such.

[92] See Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, and Lord Bingham in *A v Secretary of State for the Home Department* [2005] 2 AC 68, who both provide very clear guidance on the principles of proportionality and judicial deference.
[93] Ibid.
[94] This is unlawful under s.12(1).
[95] CP 704, para. 98.

Sections 14 and 20 limit the court's powers in other ways. Under s.14 the court cannot grant permission to bring actions in relation to acts in the course of overseas military operations, certain acts within the British Isles wholly for the purposes of overseas military operations, and inquiries or investigations into either.[96] Restrictions are also placed on an individual's ability to bring proceedings on behalf of another.[97] As we have noted above, this provision is in response to a number of court rulings that have established liability and provided remedies for violation of Convention rights. Its inclusion, however, is still surprising. The unsatisfactory nature of a purely domestic response to extra-territoriality was noted by the IHRAR and in both the CP and CR. The Government claims that it needs to '…signal at domestic level our commitment to the principle that claims relating to overseas military operations should not be brought under human rights legislation'.[98] This implies that anyone wishing to pursue such a claim must proceed directly to Strasbourg, where government defeats would appear inevitable. Anticipating this, the CR states that 'alternative remedies' will be made available through later legislation and further that s.14 provisions will not be brought into force until these are in place.[99] A more likely explanation for the inclusion of s.14 is to signal ministers' belief that such actions should not be entertained at all under human rights legislation; in other words that these matters should be non-justiciable, by both our courts and Strasbourg. However, as we shall see, plans to reduce the applicability of human rights law at the domestic level are worthless if indeed such a reduction conflicts with the case law of the ECtHR, and the possibility of 'appeal' to Strasbourg is still available.

Rights and Responsibilities

As mentioned above, the CP argues that fundamental rights have been undermined by a focus on trivial and undeserving claims. We have seen how s.15 aims to curb the first of these. The second is the subject of s.18, which modifies the court's duty at s.17 to grant a remedy that is 'just and reasonable'. In particular, the court is directed to consider the seriousness of the effects of the breach before determining the appropriateness of a particular remedy.[100] This takes several forms. Firstly, at s.18(1), with the exception of Article 5 (liberty and security of the person), the court may award damages only where the victim has suffered loss or harm as a result of the breach. Secondly, the existing directions at s.8(3)-(4) HRA are tightened, as under s.18(1)(b), the court must satisfy itself that without awarding damages it would be unable to provide a just and reasonable remedy. Further, under s.18(2) it cannot award an amount greater than the ECtHR would have done.[101]

However, the main changes occur at s.18(5)-(7). These amplify s.8(3) HRA which require the court to take into account all the circumstances of the case, including the consequences of the award. At s.18(5) 'circumstances' expressly includes the public authority's efforts to avoid the breach, the seriousness of its effects and critically '…any conduct of the person that the court considers relevant (whether or not the conduct is related to the unlawful act)'.[102] The last of these makes good the CP's argument that only deserving victims of

[96] The new restrictions can be found in s.14(2) and (4)
[97] Section 14(3).
[98] CP 704, para. 102.
[99] Ibid, para. 103. The question then will be whether the ECHR Machinery regards them as 'effective' remedies.
[100] CP 704, para. 118.
[101] This seems an extraordinary sentiment, given that the Government so distrusts the Convention and the Court and its jurisprudence.
[102] This provision is made at s. 18(5)(a).

breaches should receive compensation. The CR notes that the past conduct of the claimant, including conduct in the distant past, is now included in the circumstances of the case,[103] irrespective of its relevance to the facts or the breach itself. Its implications for British justice, including the rule of law, are profound. The message is: regardless of your loss or the harm suffered, don't expect redress if the court considers you 'a wrong 'un'. This was a key reason why the idea of a bill of rights and *responsibilities* was rejected by the Joint Committee in the past; that it is the antithesis to all human rights treaties and instruments – fundamental rights for all. More specifically, no particular right is excluded, so that this principle could be used when absolute rights are violated, thus in breach of clear Strasbourg rulings to that effect.[104]

Finally, under s.18(6)-(7) the court has a duty to '…give great weight to the importance of minimising the impact…any…award of damages would have on the ability of…any …public authority to perform its functions'. In addition, '…the court must have regard (in particular) to future awards of damages which may fall to be made in cases involving issues that are the same as, or similar to, those involved in the unlawful act'. Thus, not only is the Government desirous of excluding public authority liability for human rights violations, it further wishes the courts to reduce the amount of damages when such authorities are found in violation. As we have seen, the ECHR and the HRA already allow some of these factors to affect just satisfaction, but these measures contradict justice and effective remedies and will often conflict with the initial finding of fault and violation.

The cases for and against reform

In addition to the criticisms made in the preceding commentary, the Government's position is vulnerable on any number of additional points. These include the decision to dispense with the expertise of the IHRAR[105] the rushed nature of the CP and the inadequacy of its supporting evidence,[106] ministerial disregard for the lack of support emerging from the consultation, and, most worryingly, their dismissal of the many strengths of the existing arrangements. Crucially, key judgments of the ECtHR revealed '…the many gaps in the protection given by…(domestic) laws',[107] whilst giving grateful ministers the 'cover' to implement reforms in the teeth of opposition from vested interests.[108] Similarly, the CP

[103] CP 704, para. 124.
[104] *Chahal v United Kingdom*, see n. 90 above.
[105] In his lecture, *Is it time for a new British Bill of Rights?* (9 February 2022), Lord Carnwath describes the IHRAR as '…a thorough and painstaking review of the question of the HRA in the domestic courts, and brings together a wealth of valuable material and insights'.
[106] This point is made by several critics including Professor Hickman (above), who argues that the Government's reference to two, key immigration cases, including *R (OO (Nigeria) v Secretary of State for the Home Department* [2017] EWCA Civ 338 does not withstand close scrutiny. In *OO*, the Court of Appeal held that it would be a disproportionate interference with the Article 8 ECHR rights of foreign criminal to remove him under s.94 of the Nationality, Immigration and Asylum Act 2002 *pending the pursuit of his appeal against deportation (italics added).* In the Court's view, *the best interests of his son* prevailed over the strong public interest in removal of a foreign criminal, and given the mitigation as regards the offence, the offender's conduct in relation to it and his conduct since it was committed. In *Unuane v United Kingdom*, Application No. 80343/17, 24 November 2020, although the applicant successfully argued that his removal from the UK was a disproportionate interference with family life because it separated him from his children, The European Court rejected his claim on the compatibility of the Immigration Rules with the ECHR, showing the deference shown by the Court, and the domestic courts in these cases.
[107] See for example, Steve Foster, 'The Protection of Human Rights in Domestic LAW: Learning Lessons from the European Court of Human Rights' [2002] NILQ 236, and Francesca Klug 'The Long Road to Human Rights Compliance' [2006] NILQ 186.
[108] Ibid, Lord Carnwath,

downplays the role of the HRA ('…a simple and elegant way of consolidating (Convention) rights within… (UK) law')[109] in bringing about significant improvements to individual lives. The JCHR, to cite but one source, has recently highlighted the Act's many benefits: enabling enforcement of Convention rights in domestic courts, reducing the number of cases being sent to Strasbourg, enabling UK courts to influence Strasbourg jurisprudence and focusing the attention of public authorities on human rights. On this last point, the JCHR maintains that the main problem concerning the so-called 'rights culture' is that, at least with regards to the attitudes of public officials, it has by no means spread as far as it should.[110]

It also remains unclear how the Bill will bring about the changes ministers most desire. It is the case that s.3(2) – when read alongside s.3(3)(b) – invites the court to start again the business of (re)interpreting the meaning of Convention rights. The provisions in s.6 generate still stronger pressure in this respect. The Government appear to desire a return to the pre-HRA situation where the courts were constrained in using ECHR law specifically and human rights law more generally. Yet, it must be asked whether it is possible to return to that situation having had over 20 years of case law that has accepted and expanded on the jurisprudence of the ECHR. This has created a judicial approach barely recognisable in the pre-Act era; an approach, of course, that was needed to accommodate the passing of the Act and reduce conflicts with the Strasbourg Court? [111] This question is all the more pertinent given the presumption that Parliament does not intend statutes to lead to breaches of the UK's international obligations. A partial answer lies in s.40, at least in respect of interpretations that appear to the Secretary of State to have been made in reliance on s.3 HRA. We shall shortly see, however, that this provision also raises many other questions, with disturbing implications both for British democracy and the rule of law. The HRA's repeal also has adverse implications for the political stability of the Union. This is most obviously so regarding Northern Ireland, where rights protection is bound up with the peace and Brexit processes. However, as Professor Gearty explained as long ago as 2016, since Whitehall is re-asserting its role as the arbiter of rights protection for all British peoples, the Bill risks alienating still further political opinion in Scotland.[112]

A still greater problem, however, stems from the Government's commitment to continued membership of the ECHR, which exposes it to the accusation of wanting to "eat its cake and have it, too".[113] On the one hand, it wishes to protect its international standing and much-vaunted 'soft power'. On the other, it wants domestic human rights law to develop separately from Strasbourg jurisprudence. Even assuming that the domestic courts take the hint and reinterpret Convention rights restrictively, neither the CP nor the Bill explains what prevents frustrated litigants seeking redress before the ECtHR. As Lord Carnwath points out, the number of applications and adverse judgments both seem certain to increase.[114] Consequently, far from shielding the Government from the ECHR, the relatively narrow gap between domestic and European human rights jurisprudence is likely to widen once again, thereby diminishing both the standing of the UK courts and the wide margin of appreciation currently accorded them. Lurking in the background, as Professor Hickman

[109] Ibid.
[110] Joint Committee of Human Rights, *Human Rights Act Reform*, Thirteenth Report of Session 2021-22, 30 March 2022, paras 14-18.
[111] See Foster and Klug, note 107 above.
[112] Conor Gearty, 'The Human Rights Act Should Not Be Repealed', *U.K. Const. L. Blog* (17th September 2016) (available at https://ukconstitutionallaw.org/).
[113] These include Lord Sumption: see his 'Foreword' to Ekins and Larkin, *Human Rights Law Reform*: Policy Exchange's contribution to the IHRAR.
[114] Ibid, Lord Carnwath.

reminds us, is Article 13 as interpreted and applied by the ECtHR in *Jones v United Kingdom*.[115] So glaring are these problems in fact, one wonders whether the Bill is little more than a staging post preparing the ground for eventual withdrawal from the ECHR itself?

Why, therefore, is the Government pressing ahead with a reform certain to be exposed during its Parliamentary passage and, even should it become law, is unlikely to ease Mr. Raab's frustrations? Ministers argue that the Bill merely fulfils a manifesto commitment, which itself expresses Conservative policy dating from June 2006. Far better explanations, it seems to us, lie with personality and politics.[116] For Mr. Raab himself, demoted in September 2021 for his role in the Afghanistan debacle, the sweeping rejection of the IHRAR was a good starting point on the road to political redemption. Mr. Raab is a long-standing opponent of the HRA, with strongly Thatcherite views on the State (limited but authoritarian) and the constitution (political not legal). Secondly, the Bill seems part of the ongoing 'culture war'; the Government presenting the HRA as something fundamentally un-British, whose benefits have been largely confined to undeserving minorities, successfully abusing the system with the connivance of out-of-touch elites. Thirdly, it can be seen as 'settling scores' with the senior judiciary. The rebuff delivered by the Supreme Court in *'Miller 2'*[117] was followed only three months later by the Conservatives' first convincing general election victory for thirty-two years.[118] Clipping judicial wings by repealing the HRA was all the more attractive since other possible reforms - diminishing the Supreme Court's status and politicising the judicial appointments process -carried far greater political risks.[119] Further, criticism of domestic judicial power enables ministers to direct some of their fire on Strasbourg and in the process, remind voters of the seemingly permanent threat posed to Britain's sovereignty by anything European.[120]

The Bill, however, has a more sinister side. Aside from its indifference to its own rule-breaking,[121] the second Johnson ministry has been notable for its concerted executive 'power grab'. Selected examples must suffice to make this point. The prospect of voter suppression and campaign manipulation is raised by ss.1, 3 and 16-17 of the Elections Act 2022. The court's power to grant relief in asylum appeals has been already reduced by ss.26-8 of the Nationality and Borders Act 2022. One also notes the use of the 'ouster clause' at s.2 of the Judicial Review and Courts Act 2022 and again at s.3 of the Dissolution and Calling of Parliament Act 2022. Finally, whilst it has 'flown under the radar', Mr. Raab's proposed reforms of the parole system are indicative of a mind-set in which the only check

[115] [1986] 8 EHRR 123. Professor Hickman suggests that regardless of the hopes the Government might have for its Bill of Rights, Strasbourg will continue to insist that the ECHR continues to be given effect in UK law.
[116] Ibid.
[117] *R (Miller) v Prime Minister* [2019] UKSC 41.
[118] Mr. Johnson's second ministry found itself buoyed by the Conservative party's largest Commons' majority since the 1987 Parliament, in turn built on the highest number of votes received in a general election since 1992 and its highest share since 1979.
[119] Shortly into his role as the new President of the Supreme Court, Lord Reed expressed his opposition to either renaming the Supreme Court or allowing MPs and ministers greater input into judicial appointments.
[120] One marvels at the thought of Leon Trotsky's reaction to the idea of Brexit as 'permanent revolution' within British politics.
[121] The House of Lords Appointments Commission was ignored regarding the ennobling of Lord Cruddas; the Prime Minister overruled his own advisor on ministerial ethics, Sir Alex Allan, over the conduct of the Home Secretary, Priti Patel; and although it backfired spectacularly, he later sought to press Government business managers to alter the process by which MPs are disciplined for breaching accepted standards. 'Party-gate' is of course a story in itself.

ministers seem willing to countenance is the potentially manageable one occurring every 4-5 years in the form of a general election.[122]

The Bill of Rights Bill is part of this pattern. Primarily, it places the executive as far as possible, beyond the control of the courts in cases raising Convention rights. The HRA's sponsoring minister, Jack Straw, clarified that the Act had been designed in part to counter the dilution of rights protection caused by the centralisation of power in ministerial hands. Above all, it was intended to make the executive '…far more accountable for its acts and omissions to its citizens'.[123] Consequently, as Sacha Deshmukh (Amnesty International's Chief Executive) has pointed out, its repeal denies the public '…its most powerful tool to challenge wrongdoing by the government and other public bodies'.[124] In addition, it strengthens ministerial control of how the court interprets Convention rights. In this respect and in addition to ss.1-3, the proposed s.40 is an especial course for concern. Aside from its lack of clarity,[125] critics note the remarkable 'Henry VIII' quality of a provision, which:

> '…grants the Secretary of State discretionary powers to enact their own interpretation of the law. They are free to 'save' only those elements of s.3 interpretations they deem desirable and purge what remains by omission. This could leave legislation changed beyond recognition and operating in a manner that bears little resemblance to the statute passed by Parliament or the 'relevant judgment' the Secretary of State is supposedly preserving. As long as the stated intention is even a tokenistic 'saving' of some element of a s. 3 interpretation, the Secretary of State could enact their interpretation of the law by altering primary legislation'.[126]

It seems axiomatic that giving the executive powers held historically by Parliament and the courts is to put it mildly, extremely problematic.

Ultimately, however, the Bill reveals how contemporary Conservatism understands both rights protection and the concept of rights itself. One: depending upon the harm caused and the characteristics and circumstances of the victim, breaches of rights – though unlawful – become legally permissible. The Law Society notes on this point, the heightened risk of public authorities knowingly breaching rights, confident they are unlikely to be called to account.[127] Two: when the breach is caused either directly or indirectly by primary legislation, ministers will determine whether if at all, changes to the law will be made. It follows that where they are unprepared to introduce 'corrective' legislation, in the circumstances of the case, the right concerned becomes legally unenforceable: a question of justice being transformed into a question of politics. In a populist era where electoral minorities confidently assert the right to speak for everyone else, the vulnerability of the politically marginalised can be easily guessed at. Three: the Bill of Rights expresses a British

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[122] Ministry of Justice, *Root and Branch Review of the Parole System*, March 2022, CP 654. Mr. Raab plans to limit the Parole Board's power to release so-called 'first-tier offenders', whilst simultaneously increasing his own power to intervene in individual cases. One option under consideration is that the Justice Secretary, supported by two nominal independents who nonetheless he would appoint, will form an appeal panel to review release decisions in what are described as 'challenging cases'.

[123] See CP 586, Chapter 1 para. 24.

[124] *The Law Society Gazette* news desk, 22 June 2022.

[125] In particular, it is unclear whether it once the Bill comes into force, all existing interpretations of Convention rights made using s. 3 cease to have legal effect and can only be restored by subordinate legislation.

[126] Stefan Thiel, 'Henry VIII on steroids - executive overreach in the Bill of Rights Bill', *U.K. Const. L. Blog* (6th July 2022) (available at https://ukconstitutionallaw.org/)

[127] *The Law Society Gazette* news desk, 22 June 2022.

version of 'originalism'. When interpreting Convention rights, the court is pressed to set aside not just twenty years of domestic case law but also over seven decades of social and cultural evolution. Under s.3(2)(a) fully enforceable rights seem confined to interpretations acceptable to British legal and political elites in the late 1940s, who enjoyed their formative years in the late Victorian or Edwardian eras. In this way, a distinctly Conservative view of the rule of law emerges, amounting to the fetishization of Parliament. Accordingly, the rule is satisfied whenever Parliament is happy to legitimise the policies of the executive, no matter how partisan, authoritarian or discriminatory. Pertinently as we approach the first centenary of his death, one's thoughts are drawn to Lord Salisbury.[128] Notorious for his manipulation of senior judicial appointments, Salisbury had a very clear view of the British constitution: the governing party was fully entitled to the political 'spoils'. In this way, Salisbury embodied a Conservative tradition lacking commitment to the separation of powers and at best, showing ambivalence towards balancing them.[129] His ghost, it seems, once again walks abroad.

Conclusions: reforming the Act and retaining membership of the Council of Europe and the European Convention

Whilst agreeing with the above analysis and commentary on specific proposals and clauses of the Bill, your second commentator would make the following observations and criticisms. These proposals are aimed at restoring national sovereignty and the supremacy of our judges and the legal system in determining the limits of human rights. The Government has had enough of the Convention, the European Court, and the principles of human rights it uses to uphold Convention rights, including the weight it attaches to rights and the type of individual it allows to claim those rights. Yet the Government, at present, are certain of one thing:

> 'This will be achieved while retaining the *UK's fundamental commitment to the European Convention on Human Rights (author's italics)*

At present the ECHR operates primarily at the international law level, the UK is a member state and agreed to uphold ECHR rights and accept the jurisdiction of the European Court if it finds against us. In addition, our domestic law is influenced by the ECHR and the European Court because the Human Rights Act 1998 gives effect to ECHR rights and our judges have to take into account ECHR case law and rights. If the HRA was repealed, which because of sovereignty, is possible, it will be replaced by a Bill of Rights which would contain British rights (not ECHR rights). They will be similar (the right to a jury trial will be included, despite the outrage caused by juries failing to convict protestors for criminal damage), but our courts would follow these rights and not be so influenced, if at all, by the ECHR and Court. Those rights will be diluted in certain cases where that would conflict with the public interest, and/or where irresponsible law-breakers try to assert them. If we stayed in the ECHR, individuals could still bring cases to the European Court and we would be bound in international law to abide by any decision. Therefore, repeal of the HRA would need to be careful, so that our domestic law is not in breach of the ECHR, and our international obligations. The Government says the Bill and laws will not conflict with the ECHR, but of course, they will, as that is the whole point of questioning European human rights law and repealing the Act. If we left the ECHR then the Government believe that it

[128] Robert Gascoyne-Cecil, 3rd Marquess of Salisbury (1830-1903) was Conservative prime minister on three occasions between June 1885 and July 1902.
[129] Robert Stevens, 'Government and the Judiciary', in Vernon Bogdanor (ed.), *The British Constitution in the Twentieth Century* (Oxford), 2003, 335.

could pass whatever (human rights) legislation it wanted. However, we are still a member state of various UN human rights treaties, so would risk being in breach of those treaties. We would also face international criticism, and being (further) ostracised and humiliated, for not abiding by international law.

Which brings us to the government's 'moral' argument - it is wrong to be led and influenced by European Law and judges and we should be led instead by British values - not least, of course, parliamentary - or rather executive - sovereignty. The recent intervention on sending asylum seekers to Rwanda is a prime example. On the other hand, the ECHR and its 'incorporation' into domestic law has provided an objective safeguard against executive power over human rights, based on principles established by a treaty that the UK was instrumental in constructing, and which operates very much like a bill of rights, which everyone but the UK has in its constitution. All Council of Europe states (bar Russia) adopt the ECHR as the basis of their human rights, and accept the Convention and its case law as a necessary safeguard for protecting rights and balancing them with other rights and interests.

Some say that the recent plan is no more than an effort to stop judicial and political regulation of governmental power, as happens in every other formal and effective constitution, and that it is based on populist contempt for anything un-British. Whatever the case, this article has, hopefully, shown that the proposals are based on misconceptions and an exaggeration of the reach of the Convention, the Act, and of human rights in general. The proposals represent a starting point for (limited) political discussion, but as a template for legal reform, they are legally, constitutionally and diplomatically misinformed and incomplete.