

HUMAN RIGHTS AND THE UK CONSTITUTION

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Human rights and the UK constitution

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Preface

It is hard to identify a truly objective voice in the divisive and highly politicised debate that rages around human rights law in the UK. For this reason the British Academy, prompted by two of its Fellows, John Eekelaar and Sandra Fredman, has produced a report to contribute to the debate from an academic and non-partisan angle.

The British Academy, as the national body for humanities and social science disciplines, is home to a wealth of academic expertise among its Fellowship, elected for their distinction in research. Its Policy Centre, set up in 2009, draws on this expertise, and communicates it to policymakers in order to contribute to strong and effective evidence-based policymaking. Its work is part funded by the two relevant UK Research Councils, the ESRC (Economic and Social Research Council) and AHRC (Arts and Humanities Research Council). The Academy is a non-partisan body.

Human rights and the UK constitution has been overseen by an eminent group of constitutional experts including Sandra Fredman FBA, John Eekelaar FBA, Vernon Bogdanor FBA, David Feldman FBA, Conor Gearty FBA and Francesca Klug (Professorial Research Fellow, Centre for the Study of Human Rights, London School of Economics and Political Science). The group decided that a contribution of academic evidence would most usefully focus on the mechanisms by which human rights are protected in the UK, and what the effects might be of changing the existing system.

Therefore the author of this report, Colm O’Cinneide, Reader in Law at UCL, has concisely discussed the balance of power between the courts and Parliament; the relationship between the UK and the European Court of Human Rights; and the workings of the Human Rights Act 1998. Mindful of the calls from various quarters for a British Bill of Rights to supplement or supplant the Human Rights Act, he discusses how such a Bill of Rights might work and what it would imply for the

UK. The report, like all Policy Centre reports, has been thoroughly peer reviewed to ensure its academic strength.

The Policy Centre, the steering group, and the author of *Human rights and the UK constitution*, all hope that its objective and well-evidenced findings will prove useful to those who have a hand in deciding the future of human rights protection in the UK.

Iain McLean FBA

Vice-President (Public Policy), British Academy

Executive summary

1. Human rights law has been the subject of considerable controversy over the last few years. This paper aims to clarify some of the key issues at stake. In particular, it evaluates the current state of UK human rights law, and explores how proposals for a new Bill of Rights may affect how human rights are protected within the framework of the UK's unwritten constitution.
2. The UK is a parliamentary democracy: the British people can be said to govern themselves through their elected representatives in Parliament. However, it is widely accepted that healthy democracies are based on more than majority rule. Parliament, the executive and other organs of the state are expected to respect individual freedom and the human rights of every person subject to their jurisdiction.
3. From the Magna Carta through to the current day, there has been lively debate about what constitutes a human right. Deep disagreement also often exists as to what constitutes a *breach* of an individual's human rights. This is particularly true when it comes to 'qualified rights' such as freedom of speech and the right to privacy, which can come into conflict with other rights. As a result, elected politicians are usually given the authority to decide how individual rights should be balanced against the public interest.
4. However, in a majoritarian political system, minorities and other disadvantaged groups are at risk of being subject to discrimination or unfair treatment. Furthermore, most of the day-to-day functioning of the state is controlled by the executive, which through the government of the day usually exercises a dominant influence over Parliament. This limits the extent to which Parliament can protect individual rights and makes it difficult for public bodies to be held fully to account for how they use their wide-ranging powers.

5. As a result, courts have come to play a more active role in protecting individual rights over the last half century or so. This trend is not just confined to the UK: it has been a feature of elected democracies across the world. Some have expressed concern that judges lack the democratic legitimacy to perform this task. However, the opposing argument can also be made: judicial protection of human rights may enhance the functioning of democratic states. It ensures greater protection for the rights of vulnerable individuals and groups who lack political influence, helps to create a 'culture of justification' which benefits all citizens and provides a counterbalance to the dominance of the executive over Parliament.
6. In many states, such as the USA, Germany and South Africa, written constitutions give the courts the power to overturn legislation which is deemed to violate basic rights. However, the UK has not followed this approach. Instead, over the last few decades, it has developed its own distinctive system, which gives courts a role in protecting individual rights while respecting the sovereign law-making authority of Parliament.
7. Several different layers of rights protection currently exist in British law. The common law requires that public authorities must have a clear legal basis for their actions, respect the requirements of fair procedure, and act in a 'rational' manner. However, the protection it offers against abuses of state power is mainly limited to these largely procedural requirements. In contrast, the Human Rights Act 1998 (HRA), which 'incorporated' most of the rights and freedoms contained in the European Convention on Human Rights (ECHR) into UK law, gives more substantive legal protection to individual rights.
8. Moving to the level of international law, the European Court of Human Rights (the 'Strasbourg Court') acts as a court 'of last resort' to protect human rights across the whole of Europe. Individuals can bring a petition to the European Court of Human Rights alleging a breach of their Convention rights once they have exhausted all domestic remedies. All European states (except Belarus) have agreed to respect and give effect to judgments of the Court.
9. The evidence suggests that the ECHR and HRA have enhanced protection for individual rights in the UK. Furthermore, the current design of British human rights law has received favourable reviews

from legal academics and the judiciary. However, it has also been subject to strong criticism from certain quarters. Some have called for a fundamental reform of the European Court of Human Rights, and for the HRA to be replaced by a new 'Bill of Rights'. This has prompted the government to establish the Commission on a Bill of Rights, which has been charged with investigating whether there is a need for a UK Bill of Rights to replace the HRA to 'protect and extend' existing liberties.

10. In particular, critics have alleged that the European Court of Human Rights has been too 'activist' in developing its jurisprudence on human rights. However, on a close legal analysis, the 'living instrument' approach adopted by the Strasbourg Court to interpreting the ECHR appears to be fully in line with the practice of other international courts. It also ensures that the case-law of the Court is able to reflect modern moral and social standards: for example, it has allowed the Court to play a leading role in protecting the rights of LGBT persons across Europe.
11. The structural relationship between the UK and the Court also seems to be fully compatible with democratic principles. The UK has voluntarily accepted the jurisdiction of the Strasbourg Court. While its judgments are binding in international law, Parliament and the UK government can choose under national law not to give effect to judgments of the Court. However, whether it is wise or justified for them to do so is another question. Good reasons exist as to why the UK should be slow to refuse to comply with a judgment of the Strasbourg Court, not least because of the potential damage it could cause to the UK's international reputation and to human rights and democracy across Europe at large.
12. Critics have also attacked the HRA for establishing too close a link between UK law and the Strasbourg jurisprudence, instead of encouraging the development of a 'home-grown' and distinctively 'British' approach to human rights adjudication. The HRA has also been attacked for failing to strike the right balance between individual rights and the 'common good', and for being out of synch with British traditions of governance. Once again, these criticisms appear to be open to question.
13. The HRA was designed to give the courts a greater role in protecting individual rights while ensuring that the sovereign power

of Parliament to make law remained intact. The machinery of the Act appears to have functioned well over the twelve years in which it has been in effect: for example, Parliament responded positively to 18 out of the 19 definitive 'declarations of incompatibility' issued by the UK courts up to August 2011.

14. A new Bill of Rights could make some far-reaching adjustments to UK human rights law. However, any attempt to 'de-incorporate' Convention rights in UK law and break the link with Strasbourg will give rise to serious legal complications, and may be incompatible with the UK's international commitments. In any case, it is also difficult to identify how a 'home-grown' human rights jurisprudence would differ in substance from what has emerged from the ECHR and HRA case-law, unless it were to drastically restrict current rights protection or the categories of people who have access to them.
15. There are strong arguments for drawing up a new Bill of Rights to expand human rights protection beyond that offered by the ECHR. However, this would be likely to extend the role of the judiciary in protecting rights rather than reining it in, as many critics of the HRA would like. Furthermore, any such expanded Bill of Rights should ideally be the product of an extended consultative process that permits disadvantaged groups to participate fully in the process. The consequences for the devolved regions should also be taken into account, especially given that a separate Bill of Rights process has been underway in Northern Ireland for over a decade.
16. In conclusion, it should be acknowledged that getting the balance right between respecting the decisions of elected politicians and protecting individual rights is difficult. Regardless, the current state of human rights law in the UK appears to be compatible with constitutional principles. It also appears to strike a defensible balance between respect for democracy and the need to protect individual rights. Attempting to recalibrate that balance may prove to be a difficult and thankless task. It may also be unnecessary, given that the current state of UK human rights law is both principled and workable as long as Parliament, the executive and the courts continue to engage constructively with one another.

1 Introduction

Democracy will be deficient if human rights are not respected. However, disagreement often exists as to what exactly constitutes a breach of an individual's rights. This is particularly the case when individual freedom comes into conflict with what the government of the day asserts is in the public interest. For example, does it constitute a violation of the right to private life for the government to retain DNA samples from people who have never been convicted of any crime? Should it be unlawful for an individual to exercise his or her freedom of expression in a manner that offends the beliefs of particular religious groups? If a protestor demonstrating at an arms fair is stopped and searched by the police using anti-terrorism powers, is this a violation of his or her right to privacy?

Often, there are no clear-cut answers to such difficult issues. The question then becomes: who should decide how the balance should be struck between conflicting rights, or between individual rights and the broader public interest when these are perceived to come into conflict? Is it better to leave such decisions in the hands of elected politicians and other public officials, or should the courts be given a significant role in checking the decisions of the executive – or even the legislature – in this context as well? If the courts are to play a role in protecting rights, what legal standards should they apply in human rights cases, and when should they be empowered to overturn decisions taken by ministers, the police and other public bodies?

These issues have generated considerable controversy in the UK over the last few years. The influence exercised by the European Convention on Human Rights over UK law has proved to be particularly controversial, as have the provisions of the Human Rights Act 1998 and the role it has given to British courts in protecting individual rights. This paper is intended to make a contribution to this debate. In particular, it aims to clarify some of the key issues at stake, evaluate the current state of

UK human rights law, and explore how proposals to alter the existing legal framework will affect how human rights are protected within the framework of the UK's un-codified constitutional system.

2 The current system of human rights protection in the UK

2.1 Parliamentary sovereignty, human rights and the rule of law

The UK is a parliamentary democracy: the British people could be said to govern themselves through their elected representatives. The Westminster Parliament serves as the primary route through which democratic expression is given to the popular will of the people. As a result, orthodox constitutional doctrine views Parliament as enjoying sovereign authority to make or unmake any law.¹ The strength of parliamentary sovereignty has recently been called into question by some prominent academic commentators, on the basis that membership of the European Union (EU), the establishment of the devolved legislatures and the increasing reliance on referenda to settle disputed issues of constitutional importance have placed *de facto* limits on the power of Parliament.² Furthermore, some judges and academics have suggested that courts might legitimately refuse to give effect to an Act of Parliament which violated the fundamental principles of the rule of law, by for example introducing apartheid-style distinctions between different ethnic groups.³ However, for now, this remains a largely theoretical debate. Statutes passed by Parliament are generally understood to constitute

1 A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915), pp. 3-4.

2 V. Bogdanor, *The New British Constitution* (Oxford: Hart, 2009); by the same author, 'Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty' (2012) 32(1) *Oxford Journal of Legal Studies* 179-195. For a contrary view, see J. Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: CUP, 2010).

3 See the comments of Lord Steyn and Lord Hope in *Jackson v AG* [2005] UKHL 56, [102]-[107].

the highest form of law (subject to the requirements of EU law in line with the provisions of the European Communities Act 1972).⁴

As a result, the UK is often viewed as having a ‘political constitution’, on the basis that elected politicians enjoy the final say when it comes to disputed legal issues rather than courts and other non-elected bodies.⁵ However, the exercise of political power does not take place in a vacuum. Strong expectations exist that Parliament, along with executive, local authorities, the police and other organs of the state, should respect basic principles of justice, fairness and respect for rule of law.⁶ In particular, a consensus exists that individuals possess certain basic and inalienable human rights and that democracy should be based on respect for these rights, without which individuals could not participate freely or effectively in the democratic process.⁷

These principles have become embedded in British constitutional culture through an extended process of political struggle and legal evolution. Their origins can be traced as far back as the Magna Carta and medieval law. They began to acquire their contemporary shape in the seventeenth century, when the conflict between Parliament and the Crown established the primacy of representative government and laid the foundations for religious toleration and respect for freedom of speech. Subsequent centuries saw the expansion of the franchise and the bedding down of a culture of individual freedom and respect for the rule of law (although of course these principles were not always respected in practice either in Britain or throughout the wider Empire). The British tradition of respect for liberty came to exert great influence on the development of international human rights law after 1945. When the UN Universal Declaration of Human Rights (UDHR) was adopted in 1948 in response to the atrocities of World War Two and the years that preceded it, one of its prime drafters, Eleanor Roosevelt, called it ‘the Magna Carta of Mankind.’ However, this influence also proved to be a two-way street. The ‘universal’ language of human rights, equality and non-discrimination reflected in the UDHR and the

4 Lord Neuberger of Abbotsbury, ‘Who Are the Masters Now?’ The Second Lord Alexander of Weedon Lecture, 6 April 2011, available at: <http://www.judiciary.gov.uk/NR/rdonlyres/F402769A-196C-47E3-B5D9-AAA1EEE096F3/0/mrspeechweedonlecture110406.pdf> (last accessed 10 May 2012).

5 J.A.G. Griffith, ‘The Political Constitution’ (1979) 42 *Modern L. Rev.* 1.

6 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edn, pp. 30-34; C. McIlwain, *Constitutionalism Ancient and Modern* (Ithaca, NY: Cornell University Press, 1940), pp. 20-21.

7 See J. Habermas, ‘Constitutional Democracy: A Paradoxical Union of Contradictory Principles?’ (2001) 29 *Pol. Theory* 766–769.

various treaties it has spawned has added a new dimension to the 'native' tradition of civil liberties and respect for the formal rule of law.⁸ Respect for human rights as set out in instruments such as the European Convention on Human Rights and the UN Convention on the Rights of the Child has become part of the UK's culture of public governance. Furthermore, the UK, like other democracies, has come to place great emphasis on its own internal human rights record when it comes to promoting respect for democracy, rights and the rule of law across the world.⁹

2.2 Creating a culture of justification – the relationship between politics and law

Human rights are contested concepts, which are capable of being interpreted and understood in different ways. Deep disagreement often exists as to what exactly constitutes a breach of an individual's human rights. This is particularly true when it comes to 'qualified rights' such as freedom of speech, freedom of religion and the right to private life, where a balance must often be struck between individual freedom and what governments claim to be in the public interest. As a result, the political realm is generally recognised to be the appropriate forum for resolving most disputed issues relating to questions of justice, fairness and rights. Thus, for example, it is Parliament that enjoys the final say when it comes to issues such as civil partnership legislation, the overall shape and structure of the Immigration Rules, and the contents of anti-terrorist legislation.

There are problems with relying wholly on political processes to ensure respect for human rights and the rule of law. In a majoritarian political system, minorities and other disadvantaged groups are at risk of being subject to discrimination and other forms of unjust and irrational treatment.¹⁰ If democracies are meant to represent every individual within a state's jurisdiction – and not just arithmetic majorities – then mecha-

8 See P. Craig, 'Formal and Substantive Concepts of the Rule of Law' (1997) *Public Law* 467.

9 For example, the UK was one of the first countries to take part in the Universal Periodic Review process established by the UN Human Rights Council (HRC) in 2006, whereby states submit reports on their human rights record to the HRC for review. See E. Domínguez Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session' 7(3) *Chinese Journal of International Law* 721-734.

10 See J. Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' (2000) *Public Law* 671-83.

nisms need to be established to enable everyone to participate freely as equals in the democratic process. Furthermore, most of the day-to-day functioning of the state is controlled by the executive which, through the government of the day, usually exercises a dominant influence over Parliament. This limits the extent to which Parliament can effectively hold ministers, the police and other public bodies to account for how they use their wide-ranging powers. It also means that the executive is often in a position to dictate how Parliament and public bodies in general choose to give effect to individual rights.¹¹

These considerations have led to the courts becoming increasingly involved in protecting rights over the last half century or so. This trend is not just confined to the UK: it has been a feature of elected democracies across the world.¹² It helps to ensure that public authorities can be held legally accountable for how they exercise their powers, and provides individuals and groups who lack political power with a forum to challenge unjust laws.¹³ It also helps to create what Feldman has described as a culture of ‘politico-legal justification’ which benefits all citizens, whereby governments can be required to justify their actions and how they impact upon the individual rights of persons subject to their jurisdiction.¹⁴ This alleviates some of the negative consequences of government dominance over Parliament, and helps to make state bureaucracies more responsive to the rights and needs of individuals.

Different views exist as to when and how the courts should intervene to protect individual rights, and who should enjoy the final say when it comes to giving shape and substance to abstract human rights guarantees. In many states, such as the USA, Germany and South Africa, courts have been given wide-ranging powers by the Constitution and can overturn decisions of elected legislatures if they are deemed to violate basic rights. However, the UK has not followed this approach. Instead, over a few decades, it has developed its own distinctive system, which gives judges the authority to overturn acts of public bodies which

11 This is the context to the renowned observation by the former Conservative Lord Chancellor, Lord Hailsham of St. Marylebone, that in the ‘armoury of weapons against elective dictatorship, a Bill of Rights, embodying and entrenching the European Convention, might well have a valuable, even if subordinate, part to play’. See Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription* (London: Collins, 1978), at p. 174..

12 B. Ackerman, ‘The Rise of World Constitutionalism’ (1997) 83 *Virginia Law Review* 771.

13 See R. Dworkin, *Taking Rights Seriously* (Harvard, MA: Harvard University Press, 1978).

14 D. Feldman, ‘Which In Your Case You Have Not Got’: Constitutionalism at Home and Abroad’ (2011) *Current Legal Problems* 117-149; see also S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: OUP, 2008).

violate basic rights while ensuring that the ultimate law-making authority remains in the hands of Parliament.

2.3 The protection of rights within existing UK law

The first layer of rights protection in UK law is provided by the common law (i.e. judge-made law which is based on a body of precedent which has accumulated over time). The High Court has long exercised a supervisory judicial review jurisdiction over all 'inferior courts and tribunals', including administrative decision-makers whose conduct affects people's interests. From the 1960s onwards, the courts began to subject the use of discretionary and prerogative powers to closer scrutiny.¹⁵ Parliament itself also played a role in this shift, by imposing new legislative controls on how public authorities used their powers.

Administrative law now requires that public authorities must have a clear legal basis for their actions, respect the requirements of fair procedure, and act in a 'rational' manner.¹⁶ In certain circumstances, 'rationality review' may give way to a more intense level of scrutiny, in particular when public authorities interfere with what the courts have identified as 'common law rights', such as freedom of expression and access to justice.¹⁷ Furthermore, the courts will interpret legislation with reference to the presumption that Parliament did not intend to permit public authorities to violate these common law rights, unless the statutory text contains express or clearly implied provisions to that effect.¹⁸

These administrative law requirements apply to acts of all public bodies except for Parliament. The courts are generally assumed to lack the power to review parliamentary decisions.¹⁹ (As mentioned above, some eminent academics and judges have suggested that the courts might refuse in exceptional circumstances to give effect to an Act of Parliament that contravenes the basic principles of the rule of law.) The capacity of the common law to protect individual rights is also limited in other

15 See T. Endicott, *Administrative Law* (Oxford: OUP, 2012), 57-60.

16 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935.

17 *R v Ministry of Defence, Ex parte Smith* [1996] QB 517; [1996] 1 All ER 257; *R v. Lord Saville of Newdigate, ex parte A* [1999] 4 All ER 860.

18 See e.g. *R v Home Secretary, Ex parte Simms* [1999] 3 All ER 400; *R v Secretary of State for Social Security, Ex parte JCWI* [1996] 4 All ER 385; *R (on the application of Laporte) v. Chief Constable of Gloucestershire* [2006] UKHL 55.

19 See Article IX of the Bill of Rights 1689.

ways. The courts will only strike down decisions by public authorities which are clearly unreasonable, affected by a flawed decision-making procedure, or lacking a legal basis. This limits the extent to which administrative law and the common law at large can serve as a mechanism for protecting rights. Furthermore, uncertainty exists as to the scope and content of 'common law rights', which often lack clear definition.²⁰

A second layer of rights protection is provided by the provisions of the European Convention on Human Rights (ECHR). The Convention was drawn up in 1950 within the framework of the Council of Europe, and the UK was the first country to ratify it in 1951.²¹ It protects core civil and political rights such as freedom of expression and the right to a fair trial. The European Court of Human Rights (ECtHR) is the body established to interpret the text of the Convention and determine whether states are acting in conformity with its requirements.²² The UK has agreed to be bound by the jurisdiction of the Court, which means that individuals are entitled to bring cases to the Court after exhausting all domestic remedies.²³

Under national law, Parliament or the UK government is under no obligation to respond to a ruling by the Court that an individual's rights have been violated. Unlike EU law, ECtHR judgments do not have direct effect in domestic law, and the sovereignty of Parliament is unaffected by ratification of the ECHR. However, under Article 46 of the Convention, states are required to give effect to judgments of the Court: this is a binding obligation under international law. Furthermore, states are subject to strong diplomatic pressure to respect the authority of the Court. Compliance with its judgments is supervised by the Committee of Ministers of the Council of Europe and states are expected to demonstrate their commitment to the rule of law and European democratic values by complying with the Court's rulings. As a result, successive

20 For example, it is not clear whether there exists a common law right not to be discriminated against: see *Association of British Civilian Internees (Far Eastern Region) v Secretary of State for Defence* [2003] EWCA Civ 473, especially paras. 85-86.

21 The Council of Europe was established in 1949 to bring the European countries closer together and to promote respect for rights, democracy and the rule of law across the continent. It should be distinguished from the European Union (EU): all EU states are members of the Council of Europe, but so too are non-EU states such as Norway, Switzerland, Serbia, Russia and Turkey.

22 The ECtHR should be distinguished from the European Court of Justice, which sits in Luxembourg and interprets EU law: the ECtHR is an international adjudicatory body and has no link with the EU as such.

23 The UK accepted the jurisdiction of the Court in respect of petitions by individuals with effect from 1966. With effect from November 1998, Protocol No. 11 (ratified by all the High Contracting Parties, including the UK) replaced optional acceptance of the Court's jurisdiction in relation to individuals' complaints with compulsory jurisdiction.

British governments have usually been quick to respond to negative judgments by amending domestic law to ensure conformity with the requirements of the Convention.

The case-law of the Court has established a comprehensive set of minimum legal standards which all European states are expected to respect. Few individual applications from the UK result in a finding of a violation. Nevertheless, the Court's jurisprudence has played a key role in enhancing protection for human rights in the UK, especially when it comes to freedom of expression,²⁴ privacy,²⁵ freedom from discrimination,²⁶ freedom from inhuman and degrading treatment,²⁷ and children's rights.²⁸

However, until recently, Convention rights or the case-law of the Court could not be directly invoked by individuals before domestic courts; instead they had to seek a remedy before the ECtHR in Strasbourg through a slow and time-consuming process. Following a long cross-party (but largely expert/elite-dominated) debate about whether the UK should introduce a bill of rights, this lack of a codified human rights remedy in the domestic courts was addressed by the introduction of the Human Rights Act 1998 (HRA), which now constitutes the third layer of rights protection in UK law. The HRA has made most of the rights which bind the UK by virtue of the ECHR enforceable in UK law. (These rights are referred to in the HRA as 'Convention rights'.) Convention rights as interpreted by both the ECtHR and UK courts have more concrete content than their common law counterparts and often provide a higher level of protection than is available under administrative law. As a result, the HRA has become the primary vehicle through which human rights are protected through law.

S. 6 of the Act requires all bodies performing functions of public nature to act in a manner that is compatible with Convention rights. Therefore the HRA gives the UK courts the power to review the decisions of public authorities for compatibility with Convention rights, including the devolved assemblies in Scotland, Wales and Northern Ireland. Acts of public bodies that violate Convention rights can be invalidated, unless

24 See e.g. *Tolstoy v UK* (1995) 20 EHRR 442 (excessive damages in libel actions).

25 See e.g. *Malone v United Kingdom* (1984) (No.282), 4 EHRR 330 (privacy of telephone communications); *S and Marper v UK* (2009) 48 EHRR 50 (DNA evidence).

26 *Dudgeon v UK* (1981) 4 EHRR 149.

27 *Price v UK* (2002) 34 EHRR 1285 (treatment of a disabled person in prison).

28 *Z v UK* [2001] 2 FCR 246 (liability of public authorities for failure to prevent child abuse).

these acts are required to give effect to legislation enacted by the Westminster Parliament.

The HRA thus makes it possible for individuals to seek a remedy against the executive when their Convention rights are violated. Critically, the Act also leaves the sovereign authority of Parliament intact. Under S. 3 HRA, the UK courts are required to interpret parliamentary legislation 'as far as possible' in a manner that ensures conformity with Convention rights.²⁹ If such an interpretation is not possible, then under S. 4 of the HRA the courts can issue a 'declaration of incompatibility', a statement that sets out their legal finding that the statute in question is not compatible with the right. However, such a declaration has no legal effect. It is intended to trigger a political response to the compatibility problem identified by the court. Parliament continues to enjoy the final say when it comes to determining the scope and content of human rights.³⁰

This limitation on the power of the courts was intended to work with the grain of Britain's constitutional traditions. It contrasts with the 'strike-down' powers given to courts in countries with constitutional bills of rights like the USA, Germany, South Africa and Canada, where legislation can be invalidated if it is deemed to be incompatible with fundamental rights.³¹

2.4 Examples of the functioning of the current system of rights protection

The manner in which the rights protection provided by the ECHR and HRA can positively interact with the law-making power of Parliament so as to enhance respect for human rights is illustrated by the following example.

29 The case-law under the Act has established that the courts should give statutes such a rights-friendly interpretation except where it would clearly and directly contradict a fundamental feature of the structure of the legislation or the clear meaning of the provisions of the Act itself. See e.g. *R (GC) v Commissioner of Police for the Metropolis* [2011] UKSC 21.

30 C. Gearty, 'Reconciling Parliamentary Democracy and Human Rights' (2002) 118 *Law Quarterly Review* 248; by the same author, *The Principles of Human Rights Adjudication* (Oxford: OUP, 2003).

31 In Canada, federal and provincial legislatures can by virtue of s. 33 of the Canadian Charter of Rights and Freedoms vote to maintain legislation in force for a renewable period of five years, 'notwithstanding' a judicial decision to invalidate the statute in question. This power has rarely been used: see J. Cameron, 'The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination' [2004] 23 *Supreme Court L.R.* (2d) 135.

The Gender Recognition Act 2004

Despite increasing understanding during the 1980s and 1990s of gender dysphoria, English law did not allow for the possibility of reassigning the sex ascribed to individuals when their birth was registered. This in turn prevented transsexuals marrying persons of the same sex that they were assigned at birth. Claims that the UK was thus violating the right to marry and the right to enjoy a private life were initially rejected by the ECtHR (*Rees v United Kingdom* (1987) 9 EHRR 56; *Cossey v United Kingdom* (1991) 13 EHRR 622; *Sheffield and Horsham v UK* (1999) 27 EHRR 163). The Court nevertheless urged the UK to keep the law under review, but no action was taken by the government.

Finally, in 2002, the Strasbourg Court in *Goodwin v UK* (2002) 35 EHRR 447 concluded that the UK was now in breach of the Convention, on the basis that it was out of step with the prevailing European consensus on this issue. The government began to prepare legislation to remedy the problem. A subsequent claim under the HRA resulted in the grant of a declaration of incompatibility by the House of Lords in *Bellinger v Bellinger* [2003] UKHL 21, which confirmed that existing UK law was not compatible with Convention rights but left it to Parliament to resolve the issue. Subsequently, the Gender Recognition Act was enacted by Parliament in 2004, which made provision for full legal recognition to be given to gender reassignment.

Other examples exist of Parliament and the courts working together to protect rights. The Civil Partnerships Act 2004, the Coroners and Justice Act 2009 and the Protection of Freedoms Act 2012 were all passed partially in response to court decisions which identified problems with the justice and fairness of existing law.³² In other contexts, Parliament has been willing for the courts to extend rights protection through the gradual development of case-law. Amongst many other cases, decisions by the ECtHR and UK courts applying both common law and HRA standards have reformed defamation law by extending protection for freedom of speech,³³ established a remedy against media intrusion into the

32 The cases of *Karner v Austria* (2003) 38 EHRR 528 and *Ghaidan v Mendoza* [2004] UKHL 30 highlighted the existence of discrimination against same-sex couples in the context of tenancy rights. The cases of *Jordan v United Kingdom* (2003) 37 EHRR 2 and *R (Khan) v Secretary of State for Health* [2004] 1 WLR 971 identified deficiencies in the handling of inquests. The judgments of the ECtHR in *S and Marper v UK* (2009) 48 EHRR 50 in respect of the retention of DNA profiles and *Gillan and Quinton v UK* (2010) 50 EHRR 45 on the use of anti-terrorism stop and search powers influenced the provisions of the Protection of Freedoms Act 2012.

33 *Derbyshire County Council v Times Newspaper Ltd and others* [1993] AC 534; *Tolstoy v UK* (1995) 20 E.H.R.R. 442; *Jameel v Wall Street Journal* [2006] 4 All ER 1279.

private lives of individuals,³⁴ enhanced the rights of patients undergoing mental health treatment,³⁵ granted new rights to unmarried would-be adopters in Northern Ireland,³⁶ and extended the circumstances in which public authorities will be liable for negligence in how they have treated vulnerable individuals in their care.³⁷ Furthermore, the case-law of the ECtHR and the UK courts on human rights helps to inform the work of the UK Equality and Human Rights Commission, as well as the important scrutiny role played by the Joint Committee on Human Rights and other parliamentary committees.

2.5 Criticism of the existing state of UK human rights law

In general, the existing state of UK human rights law has received favourable reviews from legal academics and the judiciary.³⁸ However, it has also come under criticism from other quarters. A media narrative has developed which portrays human rights adjudication as being excessively concerned with the rights of minorities at the expense of the public interest. Academic analysis suggests that much of this commentary has been inaccurate or distorted.³⁹ However, sharp criticism of the existing status quo has also come from Lord Hoffmann, a former Law Lord, certain politicians (including the Prime Minister), and commentators linked to centre-right think-tanks. Calls have been made for a fundamental re-think of the UK's relationship with the Strasbourg Court, and for the HRA replaced by a new 'Bill of Rights'. This has prompted the government to establish the Commission on a Bill of Rights, which has been charged with investigating whether there is a need for a UK Bill of Rights to 'protect and extend' existing liberties.

34 *Peck v UK* (2003) 36 EHRR 41; *Campbell v MGN* [2004] 2 AC 457.

35 See e.g. *HL v UK* (2005) 40 EHRR 32.

36 *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38.

37 *Z v UK* [2001] 2 FCR 246; *Barrett v Enfield London Borough Council* [2001] 2 AC 550.

38 For recent overviews, see A. Kavanagh, *Constitutional Review under the Human Rights Act* (Cambridge: CUP, 2009); T. Hickman, *Public Law after the Human Rights Act* (Oxford: Hart, 2010); S. Garbaum, 'How Successful and Distinctive is the Human Rights Act? An Expatriate Comparatist's Assessment' (2011) 74 *Modern Law Review* 195; Lord Dyson, 'What is Wrong with Human Rights?', address at Hertfordshire University 3 November 2011, available at http://www.supremecourt.gov.uk/docs/speech_111103.pdf.; BBC News, 'Retiring Supreme Court President Defends Human Rights', 11 October 2011, available at <http://www.bbc.co.uk/news/uk-15253829> (last accessed 20 June 2012).

39 A. Donald, J. Gordon and P. Leach, *The UK and the European Court of Human Rights*, Equality and Human Rights Commission Research Report No. 83 (London: EHRC, 2012).

Critics of the ECHR and HRA have put forward several different arguments to support their call for reform. Some argue that judicial protection of rights imposes constraints on political decision-making that are incompatible with democratic principles.⁴⁰ Others view human rights as indeterminate and abstract concepts, whose interpretation should be left in the hands of elected politicians rather than unelected judges. Many of these critics focus on specific judgments which they consider to have been wrongfully decided, and use these decisions as evidence of how human rights law is deeply flawed. For example, the *Hirst* (No. 2) decision of the European Court on prisoner voting rights has attracted considerable hostility,⁴¹ as have judgments by both the ECtHR and UK courts which have imposed constraints on the power of ministers to deport non-nationals.⁴² Others have argued that human rights law encourages dubious claims for compensation schemes, trivial complaints and a undermining of a collective sense of responsibility.⁴³

Other critics have focused on specific institutional and structural aspects of human rights law which they consider to be seriously defective. In particular, they have attacked how the Strasbourg Court interprets Convention rights and discharges its functions under the ECHR.⁴⁴ Some have also accused the Strasbourg Court of lacking the legitimacy to pass judgment on the human rights record of a well-established democracy like the UK.⁴⁵ Criticism has also been directed at the HRA and how it has been interpreted by UK judges, on the basis that it has linked UK law too closely to the Strasbourg case-law and stunted the development of a 'home-grown' domestic rights jurisprudence.⁴⁶ The HRA has also been attacked for striking a less than optimum balance between individual

40 See M. Pinto-Duschinsky, *Bring Rights Back Home: Making human rights compatible with parliamentary democracy in the UK* (London: Policy Exchange, 2011).

41 *Hirst* (No 2) v UK (2006) 42 EHRR 41.

42 See e.g. the media and political response to the ECtHR decision in *Othman (Abu Qatada) v UK*, App. No. 8139/08, Judgment of 17 January 2012, GC. See also BBC News Online, 'Theresa May Under Fire Over Deportation Cat Claim', 4th October 2011, available at <http://www.bbc.co.uk/news/uk-politics-15160326> (last accessed 20 June 2012).

43 Society of Conservative Lawyers, *Response to the Commission on a Bill of Rights Consultation*, written by Lord Faulks, Andrew Warnock and Simon Murray, 21 October 2011.

44 See the criticisms directed against the Strasbourg Court by MPs during the House of Commons debate on prisoner voting rights on 10th February 2011, *H.C. Deb.* 10 Feb 2011, cols. 493-586.

45 Lord Hoffmann, 'The Universality of Human Rights' (2009) 125 *Law Quarterly Review* 416; J. Fisher, *Rescuing Human Rights* (London: Henry Jackson Society, 2012).

46 See the nuanced analysis presented by D. Grieve M.P. (now the Attorney General) on the Conservative Home blog, 'It's the Interpretation of the HRA That's The Problem – Not the ECHR Itself', available at <http://conservativehome.blogs.com/platform/2009/04/dominic-grieve-.html> (last accessed 20 June 2012).

rights and democratic rule, and for being out of synch with British traditions of governance.⁴⁷

Some of these arguments appear less than convincing. For example, the suggestion that judicial protection of rights is intrinsically incompatible with democratic principles can readily be turned on its head. Giving courts the power to protect individual rights could be viewed as strengthening democracy. As previously discussed, it protects disenfranchised minorities, helps to create a 'culture of justification' which benefits all citizens and provides a counterbalance to the dominance of the executive over Parliament.⁴⁸ The argument that human rights are too indeterminate to be interpreted and applied by courts is also open to question. Human rights standards are usually no more abstract than the standards that the courts apply every day of the week in administrative law or tort law cases.⁴⁹

The fact that certain court decisions have proved to be politically unpopular is not a compelling criticism. Human rights law will always generate the occasional decision which attracts political and media hostility. After all, its entire purpose is to protect individual rights against executive dominance and to act as a brake on majoritarian rule. Many ECHR and HRA decisions attract little or no negative commentary, especially when they protect the rights of all citizens rather than small and politically unpopular minorities.⁵⁰ The arguments that human rights law encourages trivial complaints or social irresponsibility is also open to question. Little or no hard evidence or sustained argument has yet been presented in support of these conclusions, which makes it difficult to assess whether they are based on anything more than subjective opinion.

47 For example, the Prime Minister, David Cameron M.P., has commented that 'we will abolish the Human Rights Act and introduce a new Bill of Rights, so that Britain's laws can no longer be decided by unaccountable judges': see 'Rebuilding Trust in Politics', 8 February 2010, speech at the University of East London..

48 See T. Hickman, 'In Defence of the Legal Constitution' (2005) 55(4) *University of Toronto Law Journal* 981-1022.

49 C. O'Connell, 'Democracy and Rights: New Directions in the Human Rights Era' (2004) 57 *Current Legal Problems* 175-211.

50 Notably, the judgment of the European Court in *S and Marper v UK* (2009) 48 EHRR 50, which found UK legislation governing the retention of DNA samples taken from persons not convicted of any criminal offence, did not attract much domestic political criticism, even though the Strasbourg Court in this case took a dramatically different view of how individual rights should be balanced against the public interest than had the UK courts. This may reflect the fact that the legislation in question had been introduced by the previous Labour government and was unpopular with Conservative and Liberal Democrat voters. See also the judgment of the ECtHR in *Gillan and Quinton v UK* (2010) 50 EHRR 45.

This analysis only leaves the institutional and structural criticisms that have been directed at the ECHR and HRA, which deserve to be analysed in greater detail. They raise important issues, which are central to the debate as to whether radical change is needed in this area of law.

3 The relationship between the UK and the ECHR

3.1 The structure and functioning of the ECHR system of rights protection

The ECHR is sometimes portrayed as a 'foreign' legal instrument alien to the British legal heritage. This is something of a myth. The Council of Europe and its Convention were partly the brainchild of Winston Churchill, UK lawyers were instrumental in its drafting, and as previously mentioned the UK was one of the first states to ratify the Convention in 1951, albeit not without some internal reservations on the part of some Cabinet Ministers.⁵¹

The text of the Convention has subsequently been interpreted and applied by the ECtHR, which has built up a substantial case-law over the last five decades. In interpreting the Convention, the Court adopts a 'living instrument' approach, whereby the rights set out in the text of the Convention are interpreted in the light of contemporary social and moral attitudes across Europe.⁵² In line with this purposive approach, combined with the express wording of the Convention, the Court has concluded that state action which violates 'absolute' rights such as the Article 3 right to freedom from torture and inhuman and degrading treatment cannot be justified.⁵³ In contrast, state action which interferes with a 'qualified' right, such as freedom of expression or freedom of religion, must be shown to be 'objectively justified'. However, the Court will grant states a 'margin of appreciation' and impose a 'self-restraint

51 See E. Bates, *The Evolution of the European Convention on Human Rights* (Oxford: OUP, 2010).

52 *Goodwin v UK* (2002) 35 EHRR 447.

53 *Soering v U.K.* (1989) 11 EHRR 439.

on its power of review⁵⁴ in situations where state authorities are best placed to form their own assessment of the rights issues at stake, as when complex issues of economic and social policy are at issue or there is no European-wide consensus about the general level of protection that should be afforded to the right in question.⁵⁵

These key elements of the Court's jurisprudence were initially formulated in the 1970s and early 1980s, and have formed a consistent part of its case-law for over four decades. During that time, the Strasbourg Court has come to play an influential role in the development of UK human rights law, as discussed previously. Most cases that reach it from the UK are unsuccessful. From 1966 to 2010, approximately 14,460 individual applications to the Court related to the UK, of which the vast majority were declared inadmissible (i.e. they were not given permission to proceed on the basis that they gave rise to an arguable claim under the Convention, or were time-barred or otherwise procedurally barred from progressing.)⁵⁶ During this time period, only 1.3% of cases brought against the UK resulted in a finding of a violation. However, some of these findings of a violation have had a significant impact on UK law, as discussed above.

Most of these judgments of the Court have been absorbed seamlessly into national law, and are now viewed as having identified and helped to redress deficiencies or flaws in national law. For example, the finding by the Court in *Dudgeon v UK* that the ban on homosexual acts in Northern Ireland was contrary to the right to privacy protected by Article 8 of the Convention is now generally regarded to be a self-evidently correct decision, even though at the time it was controversial.⁵⁷ Many of the Court's judgments have exercised considerable influence over the development of the common law jurisprudence.⁵⁸ The ECHR system of rights protection also played an important role in securing rights protection during the Northern Irish conflict and setting standards which have been subsequently applied in other situations of armed conflict elsewhere

54 Judge Dean Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' *CELS Working Paper* (Cambridge: Centre for European Legal Studies, 2012), p. 2.

55 See e.g. *Hatton v UK* (2003) 37 EHRR 611 [GC].

56 The statistics in this paragraph are all taken from A. Donald, J. Gordon and P. Leach, *The UK and the European Court of Human Rights, Equality and Human Rights Commission Research Report No. 83* (London: EHRC, 2012), 30-43.

57 See e.g. *Dudgeon v UK* (1981) 4 EHRR 149.

58 See e.g. *Reynolds v Times Newspapers* [2001] 2 AC 127.

in Europe.⁵⁹ Furthermore, successive UK governments have complied with judgments of the Court, even if the odd decision has attracted political hostility.⁶⁰ The UK along with other EU states has also encouraged many eastern European states such as Serbia and Ukraine to ratify the Convention and accept the jurisdiction of the Court over the last two decades. However, the authority of the Strasbourg Court and its influence over UK law has recently come under serious and sustained criticism from a range of sources.

3.2 Institutional and structural criticisms of the ECHR system

Some of this criticism has focused on specific aspects of the case-law of the Court. For example, the Attorney General, Dominic Grieve M.P., has called for states to be granted a much wider ‘margin of appreciation’, while nevertheless praising the overall contribution of the ECHR system to the protection of rights across Europe.⁶¹ However, other critics have questioned sharply both the functioning of the Court as an institution and the structural nature of the relationship between UK law and the ECHR.

For example, Lord Hoffmann in 2009 suggested that an international court like Strasbourg lacked the ‘constitutional legitimacy’ to impose its interpretation of the abstract rights set out in the text of the Convention on national parliaments and courts. He also attacked what he saw as expansionist tendencies within the jurisprudence of the Court, and went on to criticise the right of individual petition, which he said enabled the Court ‘to intervene in the details and nuances of the domestic laws of Member States’.⁶²

These criticisms were echoed in a report written by Michael Pinto-Duschinsky and published by the think-tank Policy Exchange in February 2011.⁶³ Similar arguments were also made in a pamphlet entitled *Strasbourg in the Dock* published by a Conservative MP, Dominic Raab,

59 B. Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford: OUP, 2010).

60 See e.g. *McCann v UK* (1995) 21 EHRR 97.

61 See e.g. D. Grieve M.P., ‘Can the Bill of Rights do better than the Human Rights Act?’, Middle Temple Lecture, 30 November 2009.

62 Lord Hoffmann, ‘The Universality of Human Rights’ (2009) 125 *LQR* 416.

63 M. Pinto-Duschinsky, *Bringing Rights Back Home: Making human rights compatible with parliamentary democracy in the UK* (London: Policy Exchange, 2011).

in conjunction with the think-tank Civitas in April 2011, and by Jonathan Fisher QC in a paper published by the Henry Jackson Society in March 2012.⁶⁴ These commentators echoed many of Lord Hoffmann's key points, focusing in particular on what their authors saw as institutional failures on the part of the Strasbourg Court. In their view, these included the Court's refusal to grant states a wide margin of appreciation, its alleged expansion of the scope of Convention rights beyond what was originally intended by the drafters of the ECHR, and what they saw as the questionable composition of the Court and the competency of some of its judges. They also drew attention to the massive back-log of cases that the Strasbourg Court is struggling with, and called for a fundamental 'reform' of the Court which would involve the Court adopting a much more deferential stance towards the decisions of national lawmakers. Pinto-Duschinsky went further and suggested that, if this 'reform' was not forthcoming, the UK should reconsider its participation in the Convention system or seek to amend it to allow domestic parliaments to override decisions of the Strasbourg Court. In his view, the extent of the current influence exerted by the Strasbourg Court over UK law was incompatible with the UK's commitment to democratic self-governance.

Similar criticisms were aired in a parliamentary debate on a motion tabled in the House of Commons on 11th February 2011, which was intended to demonstrate the extent of cross-party opposition to the Strasbourg Court's decision in the *Hirst* case.⁶⁵ For example, Dominic Raab MP described the Strasbourg decision in the *Hirst* case as a 'serious abuse of power'.⁶⁶ Labour MP Jack Straw MP, the Minister responsible for introducing the HRA, asserted that the Strasbourg Court lacked the legitimacy to intervene in matters in respect of which 'member states... have not surrendered their sovereign powers'.⁶⁷ Following the decision in May 2012 of the Grand Chamber of the Strasbourg Court in *Scoppola v. Italy (No. 3)*,⁶⁸ which confirmed that the UK's blanket ban on prisoners voting was incompatible with the Convention, Jack Straw MP and Conservative MP David Davis returned to the attack in a joint comment piece in the *Daily Telegraph*, where they criticised the 'living instrument'

64 J. Fisher, *Rescuing Human Rights* (London: Henry Jackson Society, 2012).

65 *H.C. Deb.* 10 Feb 2011, cols. 493-586. The wording of the motion asserted that the question of prisoner voting rights was a 'legislative decision...which should be a matter for democratically-elected law makers' and it was ultimately carried by 234 votes to 22. No legal consequences flowed from the passing of the motion.

66 *H.C. Deb.* 10 Feb 2011, cols. 583-4

67 *H.C. Deb.* 10 Feb 2011, cols. 502-4.

68 Application No. 126/05, Judgment of 22 May 2012, GC.

approach adopted by the Court in interpreting Convention rights and called upon Parliament to continue to defy Strasbourg.⁶⁹

These criticisms of the ECtHR thus call into question both the institutional integrity of the Court and the manner in which its case-law places restrictions on the freedom of action of democratically accountable legislators and ministers. To assess the validity of these arguments, it is helpful to look at each of these strands of criticism separately and see whether there exists a real need to re-think the existing relationship between the ECHR and UK law.

3.3 The institutional integrity of the Strasbourg Court

To begin with, the argument that the Strasbourg Court lacks the competency and capacity to perform the interpretative task assigned to it is open to question. The Court's back-log of cases is extensive, but there are signs that the Court is getting to grips with it: in any case, much of the back-log consists of non-urgent cases or repetitive applications. The quality of the Court's judges can vary, as is the case with any court: however, the manner in which judges are appointed through a democratic process involving the Parliamentary Assembly of the Council of Europe helps to guarantee a certain level of expertise and independence.⁷⁰ Jonathan Fisher QC has criticised the fact that a considerable proportion of judges on the Court are academic lawyers who have not served as trial judges in their home states. However, it is common across Europe and indeed the Commonwealth to appoint academic lawyers to constitutional courts in light of their specific expertise in the fields of human rights and constitutional law.⁷¹

69 D. Davis and J. Straw, 'We Must Defy Strasbourg on Prisoner Votes', *Daily Telegraph*, 24 May 2012, available at <http://www.telegraph.co.uk/news/uknews/law-and-order/9287633/We-must-defy-Strasbourg-on-prisoner-votes.html> (last accessed 24 June 2012). The *Daily Mail* described the decision on the front page of its print edition as representing 'contempt for democracy': for the online report, see <http://www.dailymail.co.uk/news/article-2148208/Prisoner-vote-row-European-judges-insist-prisoners-MUST-vote.html> (last accessed 26 June 2012).

70 Every state party to the Convention has one seat on the Court. When a seat becomes vacant, the state concerned submits a shortlist of three candidates to the Parliamentary Assembly of the Council of Europe, which is composed of delegations from national parliaments: the Parliamentary Assembly selects the successful candidate, and can even reject all the shortlisted candidates if they do not satisfy the relevant criteria of independence and expertise. For further information on the procedure for electing judges, see http://assembly.coe.int/CommitteeDocs/2010/20100504_ajdoc12rev.pdf (last accessed 20 June 2012).

71 The appointment of academics to constitutional courts is commonplace across continental Europe. It is also not unknown in common law jurisdictions. For example, the most recent judge appointed to the US Supreme Court, Elena Kagan, had spent most of her previous career as an academic and never served as a trial judge.

The suggestion that the Court has exceeded its mandate through adopting a ‘living instrument’ approach is also open to question. The argument is frequently made that the original drafters of the ECHR saw it as a minimalist instrument intended to guard against totalitarianism, not as a treaty which would be re-interpreted over time to extend rights protection in healthy democracies. However, the *travaux préparatoires* of the ECHR do not necessarily support that conclusion. As Nicol has demonstrated, sharp differences of view existed between the drafters on this specific point: many of the negotiators viewed the Convention as a Bill of Rights for Europe which would help to identify and address rights abuses in otherwise well-functioning democracies.⁷²

Furthermore, many commentators even argue that the Court is obliged to adopt a ‘living instrument’ approach, on the basis that this is necessary to ensure the integrity and justice of its case-law.⁷³ It would be highly questionable if the Court were to refuse to find a violation in a case involving the prohibition of same-sex acts such as *Dudgeon v UK*, human trafficking such as *Rantsev v Cyprus and Russia*,⁷⁴ or segregation of Roma children in *D.H. v Czech Republic*,⁷⁵ simply because the drafters of the Convention had not foreseen that such situations would arise before the Court.⁷⁶ The ‘living instrument’ approach allows the Court to adjust its case-law to reflect modern moral and social standards, and ensures that its jurisprudence remains relevant and effective rather than being marooned in the early 1950s. Common law adjudication in the English courts has adopted a similar approach: for example, in 1991, the House of Lords in the case of *R v R* declared that the long-established ‘marital rape exception’, whereby a man could not legally rape his wife, should no longer be regarded as forming part of English criminal law on the basis that it was anachronistic and offensive to modern views on morality.⁷⁷

In general, the Court’s ‘living instrument’ approach appears to be broadly in line with the standard rules of treaty interpretation set out by the Vienna Convention on the Law of Treaties 1969, which provides that treaties

72 D. Nicol, ‘Original Intent and the European Convention on Human Rights’ (2005) *Public Law* 152-17.

73 G. Letsas, ‘The European Convention on Human Rights as a Living Instrument: Its Meaning and Legitimacy’, forthcoming in G. Ulfstein, A. Follesdal and B. Schlüter (eds), *The European Court of Human Rights in a National, European and Global Context* (Cambridge: Cambridge University Press, 2012).

74 Application no. 25965/04, Judgment of 7 January 2010.

75 ((2008) 47 EHRR 3.

76 Donald *et al.*, 110-113.

77 [1991] UKHL 12.

should be primarily interpreted by reference to their ‘object and purpose’: the ECtHR consistently interprets the text of the Convention by reference to its primary objective, which is to ensure that substantive protection is given to individual rights across Europe.⁷⁸ Its approach is very similar to the approach adopted by other international courts,⁷⁹ and by the Privy Council, Commonwealth courts and continental European courts in interpreting the fundamental rights provisions of their national constitutions.⁸⁰

Obviously, it can be disputed whether or not the Strasbourg Court failed to grant states an adequate margin of appreciation in any given case. Its case-law is not without its flaws, in this regard and others. However, it is difficult to identify patent defects in the general interpretative approach and mode of functioning of the Court.⁸¹ The odd contestable decision does not invalidate the legitimacy of the Court: after all, no national or international court is immune from error. The ECtHR in common with courts throughout the world has been grappling for decades with the difficult issue of how best to reconcile judicial rights protection with democratic self-governance, and in general it appears to strike a good balance between these two competing considerations. As a result, the institutional integrity of the Court does not appear to be seriously in doubt, and accusations that it is abusing its power under the Convention appear to be wide of the mark.

3.4 The legitimacy of the structural relationship between the UK and the ECHR

The argument advanced by Lord Hoffmann, Pinto-Duschinsky and others that it is inherently objectionable for an international court to exert such wide-ranging influence over UK law appears also to be open to question. States often limit their own sovereign authority and defer to external decision-makers when entering into international agreements:

78 See Article 31(1) of the Vienna Convention taken together with Article 32.

79 See e.g. *Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75), Advisory Opinion OC-2/82, September 24, 1982, Inter-Am. Ct. H.R. (Ser. A) No. 2 (1982), (1983) 22 ILM 37.

80 See e.g. the judgment of Lord Wilberforce in the Privy Council case of *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC), 328-9; Dickson J. in the Canadian case of *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321, 395-6; Kentridge A.J. in the South African case of *S v Zuma and Others* 1995 (4) BCLR 401 (CC); 1995 (2) SA 642 (CC), [13]-[18].

81 The suggestions periodically made in the media by politicians and commentators that the Strasbourg Court has become a ‘small claims court’ and is biased against the UK are comprehensively rebutted by Donald *et al.*, 30-42. In particular, they note that in 2011, 2011, 36 per cent of ECHR judgments finding at least one violation related to the Article 3 right to freedom from torture and inhuman and degrading treatment.

international collaboration would be impossible otherwise. As Jeremy Waldron has commented, '[p]art of the point of being a sovereign is that you take on obligations'.⁸² The UK voluntarily ratified the Convention and accepted the jurisdiction of the Court, and has strongly encouraged others to do likewise, including the 'newer' states of Europe such as Serbia and Bosnia.

The fact that judgments of the European Court of Human Rights may touch on issues which have been the subject of democratic debate and disputation does not render them inherently anti-democratic. Richard Bellamy, a prominent critic of granting excessive power to the judiciary, considers that the Strasbourg jurisprudence helps to enrich democratic debate by bringing an international legal perspective to bear on domestic law and practice.⁸³ Diplomatic pressure to comply with Strasbourg decisions may place constraints on the power wielded by elected politicians in the UK, but the same could be said of many other external and internal factors. There also needs to be some sense of proportion in this debate. As previously discussed, the UK loses few cases in Strasbourg, and even fewer of these 'defeats' have proved to be particularly controversial. Indeed, academic commentary has often criticised Strasbourg for being too respectful of domestic political choices.⁸⁴

In addition, even though the UK is required under the Convention to give effect to judgments of the Strasbourg Court, national authorities retain the ability to decide exactly how to implement a decision of the Court. They also retain the ultimate power to say no. Parliament and the UK government are under no formal constitutional obligation to give effect to a Strasbourg judgment: the UK could even choose to renounce the Convention and withdraw from the ECHR system of rights protection at any time if it wished. The UK would, in all likelihood, face severe diplomatic sanctions in such a situation, including expulsion from the Council of Europe, while its continued membership of the EU might also be called into question.⁸⁵ Such a decision might also cause immense and

82 Oral Evidence, Joint Committee on Human Rights, 15 March 2011, Q 57, p. 22.

83 R. Bellamy, 'ECHR - Bringing Home the Facts', UCL European Institute, 21 February 2011, available at http://www.ucl.ac.uk/european-institute/comment_analysis/commentary/ecthr/rbellamy (last accessed 20 June 2012). See also Donald et al. 164-77.

84 See e.g. H. Fenwick, 'An Appeasement Approach in the European Court of Human Rights?', *UK Human Rights Law Blog*, 17 April 2012, available at <http://ukhumanrightsblog.com/2012/04/17/an-appeasement-approach-in-the-european-court-of-human-rights-professor-helen-fenwick/> (last accessed 10 July 2012).

85 See the useful analysis in Pinto-Duschinsky, *Bringing Rights Back Home*, 49-55, which may however underplay the extent to which other European states may choose to treat a withdrawal from the ECHR as a repudiation of the fundamental European values set out in Article 2 of the Treaty of the European Union.

irreparable damage to its international standing (see below). However, in the final analysis, Parliament retains the final say: it can always elect to withdraw from the Convention system, as long as it is prepared to accept all the consequences that may follow.

As a result, it appears as if the structural relationship that currently exists between the UK and the Strasbourg Court is not incompatible with the UK's constitutional commitment to democratic self-governance and the primacy of Parliament. In any case, it should be noted that the relationship between Strasbourg and the UK is not a one-way street: in decisions such as *Z v UK*⁸⁶ and *Al-Khawaja v UK*,⁸⁷ the Strasbourg Court has shown a willingness to adjust its case-law in response to reasoned and well-developed criticisms of its previous decisions emanating from national authorities.

3.5 Proposals for reform and the question of adherence to judgments of the Strasbourg Court

It appears therefore that the two main strands of criticism directed towards UK participation in the ECHR system of rights protection are not very convincing. Furthermore, European governments in general appear to be content with the role played by the ECtHR in protecting rights.⁸⁸ While the UK held the Presidency of the Council of Europe in early 2012, proposals were made as part of the ongoing reform process of the Convention system launched at Interlaken in 2010 to limit the circumstances in which the Court could accept individual petitions. However, the Brighton Declaration adopted by the High-Level Conference on the Future of the ECHR in April 2012 broadly endorsed the existing relationship between the Court and state parties to the Convention.⁸⁹

This leaves open the question of when Parliament and/or the UK government would be justified in disregarding a judgment of the Strasbourg

86 [2001] 2 FCR 246

87 *Al-Khawaja and Tahery v UK*, Application nos. 26766/05 and 22228/06 [GC], Judgment of 15 December 2011.

88 For analysis of how the legitimacy of the Strasbourg Court is perceived across Europe, see B. Çali, A. Koch and N. Bruch, *The Legitimacy of the European Court of Human Rights: The View from the Ground* (London: Department of Political Science, University College London, 2011), available at <http://ecthrproject.files.wordpress.com/2011/04/ecthrlegitimacyreport.pdf> (last accessed 20 July 2012).

89 For a detailed analysis of the Declaration, see M. Elliott, 'The Brighton Declaration: Where now for the Human Rights Act and the Bill of Rights Debate?', <http://ukconstitutionalallaw.org/2012/04/25/mark-elliott-the-brighton-declaration-where-now-for-the-human-rights-act-and-the-bill-of-rights-debate/> (last accessed 27 May 2012).

Court. Strong arguments can be made to the effect that the UK should be slow to refuse to implement a decision of the Court. To start with, this could be viewed as a violation of the principle of respect for the rule of law. As Lord Mackay of Clashfern has argued, a refusal to abide by a judgment of the Court would involve disregarding a judicial determination that the UK had committed itself to respect.⁹⁰ Furthermore, if the UK refuses to comply with its obligations under the ECHR, then it will weaken the entire Convention system. If a leading European state such as the UK refuses to give effect to a judgment of the Court, then Russia, Turkey and other states with worse human rights records than the UK may well be tempted to do the same. The same considerations apply with even greater force to UK withdrawal from the Convention: this could cause fatal damage to the attempt to ensure that a minimum floor of human rights standards applies across Europe and damage the health of democracy in many parts of the continent.⁹¹

Pinto-Duschinsky has dismissed this external dimension as irrelevant to the question of how the UK should respond to Strasbourg judgments. In his view, if deferring to the authority of the Court undermines democracy in the UK, then 'that is something too important and too intimate to be sacrificed for the supposed but unproven advantage of other peoples'.⁹² However, it makes little sense to be concerned for the health of democratic self-governance in the UK, while ignoring the state of health of democracy in other countries: there appears to be no good reason why the moral commitment to promote democracy and respect for human rights should stop at the English Channel. Furthermore, if hard-won democratic gains in countries such as Hungary, Ukraine and Romania are destabilised, then this will inevitably impact on the UK. In any case, as previously discussed, the argument that respecting Strasbourg judgments violates democratic principles is seriously open to question.

It is also in the UK's self-interest to be seen to respect and give effect to Strasbourg decisions. At present, the ECHR is acknowledged to be the world's most successful international mechanism for protecting human rights through law, and the UK has a strong reputation for adhering to

90 Oral evidence to the House of Commons Political and Constitutional Reform Committee, 1st February 2011, Q. 13.

91 Loose talk of a UK withdrawal may already have caused damage to the status and standing of the Court and the Convention in Eastern Europe: see Donald *et al.*, 145-48; 174-77.

92 M. Pinto-Duschinsky, *Bringing Rights Back Home: Making human rights compatible with parliamentary democracy in the UK* (London: Policy Exchange, 2011), 65.

its norms. If the UK were to undermine it, it would greatly weaken its moral authority and cause serious damage to its attempts to ensure that other states respect their human rights obligations. The hypocrisy of preaching the virtues of adhering to international human rights law if the UK itself was busily ignoring decisions of the European Court of Human Rights would quickly become apparent to those we most wish to influence.⁹³

3.6 Overview

In summary, it appears as if the institutional integrity of the ECtHR is sound, and the structural relationship between the UK and the Convention system of rights protection is compatible with its commitment to democracy, rights and rule of law. It remains open to elected politicians to disregard judgments of the Court. Whether it would be wise or justified for them to do so is another question. Good reasons exist as to why the UK should be slow to refuse to comply with a judgment of the Strasbourg Court. More may be gained by engaging with the Court than by undermining its central place in the European human rights architecture.

93 For an example of the UK urging another state (in this case Zimbabwe) to comply with a decision of an international tribunal on the topic of human rights, see UK Embassy in Zimbabwe, 'Zimbabwe Land Reform', policy statement, 11 February 2011, available at <http://ukinzimbabwe.fco.gov.uk/en/about-us/working-with-zimbabwe1/uk-zimbabwe-relations/uk-policy-zimbabwe/zimbabwe-land-reform> (last accessed 27 May 2012).

4 The Human Rights Act 1998 and the Bill Of Rights Debate

4.1 The purpose, structure and functioning of the HRA

Along with the ECHR, the Human Rights Act is the other key element in the UK system of rights protection. When it was enacted in 1998, the HRA was intended to enhance legal protection for human rights by making Convention rights enforceable before the British courts. It represented a compromise between those who wanted a US-style 'full' Bill of Rights, which would have permitted the courts to strike down legislation, and those who wished to maintain the unlimited authority of Parliament to legislate as it saw fit.⁹⁴ As a result, as discussed above, the Act requires the courts to invalidate acts of the executive which violate Convention rights and to interpret legislation 'as far as possible' in a manner that is compatible with Convention rights. However, the courts have no power to overturn Acts of Parliament: if legislation cannot be interpreted in a way that is compatible with the Convention, then the courts can only issue a non-binding 'declaration of incompatibility'.

Since it came into force in 2000, the courts in interpreting the provisions of the HRA have tried to strike a careful balance between protecting rights and respecting democratic decision-making. The one aspect of this case-law that has attracted serious criticism has been the interpretation given to s. 2 HRA by the House of Lords in *R (Ullah) v Special Adjudicator*,⁹⁵ when Lord Bingham suggested that the UK courts should

94 F. Klug, 'The Human Rights Act: Origins and Intentions', in N. Kang-Rioux, J. Milner and S. Nayak (eds.) *Confronting the Human Rights Act: Contemporary themes and perspectives* (London: Routledge, 2012).

95 [2004] UKHL 26.

adhere closely to the jurisprudential approach adopted by the Strasbourg Court.⁹⁶ As applied in subsequent cases, this approach has generated what Lord Kerr has described as an ‘Ullah-style reticence’, whereby the UK courts have shown some reluctance to depart from or go beyond established Strasbourg jurisprudence.⁹⁷ This has been criticised as inconsistent with the text of s. 2 HRA, which only requires UK courts to ‘take into account’ the Strasbourg jurisprudence.⁹⁸ It also has been criticised as tying the UK courts too closely to Strasbourg and preventing the emergence of a fully-fledged ‘native’ rights jurisprudence. However, in *R v Horncastle*,⁹⁹ the UK Supreme Court showed a willingness to depart from Strasbourg jurisprudence which they considered to be defective: furthermore, as discussed above, the Grand Chamber of the European Court of Human Rights in *Al-Khawaja v UK* subsequently showed a willingness to take on the board the views of the UK Court and to modify its case-law in response.¹⁰⁰

The machinery of the Act also appears to have run relatively smoothly since it came into force in 2000. As of August 2011, Parliament had responded positively to 18 of the 19 definitive declarations of incompatibility made by the courts under the HRA and amended the offending legislation in question. (The one exception has been the declaration issued by the Scottish Court of Session in *Smith v Scott*¹⁰¹ following the decision of the Strasbourg Court in *Hirst v UK (No. 2)*¹⁰² that the legislative ban on prisoners voting was disproportionate.)

However, as already mentioned above, decisions of the UK courts in respect of the Article 8 rights of non-nationals facing deportation have generated political hostility in certain quarters, as have other decisions in the sphere of criminal procedure rights.¹⁰³ This has fuelled media criticism of the Act, and added momentum to the arguments of critics

96 [2004] UKHL 26, [20].

97 Lord Kerr, ‘The UK Supreme Court: A Modest Underworker to Strasbourg?’, The Clifford Chance Lecture 25 January 2012.

98 J Lewis, ‘The European Ceiling on Human Rights’ (2007) *Public Law* 720; R. Masterman, ‘Section 2(1) of the Human Rights Act: Binding domestic courts to Strasbourg’ (2004) *Public Law* 725.

99 [2009] UKSC 19.

100 *Al-Khawaja and Tahery v UK*, Application nos. 26766/05 and 22228/06 [GC], Judgment of 15 December 2011.

101 [2007] CSIH 9.

102 (2006) 42 EHRR 41.

103 See e.g. the political response to the decision of the UK Supreme Court in *R (F (A Child)) v Secretary of State for Justice* [2010] 2 WLR 992.

who view it as flawed instrument for protecting rights which should be supplemented or replaced by a new Bill of Rights. In assessing the merits of these proposals, it will be useful first to disentangle the various criticisms that have been directed at the HRA in order to analyse the pros and cons of the case for reform.

4.2 Criticisms of the HRA and the proposal for a new UK Bill of Rights

As previously mentioned, some of the criticism directed at the HRA is based on how the UK courts have interpreted its provisions in cases such as *Ullah*, which in the eyes of some commentators links UK human rights law too closely to the Strasbourg jurisprudence. In their view, this has prevented the British courts from developing a 'home-grown' jurisprudence which they presume would better reflect 'British values'.¹⁰⁴ Many of these critics tend to assume that such a 'native' approach would involve the courts being much more deferential to decisions of elected politicians and much less inclined to find in favour of claims brought by immigrants, prisoners and other minority groups.

Another set of criticisms of the HRA are focused on its alleged failure to respect British traditions of governance, notwithstanding the manner in which it respects the sovereignty of Parliament. Some critics are hostile to the HRA on the basis that it gives the courts too much power to intervene in democratic decision-making and risks impairing national security and social order. The criticism is also sometimes expressed that the interpretative powers given to the courts under sections 3 and 4 of the HRA make it possible for the courts to give a dramatically different reading to legislation than Parliament intended it to have. Others view the legislation as being both under-inclusive and over-inclusive: it fails to protect rights which have been in the past regarded as fundamental within the UK constitutional tradition, such as the right to jury trial, but grants excessive protection to individuals when it comes to the Article 8 right to family life and other areas of human rights law.¹⁰⁵

Another school of thought is critical of how the HRA has failed to capture the public imagination. In their view, an instrument designed to

104 This criticism has been expressed by a range of commentators, as noted above in Part 2.5.

105 Society of Conservative Lawyers, *Response to the Commission on a Bill of Rights Consultation*, written by Lord Faulks, Andrew Warnock and Simon Murray, 21 October 2011.

protect rights should be couched in more accessible and less abstract terms, which will better resonate with the public. According to some, it should also make clear that individuals have responsibilities as well as rights and discourage what they see as frivolous or indulgent claims.¹⁰⁶

A final critical perspective comes from those who regard the HRA as a limited instrument which fails to protect human rights in a sufficiently developed manner. In their view, a UK Bill of Rights could go further and offer an extended level of rights protection to 'native' rights such as jury trial. Some commentators have also argued the case for greater protection to be extended to freedom of expression and other rights than is currently available under the HRA.¹⁰⁷

As previously noted, these criticisms of the HRA are by no means universally shared. Furthermore, critics of the existing status quo disagree on many fundamental issues. For example, those critical of how the HRA enhances the role of the judiciary adopt a starkly different position from those who want a more enhanced role for the judges in protecting rights. Therefore, it is difficult to see how a new Bill of Rights that either replaced the HRA or substantially amended its provisions could satisfy all those seeking reform of the current system.¹⁰⁸ In general, any attempt to change existing human rights law is likely to be a complex and controversial process.

4.3 The place of convention rights in UK law

Difficult issues arise with respect to the place of Convention rights in UK law. Many critics of the HRA seem to view proposals for a Bill of Rights as an opportunity to dilute what they see as the problematic influence of the ECHR on UK law. Some have argued the case for the Convention rights to be de-incorporated and for the UK to revert back to relying solely on the common law to protect rights.¹⁰⁹ Others would prefer that Convention rights be removed from UK law and replaced with new 'home-grown' standards set out in a Bill of Rights, or for the UK courts

106 *Ibid.*

107 For a pre-HRA detailed outline of what a comprehensive UK Bill of Rights might contain, see A. Lester *et al.*, *A British Bill of Rights* (London: Institute for Public Policy Research, 1990).

108 F. Klug, 'A Bill of Rights – Do we need one or do we already have one?' (2007) *PL* 701.

109 Society of Conservative Lawyers, *Response to the Commission on a Bill of Rights Consultation*, written by Lord Faulks, Andrew Warnock and Simon Murray, 21 October 2011.

to be freed from any obligation to take the case-law of the Strasbourg Court into account when deciding human rights cases.

However, any attempt to de-incorporate the Convention rights from UK law will give rise to serious legal complications. To start with, the Northern Ireland Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998 all require the devolved legislatures to comply with Convention rights. As a result, any amendment or repeal of the HRA would either have to leave Convention rights applicable when it came to areas within devolved competence, or else alter the fundamental structure of the devolved settlement. This would in turn give rise to complex constitutional questions.

In addition, the Convention rights form part of the ‘general principles’ of EU law, which member states are obliged to respect when they give effect to EU legislation.¹¹⁰ Therefore, even if the HRA was repealed or amended so as to de-incorporate Convention rights, they would still be potentially applicable by UK courts whenever EU law was in play.¹¹¹ The removal of Convention rights from UK law would thus create a messy legal situation and create anomalies in rights protection across different areas of law. Indeed, there is a risk that English courts, courts in the devolved regions, the Strasbourg Court and the European Court of Justice will all end up applying different human rights standards. Furthermore, given that almost all existing UK human rights law, including the case-law on common law rights,¹¹² is heavily influenced by the Strasbourg jurisprudence, any de-incorporation of Convention rights would generate considerable legal uncertainty: the status of all of these precedents would be called into question, which might open the door to fresh waves of litigation.

Any amendment or repeal of the HRA which de-incorporated Convention rights would also appear to be contrary to the UK’s international commitments. In particular, it would be contrary to the express terms of the recent Brighton Declaration, which emphasises that all state parties to the ECHR are under an obligation to take responsibility for ensuring that Convention rights as interpreted by the ECtHR are adequately protected in national law. In particular, paragraph 7 of the Declaration

110 P. Craig and G. De Búrca, *EU Law*, 4th ed. (Oxford: OUP, 2008), 381-6.

111 See now Articles 52(3) and 53 of the EU Charter of Fundamental Rights.

112 See e.g. *Derbyshire County Council v Times Newspaper Ltd and others* [1993] AC 534.

states that 'States Parties must also provide means by which remedies may be sought for alleged violations of the Convention', while '[n]ational courts and tribunals should take into account the Convention and the case law of the Court'.¹¹³ Any attempt to uproot Convention rights from UK law would thus undermine the commitments set out in the Brighton Declaration.

It would also set a bad example for other European states, and in particular the emerging democracies of Eastern Europe. As reflected in the wording of the Brighton Declaration, the Council of Europe is encouraging all European states to ensure that Convention rights and the jurisprudence of the Strasbourg Court are given effect in their domestic law, as part of its aim to reinforce respect for democracy, rights and the rule of law. Any moves in the UK to uproot the Convention rights would undermine this objective. Similar problems would arise if the provisions of a new Bill of Rights reduced the level of protection normally enjoyed by individuals under the case-law of the Strasbourg Court - for example, by limiting the scope of some of the Convention rights. This would limit the ability of the UK government to object if countries such as Russia, Turkey or Serbia did the same.

It would be possible to take steps to encourage the British courts to shake off their *Ullah*-style reticence and to develop their own 'home-grown' interpretation of Convention rights. For example, section 2 of the HRA could be amended to give British courts express authority to depart from the Strasbourg case-law. However, the UK Supreme Court has already indicated in *Horncastle* that it is prepared not to follow Strasbourg in certain circumstances.¹¹⁴ Therefore, it is not very clear what added value could be gained from tampering with the existing language of s. 2 HRA. Furthermore, as long as the UK remains within the ECHR system of rights protection, it makes sense for the UK courts to take Strasbourg jurisprudence into account in interpreting rights, as individuals will still be able to bring a case to the ECtHR after they have exhausted all domestic remedies.

It is also difficult to identify how a 'home-grown' jurisprudence would differ in substance from what has emerged from the ECHR and HRA

113 Available at <http://www.coe.int/en/20120419-brighton-declaration/> (last accessed 21 May 2012).

114 Lady Hale, '*Argentorum Locutum*: Is Strasbourg or the Supreme Court Supreme?' (2012) 12(1) *Human Rights Law Review* 65-78.

case-law. Human rights are often interpreted differently by different courts in different countries. However, British concepts of liberty have cross-bred with the universal language of human rights, while UK law has been influenced by the Strasbourg jurisprudence for decades. As a result, it is unlikely that UK courts would interpret rights such as freedom of expression or freedom of privacy in a radically different way than they do at present under the HRA, unless they were to drastically restrict current rights protection or the categories of people who have access to them. Furthermore, the argument could be made that the ECHR jurisprudence has enriched British law and exposed it to healthy new influences: relying on home-grown standards alone runs the risk of encouraging domestic law to turn inwards upon itself and become stale, insular and outmoded.

In general, it would be difficult and arguably undesirable for a new Bill of Rights to cut off UK law from the influence of Strasbourg, or to de-incorporate Convention rights. As long as the UK remains a party to the ECHR, it makes sense for Convention rights to remain incorporated within UK law, and for the jurisprudence of the Strasbourg Court to serve as a significant reference point for UK courts in interpreting these rights. It would be possible for the UK to repeal the HRA, or amend it in a way that de-incorporated Convention rights and cut off domestic law from the influence of Strasbourg. However, this would undermine legal certainty, breach the terms of the Brighton Declaration agreed as recently as April 2012, and add new layers of complexity to UK human rights law.

4.4 A new Bill of Rights?

None of the above discussion precludes the introduction of a new Bill of Rights which would provide additional legal protection for human rights running in parallel or going beyond that on offer in respect of Convention rights. Most other European states have two parallel systems of rights protection in place: incorporated Convention rights are supplemented by domestic constitutional rights provisions, which often provide greater rights protection than that provided for under the ECHR. For example, the German Basic Law protects all the rights set out in the ECHR but also extends protection to other entitlements such as the right to freedom of movement (Article 11), the right to occupational freedom (Article 12) and an inviolable entitlement to respect for human dignity (Article 1). It would be entirely possible for a new UK Bill of Rights to create such a parallel or

supplementary list of rights and establish a judicial mechanism to enforce them, which could differ from that which exists under the HRA.

Various templates exist which provide possible guidance as to the contents of such an 'extended' Bill of Rights. In 2008, the Joint Committee on Human Rights proposed the introduction of such an extended Bill of Rights, which would complement and enhance the level of rights protection on offer from the HRA.¹¹⁵ In Northern Ireland, the Belfast Agreement provided that the Northern Irish Human Rights Commission (NIHRC) was to advise the UK government on the 'scope for defining in Westminster legislation, rights supplementary to those in the ECHR, to reflect the particular circumstances of Northern Ireland'. The NIHRC published its advice in 2008, wherein it recommended the enactment of a Northern Irish Bill of Rights which would provide legal protection for a wide range of rights recognised in international human rights law instruments, including socio-economic rights, children's rights and environmental rights.¹¹⁶ On a more modest note, the Attorney General, Dominic Grieve MP has proposed that a Bill of Rights could extend protection to the right to jury trial and other entitlements recognised as integral to the British tradition of civil liberties.¹¹⁷

Such an 'extended' Bill of Rights, or a 'Bill of Rights plus' as it is sometimes referred to, would add a new layer of rights protection to UK law which would complement the protection afforded by Convention rights. This would ensure greater protection for individuals against interference with their rights, and enable the courts to exercise more control over the executive. Over time, such an instrument could become the primary source of rights protection in UK law, as the Basic Law is in Germany. It also might be possible to frame its provisions using language that might have greater resonance with the public at large than the current wording of the HRA, although it is difficult to see how this could be achieved in practice: Bills of Rights must combine technical legal provisions with clear descriptions of the rights they contain, and the current wording of the HRA and ECHR is actually very similar to that of other human rights instruments such as the Canadian Charter of Fundamental Rights.

115 Joint Committee on Human Rights, Session 2007-08, 29th Report, *A Bill of Rights for the UK?*, HL 165-I/HC 150-I, 10 August 2008.

116 C. Harvey, 'Taking the Next Step? Achieving Another Bill of Rights' (2011) *European Human Rights Law Review* 24-42.

117 See D. Grieve M.P., 'Can the Bill of Rights do Better than the Human Rights Act?', Middle Temple Lecture, 30 November 2009, available at <http://www.middletemple.org.uk/Downloads/Grieve%20Bill%20of%20Rights%20lecture%2030%2011%2009.pdf> (last accessed 20 June 2012).

However, such an extended Bill of Rights would obviously extend the judicial role in protecting individual rights, rather than reining it in as many critics of the HRA would like. Furthermore, any new rights would constitute a blank slate, which judges might interpret in a variety of ways. Therefore, while an extended Bill of Rights might please rights enthusiasts, it may disappoint those who would like to see human rights law cut down to size or limits imposed on the authority of judges to protect rights.

It would also be possible for a Bill of Rights to 'repackage' the provisions of the HRA and re-incorporate Convention rights within a different legislative framework. For example, the requirement imposed by s. 3 HRA on the courts to interpret legislation in a rights-friendly manner could be diluted, or changes could be made to the remedial order mechanism by which amendments to legislation declared to be incompatible with Convention rights can currently be fast-tracked through Parliament. These adjustments could be presented as a 'fresh start', which might placate some critics of the HRA.

However, in practice, such a 're-packaging' would change little of substance. Courts would still be able to invalidate decisions of the executive, and individuals would still be able to go to Strasbourg if they could not get a remedy before the domestic courts. The authority of the courts may be limited to some degree, but the fundamentals of the current system would remain intact. Furthermore, given that the existing machinery of the HRA has worked relatively well so far, there is a danger that tampering with its functioning will produce some unanticipated and undesirable consequences. For example, placing additional constraints on the power of the courts to interpret legislation in a rights-friendly manner may limit their ability to remedy clear-cut violations of rights.

It would also be possible to introduce a purely declaratory (i.e. not legally binding) Bill of Rights and Responsibilities as proposed by the last Labour administration, which would leave the HRA untouched while setting out the rights and responsibilities of citizens.¹¹⁸ This could perhaps serve a useful symbolic function, even if there is also a risk that it might also be viewed as a vacuous piece of political sloganeering. However, beyond that, it is unclear what a declaratory instrument would achieve. Furthermore, the notion of 'responsibilities' brings certain conceptual

118 J. Straw MP, 'Towards a Bill of Rights and Responsibilities', speech made on 21 January 2008, available at <http://www.justice.gov.uk/news/sp210108a.htm>.

problems in its wake. The obligations of citizens towards the state are already integrated into the framework of human rights law.¹¹⁹ It also risks complicating the existing legal situation, even if they are only set out in a declaratory document.¹²⁰

In general, it is difficult to identify reforms which would clearly improve the existing state of UK human rights law. An 'expanded' Bill of Rights has much to commend it. It would encourage the growth of a uniquely 'British' rights jurisprudence alongside the ECHR standards, and extend rights protection into new terrain. However, it might be unpalatable to those who wish to limit the protection UK law gives to individual rights.

Three additional points need also to be made about the current Bill of Rights debate. First of all, if a new Bill of Rights is going to change how individual rights are protected through law, then it should be the subject of an extensive consultative process that provides adequate opportunity for vulnerable groups to participate.¹²¹ Secondly, the consequences for the devolved regions need to be taken into account, especially given that a separate Bill of Rights process has been underway in Northern Ireland for over a decade. Thirdly, the Bill of Rights debate has been characterised by copious political rhetoric rather than by sustained engagement with the details of legal rights protection in the UK: this is highly unsatisfactory for a mature democracy, given the serious constitutional issues at stake.

4.5 Overview

Good arguments exist against the introduction of a new Bill of Rights which limits existing rights protection by de-incorporating the Conven-

119 Convention rights incorporate considerations relating to the public interest into how they are defined and applied. For example, the text of Article 8(1) ECHR states that '[e]veryone has the right to respect for his private and family life, his home and his correspondence', while Article 8(2) places limits on the scope of the right to reflect the public interest: '[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others...'

120 For example, it might open the question of what are the responsibilities of private companies to the state, which could have an indirect impact when it comes to applying Convention rights 'horizontally' to private bodies.

121 L. Lazarus, 'The Composition of the UK Bill of Rights Commission', *UK Constitutional Law Blog*, 24 April 2011, <http://ukconstitutionallaw.org/2011/04/24/the-composition-of-the-uk-bill-of-rights-commission/> (last accessed 20 June 2012).

tion rights and/or cutting the link with the Strasbourg jurisprudence. A 'Bill of Rights plus' would expand the scope of rights protection in UK law, and has much to commend it. However, along with a 'repackaged Bill of Rights' and a 'symbolic' statement of rights and responsibilities, it would do little to meet many of the concerns expressed by critics of the HRA. In light of this analysis, and given the relatively smooth functioning of the HRA thus far, it remains open to question whether replacing the HRA with a Bill of Rights would improve UK human rights law for the better.

5 Conclusion

The relationship between politics and law is controversial, contested and difficult. Legal controls attempt to protect rights and encourage respect for the rule of law: in response, politicians often chafe at what they perceive as the erosion of their democratically-derived authority. Getting the balance right between respecting the decisions of elected politicians and protecting rights can be difficult. The UK's unwritten constitutional system gives primacy to representative government, on the basis that Parliament represents the voters. As a result, British judges have no power to strike down decisions of the legislature. However, the executive is required by law to respect rights and is answerable to courts if fails to do so. Administrative law, Convention jurisprudence and the HRA all impose certain legal constraints on the exercise of public power, which are intended to encourage the growth of a culture of justification and respect for individual rights.

The addition of these legal elements to the UK's political constitution has provoked a backlash against human rights in certain quarters. However, the current state of human rights law in the UK is both compatible with constitutional principles and strikes a decent balance between respecting the British tradition of parliamentary democracy and protecting individual rights. Attempting to recalibrate that balance may prove to be a difficult and thankless task. It may also be unnecessary, given that the current state of UK human rights law is both principled and workable as long as Parliament, the executive and the courts continue to engage constructively with one another.

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Human rights and the UK constitution finds that the current state of human rights law in the UK strikes a good balance between respect for democracy and the need to protect human rights. Attempting to recalibrate that balance may prove to be a difficult and thankless task.

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