Bringing Rights Back Home

Policy Exchange

Making human rights compatible with parliamentary democracy in the UK

Michael Pinto-Duschinsky

Foreword by The Rt Hon Lord Hoffmann, PC
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About the Author

Dr Michael Pinto-Duschinsky is president of the International Political Science Association's research committee on political finance and political corruption, member of the academic panel on party funding of the Committee on Standards in Public Life, and a director of the International Foundation for Electoral Systems. He a former research fellow of Merton College, Oxford; Pembroke College, Oxford; and Brunel University.

He has been a consultant to the Policy Planning Staff of the Foreign & Commonwealth Office, Cabinet Office, Home Office, the Department for International Development and the Committee on Standards in Public Life. He was an advisor to the Constitutional Reform Commission in Fiji, to the ill-fated Constitutional Reform Commission in Zimbabwe, to the Supreme Rada in Ukraine, as well as to the Civic Democratic Party in Czechoslovakia prior to the break-up of that country. He has been a consultant on human rights and political finance to the Council of Europe and on constitutional and political reforms to the United Nations, World Bank, OECD, European Union, Commonwealth Secretariat, Inter-American Development Bank, the United States Agency for International Development and the Canadian International Development Agency (on human rights and democratic development strategies), the National Endowment for Democracy and International IDEA. He was a founder governor of the Westminster Foundation for Democracy and a founder member of the steering committee of the World Movement for Democracy.

In the field of human rights, he was the honorary academic advisor to Claims for Jewish Slave Labour Compensation and was involved in activities to promote human rights and combat torture in Fiji, South Vietnam, South Africa, the southern states of the United States and the Middle East.

Blair Gibbs joined Policy Exchange in June 2010 as the Head of Crime and Justice policy. He edited the Policy Exchange report *Fitting the Crime: Reforming Community Sentences* (November 2010) and has been a regular commentator on current policing and criminal justice topics, writing numerous articles for the national print media. Prior to joining Policy Exchange he worked (2007-10) as Chief of Staff and policy advisor to the Policing and Criminal Justice Minister, Rt Hon Nick Herbert MP.

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Preface and Acknowledgements

Judges play a vital role in a good society. Their independence needs to be respected and protected so that they are able to ensure that the due process of law is not short-circuited. In particular, it falls to them to ensure that human rights and dignities are assured. No society is safe from torture and brutality on the part of public officials. In every country, there will be occasions when the judiciary must protect persons – citizens and non-citizens – against governmental actions.

However, the term "human rights" covers an extremely wide range of subjects from fundamental liberties to matters which fall under the category of "rights" only by ingenious legal pleading. The courts must not become so political that they consistently undermine the will of the people as expressed through a popularly elected and sovereign legislature on a wide range of matters with little relevance to basic human rights. It is dangerous for democracy to permit judges to become politicians in robes and to substitute their moral judgements for those of elected representatives on issues outside their essential but circumscribed field. When they are under attack, as they unfortunately have been during the past decade in the UK, human rights and accepted legal procedures need to be safeguarded by the courts. But we need to be careful that the concept of rights is not over-stretched. When the prohibition against torture in the European Convention on Human Rights is extended to include spanking, the idea of "human rights" has been transformed and trivialised. No matter what one's view is of child rearing norms, domestic discipline and torture are not meaningfully categorised together.

As demonstrated by the recent scandal of expenses claimed by members of both legislative chambers at Westminster, Parliament has not exactly covered itself with glory. Despite the justified, deep public resentment about the goings-on within the Palace of Westminster, the doctrine of Parliamentary sovereignty deserves continuing reverence. This cornerstone of our democracy has been undeservedly attacked, not least by elite circles of human rights experts, lawyers and employees of public interest lobbies.

The underlying objective of this study is to suggest ways in which the UK can have a robust system of protecting human rights while at the same time ensuring that judicial assertiveness does not undermine parliamentary democracy.

I am most grateful to Policy Exchange and in particular to Dean Godson for asking me to write on this important topic. In part, I was chosen because I am not a lawyer but a political scientist who has advised a number of governments on constitutional reform. Few academics dare to cross the disciplinary divide between students of law and of government for fear of exposing their ignorance. This project has forced me to learn a great deal that is new to me but is bread and butter to constitutional lawyers. One core problem about the profound changes that have been taking place in the structures of government in the United Kingdom is that key reforms have been discussed in a semi-private world of human rights lobbyists

and some specialist lawyers and legal academics. They have attracted relatively little notice or discussion from students of British government let alone from members of the general public. How many people realise that the UK effectively has no fewer than three separate "supreme" courts which sit respectively in London, Luxembourg and Strasbourg? As Kate Malleson has rightly written:

> *"[t]he need for greater visibility and public awareness of the increasingly powerful judiciary is acute."*[1]

I have a long-standing and active commitment to human rights, especially to the unending fight against torture and brutality. In my first foray in 1967 as a temporary reporter for The Times in war-torn South Vietnam, I encountered the use of torture during prisoner interrogations and wrote in the strongest terms about it only to see my work spiked – as I later found out – as a result of advice from the UK government of the time. During later wars in the Middle East, I took up the cause successively of Israeli soldiers captured by the Syrians and of Palestinians detainees of the Israeli Defence Forces. I participated in the non-violent civil rights campaigns in the United States and in South Africa.

However, I believe too in the centrality of the electors in any democracy and thus the sovereignty of the legislature which they elect and which, under the unjustly maligned first-past-the-post voting system for the Westminster Parliament, they are able to oust in a general election.

There is – or should be – a natural tension between judges and politicians. This tension has increased and is likely to increase further as a result of the Human Rights Act 1998 and of the growth in judicial power and assertiveness it has produced. Judges must protect the rights of unpopular individuals, minorities and foreigners; elected politicians represent the mass of the citizenry. Judges need to be able to reach their verdicts without fear of dismissal; in a democracy, politicians need to be ever aware of the possibility of being ousted by the voters. Yet, justice ultimately works best and human rights are most effectively assured by a system of democracy. Judicial independence is essential; but that should not mean that judges should be unaccountable. This study explores how best the competing demands of justice and democracy can be accommodated in the United Kingdom.

The text has been the subject of scrutiny, discussion and revision by a number of people at Policy Exchange. Neil O'Brien, the Director, redrafted the Executive Summary and Conclusions while James Norman wrote the information contained in some of the boxes and made a great number of valuable suggestions and amendments. I am very grateful to both of them, to Natalie Evans and Blair Gibbs, of Policy Exchange, and to the many people who have contributed their time, knowledge and advice in support of this work. They include leading lawyers and academics, officials of both Houses of Parliament, present and former civil servants, senior officials of the Council of Europe, and human rights activists. I thank also seven persons outside Policy Exchange who read and commented on the drafts. Responsibility for errors is mine alone.

Michael Pinto-Duschinsky

1 Kate Malleson (2007)."Judicial reform: the emergence of the third branch of government." In *Reinventing Britain: Constitutional Change under New Labour.* Edited by Andrew McDonald. Berkeley, California: University of California Press, page 150

Foreword

In the last few years, human rights have become, like health and safety, a byword for foolish decisions by courts and administrators. That things should have come to such a pass is sad, because human rights, which used to go under the name of freedom, are a noble idea, especially dear to the people of this country.

In 1794, Jeremy Bentham mocked the French revolutionaries for claiming that they had invented the Rights of Man. In France, he said, they were just a piece of rhetoric, contradicted by the daily practice of the government. We in England had the real thing. Perhaps we still do, but our self-esteem on this matter has been damaged by the events of the past ten years.

What has gone wrong? The brief list of human rights in the 1950 European Convention, which now forms part of our own law, is, in general terms, admirable. Who could object to the government having to respect the rights of its people not to be tortured or inhumanly treated, not to have their privacy invaded, to have a fair trial, or to be free to speak their minds and practice their religions. These freedoms are the badge of a civilized society. The devil is in the detail: in the interpretation by the courts of the high-minded generalities of the written instrument. It is these interpretations, which often appear to people to bear little relation to the values that they think really important in the way our country is governed. Since 9/11 there have been enough real and serious invasions of traditional English freedoms to make it tragic that the very concept of human rights is being trivialized by silly interpretations of grand ideas.

This study is a close and thoughtful examination of why this has happened. It starts with the decision, in 1950, to entrust the task of deciding whether our laws complied with the rights listed in the Convention to an international court in Strasbourg. International institutions which are set up by everyone become in practice answerable to no one, and courts have an age-old tendency to try to enlarge their jurisdictions. And so the Strasbourg Court has taken upon itself an extraordinary power to micromanage the legal systems of the member states of the Council of Europe (or at any rate those which pay attention to its decisions) culminating, for the moment, in its decision that the UK is not entitled to have a law that convicted prisoners lose, among other freedoms, the right to vote.

Since the Convention rights were incorporated into UK law by the Human Rights Act 1998, the UK courts have followed in the wake of Strasbourg, loyally giving effect to its rulings and the principles (where discernible) laid down in its jurisprudence. The result has been that UK judges have reached decisions, sometimes with regret and sometimes with enthusiasm, which would have astonished those who agreed to our accession to the Convention in 1950.

That is what has gone wrong. What is to be done about it? I think that the most admirable part of Mr Pinto-Duschinsky's study is his discussion of how we might extricate ourselves from the jurisdiction of the Strasbourg Court. On the

whole, the tendency has been to say that there is nothing to be done. We are stuck with the Convention and the European Court of Human Rights and unless we are willing to cast ourselves as a pariah state and get expelled from the European Union, we must accept the Court's jurisdiction. But Mr Pinto-Duschinsky shows that the situation is not so hopeless and there are means by which, with sufficient support from other states in the Council of Europe, we can repatriate our law of human rights. It is worth a try.

There are several things in this paper that I disagree with. For example, I disagree with the proposal for legislators being involved in the process of appointing Supreme Court judges. Experience in the United States shows that this is nothing more than an opportunity for senators and congressmen to show off to their constituents. But we owe Mr Pinto-Duschinsky a debt for his carefully researched and thoughtful study, which opens up for public discussion questions which deserve very serious consideration.

Leonard Hoffmann

Executive Summary

The Human Rights Act 1998

The passing of the Human Rights Act in 1998 has had far reaching ramifications for the British political system. It has put considerable power into the hands of judges and has affected the sovereignty of Parliament, which is the cornerstone of our democracy.

Whether the Act has improved human rights in the United Kingdom is unclear, since the same Labour governments of 1997-2010 which passed the Human Rights Act 1998 as well as an extensive set of constitutional reforms came under severe attack for their poor human rights record. Conservative politicians, as well as leading lawyers associated with the Labour Party, have deplored what Labour peeress Helena Kennedy QC has characterised as "inroads into our liberty". In her book *Just Law*, she complained about:

- Internment without trial for non-citizens suspected of terrorist links;
- Repeated efforts to reduce trial by jury for citizens on a whole range of issues;
- Retrial of those who have been acquitted, thus eroding the double jeopardy principle;
- Serious limits on access to justice through cuts to legal aid;
- Severe limitations on the right to silence;
- Subversion of new technology such as telecommunications and DNA for undeclared ends; and
- The proposed introduction of identity cards so that people can be monitored at all times.

The Human Rights Act 1998 (HRA) incorporated the European Convention on Human Rights (ECHR) into British law. The rights set out in this document have long been accepted. No major British political party challenges them. The UK was a founder signatory of the ECHR and became bound by it on 3 September 1953.[2] The ECHR includes the following rights:

Article 2: Right to life
Article 3: Prohibition of torture
Article 4: Prohibition of slavery and forced labour
Article 5: Right to liberty and security
Article 6: Right to a fair trial
Article 7: No punishment without law
Article 8: Right to respect for private and family life
Article 9: Freedom of thought, conscience and religion
Article 10: Freedom of expression
Article 11: Freedom of assembly and association
Article 12: Freedom to marry
Article 13: Right to an effective remedy
Article 14: Prohibition of discrimination

2 See: http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG

The European Convention on Human Rights and the British judiciary

In the beginning, the Convention had moral but not legal force in the UK. Following the Human Rights Act 1998, the provisions of the Convention were incorporated into British law. Moreover, they came to control and limit all other laws.

Firstly, British judges were given the power and obligation to interpret every law enacted by Parliament in a manner that made it consistent with the Convention, even if by so doing they needed to stretch and alter the meaning of legislation. In effect, the judges obtained the last say in lawmaking.

Secondly, if the judges considered that a law could not be made consistent with the Convention even by stretching and altering its meaning, the 1998 Act allowed them to issue a "declaration of incompatibility". This then obliged Parliament to reconsider and change the law to make it consistent with the Convention.

> "UK judges have been too attentive to lobby groups which have brought cases arguing for the expansion of the scope of the European Convention on Human Rights"

Lord Irvine of Lairg, the Lord Chancellor when the Act was passed, sought to assuage the concerns over damage to Parliamentary Sovereignty at the time that the Act was passed, telling the House of Lords that he expected such incidents to be "very rare". By October 2005, five years after the Act came into force, there had already been 17 such declarations. The latest statistics published by the Ministry of Justice show that by July 2010, that number had increased to 26 – an average of 2.5 declarations for every year of the Act's life.

Under Article 10.2 of the Human Rights Act, this amendment procedure may sacrifice the normal process of Parliamentary scrutiny of new legislation for the sake of speed: "If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendment to the legislation as he considers necessary to remove the incompatibility."

Such a "remedial order" takes the form of a statutory instrument. The minister either may lay a draft of the order before Parliament for 60 days, or make the order before laying it before Parliament, "thus taking the process," as Aileen Kavanagh explains, "totally outside the Parliamentary process which would normally be required for primary legislation." The "fast-track" procedure had only been used to remedy one of the 15 declarations of incompatibility down to 2008. However critics have argued that ministers should not have such an opportunity to bypass Parliament

The Human Rights Act gave the Convention an unparalleled influence over the whole field of British law in others ways too.[3] Under the terms of the Act, individuals were able to take cases relating to the ECHR to British courts, while also retaining the right to appeal their decisions to the European Court of Human Rights in Strasbourg. This widened the group of judges who could engage in "creative" interpretations of human rights law.

UK judges arguably have been too attentive to lobby groups which have brought cases arguing for the expansion of the scope of the European Convention on Human Rights so that there has been what critics have dubbed as "rights contagion". In 2009, a Supreme Court came into existence in London under the terms of the Constitutional Reform Act 2005. In its first year of operation, it has demonstrated its assertiveness.

3 For example, in any civil legal action in England and Wales, every claimant has to state at the very outset whether their case involves, or is likely to involve "any issues under the Human Rights Act 1998" (as stated on Claim Forms issued Under Civil Procedure Rules Part 7, see: http://www.hmcourts-service.gov.uk/courtfinder/forms/n1_0102.pdf). No other area of law touches every other in this way.

The European Convention on Human Rights and the European Court of Human Rights (Council of Europe: Strasbourg)

Following the European Convention on Human Rights, the Council of Europe – a body not to be confused with the European Union – created the European Court of Human Rights in Strasbourg to judge whether governmental actions in particular cases and whether laws enacted by national legislatures conformed to the Convention. In 1965, the UK government gave individuals a right to appeal to the European Court of Human Rights. Interestingly, there was no discussion of this decision in either the Cabinet or any cabinet committee.

The European Court of Human Rights assumed jurisdiction over the UK government and the UK courts in an incremental fashion. At first, the UK was not obliged to accept decisions of the Strasbourg Court, though in practice it invariably chose to do so. By now, the UK has accepted this jurisdiction and British governments are obliged to implement its rulings.

The Strasbourg Court has become an important institution. It not only embodies the will of the international community that the atrocities of the Nazi regime never again will be tolerated but also has a significant influence over the actions of governments of the 47 member countries of the Council of Europe.

The power of the European Court of Human Rights has created significant problems for the UK. First, the judges in Strasbourg have tended to stretch the original text of the European Convention on Human Rights to fit situations well outside the expectation of those who drafted and ratified it. It is open to question, for example, whether the Strasbourg Court was justified in challenging long-standing UK law concerning the voting rights of prisoners, given that Parliament had expressed a settled opinion on the issue.

Second, decisions of the Court are open to criticism on the grounds that they do not take sufficient account of the cultural and other differences between different countries. In cases involving a conflict between privacy on the one hand and freedom of expression (including press freedom) on the other hand, the interpretation of Convention rights arguably ought to be left to national courts.

Third, the operation of the Court is open to severe criticism:

a) The fact that citizens from each of the 47 member countries have a direct right of appeal to the Court means that it is heavily overloaded with cases and that judgements are greatly delayed. By February 2010, there was a backlog of 120,000 cases. There was a reported average of six years' delay in hearing cases and, without reform, it would take 46 years to deal with all of them.
b) The competence of some of the judges is severely in doubt (one was unaware of the concept of a legal "precedent").
c) Some of them represent undemocratic countries with poor legal traditions. Nine judges come from countries which are categorised in the annual Freedom House rankings either as "not free" (Azerbaijan and Russia) or only "partly free" (such as Armenia and Moldova).
d) The procedure for appointing judges is open to criticism since it permits politicians in some countries to nominate cronies.
e) The fact that each member country is permitted to nominate a judge means that micro-states such as Monaco, Andorra, San Marino and Liechtenstein have the same entitlement as France, Germany, Italy and the UK.[4]

4 See Lord Hoffmann (2009), "The Universality of Human Rights." Judicial Studies Board Annual Lecture 2009, London: Judicial Studies Board, page 23

Fourth, it is inherently difficult for any court whose judges come from 47 different countries to be democratically accountable to any of those countries.

The debate about reform in Britain

Between the status quo, and the complete disavowal of the European Convention, is there a meaningful middle way?

In 2007 the Labour government began to consult on building on the Human Rights Act to create a Bill of Rights. In opposition the Conservative Party also called for a British Bill of Rights. There are various models for such a document, which would have different implications.

The new government is to investigate the various options. The Coalition agreement states that: "We will establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties."

Such a Bill of Rights could take the form of a new text in *addition* to the Human Rights Act, which would guide the courts in interpreting the Convention. It would exploit the national "margin of appreciation" in how the rights were applied in a domestic context.

However, this would clearly not address some of the concerns set out above. If the UK remained within the jurisdiction of the European Court of Human Rights, aggrieved parties could still take their cases to the Strasbourg Court for determination, and problems with its operation and jurisprudence would remain.

A quite different approach to reform was suggested in a lecture by Lord Hoffman in March 2009. In his lecture, "The Universality of Human Rights" he argued that the problem was not the text of the Convention, but the role of the Court.

> *"In practice, the Court has not taken the doctrine of the margin of appreciation nearly far enough. It has been unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States. It considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe.*
>
> *I have no difficulty about the text of the European Convention or its adoption as part of United Kingdom law in the Human Rights Act 1998. It was largely drafted in London, intended to reflect common law understandings of human rights [...] I think it would be valuable for the Council of Europe to continue to perform the functions originally envisaged in 1950, that is, drawing attention to violations of human rights in Member States and providing a forum in which they can be discussed.*
>
> *The problem is the Court; and the right of individual petition, which enables the Court to intervene in the details and nuances of the domestic laws of Member States.*
>
> *We remain an independent nation with its own legal system, evolved over centuries of constitutional struggle and pragmatic change. I do not suggest belief that the United Kingdom's legal system is perfect but I do argue that detailed decisions about how it could be improved should be made in London, either by our democratic institutions or by judicial bodies which, like the Supreme Court of the United States, are integral with our own society and respected as such."*

In response the then Shadow Attorney General Dominic Grieve wrote: "I was delighted to read Lord Hoffmann's critique ... Ever since the Human Rights Act, the government has ducked all debate on any problems that have arisen with its operation, and refused to consider whether there could be better ways to protect our freedoms."

Recommendations

The main recommendations in the concluding chapter are:

1. British governments, in particular the Home Office, need to take great care to respect core human rights, thereby reducing the scope for clashes with the judiciary such as those which developed in recent years. This admittedly poses practical problems especially because of the threats of terrorist violence.
2. The system of judicial appointments for members of the UK Supreme Court should be re-examined. Since, as will be shown, judges now have significant powers over what essentially are political matters, the views and competence of new nominees should be scrutinised by Parliament, before they take up office. Arguably, Parliament should vote to approve the appointment of nominees to the Supreme Court.[5]
3. The UK should open time-limited negotiations with the Council of Europe to make substantial reforms to the way that the Court is run and its caseload managed. Such reforms would include new procedures to assure the judicial competence of new judges and the greater efficiency of the Court. The negotiations would seek to find agreed ways to ensure that the judges at Strasbourg give greater discretion to the domestic judges of each member state.
4. If such negotiations are unsuccessful, the UK should consider withdrawing from the jurisdiction of the European Court of Human Rights in Strasbourg and establishing the Supreme Court in London as the final appellate court for human rights law. In that case, the UK would continue to incorporate the European Convention on Human Rights into its domestic law.

Contrary to what has been stated by some opponents of such a reform, it is our conclusion that there is strong evidence to suggest that the UK's membership of the European Union and of the Council of Europe does not require continued adherence to the judgments of the European Court of Human Rights should the UK opt for such a withdrawal.

Over the last three decades, several Commonwealth countries, including Australia and New Zealand, have moved to create their own final courts of appeal. In doing so they have dispensed with the jurisprudence of the Appellate Committee of the Privy Council, which is made up of UK Supreme Court judges. Entirely understandably, they have decided that they would like final decision on key questions of law to be made by judges in their own country, as this position will best reflect the needs of the society they live in.

5 It will be no simple matter to reverse the trend towards judicial assertiveness in the UK. British judges honour legal precedent and are unlikely to abandon the rulings of recent decades even if the Human Rights Act 1998 is repealed. As legal scholars have made clear, judges used principles of common law to increase their powers to challenge administrative decisions of public authorities ("judicial review") well before the Human Rights Act. Giving Parliament a role in the appointment of our top judges will provide a check to the power of the UK judiciary over political questions without challenging the freedom of judges to make decisions without fear or favour.

1
Introduction

The Human Rights Act 1998, a relatively obscure and exceptionally complex piece of legislation, has had far-reaching effects. Whether it has improved human rights in the United Kingdom is a matter of controversy. Its real importance has been to undermine the time-honoured guarantees provided by the British political system while providing business for lawyers and making the judiciary into a political power.

It is a paradox that the same Labour governments of 1997, 2001 and 2005 which passed the Human Rights Act 1998 as well as an unparalleled set of constitutional reforms have come under severe attack for their poor human rights records. The criticisms have come from its political supporters and opponents alike.

In 2004, the Labour peeress Helena Kennedy QC wrote both in sorrow and in anger in her book *Just Law* that "a quiet and relentless war is being waged on our rights."[6] In 2009, Dominic Raab, chief of staff to the Conservative Shadow Secretary of State for Justice wrote a book titled *The Assault on Liberty: What Went Wrong with Rights*, which bore many similarities to Kennedy's work. In the same year, the former editor of the *New Statesman*, John Kampfner wrote *Freedom for Sale*, in which he quoted the words of a French journalist writing from the UK:

> *"Here you are actively encouraged to denounce your neighbour for not paying road tax or putting a bin out early … There are councils that spy on their taxpayers as if they were common criminals … the Home Office proposes to set up a database holding information on every telephone call made, every email sent and every website visited by every single British citizen."*

In 2009, David Cameron complained about the Labour government's

> *"legislation that is at the same time authoritarian and ineffective legislation that fails to protect our security but which in the process undermines our civil liberties. . . . We were sceptical about some of the new powers for government in the Regulation of Investigatory Powers Act. We opposed the Government's undermining of the right to trial by jury and some of the more draconian powers proposed under the Civil Contingencies Bill. And we strongly oppose Labour's plans for ID cards. This is a measure that fails on every count. It would impose a burden on citizens and intrude upon their privacy. Yet it would do little to protect them from harm."*[7]

Shadow Justice Minister, Dominic Grieve QC attacked Prime Minister Gordon Brown in *The Times* on the grounds that he:

6 Helena Kennedy Q.C. (2004). *Just Law: The Changing face of Justice – and Why It Matters to Us All.* London: Vintage Books, page 3

7 David Cameron (2006). "Balancing freedom and security – a modern British Bill of rights." London: Centre for Policy Studies. http://www.cps.org.uk/cps_catalog/Catalogue_Balancing_freedom_and_security_a_modern_British_Bill_of_Rights_635.html

> *"Pressed to extend detention without charges to 42 days, inflicted a fresh attack on our jury system and still clings to the remnants of a flawed ID cards scheme … Surveillance introduced to crack Al Qaeda now monitors newspaper boys, dog fouling and school catchment areas. You can be fined on the spot for dropping a crisp, or because your parking permit is upside down."*[8]

In *Just Law*, Kennedy set out some of the "inroads into our liberty". Her list had much in common with those of the Conservatives. They included:

- Internment without trial for non-citizens suspected of terrorist links;
- Repeated efforts to reduce trial by jury for citizens on a whole range of issues;
- Retrial of those who have been acquitted, thus eroding the double jeopardy principle;
- Serious limits on access to justice through cuts to legal aid;
- Severe limitations on the right to silence;
- Subversion of new technology such as telecommunications and DNA for undeclared ends; and
- The proposed introduction of identity cards so that people can be monitored at all times.

It may be argued that the problems would have been worse had it not been for the Human Rights Act 1998 as discussed in Aileen Kavanagh's 2009 academic study *Constitutional Review under the UK Human Rights Act*. However, this "what if?" question is inherently hard to answer. The experience of the first decade of the Human Rights Act should raise tough questions about whether such legislation provides the only or best way to safeguard individual citizens or non-citizens in the United Kingdom.

If it has achieved few of its stated objectives, the 1998 Act has had side effects. These have proved far more significant and undesirable. According to Sir William Wade, the passage of the Act "must certainly be regarded as one of our great constitutional milestones".[9] In his important book, *The New British Constitution*, Vernon Bogdanor justifiably calls the Human Rights Act 1998 the "keystone" of an entirely new constitutional order.[10]

Whereas he welcomes this development and recommends a further erosion of British constitutional traditions, we are more sceptical. Though we accept some of the detailed criticisms made by Bogdanor and others of the traditional British constitutional order, we believe there is a profound danger that ill-considered reforms have done and, unless they are challenged, will do great harm to British political institutions. They threaten democracy itself. The core debate should not be about whether human rights are desirable but about how best they can be promoted and safeguarded. There are two main options, though they are likely to be combined in different proportions in any given political system.

On the one hand, there is the judicial option. The legal approach to rights is to draw up a code setting out the rights it is proposed to protect. Inevitably those rights must be expressed in very general terms, and as a result conflicts between different rights will emerge (between freedom of expression and the right to privacy or family life, for example). Almost inevitably, a system of law based on a bill of rights will require judges to make decisions on the meaning of the broad terms contained in such documents. This, in turn, will put powers which are essentially political into the hands of judges.

8 Dominic Grieve "Greater liberty and less intrusion 'will give power back to the people'; Stop and search, ID cards, over-zealous surveillance – it is time to check the creeping might of the State." *The Times*, 9 May 2009. Concerns about the encroachments on traditional British guarantees of due process of the law have been expressed forcefully by the defeated candidate for the Conservative Party leadership, David Davis, who resigned his seat in the House of Commons and in the shadow cabinet to fight a by-election on the issue.

9 Aileen Kavanagh (2009). *Constitutional Review under the UK Human Rights Act*. Cambridge: Cambridge University Press, page 1

10 Vernon Bogdanor (2009). *The New British Constitution.* Oxford: Hart, page 62

On the other hand, there is the democratic option. Provided that elections permit the voters to dismiss a tyrannical or unpopular government, there will be a brake on governmental power. Throwing the rascals out through the ballot box is arguably a much more effective way of pressuring our rulers than taking cases through the law courts. Of course, elections are crude, periodical devices. This does not mean, as Rousseau wrongly suggested, that the populace is powerless between elections. The threat of the removal van at the back door of Number 10 Downing Street on the day after the poll works wonders. Richard Bellamy, the director of the School of Public Policy at University College, London, has set out a case for the democratic option in his 2007 book *Political Constitutionalism: A Republican Defence of the Constitutionalism of Democracy.*[11]

This study will argue that it is unwise to abandon or fatally weaken the democratic option in favour of the legal one. The danger of this occurring is far greater than generally realised.

In parallel with the choice between democracy-based and judge-based institutions, there is the matter of deciding between the contrasting political traditions of the United Kingdom and of Western Europe. A majority of the British electorate is suspicious of the growing stranglehold of supra-national institutions but only a minority wishes to take the nuclear option of a British withdrawal from the European Union. This report will argue that it is possible for the UK both to pursue its own methods of securing liberties and rights while at the same time adhering to the international treaties to which the country is now a party.

At the time of publication, the new Liberal-Conservative Coalition government, which emerged out of the 2010 General Election, is on record as stating that it will:

> *"establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties. We will seek to promote a better understanding of the true scope of these obligations and liberties."*[12]

This report examines the background to the UK's current position as a signatory to the European Convention on Human Rights (ECHR), which in turn was incorporated into English law by the Human Rights Act 1998. It is intended to be both an intellectual and practical document and will make the following arguments.

First, some of the predominant ideas expressed in recent writings on the British Constitution and on the role of the judiciary need to be disputed. Despite the understandable dissatisfaction concerning actions by British governments since 1997, it is doubtful whether overweening executive power and the greatly over-quoted phenomenon of "elective dictatorship" are the root problems. Power may – with limits – safely be entrusted to a British government provided that there is a robust political mechanism for throwing it out if it performs badly or dishonestly or if it abuses its power.

Second, the rule of law is an essential part of a democratic regime. This does not mean, however, that judges should possess wide-ranging, unaccountable

11 See also Michael Pinto-Duschinsky (2010). "Let's Keep Throwing the Rascals Out." Standpoint, September www.standpointmag.co.uk/features-sept-10-lets-keep-throwing-the-rascals-out-pinto-duschinsky-alternative-vote

12 *The Coalition: Our Programme for Government*, page 11

political powers. Whereas the judiciary has in some countries at times played the hero, it has not always done this. There are two key challenges in this area that will be discussed:

i) Judges should be sufficiently independent to enable them to make decisions without fear or favour, but they must not be totally unaccountable; and
ii) Judges should have a key role in certain areas of public life (such as the protection of individuals against torture and similar iniquities); however, their role should not extend too far into the political arena. There is a temptation to attach the language of "human rights" to economic and social areas and stretch the scope of the word "rights" beyond reasonable limits.

Third, the core objection to the Human Rights Act is not the statute itself but the fact that it makes British law further subservient to an expansionist, virtually unaccountable, supra-national bureaucracy in Strasbourg. This bureaucracy effectively runs a court – the European Court of Human Rights – which represents worthy ideals but which is not fit for purpose.

Fourth, fundamental changes to a country's constitution should not be introduced without proper public discussion, understanding and consent. A deplorable feature of recent reforms has been their obscurity and the failure of those enacting them to secure the electorate's informed consent. As a result, there was little public discussion or awareness of the rapid growth in judicial power, triggered by the enactment of the Human Rights Act, before it occurred.

> "This study will argue that it is unwise to abandon or fatally weaken the democratic option in favour of the legal one. The danger of this occurring is far greater than generally realised"

Fifth, whenever vital political matters are decided in courts of law, the power of pressure groups will almost inevitably burgeon. Individuals lack the legal knowledge or the resources to fight for their legal rights. In practice, only pressure groups will be able to find the money and to provide the necessary legal expertise. There have been landmark cases in which the poor and disadvantaged have prevailed because an organised group has taken up their cause in the courts. But the work of pro-rights pressure groups is not always benign. Nor are such groups necessarily as non-political as they make themselves out to be. As the respected legal commentator, Joshua Rozenberg, has pointed out, actual and threatened court action sometimes is part of a process aptly called "lawfare" – the conduct of war through legal means.[13]

Finally, jurisdiction is shared between three supreme courts. Human rights law is a peculiar and unsatisfactory position, because the UK now has a Supreme Court based in London, which is not as the name suggests "supreme" in all matters. It must follow decisions of the European Court of Justice (ECJ) in Luxembourg concerning relevant European Union matters. When it comes to matters relating to the European Convention on Human Rights (ECHR), it normally is bound by the decisions of another court – the European Court of Human Rights in Strasbourg.[14]

13 Joshua Rozenberg (2009). "Modern lawfare." *Standpoint*, December www.standpointmag.co.uk/node/2425/full

14 Furthermore, since the passing of the Lisbon Treaty, the European Court of Justice in Luxembourg has a role in interpreting the provisions in a separate document, the Charter of Fundamental Rights. The UK is one of three member countries of the European Union to have negotiated an opt-out from this Charter. However, the practical meaning of this opt out is itself complex and open to argument among constitutional lawyers.

2
The Consequences of a Changing Constitution: When Voters and Judges Collide

While the general public sleeps and even the educated elite remains largely ignorant, there has been a recent glut of literature on constitutional change in the UK. For the sake of simplicity, I will focus on two significant books published in 2009. They are Bogdanor's *The New British Constitution* and Kavanagh's *Constitutional Review under the UK Human Rights Act*.

Both these books welcome the constitutional revolution. The one is a masterly work by a distinguished political scientist with whose approach I differ, the other by a prominent constitutional lawyer. I agree that there have been fundamentally important changes but do not agree that they either are desirable or that further movement in the recent direction of change is inevitable.

The starting point for this report is the view that the United Kingdom has a valuable and relatively rare political tradition unbroken by foreign occupation, civil war, totalitarian rule or revolution. (Admittedly, the conflict in Northern Ireland has had some of the features of civil war but thankfully on a lesser scale than in countries such as Spain.) Because of this tradition, we can afford to have a truly democratic government. We mean by this a government, no matter the colour, which the British electorate have good reason to be confident can be (and often is) removed as a direct result of an election. Because of this, we can afford to have a powerful executive.

The consequence of this is that assurances of human dignity and well being emanating from a supra-national institution, including those involved in promoting human rights, carry significantly less force than in countries that do not enjoy the same tradition of democratic continuity. Criticism of these bodies does not stem from any nationalistic motives but from the realisation that they are remote, unaccountable and, therefore, comparatively inefficient.

Bogdanor prefers a model that has its roots in the traditions of the European continent and in the determination that the governmental machinery of different European countries becomes – step by step – so intertwined that there can never again be a war between Germany and its neighbours. Under this model, the role of elections is different and far less important. Elections do not have the primary function of dismissing governments. They merely distribute a share of power between different political parties and between different ethnic groups. Coalition governments are and should be the norm. With the development of the European

Union, such coalitions should and will (according to this approach) consist of cross-national groupings.

This model (named the "consociational" model of democracy)[15] has a further feature derived from the fragility of democratic government and the terrible tyrannies of twentieth century Europe. Since individuals had been unprotected by the mechanism of elections, statesmen searched after the defeat of Nazism for additional guarantees. The peoples of the United Nations and, in particular, of Western Europe needed, so many thought in the late 1940s, a framework of legal rights to protect them against irresponsible governmental actions or from malign regimes. The function of rights-based legal institutions was to constrain untrustworthy governments.

The problem with the Continental "consociational" or "coalition" model of governance is that the main players are a set of political elites which accommodate each other and share power among them. Elections have much reduced roles in the system since political parties form what Richard Katz and Peter Mair have justifiably described as a cartel. Moreover, some of the most important and basic choices are effectively denied to the voters since they are constrained by international treaties, barely accountable international bureaucracies and remote legal mechanisms. The claim that forces beyond the control of British electors have made further constitutional changes virtually inevitable is itself an indication of the anti-democratic nature of the arguments for reform, for democracy is about popular choices.

Constitutional change and judicial activism

Bogdanor makes three initial points about recent developments in the governance of Britain. These are undisputed. He shows that: (1) there has been a series of major changes in the rules governing British politics, (2) that the Human Rights Act 1998 has been the keystone of a new constitution and (3) that the power of judges in British politics has increased rapidly and significantly.

The Human Rights Act 1998 did not start the trend towards judicial activism but accelerated it. Judges have for at least the last 40 years used their powers under common law to back challenges by individuals and groups of citizens against unreasonable actions and administrative decisions by public authorities – known as judicial review. Some observers suggest that the judges would in any case have used common law principles to flex their muscles even had there been no Human Rights Act. It was back in 1972 that Lord Reid declared that it was a "fairy tale" to suppose that judges merely implemented the law but did not make it.

Moreover, it was not the Human Rights Act 1998 that first made the United Kingdom subject to the rulings of the European Court of Human Rights in Strasbourg. This in fact happened when the Labour government of Harold Wilson accepted in December 1965 the right of individual petition to the European Court of Human Rights for an initial period of three years together with compulsory jurisdiction of the Strasbourg Court. The decision was not considered of sufficient importance to merit reference to the Cabinet. Yet were Parliament to repeal the Human Rights Act 1998, there would still be an individual right of petition to Strasbourg and British judges would be obliged to defer to decisions taken in Strasbourg on matters falling under the European Convention on Human Rights.

15 See Arend Lijphart (1999). *Patterns of Democracy: Government Forms and Performance in thirty-Six Countries.* New Haven: Yale University Press

Be that as it may, there has by common agreement been a marked increase in the daring of judges since 1998. In particular, a few of them have cast doubt on the doctrine of Parliamentary sovereignty.

One of the most detailed and considered analyses of the judicial response to the Human Rights Act 1998 (HRA) is Aileen Kavanagh's study *Constitutional Review under the Human Rights Act*. She comments about the initial academic discussion of the Act that:

> *"Despite fervent disagreement about the merits of the Act, both admirers and detractors alike seemed to agree on its immense constitutional significance. They were all agreed that the HRA transferred extensive power from the legislature and executive to the judiciary, which in turn, placed constraints on public institutions, including the legislature itself."*[16]

According to Keith Ewing, a professor of public law at King's College, London and an adviser to the Labour Party and various trade unions, the Act represented:

> *"An unprecedented transfer of political power from the executive and legislature to the judiciary, and a fundamental restructuring of our 'political constitution' … it is unquestionably the most significant formal redistribution of political power in this country since 1911, and perhaps since 1688."*[17]

Kavanagh herself agrees that "the HRA gives judges strong powers of constitutional review",[18] though she prefers to view the new situation as one of "partnership" between Parliament and the courts rather than of judicial supremacy.[19] However, even this compromise view represents a huge change in the balance of constitutional power in the United Kingdom.

Opinions expressed occasionally by leading judges since the passage of the Human Rights Act have added to concerns about the increasingly political role of judges. In 2005, in a case about the validity of the Hunting Act 2004, Lord Steyn observed:

> *"The classic account of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. … In exceptional circumstances, involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is [a] constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish."*[20]

In a lecture, in 2005, he also noted that:

> *"In the development of our country towards becoming a true constitutional state, the coming into force of the Human Rights Act 1998 … was a landmark … By the Human Rights Act Parliament transformed our country into a rights based democracy. By the 1998 Act Parliament made the judiciary the guardians of the ethical values of our bill of rights".*[21]

The practical results of cases where British judges have found UK laws to be incompatible with the European Convention on Human Rights (incorporated into British law by the Human Rights Act 1998) may not immediately grab the public's imagination. But this is not the point. It is in the nature of court decisions that landmark principles – principles which are likely to have a major impact in the

16 *Aileen Kavanagh (2009). Constitutional Review under the UK Human Rights Act*. Cambridge: Cambridge University Press, page 2

17 Ibid, page 1

18 Ibid, page 404

19 Ibid, page 407

20 R (Jackson) v Attorney General, paragraph 102. Cited in Lord Bingham of Cornhill (2010). *The Rule of Law*. London: Allen Lane, page 166

21 Vernon Bogdanor (2009). *The New British Constitution*. Oxford: Hart, page 64

future – may be established in judgements bearing on cases of minor importance. In the United States, the basic principle of judicial review of the constitutionality of legislation was established by a case of the greatest obscurity concerning the validity of the appointment of a minor member of the judiciary by an outgoing US president (*Marbury v Madison*, 1803).

Whether or not judges have so far used with restraint their powers of review of legislation granted under the Human Rights Act 1998 is not the only or most important issue. Critics of the HRA argue that it has created a new structure of authority in the United Kingdom, the damaging effects of which will emerge over time. In fact, many observers have been struck by the speed and vigour with which the UK judiciary has used its new powers. According to one distinguished professor of human rights law interviewed for this study, judges have taken to the Human Rights Act 1998 like ducks to water. He predicts that judicial activism will continue even if Parliament were to repeal the 1998 Act. In similar fashion, Bogdanor stresses the speed with which the Human Rights Act has led to conflict between judges and the government in Britain. He points out that both the US Supreme Court and the French Conseil Constitutionnel were slower in overturning laws.[22]

The assault on Parliamentary sovereignty

The term "Parliamentary sovereignty" refers technically to the right of Parliament to make and unmake laws without the restraint of an entrenched "higher law" as set out in a written constitution. It is not, as some might imagine, an ancient constitutional nicety, but the underpinning of our system of government, because if all law emanates from Parliament and all power ultimately resides in it, then the line of accountability can easily be traced by the electorate back to those who take the decisions that govern their lives.

"Parliament" means the House of Commons, the House of Lords and the Monarch. In practice, the executive – the government of the day – has the determining voice. But it retains power only if it has the approval of the House of Commons. In the modern democratic age of universal suffrage, it is the voters who decide the composition of the House of Commons in a general election.

"Parliamentary sovereignty" in a representative democracy thus amounts to the sovereignty of the people. It follows that any attack on or limitation of Parliamentary sovereignty amounts to an attack on the sovereignty of the people.

According to Bogdanor, there were several solid, justifiable reasons why the time-honoured British system of Parliamentary sovereignty collapsed.

First, only the Good Friday Agreement of 1998 could end Northern Ireland's 30-year civil war. This involved power sharing between Protestants and Catholics, and mandated that places in the Northern Irish legislature were to be allocated according to a system of proportional representation, and that the agreement was to be subject to international guarantees and rights were to be assured by the European Convention on Human Rights. In other words, Britain was obliged to borrow the favoured model of Western European countries such as Holland, thereby acknowledging the superiority of this form of constitution and constraining the room for manoeuvre of an administration elected by a plurality of electors. Indeed, it was back in 1973 when a Conservative government under Edward Heath first introduced power sharing and proportional representation in ethnically divided Ulster.

22 Vernon Bogdanor (2009). *The New British Constitution*. Oxford: Hart, pages 83-84

Why the Human Rights Act has weakened Parliamentary sovereignty

The Human Rights Act 1998 incorporated the European Convention of Human Rights into United Kingdom law. It constituted a restriction on democracy, albeit in a complex, indirect form. The Act required British judges to interpret legislation enacted by Parliament in a manner consistent with the Convention. This led sometimes to a forced interpretation of British statutes and of meanings of words contained in them that were far from obvious in an attempt to make them compliant with the Convention. It obliged British judges to accept the interpretations of the very broad terms of the European Convention on Human Rights before their own interpretations. It obliged them to place these interpretations from Strasbourg before the meaning of the legislation passed at Westminster.

If creative reinterpretation of legislation passed by the UK Parliament proved impossible, the 1998 Act enabled the judges to declare that a statute was incompatible with the Convention and to invite the government to enact a fast-track revision of the law to eliminate this incompatibility.

Such "declarations of incompatibility" have been relatively infrequent, although certainly not as few as were envisaged when the Human Rights Act was enacted. Lord Irvine of Lairg, the Lord Chancellor when the Act was passed, sought to assuage the concerns over damage to Parliamentary sovereignty at the time that the Act was passed, telling the House of Lords that he expected such incidents to be "very rare".[23] By October 2005, five years after the Act came into force; there had already been 17 such declarations. The latest statistics published by the Ministry of Justice show that by July 2010, that number had increased to 26 – an average of 2.5 declarations for every year of the Act's life.[24]

However, the use of declarations of incompatibility is important in ensuring that key legislative questions are decided primarily by Parliament. Some legal authorities regard the requirement under the Act that judges interpret laws in a manner that makes them compatible with the Convention as more damaging to Parliamentary sovereignty than declarations of incompatibility. A declaration of incompatibility by a court at least puts a conflict between a particular statute and the Human Rights Act back into the hands of Parliament. By contrast, a forced interpretation of a statute by UK judges effectively subverts Parliamentary sovereignty by twisting the law to meet the requirements of the Act.

Second, Britain's decision to join the European Union, (then known as the EEC), made UK law subsidiary to EU law. Bogdanor undoubtedly is correct in stressing how profoundly this decision subsequently affected the workings of the British constitution. However, he claims with less justification that this ought not to have come as a surprise. Though he admits that the superiority of European law over British law "has never really been accepted by the general public", he asserts there are no grounds for saying that it had been deceived about the consequences when the House of Commons voted narrowly to join the EEC in 1972 or when it voted for membership in the referendum of 1975. His justification for this argument is that the Treaty of Rome had included the words "an ever closer union among the peoples of Europe" and that a UK White Paper of 1971 reported that the original six signatory countries of the treaty rejected the concept "that European unity should be limited to the formation of a free trade area".[25]

23 *Lords Hansard:* HL Deb 03 November 1997, vol 582, cc1227-312 "The design of the Bill is to give the courts as much space as possible to protect human rights, short of a power to set aside or ignore Acts of Parliament. In the very rare cases where the higher courts will find it impossible to read and give effect to any statute in a way which is compatible with convention rights, they will be able to make a declaration of incompatibility. Then it is for Parliament to decide whether there should be remedial legislation. Parliament may, not must, and generally will, legislate ... But the remedial action will not retrospectively make unlawful an act which was a lawful act—lawful since sanctioned by statute. This is the logic of the design of the Bill. It maximises the protection of human rights without trespassing on parliamentary sovereignty."

24 Ministry of Justice, *Responding to Human Rights Judgments*, (July 2010), page 42

25 Ibid, page 29

In fact, it is extremely doubtful whether, as he states, the 1975 referendum constituted an act of informed consent for the whole series of treaties which progressively were to increase the powers of what became the European Union. Other than perhaps a tiny number of constitutional scholars, who could reasonably claim to have expected 35 years ago that the EEC would grow into a powerful union with its own legal personality, constitution and binding supra-national decision making bodies?

Devolution was a third major change. The establishment of a Parliament in Edinburgh, along with national assemblies in Belfast and Cardiff have removed a series of competencies from ministers based in and accountable to Westminster.

Finally, the inconclusive result of the general election of February 1974 marked the end of the two-party dominance of the post World War Two political system. As the third party (successively the Liberals, the Liberal-Social Democrat Alliance and the Liberal Democrats) increased its percentage of the vote, and as nationalist parties also grew, the fairness of the first-past-the-post electoral system came into serious question. This process culminated in the 2010 general election, where the lack of an overall majority led the Conservatives and Liberal Democrats to form the Coalition government. Moreover, different systems of proportional representation have been introduced for elections to the European Parliament, the devolved assemblies, and the Greater London Authority. Only elections to the House of Commons and to local councils have retained the traditional first-past-the-post electoral rules. Bogdanor's interpretation of the constitutional developments since the 1970s is open to question. While there is no denying the gradual but remorseless impact of membership of the European Union on British institutions, the importance of the other factors cited is debateable. Though power sharing in Northern Ireland may have provided a way out of bloodshed, it was not an ideal system deserving to be copied in other parts of the United Kingdom. In effect, the political wing of a terrorist movement was appeased by the offer of a virtually assured governmental role. Elections were to play a greatly diminished role in the politics of Northern Ireland. Thus, there are few lessons to be drawn from Northern Irish institutions for the rest of the United Kingdom. The attack on the doctrine of Parliamentary sovereignty, which has been at the core of the attack on the traditional British constitution, has usually been based on accounts of the alleged dominance of the executive which have been overblown to the point of silliness. Excessive executive power has been falsely presented as a cancer in the body politic requiring urgent surgery.

A visitor from outer space who was obliged to judge the situation in the UK by looking at the statements of the critics and not at political realities would find it impossible to distinguish between the UK and the Soviet Union or Hitler's Germany. Indeed, if the space alien were to base a judgement about the welfare of individuals solely on the presence or absence of codes of rights in a written constitution, he or she might find it difficult to tell whether the UK or the old Soviet Union was a freer nation. Indeed, the space alien might even conclude that the citizens of Stalin's Russia were far more fortunate than those of the United Kingdom. For the constitution introduced in the Soviet Union in 1936, when the purges were about to reach their greatest intensity, contained no shortage of rights. Apart from universal suffrage, Soviet citizens gained the right to work together with rights to housing, education, health care, rest and leisure and cultural benefits.

The same person from space visiting the United States between the 1860s and 1940s would have to conclude on the basis of the Fourteenth Amendment to the Constitution of the United States that blacks enjoyed equal treatment because it was to that the amendment entitled them. Lord Lester of Herne Hill, the most persistent and influential of the British lawyers who have pressed for the incorporation of the European Convention of Human Rights into British law, has written of the UK Parliament's

> *"fantastical absolute powers at the expense of individual justice …"*[26]

Kavanagh writes that many lament

> *"The notorious Executive dominance of Parliament in the UK, which places so much power in the hands of so few."*[27]

Bogdanor in a chapter headed "A Peculiar Constitution" writes of the traditional British Constitution:

> *"When Lenin sought to make revolution in Russia his slogan was 'All power to the Soviets'. Critics of the British system of government might argue that the doctrine of parliamentary sovereignty has come to be transmuted into a slogan nearly as pernicious – 'All power to the government'. One important consequence of the doctrine of parliamentary sovereignty is that there can be no formal legal or constitutional checks upon the power of government. …*
>
> *[W]e had an unprotected constitution, a constitution that approached the condition famously identified by Lord Hailsham, Lord Chancellor in the Conservative governments of Edward Heath and Margaret Thatcher, in his Dimbleby lecture of 1976 as an 'elective dictatorship'."*[28]

Bogdanor charitably allows "[t]his does not of course mean that governments in practice have been tyrannical or authoritarian." Why then invoke the memory of Lenin? If the traditional British constitution managed in practice to avoid tyranny and authoritarianism, why did it deserve to be derided as "peculiar"?

It is possible to play intellectual parlour games about what a UK government supported by a Parliamentary majority could or could not theoretically do. The former Lord Chief Justice, Lord Bingham of Cornhill, refers playfully to a memorable aphorism which A. V. Dicey borrowed from an eighteenth century writer and made famous

> *"It is a fundamental principle with English lawyers, that Parliament can do anything but make a woman a man, and a man a woman."*[29]

Of course, the proliferation of such "paper rights" counts for nothing if those rights cannot be enforced. In the UK, rights had, prior to 1998, never needed to be listed in a single document for them to be real and enforceable. The comparison with Stalin's Russia is so germane, because at the very point that large numbers of individuals were being despatched to the gulags, Britain was a free and democratic nation, despite its apparent lack of individual rights. The universal acceptance of Parliamentary sovereignty across the political divide meant that,

26 Anthony Lester QC (1984). "Fundamental Rights: The UK Isolated?" London: *Public Law*, Spring., page 71

27 Aileen Kavanagh (2009). *Constitutional Review under the UK Human Rights Act*. Cambridge: Cambridge University Press, page 396

28 Vernon Bogdanor (2009). *The New British Constitution*. Oxford: Hart, page 38

29 Tom Bingham, Lord Bingham of Cornhill (2010). *The Rule of Law.* London: Allen Lane, pages 161-62

whether or not the party that you had supported in the preceding election was in power, it was possible to have confidence that your liberty would be upheld.

In the real world, comparisons between the powers of the UK executive and those of totalitarian governments are an absurdity. Lord Lester's reference to the "fantastical absolute powers" of British governments is a fantasy for as long as they subject themselves to the decision of the voters. In a democratic system, elections and the prospect of elections have a fundamental effect in containing executive power.

When President Richard Nixon was at the height of his power in the United States in 1973, Arthur Schlesinger Jr., a former adviser to President John F. Kennedy, wrote an angry work, *The Imperial Presidency*. He complained that Nixon had ignored constitutional restraints, especially in waging war in Vietnam. Actions of the executive branch under Nixon included burglary, forgery, illegal wiretapping and electronic surveillance, perjury, obstruction of justice, destruction of evidence, tampering with witnesses, giving and taking bribes, and conspiracy to involve government agencies in illegal actions. Schlesinger's book was itself part of the tide of opinion and the retaliatory actions that led to Nixon's downfall the following year. Nixon was unable to build his "imperialism" into a sustainable system of governance.

Similarly, in the United Kingdom administrations which have exercised strong powers for a time have subsequently faced a strong political backlash. There was no need for the judiciary to bring the government to heel. When Lord Hailsham wrote in 1976 of "elective dictatorship", it was only two years after the downfall of an exceptionally weak government of which he had been a member.

Far from being dictatorial, the government of Edward Heath had been unable to come to grips with trade union militancy or terrorism in Northern Ireland. The Labour governments of 1974-79 promised a set of radical measures and it was fear of these that led Hailsham to his "elective dictatorship" phrase. But Labour was unable to deliver most of them before they were constrained by the International Monetary Fund in 1976 and by their electoral defeat in 1979. Margaret Thatcher, a Prime Minister whose opponents considered her to be seemingly immune to any form of legislative restraint, was ousted by her own backbenchers. The actions of Tony Blair showed that, if he was an imperial premier at all, he was unable to remain so indefinitely. His resignation in 2007 was not entirely voluntary.

If judicial activism is to be justified in the United Kingdom, the supposed "elective dictatorship" of the House of Commons does not provide reasonable grounds for it. Far from being either "imperial" or "sovereign" the modern House of Commons has found itself under increasing assault. Power has flowed downwards to devolved assemblies and has been surrendered upwards to the European Union as well as to the European Court of Human Rights in Strasbourg.

Insufficient attention is often given by those who have analysed the current British constitution to the part played by active but fairly obscure pressure groups and research units here which devoted their attention to the advocacy of institutional change. The influence of these groups was enhanced by the fact that they appealed to a narrow politically active section of the electorate and therefore largely bypassed public attention. Thus the agenda of constitutional reform, which occupied the Labour government that came into office in 1997, had not been a major feature of that year's general election campaign.

This matters because, when looking at some of the problems that have emerged since the Labour government's constitutional reform programme (including the Human Rights Act) was enacted, it is important to keep in mind the lack of public discussion which took place at the time. Robert Hazell, director of The Constitution Unit based at University College London, correctly refers to the relative indifference of Labour's premier, Tony Blair, to the constitutional legislation that formed such a major part of his programme. The changes themselves were not rooted in positive public assent. As such, they need not be regarded as irreversible; although it is a good starting point that changes already made to a constitution should be left in place, unless there is a strong reason to turn back the clock.

Should judges exercise constitutional and political power in the United Kingdom?

There are several justifications for accepting that judges may play a positive and significant political role in a democracy. First, in the vast majority of democracies there is a written constitution in which a higher, entrenched set of rules and values is set out. The legislature and the executive are bound by the constitution; laws and executive actions which contravene the constitution are invalid. It follows that there must be an authority which can judge whether there has been a constitutional breach. This authority is normally a constitutional court of justice. It follows that review of the constitutionality of law by judges is nothing unusual.

Second, giving judges a say in matters of fundamental political importance may be justified on the ground that a division of powers between different branches of government is a useful device to prevent overweening actions by any single political leader or institution.

> "Judges are more likely to have cool heads and sensible minds. Rather than ordinary people, they may be relied upon to uphold a society's underlying moral values"

Third, majoritarian democracy may neglect the welfare of minority groups. Members of these groups cannot hope to threaten the government with the prospect of defeat at the polls. Moreover, some of those whose cases come before the courts do not have any voting rights: for example, children or citizens of other countries.

Fourth, ordinary citizens may become inflamed by anger (for example, in the aftermath of a terrorist outrage) and may therefore put pressures on a government to make hasty, unreasonable responses. By contrast, judges are more likely to have cool heads and sensible minds. Judges, rather than ordinary people, may be relied upon to uphold a society's underlying moral values.

Fifth, in view of the growth of the state and of governmental activities, it is unrealistic to hold individual ministers accountable through the doctrine of ministerial responsibility for every dubious action by individual officials employed within their departments. When there is systemic failure within a government department, it is reasonable to hold the minister to account by requiring his or her resignation. More often, the redress of grievances and individual acts of maladministration will require other remedies, including legal remedies.

Sixth, regarding the powers given to judges in the United Kingdom by the Human Rights Act 1998, Kavanagh and others suggest that the judiciary has shown considerable deference and restraint. Not all senior judges have been as provocative as Lord Steyn in his assertion of judicial supremacy. Indeed, the former Lord Chief Justice, Lord Bingham, goes out of his way to disagree with Lord Steyn and to show respect for the doctrine of Parliamentary sovereignty in his recent book *The Rule of Law*.[30]

Finally, it is widely agreed that some of the decisions by the UK courts on matters falling under the Human Rights Act 1998 have been beneficial. According to the Prime Minister:

> *"We should start by acknowledging that some of the direct consequences of the Human Rights Act have been positive ones. Of the hundreds of cases that have come to court involving the HRA – some 400 in the last year alone – there have been some rulings setting important precedents that we can all welcome. One example is the right of an elderly married couple not to be separated in different care homes. Another is the right of the families of the deceased to be represented at coroner's inquests."*[31]

However, there are important counter-arguments both about the virtues of judicial power in general and about special features of such power in the United Kingdom.

The first problem with legal decision-making in politically contentious matters is that it sometimes has an absolute character and ignores economic and political realities. Nor does the modern image of judges as liberal in their attitudes necessarily apply. For example, the decision of the US Supreme Court in the fugitive slave case, Dred Scott v Sandford, 1857, was a major cause of the Civil War of 1861-65. By a majority verdict, the Court ruled that neither blacks brought as slaves to the United States nor their descendents could be citizens of the United States. Since their legal status was that of a chattel – a chair or a table – they had no more right to bring suit in a US court than a chair or a table. Moreover, the US Congress was not entitled to prohibit slavery in any federal territory. The absolute nature of the ruling diminished the opportunities for compromise between the slave-holding states of the South and the anti-slave states of the North.

In 1896, the US Supreme Court effectively nullified the effects of the Fourteenth Amendment of the US Constitution assuring equality of all persons – including blacks – by adumbrating a doctrine of "separate but equal". The court's ruling in the case of Plessy v Ferguson allowed racial segregation and, in practice, gross discrimination against blacks for nearly 60 years. As far as the economic consequences of legal decisions are concerned, it is open to a court to take them into account. However, it is in the nature of rulings about economic and social rights in particular that they are, effectively, menus without prices. For example, a right to good health care or basic housing may be highly desirable but, in many countries, unachievable.

Second, judges normally are not, and should not be, elected. They need some distance from short-term popular pressures and passions if they are to reach decisions based on their understanding of the law and of the facts of any particular case. Unlike politicians, judges should not face eviction by an enraged

30 Tom Bingham, Lord Bingham of Cornhill (2010). *The Rule of Law.* London: Allen Lane, chapter 12

31 David Cameron (2006), "Balancing freedom and security – a modern British Bill of rights." London: Centre for Policy Studies. http://www.cps.org.uk/cps_catalog/Catalogue_Balancing_freedom_and_security___a_modern_British_Bill_of_Rights_635.html

public. However, the necessary distance of the judiciary from party politics also presents problems and, arguably, justifies caution about allowing it too great a political role. If judges are to be unelected, they must be chosen in some other way. The more political their scope of decision, the more sensitive the appointment method. They should not be in a position to usurp the authority of those who have been elected; and somehow they should be accountable. In the UK, judicial accountability might best be addressed by giving Parliament a role in appointments to the UK Supreme Court judges.

I would accept that some senior UK judges have indeed shown sensitivity to public opinion. Kavanagh's defence of the existing mechanisms of accountability exaggerates them. As she acknowledges, judicial dicta which go out of their way to express respect for the role of Parliament are often those which, at the same time, slip in new precedents intended to challenge the legislature.

Third, the UK Supreme Court is not, as the name suggests, supreme. As will be discussed in the following chapter, it is subsidiary to the European Court of Justice in Luxembourg on matters relating to the European Union and it is subsidiary – or it has chosen to be so – to the European Court of Human Rights in Strasbourg in matters relating to the ECHR. Thus judicial power in Britain can at times be both remote and unaccountable.

Fourth, there is the argument that democracies neglect the rights of minorities. John Stuart Mill referred to this as the "tyranny of the majority". Safeguarding the welfare of small groups is a problem that should not be minimised. In ethnically divided societies where voting reflects the ethnic divide, the minority community will find itself perpetually excluded from power or from any hope of gaining power. The judiciary will have a vital role in protecting the rights of members of the minority community. Apart from ethnic minorities, there are marginalised, unpopular groups divided from the mainstream of the nation by religion or lifestyle. Paedophiles lack political muscle but they deserve just treatment.

There are different responses to the argument for judicial power as a protection to minorities. Bellamy points out that minorities are not necessarily impotent as electoral forces. Such minorities may be politically active and may coalesce with other minorities to make their influence felt. An example of this is the influence of gay and lesbian groups in cities such as San Francisco or of Bible Belt conservatives in several parts of the USA.

An alternative argument acknowledges that minorities may indeed suffer and need legal protection but that this should not justify a system in which judges have too much power. After all, it is unrealistic to assume that judges will be more enlightened than members of the general public. Opinions about judicial power vary according to whether judges are seen as representing the values and the views of a particular writer. In the 1930s, liberal commentators in the United States tended to attack the notion of judicial power because the Supreme Court at that time was seen as a reactionary body. From the 1950s, many of the attacks on judicial activism came from the political right because the stance of the Court had altered. In short, there is a judicial role as protector of vulnerable individuals and minorities provided that there also are suitable mechanisms to ensure that the judiciary is not completely unaccountable.

Fifth, current advocacy in the United Kingdom of court-protected rights sometimes has an unfortunately elitist, anti-democratic ring about it. Instead of

referring to the popular will, it is habitual to criticise the "populism" of critics of court decisions. There is a worrying gap between the assumptions of a largely enclosed, sometimes arrogant professional and intellectual elite and those of ordinary people. It is a sign of the fashion of the times in lofty legal circles that a senior member of the judiciary who chose recently to criticise recent developments relating to the European Court of Human Rights felt obliged to assure his audience that he was not doing so for reasons of "populist Euroscepticism".[32]

Sixth, judicial power is associated with the influence of organised pressure groups. Historically, they have sometimes played heroic roles. Some of them have become controversial and open to criticism. The UK is particularly well populated by such groups and their activities account largely for cases involving Britain before the European Court of Human Rights. The Joint Committee on Human Rights of the two Parliamentary chambers at Westminster is dominated by an almost closed set of lobby groups of varying quality.

These lobbies – though wholly legitimate – have skewed policy debate as well as courtroom advocacy. They have been hyperactive in insisting that there is no option for the British public except to extend judicial power at the expense of elected institutions.

A seventh objection to judicial activism is that the greatly expanded political role of judges has occurred with a minimum of public discussion and consent.

A final criticism is that the concept of "human rights" constitutes an expanding universe. In parallel, the field of judicial activism is expanding. As Conor Gearty, someone who welcomes this trend, has written in a presentation on animal rights,

> *"[t]he strength of human rights language has always lain in its power to expand its net of solicitude ever outwards …"* [33]

The Council of Europe itself recognises that our existing rights fall into different tiers. For example, core rights are those such as the prohibition on torture in Article 5 of the Universal Declaration of Human Rights (UDHR). According to this declaration, adopted in Paris in December 1948 by the General Assembly of the United Nations,

> *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*[34]

In 1950 the European Convention on Human Rights laid down the same in Article 3.

The prohibition on torture is non-negotiable and may not be traded against other objectives.

Articles 8-11 of the ECHR constitute a second category of rights. They include the right to respect for private and family life and freedom of expression. These rights sometimes conflict with each other and therefore may need to be prioritised, although the Convention does not set out an order of preference.

A third category of rights are economic and social. Though several such rights were included in the UN's Universal Declaration of Human Rights (UDHR), they did not form part of the ECHR. However, a number of lobby organisations and

32 Lord Hoffmann (2009), "The Universality of Human Rights." Judicial Studies Board Annual Lecture 2009, London: Judicial Studies Board, page 39 http://www.judiciary.gov.uk/NR/rdonlyres/98EDC605-B568-433C-A8C2-E4B151B350CF/0/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf

33 Conor Gearty (2008). "Can Animals Have 'Human Rights' Too?" www.conorgearty.co.uk/pdfs/Animals.pdf

34 United Nations Universal Declaration of Human Rights: http://www.un.org/en/documents/udhr/index.shtml

university-based units, such as Democratic Audit (formerly based at the University of Essex and now at Liverpool University), have pressed for social rights and entitlements to become part of the UK human rights regime. Democratic Audit argues that:

> *"The democratic principle of equal citizenship requires that no person should be allowed to fall below a minimum acceptable level of economic and social existence. Economic and social security is vital to the enjoyment of civil and political rights in this country as elsewhere."*

According to this view, the provision of a basic level of social and economic needs should be a legal obligation beyond the choice of the electorate and Parliament. While few would deny the need for society to take adequate measures to provide for the sick, disabled, the young, and the old, it is open to question whether social and economic policy is a matter which can reasonably and practically be removed from the political arena. The South African Bill of Rights is notable for its inclusion of social and economic rights such as the right to housing, health care, food, water, and education. For example "[e]veryone has the right to have access to adequate housing."

While such statements present laudable aspirations, their practical value is controversial. Certainly, in South Africa as in many other countries, many are housed in wholly inadequate accommodation and citizens' "rights" in this regard are a dead letter.

Provided that broad social and economic objectives are presented as aspirations, there need be no objection. It is when they are incorporated as legally enforceable rights that problems arise. The project of adding social and economic values as non-negotiable "rights" often has the objective of entrenching a particular set of political priorities in a manner that places discussion and decision about them beyond the realm of ordinary party politics. In a democracy, it is the job of the voters to discuss and to adjudicate disagreements about economic policy, priorities in public spending, and about the role of the state.

There are even some who extend the language of rights beyond the social and economic sphere to the rights of animals.[35]

"Rights contagion"

The increasingly political role of the judiciary not only stands to expand if new rights are introduced; it has expanded already as a result of interpretations of existing rights. In *The Assault on Liberty*, Raab calls this "rights contagion". He states that judges in Strasbourg have stretched the meaning of some of the basic rights set out in the European Convention beyond reasonable limits and that British judges have followed them. Lord Hoffmann has expressed the same opinion. At the time of his retirement from the bench in 2009, Hoffmann lectured with pent-up passion on the theme of rights contagion by the Strasbourg Court. Some of the cases taken up by the Court served only to "trivialise and discredit the grand ideals of international human rights".[36]

Hoffmann distinguished between general statements of rights as a "mission statement" and as the basis for court decisions:

35 In Switzerland, there was a referendum on 7 March 2010 on whether allegedly abused animals should have a right to a state-funded legal representative in court. The proposal was rejected by some 70% of the voters after the government and farmers' representatives had come out in opposition. However, animals in Zurich already are entitled to legal representation. See Frank Jordans (2010)."Swiss voters reject giving abused animals a lawyer." Associated Press, 7 March. www.news.yahoo.com/s/ap/20100307ap_on_re_eu/eu_switzerland_lawyers_for_animals. The Swiss example is relevant to a discussion of the scope of rights. It does not relate to whether such rights emanate from the European Convention on Human Rights since the rules relating to animal welfare in that country are determined by the normal legislative processes (including referendums).

36 Lord Hoffmann (2009), "The Universality of Human Rights." Judicial Studies Board Annual Lecture 2009, London: Judicial Studies Board, page 40 http://www.judiciary.gov.uk/NR/rdonlyres/98EDC605-B568-433C-A8C2-E4B151B350CF/0/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf

"[A]t the level of abstraction, human rights may be universal … At the level of application, however, the messy detail of concrete problems, the human rights which these abstractions have generated are national. Their application requires trade-offs and compromises, exercises of judgement which can be made only in the context of a given society and its legal system. …

[T]he decision as to whether the concept of a fair trial requires a complete ban on the admissibility … of evidence obtained by an unlawful search or seizure, can be made only in relation to a particular system of trial and with an appreciation of such matters as the prevalent police culture."[37]

Hoffmann complained that the Justices of the Strasbourg Court ignored these differences of application of general rights and national differences in the balance between competing rights. Among examples of the trivialisation of rights, he cited *O'Halloran and Francis v United Kingdom*,[38] which involved the owner of a car who complained that his privilege against self-incrimination had been violated because he had been required, on pain of a fine, to say who had been driving his car when it was photographed speeding. Though the case was dismissed, Hoffmann felt it was a sign of the way the Strasbourg Court operated that the case was even considered and, moreover, that two Justices had dissented from the majority opinion. One dissenting Justice had gone as far as to attack the very idea of speed limits on the ground that they infringed the rights of drivers:

"I understand the reasoning behind the departure from the basic principles of a fair trial in the case of speed violations: namely, that such offences represent hundreds of thousands if not millions of cases, and that the State is unable to ensure that in each of this vast number of cases all the procedural guarantees have been complied with. I repeat: I understand this line of reasoning but I do not accept it. In my opinion, if there are so many breaches of a prohibition, it clearly means that something is wrong with the prohibition. It means that the prohibition does not reflect a pressing social need, given that so many people choose to breach it even under threat of a criminal prosecution. And if this is the case, maybe the time has come to review speed limits and set limits that would more correctly reflect peoples' needs … It is difficult for me to accept that hundreds of thousands of speeding motorists are wrong and only the government is right."[39]

In another case, the European Court of Human Rights gave serious consideration as to whether a ruling by the British government on night flights landing at Heathrow contravened the provision of the European Convention guaranteeing the right to family life. Hoffmann was especially critical of Judge Costa, who is currently President of the Court, who set out a blatantly expansionist interpretation of the European Convention. According to Costa:

"as the Court has often underlined: "The Convention is a living instrument, to be interpreted in the light of present-day conditions" … This "evolutive" interpretation by the Commission and the Court of various Convention requirements has generally been "progressive", in the sense that they have gradually extended and raised the level of protection afforded to the rights and freedoms guaranteed by the Convention to develop the "European public order". In the field of environmental human rights, which was practically unknown in 1950, the Commission and the Court have increasingly taken the view that Article 8 [the right to privacy] embraces the right to a healthy environment, and therefore to protection against pollution and nuisances caused by harmful chemicals, offensive smells, agents which precipitate respiratory ailments, noise and so on."[40]

37 Ibid, page 15

38 2007, Application No 15809/02

39 Lord Hoffmann (2009), "The Universality of Human Rights." Judicial Studies Board Annual Lecture 2009, London: Judicial Studies Board, paragraph 30 http://www.judiciary.gov.uk/NR/rdonlyres/98EDC605-B568-433C-A8C2-E4B151B350CF/0/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf

40 Ibid, paragraph 35

The consequence of judicial empire building such as this is set out by Raab:

> *"The most striking development has been the sheer number and range of legal claims that are now formulated as human rights. Once expanded beyond the traditional core of fundamental liberties, there is no obvious reason or basis for limiting the number and range of interests, claims and entitlements that can be dressed up as human rights."* [41]

Some of these rights were won not as a result of court action but were allowed by public authorities fearing possible legal challenges under the terms of the Human Rights Act 1998. Bureaucratic caution and the desire to avoid the bother of litigation thus act as further spurs to "rights contagion". Raab gives as an example the fact that in 2008 prisoners in British jails were given the right to keep twigs in their cells for use as wands in pagan rituals – an entitlement given as recognition of freedom of religion. In 2009, after the publication of his book, 500 vegan prisoners won the right to buy nuts, special cosmetics and sun creams from specified vegetarian stores.[42]

There was considerable conflict between the main political parties in 2005 about several cases which symbolised, for one side, the undesirable consequences of an exaggerated human rights culture and, for supporters of the Human Rights Act 1998, the ignorant character of the protests against it.

On 17 August 2005, Naomi Bryant was strangled and stabbed to death by Anthony Rice, a criminal who had been given a life sentence in 1989 for a series of violent acts and was then released on licence in 2004. A review by Her Majesty's Inspectorate of Probation found that considerations of Rice's human rights had undermined the decision making of the Parole Board whose decision had led to his release. The probation inspectorate recommended that

> *"Although proper attention should be given to the human rights issues, the relevant authorities should maintain in practice a top priority focus on the public protection requirements of the case."* [43]

Shortly after Naomi Bryant's murder, the former Conservative Home Secretary, Michael Howard, gave a lecture in which he claimed the case was part of a wider trend. He claimed that even without actual litigation, some public bodies were so frightened of being sued under the Human Rights Act that they tried to protect themselves by making "often absurd and occasionally dangerous" decisions:

> *"We saw this recently when the police tried to recapture foreign ex-prisoners who should have been deported and had instead gone on the run. The obvious thing to do would have been to issue "Wanted" posters but police forces across the country refused to do so on the grounds that it would breach the HRA. The Association of Chief Police officers says in its guidance to forces: "Article 8 of the Human Rights Act gives everyone the right to respect for their private and family life.....and publication of photographs could be a breach of that. According to ACPO, photographs should be released only in "exceptional circumstances", where public safety needs to override the case for privacy. These were criminals who had been convicted of very serious offences and who shouldn't even have been in the UK. Yet the Metropolitan Police said, "We will use all the tools in our tool box to try and find them without printing their identity – that's the last recourse."* [44]

The Ministry of Justice issued a robust defence against these accusations.

41 Dominic Raab (2009). *The Assault on Liberty: What Went Wrong with Rights*. London: Fourth Estate, page 125

42 Ibid, page 159 and Daily Mail Reporter (2009). "Vegan prisoners win right to buy ethical cosmetics and food in jail." London: *Daily Mail,* 25 August.

43 Dominic Raab (2009). *The Assault on Liberty: What Went Wrong with Rights*. London: Fourth Estate, page 177

44 Michael Howard QC (2006). "Lord Morris of Borth-y-Gest Memorial Lecture." Lampeter, 6 July. www.michaelhow ardmp.com/ speeches/ lampeter060706.htm

While examples such as the murder committed by Rice while on parole attracted a considerable amount of political controversy and press coverage, a less noticed sign of "rights contagion" which, according to a senior official interviewed for this study, had far-reaching significance was the maiden speech made in the House of Lords by Lord Bingham of Cornhill, the Lord Chief Justice of England and Wales on 3 July 1996 during a debate on "The Constitution". Speaking with specific reference to the European Convention on Human Rights – then not yet incorporated into British law but with the status of a treaty obligation – Lord Bingham made clear that "we are bound in international law to honour the obligations which we have undertaken". Treaties do not automatically assume the status of law in the UK. If a treaty clearly contravenes legislation enacted by Parliament, domestic legislation takes priority. But in cases of ambiguity, the courts must interpret UK statutes in a manner most consistent with international obligations.

At first glance, Lord Bingham was merely stating the obvious. Treaties are to be honoured. International agreements and declarations are to be taken seriously by British courts. In fact, the statement potentially is anything but obvious. In the course of international meetings, countries typically sign up to general statements expressing ideals and hopes. For example, the UN Convention on the Rights of the Child, 1991, gives children the right to "grow up in an environment of happiness, love and understanding". Whether the United Kingdom does or does not sign up to these statements is typically decided in an obscure manner. It is then for Parliament to decide whether and how to incorporate such conventions into domestic law. Lord Bingham implies that, even without Parliamentary approval, the courts have an obligation to interpret common law and existing legislation in line with such conventions. To translate the very broad aspirations sometimes contained in these international documents into implied interpretations of legislation or of common law by British courts is to make a major leap.

Asylum, terrorism and human rights

Two especially contentious and important areas of debate concern political asylum and torture. Have these too been areas affected by "rights contagion"? Have judges made it impossible for governments to take actions needed to guard against the risk of what many see as bogus asylum-seekers and to ensure public safety against terrorists? Or are the judges a necessary bulwark against heat-of-the-moment clamour following outrages such as the bus and underground bombings in London in 2005?

The United Kingdom has a long tradition of granting asylum to those facing oppression in other countries on the grounds of their political beliefs and activities. The 1951 UN Convention Relating to the Status of Refugees, the European Convention on Human Rights and UK law all govern asylum-seekers' rights. A condition of asylum is that those benefiting from it must not use their presence in the United Kingdom to promote political causes or to carry out political, let alone subversive or violent, activities.

In 1997, it took an average of 22 months for even an initial decision (subject to appeal) to be reached in asylum cases. This had fallen to 7 months by 2007.[45] During the time it takes for evidence relating to each case to be collected and reviewed, the claimant remains in the country and has various social and

45 House of Commons Public Accounts Committee (2009). "Management of Asylum Applications: Twenty-eighth report of Session 2008-09." London: the Stationery Office, HC 255, 16 June, page 5 www.publications.parliament.uk/pa/cm200809/cmselect/cmpubacc/325/325.pdf

economic rights. Since living standards in the UK, even for those on benefits, are far higher than in the countries from which many of them have fled, there is a strong incentive to try to enter the UK for economic reasons but to pretend that they have fled from torture or from the substantial risk of torture.

Equally, a small number of political refugees exist who allegedly carry out subversive and violent activities or who recruit others to do so. If they come from countries where judges consider that torture is practiced, it is extremely difficult to deport them, even if the British authorities feel they have compelling reasons to take this action.

Recent Labour governments have clashed with the judiciary over aspects of asylum policy. In February 2003, Mr Justice Collins ruled that the Asylum and Immigration Act violated human rights insofar as it denied the right to state benefits to immigrants who had arrived illegally and had failed to claim asylum at the earliest possible opportunity. He ruled that this amounted to "inhuman or degrading treatment" in contravention of Article 3 of the European Convention (the article banning torture). The then Home Secretary, David Blunkett, told the BBC:

> *"I am fed up with having to deal with a situation where Parliament debates issues and the judges overturn them ... Parliament did debate this, we were aware of the circumstances, we did mean what we said, and, on behalf of the British people, we are going to implement it."* [46]

In 2004, the government proposed to speed the process of removal of asylum-seekers by denying them of the right to appeal in the High Court through judicial review against adverse decisions by the Home Office. As the BBC reported:

> *"The Law Society, the Bar Council and Justice joined senior judges in calling for the plans to be abandoned, warning they could cost lives.*
>
> *And the most senior judge in England and Wales, Lord Woolf, said the plans would go against the basic principle of the rule of law."*[47]

This led to the abandonment of the plan by the Lord Chancellor, Lord Falconer. The home affairs spokespersons of the Conservatives and Liberal Democrats both welcomed the decision to do this, as did the Bar Council. The prohibition against torture is a fundamental part of the European Convention on Human Rights and the subject of a UN convention. Thus, countries such as the United States, which are not part of the Council of Europe and which are not signatories of the European Convention, are legally bound by the 1975 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Were the UK to withdraw from the European Convention, this would not affect the country's obligations concerning the avoidance of torture.

There are three major areas of controversy about the application of the main international conventions against torture. First, some argue that the rights of an individual (such as a suspected terrorist) need to be balanced against the interests of society at large to assure its security from attack. In cases where a suspected terrorist has reasons to fear ill treatment if deported to his or her country of origin, should the dangers posed by the suspect to the security of the United Kingdom be a balancing factor? If the UK government and the UK courts consider that the risk of an individual being tortured are relatively remote, should the danger posed to the British populace by that person be permitted to be an overriding consideration in permitting deportation?

46 Alasdair Palmer (2004). "The Politicisation of the Judiciary." London: *The Times,* 20 July. http://business.timesonline.co.uk/tol/business/law/article459903.ece

47 BBC (2004). "Compromise offer over asylum row," *BBC News channel*, 15 March 22.28 GMT. http://news.bbc.co.uk/1/hi/uk_politics/3511536.stm

Second, is it justified to relax the normal legal rights of defendants during national security emergencies or, outside such emergencies, in cases involving substantial risks to public safety?

A third cluster of issues relate to the definition of torture. Are there degrees of "torture"? For the purposes of public policy and law, is "torture" to be distinguished from "degrading treatment"? Are terms such as "torture" and "degrading treatment" apt to be applied too loosely in political and legal rhetoric? The philosophical "what if?" parlour game sometimes used to justify torture, deserves discussion, if only because it is the most frequently cited reason against an absolute prohibition on the practice. What if a terrorist were about to blow up the world with a nuclear weapon, the torture of a single person to establish where it was situated and thereby to save the world would surely – so the plausible argument goes – be a worthwhile, necessary price to pay.

> "Once torture is justified in "ticking bomb" scenarios, it is likely to be extended to cases where there is no "ticking bomb""

Such exercises in moral reasoning which aim to justify torture fail because they do not take account of the realities of human behaviour amid intense conflicts. Once torture is justified in "ticking bomb" scenarios, it is likely to be extended to cases where there is no "ticking bomb". Moreover, the resort to torture as a method of procedure can have a demoralising effect on interrogators so that they use their fists and their boots rather than their brains to elicit information. It also undermines the moral purpose and saps the will of a society which tolerates and promotes cruelty as an act of policy. Sir Alistair Horne's 1977 book, *A Savage War of Peace: Algeria 1954–1962*, well illustrates the point.

Although there are strong and varied arguments for keeping the powers of the judiciary under control, one of the weakest arguments for doing so is in order to permit British authorities conceivably to carry out any gross ill-treatment of prisoners and suspects without the possible intervention in the courts. Likewise, the restriction of the standard legal rights of defendants is a policy of last resort to be considered only in periods of war or equal national emergency. Derogation from the European Convention is in any case allowable under these conditions, though not in order to torture suspects.

Where there are serious questions about the treatment of suspected terrorists, it is reasonable for the law enforcement authorities to be accountable to judges and it is right for judges to ensure that this treatment conforms to international conventions against torture.

Where there is room for argument is about cases which have defined as "torture" or "cruel, inhuman or degrading treatment" far more minor activities and which have, in so doing, stretched the limits of reasonable interpretation of Article 3 of the ECHR. In a number of cases, the Strasbourg Court has defined actions of differing degrees of severity as "torture" or "degrading treatment". Until the 1970s, courts in the Isle of Man could and did sentence juvenile hooligans to up to twelve strokes of the birch, an instrument consisting of four sticks. The punishment generally was administered within hours of the sentence. In 1978, the European Court declared that the sentence of three strokes on a boy of fifteen contravened Article 3, Section 3 of the ECHR (*Tyrer v UK 1978*). A key factor for the Strasbourg judges in their 6-1 decision was that corporal punishment was not in keeping with the prevailing doctrines of punishment in other member countries of the Council of Europe. The United Kingdom accepted the Strasbourg ruling, as it did in the relatively small

number of cases that went to the European Court of Human Rights at that time, though the UK had not yet incorporated the ECHR into British law.

In a case 20 years later, *A v United Kingdom* 1998,[48] the Strasbourg Court invalidated the decision of a British jury which had judged that caning administered by a stepfather had been a form of "reasonable chastisement" allowed by UK law.[49] According to Raab, the judgement in this case has been deployed to force the British government to ban parents from smacking their children, despite domestic laws passed by Parliament – and enforced by British authorities – regulating the use of 'domestic chastisement' in the home.[50]

The definition of torture and inhuman treatment is now so broad, claims Raab, that, according to the current Director of Public Prosecutions, Keir Starmer QC, it can include "grossly defamatory remarks and extreme and continuous police surveillance."[51]

In the areas of asylum and anti-terrorism, the courts have a legitimate and vital role in protecting individuals against cruelty and ill-treatment, however abhorrent their suspected behaviour may have been. Moreover, the normal procedural rights of defendants should not lightly be abandoned. *Habeas corpus* and trial by jury are time-honoured safeguards not only to individual suspects but also to society as a whole.

However, this does not necessarily mean that an international court is better qualified than a British court to take the final decisions as to whether executive actions have conformed to the ECHR and to other international legal obligations relating to torture. Moreover, it is reasonable to expect the courts to avoid stretching and trivialising the meaning of terms such as "torture" and "degrading treatment" in a manner that has the effect of taking away from the legislature decisions about matters of social policy (such as the regulation of parental discipline over children).

Two recent cases from Strasbourg

Votes for prisoners

The case of *Hirst v United Kingdom (No.2)*[52] exemplifies the problems that democratically elected ministers have had, where decisions on key matters of public policy are threatened by judgments emanating from the European Court of Human Rights in Strasbourg.

John Hirst killed his landlady, Bronia Burton, in June 1979. The circumstances of her death were described at the trial by the prosecution in the following terms:

> "*On the evening of June 23 they were watching television when Mrs Burton asked the defendant to collect some coal from the shed. He went to the shed, got the coal and at the same time picked up a heavy hand axe. He returned to the living room, put the coal on the fire, and then approached Mrs Burton and hit her, perhaps seven times, on the head with the axe. He then went to the kitchen to make coffee and drank it, waiting for Mrs Burton to die.*"[53]

Hirst denied murder, but pleaded guilty to manslaughter on the grounds of diminished responsibility. While in prison he brought a number of cases against the UK government challenging various aspects of his imprisonment, including an action that was heard by the High Court in 2001, in which he sought a declaration of incompatibility for section 3(1) of the Representation of the People Act 1983, which provides that a convicted prisoner is legally

48 (1999) 27 EHRR 611

49 Dominic Raab (2009). *The Assault on Liberty: What Went Wrong with Rights*. London: Fourth Estate, pages 135-137

50 Ibid, page 154

51 Ibid, page 153

52 (2006) 42 EHRR 41

53 Barbara Calvert QC, cited in http://www.guardian.co.uk/uk/2006/nov/18/ukcrime.weekend7

incapable of voting at any Parliamentary or local election.[54] The High Court dismissed the claim and Lord Justice Kennedy noted that, in relation to recent discussions about the law that:

> *"When the 2000 Act was being debated in the House of Commons Mr Howarth, for the Government [George Howarth MP, then Parliamentary Under Secretary of State at the Home Office], maintained the view that 'it should be part of a convicted prisoner's punishment that he loses rights, and one of them is to vote.'"* [55]

Hirst took his case to the European Court of Human Rights which held that there had been a breach of the Article 3 of the First Protocol to the Convention, which states that:

> *"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."*

The protocol does not state that the electoral franchise must extend to every citizen of the country concerned and successive elected UK governments have decided for reasons of good public policy that convicted prisoners should not enjoy the right to vote. The UK was one of the original signatories of the protocol in 1952, and brought it into force two years later. It is difficult to imagine that the then government would have been willing to sign the protocol had it been aware that half a century later the Court would compel the UK to change its law in an area (penal policy) that was not mentioned in it.

In coming to its decision, the Court (by a majority of 12 – 5) acknowledged that Parliament had chosen to place restrictions on convicted prisoners and that the domestic courts had chosen to respect the will of Parliament. It, however, felt that the debate that had taken place had been inadequate:

> *"It may perhaps be said that, by voting the way they did to exempt unconvicted prisoners from the restriction on voting, Parliament implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoners. Nonetheless it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote.*
>
> *It is also evident from the judgment of the Divisional Court that the nature of the restrictions, if any, to be imposed on the right of a convicted prisoner to vote was in general seen as a matter for Parliament and not for the national courts."* [56]

It is worth noting that this protocol does not constitute a universal right – signatories to the convention are free to choose whether they regard it as something that they wish to add to their list of obligations. Both Switzerland and Monaco opted not to sign up to the protocol and therefore are not bound by the decision in *Hirst*.

The UK government has yet to implement the Court's judgment, but the Ministry of Justice stated in July 2010 that:

> *"The Government is considering afresh the issue of prisoner voting rights. The issues raised are important and Ministers will be giving them full consideration.*

54 Hirst v Attorney General, [2001] EWHC Admin 239

55 Ibid, at paragraph 8

56 (2006) 42 EHRR 41, paragraphs 79-80

A fuller update will be provided to the [Council of Europe's] Committee of Ministers at their meeting in September."

In December 2010, the UK government agreed reluctantly to allow prisoners to vote unless they had been sentenced to four years or more. Under the draft plans currently awaiting new legislation, in cases of prisoners sentenced to a shorter term, the judge passing sentence could specifically deny the right to vote. Any change to the franchise on these terms would require new legislation to amend the provisions of the 1983 Representation of the People Act – the last time the blanket ban on prisoner voting was reasserted in law.

In February 2011, the UK government agreed to allow MPs from all parties to debate the issue on a free vote, with numerous public surveys continuing to show widespread opposition in principle to granting voting rights to prisoners. If the UK Parliament votes to upheld the current ban, and on a subsequent whipped vote, the Government cannot secure a majority, then it will face the prospect of defying a ruling of the Strasbourg Court because it cannot pass the necessary legislative change to bring UK domestic law into compliance. This issue is the clearest example yet of a conflict between UK Parliamentary sovereignty and the Strasbourg Court.

The detention of terror suspects

In *Babar Ahmad v United Kingdom*[57] four individuals appealed to the European Court of Human Rights in Strasbourg while awaiting deportation to the United States on various terrorism-related charges. Extradition proceedings were begun for each of the suspects on a case-by-case basis between 2004 and 2006. The extradition process was subject to oversight from both the Home Secretary and the UK courts.

Two of the suspects lodged an appeal to the European Court of Human Rights in June 2007; the other two submitted theirs in 2008. It was not, however, until July 2010 that the Court held a preliminary hearing to determine the validity of the issues involved and it is yet to reach a judgement at time of writing. This case provides a vivid illustration of how the Court's backlog of cases has held up the extradition process for two years, in spite of the whole process having been subject to judicial scrutiny in the UK.

The applications centred on whether the four individuals would be treated in line with the standards expected by the Convention if extradited to the United States. The Court was asked to consider whether extradition to the United States would constitute a breach of their rights under the following Convention articles: 2 (right to life), 3 (prohibition of torture), 5 (right to liberty and security), 6 (right to a fair trial), 8 (right to respect for private and family life) and 14 (prohibition of discrimination). The issues raised by the applicants covered their legal status, their imprisonment conditions both before and after trial, the length of any possible sentences if found guilty and the use of evidence. Many of these issues had been covered in assurances given to the UK by the US government in several "Diplomatic Notes", which provided assurances about how the men would be treated.

At the preliminary hearing in July 2010, many of these issues were held to be inadmissible, but nonetheless, the Court will consider numerous aspects of the US judicial and penal system in its main hearing before deciding whether to allow extradition to proceed. This raises an important question – will UK extradition law effectively now be re-written so that the Court in Strasbourg will have to judge whether any country with which the UK has an extradition treaty has a criminal justice system that meets with its approval – even if that country is a democracy with an established civil liberties law of its own?

57 (2010) 51 EHRR SE6

3
The Complex Relationship Between Britain's Three Supreme Courts

Even among those who actively follow politics, there is little awareness about the system of constitutional courts that now have a near stranglehold on vital aspects of the British political system. When people hear the words "new Supreme Court", they naturally assume that this new UK institution is indeed "supreme". In fact, it is not.

When the term "European Court" is used it is often assumed that this refers to an institution of the European Union. In fact, there are two separate European court systems of which one is that of the 27-nation European Union while the other is a court of the entirely separate 47-nation Council of Europe. What these two courts have in common is they each are superior to the so-called "Supreme Court" which came into operation in London in October 2009 to carry out functions previously exercised by the law lords.

In simple terms – though little about the maze of European supra-national institutions is simple – the European Court to which the UK Supreme Court is subsidiary in matters covered by the European Convention on Human Rights is the European Court of Human Rights at Strasbourg. Relationships between senior British judges and the Strasbourg Court have been decidedly mixed. Over a considerable period of time, Lord Hoffmann has been especially scathing in his criticisms, while in contrast, Lady Justice Arden has jumped to the defence of the judges at Strasbourg.

British judges always have been reluctant to challenge rulings from Strasbourg. In any case, the Human Rights Act 1998 placed the British courts under the obligation to interpret Parliamentary legislation in a manner consistent with the European Convention on Human Rights as interpreted by the Strasbourg Justices.

The Supreme Court of the United Kingdom (London)

Came into operation on 1 October 2009 under the terms of the Constitutional Reform Act 2005. Subject to the jurisdictions of the European Court of Justice and the European Court of Human Rights.

"The Supreme Court is the highest court of appeal in the United Kingdom. However, The Court must give effect to directly applicable European Union law, and interpret domestic law so far as possible consistently with European Union law. It must give effect to the rights contained in the European Convention on Human Rights.

Under the Treaty on the Functioning of the European Union (article 267), The Court must refer to the European Court of Justice (ECJ) in Luxembourg any question of European Union law, where the answer is not clear and is necessary for it to give judgment.

In giving effect to rights contained in the European Convention on Human Rights, the Court takes account of any decision of the European Court of Human Rights in Strasbourg. No national court should "without strong reason dilute or weaken the effect of the Strasbourg case law" (Lord Bingham of Cornhill in R (Ullah) v Special Adjudicator [2004] UKHL 26).[58]

Number of Justices:
12, currently
Lord Phillips of Worth Matravers, President
Lord Hope of Craighead, Deputy President
Lord Saville of Newdigate
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood
Lord Mance
Lord Collins of Mapesbury
Lord Kerr of Tonaghmore
Lord Clarke of Stone-cum-Ebony
Lord Clarke

Appointment process:
The selection procedure was set by the Constitutional Reform Act 2005. It is somewhat convoluted, involving a panel of five chaired by the President of the Court and includes the Deputy President. The other three members are each nominated by the judicial appointments bodies of the constituent parts of the United Kingdom (England and Wales, Scotland and Northern Ireland). They do not have to be either judges or lawyers.

European Court of Human Rights (Council of Europe: Strasbourg)

Has jurisdiction over UK courts in matters relating to the European Convention on Human Rights.

Number of Justices:
47

Appointment process:
Each member state has the right to nominate one justice. The nominating state presents a shortlist of three persons from whom the Parliamentary Assembly of the Council of Europe must select one.

Countries nominating one justice each

- 27 member countries of the European Union
- 4 West European micro-states:

58 http://www.supremecourt.gov.uk/about/the-supreme-court-and-europe.html

Andorra (population 83,888), Liechtenstein (population 34,761, nominated a Swiss citizen), Monaco (population 32,965), San Marino (population 30,167).

- 12 former communist countries not belonging to the European Union:
  Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Georgia, Macedonia, Moldova, Montenegro, Russia, Serbia, Ukraine.
- 4 other:
  Iceland, Norway, Switzerland, Turkey.

European Court of Justice (European Union: Luxembourg)

Has jurisdiction over UK courts in matters relating to the European Union.

Number of Justices:
27

Appointment process:
Judges are "...appointed by common accord of the governments of the Member States for a term of six years."[59] In practice, each member state nominates a judge whose nomination is then ratified by all the other member states.

Nationality of Justices:
One for each member state of the European Union.

The Supreme Court of the United Kingdom (London)

At the time of writing, only one year after the Supreme Court came into operation in the former Middlesex Guildhall on London's Parliament Square, it is too early to give an evaluation of this new institution, though in many respects it is a successor to the law lords and inherited their record concerning judgements under the terms of the Human Rights Act 1998.

While Kavanagh stresses the deference of the law lords to Parliament during the first decade of the 1998 Act, others point out the surprising degree of political activism of Britain's top judges. One of Britain's most senior judges, Lord Neuberger of Abbotsbury, now the Master of the Rolls (deputy Lord Chief Justice) made no bones about the existence of judicial activism when he spoke in 2008 to the Bar Conference:

> *"Lord Neuberger identified several factors that are pushing UK judges into being more activist. They included the increasing control that the legislative and executive enjoy – "control over 40 per cent of the GDP and increasing millions of employees", he said. "This requires the judiciary to provide a balancing role."*[60]

In the past 30 years there had also been a lack of an effective opposition to the party in power, what he called "a weak, at times moribund opposition and a relatively powerless local government". That vacuum had been filled in part by judges, he continued.

> *"Other pressures included the "welter of badly drafted legislation" that encouraged judicial intervention and made it harder to "justify a cautious approach to statutory interpretation". There was also the "sclerotic condition of much of the executive" and its obsession with procedures rather than outcome that "requires judges to be more interventionist".*

59 *Treaty of Rome*, Article 223

60 Frances Gibb (2008). "Should MPs interview new supreme court judges?" London: *The Times*, 4 November. http://business.timesonline.co.uk/tol/business/law/article5080873.ece

> *"European law meant courts had powers to disapply statutes not conforming with European Union law, to overrule secondary legislation and executive decisions if they did not comply with the European Convention on Human Rights; and media pressure on politicians on topics such as terrorism and immigration meant that judges had an important role to play in ensuring that the rule of law in its widest sense prevailed, he said – "and that we have no part in disgraces like extraordinary rendition and Guantanamo Bay".*

And then there is the UK Supreme Court. Even though the previous Lord Chancellor had said that the changes of name, status and location were not intended to increase its powers, Lord Neuberger observed wryly: "The only rule which my experience suggests is infallibly reliable is the law of unintended consequences."[61]

Appointments to the Supreme Court are made by an independent panel the composition of which was, however, proposed by the government and approved by Parliament when it passed the Constitutional Reform Act, 2005. Meagre elements of accountability have been introduced, so that, for instance, the Supreme Court is to produce annual reports which may then be discussed by Parliamentary committees and judges may then appear before such committees. There may even be opportunities for Parliamentary committees to interview proposed appointees to the Supreme Court, although not on their opinions on potentially controversial matters (as happens in confirmation hearings before the Judiciary Committee of the US Senate). In short, judges of the new UK Supreme Court are relatively unaccountable.

Kavanagh presents cogent reasons why judges should not be elected.

> *"If judges were popularly elected and accountable to the general populace in the same way as MPs, it would be counterproductive because it would severely undermine their ability to perform their important constitutional functions The fact that they can make decisions without being concerned about whether they will be re-elected or being unduly swayed by the popularity of their decision provides the rationale for allocating to them the task of reviewing legislation for compliance with Convention rights."*

Where she is far less convincing is in her argument that UK judges nevertheless are responsive to public opinion.

The European Court of Human Rights (Strasbourg)

When it was established in 1959, the European Court was a practical expression of high ideals. Since then, it has steadily gained in power to the point where it now is a crucial but controversial part of the British political framework.

On 8 March 1951, the United Kingdom became the first state to ratify the European Convention on Human Rights, just before Ernest Bevin stepped down as foreign minister in the Labour government. However, ratification did not in itself mean that the Convention automatically became part of the British legal system, a step that would have required legislation to that effect. In the absence of such legislation, Harold Wilson's Labour government, having been prompted by Terence Higgins, a Conservative Member of Parliament whose wife was a distinguished international lawyer, gave British citizens a right of individual

61 Ibid

petition before the Strasbourg Court in 1965. Neither the cabinet nor any cabinet committee had discussed the matter.[62] The right of individual petition did not at that time automatically mean that the UK government and the UK courts were legally obliged to accept rulings from Strasbourg but in practice they chose to do so. As Lord Lester comments,

> *"Thus was the substance, if not the form, of parliamentary sovereignty over fundamental rights transferred from London to Strasbourg, not with a roar but a whisper."*[63]

At first, the caseload of the European Court of Human Rights was relatively light. Between 1965 and 1983, only five British cases a year (some involving groups of persons) came before the Court.[64]

The number of countries belonging to the Council of Europe has grown and the caseload of the Court has greatly expanded. Supporters of the Court see this as an indication of its success. In 2008, it received 49,850 case applications and delivered 1,543 judgements. However, by 2007 the backlog of cases had reached 90,000 and grew to 120,000 by 2010.[65]

Despite this huge expansion, it is hard to conceive of a court which has become less credible than the one in Strasbourg. Only because it is so remote has it escaped greater criticism. There are seven keys areas in which it is deficient.

First, there is the matter of its size, which is not suited to good decision-making. There are 47 judges but they never all sit in judgement of the same case. When sitting as a "Grand Chamber", the Court still has an unwieldy 17 judges. For the purpose of practicality, most cases therefore heard by smaller blocks of 7 judges sitting as a "Chamber". The difficulty posed by this is clear – with a total of 47 judges on the Court, with only 7 judges hearing each case, and with a lack of a tradition of respect for precedent, cases are unlikely to result in consistent judgements. There are 12 Justices of the UK Supreme Court, 9 Justices of the US Supreme Court and 7 Justices of the High Court of Australia. By keeping the number of Justices to the minimum needed to conduct effective hearings and manage their caseload, the Courts ensure that they can deliver judicial coherence.

Second, the allocation of places on the Court is strange. Each member country of the Council of Europe is entitled to nominate one judge, regardless of its population. The 140 million persons of the largest member nation – the Russian Federation – are entitled to one judge but so are the 30,167 persons of tiny San Marino, a micro-state within Italy. In proportion to its population, San Marino is more than 4,000 times better represented on the Court than Russia. Apart from the disproportion of this allocation of judgeships, there is a more practical problem. How many judges are there in San Marino? How many of these have experience in constitutional and international law? The same applies to Monaco, Liechtenstein and Andorra. It is hardly surprising that some nominees and appointees have been only a few years out of law school.

In defence of the Strasbourg system, some legal academics argue that the inexperience of some of the judges does not matter since it is the experienced, long-serving, professional registrars of the European Court of Human Rights who are the real decision-makers. But this only makes things worse. Some of the registrars appear to be devoted to an imperial aim of persuading the judges to reach verdicts that have the effect of expanding the Court's jurisdiction.

62 Anthony Lester Q.C. (1984). "Fundamental Rights: The UK Isolated?" London: *Public Law,* Spring, p. 60

63 Ibid, p. 61

64 By September 1983, the Court had ruled that 80 British cases were admissible. See Anthony Lester Q.C. (1984). "Fundamental Rights: The UK Isolated?" London: *Public Law,* Spring.

65 "Profile: European Court of Human Rights." *BBC News channel*, 15 January 2010. http://news.bbc.co.uk/1/hi/world/europe/country_profiles/4789300.stm and "Mammoth backlog prompts European rights court reforms." BBC News channel, 19 February 2010. http://news.bbc.co.uk/2 /hi/europe/8525524.stm

Furthermore, it is open to a country to nominate a non-citizen as a judge. This happened in the case of Liechtenstein, which is represented on the Court by a Swiss judge. However, micro-states more usually nominate their own citizens, however inexperienced or unsuitable. Some observers of the Court have stressed that judges from the micro-states sometimes have been among the best. Yet, this observation does not address adequately the objection to the vast disparity between the populations of different member countries each entitled to the same representation on the Court.

Third, there are significantly varied democratic traditions amongst the different member states of the Council of Europe.[66] That is to say that for some, democratic accountability is a relatively recent state of affairs and is not as deeply ingrained in their political culture. Judges coming from such countries are likely to have a very different approach to which rights are the most fundamental and where the margin of appreciation is to be drawn. Such problems are inherent in any large supra-national organisation, but when you are dealing with an issue that carries the burden of history as heavily as human rights, the different political cultures from which judges emerge certainly matters.

Furthermore, a stated reason for encouraging additional countries to take up membership of the Council of Europe is to give them the incentive to enter the democratic fold. As a result, some of the member countries – each of them entitled to a seat on the Strasbourg Court – have fairly dubious records themselves. The non-governmental organisation, Freedom House (based in New York and Washington) issues annual rankings of political and social freedoms. According to their rankings, 89 out of the world's 189 countries achieved the ranking of "free". This constituted 46% of countries. However, a number of member countries of the Council of Europe failed to make the grade: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Macedonia, Moldova, Russia, and Turkey. Other countries which are rated as "free" but with reservations are Bulgaria, Montenegro, Romania and Serbia. The rating of a country does not correspond with the quality of the judge from that country on the Strasbourg Court. But it is reasonable to ask whether the United Kingdom is properly served by a court drawn from such a mixed group of nations.

> "A consequence of the appointment procedure is that judges sometimes are political cronies of a country's ruling party. They may be barely able to understand the main languages of the Court – French and English"

Those who defend judges from barely democratic countries on the Court argue how else would countries learn to become democracies than by being invited into the democratic family and by being allowed to participate as judges? Decisions which can have a major bearing on the British constitution are, however, too important to be learning exercises for barely qualified judges or unelected and unaccountable court officials.

Even staunch supporters of the Court and some of its officials acknowledge the exceedingly low quality of some judges. According to information given non-attributably by a senior figure, one newly appointed judge did not even understand the concept of a legal precedent. It is not surprising therefore, that Court judgements have tended to be inconsistent. Lord Hoffmann has highlighted the issue

66 The reason for the expansion of the Council of Europe to include countries with poor democratic pedigrees is not hard to explain. Each international organisation has an urge to expand its bureaucracy and its functions. In Europe, there is competition between the European Union, the Council of Europe, the Organisation for Security and Cooperation in Europe and the North Atlantic Treaty Organisation. Such expansion is a primary motive for admitting new countries.

of the conflict between Article 8 (Right to respect for private and family life) and Article 10 (Right to freedom of expression). In *Von Hannover v Germany* (2004), arguably the single most important case to date concerning how these rights should be balanced, Judge Zupančič, the Court's Slovenian judge stated in his judgment that:

> *"I believe that the courts have to some extent and under American influence made a fetish of the freedom of the press ... It is time that the pendulum swung back to a different kind of balance between what is private and secluded and what is public and unshielded."* [67]

Whatever the judge's opinion of the primacy of the freedom of the press over individual privacy (a principle that was until *Von Hannover* was a very long established principle of English law), to describe other courts' behaviour as being driven by a "fetish" created by American influence, does not reflect at all well on the Court or its case law, especially in such a significant case.

A fourth problem is the questionable method by which Justices are appointed. Even groups which are strong supporters of the Strasbourg Court, such as Interights, have criticised the process. The current system involves the nomination of three candidates at a national level, followed by an election by the Council of Europe's Parliamentary Assembly. At both stages, the processes lack transparency and accountability.

> *"At a national level, States are given absolute discretion with respect to the nomination system they adopt. The Council of Europe does not provide guidelines on appropriate procedures; nor does it require States to report on or account for their national procedures. Even in the most established democracies, nomination often rewards political loyalty more than merit."*[68]

At the international level, the Convention provides that the power to appoint judges lies solely with the Parliamentary Assembly. The Committee of Ministers has adopted a limited review role, which on paper allows it to question States' lists of nominees and nomination procedures. However, in practice the Committee of Ministers gives the impression of being more interested in safeguarding state sovereignty, than in ensuring the quality of candidates nominated.

The only safeguard in the current system lies with the Sub-Committee on the election of judges, appointed by the Parliamentary Assembly's Committee on Legal Affairs and Human Rights. The Sub-Committee consists of parliamentarians, most of whom lack experience in human rights or international law. It makes recommendations to the Parliamentary Assembly on the most suitable candidate based on a superficial assessment of the curricula vitae of nominees and a 15-minute interview. The deliberations of the Sub-Committee are held in private and it does not give reasons for its ranking of candidates.[69]

A consequence of the appointment procedure is that judges sometimes are political cronies of a country's ruling party. They also may be barely able to understand the main languages of the Court – French and English.

Fifth, the Court is barely able to cope. By February 2010, there was a backlog of 120,000 cases.[70] There was a reported average of six years' delay in hearing cases and, without reform, it would take 46 years to deal with them all.[71] The 14th Protocol to the Convention, which came into force on 1 June 2010, was intended to reduce the amount of time that it takes for a case to be heard and reduce the number of judges at hearings in order to try to gradually reduce the backlog.[72]

67 Judge Zupančič concurring opinion in *Von Hannover v Germany.*

68 Jutta Limbach, Pedro Cruz Villalón, Roger Errera, Anthony Lester, Tamara Morshchakova, Stephen Sedley, and Andrzej Zoll (2003). *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights.* Interights. www.interights.org/ jud-ind-en/index.html

69 Jutta Limbach, Pedro Cruz Villalón, Roger Errera, Anthony Lester, Tamara Morshchakova, Stephen Sedley, and Andrzej Zoll (2003). *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights.* Interights www.interights.org/jud-ind-en/index.html

70 The relevance of statistics about the number of cases before the Court is open to varying interpretations. According to an official of the Council of Europe interviewed for this study, it has been the policy to include every inquiry in its statistics of the number of cases.

71 BBC News (2010) "Mammoth backlog prompts European rights court reforms." *BBC News channel*, 19 February 2010 http://news.bbc.co.uk/2/hi/europe/8525524.stm

72 There is a possible argument that reducing the number of judges hearing a particular case without reducing the total number of judges is problematic. While it might produce swifter justice, it could be at the expense of the consistency of the Court's case law.

A large number of cases have resulted from the right of individual petition to the Court. Some 27,000 of the cases outstanding in February 2010 had been brought by Russian citizens, a high proportion involving alleged human rights abuses in Chechnya. Russia refused to ratify the 14th Protocol until it was amended to ensure the Court's sole Russian judge, or another nominated Russian national would be part of the Court hearing cases brought against Russia.[73] This will clearly impact significantly on the speed at which the backlog can be reduced.

Sixth, it is admitted within the Council of Europe itself that the Court is too easily subject to the influence of non-governmental organisations and lobbies, which sometimes sponsor cases for political reasons.

Seventh, according to some of those interviewed, the Court and its officials are perceived to have a federalist agenda as well as ideological prejudices. Its apparent desire to promote Europe-wide standards of behaviour makes the Court reluctant, say some of the critics, to take as much account as some would desire of national differences and traditions. The Court is seen too as broadly anti-clerical in its approach.

The fact that the Court is part of the Council of Europe lends itself to prejudices. As they see their jobs threatened by the increasingly assertive rival bureaucracy of the European Union, officials at the Strasbourg headquarters of the Council of Europe search for general moral causes that will justify campaigns. At the time of writing, special prominence is being given to a campaign against parents' smacking their children.

European Court of Justice (European Union: Luxembourg)

The European Court of Justice (ECJ) is the highest legal authority for deciding the ever-growing range of matters covered by successive European Union treaties. Like the Strasbourg Court, its load is too large to permit cases to be heard by all the 27 judges – one for each member state of the European Union. Therefore, cases normally come before a panel of three, five or thirteen judges. The ECJ was established in 1952 to judge disputes relating to the six-nation European Coal and Steel Community, the precursor of the European Union. From 1 December 2009, when the Lisbon Treaty came into force, the name of the Court was changed to the "Court of Justice of the European Communities". It is the function of the ECJ to ensure that European Union laws are applied consistently in all the member countries. Eight advocates general advise the judges.

A landmark ruling of the ECJ, decided before British entry into the (then) European Economic Community, determined that the laws of the European Economic Community (now the European Union) supercede those of member states in areas covered by European treaties. (Case 26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen, 1963 and Case 6/64 Costa v ENEL, 1964, Turpin and Tomkins, 2007, 305 and 308). After the UK joined the European Economic Community in 1972, the British courts were obliged to accept this as a result of the so-called Factortame cases (R v Secretary of State for Transport, ex p Factortame Ltd., 1989, 1990, 1991, 1992, 1996 and 2000. See Turpin and Tomkins 2007, 329-32).

73 The 14th Protocol states: *"There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge."* See: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=194&CM=7&DF=18/08/2010&CL=ENG

Many of the cases before the ECJ concern economic and trade issues, for example, the free movement of goods and of persons. Unlike the Strasbourg Court, the ECJ is not primarily concerned with human rights issues; however, since the Lisbon Treaty came into effect in 2009, the ECJ has gained a formal, though complex, role on these matters.

Significantly, for the first time ever, the Lisbon Treaty gives the European Union a legal identity of its own. Accordingly, the European Union as an institution (and separate from its individual member states) has acceded to the European Convention on Human Rights. In addition, the same treaty introduces as a part of the European Union a separate list of rights – the Charter of Fundamental Rights of the European Union. However, three of the member nations – the United Kingdom, Poland and the Czech Republic – signed the Lisbon Treaty with provisos included in a special protocol to the treaty. The UK insisted on these provisos because the Labour government did not wish to be committed to some of the social rights included in the Charter.

These developments have created a framework whose implications remain unclear, even to several legal specialists who were invited to give evidence about it in 2008 before the Select Committee on the European Union of the House of Lords (House of Lords, 2008). They gave varying evidence as to whether or not the protocol signed by the UK amounted to an opt-out from the Charter of Fundamental Rights.

The Courts' conundrum – why human rights law could trigger conflict

If a system is too complex to be understandable even to informed citizens, then it cannot possibly be democratic. The interrelationships between the supreme courts in London, Luxembourg and Strasbourg are Dickensian:

1. Where the Strasbourg Court rules on a British case, the UK courts are bound to accept its ruling and the UK government is obliged by treaty to implement the decision (although it sometimes delays for a considerable time in doing so);[74]
2. where the Strasbourg Court rules on a case not involving the UK, the British courts are not obliged to follow the precedent established in Strasbourg, though in practice, they choose to do so;
3. the UK courts are subject to the supremacy of the Luxembourg Court in matters relating to the European Union; and
4. the relationship between the European Court of Justice in Luxembourg and the Strasbourg Court on matters of human rights is unclear and are a matter of negotiation between the European Union and the Council of Europe following the Lisbon Treaty.

Following the Lisbon Treaty, the European Union is to become a signatory in its own right to the European Convention of Human Rights. There will be a judge on the Strasbourg Court representing the European Union, even though every member country of the European Union already is a member of the Council of Europe and has the right to nominate a judge to the Strasbourg Court.

74 The matter is complicated by *R v Horncastle*, in which the Supreme Court set out conditions in which it would and would not be bound by Strasbourg. The implication of the case is that there are cases in which the Supreme Court would not feel itself so bound. However, the basic point remains that the current system provides for a British Supreme Court that is subsidiary to Strasbourg.

Although the European Union is to sign a treaty with the Council of Europe whereby it will accede to the European Convention of Human Rights, it will not become a member of the Council of Europe. The relationship between the Luxembourg and Strasbourg Courts on matters of human rights is still to be hammered out in forthcoming negotiations. In addition to being bound by the ECHR, the European Union also now has its own Charter of Fundamental Rights and Freedoms as well. It remains to be seen how conflicts between these two documents can be resolved.

4

Could the UK Leave the Jurisdiction of the European Court of Human Rights?

Before considering whether it is desirable to abolish or change the current human rights system introduced in Britain in 1998, the legal practicalities of doing so need to be examined. Before the 2010 general election, there was a flurry of statements and publications which argued that it is now impossible for the UK to withdraw from the jurisdiction of the Strasbourg Court without also having to leave the European Union.

In her 2009 lecture in defence of the Strasbourg Court, Lady Mary Arden, a Lady Justice of the Court of Appeal, warned that were the United Kingdom "to cease to be a contracting party to the Convention" [the European Convention of Human Rights], "it might well have to cease to be a member of the European Union."[75] Her opinion carries particular weight because she is a former chair of the Law Commission of England and Wales who in 2000 acted as an ad hoc judge of the Strasbourg Court. It is only fair to mention that she has been one of the most forceful supporters of the Court among senior judges in England and Wales. The character of her public disagreements with Lord Hoffmann about the role of the Strasbourg Court is an indication of how the politicisation of the British judiciary has accompanied its growing assertiveness in dealing with politically charged questions.

According to the Joint Committee on Human Rights of the House of Commons and the House of Lords, a body with a longstanding record of supporting the growth of the law in this area, British legislation "cannot detract in any way from the rights guaranteed by the ECHR."[76] Moreover, "withdrawing from the ECHR is not a realistic possibility". This is because, according to the committee, "being a signatory to the ECHR is now effectively a condition of membership of the EU."[77]

In a similar vein, the human rights pressure group, Justice, warns that, unless the UK withdraws from the Council of Europe, the scope for reform is "extremely limited".

A considerable number of senior lawyers, academics and officials in the UK and in Strasbourg were interviewed for this report, in order to establish whether the legal scope for reform is as limited as has been suggested. In doing so, it has become apparent that the legal scope for future action by the United Kingdom is considerably greater than some have suggested.

75 Lady Justice Mary Arden, "Human Rights and Civil Wrongs: Tort Law under the Spotlight", Hailsham Lecture 2009. London: Judiciary of England and Wales, 12 May 2009, page 15 http://www.judiciary.gov.uk/docs/speeches/arden-speech-hailsham-lecture.pdf

76 Jack Straw (2009). Responding to Human Rights Judgements: Government Response to the Joint Committee on Human Rights' Thirty-first Report of Session 2007-08. London: TSO, January, Cm at paragraph 50

77 Ibid. at paragraph 48

Lord Hoffmann has already alluded to withdrawal from the jurisdiction of the European Court of Human Rights as being one of several policy options open to the UK.[78] In a lecture to the Judicial Studies Board in 2009, he stated:

> *"Let me be clear about what the problem is. First, as I said earlier, I have no difficulty about the text of the European Convention or its adoption as part of United Kingdom law in the Human Rights Act 1998 ... Secondly, I think it would be valuable for the Council of Europe to continue to perform the functions originally envisaged in 1950, that is, drawing attention to violations of human rights in Member States and providing a forum in which they can be discussed. Thirdly, I have no objection to the text of the Convention being used as a standard against which a country's compliance with human rights can be measured for the purposes of such political criticism. Fourthly, I would accept, indeed applaud, the use of this instrument at the political level as a benchmark for compliance with human rights by members of the European Union. The problem is the Court; and the right of individual petition, which enables the Court to intervene in the details and nuances of the domestic laws of Member States."*

What would be the legal consequences, were the UK to withdraw from the jurisdiction of the European Court of Human Rights?

1. Would British withdrawal from the jurisdiction of the European Court of Human Rights entail withdrawal from the European Convention on Human Rights?
2. Would it entail withdrawal from the Council of Europe?
3. Would it entail withdrawal from the European Union?

Would the UK's withdrawal from the jurisdiction of the European Court of Human Rights entail withdrawal from the European Convention on Human Rights?[79]

UK obligations derive from its signature in 1949 of the Statute of the Council of Europe, in 1950 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and from a set of subsequent protocols. Originally, acceptance of the Convention was separate from acceptance of the jurisdiction of the European Court. It was only in 1965 that the UK accepted the right of individual petition to the Court and only in 1998 that the European Convention on Human Rights was incorporated into UK law. In France, the right of individual petition to the Court was granted only in 1981. However, under the terms of Protocol 11 of the ECHR (which Britain signed in 1994), acceptance of the jurisdiction of the Court is now an integral part of the treaty. Therefore, the UK can no longer leave the jurisdiction of the European Court of Human Rights without also rejecting the ECHR treaty. The UK is entitled to leave the treaty, under Article 58, by giving six months' notice. In the event of its taking such a step, it would remain obliged to accept the jurisdiction of the Strasbourg Court in any ongoing cases.

If the UK wished to withdraw from the jurisdiction of the Strasbourg Court and at the same time to retain its commitment to the ECHR it could do so in either of two ways. First, it could simply continue to incorporate the ECHR into UK law. This would signal a continuing adherence to the basic standards set forth in the Convention without being a signatory to the Convention by international

78 Lord Hoffmann (2009). "The Universality of Human Rights." Judicial Studies Board Annual Lecture 2009. London: Judicial Studies Board, paragraph 44 http://www.judiciary.gov.uk/NR/rdonlyres/98EDC605-B568-433C-A8C2-E4B151B350CF/0/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf

79 A part of the following analysis draws heavily on the work of Anthony Speaight QC

treaty. Second, it could negotiate with the Council of Europe to permit it to remain a signatory of the ECHR without accepting the jurisdiction of the Strasbourg Court. One academic lawyer has suggested in an interview that this is an option; others warn that it would be unacceptable to other member countries of the Council of Europe. Since the first option – the continuing incorporation of the ECHR into UK law – is available, it would be of only symbolic significance whether the second option succeeded or not.

Thus, the simple answer to the question is "No". The UK is not entitled to remain a signatory of the ECHR treaty if it rejects the jurisdiction of the European Court of Human Rights. But this would not prevent the UK's attempting to negotiate such a position or, failing that, simply to continue to incorporate the Convention into UK law.

Any UK government wishing to withdraw from the jurisdiction of the Strasbourg Court would face particular legal obstacles derived from the legislation relating to devolution for Scotland and Northern Ireland. Thus, the projected measure would apply to England and Wales alone unless the government were to undertake the more drastic step of amending the devolution acts.

Would the UK's withdrawal from the jurisdiction of the European Court of Human Rights entail withdrawal from the Council of Europe?

Since the break-up of the Soviet Union, the Council of Europe has aimed to attract former communist countries as members. Under its rules, any country wishing to join the Council must first sign up to the European Convention on Human Rights and accept the jurisdiction of the European Court of Human Rights. Crucially, Russia became a member of the Council of Europe under these terms in 1996, but the UK was not subject to this principle when it joined as one of the founder members in 1949.

Some UK lawyers, such as Rabinder Singh QC, argue that the requirement on new countries to accept the jurisdiction of the Strasbourg Court implicitly creates an obligation on existing members to do the same.[80] But this is not set out in any of the treaty documents or protocols signed by the UK.

The Statute of the Council of Europe (1949) includes two relevant articles. Under Article 3,

> *"Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I."*

Under Article 8,

> *"Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine."*

80 Theo Rycroft (2008). "The Rationality of the Conservative Party's Proposal for a British Bill of Rights." *UCL Human Rights Review* (1) No 1, 51-77 www.uclshrp.com/images/uploads/pdf/HRR%20-vol%201%20-%204%20RYCROFT.pdf

As the wording of these articles shows, it would require a serious substantive breach by the UK of the rule of law and of human rights and fundamental freedoms to justify expulsion from the Council of Europe. As acknowledged by a senior official of the Council of Europe, it is hard to see how withdrawal from the jurisdiction of the Strasbourg Court would of itself constitute such a breach. There undoubtedly would be strong objections from the Council of Europe were the UK to consider rejecting the jurisdiction of the European Court of Human Rights but they would be based on political and diplomatic grounds, rather than legal ones.

In summary, there is no clear legal provision in the Statute of the Council of Europe which would oblige the UK to cease being a member were it to withdraw from the ECHR.

Would withdrawal from the jurisdiction of the European Court of Human Rights entail withdrawal from the European Union?

In evidence given in 2006 to the Constitutional Affairs Committee of the House of Commons, the human rights activist, Francesca Klug, stated:

> *"It is a requirement now of the European Union that you ratify the Convention. You do not have to incorporate it into your laws, as we have done with the Human Rights Act, but you do have to ratify the European Convention on Human Rights to be a member of the EU."*[81]

When questioned on the same point, Rabinder Singh QC gave a similar reply but with greater caution to the question of whether the UK could remain a member of the European Union if it were to withdraw from the European Convention on Human Rights:

> *"I am not going to suggest that my answer is definitive by any means, but certainly I have to say that I had always understood, as a legal matter, that membership of the European Union today requires adherence to the European Convention on Human Rights. That is certainly, as I understand it, what we expect of potential new entrants, so I think it is a matter of legal obligation."*[82]

Jonathan Fisher QC, testified to the same Parliamentary committee that it is not a requirement of continued UK membership of the European Union to remain a signatory to the European Convention. (House of Commons, 2007, answer to Question 41.) On behalf of the Labour government, Lord Falconer of Thoroton, the Lord Chancellor, gave the opinion that "the way that the relevant treaties are drafted does not express [continued adherence to the European Convention of Human Rights treaty] as a condition [of continued UK membership of the European Union]." (Answer to Question 96.) However, he argued that there are strong reasons why a withdrawal would be impractical.

The relevant parts of the European Union Treaty (as amended by successive negotiations, most recently those leading to the ratification of the Lisbon Treaty) are Articles 6 and 7. There are four relevant provisions.

First, the new terms of the European Union Treaty agreed at Lisbon provide that the European Union, as a collective body with a legal identity distinct from those

81 House of Commons, 2007, answer to Question 20

82 House of Commons, 2007, answer to Question 63

of its member states, is to become a signatory of the European Convention on Human Rights. Currently all 27 member states of the EU are signatories of the Convention. Were a country to denounce the Convention treaty, it would still be bound by its membership of the EU to adhere to the terms of the Convention in matters falling under EU jurisdiction. However, this in itself would not necessitate its individual adherence to the Convention.

Second, as for accession by new states to the Council of Europe, accession to the EU requires adherence to the European Convention on Human Rights. But there is no document that binds existing members of the EU to this requirement. Indeed, there is some logic in imposing more stringent conditions on potential new member states, in many of which there may not be the same tradition of the rule of law as in the states which formed the EU at an earlier time.

Third, Article 2 of the Treaty of European Union as amended by the Lisbon Treaty establishes a number of broad values such as respect for human dignity, freedom, democracy, equality and respect for human rights. Withdrawal from the ECHR would not in itself entail the abandonment of such values.

Article 6.3 sets out that

> *"Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."*[83]

The meaning and implications of this are far from clear. As far as the requirements imposed on individual member states of the EU are concerned, one senior British lawyer interviewed for this report insisted that a country needs to adhere to the same general standards as those set out in the ECHR. This is something less precise than adherence to the ECHR itself. Moreover, if a member country of the EU adheres to standards as high as those set out in the ECHR (or incorporates the ECHR into its national legislation), there is nothing in Article 6.3 that requires that country to accept the jurisdiction of the Strasbourg Court as the preferred method of enforcement of those standards.

> "It is wholly wrong to state as a matter of established fact that the UK is now obliged to accept the legal supremacy of the European Court of Human Rights as a condition of continued membership of the EU"

Fourth, it is clear from Article 7 that retaliatory action by the EU requires substantive abuses of human rights by a member nation. According to Article 7.1, a majority of four fifths of the members of the EU Council must vote that "a risk of a serious breach by a member state of the values referred to in Article 2" and the other 26 members of the European Council must then vote unanimously to "determine the existence of a serious and persistent breach" by a member state.

If the United Kingdom withdrew from the jurisdiction of the Strasbourg Court and if, for this reason, it was obliged to denounce the ECHR treaty in order to do so, it is conceivable that the other members of the European Union would vote unanimously that this action in itself constituted a "risk of a serious breach" of the core values of the EU.

83 http://europa.eu/abc/treaties/index_en.htm

Unless the United Kingdom withdrew from the jurisdiction of the Strasbourg Court because it wished grossly to ill-treat terrorist suspects or to carry out some clear, major and systematic breaches of core human rights, it is hard to imagine that withdrawal from the jurisdiction of the European Court of Human Rights would trigger such a response.

If the UK decided to withdraw from the Strasbourg Court with the intention of substituting an effective method of enforcement of rights in its domestic courts, it is barely conceivable that this alone could lead to the suspension of the UK from institutions of the EU under Article 7 of the Treaty of European Union.

Certainly, it is wholly wrong to state as a matter of established fact that the UK is now obliged to accept the legal supremacy of the European Court of Human Rights as a condition of continued membership of the EU. Admittedly, it must accept the supremacy of the European courts at Luxembourg and in the future at Strasbourg in the extensive range of matters falling under the jurisdiction of the EU, but not in other fields.

It is an indication of the politicisation of legal discourse in Britain and of the undesirably large influence of a set of pressure groups that the legal scope of action available to the UK in the field of human rights legislation has been underestimated. Some of these lobbies – the Commission on Equality and Human Rights, for example – receive generous funds from the government. Unfortunately, the argument that the UK has little legal room for manoeuvre and is stuck with the Strasbourg Court reflects more of a gut reaction than a considered legal analysis.

The Attorney General, Rt. Hon. Dominic Grieve QC MP, observed in 2009, while Shadow Secretary of State for Justice, that adherence to the European Convention on Human Rights and membership of the European Union were not, in fact, linked. While making clear that he was keen to ensure that the UK continued to uphold the Convention's values, he stated:

> *"It would be a strange thing indeed to abandon it and could bring international disadvantage. But it would have not any bearing on our membership of the European Union."*[84]

In Theo Rycroft's words, "Most commentators consider that it would be political suicide to withdraw from the ECHR."[85] Yet, these commentators are often passionate supporters of the status quo, who have no interest in allowing the debate on reform to consider any viable alternatives. In her evidence in 2006 to the Constitutional Affairs Committee of the House of Commons, the human rights campaigner and academic Francesca Klug described denunciation of the ECHR as "an extraordinary thing to do":

> *"It would be inconceivable to the rest of the world because we fight wars in the name of democracy and human rights to disown the most successful human rights treaty in the world … Surely this is who we are, and we have to learn there are no ways around this. There really are no ways around this. What surely we do not want to do—and in the end it is a political judgment and you are a politician, I am not—in my view I cannot believe that this country wants to disown itself from these values that we have had such an important role in history in shaping."*[86]

84 *It's the interpretation of the Human Rights Act that's the problem – not the ECHR itself*, Dominic Grieve, 14 April 2009 http://conservativehome.blogs.com/platform/2009/04/dominic-grieve-.html

85 Theo Rycroft (2008). "The Rationality of the Conservative Party's Proposal for a British Bill of Rights." *UCL Human Rights Review* (1) No 1, 51-77, at page 67www.uclshrp.com/images/uploads/pdf/HRR%20-vol%201%20-%204%20RYCROFT.pdf

86 House of Commons, 2007, answer to Question 13

This view reflects a belief that the creation and growth of international legal institutions since the Second World War is and should be a "one way street" along which the only possibility is the progressive abandonment of sovereignty by the electors of nation states.

As examples of this expansionist approach, Lord Hoffmann highlighted three cases including that of *Hatton v United Kingdom*,[87] in which the Strasbourg Court considered whether the decision of the Secretary of State for Transport, to allow certain night flights into Heathrow Airport breached the right to privacy and family life and should therefore be reversed. Hoffmann stated:

> *"The judges of the Chamber in Strasbourg therefore considered that it was their function under the Convention to decide whether the elected Government of the United Kingdom had struck the right balance concerning flights at Heathrow... I regard all three of these cases and many that I could mention if I had time, as examples of what Bentham called teaching grandmothers to suck eggs."*[88]

By contrast, as is demonstrated in the next chapter, it is both legally possible and desirable to consider a range of options relating to the British constitution generally and, in particular, to human rights and judicial power.

87 (2003) 37 EHRR 611

88 Lord Hoffmann (2009). "The Universality of Human Rights." Judicial Studies Board Annual Lecture 2009. London: Judicial Studies Board

5
Democracy and the Judiciary: Options for Reform

What are the problems?

Persons and groups with considerably differing objectives have put forward reforms of the new constitutional system inaugurated by the Human Rights Act 1998. Since the substance of the reforms depends on what they aim to achieve, it is necessary to start by considering a variety of opinions about the existing problems.

(i) Poor administration of human rights laws

A first ground of complaint has been about the way in which the British government, the police and other public authorities have administered laws bearing on human rights and not to the legal regime itself. Critics of current practices include proponents of civil liberties, who feel that too little is being done to protect the rights of individuals, and those with a diametrically opposite view. Opinions about whether the authorities responsible for law and order pay too little or too much attention to human rights cross party lines and are the subject of divisions within political parties.

On the one hand, recent governments have been criticised for paying too little attention to the rights of suspected terrorists, asylum-seekers and other individuals. For example, some asylum-seekers are held in detention centres such as Yarl's Wood. It has been a common practice to detain children in a special wing at Yarl's Wood if their parents are being held there while their cases are under review or while they are awaiting deportation. Following a campaign by human rights groups, the Deputy Prime Minister, Nick Clegg, pledged in July 2010 in the House of Commons that the detention of children would end. It was

> *"simply a moral outrage that last year the Labour government imprisoned behind bars 1,000 children who were innocent of any wrongdoing whatsoever … This coalition government … will once again restore a sense of decency and liberty to the way in which we conduct ourselves."*[89]

Similar civil libertarian criticisms voiced before the general election of 2010 by Conservative leaders and by the Labour peeress, Helena Kennedy, have been cited in the Introduction to this study. Human rights groups object strongly to the restrictions placed under the system of control orders on suspected terrorists against whom no charges have been brought.

89 BBC (2010). *BBC News UK* "Pledge to end child asylum detention next May" ww.bbc.co.uk/news/uk-12011862

On the other hand, it is a common view that the administration of the system of justice is unfairly tilted in favour of criminals. When it comes to the control of terrorism or mass immigration, many feel that the welfare of the community at large needs to be balanced against that of suspected terrorists or persons claiming to be political refugees. Those responsible for law enforcement, according to this view, need greater freedom of action.

(ii) Assertiveness of British judges

Second, British judges have come under attack for interpreting the European Convention on Human Rights in a way that has stretched the meaning of its provisions and which have involved an unreasonable assertion of judicial power over political matters.

UK judges have been attacked for challenging public authorities on the basis of what are seen as far-fetched interpretations of the European Convention on Human Rights. In December 2010, for example, the Prime Minister expressed his anger about the decision of two senior judges from the Upper Tribunal of the Immigration and Asylum Chamber. They ruled that a Kurd could not be deported despite the fact that he had been jailed for a hit-and-run motoring offence while disqualified from driving, had been turned down twice for asylum and reportedly had a string of other offences. Because he had fathered a child in the UK, the judges ruled that his deportation would contravene his right to family life under Article 8 of the Convention.[90]

Many objections to the British judiciary centre on what some see as the capture of large parts of it by adherents of excessively liberal philosophies. This leads, according to this view, to excessive judicial activism. Though not yet as highly developed, the battle lines are similar to those in the United States between judicial activists and those favouring a strict construction of the US Constitution.

Typically, those who favour an active, "progressive" interpretation of the European Convention on Human Rights refer to it as a "living instrument" and claim that judges, whether in London or in Strasbourg, are entitled to interpret the general terminology of the Convention according to their views of modern European morality. On this ground, they may extend the application of some of the articles beyond the meanings originally intended.

By contrast, "strict constructionists" feel that judges should refrain from acting as moral arbiters. In the often-cited words of a US Supreme Court Justice, Judge Learned Hand, it is not the role of judges to act as "Platonic guardians" of their societies. British critics of excessive judicial activism are equally concerned about the stances of senior judges in London as with those in Strasbourg.[91]

(iii) The undemocratic character of judicial power

A third category of objection is that, regardless of the way in which British judges have decided particular cases, the post-1998 system is unacceptable because it permits the judiciary to usurp Parliamentary sovereignty in a manner that lacks democratic accountability.

Judges are not elected and, for this reason, they are not accountable. Obviously, members of the judiciary must be free to promulgate their legal opinions free of pressure from the popular press or from politicians. They ought not to be answerable to the voters and subject to dismissal in the same way as those holding

90 Tim Shipman (2010). "Cameron's fury over the killer who can't be deported due to the Human Rights Act." *Daily Mail,* 19 December. http://www.dailymail.co.uk/news/article-1339643/Camerons-fury-killer-deported-Human-Rights-Act.html#ixzz18lVRs7Jg

91 In contemporary Britain, proponents of restricting judicial assertiveness often come from the political centre-right and right. This has not always been the case. In the United States, critiques of an unaccountable judiciary came in the 1930s from the political left in response to decisions by the Supreme Court which challenged and obstructed Franklin Delano Roosevelt's New Deal.

elective office. This does not mean, however, that the judiciary can or should be wholly divorced from the political process. The more judges are able to make what effectively are political decisions, the more pressing is the issue of their rightful role in a democracy and of the way in which that role is to be regulated.

(iv) The undesirability of international jurisdiction over human rights in the UK

A fourth set of objections is to the international character of the legal framework set out in the Human Rights Act of 1998. According to this view, the European Court of Human Rights is defective both for reasons of principle and of practice.

There are those who dislike the European Court of Human Rights because they see it as a part of a dangerous stranglehold of European institutions. The Strasbourg Court is part of the Council of Europe not, as often presumed, of the European Union. But the provision of the Lisbon Treaty whereby the European Union is soon to sign up to the Convention and to appoint a judge to the Strasbourg Court increases the suspicions of Euro-sceptics. For them, it is the mere fact of the ECHR's being a European instrument that is the problem. Their core objection to the current system of enforcement of human rights in the UK is that it involves the subjection of British judges to a superior international regime. Thus, the development of human rights mechanisms is part of a wider assault on national independence.

Further objections to Britain's accepting the jurisdiction of the Strasbourg Court are more practical: the Court is condemned because it is inefficient, some of its judges are of poor quality and the Court has an over-active jurisprudence which takes too little account of variations in national cultures and circumstances. Moreover, the fact that the Strasbourg Court has jurisdiction in no fewer than 47 different countries makes it inherently remote and unaccountable.

In matters such as the balance between the right to privacy and the right to freedom of expression (Articles 8 and 10 of the ECHR), there is no reason why different countries should not have different priorities. Similarly, in matters relating to religious rights, it may be argued that national realities and moralities need to be taken into account. If the courts are to act as moral guardians, it is better – according to this view – that it is national courts that carry out the task rather than a 47-nation court promulgating a common set of values across such a wide and diverse set of countries. Lord Hoffmann has questioned whether or not the nature of human rights means that they cannot in fact be universally applied by a central multi-jurisdictional court.[92]

For the reasons that have been outlined, there is widespread dissatisfaction with the status quo in human rights law. This is shown by opinion polls of the UK population. A poll for YouGov taken in May 2010 showed that 61% of respondents thought that the establishment of a Human Rights Commission by the Coalition government to examine options for reform was a good idea. When asked whether they would prefer to replace the Human Rights Act with a British Bill of Rights, only 24% of respondents wanted to retain the Act, while 53% of respondents wanted to replace it with a British Bill of Rights.[93]

Despite all of the criticisms,[94] one core aspect of the UK human rights regime is accepted by all of the main UK political parties: namely, the European Convention on Human Rights itself.

92 Lord Hoffmann (2009), "The Universality of Human Rights." Judicial Studies Board Annual Lecture 2009, London: Judicial Studies Board, throughout, but particularly page 11.

93 Sample size 882 adults, fieldwork conducted by YouGov on 19 May 2010. Full details at: http://today.yougov.co.uk/sites/today.yougov.co.uk/files/YG-Archives-Pol-Sun-coalition-100519.pdf

94 The case of those who wish to extend the range of human rights to the economic and social sphere will not be addressed. This has been discussed in Chapter 2.

Why the UK should retain the European Convention on Human Rights

There is a widespread belief that to withdraw completely from the Convention would be a retrograde step. This historic document provides clear and unambiguous statements of what citizens can expect by way of protection of individual liberties matters. It helps to frame what constitutes norms of acceptable behaviour in the wider world.

The Convention is a model example of a minimalist, but realistic, list of the fundamental rights, almost all of which would achieve near unanimous public support if they were interpreted on a fairly strict interpretation. The core rights are listed in articles 2 – 14 of the Convention, the full text of which is reproduced as an appendix to this report. In summary, they are:

Article 2:	Right to life
Article 3:	Prohibition of torture
Article 4:	Prohibition of slavery and forced labour
Article 5:	Right to liberty and security
Article 6:	Right to a fair trial
Article 7:	No punishment without law
Article 8:	Right to respect for private and family life
Article 9:	Freedom of thought, conscience and religion
Article 10:	Freedom of expression
Article 11:	Freedom of assembly and association
Article 12:	Freedom to marry
Article 13:	Right to an effective remedy
Article 14:	Prohibition of discrimination[95]

The administrative challenge of making human rights compatible with public safety

The problems caused by the significant growth in judicial power in the UK will require legal remedies, as will be argued below. However, it is important also for the government to reduce the scope for clashes with senior judges by taking steps to improve the way in which the country is policed and administered.

It is widely accepted that there are extreme situations in which it may be impossible to maintain the normal rights of suspects. There may be circumstances under which the dangers are so dire and the number of suspects is so great that the case for measures such as detention without trial becomes too great to resist. The ECHR makes it possible to derogate from some of its articles in a state of emergency. But there is a difference between restricting rights on a temporary basis in a genuine emergency and doing so merely for the convenience of the law enforcement authorities. Hallowed rights – such as habeas corpus and the right to trial by jury – should not be denied lightly.

The greater the care taken by public authorities to limit their demands to restrict rights, and the fewer the occasions on which they do so, the more seriously they will be taken by senior judges. In recent years, conflicts between the government and the judiciary resulted in considerable part from judges'

95 See: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf for the full text of the Convention

mistrust of the reasons provided by the government for removing traditional legal safeguards. There also has been a widespread perception that the Home Office has been inefficient.

Improvement in the effective organisation and functioning of law enforcement is one vital ingredient of a policy that will promote public safety with a minimum infringement of rights.

Replacing the Human Rights Act 1998 with a "British Bill of Rights"

The aim of this proposal is to lessen the influence of judges at the European Court of Human Rights and to increase that of British judges and of Parliament. It sets out to achieve these ends without interfering with Britain's current treaty commitments as a member of the European Union, the Council of Europe, and as a signatory of the European Convention on Human Rights. This proposal is worthwhile but would not be sufficient.

A British Bill of Rights would serve three main (and one subsidiary) purposes. At a symbolic level, it would express the link between documents such as the Magna Carta of 1215 and the current conceptions of rights. Second, it would incorporate and entrench the right to trial by jury, a long-standing and basic feature of the British legal system which, nevertheless, has been eroded in recent years. Third, it would lay out in greater detail the relative priorities to be given to competing rights. For example, it would lay down the primacy of the right of freedom of expression (Article 10 of the European Convention) over the right to privacy (Article 8). By doing this, British judges would have to honour these priorities. According to some proponents of a "British Bill of Rights", the judges in Strasbourg would be more likely to respect the guidelines set out in UK legislation. The European Court would, as a result of the introduction of a British Bill of Rights, give a greater leeway to British judges; to use the technical term, they would grant a greater "margin of appreciation". Whether the Justices at Strasbourg actually would do this is unclear. The fourth and arguably subsidiary aim of a British Bill of Rights would be to set out the main responsibilities of citizens.

Some proponents of a British Bill of Rights also advocate limiting the influence of judges over the interpretation of legislation by repealing the Human Rights Act 1998. At least two undesirable features of the Act would thereby be eliminated. If judges feel that an act of Parliament is wholly incompatible with the European Convention, the Human Rights Act entitles them to issue a "declaration of incompatibility". At that stage, a government minister may amend the law in order to eliminate the conflict (as divined by the judges) between the existing act of Parliament and the ECHR.

Under Article 10.2 of the Human Rights Act, this amendment procedure may sacrifice the normal process of Parliamentary scrutiny of new legislation for the sake of speed.

> *"If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendment to the legislation as he considers necessary to remove the incompatibility."* [96]

96 Aileen Kavanagh (2009). *Constitutional Review under the UK Human Rights Act.* Cambridge: Cambridge University Press, page 11

Such a "remedial order" takes the form of a statutory instrument. The minister either may lay a draft of the order before Parliament for 60 days, or make the order before laying it before Parliament, "thus taking the process," as Kavanagh explains, "totally outside the parliamentary process which would normally be required for primary legislation."

The "fast-track" procedure had only been used to remedy one of the 15 declarations of incompatibility down to 2008.[97] Nevertheless, it is regarded by many proponents of a British Bill of Rights as important to remove this opportunity for ministers to bypass Parliament after a "declaration of incompatibility" by the judiciary.

Even if a British Bill of Rights were to replicate the European Convention on Human Rights, the repeal of the Human Rights Act 1998 could present two interesting opportunities. Firstly, it could allow for the codification of established rights – such as the right to trial by jury and habeas corpus.

Secondly, it would also be an opportunity to repeal of Section 3.1 of the Act, which compels a court dealing with a case concerning a human rights question to interpret it in line with the provisions of the ECHR – thus, in practice, altering existing legislation without first making recourse to Parliament. A new provision could be prepared to ensure that questions relating to the interpretation of existing legislation be referred back to Parliament. Declarations of incompatibility are issued to deal with statutes that a court considers incompatible with the terms of the Convention, so there is an established procedure for dealing with legislation that fulfills a different purpose to that which is now needed. Such a procedure would end the situation where judges can re-focus the settled will of Parliament in a manner that they believe to be compliant with the terms of the Convention (which itself has been interpreted through the Strasbourg's Court's own jurisprudence), but which results in a clear democratic deficit.

If it were to be effective as a solution to the problems which have been identified, a British Bill of Rights would need to be accompanied by these reforms to reinstate Parliament's role as sovereign over the legislative process. But they would not be enough. At the domestic level, there still would be no democratic check on the judiciary. At the international level, there would be nothing to stop a case being brought before the European Court of Human Rights in Strasbourg where rights contained solely in the British Bill of Rights, could be trumped by those in both the bill and the Convention. In that case, the Strasbourg Court would, on past form at least, be very likely to assert the primacy of its rights over "British" rights.[98]

Improving the democratic accountability of candidates for the Supreme Court

One of the key objectives of the reforms contained in the Judicial Reform Act 2005 was to guarantee the independence of the judicial branch of government. The Judicial Appointments Commission began work in 2006, charged with making the selections. The composition and remit of the commission were set out in the 2005 Act and may thus be considered to reflect the Labour government's values, though the objective of securing the appointment of more women and members of ethnic minorities to the bench have commanded widespread support.

97 Robert Hazell (2010). *The Conservative Agenda for Constitutional Reform.* London: The Constitution Unit, page 66

98 A senior official of the Strasbourg Court interviewed for this study indicated that the Court would be unlikely to grant the UK an additional "margin of appreciation" in its judgements on cases involving the UK in response to the provisions of a British Bill of Rights.

The 15 person commission, chaired by Baroness Usha Prashar, started in 2005 with a staff of over 100 persons and with the stated determination to select on the criterion of merit.[99] The commissioners themselves have a balance of male and female members as well as representatives of various sections of the legal profession as well as non-lawyers.

The merit principle of appointment relies on the assumption that there is a reasonably objective way in which this may be assessed. It also assumes that judges – like permanent civil servants – are "non-political". This latter assumption is likely to come under increasing pressure as judges become more activist in nature and are involved in considering ever more politically loaded cases. It is not only in their legal opinions, but also in speeches outside of court, that senior members of the judiciary have felt entitled to comment forcefully on matters of politically-controversial public policy.

> "It is impractical for judges to expect to be given the licence to participate in political discourse but to be exempt from political criticism"

This new situation raises important issues about the accountability of the judiciary. If all senior judges were willing to act like politically-neutral civil servants and provided that – like other public officials – they refrained from making loaded comments outside the courtroom, the issue of political accountability need not loom large. But they cannot expect on the one hand to be free effectively to enter the political arena and on the other hand to be afforded the deference traditionally afforded to them.

A proponent of the new system of constitutional review under the Human Rights Act 1998 such as Kavanagh acknowledges the increase in judicial daring but feels that it poses little problem for democracy. She concludes her important 2009 work by writing

> *"The HRA is, albeit slowly, subtly and incrementally, contributing to a change in how we understand constitutional law and how we characterise the appropriate relationship between Parliament and the courts and has begun to unleash the constitutional imagination in order to reassess the theroretical foundations of UK constitutional law … Rather than starting from the premise that democratically elected bodies is somehow constitutionally suspect, the courts now start from the premise that they have a strong democratic mandate to engage in strong constitutional review. A legal culture of demanding justification for inroads on fundamental rights now prevails. The courts are more prepared to intervene."*[100]

It is true that the incoming Labour government introduced the Human Rights Bill in accord with its manifesto in the general election of 1997. Still, we may question the basis of this "strong democratic mandate". Kavanagh assumes that courts are – and will in the future continue to be – protectors of constitutional values. She thus denies any tension between judicial power (what she calls "constitutionalism") and democracy. She recalls that judges such as Lord Justice Steyn and Lord Justice Hoffmann have claimed that by challenging the government by upholding the rule of law, they protect, rather than undermine the democratic ideal.[101] Many in the Conservative and Liberal Democratic parties and on the left-wing of the Labour party would agree with her that the

99 Frances Gibb "Merit is our bedrock – we'll appoint judges solely on merit." London: *The Times,* 31 October 2006. http://business.timesonline.co.uk/tol/business/law/article616144.ece

100 Aileen Kavanagh (2009). *Constitutional Review under the UK Human Rights Act.* Cambridge: Cambridge University Press, pages 415 and 421

Labour governments of 1997 onwards made illegitimate inroads into civil liberties and that the courts were justified in at least some of their challenges.

However, there is the world of difference between approving of the actions of the UK judiciary in key cases involving due process of law in recent years and denying that these actions are part of a process of judicial politicisation. We need to examine if measures need to be introduced in recognition of this situation. In broad terms, there are four alternatives. First, there is a relatively weak form of democratic accountability of judges whereby they are asked to answer questions from members of the legislature under strict rules which limit the type of information which they may seek. Legal accountability has been fairly narrowly defined by Andrew Le Sueur as a "principle which requires public authorities to explain their actions and be subject to scrutiny."

Second, there is full legislative oversight of appointments, with the right of veto. This is the system used in the United States for the appointment of judges to their Supreme Court and other federal courts. Under this system, the US president makes nominations on grounds which may include the judicial and political philosophies of nominees and the upper house of the legislature, the US Senate, must approve of the nominations by a two-thirds majority.

A third method of democratic accountability is the popular election of judges. A fourth method is making judges subject to dismissal. These last two methods are not seriously considered in Britain. They undermine judicial independence and run contrary to the spirit of our uncodified constitution, where judges do not have the power to undo the will of the legislature.

The UK is moving cautiously towards the first of these methods. However, as the UK Supreme Court begins to adjust to its new role as the apex of judicial power, a more radical approach to judicial selection should at least be considered – namely legislative oversight of appointments to the Supreme Court. This would have the advantage of ensuring that judges retained their independence, but would be subject to Parliamentary scrutiny prior to their appointment.

Under the proposed system, candidates would still need to have the experience judged necessary by their peers to ensure that nominees did not become political appointments. A shortlist of names would be prepared by a commission made up of one representative from each of the UK's three Judicial Appointments Commissions (England & Wales, Scotland and Northern Ireland) the President and Deputy President of the Supreme Court. This is the group which currently appoints Justices to the Supreme Court. This commission would then send a shortlist of names to the Prime Minister. The Prime Minister would then select a name from that shortlist and put it before Parliament, where a hearing could be conducted by the House of Commons Justice Committee. Motions would then be tabled in each house and, if passed by a simple majority, the Prime Minister could recommend the appointment to the Queen.

The United States system of separation of powers between the three main branches of government combined with checks and balances has a solid logic. It allows sitting judges to carry out their work without fear or favour. But it also ensures that, if the approach of the Supreme Court is consistently out of line with prevailing public opinion, an elected chief executive will nominate and members

101 Ibid., page 402

of an elected legislature who will confirm new judges more in line with the wishes of the electors when vacancies on the Court occur.

Until now, judicial accountability has consisted of modest innovations. It is already accepted practice that senior members of the judiciary appear occasionally before specialist Parliamentary committees to answer questions about the overall state of the judiciary. There is already precedent for the appearance before Parliament of nominees for some other senior positions. However, the rules of conduct for such hearings are themselves somewhat controversial. Normally, members of the legislature are expected to restrict themselves to questions designed to establish whether a nominee understands the role for which he or she has been put forward. Questions about their political views and how they would decide real or hypothetical problems are out of order. Thus the scope of questioning is narrow.

Were there to be confirmation hearings for nominees for persons who in their future capacity would be required to rule on politically sensitive matters, the members of the relevant committee of the House of Commons (or of the House of Lords) inevitably would wish to probe their likely political attitudes.

It has been a firm tradition that members of Parliament must respect judicial decisions and must not even criticise them. However, the reality is that the judges themselves have become far less inhibited about making politically-loaded statements, both in delivering their judgements in courts of law and in lectures to outside audiences. It is impractical for judges to expect to be given the licence to participate in political discourse but to be exempt from political criticism.

Withdrawing from the jurisdiction of the European Court of Human Rights

It would be possible for the UK to retain a commitment to the European Convention on Human Rights but to make the UK Supreme Court rather than the Strasbourg Court its ultimate arbiter.

Whether withdrawal from the jurisdiction of the Strasbourg Court is desirable depends partly on diplomatic considerations and partly on the willingness and ability of the Council of Europe to introduce reforms of the Court needed to make it more efficient, more restrained and more respectful of national traditions. The Council of Europe itself has recognised that there are problems concerning the operation of the Court and the "Interlaken Process" of 2010 has been set in train to consider remedies.

(i) Diplomatic considerations

Whereas officials in the Home Office probably would welcome freedom from the Strasbourg Court, diplomats at the Foreign Office would be likely to frown on the move. The main fear in the Council of Europe is that a rejection of the authority of the Court by Britain would lead to similar moves by countries such as Russia. Since Russia became a member of the Council of Europe and accepted the jurisdiction of the European Court of Human Rights, its government has been at the receiving end of a large number of cases brought by its citizens for alleged human rights abuses in Chechnya and elsewhere.

The only reason – so the argument goes – that Russia tolerates this is that the governments of other member countries of the Council of Europe also are subject to the same process. Were Britain to express its reservations about the Court so forcefully that it decided to leave its jurisdiction, this would be like a nuclear explosion that would fatally undermine it. Moreover, without the Court, the Council of Europe would itself be wounded gravely. The Council of Europe – unlike the European Union or the United Nations – is an international body in which the United Kingdom wields real influence. Hence, the move would be counter to its national interests.

Even if these concerns are valid, it is a matter of debate how much weight they need to be given. When the issue at stake is the welfare and integrity of the UK's system of justice and democracy, it may be argued that this must be the predominant consideration. If the existence of an international court improves British democracy and the welfare of British citizens and of foreigners living in the country, then there is a strong case for accepting it as a part of our system of governance. If it undermines our constitution, then that is something too important and too intimate to be sacrificed for the supposed but unproven advantage of other peoples. The promotion of democracy, justice and good governance in other parts of the world, especially in countries emerging from decades of one-party rule, is a valid and valuable objective. However, there are alternative and better ways of achieving this end than by subjecting our own population to an international regime of adjudication – unless, of course, that regime is desirable in its own right.

(ii) Can the Strasbourg Court reform itself?

Before making a final judgment on whether the UK should leave the Court's jurisdiction, it is worth taking a moment to consider whether it is realistic to expect the Court to reform itself so that some of the main objections to it are dealt with. To the extent it is willing and able to do this, the further the reforms that the Council of Europe is considering will weaken the case for withdrawal.

As a part of this study, the author visited the Council of Europe in April 2010, to speak with senior officials at both the Court and the Council of Europe. This visit followed shortly after a special conference of ministers of the Council's member states held at Interlaken, Switzerland. The specific objective of the meeting was to discuss ways in which the Court can be reformed. This "Interlaken Process" is part of a broader project to consider the reform and reorganisation of the Council of Europe. This is being coordinated by Ambassador Gérard Stoudmann of Switzerland, who has been appointed as special representative of the secretary-general for re-organisation and reform. The UK's Ambassador to the Council of Europe was appointed to chair a diplomatic working group to implement the "Interlaken Process".[102]

The Interlaken reforms propose, first, to limit access to the Court to cases where it can be shown that the matter involves "significant harm" to those seeking redress.

A second issue concerns the quality of certain judges, some of whom are considered to be incompetent political cronies of the nominating government. A problem of the current appointment process is that each country has to submit the names of three nominees. The nominations are public. If all three nominees

102 Apart from the reforms outlined, certain administrative changes were introduced at Interlaken in Protocol 14 of the European Convention on Human Rights. Russia's agreement to this protocol was crucial since a considerable proportion of the outstanding cases relate to Russian cases.

from a country are considered incompetent – as has happened sometimes – it is then hard for the nominating country to accept this verdict since it would involve the public humiliation of the nominees and thus an attack on national pride. One idea is that nominations should be made confidentially to a scrutiny committee (similar that that of the European Court of Justice at Luxembourg). This would make it easier for the nominating country to accept a rejection of its nominees because it would no longer involve a national loss of face.

At this preliminary stage, it is not yet possible to judge whether this measure, or any alternative ones, would be acceptable to all 47 member countries of the Council of Europe. Nor can we be confident that it would sufficiently improve the quality of the judges. Legal traditions and qualifications in some of the newer member states are generally poor. As long as the system of one judge nominated by each member state is considered sacrosanct, it is likely to be hard to assure that all nominees will have sufficient judicial experience and qualifications in human rights law. Since the two main languages of the Court are French and English, the linguistic capacity of judges is a significant consideration.

Third, there is the question of judges from micro-states. Observers of the Court stress that judges from micro-states such as San Marino are not necessarily the problem. Such judges have sometimes proved to be of higher quality than those from states with much larger populations. Nevertheless, it is not denied at the Council of Europe that there are problems with the existing system of allowing member states to have the same allocation of one judge regardless of huge disparities in their populations. One way to meet the objection to the disproportionate role of judges from very small countries is to reform the 17 member Grand Chamber. The judges who sit in this chamber are an inner-circle of the 47 judges. One proposal is that ten of the 17 always come from the ten countries with the largest populations and that the remaining seven places rotate between the other 37 judges from countries with smaller populations. This would deal in small measure with the problem of judges from micro-states but would have other disadvantages, as not all of the largest states have long established liberal democratic traditions.

Fourth, the Interlaken Process recognises that a problem of Strasbourg jurisprudence is that judgements in cases relating to similar issues have in the past been inconsistent. The idea of creating and respecting precedent has been alien to the jurisprudence of some judges. The issue of inconsistency has become more urgent since the ratification of the Lisbon Treaty and the forthcoming accession of the European Union to the European Convention on Human Rights. This will make it important for decisions of the Luxembourg and Strasbourg Courts to be in line with each other in matters concerning human rights. How this consistency will be achieved in practice is so far unclear.

Fifth, in addition to procedural changes, officials of the Court and of the Council of Europe are prepared to put informal pressure on the judges to persuade them to be prudent and to avoid verdicts which needlessly provoke and offend public opinion. For example, a recent decision to ban the display of crosses in state schools in Italy is viewed by some officials as tactless to say the least.

A key underlying objective of reformers within the Council of Europe and within the Court is to find a way to enable the Strasbourg judges to focus on "big" matters of human rights while leaving routine matters to national courts, which

will be expected to make their judgements in accord with the precedent set by previous rulings at Strasbourg on test cases. This brings up the question of whether it is possible for the judiciary to distinguish between "core" human rights and peripheral, additional rights. If such a distinction can be set, it will help alleviate the concerns within the UK and in other countries about the jurisdiction of a remote international court.[103]

The European Convention on Human Rights already makes a distinction between different rights in its provision for derogation from the Convention at times of national emergency. Even at such times, certain rights, such as freedom from torture (Article 3), may not be abandoned. Thus, there already is a hierarchy of rights. It may be argued that the same idea of a hierarchy of rights could be used to separate some rights which need to be adjudicated by an international court and others better left to national courts. For example, where cases involve a conflict between competing rights – particularly between the right to freedom of expression (Article 10) and the right to privacy (Article 8) – they could be left to a decision in national courts. The priority given to a particular right is likely to reflect national traditions and mores and need not be set in the same way for all the 47 member states.

Were it possible to define considerably more narrowly than at present the criteria for acceptance of cases by the Strasbourg Court, it would be of benefit to its efficiency as well as its acceptability. It is not only officials in Strasbourg but some human rights professors who recognise that it is desirable in theory to decide what are the "big" cases and thus to limit the phenomenon of "rights contagion" discussed earlier. This is not an easy task. The problem is that cases which are "small" in themselves may set precedents of far-reaching consequence. There is therefore no simple test, such as the amount of money at stake in a claim, which can be used to distinguish between routine and groundbreaking cases in the human rights field.

Undoubtedly there are ways in which the quality and efficiency of the European Court of Human Rights can be improved and, possibly, its scope somewhat limited. How far it is capable of reform, is however, a matter of judgement. Even if these improvements are significant, there remains the vital underlying problem of democratic accountability. It is hard enough in a national context to devise a method whereby the judiciary is at one and the same time independent and accountable. It is far harder to assure any significant degree of accountability for a court serving 47 far-flung countries with diverse languages, religions, cultures and economies.

A fig-leaf of accountability is provided at present by the Parliamentary Assembly of the Council of Europe. This body has a minor role in the appointment of judges to the European Court of Human Rights, but, in reality, the Assembly is an obscure body. The representatives who attend the meetings have only tenuous connections with the electorates of the 47 countries they represent whose territories stretch from Cork to Vladivostock. Even if the Parliamentary Assembly of the Council of Europe were to become a directly elected body, it still would be too remote.

It is not only the European Court of Human Rights but also some other international tribunals such as the International Criminal Court and the International Court of Justice at The Hague which face this problem. The

103 In the course of interviews carried out for this study, representatives of human rights organisations, academics and practitioners agreed about the need for further discussion of this issue. It was agreed too that there has been too little contact between constitutional lawyers and political scientists concerning the question.

International Court of Justice partially solves the issue of accountability in two ways: some cases are brought by competing parties both of which choose to accept its jurisdiction; on other cases brought mainly by the United Nations, it gives merely advisory opinions.

There is a distinction between international tribunals which are highly specialised bodies considering relatively few, special cases and institutions such as the Luxembourg and Strasbourg Courts which are part of the internal fabric of the political systems of their members' countries. The position of the Strasbourg Court raises especially intense problems of democratic accountability because it has a larger number of member countries than the Luxembourg Court and because the Parliamentary Assembly of the Council of Europe is an even weaker and even less legitimate democratic institution than the European Parliament. There is, unfortunately, no easy solution to the lack of the democratic accountability of the European Court of Human Rights. If, therefore, the UK government is to remain committed to its jurisdiction, it must be fully aware of this.

It would be unwise to minimise the difficulties created by the progressive expansion of the role of an international court on which the UK nominates only one out of a total of 47 judges but whose verdicts have such far-reaching consequences for the UK public and for its politics. It remains an open question and a matter of considerable doubt whether the European Court of Human Rights is capable of reforming itself to the extent needed to justify continued UK acceptance of its jurisdiction. Certainly, the UK government should enter into discussions with the Council of Europe and with officials of the Strasbourg Court to examine the issues. But the option of Britain's rejecting the jurisdiction of the Court must remain a serious option.

There is good precedent for a country's taking such a decision. The people of Australia,[104] New Zealand[105] and several other Commonwealth countries over the last three decades have moved to create their own final courts of appeal, thereby dispensing with the judgments of the Appellate Committee of the Privy Council. Entirely understandably, they have decided that they would like final decision on key questions of law to be made by judges in their own country, as this position will best reflect the needs of the society they live in.[106]

A decision by the UK to leave the Strasbourg Court's jurisdiction would not involve renouncing the values and wording of the European Convention on Human Rights. It would mean embracing them in domestic law. The UK would still respect and enforce Convention rights, but would do so in a manner decided by its own senior judges. In practice, these judges would frequently be likely to take account of decisions made in Strasbourg, but they would not be obliged to do so.

What kind of a hearing would this option be likely to receive from the government? At present, it is unclear, as the question has not been asked. However, in 2009 the Attorney General, Rt. Hon. Dominic Grieve QC MP (while Shadow Secretary of State for Justice), wrote in response to Lord Hoffmann's lecture, in which the latter had laid out a detailed critique of the Strasbourg Court:

> *"In his recent lecture to the Judicial Studies Board, Lord Hoffmann produced a stinging criticism of the operation of the European Court of Human Rights (Strasbourg Court). This in turn has generated renewed criticism of both the Human Rights Act (HRA) and the European Convention (ECHR), which the HRA incorporates into our domestic law.*

104 The High Court of Australia ended the right of appeal to the Privy Council in the 1980s, with the Australia Acts - http://www.hcourt.gov.au/about_02.html

105 The Supreme Court of New Zealand's creation in 2004 ended the Privy Council's role as an appellate court in New Zealand

106 A full list of countries that have in the past relied on the Judicial Committee of the Privy Council as a final court of appeal is available at http://www.jcpc.gov.uk/files/UKSC_Panel_13_Map_stage3_1100hx2600w__v8.pdf

I was delighted to read Lord Hoffmann's critique … Ever since the Human Rights Act, the government has ducked all debate on any problems that have arisen with its operation, and refused to consider whether there could be better ways to protect our freedoms. But the Act hasn't worked properly - and this debate is not going away."[107]

107 *It's the interpretation of the Human Rights Act that's the problem – not the ECHR itself,* Dominic Grieve, 14 April 2009 http://conservativehome.blogs.com/platform/2009/04/dominic-grieve-.html

6
Conclusions and Recommendations

When the European Convention of Human Rights was originally drafted and ratified, the member states of the Council of Europe came together to establish a court that would provide objective, international standards of human rights to be enforced across Europe. The Council was formed in 1949, when the atrocities of the Second World War were understandably at the forefront of the member state governments' thinking and the terrible human rights abuses taking place behind the Iron Curtain were beginning to become apparent. It was necessary then to enunciate clearly what constituted basic standard of human dignity, which the citizens of any European state were entitled to expect from their government. Britain played a key role at this time, it was the only one of the ten original member states that had both fought Nazi Germany and not been occupied. As such it brought significant moral authority, to the process of determining what form universal high rights should take.

However, there is a clear distinction between agreeing to the principles set out in the Convention and accepting the jurisdiction of a court in Strasbourg – which was established only later – as the means to implement the Convention. More than six decades later, there is widespread acceptance of the Convention across Europe. But the need for a central court, handing out one-size fits all judgements to 47 nations on a broad range of questions that go far beyond the original matters of human dignity for which it was intended is highly questionable.

The time has now come for the UK government to consider whether or not it wishes to remain tied to an inefficient, unaccountable and remote court, or whether our own constitutional reforms have done enough to ensure that the British judiciary is itself capable of considering these questions as the final appellate court. Just as Commonwealth countries have evolved and developed their legal systems to a level where they have felt capable of dealing with all cases that come before their courts domestically, so the UK should now ask itself the same question.

Other measures should also be considered to ensure that judicial activism remains within the confines of democratic accountability.

First, British governments need to take great care to respect core human rights, thereby reducing the scope for clashes with the judiciary such as those which developed in recent years. The judiciary must no longer be provoked by actions taken by public authorities unduly to limit hallowed safeguards for defendants. The authorities must respect the rule of law and avoid measures which limit habeas corpus or jury trial for reasons of administrative convenience.

The current Coalition government inherited a Home Office in urgent need of improvement. When Home Secretary John Reid declared on 23 May 2006 that its administration of immigration rules was "not fit for purpose", he was expressing a widely shared opinion. He said it had inadequate leadership and management systems, that it could be "dysfunctional" and that "wholesale transformation" was probably needed.[108]

Respect for the rights of suspects does not imply any softness on terrorism. The European Convention on Human Rights recognises that there may be emergency situations in which habeas corpus and jury trial may temporarily need to be suspended.

Second, the government should consider whether the present method of appointing Justices to the UK Supreme Court provides for sufficient Parliamentary scrutiny. At present, appointments are made by a commission made up of two existing Justices and appointees from the UK's three jurisdictions, without any Parliamentary oversight or public discussion. This should change. If Parliamentary sovereignty is to remain the most important factor underpinning the legislative process, then Parliament must be able to consider what the views are of a candidate for the Supreme Court on how they are likely to interpret legislation, and whether they will do so in a way that either strengthens or undermines the intentions of those who enacted it.

There are at least three options for strengthening the democratic accountability of the UK judiciary and, in particular, the new Supreme Court. Pending discussions within the projected Human Rights Commission (outlined below), Policy Exchange regards the second option as the front runner.

i) Give a Parliamentary committee the right to question nominees for the UK Supreme Court on how they are likely to interpret human rights and constitutional legislation.
ii) Give the Prime Minister the right to choose between two or three nominees for the Supreme Court selected by the Judicial Appointments Board and make his choice subject to approval by Parliament. (This would be a variation of the method used for the selection of the Archbishop of Canterbury.)
iii) Give the Prime Minister the right to nominate Supreme Court judges subject to Parliamentary approval (along the lines of the United States Constitution).

Third, the UK government should begin negotiations with the Council of Europe to make substantial reforms to the operation of the European Court of Human Rights. In these negotiations, the British aims should be:

i) Re-balancing the number of judges to reflect more accurately the populations of the 47 members of the Council of Europe, rather than the current system whereby each member state is entitled to one judge.
ii) Acceptance by the Council of Europe and by the Court that judgements will be based on a strict construction of the meaning of the articles in the European Convention on Human Rights and not on the expansionist idea of the Convention as a "living instrument" whose meaning is to be interpreted by the judges in line with their personal interpretations of changing European moralities.

108 http://news.bbc.co.uk/1/hi/uk_politics5010918.stm

iii) The Court should recognise that the prioritisation of Article 8 and Article 10 (privacy and freedom of expression) varies according to national circumstances and traditions. Thus, the Court should agree formally to leave decisions about these priorities to national courts and extend an absolute margin of appreciation on such questions.

iv) Apart from agreeing to leave questions of priorities of rights to national courts, the European Court should set out clear and extended rules for granting a margin of appreciation to different countries in a range of other matters. The objective being to ensure that the European Court intervenes only in cases involving core human rights, based on a strict construction of the Convention's text.

v) The introduction of stricter procedures for nominating Justices to the Strasbourg Court to ensure improved quality of jurisprudence emanating from the Court.

vi) There should be discussions about whether or not it is possible to devise a method of democratic accountability of the 47-nation Strasbourg Court as a substitute for the wholly inadequate Parliamentary Assembly of the Council of Europe.

Such negotiations should be time limited. It is the view of Policy Exchange that they should last for no more than two years, to ensure that obfuscation does not frustrate the process. If they do not succeed, then the UK should consider withdrawing from the jurisdiction of the European Court of Human Rights. The UK is a mature and long established democracy and, along with the vast majority of other nations, is capable of appointing judges to determine its own human rights law. The UK should retain the text of the European Convention of Human Rights in UK law, but judges would be free to develop a distinctive UK human rights jurisprudence, as cases are presented that allow them to re-consider the Convention in the context of British political culture as well as the provisions of the proposed British Bill of Rights.

Fourth, Parliament should consider repealing Section 3.1 of the Human Rights Act 1998. This provides that "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." This encourages judges to stretch the meaning of legislation beyond reasonable limits and gives Parliament no ready recourse short of repeal. It is better that judges should rely on the remedy of a "declaration of incompatibility" if they feel that legislation falls foul of the European Convention on Human Rights. At the same time, the "fast-track" method of changing the law following a judicial declaration of incompatibility under Article 10 of the Human Rights Act 1998 should be repealed. If judges declare a law incompatible with the Convention, Parliament must go through the normal stages of debate and scrutiny before any new legislation is enacted.

Fifth, the strategy of assuring core human rights while avoiding the trivialisation of rights discourse through "rights contagion" requires attention.

i) The UK should not agree to sign further international conventions and agreements bearing on human rights matters, especially in the fields of

economic and social rights unless (a) there is an impact assessment as well as full discussion in Parliament of the proposed agreements or (b) unless the new agreements are strictly non-justiciable.

ii) There needs to be an active discussion among academic and practising lawyers, politicians, and political scientists about whether it is possible to distinguish between "core" human rights and peripheral rights. The better it is possible to define and thus to confine the field of rights discourse to core rights, the less the tension between rights and democracy.

Finally, the role of the anticipated Human Rights Commission must be carefully considered before it is constituted. The government committed itself, in the Coalition Agreement, to appoint a Commission to consider the future of human rights law in the UK. The Agreement stated that:

> *"We will establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties. We will seek to promote a better understanding of the true scope of these obligations and liberties."*[108]

The creation of a Commission, which is expected to be constituted in 2011[109] by the Cabinet Office Constitution Group and the Ministry of Justice, is a welcome development in setting the process of reform in train. However, it is vital that those charged with its establishment bear in mind two particular considerations when setting it up.

a) Firstly, its remit should not simply be limited to considering whether a British Bill of Rights should be created. To do so would tie the government to availing itself only of a remedy which, as has been demonstrated in this report, is significantly flawed and which would create yet another competing tier of rights[110] without dealing with the underlying problem – the Strasbourg Court's interpretation of the Convention.

b) Secondly, its membership should be representative of both sides of the human rights debate. Given the relatively technical nature of the issues involved, human rights lawyers alone, most all of whom are (by the very nature of their work) strong supporters of either maintaining or even expanding the current scope of UK human rights law, often dominate official discussions. It would undermine public confidence in the review process before it had begun were the UK's future policy on human rights law left solely with those who are convinced that both the expansionist tendency that has taken root since the passage of the Human Rights Act and the link to the European Court of Human Rights should both continue without question.

As with the proposed negotiations with the Council of Europe concerning the European Court of Human Rights, the proposed Human Rights Commission should have a rapid timetable so that the promised new legislation concerning the Human Rights Act 1998 has a high priority.

108 http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf

109 See dates set out by the government in "Political Reform – Draft Structural Reform Plan" http://www.number10.gov.uk/wp-content/uploads/Draft-Political-Reform-SRP.pdf at page 10

110 To accompany those already contained in the ECHR and the EU's Charter of Fundamental Rights.

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Appendix 1: The European Convention on Human Rights 1950

The Governments signatory hereto, being Members of the Council of Europe, considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948… have agreed as follows:

Article 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Article 2

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law…

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour…

Article 5

1. Everyone has the right to liberty and security of person.
   No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
   (a) the lawful detention of a person after conviction by a competent court …

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…

Article 7

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence …

Article 9

1. Everyone has the right to freedom of thought, conscience and religion…

Article 10

1. Everyone has the right to freedom of expression

Article 11

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others

Article 12

Men and women of marriageable age have the right to marry and to found a family …

Article 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority…

Article 14

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

Article 15

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation …

Article 16

Nothing in Articles 10, 11, and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 46

1. Any of the High Contracting Parties may at any time declare that it recognizes as compulsory 'ipso facto' and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention.
2. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain other High Contracting Parties or for a specified period…

Article 58

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.

Protocols ratified by the United Kingdom

Protocol 1 (Ratified by the UK with reservations)

Article 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions.

Article 2

No person shall be denied the right to education…

Article 3

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Protocol 13

Article 1

The death penalty shall be abolished. No one shall be condemned to such penalty or executed… [Note: Protocol 13 supercedes Protocol 6)

Appendix 2:
The Human Rights Act 1998

Introduction

1. The Convention Rights

(1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in—

(a) Articles 2 to 12 and 14 of the Convention,

(b) Articles 1 to 3 of the First Protocol, and

(c) Articles 1 and 2 of the Sixth Protocol,

as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation

2. Interpretation of Convention rights

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

3. Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted …

4. Declaration of incompatibility

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.
(4) If the court is satisfied—
(a) that the provision is incompatible with a Convention right, and
(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,
it may make a declaration of that incompatibility.

6. Acts of public authorities
(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

12. Freedom of expression
(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
(2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied —
(a) that the applicant has taken all practicable steps to notify the respondent; or
(b) that there are compelling reasons why the respondent should not be notified.
(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
(4) The court must have particular regard to the importance of the Convention right to freedom of expression

13. Freedom of thought, conscience and religion
(1) If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

19. Statements of compatibility
(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—
(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility")…

Major constitutional reforms including the passage of the Human Rights Act and the creation of a Supreme Court have fundamentally altered the legal and political landscape in the United Kingdom. High-profile human rights cases in recent years have also drawn attention to the significance of these reforms, their democratic impact and the changing role they signal for the judiciary.

Judges in a democracy have an essential role in protecting core human rights. However, this report argues that the senior judiciary, both within the United Kingdom and at the European Court of Human Rights in Strasbourg, has unduly expanded the concept of "rights" to the point where their verdicts now often undermine parliamentary democracy and risk debasing the very concept of human rights. It is vital that judges at home or in Strasbourg must not become so political in their judgments that they consistently undermine the will of the people as expressed through an elected, sovereign parliament on a wide range of matters with little relevance to basic human rights as laid down in the European Convention.

The United Kingdom needs a robust system of protecting fundamental human rights while at the same time ensuring that senior Supreme Court justices are more accountable and judicial assertiveness does not undermine parliamentary democracy. This report explores the judicial landscape of the UK's three supreme courts – in London, in Strasbourg and in Luxembourg (the European Court of Justice) – and the new human rights context in which the judiciary and politicians now operate. It identifies key weaknesses in the current arrangements and recommends a series of political reforms to create a new constitutional settlement – one that guarantees the place of core human rights in national life, while helping to check judicial activism and protect parliamentary democracy.

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Policy Exchange
Clutha House
10 Storey's Gate
London SW1P 3AY

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