Thoughts on a Modern Bill of Rights

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Introduction

1. This paper is the text of a response to the Consultation on Human Rights Act Reform,[1] which I made on behalf of Policy Exchange's Judicial Power Project. The response builds on my submission to the Independent Human Rights Act Review (IHRAR), with John Larkin QC.[2] The response does not address every question in the consultation but does address the main points related to design of a modern Bill of Rights, focusing in particular on the rights that the Bill would introduce and the mechanisms that it would provide in relation to the application of those rights in domestic law.

A modern Bill of Rights and the common law constitutional tradition

2. In our submission to the IHRAR, John Larkin and I opposed the introduction of a British Bill of Rights, reasoning that it might compound the problems that the Human Rights Act 1998 (HRA) had created for the balance of the constitution.[3] Much turns, of course, on what exactly a Bill of Rights consists in. In the context of our recent submission, our concern was that domestication of the European Convention on Human Rights (ECHR) might move the UK further away from its traditional commitment to the British model of rights protection, a model in which "Parliament has been central to rights protection, with courts playing an indispensable but ancillary role."[4] Specifically, our argument was that:

> *"Parliament cannot address the problems noted above[5] by authorising UK courts to decide freely how to construe convention rights or how to receive ECtHR case law. Indeed, if Parliament were to do so, it would likely worsen… the problem of UK courts pursuing their own law-reform agenda more aggressively than the ECtHR."*[6]

We argued further that:

> *"Domestic courts are increasingly approaching the HRA on the footing that it empowers them to develop a kind of British bill of rights chosen by our judges themselves, which would gold-plate the ECHR, imposing further limits on government and Parliament. The HRA should not be interpreted in this way and Parliament should make this clear."*[7]

3. The day after publication of this consultation, the Supreme Court handed down an important judgment,[8] disapproving the line of cases in which courts had interpreted the HRA in this way. This was an important victory for the rule of law, which limits the risks that UK courts may gold-plate the ECHR. In deliberating about

1. Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights – A consultation to reform the Human Rights Act 1998*, 14 December 2021
2. Published in slightly revised form as R Ekins and J Larkin, *Human Rights Law Reform: How and why to amend the Human Rights Act 1998* (Policy Exchange, 11 December 2021), with a foreword by Lord Sumption
3. Ibid. at [27]
4. Ibid. at [4]; see also [5-7]
5. Ibid. at [25]: "The Government's intention that the UK should remain a signatory to the ECHR does not make reform of the relationship between ECtHR case law and domestic law (and thus reform of section 2 of the HRA) impossible or impracticable. Several options are open, which we outline below. The object of reform should not simply be to clarify the relationship between the case law of the ECtHR and domestic law, although this is important. Instead, **reform should address the problems that (a) in some cases the Strasbourg Court rewrites the ECHR and (b) in some cases domestic courts find against UK public authorities in circumstances in which the Strasbourg Court would not have done.**" (emphasis added)
6. Ibid. at [27]
7. Ibid. [17]
8. *R (Elan Cane) v Home Secretary [2021] UKSC 56*

replacement of the HRA with a modern Bill of Rights, government and Parliament should be very careful not to undo this victory and to free domestic courts to decide what our rights should be.[9]

4. The foreword to the consultation notes the UK's long, proud history of freedom, mentioning a number of landmark statutes in this history. But the foreword then adds that HRA "has been a further stepping-stone along the path of that tradition". The foreword goes on to say, rightly, that no law is ever the last word on a subject and to frame the proposal for a modern British Bill of Rights as a further development. With respect, this underplays the extent to which the HRA jars with the traditional British model of rights protection. For, "[t]he UK's history of rights protection has not required or involved submission to an international court or rights adjudication in the modern sense."[10]

5. The common law constitutional tradition is one in which:

> *"…courts have adjudicated disputes fairly according to law, law over which Parliament has had authority. While the case law developed by courts is of course an important source of law, articulating many important rights, very many of our rights are, and all of them can be, articulated authoritatively in statute. These "legislated rights" are a main way in which Parliament, led by government and accountable to the people, secures the common good. It is a mistake to think that the merits of Parliament's lawmaking choices must be subject to judicial supervision if human rights are to be protected."*[11]

It would be entirely consistent with the common law tradition to repeal the HRA and not to replace it with another statutory bill of rights. This would restore the law of the constitution, in relevant part, to its condition in 1998/2000. The points made above are consistent with the consultation's recognition, most notably in Appendix 1, that the main protection for human rights in the UK has long been ordinary legislation, and common law rules, over which Parliament has exercised continuing authority.

6. The government's proposal is to replace the HRA with a modern Bill of Rights. In making this proposal, the government goes further than the IHRAR, both in its evaluation of the problems to which the HRA gives rise and in its proposed solutions. I share the government's critique of the HRA, advanced primarily in Chapter 3 of the consultation, and note that the government is entirely free to take a different view from the IHRAR of the merits of the 1998 Act. With respect, establishing the IHRAR was a mistake. It was entirely predictable, and predicted, that the IHRAR, chaired by a former Lord Justice of Appeal and composed exclusively of lawyers, would largely endorse the HRA. This is not to say that

9. See R Ekins, "Under Lord Reed, the Supreme Court itself is pushing back against judicial activism", Conservative Home, 17 December 2021
10. Ekins and Larkin (2021), [3]
11. Ibid., [4]

the IHRAR's report does not make some good points – in view of its length it would be surprising if it did not – but its conclusions largely echo lawyerly consensus. (There was of course a minority view on the Panel, which the report makes clear at times.)

7. It was not open to the IHRAR, in view of its terms of reference, to recommend replacement of the HRA with a new Bill of Rights. However, it is very unlikely the IHRAR would have made such a recommendation in any case: on the whole, it was content with the HRA and its operation. However, it bears noting that in one important respect, the IHRAR's report reflects an outdated legal consensus. The IHRAR rejected the idea that within the UK's margin of appreciation the UK courts should not be able to hold legislation or other public action incompatible with Convention rights. Yet this is precisely what the Supreme Court has now ruled, in its unanimous *Elan Cane* judgment, disapproving the line of cases that the IHRAR was content to uphold as a constitutionally defensible legal status quo. In developing its proposals for a modern Bill of Rights, the government should be very careful not inadvertently to restore the constitutionally dubious consensus that the IHRAR defended and the Supreme Court has now, to its credit, undone.

8. The HRA is a statutory bill of rights, bearing a family resemblance to the New Zealand Bill of Rights on which it is partly based. The modern Bill of Rights the government proposes would be another, somewhat different statutory bill of rights. The question to be asked, in bringing forward legislation to this end, is whether the new statutory bill of rights is likely to be an improvement on the old statutory bill of rights. In particular, the question is whether the new Bill of Rights will effectively address the problems the consultation identifies with the HRA. Our submission to IHRAR set out at some length problems with the HRA which warrant its amendment (or outright repeal). In my response to this consultation, I consider the changes that the government proposes in this light, commenting on the extent to which they address the relevant problems or risk introducing new problems.

9. In brief, the consultation has identified many problems with the HRA and many of its proposed changes, including to section 3 and section 4, would be helpful. In addition, the consultation poses questions that need to be asked, including about section 10 remedial orders and section 19 certificates of compatibility, about extra-territorial application, and about adjudication of qualified rights and lawful public action. However, there is, with respect, an important imprecision of aim at the centre of the consultation, about the nature of the rights which the Bill of Rights would

introduce or establish, an imprecision which needs to be carefully resolved before legislation is brought forward. The government's ambition to address rights inflation and the misuse of human rights law, on the part of the European Court of Human Rights and domestic courts, is well taken. Domestic law need not march in lockstep with the case law of the Strasbourg Court. But care must be taken to avoid tacitly licensing UK courts to run amok. This is the central risk with a modern British Bill of Rights and should be painstakingly addressed.

Making and interpreting rights

10. The most important question to be determined in deliberating about repeal of the HRA and enactment of a modern Bill of Rights is what rights the latter will introduce into our law and the form in which they will be introduced. It is a distinctive feature of the HRA that it reproduces the rights set out in the ECHR as a schedule to the Act. Quite apart from section 2 of the HRA, the Convention rights would almost inevitably have been understood to be equivalent to the rights secured by the ECHR, which are authoritatively applied in judgments of the European Court of Human Rights (ECtHR). The whole structure of the Act supports this inference about Parliament's lawmaking intention in 1998.

11. In introducing the government's proposals, the consultation says:[12]

> *"The rights as set out in Schedule 1 to the Human Rights Act will remain. We regard the Convention as offering a common-sense list of rights. The key problems have arisen from the way in which those rights have been applied in practice, at both the Strasbourg and domestic levels."*

The consultation notes uncertainty about how section 2 should be applied. The IHRAR's report downplayed this uncertainty, but it is confirmed, and partly resolved, by recent judgments of the Supreme Court. There is a strong case for legislating expressly in support of the Supreme Court's new approach (an approach that correctly infers Parliament's lawmaking intention in 1998) in order to prevent future regression. There must be a strong risk that a future generation of judges will be inclined, like their forebears, to attempt to gold-plate the ECHR, creating a British Bill of Rights without parliamentary approval.

12. The consultation proposes to reproduce the text of Schedule 1 (and thus the ECHR) but to adopt a different formulation in place of section 2 of the HRA, a formulation which provides some direction to judges about how to interpret the rights in question.

12. Consultation, [184]

Section 2 is entitled "Interpretation of Convention Rights" but strictly has a much broader reach, because it is addressed to "A court or tribunal determining a question which has arisen in connection with a Convention right". The alternative clauses set out in Appendix 2 seem to follow the HRA's lead in this regard, failing to distinguish the legal meaning of rights from the question of how they be applied in the context of particular disputes. The government's proposal is to widen the range of case law that UK courts may consider in the course of making decisions in the course of rights adjudication, while specifying that they need not reach decisions that accord with the jurisprudence of the ECtHR. What this fails to address is the question of what rights Parliament will be introducing into law when it enacts the Bill of Rights and whether those rights are intended to be identical to the terms the UK and other member states agreed in 1950 or whether they are to be developed further.

13. The consultation says that "[t]he starting point for the courts' interpretation of rights should therefore be the text of the rights themselves, together with past decisions of the domestic courts on the point."[13] But in interpreting statutory provisions, including provisions that establish legal rights, the question is not simply what the text states but what meaning Parliament intends to convey in promulgating that text. The question thus arises whether, in enacting the Bill of Rights, Parliament will be acting on a proposal to restore to UK law the terms of the ECHR which the UK agreed in 1950, which should be understood in accordance with the intentions of the signatories, or whether it will be inviting the courts to develop a new human rights law, grounded in the text but taking into account case law from around the world. The former proposition is attractive. The latter proposition, to my mind, is not, for it would confer on domestic courts an improper lawmaking responsibility. The HRA, properly interpreted, attempts to avoid authorising UK judges to exercise this responsibility by requiring them to keep track with the case law of the ECtHR. The problem, of course, is that the ECtHR is willing to interpret the ECHR in ways that are openly inconsistent with the meaning agreed in 1950.

14. In other words, there is a question that needs to be answered before a modern British Bill of Rights is introduced, let alone enacted, which is what rights Parliament is intending to establish and how courts are to identify Parliament's lawmaking intentions without simply making law themselves. Not every question in the course of rights adjudication is an interpretive question. The court may identify the intended meaning of the relevant legal provision, which may then require application in the context

13. Consultation, [195]

of some particular public action or predicament. With respect, the consultation sometimes runs together questions about interpretation of Convention rights with questions about how they should be applied, including how a court is to determine whether some legislation or policy is proportionate. This is not itself an interpretive question; it is a question about rule application, even if of course how one interprets the rule is a very important prior question.

15. A modern Bill of Rights should be consistent with the UK's history of rights protection, in which the authority to make new law is exercised first and foremost with Parliament and only secondarily by the courts, with courts responsible for fairly adjudicating disputes in accordance with settled law. This may mean that in preparing legislation the government should not simply reproduce the text of the Convention rights, which are routinely glossed and qualified, but should instead reformulate the rights on the terms in which it understands them, inviting Parliament to agree or to amend (specify) them further. The consultation's questions about the right to jury trial, protection of freedom of speech, and making special provision for deportation and illegal/irregular migration all speak to this point. That is, Parliament should not be invited simply to reproduce the terms that have been understood, by the ECtHR and thence by domestic courts, in the ways that the government finds objectionable. The way to avoid those understandings is not to tinker with section 2 and the rules of interpretation or adjudication. Instead, Parliament should more directly legislate about particular rights, making clear how each is to be understood and standing ready to intervene to correct what it takes to be misunderstandings.

16. I turn now to the two options set out in Appendix two. Option 1 proceeds by way of a series of negative propositions about how question about rights are *not* to be determined. It requires the court to follow relevant precedent,[14] but does not address the question of how the first judgments on point are to be made, viz. what the object of interpretation is. The clause also invites UK courts to consider judgments of courts in other countries or in the international arena. The invitation is, I think, unnecessary, for UK courts already have this freedom. But the effect is to leave unresolved the question of what it is that settles the meaning of the rights the Bill of Rights creates. This may be, again, because the clause runs together the question of meaning with the question of application.

17. Option 2 is similar but different. Subsection (1) is intended to encourage the Supreme Court not to feel obliged to follow the

14. The definition of precedent set out in subsection (8) is circular.

ECtHR. It would be quite possible for the UK courts to read that subsection as superfluous, for the Supreme Court is already the judicial authority with ultimate responsibility for interpretation of Convention rights, notwithstanding the fact that the Court thinks itself bound to interpret – and apply – those rights consistently with settled ECtHR case law. Subsection (3) requires the UK court to have particular regard to the text, and permits it to have regard to the preparatory work of the ECHR. This invites confusion about whether the intention is for the Bill of Rights to be taken to establish the terms agreed in 1950. An injunction to have particular regard to the text is insufficiently precise. It risks inadvertently discouraging the court from inferring Parliament's intended meaning, although on the other hand the reference to the preparatory work of the ECHR does suggest that the point is to infer what was intended (agreed by member states) in 1950. Subsection (6) specifies that the UK court is not required to follow the ECtHR. This is usefully clear as a means of displacing the presumption of compatibility with international law. It would remain the case that the UK court might well choose to follow the ECtHR and there must be a significant risk that our courts will do this even if a Bill of Rights is enacted.

18. In short, I recommend that before legislation is introduced the government think very carefully about the rights it intends the Bill of Rights to establish. This may require making the object of interpretation the terms of the ECHR agreed in 1950, cut free from the "living instrument" gloss that the ECtHR has applied to the ECHR since the late 1970s. It will be difficult to encourage UK judges to approach the text of the ECHR in this way: the gravitational force of ECtHR case law and the felt need to avoid the UK being held in breach of the ECHR will encourage UK courts to continue to adopt the ECtHR's technique. Relatedly, it is worth considering reframing the terms in which Convention rights are currently articulated, avoiding recurring misunderstandings, cancelling positive obligations that have improperly been interpolated, and adding further protections as appropriate. This would be to begin to reconcile Convention rights with "legislated rights", taking legislative responsibility for specifying how they should be understood, knowing of course that subsequent Parliaments would enjoy similar freedom to recast, qualify or extend them, which is precisely how human rights law should be settled.

Rights-compatible interpretation

19. There is a strong case for simply repealing section 3 of the HRA. The presumption of compatibility with international law is a reasonable presumption in the event of ambiguity and would not

simply reproduce the effect of section 3, which operates even when there is no ambiguity and even when the rights-compatible meaning cannot be squared with Parliament's intention in enacting the relevant statutory provision. It is true that if section 3 were repealed UK courts might lean more heavily on that presumption, or on the principle of legality, but the default would remain that the meaning of an enactment is settled by our best inference about Parliament's intended meaning.

20. One might reason, however, that it is safer for Parliament to specify the interpretive rule that is to apply, when rights in the Bill of Rights are in question (and displacing expressly any rule of compatibility with the ECHR or, better, with the case law of the ECtHR), rather than leaving this to judicial elaboration on otherwise well-established principles. The risk is that the principles might be revised by the courts in order to compensate for felt loss when section 3 is repealed. In thinking about this point, it bears noting that while not every case has taken up the full radical potential of *Ghaidan*,[15] section 3 remains a significant provision. Further, its application over time is not stable, as recent New Zealand precedent (in relation to the equivalent of section 3) demonstrates, with the New Zealand Supreme Court deploying the interpretive rule to undermine the central legal rule in controversial criminal justice legislation.[16] Parliament cannot responsibly tolerate the risk of section 3's misuse and should at least amend it, if not repeal it, in order to safeguard the rule of law.

21. I turn now to the two options set out in Appendix two. The first option, Option 2A, is intended to be limited to cases of ambiguity, where ambiguity is defined as the situation in which more than one meaning is available and when each meaning is an ordinary reading and is consistent with the overall statutory purpose. When these conditions are not satisfied the rule would not apply. Option 2A has its appeal, reconciling the approach to rights-compatible interpretation with the approach taken to compatibility with international law. However, the focus on when a provision "can be given more than one interpretation" risks deflecting subjects of the law from what should be the primary question, which is what meaning Parliament intended to convey.

22. The second option, Option 2B, does not require ambiguity but will only apply if there is an available rights-compatible interpretation that is an ordinary reading of the words and is consistent with the overall statutory purpose. In a sense, this formulation gives greater specification to what readings are possible. The problem, again, is that the interpretive rule risks displacing a focus on

15. *Ghaidan v Godin-Mendoza [2004] UKHL 3*; see further *Ekins and Larkin (2021), [41]*

16. *Fitzgerald v R [2021] NZSC 131*, discussed at ibid., n24

legislative intent. If the court has reason to think that Parliament's intended meaning was X, it should not adopt Y, even if Y is an ordinary reading of the words that is consistent with the overall purpose. Respect for the will of Parliament requires priority for legislative intent. Parliament's choice of statutory language and apparent purpose are relevant to – help inform – the inferences one should make about Parliament's intended meaning and lawmaking intention.

23. If a rule about rights-compatible interpretation is to be constitutionally legitimate, it should be a defeasible statutory presumption about Parliament's intended meaning. This would be consistent with constitutional principle, viz. the priority of legislative intent. Parliament might specify that "Unless the context otherwise requires, legislation should be read and given effect in a way which is compatible with the rights in this Bill of Rights", or "So far as is consistent with the intention of the enacting Parliament or relevant lawmaker, legislation should be read and given effect in a way which is compatible with the rights in this Bill of Rights". Either change, or a change to similar effect, would make much clearer to courts that the interpretive rule informs a process of inference about the meaning of the statutory text, and thus about the meaning that the lawmaker intended to convey by uttering that text in its context. Such change is needed to stabilise the statute book.

24. If these changes are made, the need for parliamentary oversight of section 3 judgments in particular falls away, for section 3's application will be consistent with legislative intent. Without reform of section 3, oversight is required, because the courts will in some cases be amending legislation, glossing statute with law the courts have made in order to secure rights-compatibility as they see it. With respect, the Joint Committee on Human Rights is not the right body to lead this oversight for it is disposed, in every controversy, to accept uncritically the lawyerly status quo. It is very unlikely that this Committee would engage critically with judicial action that involves effective amendment of the statute book.

25. The consultation asks whether a database should be maintained to record all section 3 judgments. It is true and important that the full reach of section 3 is not well understood and maintaining a database might help. But the full implications of section 3 take place apart from adjudication, for the section applies to all legislation regardless of whether it comes before a court. But again, the answer to the problem is to amend (or repeal) section 3, replacing it with a more disciplined, constitutionally sound

provision. If section 3 is amended (or repealed) in this way, Parliament should take care to address the risk of legal uncertainty by enacting detailed transitional provisions.

Secondary legislation

26. In our submission to IHRAR, we argued that the HRA puts the validity of secondary legislation in doubt and that save where secondary legislation clearly falls outside the scope of its empowering provision, it should not be quashed on grounds of rights-incompatibility.[17] I would thus support legislation that made section 4 declarations of incompatibility the primary remedy for secondary legislation that the court considers rights-incompatible, save when the court reasons (in application of an amended section 3) that the empowering provision does not authorise the making of the (purported) secondary legislation. In the alternative, I would support extension of the provisions in the Judicial Review and Courts Bill, in relation to suspended and prospective quashing orders, to secondary legislation that is found to be rights incompatible. It is in relation to quashing secondary legislation ab initio, as opposed to quashing particular administrative acts, that concerns about legal uncertainty loom largest and the Bill's new remedial provisions are most apt.

Remedial orders

27. A modern Bill of Rights should not contain a remedial order power. Section 10 of the HRA is constitutionally objectionable. There is a case to be made for urgent remedial action, especially if the alternative is that the UK is likely to be found in breach of its international obligations. However, the provision has developed into an alternative to making time for full parliamentary deliberation and decision. The provision's application to the HRA itself is particularly objectionable and it is encouraging that the IHRAR recommended amendment to avoid such use. If the Bill of Rights is no longer to be framed around maximising compatibility with ECtHR case law, then a finding of rights incompatibility by a UK court need not warrant a particular course of remedial action. Instead, Parliament should be invited to consider proposals for legislative change, unless of course the government takes the view that no change is warranted and thus does not bring forward proposals. (This is possible under the HRA as well of course; section 10 is not mandatory.) It might be reasonable to oblige a Secretary of State to make a statement to the House of Commons in response to a declaration of incompatibility, setting out the government's view about whether a legislative response is necessary. The government should be free to maintain that the

17. Ibid., [58]

court's conclusion about rights-incompatibility is wrong.

Statements of compatibility

28. Section 19 of the HRA is in principle unobjectionable. It is good for ministers (or other parliamentarians introducing legislation) to consider whether their legislative proposals can be squared with the Convention rights and to indicate as much to Parliament. The problem is that reflection about whether a statement of compatibility can be made has too often collapsed into an exercise in predicting what a court is likely to do, rather than the minister forming his or her own view, for which he or she takes responsibility, about rights-compatibility. This dynamic was perhaps inevitable in view of the prospect of domestic and European litigation challenging the rights-compatibility of legislation, with officials advising ministers on the relative odds of success. However, the HRA itself did not, and does not, require ministers to make a section 19(1)(b) statement if they think a court is more likely than not to find legislation incompatible. They are legally free to take their own view. The Labour government, per the then Lord Chancellor, Jack Straw QC MP, was not under any obligation to adopt the practice that a section 19(1)(a) statement of compatibility cannot be made if there is more than a 50% risk that the legislation will be held incompatible. The government now is under no obligation to maintain that practice and on the contrary should change it forthwith.

29. The spectre of having to make a section 19(1)(b) statement is deployed within government as a means to chill policy-formation. It should not be thus. That is, ministers should be willing to proceed with legislation that they think is an intelligent means to the common good, which does justice between persons and secures the public interest, even if there is a risk (even a strong risk) that a court, whether domestic or European, will take a different view. However, the political cost, both within government (objections from civil servants) and beyond, is such as to unduly hamper policy formation and thus legislative freedom. In a range of contexts, including legislating about historic investigations in Northern Ireland or immigration and asylum, it is clear that section 19 is now a problem. Strictly, one could deal with the problem by changing government practice – abandoning the practice of only making a section 19(1)(a) statement when one expects victory in litigation. But it may be that it would be clearer and cleaner to remove section 19 and to replace it with Standing Orders that required the minister to make a statement about how the proposed legislation related to rights and freedoms long recognised in our constitutional tradition.

The lawfulness of public authority action

30. I agree with the consultation's proposal to amend section 6 in order to avoid the lawfulness of public action being wrongly called into question, in cases where the public body is exercising its statutory powers or discharging a statutory duty. Section 6 has been used to impugn the lawfulness of secondary legislation otherwise properly made under the relevant empowering Act, which is a further (particular) reason for reform. The consultation outlines two options for amending section 6. I think either would be an improvement (provided always that section 3 is amended). However, it might be better simply to provide that section 6(1) is subject to any one or more provisions of, or made under, primary legislation that requires or permits the public authority to act otherwise. The primary legislation in question would often be read consistently with the rights set out in the Bill of Rights, but more specific provision in other primary legislation would take precedence, which is entirely defensible precisely because it is more specific. It would remain open to the court to declare such legislation incompatible with rights, which would then leave to government and Parliament (and the people) the question of what next to do.

Extraterritorial jurisdiction

31. There is a strong argument that the HRA should never have been interpreted to apply outside the UK at all, let alone to apply in the extravagant way that recent ECtHR case law has mandated. The Bill of Rights should make very clear whether, and to what extent (if any), it applies extra-territorially (and temporally). There is good reason for legislation to provide for such limited extraterritorial application as is necessary to align with the UK's understanding of its obligations under Article 1 of the ECHR.

32. Like the IHRAR, the consultation concludes that the problem of extraterritorial application can only be resolved at the Strasbourg level. With respect this is an odd conclusion to reach in view of the consultation's commitment in all other respects to tolerating divergence between UK law and ECtHR case law (as opposed to the text of the ECHR). Limiting the reach of the HRA or Bill of Rights would be important in order to have the room to argue before the ECtHR that its understanding of jurisdiction has gone astray.

33. The Bill of Rights might make specific provision for the priority of the law of armed conflict (to the extent incorporated into domestic law) in the context of military action abroad. It might also make

provision for oversight of public action (including action by UK forces or security services) that takes place outside the UK, but that the ECtHR would conclude was nonetheless within the jurisdiction of the UK. The oversight in question might be modelled on the Investigatory Powers Tribunal or Courts Martial, making provision for supervision of state action other than by way of human rights litigation in the ordinary courts. This would help avoid, or at least minimise, some of the problems that have arisen because of the extraterritorial application of Convention rights, while avoiding prejudice to the UK's case in the Strasbourg Court. That said, it is not obvious that without such provision the UK will somehow be forced to disclose sensitive materials in Strasbourg.

Qualified and limited rights

34. The doctrine of proportionality has given rise to considerable problems. Despite its presentation as technical legal reasoning, each step in the proportionality assessment requires the court to engage in political reasoning, especially the final evaluation of the "fair balance" between the interests of the individual and the public interest. This way of framing the considerations in play has been heavily criticised in scholarly work and extra-judicial commentary. The ECtHR, like courts elsewhere, adopted the idea of proportionality as a way of determining whether some prima facie interference with a qualified Convention right passes muster. But it is open to Parliament, especially in the course of enacting a Bill of Rights, to reframe the way in which qualified rights are articulated and the extent to which proportionality is made the touchstone of rights-compatibility. Legislation could provide that certain types of question are not for courts to consider or could specify how certain grounds of limitation are to be understood.

35. The consultation sets out two legislative options. They are very similar, but the first focuses on what is necessary in a democratic society and the second on what is in the public interest. The former formulation is more familiar from modern rights adjudication. While I support legislating about qualified rights, displacing the centrality of the doctrine of proportionality, the draft clauses do not seem to me likely to be very effective. The courts would likely reason that they already give great weight to Parliament's views. Option 1 might be understood to require the court to accept that in Parliament's view (which must be given great weight) the legislation is necessary in a free and democratic society. The courts might nonetheless conclude that Parliament was wrong or that it had overlooked the problem in question. Option 2 requires the court to accept that Parliament was acting in the public interest, but leaves it open to the court nonetheless to conclude that the

legislation (or public action under the legislation) was not in the public interest. The courts should not be invited to reach such an open-ended and political (not party political) conclusion.

36. Ideally, legislation about qualified and limited rights would specify those rights in ways that would make authoritative Parliament's view about what they require. But if there is to be a Bill of Rights, affirming rights in general in addition to the specific provision made by legislated rights in the balance of the statute book, there is good reason for a provision that states in effect that courts may only conclude that legislation is incompatible with rights if the legislation is manifestly without reasonable foundation. That is, where the incompatibility turns on the court's assessment of the proportionality of the legislation, or the extent to which it is necessary in a free and democratic society, UK courts should be required to adopt the reserved test that the ECtHR applies in some types of case.

Deportations and illegal/irregular migration

37. The application of Convention rights in the migration and asylum context has been very significant. In a Policy Exchange report published last March, John Finnis and Simon Murray chronicle the extent to which the ECtHR has distorted the intended meaning of the ECHR, inventing new legal rights that were not agreed by the member states.[18] The UK courts have not been at the forefront of this development, although have sometimes moved ahead of the Strasbourg Court, but have loyally followed it for the most part.

38. The answer to the consultation questions about deportation and illegal/irregular migration is that Parliament should specify, perhaps in a new Bill of Rights but especially in detail in immigration and asylum legislation, how the relevant rights (in particular Article 3 and Article 8) are to be understood and applied in UK law. The immigration and asylum legislation needs to authoritatively and expressly address the rights questions in play and to make provision for how the balance (if one wishes to put it thus) is to be struck in different types of case, for example, when and to what extent it should be open to the Secretary of State to order deportation if someone is at risk of maltreatment elsewhere or if that person would not enjoy UK-level healthcare at home or so forth and so on.

39. Legislation might make clear that decisions about the public interest in deportation, and about the proportionality or otherwise of a deportation, are to be made by the Secretary of State and not by the court, with the court's role limited to traditional judicial

18. J Finnis and S Murray, *Immigration, Strasbourg and Judicial Overreach* (19 March 2021, Policy Exchange), foreword by Lord Hoffmann

review principles. The answer then is careful specification of the rights in question in the Bill of Rights, if such is to be enacted, and careful drafting in immigration and asylum legislation, which makes clear that the latter legislation is Parliament's specific decision on point, which is not to be glossed or frustrated by reference to the Bill of Rights.

Responsibilities

40. If the rights in the Bill of Rights are to be statutory rights then they must be open to all persons to insist upon, however unattractive the person's other conduct may be. I do not think that damages for breach of the HRA (or Bill of Rights) is the main problem with the Act. Much more important is the risk of displacing legitimate political choice, undermining legal certainty, and frustrating effective government for the common good. However, making legislative provision in relation to damages is perfectly reasonable. Of the two options the consultation outlines, I think it is Option 1 that should be adopted. The claimant's conduct in relation to the claim itself is certainly relevant to the award of damages, if any, that should be made. Option 2 is to my mind much less attractive because it implies that one may discount a claim, otherwise well-made and warranting recompense, because the claimant is an unattractive (unpopular, wicked) person. I think Option 2 risks undermining the idea of legal rights in general, whereas Option 1 does not have this defect.

Dialogue with the Strasbourg Court and Parliament's role

41. I have doubts about the government's proposals in relation to replacing section 2 of the HRA. But I agree that the UK should be willing to tolerate divergence between its domestic law and the case law of the ECtHR. Strictly speaking, the HRA also tolerates such divergence, leaving it to government and Parliament to decide when or if to change the law in response to adverse decisions by domestic courts or the ECtHR. The risk has always been that the HRA will encourage government and Parliament to think that they have no legally or politically respectable option save to comply. This risk has manifested in part, as I noted above in relation to section 19, but prisoner voting is a very significant exception, and more generally most parliamentarians have continued to appreciate that Parliament remains constitutionally free to make the law it thinks warranted.

42. The consultation proposes a formal means by which Parliament might consider adverse Strasbourg judgments. The consultation

frames this as "a clear and explicit democratic shield to defend the dualist system in the UK by making clear that Parliament, in the exercise of the legislative function, has the last word on how to respond to adverse rulings."[19] I agree that in our system it is for Parliament, led by government, to decide how to legislate and whether to change the law in response to an adverse Strasbourg ruling. This is what it means to exercise self-government. It is also a means to avoid the UK being forced to arrange its public life in accordance with terms to which it did not voluntarily agree, viz. the ECtHR's gloss on the ECHR, per the living instrument doctrine.

43. However, subsection (1) of the draft clause is unnecessary. It is not required in order to vindicate parliamentary sovereignty and it would be a mistake to think that if such a provision were in force its repeal would have any legal effect whatsoever – that is, its repeal would not in any way diminish parliamentary sovereignty. It is not unreasonable to impose a duty on a minister to bring an adverse judgment to the attention of the Houses of Parliament and to table a motion for debate. Legislating in this way should be framed in such a way as to avoid any implication, whether as a matter of law or constitutional practice, that ministers are somehow under a duty to encourage Parliament to legislate in compliance, let alone to bring forward legislation to this end. I do not think the clause risks implying such a legal duty exists, but in view of the widespread misunderstanding on the part of many senior lawyers and some parliamentarians about the relationship between the Ministerial Code, ministers and the rule of (international) law, the clause would need to be introduced and explained carefully in line with settled constitutional principle.

19. Consultation, [316]

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