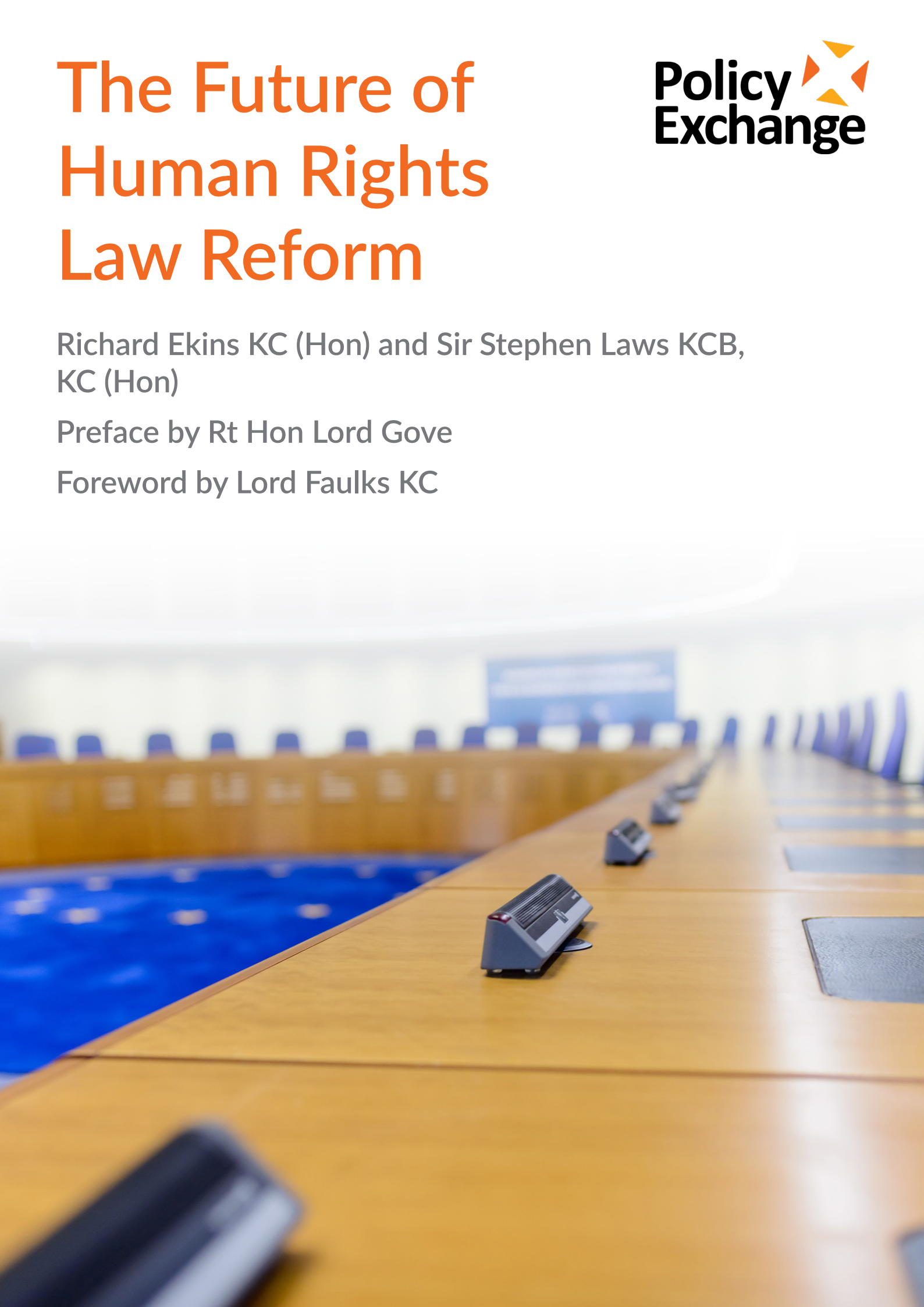
The Future of Human Rights Law Reform

Richard Ekins KC (Hon) and Sir Stephen Laws KCB, KC (Hon)

Preface by Rt Hon Lord Gove

Foreword by Lord Faulks KC



The Future of Human Rights Law Reform

Richard Ekins KC (Hon) and Sir Stephen Laws KCB, KC (Hon)

Preface by Rt Hon Lord Gove

Foreword by Lord Faulks KC

Policy Exchange

About the Authors

Richard Ekins KC (Hon) is Head of Policy Exchange's Judicial Power Project and Professor of Law and Constitutional Government, University of Oxford.

Sir Stephen Laws KCB, KC (Hon) is Senior Fellow of Policy Exchange's Judicial Power Project and former First Parliamentary Counsel; he was a Member of the Independent Human Rights Act Review.

Published by
Policy Exchange, 1 Old Queen Street, Westminster, London SW1H 9JA

www.policyexchange.org.uk

ISBN: 978-1-917201-67-4

Contents

Preface

Rt Hon Lord Gove, former Lord Chancellor

A fortnight after his historic election victory in July 2024, Sir Keir Starmer told the opening plenary session of the European Political Community, meeting at Blenheim Palace, that "we will never withdraw from the European Convention on Human Rights." If any political conviction is close to the Prime Minister's heart, fealty to European human rights law must be it.

Yet fifteen months later, the merits of UK membership of the ECHR are much more hotly debated than one might reasonably have expected. Old loyalties are fraying. Sir Malcolm Rifkind, once a stalwart of the status quo, has now changed his mind and supports ECHR withdrawal; Sir Jack Straw and Lord Blunkett do not (yet) support withdrawal, but both have questioned the terms of our membership. Labour MPs, with Reform on their minds, have called for change. And senior Ministers have said that they are looking hard at securing changes to domestic law or international law, although details have not yet been forthcoming. For its part, the Conservative Party has yet finally to decide its policy – whether to commit to ECHR withdrawal, to call for ECHR reform, or to amend, repeal or replace the Human Rights Act 1998.

Into this debate comes Policy Exchange's new paper. It is a major contribution to future deliberation about meaningful human rights law reform, about the principles on which it must be grounded and the practicalities it must address.

The paper is a painstaking review of the series of attempts undertaken by successive Conservative governments, in which I served to place reform of our human rights framework on a proper footing. Despite the best efforts of talented and committed colleagues, from Dominic Raab to Suella Braverman, we did not, as the authors make clear, resolve these questions properly. But there is much to learn from the paths not taken. Indeed, I agree with the authors that if any future programme of reform is to be effective, it must learn the lessons of 2010-2024, when the Conservative Party never quite made up its mind about what the problem was, how best to address it, or how much boldness was required.

This paper is the latest publication of Policy Exchange's remarkable Judicial Power Project, which for ten years now has been leading the public debate about the constitutional role of the courts and the place of law in our politics. In my brief tenure as Lord Chancellor, I had the great

privilege of welcoming the launch of the Project, which I said then was "one of the most important pieces of work being carried out by any think-tank or any academic institution in Britain today". The years since have only reinforced my admiration for the Judicial Power Project's work, with the Project helping to transform the public conversation, discomfiting uncritical enthusiasm for the status quo and equipping parliamentarians and others to think much more critically about constitutional fundamentals.

It has been twenty-five years now since the Human Rights Act came into force. The governments that held office from 2010 failed properly to grip the problem of human rights law. If any future government, of whatever complexion, is to fare better, it must heed the advice of this excellent paper.

Foreword

Lord Faulks KC, former Minister of Justice, Chair of the Independent Review of Administrative Law, and Member of the Commission on a UK Bill of Rights

When the Human Rights Act 1998 (HRA) was enacted, there was considerable uncertainty in the legal profession as to what impact the legislation would have on domestic law. As a part time judge, I attended lectures where the message sent out was that it would make little difference since our domestic law already reflected the rights embodied in the European Convention on Human Rights (ECHR). Many lawyers viewed the changes as largely cosmetic.

The metaphor adopted by the Labour government was that human rights were being "brought home" saving litigants the long journey to Strasbourg, with the clear indication that human rights would now be given a British character.

The metaphor was wholly misleading, since the terms of the Act, as well as incorporating the convention (an international treaty) into domestic law, required our judges to take into account the Strasbourg jurisprudence and not simply to comply with rulings against us (there were never many of these). This was a subcontracting of the law in relation to our public authorities to Strasbourg and embodied a massive transfer of power to judges in Strasbourg and in the United Kingdom.

The late distinguished lawyer (and one of the founders of Matrix Chambers) Professor Conor Gearty KC (Hon), FBA is reported to have been worried that our judges would be too conservative in their interpretation of the law. He changed his mind when he saw the approach judges in fact took to the Convention.

Politicians began to regret the HRA quite early, when Labour Home Secretaries found that their attempts to counter terrorism were frustrated by court decisions relying on the Act. The Conservatives whilst generally unenthusiastic about the HRA were more inclined to incremental change rather than repeal and were generally reluctant to leave the Convention. The authors of this paper give a comprehensive account of 14 years of missed opportunities to make any significant changes.

One of the reasons for the lack of action was the insistence in asking lawyers (including me) for their views as to possible reform. Many of these lawyers had previously expressed enthusiasm for the status quo.

The future of the HRA and our continued membership of the ECHR has now reached maximum salience in the light of illegal migration. There are

all sorts of legal reasons for inactivity. The authors address these in detail in this paper and, in relation to the Belfast agreement, in a previous one. But ultimately there are political decisions to make rather than legal ones.

To make a significant difference to the law in relation to illegal migration, a government will have both to repeal the HRA and to change our international obligations, as the authors discuss. This is a decision for the executive in terms of foreign policy and for parliament as to the relevant legislation. The role of lawyers is to advise a government how to implement policy decisions in accordance with the law, not to take the decision as to what the policy should be.

The current government has said it will not leave the Convention or repeal or amend the HRA. The Home Secretary may find this approach seriously undermines her options. Reform has said that it will leave the ECHR and do what is necessary to stop illegal migration. The Conservatives will shortly announce what their policy is in this space.

The authors have provided an invaluable legal road map for policy makers. What is becoming increasingly clear is that the HRA and our membership of the ECHR is seriously inhibiting the government's freedom to respond to what is regarded by many as the "emergency" of illegal migration. This is the current issue, but there will be others as long as we retain the current legal architecture for the protection of human rights.

Executive Summary

Between 2010 and 2024, successive Conservative governments made various half-baked or half-hearted attempts to reform the Human Rights Act 1998 (HRA) and the European Convention on Human Rights (ECHR). Reform was, and still, is very much needed – this body of human rights law distorts parliamentary democracy, disables good government, and departs from the ideal of the rule of law. But the reform attempts largely failed. Unless parliamentarians and others learn the lessons of these failures, no future programme of human rights law reform is likely to succeed. This paper explains these lessons and outlines how to develop a workable programme of reform.

The first part of this paper reflects on the litany of misfires and half-measures that characterised this period, as well a handful of partial successes (including decisions in the courts partly stemming the tide of expansion), noting problems and dynamics that need to be considered in any future reform.

The **2011 Commission on a UK Bill of Rights** did not result in a meaningful proposal for reform, in part because of its divided membership and limited terms of reference. The failure owed something to the imprecision of the Conservative Party's understanding of the problem and its illusory but persistent hope that replacing the HRA with a *British* Bill of Rights would transform the relationship with the European Court of Human Rights in Strasbourg. The **2012 Brighton Declaration l**ed to Protocol 15 of the ECHR, which came into force in August 2021 and introduced a new preamble to the Convention, stressing the importance of subsidiarity. But this has not led the Strasbourg Court to change its behaviour in any significant respect.

The **2015 Conservative Party manifesto** set out a robust commitment to scrap the HRA, but left it entirely unclear just how replacing the HRA with a British Bill of Rights would constitute an improvement. In the wake of the 2016 referendum, no legislative proposals were tabled. The **2020 Independent Review of the Human Rights Act** was set up to secure support from within the legal profession for change. This was a fool's errand, outsourcing responsibility for the Government's thinking about law reform, and tacitly giving lawyers a veto. Four **2021 Supreme Court judgments** partly reversed the effect of previous judicial decisions about the meaning and application of the HRA. But Parliament should have amended the legislation in this way long before the late 2021 course correction: the changes the Supreme Court has made are welcome but inherently more unstable, complex and incomplete than legislative change.

The **2022 Bill of Rights Bill** addressed some real problems with the HRA but also risked introducing some new problems, notably imprecision about what rights Parliament intended to be protected and about the power of domestic judges to elaborate the imprecise rights in question. The Bill also risked establishing a cross-party consensus in favour of open-ended human rights adjudication. The **2023 ad hoc legislative disapplication of the HRA's operative provisions** in three different Acts of Parliament was an important moment, but the Conservative government never brought the relevant provisions into force and seemed reluctant to commit itself to the legislation, or to go far enough in excluding HRA challenges to guarantee the effect that it said it wanted to achieve.

The uncertainty of aim and inconstancy of method that characterised the 2010-2024 period should not be repeated. Past attempts at reform have failed in part because they have been dominated by a technocratic and legalistic approach that is biased in favour of the status quo. Would-be reformers have too often been divided in their aims and imprecise in their means, which has made their proposals easy prey for the legal lobby, inside and outside Parliament. The Convention, as it has been expanded in the hands of the Strasbourg Court, has too often been assumed to be the baseline, whereas the extent to which that Court has remade the ECHR should be front and centre in any debate about reform. Conversely, reformers have often wrongly assumed that the problem is that the Strasbourg Court is a foreign court and that the remedy for its ills is therefore to empower a domestic court to exercise a similar jurisdiction – a complete misconception.

The second part of the paper builds on this analysis of the failures of human rights law reform to outline how an effective future programme of reform should be framed and implemented.

Parliamentarians must distinguish human rights from human rights *law*. It would be a bad mistake to cede the idea of human rights to enthusiasts for the status quo. Parliamentarians should firmly reject the assumption that the Strasbourg Court's case law tracks human rights properly understood. It is always an open question whether European human rights law protects human rights in a way and in a form that is acceptable in a parliamentary democracy.

The protection of human rights does not require either a domestic or an international court to engage in the judicial review of legislation in any form (including under guise of statutory interpretation). In the UK constitutional tradition, Parliament has had responsibility for deliberating about legal change, including for making changes required to protect individual rights and freedoms, and courts have not stood in judgement over Parliament.

The UK's decision in 1950 to join the ECHR did not constitute a repudiation of this constitutional tradition. The statesmen who reluctantly ratified the ECHR were concerned about its implications for parliamentary government. But they did not foresee, and would have been horrified to see, the extent of the Strasbourg Court's subsequent abuse of its

jurisdiction. The Strasbourg Court's case law is unstable, often incoherent, and constantly transgressive of earlier-established boundaries.

It is perfectly reasonable for Parliament to adopt procedures to remind itself of the importance of individual rights and freedoms, which should be considered in relation to wider questions about the public interest and common good. But these arrangements should not allow predictions about what a court might do to be regarded as a more important question than the merits of what should be done.

Parliamentarians should recognise the indispensable role that ordinary law plays in securing human rights. Human rights *law* as such is not necessary at all. In deliberating about whether to incorporate open-ended justiciable principles into our law, parliamentarians should reflect on the practical problems that are illustrated by the history of the HRA across the 25 years since it came into force.

The promise of the HRA was that it would secure the supposed advantages of European or North American style constitutional review without having to abandon parliamentary sovereignty. The promise is illusory, as is illustrated by the supine approach taken by successive governments to section 4 declarations of incompatibility and by their approach to their section 10 powers to amend legislation. Effective reform must aim to revive both Parliament's responsibility for deciding for itself what the law should be and the political accountability of elected politicians for what it says.

Implementing a new approach to protecting human rights, one which restores Parliament's primacy and protects the exercise of executive power from unpredictable open-ended rights adjudication, will necessarily be in tension with membership of the ECHR and the UK's subjection to the Strasbourg Court's jurisdiction. In addressing (or seeking to manage) this tension, there are three main options, each of which would need to be backed up by changes to domestic law.

The first option is to adopt a practice of "principled defiance", choosing not to comply with judgments of the Strasbourg Court that depart from the terms the member states originally agreed. While there is a strong intellectual case to be made for this course of action, it is far from clear that it would be a politically viable option in the medium term and across a wide range of questions. It is likely that any government that wished to deploy this option, especially to deploy it repeatedly, would find it impossible in practice to resist the political imperative to take the easier route of avoiding domestic and international controversy and succumbing to complaisance and compliance.

The second option is for the UK to persuade member states jointly to reform the ECHR. The UK might aim to negotiate a withdrawal of the UK from the right of individual petition and/or from Article 46, which requires compliance with judgments of the Court. However, such changes would likely be very difficult to secure. The two priorities for ECHR treaty reform should be to address the Strasbourg Court's inconsistent and inadequate deference to domestic political decision-making and the

Court's willingness to treat the Convention as a "living instrument" and thence to remake it.

For treaty reform to be worth undertaking, it would have to be specific and far-reaching. The first lesson of the Brighton Declaration (and the later Copenhagen Declaration) is that member states must confront the true nature of the problem, which is not a problem in managing a vast case load but rather a fundamental failure to adhere to the limits of the Court's jurisdiction. The second lesson is that without very careful political direction any UK attempt to secure treaty reform would not be worth undertaking and would simply waste time and dissipate political capital.

The third option is that the UK should withdraw from the ECHR. There is a strong case in principle for ECHR withdrawal: the Convention has been tried and tested for seventy-five years now and has proved increasingly incompatible with our constitution and damaging to the common good. It will be said that there are considerations of foreign policy making a persuasive case for remaining within the ECHR, but against such considerations must be set the powerful constitutional grounds for extricating ourselves from a set of institutions and practices that have proved themselves to be in practice invulnerable to alternative, less "drastic" remedies.

Any government that intends to lead the UK out of the ECHR would need to attempt to anticipate and address the various objections that are likely to be made to withdrawal and thus to build political support for withdrawal, within Parliament of course, but also across the country. The objections that are likely to be made include that ECHR withdrawal would:

(1) place the UK in breach of the Belfast (Good Friday) Agreement and would thus put peace in Northern Ireland in jeopardy,
(2) place the UK in unhappy company with Belarus and Russia, as the only two European states that are not members of the ECHR,
(3) put vulnerable minorities in peril by enabling the tyranny of the majority, and
(4) constitute a foreign policy blunder, weakening the UK's standing in the world, and relatedly would place us in breach of our agreements with the EU.

Each of these objections is answerable and should be answered. In a recent paper, we have addressed (1) in detail, and (4) in part, and we will consider the other objections closely in future work, articulating them fairly and forcefully, before explaining how they can be answered. The argument of this paper, which makes clear that the UK's traditional approach to protecting human rights is attractive and defensible, helps show that neither (2) nor (3) are plausible.

Unless and until the UK has withdrawn from the ECHR, or the treaty is significantly reformed, a reforming government should maintain a stance of "principled defiance". But in view of the difficulty of maintaining this stance over time, a reforming government should commit to UK

withdrawal from the ECHR unless far-reaching and meaningful treaty reform can be agreed in short order. No government should accept cosmetic treaty changes or an indefinite period of negotiation.

For much of the 2010-2024 period, the focus of reform efforts was a vague proposal to replace the HRA with a (British) Bill of Rights. This was an ill-considered proposal, which did not promise to secure meaningful reform and might well have made matters worse in some respects.

If the UK leaves the ECHR, Parliament should not replace the HRA with a British Bill of Rights. Even if the UK remains within the ECHR, Parliament should strongly consider repealing and not replacing the HRA. In the alternative, Parliament should sharply amend the HRA and/or enact legislation disapplying it in this or that context.

But just removing or qualifying the existing mechanisms that support the current role for human rights in UK law will not be enough, on its own, to produce the necessary objectives of reform. Parliament must enact legislation clarifying both the required level of deference for legislative and administrative decision-making and the principles of statutory interpretation in relation to international obligations that should be adopted under the reformed system.

Introduction

Human rights law is controversial. Whether the UK should withdraw from the European Convention on Human Rights (ECHR) is now a live question in UK politics. So too is the question of whether the Human Rights Act 1998 (HRA) should be repealed, perhaps to be replaced by a (British) Bill of Rights or perhaps not to be replaced at all. While the new Labour Government is robustly committed to UK membership of the ECHR and has an "absolute commitment"[1] to the HRA, one former Labour heavyweight, Jack Straw, has called for the UK to withdraw from the ECHR (although he has since also said that he wants the UK to decouple from the ECHR, a position apparently shared by Lord Blunkett, his former cabinet colleague) and several new Labour MPs have said they are open to withdrawal if this proves necessary to address the migration crisis – precisely the position taken by the last Conservative Prime Minister, Rishi Sunak MP. One Labour MP has gone further and called for outright withdrawal.[2] The Government itself is reportedly considering proposals to tighten up the application of Convention rights in the context of migration and asylum, amid concerns that immigration judges are routinely deploying the Article 8 right to respect for private and family life to prevent removal of foreign criminals or illegal migrants or to allow entry to the UK. On the right of UK politics, the Reform Party is committed to ECHR withdrawal, and the Conservative Party is openly discussing this course of action, with the Leader of the Opposition, Kemi Badenoch MP, setting up a new "Lawfare Commission" to consider, inter alia, the problem of human rights law.[3]

Many scholars and jurists take the view that popular and parliamentary discontent with human rights law is a function of ignorance at best – incipient fascism at worst – for which the remedy is more and better communication.[4] That is, human rights lawyers and scholars should redouble efforts to educate parliamentarians, the press, and voters. Once the UK public and Parliament are better informed about the HRA and ECHR, so the argument goes, they will learn to love human rights law – or at least will abandon the fantasy that there is any viable alternative to the status quo. We say, on the contrary, that the problems with human rights law are real and serious. There is a compelling case for reform, which Policy Exchange's Judicial Power Project has advanced for ten years now, a case which has very strong foundations in our country's constitutional tradition.

Setting out "The Conservative Case for the Human Rights Act" in 2009, Jesse Norman, then a Conservative parliamentary candidate, and Peter Oborne, felt able to say that "we will assume in what follows that there is

1. Ministerial Statement by Secretary of State for Northern Ireland Hilary Benn MP (29 July 2024) https://questions-statements.parliament.uk/written-statements/detail/2024-07-29/hcws30.
2. https://www.telegraph.co.uk/politics/2025/08/21/labour-mp-european-convention-human-rights-graham-stringer/.
3. Lord Wolfson of Tredegar KC, the Shadow Attorney General, is leading the commission, which is expected to report imminently.
4. See for example a recent report which argues, inter alia, that "Suggestions that the European Court [of Human Rights] plays a significant role in shaping the UK's immigration decision-making and immigration rules, to the extent of "hindering" immigration control, therefore, do not stand up to scrutiny." Victoria Adelmant, Alice Donald and Başak Çali, *The European Convention on Human Rights and Immigration Control in the UK: Informing the Public Debate* (Bonavero Institute for Human Rights, August 2025), 28. The report's assessment would seem to be rejected by Government and Opposition alike and for good reason: see John Finnis and Simon Murray, *Immigration, Strasbourg and Judicial Overreach* (Policy Exchange, March 2021) https://policyexchange.org.uk/wp-content/uploads/2022/10/Immigration-Strasbourg-and-Judicial-Overreach.pdf.

no case for the UK to leave the European Convention on Human Rights. This move has never been seriously advocated by any mainstream political party."[5] This was a dubious assumption in 2009; it would be an absurd assumption in 2025. While it remains to be seen whether the UK will choose to leave the ECHR, it is clear that there is now in UK politics both an interest in the prospect of far-reaching human rights law reform and an openness to it. But effective reform, whether in this Parliament or, more likely, in some future Parliament, will require parliamentarians and others to think intelligently about how best to reform the law and about what the law should look like when reformed. This paper aims to support that process.

The paper reflects on the lessons to be drawn from the various attempts at reform that have been made in recent years. The litany of misfires and half-measures that has characterised this period, alongside a handful of partial successes (including decisions in the courts partly stemming the tide of expansion), is instructive, and suggests various problems and dynamics that future reformers will need to address with care.

The first part of this paper reviews the recent history of human rights law reform, helping to explain why past attempts have, for the most part, been misconceived or ineptly carried forward. It considers, inter alia, the Commission on a UK Bill of Rights, successive Conservative Party manifesto commitments, diplomatic efforts at the European level, developments in Supreme Court case law, the Independent Human Rights Act Review, the ill-fated Bill of Rights Bill 2022, and more.

Past attempts at reform, we shall suggest, have largely failed because they have been dominated by a technocratic and legalistic approach that is biased in favour of the status quo – as one should expect when lawyers are taken to have exclusive competence to understand the problems in question. Would-be reformers have too often been divided in their aims and imprecise in their means, which has made their proposals easy prey for the legal lobby, inside and outside Parliament. The Convention, as it has become in the hands of the Strasbourg Court, has too often been assumed to be the baseline, whereas the extent to which that Court has remade the ECHR should be front and centre in any debate about reform. Conversely, reformers have often wrongly assumed that the problem is that the Strasbourg Court is seen as a foreign court or is dominated by foreigners, such that the remedy for its ills is simply to empower a domestic court to exercise a similar jurisdiction.

The second part of the paper looks ahead to the future, drawing the lessons from history about the role that human rights should have in the UK's political and legal processes in the light of our constitutional traditions and examining the implications that this has for developing and implementing proposals for reform, both at the international level in relation to withdrawing from the ECHR or negotiating treaty changes and in domestic law. Some of these issues warrant, and will receive, more detailed elaboration and exploration in successive Policy Exchange publications. But for now, the paper outlines what must be done,

5. Jesse Norman & Peter Oborne, *Churchill's Legacy: the Conservative Case for the Human Rights Act* (Liberty, 2009) https://www.libertyhumanrights.org.uk/wp-content/uploads/2023/10/Churchills_Legacy.pdf.

intellectually and politically, if parliamentarians are to develop and execute credible and attractive proposals for reform.

Part A – Learning from the Past

Between 2010, when the Conservative-Liberal Democrat coalition government took office, and 2024, when the Conservative majority government left office, there were several faltering attempts to reform human rights law. This section of the paper reviews the relevant developments, aiming to explain why reform proposals so often came to nothing. While our focus is on government initiatives, especially legislative proposals, we also consider diplomatic engagement with the Council of Europe, and a handful of significant domestic court judgments.

The Conservative period in office is largely a record of failure in terms of human rights law reform and while the various failures differ one from another, there are some recurring themes. Successive Conservative governments have been imprecise about the point of reform, divided about the need for reform, and confused about how best to achieve it. They have repeatedly assumed that the main problem with the HRA and ECHR is that foreign judges rather than UK judges have been in the driving seat, when in fact empowering British judges might well have made a bad situation worse. They have also often taken for granted that the HRA, or some equivalent measure, would be a useful addition to the UK constitutional system insofar as it might obstruct the policy programme of their political opponents. In pinning their hopes on a British Bill of Rights, Conservative governments have endeavoured to achieve human rights law reform only at a superficial level, without having squarely to address the inherent mischief in the fundamental nature of the ECHR or to confront the Strasbourg Court's misuse of its jurisdiction. Likewise, successive Conservative governments have wrongly outsourced their thinking about human rights law reform to arms-length bodies and that has predictably scuppered meaningful reform. Human rights law cannot be reformed unless and until Parliament takes full responsibility for the state of the law and for its practical impact on political decision-making. These are truths that should have informed past reform attempts.

2011 Commission on a UK Bill of Rights

The Conservative Party campaigned in the May 2010 General Election on a manifesto commitment to "replace the Human Rights Act with a UK Bill of Rights", saying:

> *"Labour have subjected Britain's historic freedoms to unprecedented attack. They have trampled on liberties and, in their place, compiled huge databases to track the activities of millions of perfectly innocent people, giving public bodies*

> *extraordinary powers to intervene in the way we live our lives … To protect our freedoms from state encroachment and encourage greater social responsibility, we will replace the Human Rights Act with a UK Bill of Rights."*[6]

The emphasis in the manifesto was thus on the inadequacy of the HRA in fending off "state encroachment" on "historic freedoms". David Cameron sounded a similar note in 2006, when he said that the HRA "has stopped us responding properly in terms of terrorism, particularly in terms of deporting those who may do us harm in this country, and at the same time it hasn't really protected our human rights."[7] The Conservative Party's critique of the Act, in the 2006 speech and the 2010 manifesto, was thus somewhat ambivalent – objecting to the limitations it placed on government (in responding to terrorism and deporting terror suspects), while at the same time lamenting its ineffectiveness at limiting Labour's "unprecedented attack" on freedom.[8]

This ambivalence informed the case that David Cameron made for a British Bill of Rights, which relied in part on the assumption that repealing the HRA without replacing it would be a backward step and that withdrawal from the ECHR would be a costly mistake. Hence, the middle way, he reasoned, was to replace the HRA with new legislation that would protect fundamental rights in clearer and more precise terms than the HRA and would make it harder to extend these rights over time. His hope was that a suitably drafted Bill of Rights would encourage the Strasbourg Court to apply a greater "margin of appreciation" to the UK. But he acknowledged that there might remain points of tension, including in relation to deportation of terrorist suspects, and thus undertook to review, somehow, how the UK participated in the ECHR to manage this tension effectively.

The Conservative Party failed to secure a parliamentary majority in the 2010 General Election, instead entering into a coalition Government with the Liberal Democrat Party. On 20 May 2010, David Cameron and Nick Clegg published *The Coalition: Our Programme for Government*. Under the heading 'Civil Liberties', the Coalition Government proposed to investigate the creation of a Bill of Rights that "that incorporates and builds on all our obligations under the European Convention on Human Rights" and "protects and extends British liberties".[9]

> *"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."*[10]

On 18 March 2011 the Government followed through on this pledge and launched an independent Commission on a UK Bill of Rights. Sir Leigh Lewis (former Permanent Secretary at DWP) served as chair. The additional members consisted of seven silks and Michael Pinto-Duschinsky (who resigned a year later). The Commission was thus almost entirely

6. Conservative and Unionist Party, *Invitation to Join the Government of Britain: The Conservative Manifesto* (2010) 79. See https://conservativehome.blogs.com/files/conservative-manifesto-2010.pdf.
7. https://www.theguardian.com/politics/2006/jun/26/uk.humanrights
8. Ibid.
9. HM Government, *The Coalition: Our Programme for Government* (2011) 11, https://assets.publishing.service.gov.uk/media/5a74a4b3e5274a5294069025/coalition_programme_for_government.pdf.
10. Ibid.

dominated by lawyers, several of whom were outspoken supporters of the HRA and ECHR, including Baroness Kennedy of the Shaws QC, Lord Lester of Herne Hill QC, and Philippe Sands QC. This composition of the Commission was unfortunate, insofar as (a) it seemed to concede that the design and operation of human rights law was exclusively a matter for lawyers, rather than a political question that all persons are free to address, and (b) it made it very unlikely from the start that the Commission would see the need to reform the status quo.

The terms of reference incorporated the language in the coalition programme. They also expressly referred to the Interlaken process to reform the Strasbourg Court ahead of the UK taking up a six-month term as chair of the Committee of Ministers of the Council of Europe on 7 November 2011.

A serious issue built into the process was the gap between the Conservative Party's rationale for a commission and the commission's official terms of reference. The explanation for this was, of course, the dynamics of coalition government. On 26 June 2006, David Cameron had vowed to move from the HRA to a Bill of Rights to provide a "hard-nosed defence of security and freedom". A different aspect of the HRA had come up five years later, when the Supreme Court handed down judgment in *R (F) v Home Secretary*.[11] In this case, the court made a declaration of incompatibility in relation to section 82 of the Sexual Offences Act 2003, which provided for a regime of indefinite notification for certain sex offenders. Speaking about the ruling in Parliament on 16 February 2011, David Cameron termed it "offensive and appalling" and said it was another instance of "a ruling by a court that seems to fly completely in the face of common sense". He committed to launching a Bill of Rights Commission to help make sure "decisions are made in this Parliament rather than the courts".[12]

However, the actual terms of reference of the Commission established in 2011 expressly took the ECHR as a starting point and only envisaged its expansion or elaboration in UK law:

> *"The Commission will investigate the creation of a UK 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 UK law, and protects and extend our liberties. It will examine the operation and implementation of these obligations and consider ways to promote a better understanding of the true scope of these obligations and liberties."*[13]

The premise of the inquiry was thus that the rights enshrined in the ECHR, and implicitly in the case law of the Strasbourg Court, should continue to be "enshrined" in UK law in the same form. One way "to promote a better understanding of the true scope of these obligations and liberties" might have been to enact legislation specifying how Convention rights should be understood in UK law, rather than adopting the HRA's approach of simply transposing (as the HRA does) the relevant text of the ECHR. However, the framing of the terms of reference required the

11. [2010] UKSC 17
12. https://www.theguardian.com/society/2011/feb/16/david-cameron-condemns-court-sex-offenders.
13. https://www.gov.uk/government/news/commission-on-a-uk-bill-of-rights-launched

Commission to treat the ECHR and its enshrinement in domestic law as a fixed point, with a British Bill of Rights conceived as, at best doing no more than building on this foundation. This had the effect of excluding a more critical examination of the effect of enshrining those rights in UK law from the Commission's remit.

The final report, *A UK Bill of Rights? The Choice Before Us*, was published on 18 December 2012.[14] The Commission was split. A majority supported the enactment of a new Bill of Rights on the basis that it is the general practice in Europe to have a written constitution,[15] that it may help with public understanding and "ownership" of a regime of rights protection, especially in terms of framing the matter as being British rather than European,[16] that it would "offer the opportunity to provide greater protection against the possible abuse of power by the state and its agents",[17] and the opportunity to adjust the language of how certain rights are formulated to reflect "the distinctive history and heritage of the countries within the United Kingdom".[18] The Commission's main rationale for a Bill of Rights thus seemed to be in effect to vindicate the status quo, insulating it from criticism by rebranding it as home-grown rather than imported.

As the report pointed out, over 80% of submissions to the Commission supported the *addition* of rights beyond those in the ECHR. More than half of these submissions opposed a Bill of Rights but thought, conditional on it going forward, that it should include more rights. The most popular suggestion was the incorporation of other international instruments, such as the UN Convention on the Rights of the Child. Others include "in order of preference, socio-economic rights (including in relation to the environment) and equality rights".[19]

The Bill of Rights Commission did not either result in a meaningful proposal for human rights law reform or provide any greater intellectual or political support for reform. This, as indicated above, was predictable in view of the terms of reference and composition of the Commission. However, the failure also owes something to the imprecision of the Conservative Party's understanding of the problem and its persistent hope that replacing the HRA with a *British* Bill of Rights would transform the relationship with the Strasbourg Court. The mischief in this approach to human rights law reform is the misconception that one can solve the problem with a change in form without addressing the substance of the difference that adopting a different form is intended to produce. That is the inevitable consequence of a commitment to keeping the obligations as they are. In addition, some in the Conservative Party clearly retained a lingering fear that repealing (or limiting) the HRA, or severing the UK's connection to the ECHR, would risk empowering their political opponents, when in power, to trample on rights and freedoms that would be safer if protected by the HRA.

2012 Brighton Declaration

The UK took up the chair of the Committee of Ministers on 7 November 2011, with David Lidington, Minister for Europe, stating that:

14. Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (18 December 2012), https://webarchive.nationalarchives.gov.uk/ukgwa/20130206021312/http://www.justice.gov.uk/about/cbr/.
15. Ibid, 79.
16. Ibid 80.
17. Ibid, 85.
18. Ibid, 86.
19. Ibid, 53.

> *"The Court is an essential part of the system for protecting human rights across Europe. But it is struggling with its huge, growing backlog of applications – now over 150,000. And at times it has been too ready to substitute its own judgments for that of national courts and Parliaments. The situation undermines the Court's authority and efficiency, and we are determined to change that".*[20]

These were, nominally at least, far-reaching reform aims. The relationship between them was not entirely clear, although it was plausible to think that the Strasbourg Court's readiness to substitute its judgement for that of national courts and Parliaments had made a rod for its own back and had contributed to the growing backlog of applications. The Government's opportunity to pursue these reform aims arose during the high-level conference that the UK held at Brighton, during its chairmanship of the Council of Europe, on 19-20 April 2012. This followed the Interlaken high-level conference on 19 February 2010 and the Izmir conference on 26-27 April 2011. Both had produced relevant declarations.

The 2010 Interlaken Declaration had mostly focused on the large backlog of applications to the Strasbourg Court. It did emphasise the 'subsidiary nature of the supervisory mechanism established by the Convention' but in the context of enabling national authorities to help the Court reduce the backlog.[21]

There had been some shift in tone a year later in the 2011 Izmir Declaration. It had continued to observe the increase in applications. It again returned to the theme of "subsidiarity", this time making clearer that it was a fundamental principle "which both the Court and the State Parties must take into account". It also expressed "concern" at the increase in interim measures. The focus was on the admissibility criteria in Protocol No 14 and how they might, as a matter of subsidiarity, reduce the number of reviewed cases.[22]

This framing, while it concerned genuine problems with the operation of the Strasbourg Court, was ill-suited for grappling with the issues that most centrally concerned (and still concern) the UK. The focus of these declarations was on a problem of application. The challenge they addressed was to ensure that the high-level principles articulated by the Strasbourg Court were faithfully applied to the facts at the domestic law level, so that the rights the Court recognised in its judgments were given effective legal recognition on the ground, throughout the member states. Failures of compliance, where principles articulated by the Strasbourg Court were mistakenly applied or ignored in a range of one-off factual applications, was threatening to overwhelm the court's capacity. The main source of such problems was Russia, Turkey and Azerbaijan. A related challenge was the risk that the Strasbourg Court would seek to micro-manage the factual determinations of national courts.

However, for the UK, the main problem with the Strasbourg Court was not then – and is not now – the inability of UK courts faithfully to apply Strasbourg jurisprudence, or to render credible factual determinations. The

20. https://www.gov.uk/government/news/uk-to-chair-council-of-europe.
21. https://www.echr.coe.int/documents/d/echr/2010_interlaken_finaldeclaration_eng
22. https://www.echr.coe.int/documents/d/echr/2011_izmir_finaldeclaration_eng

problem, rather, was and remains the tendency of the Strasbourg Court itself to act in an unprincipled way, developing its jurisprudence in startling directions in a manner unmoored from the ECHR's provisions or even the Court's previous case law and doctrine. That problem with the Court is one of fundamental principle, wholly independent of administrative concerns about capacity; and there are respects in which it is also a problem that is the inevitable consequence of the formulation of the Convention rights as abstract *a priori* principles that in practice need elaboration over time. These are problems that it is necessarily very difficult to address in high-level conferences, which are ill suited to grappling either with the legal merits of particular questionable judgments or with the weaknesses inherent in the philosophical foundations of an international human rights regime. It is unsurprising, perhaps that the conference, focused instead on administrative and logistical, questions about judicial throughput.

This is reflected in the Brighton Declaration (19-20 April 2012), which followed on from Interlaken and Izmir.[23]

The Declaration noted that there is some recognition of the margin of appreciation in the Strasbourg jurisprudence.[24] The principles of subsidiarity and margin of appreciation were "welcomed".

The Declaration proposed the addition of a reference to the principle of subsidiarity and the doctrine of the margin of appreciation to the Preamble to the Convention. This was implemented by Protocol 15 which did not enter into force until 1 August 2021. That Protocol also removed the constraint (in Art 35(3)(b) of the Convention) which previously provided that where the applicant's case had not been "duly considered by a domestic tribunal", it could not be ruled inadmissible on the grounds of the absence of a significant disadvantage to the applicant.

Protocol 15 has not been in force for long enough for any effect it might have had on the approach of the ECtHR to subsidiarity and margin of appreciation issues to have become apparent. However, it has to be regarded as highly likely that any effect will be minimal.

When reporting to Parliament for the purposes of the process of ratification of the Protocol in 2014, the JCHR was relatively optimistic about the likely effect of the preamble amendment in the Protocol.[25] However, all the indications, including in the speech of President of the Court Spielman, part of which is mentioned on page 16 of the JCHR report, are that the optimism is unlikely to prove justified, and that the Protocol is likely to be regarded as significant only so far as it is relevant to the need to mitigate the caseload of the Strasbourg court.

At the start of the Brighton meeting, Sir Nicolas Bratza, the UK judge then serving as President of the European Court of Human Rights, had expressed scepticism about any effort to legislate the margin of appreciation and principle of subsidiarity into the Convention. He suggested the margin of appreciation was "a variable notion which is not susceptible of precise definition".[26] It is difficult to see how the addition to the preamble can be expected to have any effect beyond reinforcing what can already found in the jurisprudence of the Strasbourg Court, or indeed (given the practice

23. https://www.echr.coe.int/documents/d/echr/2012_brighton_finaldeclaration_eng
24. Ibid, 11.
25. See Fourth Report of the JCHR for Session 2014-15 HI 71; HC 837 pp 16-17.
26. https://www.echr.coe.int/documents/d/echr/Speech_20120420_Bratza_Brighton_ENG

of that Court) to have any effect that is likely to act as a constraint on that Court in future.

This is reinforced, perhaps, by what has happened in practice in the case of the amendment of Article 35(3)(b) about the inadmissibility of applications. That amendment has effectively been rendered irrelevant by the Strasbourg Court's almost complete abandonment of the admissibility requirements of Article 35 in its landmark *KlimaSeniorinnen* judgment in April 2024.

There was also a reference in the Brighton declaration, building on Izmir, of a procedure to invite advisory opinions. This later entered into force on 1 August 2018 as Protocol No 16 but has not been signed or ratified by the United Kingdom. It would represent a further involvement of the Court in policy making processes that it would be impossible to reconcile with the traditional UK constitutional understanding of what courts are for or, it might be thought, with continuing to defend or maintain the tradition of judicial impartiality in political matters. A proposal to allow the Court to intervene in political decision-making in advance is not evidence of any serious concern about the expansionist inclinations of the Court.

Interestingly, a draft version of the final Brighton declaration had been leaked in advance, which instead proposed more restrictive admissibility criteria and included language suggesting that the Strasbourg Court should focus on "serious or widespread violations, systemic and structural problems", and so be called on to "remedy fewer violations itself" and "deliver fewer judgments".[27] These proposed changes were not to be found in the published document: and that would seem to confirm the difficulty of advancing meaningful reform proposals in this sort of forum, where any change requires unanimous support from member states. In those circumstances, the status quo has an overwhelming advantage, while officials of the Strasbourg Court itself are well-placed to dilute or disarm change with which they are unhappy or which diminishes any expansion of the Court's reach.

So, the Brighton Declaration and the UK's period as chair of the Committee of Ministers did not result in any meaningful reform of European human rights law. The Strasbourg Court has not tempered the exercise of its jurisdiction since the Brighton Declaration in 2012 or, since August 2021 when Protocol 15 finally came into force, *pace* assertions to the contrary by defenders of the status quo, some of whom make much of the new preamble, despite the indications that it is likely to prove to be no more than "window dressing". It is tempting to ask how the amendment of a preamble, even in the international law context, could be anything else.

2015 Conservative Party manifesto

At the 2014 Conservative Party Conference, the Prime Minister, David Cameron, said:

27. https://www.theguardian.com/law/interactive/2012/feb/28/echr-reform-uk-draft.

> *"When that charter was written, in the aftermath of the Second World War, it set out the basic rights we should expect. But since then, interpretations of that charter have led to a whole lot of things that are frankly wrong. Rulings to stop us deporting suspected terrorists. The suggestion that you've got to apply the human rights convention even on the battlefields of Helmand. And now—they want to give prisoners the vote. … This is the country that wrote Magna Carta … the country that time and again has stood up for human rights … We do not require instruction on this from judges in Strasbourg."*[28]

This speech did usefully take aim at the Strasbourg Court's abuse of its jurisdiction, picking out three high-profile misinterpretations of the ECHR (all of which remain relevant in 2025). The case made in the speech was amplified in the Conservative Party's report, *Protecting Human Rights in the UK*.[29] This report proposed changing the law (in future legislation yet to be drafted) to make Strasbourg judgments "no longer binding" over the Supreme Court, to make the Strasbourg Court an "advisory body only", and to ensure a "proper balance between rights and responsibilities" in UK law.

This report led to the 2015 manifesto, which contained a clear commitment to "scrap the Human Rights Act and curtail the role of the European Court of Human Rights, so that foreign criminals can be more easily deported from Britain".[30] The manifesto continued:

> *"we will … introduce a British Bill of Rights which will restore common sense to the application of human rights in the UK. The Bill will remain faithful to the basic principles of human rights, which we signed up to in the original European Convention on Human Rights. It will protect basic rights, like the right to a fair trial, and the right to life, which are an essential part of a modern democratic society. But it will reverse the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society".*[31]

This was a robust commitment to human rights law reform, which intimated clearly that European human rights law had departed from the terms of the ECHR, thus putting in doubt the rights of others. What was less clear was how exactly replacing the HRA with a British Bill of Rights would constitute an improvement. The implication was that it would do so by adhering more closely to "basic principles" and thus repudiating the "mission creep" which had seen human rights law expanded well beyond the conception of the ECHR at its foundation.

In the 2015 Queen's speech, the Government said no more than that that it would "bring forward proposals for a British Bill of Rights." While proposals were reportedly developed within government, they were not introduced to Parliament at the time. (It seems likely that the Bill of Rights Bill introduced to Parliament in 2022 originated to a significant extent in work, including drafting, done in 2015.) The Brexit referendum then displaced all else. Reflecting the changed priorities, the Conservative Party's 2017 manifesto stated, "we will not repeal or replace the Human Rights Act while the process of Brexit is underway, but we will consider

28. https://www.theguardian.com/politics/2014/oct/01/cameron-pledge-scrap-human-rights-act-civil-rights-groups.
29. Conservative and Unionist Party, *Protecting Human Rights in the UK* (October 2014).
30. Conservative and Unionist Party, *Manifesto 2015* (2015) 60, https://www.theresavilliers.co.uk/files/conservativemanifesto2015.pdf.
31. Ibid, 73.

our human rights legal framework when the process of leaving the EU concludes".[32]

2017 Prisoner voting redux

In 2005, the Strasbourg Court had ruled that the UK was in breach of Article 3, Protocol 1 of the ECHR insofar as section 3 of the Representation of the People Act 1983 failed to permit a serving prisoner to vote.[33] The judgment was highly controversial. The Labour Government did not propose legislation amending the 1983 Act. The Coalition Government in 2012 introduced a draft Bill setting out three options, one of which was the maintenance of the status quo, but did not take forward any particular proposal for legislative change. In 2012, David Cameron, speaking at the despatch box, made clear that the ban on prisoner voting would not be changed while he was Prime Minister. In refusing to change the law, successive governments and Parliaments were willing to tolerate a mismatch between the Strasbourg Court's interpretation of the ECHR and domestic law, tolerance which involved a failure to comply with a final judgment of the Court.

Nothing in the HRA requires Parliament or government to change the law to comply with a judgment of the Strasbourg Court. Article 46 of the Convention giving binding force to the decisions of the Court is not part of domestic law, and it is specifically omitted from the Schedule to the HRA that lists the Articles of the Convention that are incorporated into domestic law.

Indeed, part of the case that was made to justify the enactment of the HRA in the form it was passed by Parliament was that it maintained Parliamentary Sovereignty, leaving it to Parliament to decide whether (and, if so, how) the law should be changed in response to a declaration of incompatibility (made under section 4 of the HRA) or to the case law of the Strasbourg Court, or even a final judgment of the Court in a case to which the UK is a party. The refusal to enfranchise prisoners was, and remains, the highest profile instance in which Parliament and government have chosen not to change the law in response to such a judgment of the Strasbourg Court. It was thus an important potential turning point and appeared to confirm that it was possible in practice for the UK to stand its ground and to maintain a state of affairs that it thought justified.

Nevertheless, attempts to resolve the stand-off continued and in 2017 David Lidington, the Lord Chancellor, made a statement to the House of Commons outlining an approach to address the Strasbourg Court's 2005 judgment.[34] The approach was not to amend section 3 of the 1983 Act but rather (1) to notify prisoners on conviction that they would lose the right to vote and (2) to clarify Prison Guidance so that prisoners released on temporary licence would, like prisoners released on home detention curfew, be able to vote. Having considered these "administrative changes", the Committee of Ministers of the Council of Europe accepted that the UK had complied with the 2005 judgment. In fact, it is far from clear how the administrative changes in question could have enabled any

32. Conservative and Unionst Party, *Forward Together: Manifesto 2017* (2017) 37, https://general-election-2010.co.uk/2017-general-election-manifestos/Conservative-Party-Manifesto-2017.pdf.

33. *Hirst v United Kingdom* (Application no. 74025/01), 6 October 2005.

34. https://hansard.parliament.uk/commons/2017-11-02/debates/9E75E904-9B25-475F-87C4-DD8F3C4836C4/Sentencing.

more prisoners to vote. And it is obvious that the changes did not truly comply with the Strasbourg Court's judgment, but that the Committee of Ministers had, instead, accepted that the UK had complied in order to move on from an impasse by accepting a politically negotiated concession to UK resistance.

It is unclear whether anyone in government considered the wider implications of the 2017 administrative changes in terms of the UK's overall relationship with the Strasbourg Court. On one view, the Government's nominal compliance with the Court's judgment, and negotiation with the Committee of Ministers to accept it as satisfactory, removed from view a striking (totemic) case of UK principled non-compliance, which might have served as a model for future action. On another view, the episode confirms that one way in which the UK might handle unacceptable judgments of the Strasbourg Court is to refuse to comply with them for a dozen years, before making nominal concessions that the Committee of Ministers can then accept as a negotiated solution.

2018 Copenhagen Declaration

Following on from Interlaken, Izmir, and Brighton, another high-level conference was held in Copenhagen in 12-13 April 2018. It faced the same issues as before, however, in terms of being a productive way of addressing the problems facing the UK in terms of its relation to the ECHR, it achieved little or nothing.

The Copenhagen Declaration reiterated support for the ratification of Protocol 15, which (as mentioned above) had at that time still not come into force, and encouraged the development of more domestic remedies, the training of domestic lawyers and judges on Strasbourg jurisprudence, and the translation of the Court's judgments into local languages.

The backlog of cases remained a continuing concern, and there were calls for dialogue between states and the Court on their "respective roles in the implementation and development of the Convention system, including the Court's development of the rights and obligations set out in the Convention".[35] The declaration also expressed support for the ratification of Protocol 16 (which subsequently came into force in August 2018), with its provision of a mechanism for national courts to request advisory opinions from Strasbourg, and for the number of third-party interventions to increase in front of the Court. It should be noted with relief that the UK, with its long tradition of thinking that it is an anathema to use the courts to answer academic and hypothetical questions has not ratified Protocol 16.

2019 Human Rights Act Remedial Order

In July 2018, the Government exercised its powers under section 10 of the HRA to lay a draft remedial order before Parliament. The draft remedial order was subsequently widened, in response to pressure from the JCHR, and replaced by a new order that was laid in October 2019.

The Human Rights Act 1998 (Remedial) Order 2019 amended section

35. Ibid, para 33.

9(3) of the HRA itself, in response to the Strasbourg Court's 2016 judgment, *Hammerton v UK*.[36] The Court had held that the failure of UK courts to award damages for a judicial act that involved breach of the Article 6 right to a fair trial (section 9(3) does not allow payment of damages for a judicial act) meant that the UK had breached the Article 13 right to an effective remedy. It is unclear whether anyone in government gave serious thought to whether the UK should comply with this judgment and especially whether it should do so by way of the section 10 power to make a remedial order.

In a paper published in June 2020, one of us argued that the remedial order was *ultra vires* section 10, which does not authorise amendment of the HRA itself, or in the alternative was an unusual and unexpected use of the power, which Parliament should refuse to support.[37] While these arguments were raised in each House of Parliament (and in a subsequent debate about executive overreach), the Government maintained that it was acting lawfully, and parliamentarians agreed.

By using a remedial order, the Government chose to change the HRA by way of a process that sharply limited the opportunity for parliamentary debate. The remedial order removed an important feature of the original Act, which deliberately maintained the traditional common law understanding about judicial immunity, simply in order to comply with the Strasbourg Court's understanding of the requirements of Article 13, which having been omitted from Schedule 1 to the HRA had no effect in domestic law. Even if this was a lawful exercise of the section 10 power, which is questionable, it was inappropriate and arguably unconstitutional. It was also imprudent, opening the door for successive governments to expand the HRA without adequate parliamentary oversight, by adopting a highly expansive reading of section 10's scope.

We note this episode because it is one of the few instances of legislative change to the HRA itself since 1998; but far from demonstrating a willingness to contemplate reform, it betrays, instead, a dismal, limited approach to legal change. Despite the Government's nominal commitments for human rights law *reform*, it unthinkingly expanded the HRA's scope in response to the Strasbourg Court's denunciation of its original terms.

2019 Policy Exchange's programme for human rights law reform

Shortly after the 2019 General Election, Policy Exchange published *Protecting the Constitution*,[38] a report that set out a programme for constitutional reform. In relation to human rights law, the paper recommended that:

- before deciding to leave the ECHR, the Government should propose a new protocol to the ECHR, which would permit member states to make reservations in relation to particular Strasbourg Court interpretations of the ECHR;
- unless and until such a protocol is agreed, at least in cases where important UK interests are in play, the next government

36. Application no. 6287/10, 12 September 2016.

37. Richard Ekins, *Against Executive Amendment of the Human Rights Act 1998* (2020), https://policyexchange.org.uk/publication/against-executive-amendment-of-the-human-rights-act-1998/.

38. Richard Ekins, *Protecting the Constitution* (Policy Exchange, 2019), https://policyexchange.org.uk/publication/protecting-the-constitution/.

should consider not complying with the Strasbourg Court's misinterpretation of the ECHR;

- neither the Government nor Parliament should accept that it is unconstitutional for ministers or civil servants to act in ways that would place the UK in breach of its international obligations;
- if Parliament thought it prudent to delay repeal of the HRA, in view of recent constitutional instability (and tension with the devolved administrations), it should at least amend the HRA to limit the extent to which it undermines the constitutional balance;
- the HRA should be amended to restore its temporal scope – making clear that it does not apply to events that pre-date the Act – and its spatial scope – making clear that it does not generally apply outside the UK;
- the HRA should also be amended to prevent its misuse as a vehicle for expanding the power of domestic courts;
- the HRA should be amended to protect subordinate legislation, as well as primary legislation, from invalidation on the grounds of incompatibility with Convention rights;
- the HRA should be amended to prevent its misuse to misinterpret other legislation – section 3 should be amended to specify that it does not authorise courts, or anyone else, to read and give effect to legislation in ways that depart from the intention of the enacting Parliament;
- the HRA might be amended to make clear, on the face of the Act, that a judicial declaration of incompatibility, per section 4, does not require amendment of the law in question; and
- the Government and Parliament should make it clear that they do not accept that there is a constitutional convention that either the Government or Parliament ought to respond to a judicial declaration that legislation is rights-incompatible by changing the law.

While this paper was raised in Parliament and discussed in the press, the Government did not adopt it, with suitable modifications, as a programme for constitutional reform, instead wasting time and political capital on commissioning a self-defeating independent review of human rights law.

2020 Independent Review of the Human Rights Act

The Conservative's 2019 manifesto recognised that:

> *"the ability of our security services to defend us against terrorism and organised crime is critical. We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government".*[39]

39. Conservative and Unionist Party, *Manifesto 2019* (2019), 48 https://cdn.prod.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf.

Although the commitment was to *update* the HRA to achieve a proper balance, the Government backed away from this firm commitment in favour of launching the Independent Human Rights Act Review (IHRAR) in December 2020. (Earlier in the year, it had also launched the Independent Review of Administrative Law (IRAL).)

The Government never adequately explained why it was proceeding in this way, but the intention seems to have been to secure support from within the legal profession for change, thus paving the way for legislation to be enacted with minimal controversy. This was always a fool's errand. It outsourced to an independent body responsibility for the Government's thinking about law reform, giving the lawyers on IHRAR (and they were all lawyers, although they did include one of us) on IHRAR and on IRAL (and they were all lawyers too) a tacit veto on any politically driven reform. Indeed, they implicitly assumed that the only case there could be for reform had to be one based on legal analysis alone.

This was irresponsible lawmaking, with the Government failing to consider for itself what reforms were warranted and why – and instead attempting to outsource to an ostensibly independent and impartial body decisions for which it would itself need to be politically accountable. Predictably, the process did not secure what the Government sought, which was an intelligent case for reform. As with the 2011 Commission, the choice of personnel was critical. Aiming once again to charm (or dull) the legal profession, the Government appointed a recently retired judge to chair IHRAR, implying in this way that the main question was whether the HRA was operating effectively in court, whereas its impact outside the courtroom was at least as important. With one exception, one of us, the other members of the IHRAR had not expressed any support for human rights law reform before and, predictably, did not support reform in the end, instead largely defending the status quo.

As with the 2011 Commission, the IHRAR concluded that the answer to the controversy about the HRA was education, as if parliamentarians and the public were simply ignorant and would learn to love (or at least to live happily with) the HRA once the Act and the ECHR were explained patiently to them – presumably in some way that had not already been tried in the previous 20 years and despite the fact that changing minds on a matter of political controversy requires the exercise of political leadership, which lawyers, particularly in roles that require them to be impartial, are not equipped to provide.

The IHRAR considered two themes. The first theme concerned how *domestic courts* relate to the Strasbourg Court and its case law. The second theme concerned how the Human Rights Act changed the way *the courts* relate to the executive and legislature.

In accordance with its terms of reference, the IHRAR took as a given the UK's continued membership of the Convention. It also did not question the merits of any substantive law with respect to any Convention right so far it is derived from the jurisprudence of the Strasbourg Court. The principal focus was on the operation of the HRA *in the courts*, effectively assuming

the correctness and appropriateness of all Strasbourg judgments and using the premise of the 1998 Act that it was the main intended function of that Act to minimise the number of cases the UK is likely to lose in Strasbourg. This narrowed the inquiry in ways which were seriously distortive. The problem is that the merits of reevaluating the HRA cannot take place in isolation from an assessment of the merits of Strasbourg jurisprudence interpreting the Convention, since the haphazard development of that jurisprudence is a central plank in the case for reform.

In a submission to the review, written by one of us and later published as a report,[40] Policy Exchange recommended enacting legislation to provide that a court could not find a public authority's act incompatible with a Convention right (under section 6) or find legislation to be rights-incompatible (under sections 3 and 4) unless its finding was based on a clear and consistent line of Strasbourg jurisprudence. Other options included (a) adding that the clear and consistent line of jurisprudence must not clearly depart from the terms of the ECHR or (b) providing a Schedule listing various mistaken Strasbourg Court judgments that UK courts should not follow in construing Convention rights.

With respect to section 3, Policy Exchange proposed either repealing it or amending it to forbid courts from defying or distorting the intention of the Parliament which enacted the legislation. This could involve replacing the 'so far as possible' language in section 3 to instead read 'so far as is consistent with the intention of the enacting Parliament or relevant lawmaker'. With respect to section 4, Policy Exchange recommended amending the language of the declaration of incompatibility such that it would be made clearer that it stated the court's opinion on a statute's rights-incompatibility, rather than constituting a final settlement on the matter.

IHRAR's final report was published in December 2021.[41]

The panel did recommend some reforms, but they are best characterised as tinkering with the operation of the HRA on the margins, with the bottom-line conclusion being that the HRA regime is working well. It is difficult to see how any of them would have any significant impact on the practical and conceptual problems to which the Act gives rise in practice.

For instance, the report recommended a limited amendment of section 2 of the HRA. The idea was to provide that, when interpreting the Convention, UK legislation and common law (UK law) was to be considered prior to taking into account Convention rights and the Strasbourg jurisprudence that helps define them. Whether this idea was suitable for inclusion in section 2 is perhaps open to question. The idea was to emphasise the significance of UK law in the protection of human rights, while leaving untouched the relevance of the Strasbourg cases. To that extent it was largely cosmetic.

The proposal makes little sense. It would involve a completely unjustified burden on litigants and the public purse to require argument on points which, if they did not lead to the same conclusion as the application of Convention rights, would be discarded as irrelevant. It was incoherent

40. Richard Ekins and John Larkin QC, *Human Rights Law Reform* (Policy Exchange, 11 December 2021), https://policyexchange.org.uk/publication/human-rights-law-reform/.

41. https://assets.publishing.service.gov.uk/media/61b8531c8fa8f5037778c3ae/ihrar-final-report.pdf.

in so far as it related to legislation that might fall to be construed in accordance with section 3 of the HRA, because the actual meaning of any enactment, as construed in accordance with that section, would need to be determined first, in advance, supposedly, of the application of Convention rights. It would have created an undesirable incentive on courts to construe common law rules to coincide with the jurisprudence of the Strasbourg Court to avoid adding complexity and doubt to the outcome of the decision-making process. It would thus make the actual mischief of the ECHR in domestic law potentially much worse.

The report took the view, with one dissenting voice (one of us, in fact), that the judiciary shares responsibility, with Parliament and Government, for making decisions on behalf of the UK within the margin of appreciation. This was later rejected by the Supreme Court, which made clear in *R (Elan-Cane) v Secretary of State for the Home Department* that such decisions are for Parliament and Government alone.[42]

The report also recommended a reform to section 3 of the HRA, requiring courts first to apply the ordinary principles of interpretation prior to applying section 3. (This mirrored the proposed amendment to section 2.) Such a sequential approach, however, would make little difference to address the relevant issues. The problem is *not* that the courts prematurely invoke section 3 to arrive at an unprincipled interpretation of a statute when it could have arrived at the same mistaken conclusion using the ordinary principles of statutory interpretation. Rather, the problem is the risk that courts will invoke section 3 to arrive at interpretations that they could never have achieved through a careful interpretation of the statute that stayed loyal to Parliament's actual intentions. The suggested sequential approach may actually be actively harmful to the extent that it mistakenly suggests that, if the ordinary principles of interpretation do not suffice at the first stage, they lose all relevance at the second stage in which section 3 is applied. It is open to similar objections to the section 2 proposal and seems to have been proposed largely in order to enable data to be collected on whether section 3 was being misused, something that it was unlikely to achieve in practice and, in any event, is not an appropriate or legitimate use of legislative change to the rules of statutory interpretation .

Apart from this, the panel accepted that there was a clear case for change with respect to the HRA's extraterritorial application. But given its terms of reference, which excluded any consideration of the ECHR itself and its premise that the ECHR jurisprudence should continue to be taken into account as before in domestic law, there were no reforms the IHRAR felt it could suggest.

Finally, the report recommended an amendment to section 10 of the HRA to clarify that remedial orders cannot apply to the HRA itself. It also suggested greater parliamentary scrutiny of remedial orders.

The IHRAR exercise was a missed opportunity, consuming valuable time and effectively resourcing opponents of human rights law reform to make their case, while also providing them with a stick with which to beat

42. [2021] UKSC 56.

the government when it eventually came to propose legislative reforms.

One cannot avoid taking responsibility for choice; the whole stratagem of setting up a review that would consider the matter and make proposals was an exercise in dodging responsibility. In addition, IHRAR had been handicapped by its terms of reference and its composition to address what is essentially a political problem as if it were a legal one – as it happens the very same underlying mischief created by the HRA itself in the contexts where it applies. It is not in the least surprising that the outcome was a damp squib at best and positively harmful at worst. Ironically it was published only days before the UKSC rendered an important part of its analysis moot (in *Elan-Cane*, on which see below). The IHRAR report was quickly shelved and ignored by the government, which then launched a consultation on its own proposals for a British Bill of Rights.

2021 Overseas Operations Act

After prisoner voting and the deportation of terror suspects, lawfare against UK forces was the third main ground on which Conservative governments decried the excesses of human rights law. The lawfare in question involved the extra-territorial application of human rights law to Iraq and Afghanistan and its retrospective application to the Northern Ireland Troubles. Policy Exchange first put this problem on the national agenda in *The Fog of Law* (2013),[43] returning to it in detail in two further major reports, *Clearing the Fog of Law* (2015)[44] and *Protecting Those Who Serve* (2019),[45] as well as in many short articles and in evidence to the Defence Committee. Despite much parliamentary and public disquiet, legal reform was slow in coming and weak when it arrived.

The Overseas Operations (Service Personnel and Veterans) Act 2021 aimed to address the plight of UK forces serving abroad, introducing a new presumption against prosecuting service personnel more than five years after the events in question. The Act also introduced a new section 7A into the HRA, which frames how judges are to exercise their discretion under section 7 to allow applications out of time when the UK armed forces are involved. The Government did not adopt Policy Exchange's recommendations to legislate to limit the extraterritorial reach of the HRA or to require Ministers to derogate from the ECHR, by way of exercise of Article 15 of the ECHR, in advance of future military action abroad, or to have to explain to Parliament their failure to derogate.

2021 Supreme Court judgments

Perhaps the most significant recent "reforms" to the HRA were realised not by Parliament on the initiative of the Conservative Government, but rather by the Supreme Court in a series of judgments in late 2021. These judgments addressed some key problems in this field, but by no means all.

While the outcome of the decisions is welcome, reliance on appellate adjudication to reform the statutory framework of human rights law is unfortunate. There are sharp limits, not least those based on the rule of law, as to how far courts can go in bringing about legal change. This means

43. https://policyexchange.org.uk/publication/the-fog-of-law-an-introduction-to-the-legal-erosion-of-british-fighting-power/.
44. https://policyexchange.org.uk/publication/clearing-the-fog-of-law-saving-our-armed-forces-from-defeat-by-judicial-diktat/.
45. https://policyexchange.org.uk/publication/protecting-those-who-serve/.

of legal change also risks encouraging the fallacy that the reform of human rights law is more naturally realised by the development of supposedly immutable concepts through the application of legal analysis, than by legislative change that is policy-driven and democratically legitimate.

Insofar as reform effected in the courts is truly significant, it can only give rise to an inference that the reformed law itself will be no less vulnerable to further significant judicial reform than the law it supersedes; and that, in turn, puts the judiciary's reputation for political impartiality at risk (whether the reform produces new extensions to the reach of human rights law or new limitations on it). It also unhelpfully encourages the airing of arguments for legal reform in litigation: with the questions of what the law should be and of how it should be applied becoming hopelessly intermingled.

In *R (SC) v Secretary of State for Work and Pensions*,[46] the Supreme Court considered whether a cap on child tax credit to two children amounts to violation of the right against discrimination under Article 14, read in light of the right to privacy and family life under Article 8. The court clarified that a low intensity of review is generally appropriate in the context of welfare benefits.[47] Only democratically elected institutions can decide how to strike the balance between the interests of children to financial support and the interest of a community in placing responsibility for the care of children to their parents.[48]

In *R (AB) v Secretary of State for Justice*,[49] the Supreme Court considered the test for when the solitary confinement of a minor violates the article 3 right against inhuman and degrading treatment under the Convention. The Court held that "it is not the function of our domestic courts to establish new principles of Convention law" beyond those already to be found in Strasbourg jurisprudence.[50]

In *R (Elan-Cane) v Secretary of State for the Home Department*,[51] the Supreme Court considered a policy requiring passports to declare a gender as either male or female. The question of whether the ECHR required a state to issue a non-binary passport was a matter which the Strasbourg Court would view as falling within the margin of appreciation. That is, the Strasbourg Court would conclude that the UK had not violated Convention rights in refusing to issue a non-binary passport. While the UK was free to go beyond Strasbourg, so to speak, and to choose to issue a non-binary passport, the HRA could not be interpreted to require this course of action. Deciding whether to go beyond Strasbourg fell to Parliament and Government.

In *Re McQuillan*,[52] the Supreme Court addressed the question whether and to what extent the HRA applies retrospectively to events (including deaths) that took place before it came into force. This has been particularly important in the context of legacy cases arising out of the Northern Ireland Troubles. After some initial confusion, by 2004 UK courts had concluded that the Act was not intended to apply retrospectively. Alas, this position was abandoned by a Supreme Court majority in 2011, which understood a deeply confused Strasbourg judgment to require it to extend the Act's application back in time. In *McQuillan*, the Supreme Court, to its credit,

46. [2021] UKSC 26.
47. Ibid, para 151.
48. Ibid, 208.
49. [2021] UKSC 28.
50. Ibid, para 59.
51. [2021] UKSC 56.
52. [2021] UKSC 55.

attempted to fix the problem, sharply limiting the extent to which the Act has retrospective effect. The judgment, though, left the law still in a confused state: insofar as it did not quite go so far as upholding in its entirety Parliament's legislative decision in 1998 that the HRA should not have retrospective effect.

The significance of these judgments is that they partly reversed the effect of previous decisions made by the courts themselves in relation to the HRA as enacted, changes which Policy Exchange had firmly criticised over many years. Parliament should have amended the legislation in this way long before the late 2021 course correction, rather than leaving reform to the vagaries of litigation. The changes the Supreme Court has made are welcome but incomplete. They constitute meaningful, but (for the reasons given above), problematic and only partial reform. The confusion that remains and the confusion that has prevailed throughout the process of change is symptomatic of leaving it to the judiciary to crystallise the precise meaning of broad general principles.

Failing to legislate: the *Ziegler* debacle 2021-present

The failure of successive governments to legislate effectively in response to the problems of human rights law is made vivid by the response to the Supreme Court's judgment in *DPP v Ziegler*.[53] The judgment concerned the offence of obstructing the highway and introduced significant uncertainty into the law of public order and the practice of policing protests. Policy Exchange has written extensively about the judgment elsewhere, noting the shortcomings in the reasoning of the majority judgment, the difficulties to which it has given rise in practice, and how it should have been understood by police and subsequent courts – in ways that would limit the damage it otherwise threatened to impose, and has in fact imposed.

Predictably, the approach taken in *Ziegler* (requiring the prosecution to establish that a conviction was not a disproportionate interference in the defendant's Convention rights, which turned on whether the "protest" caused "serious disruption") was extended to other criminal offences, including, for a time at least, criminal damage. In subsequent litigation, the courts have somewhat limited its reach, but not with total clarity, and the central holding of *Ziegler* has not yet been squarely reversed by the Supreme Court in relation to obstruction of the highway.

The Police, Crime, Sentencing and Courts Act 2022 was enacted in the wake of *Ziegler*. While it introduced a number of new public order offences, each of them included a "lawful excuse" or "reasonable excuse" defence, which made importation of the *Ziegler* approach inevitable and thus made the relevant offences close to unworkable in practice. The 2022 Act did also empower the Home Secretary to amend the Public Order Act 1986 to clarify the meaning of the term "serious disruption to the life of the community", which was not otherwise defined. This Henry VIII clause provided that the Home Secretary could define any

53. [2021] UKSC 23.

aspect of the term or give examples of what is or is not serious disruption.

The Government's second major attempt to legislate, the Public Order Act 2023, again failed entirely to address the *Ziegler* case – instead taking for granted its continuing application. Late in the parliamentary day, the Government did adopt Lord Hope and Lord Faulks KC's amendments to the Bill, as it then was, which said that a person causes "serious disruption" if he hinders to more than a minor degree the activities of others. But the House of Lords rejected the amendments. (We argued for Policy Exchange that while the amendments would improve the Bill, Parliament should go much further and specify that a person had no lawful defence for obstructing the highway if that person intended to intimidate, provoke, inconvenience, or otherwise harm members of the public.[54] We added that the legislation should provide that, for the purposes of the HRA, this legislation was to be treated as necessary in a democratic society for the protection of the rights of others (viz effectively presuming it to be compatible with Convention rights.)

Before the Bill received Royal Assent, the Government tabled draft regulations which said that "serious disruption" meant disruption that was "more than minor". The pressure group Liberty challenged the regulations and in May 2024 the Divisional Court ruled that they were indeed *ultra vires*. We agreed with this analysis, as one of us said at the time. By the time that the Divisional Court judgment was handed down, the Government had tabled an amendment to its own Criminal Justice Bill, which was then set to be debated in the House of Commons in early June 2024. The amendment was, one of us said publicly,[55] a half-hearted response to the *Ziegler* judgment, making clear that a person has no defence if his actions cause "serious disruption", which is defined to mean that it hinders "to more than a minor degree" the activities of others.

The dissolution of Parliament before the 2024 General Election meant that the Criminal Justice Bill was not in the end enacted. But it is striking that the Government had still failed, even on its third attempt, to grasp the problem and to address it. We had made our arguments for more effective legislation available to ministers and officials, who chose not to take them up, preferring instead to attempt half-measures, apparently on the grounds that the legislation we proposed might be challenged before the Strasbourg Court. Our response to this fear is twofold. First, the *Ziegler* decision was arguably not required by the jurisprudence of the Strasbourg Court but goes well beyond it. So, there is a strong risk that the Government was prematurely limiting the policy options that it took to be permissible as a matter of European human rights law. Second, the Government's responsibility was to advance legislation that promised to be effective in addressing the crisis of public order and was fair to the police asked to apply it on the streets, as well as those subject to it or affected by its contravention. The Government should have been ready

54. Richard Ekins and Sir Stephen Laws, *Amending the Public Order Bill* (Policy Exchange, January 2023), https://policyexchange.org.uk/publication/amending-the-public-order-bill/.

55. Richard Ekins, "The Government's court defeat on public order regulations was of its own making", *Conservative Home*, 22 May, 2024 https://conservativehome.com/2024/05/22/richard-ekins-the-governments-court-defeat-on-public-order-regulations-was-of-its-own-making/.

to invite Parliament to enact such legislation and to defend the legislation robustly before the Strasbourg Court – and to stand its ground if need be in the face of an adverse judgment.

The public order legislation enacted in the wake of the *Ziegler* judgment has been attacked as heavy-handed and authoritarian, which is obviously absurd in relation to the offence of obstructing the highway (and by extension to many other public order offences, including those introduced in the 2022 and 2023 legislation). The truth is that the Government repeatedly failed to muster up the will to promote effective legislation, that squarely addressed the problems created by the *Ziegler* judgment and its reading of Convention rights and it failed to persuade Parliament to support such legislation. We note that the current government did not abandon the appeal against the Divisional Court's judgment and predictably the Court of Appeal upheld Liberty's challenge to the regulations. The Government should have abandoned this appeal, at least on the question of *vires*. (There was an important point of principle in relation to duties of consultation, which was rightly overturned on appeal). It should, instead, have legislated to support public order and facilitate in practice the effective policing of protest. There is no sign as yet that the Government will respond to its defeat in the Court of Appeal in this way.

2022 Bill of Rights Bill

In December 2021, the new Lord Chancellor, Dominic Raab, published and dismissed the IHRAR report, outlining instead the Government's plans to replace the HRA with a Bill of Rights.

He was right to dismiss the IHRAR report, which should never have been commissioned, and the majority on which, applying legal methodology to a policy problem, had failed to come up with any practical proposals to address the problems the Government had set it up to try to solve. Instead, it had preferred to accept, as if it were "evidence" of fact, the consensus of opinion of the representations it received in favour of the status quo, overwhelmingly from legal and academic institutions.

After a brief consultation on the plan for a modern Bill of Rights, the Lord Chancellor introduced the Bill of Rights Bill to Parliament on 22 June 2022. But Liz Truss, soon after she became Prime Minister, halted the Bill prior to its second reading on 7 September 2022.

The Bill was a mixed bag. It did address some real problems with the Human Rights Act. For example, the Bill prohibited the interpretation of Convention rights in a manner that would impose positive obligations on public authorities. It required the court to give the 'greatest possible weight' to the value of limiting the risk to the public from persons who had previously committed offences. More generally it required courts to give the greatest possible weight to the balance struck by Parliament between different policy aims, different Convention rights, and between the Convention rights of different persons. It required courts to refrain

from stopping a deportation on ECHR grounds absent 'extreme' harm and it made clear that the Bill was not to have extraterritorial effect. The Bill was, thus far, to be welcomed.

However, the Bill also risked introducing some other problems, notably imprecision in relation to the rights that Parliament intended to be protected and the extent to which it would leave the reach of those rights to be decided by judges in the domestic courts. The Bill also risked establishing a cross-party consensus in favour of domestic litigation by reference to the very broadly expressed human rights concepts set out in the Convention rights and for the judicial review of primary legislation on those grounds – thus undercutting the Government's own reservations about those processes.

The better course of action had always been for the Government to aim to restore the traditional British model of rights protection by either repealing the HRA altogether, without replacing it but doing whatever else was needed to secure a new settlement based on the pre-1998 situation, or by sharply amending the 1998 Act more clearly to set out the respects in which Parliament could properly disregard the Convention when legislating, with a view to its eventual repeal and withdrawal from the ECHR if the new settlement proved unworkable, for example, as a result of the response to it by the Strasbourg Court.

In a paper published immediately after the Bill was shelved, *The Limits of Judicial Power*, Policy Exchange noted two main questions with respect to how the UK is to protect human rights going forward.[56] The first was the status of the UK's continued membership of the ECHR. The second was the approach that the UK should take in terms of protecting human rights as a matter of domestic law.

The report argued that the UK should stand ready to leave the ECHR as a matter of international law, but whether and when to do so is a matter of political judgment. The way forward was to set out the principled case for withdrawal, but then to gather support, and first to seek to reform the present state-of-affairs from within the Council of Europe.

As for the domestic legal framework, there should be a recommitment to the traditional British model of rights protection. The HRA should be repealed and should not be replaced by a Bill of Rights. In the alternative, if repeal of the HRA was not politically feasible, it should at minimum be amended

(a) to prevent courts from misinterpreting the intentions of Parliament,
(b) to require respect for Parliament's decisions regarding the limits or specification of rights,
(c) to remove the requirement for ministers effectively to certify legislation as being rights-compatible, and
(d) to remove the power to make Remedial Orders (both following a section 4 declaration and in response to a defeat in the Strasbourg Court) amending legislation to secure compatibility

56. Richard Ekins, *The Limits of Judicial Power: A programme of constitutional reform* (Policy Exchange, October 2022) https://policyexchange.org.uk/publication/the-limits-of-judicial-power/.

with Convention rights in a way that circumvents the need for the parliamentary scrutiny of primary legislation.

2023 Ad hoc legislative disapplication of the HRA's operative provisions

In our *Limits of Judicial Power* paper, Policy Exchange also recommended that until such time as Parliament repealed the HRA, it should be willing to legislate to make specific provision for its decisions to stand notwithstanding human rights litigation, viz. it should disapply the operative provisions of the Act when it thought legislation was needed despite any potential incompatibility with Convention rights.[57] We first called for this course of action in relation to the Channel crisis in our *Plan B* paper (February 2022) and again in *How to legislate about small boats* (January 2023). This technique, which would appear to be a potentially successful mechanism to deploy as at least a partial means of human rights law reform, has informed some recent legislation.

The Illegal Migration Act 2023 received Royal Assent on 20 July 2023. The Act, which imposed a legal duty on the Home Secretary to remove from the UK persons who travelled to the UK from a safe country, expressly disapplied section 3 of the HRA with respect of any of its provisions or those made under it.[58] It further provided that, when a judge of the Strasbourg Court indicated an interim measure with respect to a person intended to be removed under the Act, a Minister might choose to lift the duty to remove; but absent such a decision, the duty to remove would continue to apply and removal would go ahead notwithstanding the fact of the interim measure.[59] Importantly, though, the legislation did not disapply section 4 of the HRA, thus leaving litigation seeking a declaration that the legislation was incompatible with Convention rights still a possibility – a declaration that would in practice have created considerable political pressure on the Government to amend the legislation by way of a section 10 Remedial Order.

The Government did not bring the provisions of the Illegal Migration Act 2023 into effect prior to the 2024 General Election. On 30 January 2025, Yvette Cooper, the new Home Secretary, introduced the Border Security, Asylum and Immigration Bill to the House of Commons.[60] This will repeal the key provisions of the Illegal Migration Act 2023, including the duty to remove and the disapplication of the HRA.

The same technique of legislative disapplication of the HRA also appeared in section 3 of the Safety of Rwanda (Asylum and Immigration) Act 2024, which goes further than the Illegal Migration Act 2023and disapplies sections 2-3 and 6-9 of the HRA.

Inexplicably, the Safety of Rwanda Act 2024 failed to disapply section 4, thus practically inviting litigation seeking a declaration of incompatibility. The point was never tested because again the Government did not attempt to rely on the Act before it lost office, at which point it was of course

57. Ibid, p.15.
58. Section 1(5) Illegal Migration Act 2023
59. Section 55 Illegal Migration Act 2023
60. At the time of writing it has reached Committee stage in the House of Lords.

replaced by a new government that firmly opposed the Rwanda policy. (Section 5 of the Safety of Rwanda Act also provided that it was for the Minister, and not a tribunal, to decide whether the UK would comply with an interim measure.[61]

Disapplying the operative provisions of the HRA on an ad hoc basis was and is a reasonable technique, but it is striking that the Government never brought the relevant provisions (including the duty to remove) into force. It seemed unwilling to implement the legislative framework that it had secured. Relatedly, it is telling that the Government did not disapply section 4 of the HRA, thus leaving the legislation exposed to judicial challenge.

Parliament was right to legislate to address the prospect of interim measures, but the technique that it adopted seemed carefully framed to skirt around the division within government, including between the Law Officers and other Ministers, about whether the UK had an obligation in international law to comply with interim measures. The Conservative Government failed to insist on what should have been clear, viz. that the Strasbourg Court had no power to grant binding interim relief, and that its assertion of a purported power to do so was an act of usurpation.

2023 The Northern Ireland Troubles (Legacy and Reconciliation) Act

The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 aimed, amongst other things, to address the plight of UK forces who served in Northern Ireland during the Troubles. The Act did not build on the Supreme Court's judgment in *McQuillan* to limit the retrospective scope of the HRA, but it did provide for immunity from prosecution in certain cases and did impose a limit on further civil cases.

Importantly, the Act failed to anticipate and address with an ad hoc exclusion of the HRA the obvious risk of human rights law challenge, which duly culminated in February 2024 in the Northern Ireland High Court's findings in relation to various provisions of the Act.[62] The Court found elements of the legislation incompatible with the Windsor Framework and, relying on the European Union (Withdrawal) Act 2018, disapplied them to that extent. The Court also found other elements of the legislation, including the provisions concerning immunity from prosecution and limiting civil cases, incompatible with Convention rights and made declarations of incompatibility to that effect. The fact that a challenge would be attempted was obvious but the analysis that supports the court's decisions was seriously open to question.

The then Conservative government appealed; but in the wake of the July 2024 General Election the new Labour government abandoned the appeal, instead committing itself to the exercise of its powers under section 10 of the HRA to repeal the relevant provisions of the Act. While a new Parliament could always have repealed the 2023 Act, the proposal to use a statutory instrument would streamline the repeals, minimising the

61. See also sections 69-71 of the Victims and Prisoners Act 2024, which disapply section 3 of the HRA in relation to three other enactments.

62. *Dillon v Secretary of State for Northern Ireland* [2024] NIKB 11.

political cost to the new government. The previous government should have anticipated the risk that the HRA posed to its policy and addressed it directly – limiting the retrospective reach of the HRA and disapplying its operative provisions in relation to the 2023 Act. This would clearly and properly have reserved to Parliament the responsibility for deciding whether, when and how the law should change.

2024 Rule 39 reform

The purported power of the Strasbourg Court to grant binding interim relief came to public attention on 14 June 2022, when an unnamed judge of the Strasbourg Court, in an unreasoned press release, indicated interim measures against the UK's removal of asylum-seekers to Rwanda. This intervention came on the same day as the Supreme Court had refused permission to appeal, having decided, in reasoned agreement with the Court of Appeal, that interim relief under domestic law was unwarranted.

Policy Exchange published a critique of the Strasbourg Court's assertion that it (still less, a single anonymous judge of the Court) enjoyed the power to grant binding interim relief or to do so without hearing argument or giving reasons.[63] The political controversy that arose after June 2022, which informed the enactment of section 55 of the Illegal Migration Act 2023, called into question the legitimacy of the Court's practice of issuing unreasoned, anonymous, *ex-parte* decisions.

In early February 2024, the European Court of Human Rights revised its Rules of Court to make minor changes to Rule 39, which governs interim measures – in the absence of any treaty provision. The rule now states that interim measures are only applicable when there is an imminent risk of irreparable harm to a Convention right. It lists the judges with the power to issue such measures, which includes duty judges appointed among the Vice-Presidents of each Section, the Presidents of each section, the President of the Grand Chamber, the Grand Chamber, or the President of the Court. It also issued a Practice Direction on 28 March 2024 suggesting the name of the judge will now be included in the decision.

The effect of these changes is that, as a procedural matter, there is marginally more transparency in the authorship of these measures. They do not, however, address the more fundamental problems with the Court's invention of a purported power to bind states on an interim basis: a power which it lacks any jurisdiction to wield and is without any proper justification in the terms of the Convention. The change in practice has been minimal and trivial. Yet it was hailed by many as a victory, showing that the Strasbourg Court responds to reasoned engagement and has reformed its practice in light of reasoned criticism. This is an unsustainable assessment, which suggests either a failure to grasp the conceptual problem or a determination to ignore it.

63. Richard Ekins, *Rule 39 and the Rule of Law* (Policy Exchange, June 2023), https://policyexchange.org.uk/publication/rule-39-and-the-rule-of-law/.

Part B – The Shape of Things to Come

In fourteen years in office, the Conservative Party failed to reform human rights law, never managing to adopt or carry out a coherent plan of action grounded on sound constitutional principles. Its attempts at reform failed satisfactorily to engage with the central critique that should be made of European human rights law, or to advance it with clarity and resolution.

The critique that should be made is that European human rights law does not, in practice, involve affirming settled legal rights that track sound moral principles. It involves, instead, the judicial elaboration of open-ended propositions – some of which may be so vague as to be almost meaningless – or, worse, involves the arbitrary invention by an unaccountable elite of damaging new constraints on political decision-making. European human rights law has a rule of law problem in terms of its dynamism and more general unpredictability, as well as a democratic legitimacy problem. The HRA and the ECHR, taken together, upend the traditional balance of the Westminster constitution, compromising both effective government and parliamentary democracy, as well as creating unacceptable risks for the reputation of the judiciary for political impartiality.

Conservative ministers were unable to agree amongst themselves about the nature of the problem and unwilling firmly to confront the tension between the requirements of practical politics in accordance with democratic principles and the judicial application of Convention rights: specifically, their application in the context of the Strasbourg Court's expansionist abuse of its jurisdiction. For that reason, they were never well-placed to champion a coherent programme of human rights law reform. It is no surprise that they failed to make any worthwhile major changes, and that the various minor, ad hoc changes that did occur (viz. in relation to prisoner voting, lawfare, and immigration) were half measures and half-heartedly implemented at best.

So, the case for significant reform remains unaddressed and, maybe as a result, becomes ever more compelling. The case continues to attract significant support on all political sides, even since a change of political control in Westminster. Throughout more than a quarter of a century, since the incorporation of the ECHR into UK domestic law, the Convention (as IHRAR's call for "education" implicitly accepted) has never commanded a level of popular support and acceptance sufficient for it to become an uncontroversial, and therefore valuable, aspect of the UK's political and constitutional settlement.

Unhappiness about European human rights law may seem largely focused on immigration, asylum and deportation; but the reason for this is that those topics are, at present, the most politically salient examples of where the law and practical politics collide and diverge. There can be little doubt that, if other topics developed greater political salience (say, climate change or welfare reform), judicial intervention in practical policymaking and administrative decision-making on those topics would attract similar unhappiness (as was seen, in the not so recent past, in relation to lawfare against UK forces). The one virtue required of constitutional mechanisms for deciding what should be done is that they should be uncontroversial enough that the outcomes of their operation on the most salient issues of the day should command general, popular acceptance.

In this section of the paper, we discuss what it is that would-be reformers should consider if a reform of human rights law is to succeed. Our purpose is to map an intellectual agenda for public and parliamentary deliberation, making clear what questions should be asked and answered. In our view, no programme of reform is likely to succeed – or to be worth supporting – unless it is grounded on close engagement with the issues we discuss.

Applying the lessons of the recent past

One important lesson from past attempts at reform is that questions about how to address the existing structures of human rights law need to be regarded as only subsidiary issues. In the history of attempts at reform, they have, however, often been treated as the only questions.

The fundamental question is not whether engagement or withdrawal, or amendment or repeal, is a solution to the problem. The principal questions that need to be answered are all about what role (if any) human rights should play in UK political processes and in UK domestic law, respectively. Questions about engagement with the Council of Europe or withdrawal from the ECHR, or about repealing, amending or replacing the HRA, are only questions about what is necessary to secure the implementation of what should be a clear and settled conception of the role that "human rights" should have in UK politics and domestic law.

One might think that a clear and settled conception of this role led to the proposals for "a British Bill of Rights". In practice, however, the weakness of those proposals has been uncertainty about whether they are really intended to produce different outcomes from those produced by the ECHR and HRA – and if so, how. The public deliberation that has unfolded has thus wrongly concentrated on tweaking the mechanism without sufficient regard to the practical benefits to be secured by so doing. The current controversy about immigration, asylum and deportation issues is instructive in this regard, providing a clear example of how any new system must be able to ensure different outcomes in cases where the demands of practical, democratic politics and legal reasoning currently diverge.

As with all lawmaking, the policy for how things need to work when

the reform is complete should be conceived before decisions are made about how to implement that policy. Nothing will be achieved if the options for change are treated as constrained by the status quo. Nor will anything be achieved if proposals for reform are confined to proposals for abolishing elements of the status quo, or modifying them, without any clarity, if necessary in new legislation, about what different outcomes from the changes are expected and intended.

Another mistake demonstrated by the recent history is to assume that the reform that is needed can somehow be extracted from within the existing structures that have triggered the need for reform. Those who are now advocates of limited reform need to reflect on why all the previous reform attempts, which have largely been limited to identifying and addressing unsatisfactory aspects of the current system while at the same time taking for granted its continuance in force, have failed.

It seems that the answer may be that the current system is inherently resistant to change by being structured to suggest, without expressly asserting, that its principles are entrenched, a priori, in moral and ethical superiority to the politics which actually gave them life. It is a cliché of legislative policy-making (but one that tends to be uncomfortable for the lawyerly mind, which is trained to treat the law as a fixed point) that unsatisfactory outcomes are guaranteed where elements of the legal analysis are treated as fixed points when they could in fact be abandoned or moved.

So, while we have been critical of the record of successive governments in their attempts at reform, it is true and important that there is, and can be, no Platonic ideal for a reform programme, or for what should emerge from it – any more than there can be for constitutional human rights protection more generally. The assertion that the status quo – human rights law as it now stands – has achieved an unimprovable perfection is often heard, but manifestly false.

Rather, quite how to proceed is a question of fine judgement, which must turn on political contingency and prudence. Any renewed imagining of our political and legal institutions needs to command a consensus of popular support – in a way the current dispensation does not – and may require the exercise of political leadership to promote it. Constantly asserting, with or without prior educative efforts, that the status quo must be accepted on the basis that it is the product of received truth is neither convincing nor effective. And that is why there needs to be clarity about the intended outcome of any reform in positive rather than negative terms.

As demonstrated earlier in this paper, much of the approach during the past quarter of a century to questions about the reform of human rights law has adopted a negative approach and been devoted to a search for defects in a status quo that consists of the Strasbourg Court's jurisprudence and the system for its incorporation into domestic law. This has then involved arguing about what is or is not a defect and (if it is) how serious it is and then considering whether the existing system allows for the removal or mitigation of any defect that is identified.

This latter process has then been conducted with a massive bias in favour of the status quo, assuming that what is at stake is a choice between the supposedly known and settled and the potential unknowability of change: with the status quo therefore requiring no substantive vindication. But in a contest between change and a status quo that is built on inherently imprecise and unknowable concepts, the status quo should have no priority over the uncertainties of change. It needs to be justified in its own right – to be shown to be preferable to what is proposed should replace it, and indeed, so far as it can be reproduced in future, to what went before.

Much of the consideration of whether the status quo is satisfactory has also, in past attempts at reform, been devoted to asking whether the law on which it is based (the HRA) has achieved its original objectives, rather than, more appropriately, questioning whether there are any problematic aspects of those objectives and whether the attempt to achieve them, in so far as they would be beneficial, has in fact had adverse effects that outweigh any benefits that may have been secured.

In this process and more generally, energy devoted to identifying defects in the status quo, and in identifying the benefits it confers, has also often been confined to assessing the outcomes of individual cases in the courts, at the expense of any proper assessment of the impact of the existing law at the systemic level on the processes of policy formulation and implementation, or on levels of trust in democratic politics and the reputation of the judiciary for impartiality, respectively. The former assessment, of course, is much easier than the latter, but that does not make it more important or more worthy of being treated as a relevant. The contrary is actually the case.

Any failures of the current law to achieve its original objectives (whether in individual cases or at the systemic level) as well as any adverse effects of the existing law (whether foreseen or intended or not, and whether specific or systemic) are clearly all relevant as indicators of things to avoid in determining the objectives of any reform, as well as in designing the mechanisms for implementing them; but they can only be part of that analysis. A clear vision of what would be better and of what objectives should supersede the objectives of the existing law, and of the trade-offs that it involves, is also required.

Human rights and human rights law

Any programme of human rights law reform should begin by recognising the truth that there are some things that no human being should ever do to another, absolute prohibitions which correspond to absolute rights – not to be murdered, raped, tortured or enslaved.[64] Likewise, it should be recognised that there are some established human interests that warrant protection and security, and certain arrangements helping to secure those interests that ought to be upheld and maintained. The freedom to raise a family, to work and trade, to think and speak, to practice one's religion, to travel, and to have a share in government, all these and more should be protected by law. Part of the challenge of government is to work out

64. The next few paragraphs draw on Richard Ekins, *Human Rights and the Rule of Law* (Policy Exchange, 2024), https://policyexchange.org.uk/publication/human-rights-and-the-rule-of-law/.

exactly how and in what terms and detail these freedoms should be defined and protected in the light of the potentially competing interests of others, both as individuals and collectively.

Focusing on individual rights may give rise to a neglect of common duties and to an excessive veneration of autonomy, heedless of the impact of our actions on others. But these pathologies are not inevitable. The idea of human rights warrants a central place in political thought and action insofar as it picks out a fundamental truth about the limits and objects of reasonable human action. The point of government is to protect and promote the common good, which includes – but is not confined to – upholding individual rights, giving to each person what he or she is entitled to expect as a matter of fairness and humanity.

None of this is to say that identifying human rights, or working out what they require in this or that particular context, will be straightforward or uncontroversial. On the contrary, argument about how human rights are properly to be understood and how they should be specified or qualified is a routine feature of any reasonable politics. This is not a type of argument that the law can somehow bypass or overcome, although acts of lawmaking are needed to settle what is to be done, here and now, on particular questions. The law answers to morality and whatever laws we make, even laws that proclaim themselves to be human rights laws, may fail to reflect what morality truly requires.

So, it seems to us important firmly to reject the common but mistaken conflation of "human rights" with "human rights law", and particularly the misconceived notion that the former must be defined and delimited by the latter. The question is not *whether* our political processes and law should protect human rights; that question answers itself. The questions are all about what should count as a human right, about the stages in the process at which its detailed parameters as a "right" should be crystallised, about the form in which the protection should be provided, and about who should be accountable for the effectiveness of that protection, or for any adverse effects of its provision, and how.

Would-be reformers should not be sceptical about human rights and should not encourage public cynicism about them. They should readily agree, and indeed insist, that human rights are, and long have been, central objects of concern, and constituent elements, in our tradition of government and our public discourse. But they should certainly be sceptical about unthinking, dogmatic appeals to human rights, which assume that European human rights law is synonymous with human rights properly understood. They should point out that such appeals may often be intended to shortcut democratic political processes, or will have the effect of shutting them down, and in that way may transfer political responsibility from Parliament and the people to the less accountable decision-making of the courts. Likewise, they should not be slow to point out that such thoughtless rhetoric, which routinely conflates human rights with whatever a court has articulated in its most recent case, results in irresponsible government. It does not, indeed cannot, observe the

discipline of the rule of law, for daily life and everyday government to be subject to unpredictable, unstable and often incoherent rules. It requires constant care to distinguish and to contrast human rights *law* with human rights properly understood.

Protecting human rights in the UK constitutional tradition

In seeking to define the objectives of reform and the form of protection provided by any new dispensation, it is essential to have regard to our constitutional history and customs, and to the foundations on which our system of Parliamentary democracy is built. In the absence of any consensus for overthrowing that system, the role for human rights in our politics and law must be consistent with our traditions, and in that way ensure that the effects it produces command at least the same consensus of popular acceptance as is afforded to our established constitutional arrangements.

But another and equally important consideration is the need to produce a system for protecting human rights that is compatible with securing that democratically accountable decision-making in government (particularly about change) adopts what is also the most appropriate and efficient methodology. Trust in democratic institutions depends on their remaining effective at what they do, and on their being seen to be so.

Full consideration is needed, not only of the traditional constitutional demarcation in the UK constitution between what is best made the subject of political decision-making and what can be decided by the courts, but also of the intrinsic virtues, in relation to different sorts of decision-making, of the different methodologies adopted by the different institutions of the constitution. The question is not only how far the demarcations are endorsed by constitutional history but also how far they also represent a sensible, pragmatic and democratically legitimate approach to decision-making.

So, courts are better equipped to engage in fact-finding in individual circumstances, and in applying settled rules to specific circumstances. Politics, we suggest, is much better suited to questions about change or questions which involve striking a balance between different sections of society or different competing public policy objectives (rather than as between different individual litigants). Indeed, politics is generally better for any question that requires a stochastic analysis or risk assessment, or which requires the exercise of political leadership for it to command a consensus of acceptance.

This all seems to us to be a sound basis for a demarcation, in terms of both legitimacy and effectiveness, between politics and law that is not confined to the subject matter of the decision-making. Some subjects, it is clear, are inherently political: those involving the management of the nation's finances, for one. But the tests that need to be applied in making different decisions on other subjects are also highly relevant to the question of which institution should have the final say on those decisions.

It bears noting that European human rights law now routinely involves the application of tests that necessarily, or at the very least ideally, require a political approach to the decision-making to which they are applied.

These tests all require choices to be made between different options on the basis of an assessment of the relative importance or value of different elements of the decision and different judgements about the future. They are not findings about past facts, on which courts might be expected to have expertise. They are inherently political in nature in that their success will not depend on some objective and provable truth or on the authority with which they are imposed but, instead on the degree to which the value judgements and prediction they involve will be accepted as legitimate and fair.

"Proportionality", for example, requires the importance of a legislative objective to be weighed against the burden of the legislative consequences imposed to secure it. No court is equipped to assess the first, or indeed the second, element of that decision. Nor is any court properly equipped to decide how much trust should be conferred on a foreign state, particularly when that decision is bound to be influenced, as it usually will be, by consideration of what approach is most likely to further the development of a relationship of greater trust between that state and the UK. These are all political choices and judges who are forced to make them, or volunteer to do so, are bound, sooner or later, to have their political impartiality called into question.

The matter is complicated if it is mistakenly assumed (as, for example, the Supreme Court and many others did in relation to whether Rwanda was safe) that what is, on analysis, only a value judgment or risk assessment must be treated as a finding of incontrovertible fact, or if European human rights law imposes an obligation to make that mistake.

The UK constitutional tradition has been first and foremost that it is for Parliament to decide what the law should be, with courts enjoying no jurisdiction to supervise the merits of its legislative choices. This is encapsulated in the foundational principle of the UK constitution, Parliamentary Sovereignty and the usual assumption that every form of deliberate legal change should be subject to close pre-enactment scrutiny in Parliament.

Likewise, while the courts have long exercised a supervisory jurisdiction over public bodies other than Parliament, the courts have not had authority simply to prefer their own view of what should be done to the view taken by ministers who are accountable to Parliament.

In making the case for human rights law reform, it is important always to bear in mind the extent to which the incorporation of European human rights law into the UK constitution represented a sharp break from that our constitutional tradition, and to consider how far (and if so, on what grounds) that departure was desirable. Would-be reformers should reject out of hand assertions that the role now played by courts, domestic or European, in protecting human rights is somehow continuous with, or an organic development, of the traditional common law approach.

In a recently published paper, Policy Exchange has addressed the historical foundations of the ECHR,[65] refuting the common assertion that the Convention is a quintessentially conservative document, which should be attributed to the inspiration of Sir Winston Churchill in particular. On the contrary, as the paper shows, it was the Labour Government led by Clement Attlee that took the UK into the Convention, notwithstanding its own very serious concerns about what this might mean in the future. Churchill provided vague rhetorical support for what was to become the ECHR, but barely mentioned the Court itself, and when back in government showed no enthusiasm for it and declined to accept its jurisdiction over the UK. That had to wait until the Wilson Government in 1966. Neither the Attlee nor Churchill governments – nor it seems the subsequent pre-1966 Conservative governments – had been willing to accept a right of individual petition to the Court.

The "living instrument" and the dynamic status quo

So, cross-party scepticism about the ECHR was a feature of UK politics from the start, well before the extent of the dynamism in the Convention rights that emerged from the Strasbourg Court's adoption of the living instrument doctrine had had its damaging impact. That further factor is of immense importance in any consideration of what role (if any) human rights in the form represented by the rights in the ECHR should now play both in UK political processes and in UK domestic law.

There is a striking difference between the ECHR in 1950 and the ECHR in 2025, which every serious student of human rights law readily recognises and accepts – some, it must be said, more enthusiastically than others. Since the mid-1970s, the Strasbourg Court has been openly remaking the Convention, brazenly imposing new obligations on the member states that they never consciously agreed to undertake.

That development renders entirely beside the point whatever support British statesmen may have given to the foundation of the ECHR in the immediately post-war period. They would not recognise the ECHR as it has become as the treaty the terms of which they negotiated with care and with the objective in part of minimising the risks of judicial expansionism. True, their ambivalence about whether the UK should in the end sign the treaty, or subsequently accept the right of individual petition, did involve a conscious acceptance of some risk of expansive interpretation; but they certainly could not have foreseen, and did not foresee, the full extent of the Court's subsequent ambition or its later willingness openly to make new law in the course of adjudication. They would almost certainly not have signed up if they had.[66]

It is because of this development that, in deliberating about the proper future role for human rights in the UK's political and legal processes, parliamentarians and others need to get to grips with the status quo that is comprised in the detail of the Strasbourg Court's most recent case law and to consider the extent to which they can really continue to endorse it open-endedly. They need to reflect, in particular, on the extent to which

65. Conor Casey and Yuan Yi Zhu, *Revisiting the British Origins of the European Convention on Human Rights* (May 2025), https://policyexchange.org.uk/publication/revisiting-the-british-origins-of-the-european-convention-on-human-rights/.

66. The distinguished legal historian AWB Simpson – himself an admirer of how the Convention would eventually develop – sums it up well when he said that the: "sheer scale of the activities of the convention's institutions, and their intrusiveness into what were once viewed as purely domestic matters, was never dreamt back in 1950. Indeed, had the politicians then been able to foresee this intrusiveness then it is most improbable that the convention would ever had been ratified". See AWB Simpson, *Human Rights at the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2001) 4.

human rights law now intersects with a very wide range of policy questions and problems (which the traditional UK approach would treat as for the democratic and political institutions and processes of the constitution), a much wider range than was ever contemplated when the Convention was agreed.

They should also note the intellectual weakness of the jurisprudential foundations on which so much of this case law rests. The conversation about reform must be grounded firmly in a recognition and analysis of the law that the European Court of Human Rights has made and is in the process of making. It is impossible to assume any necessary correspondence between any particular Strasbourg Court judgment and either—

(a) human rights properly understood (whether that is an unequivocal protection that every human being should enjoy or a freedom, defined to protect society and its members from harm, which every individual should be able to exercise), or
(b) the terms agreed by the member states in 1950 and subsequent protocols.

On the contrary, any close study is likely to reveal the full extent of the departure from both of those, with what exactly human rights require itself often being a hotly contested political question that does not become less political if it is given to a court to decide it.

In addition to analysing the Strasbourg Court's existing case law, in cases involving not only the UK but also other member states, would-be reformers will also need to consider its likely future trajectory – as best as that is capable of being determined from the logic of the Court's doctrine, from the political consensus it purports to represent, and from extra-judicial commentary. In this analysis, the focus should not be confined to the Judges of the Court but should also take account of the permanent bureaucracy of the Court, which frames how adjudication is carried out and how the institution orders itself over time, and of the bureaucracy of the Council of Europe.

Much turns on the way in which those who comment on or participate in the proceedings of the Court, such as academic lawyers and practising lawyers, conceive of its mission and its opportunities for further lawmaking. It is impossible to assume that any of the Strasbourg Court's jurisprudence is stable or principled. How it may develop on particular points is not a function of disciplined legal technique or binding precedent. Instead, it turns on the intersection of dubious pseudo-legal techniques – such as proportionality, the living instrument, and the notion that Convention rights must be made "practical and effective" – and indeed on the changing politics of European human rights law. In those political processes, the Court's room for manoeuvre is calculated, sometimes with political acuity, but also often clumsily and insensitively, to minimise resistance to its choice of the direction of travel. That sort of politics is a very poor substitute for democratic accountability at the domestic level.

As mentioned above, the existence of a large element of dynamism in the status quo is another reason why, when it comes to assessing the risks of reform, the status quo has no advantage over the uncertainties of political change initiated at the domestic level. In the case of domestic law and practice, there is some hope of ensuring that future change is kept under control and subject to the practical restraint of democratic electoral politics. Domestic legal change is much less likely to outdistance the tolerance of popular acceptance and the culture of respect for the law which that engenders. Domestic legal change is also much more capable than the Strasbourg Court's case law of securing the stability and predictability that the ideal of the rule of law demands.

It may be helpful to note, in partial summary of much of the argument of this paper, that there are two main reasons to object to the developed human rights law regime – founded on the ECHR and the HRA – under which the UK has laboured for the past quarter century, the regime one may reasonably term the status quo, dynamic though it may be.

First, the changes that the HRA and the ECHR set in motion have worked systematic damage to our constitutional arrangements and the rule of law, with its insistence on legal predictability in particular, and they continue to do so. Repair is warranted to protect parliamentary democracy and to restore the rule of law and to prevent further damage.

Second, the practical effect of European human rights law is to make it ever more difficult for ministers, parliamentarians, and officials to develop and to implement policy and new law that is suitable for effectively addressing the many serious challenges that we face as a society – or that we are likely to face in the future. The tendency of human rights law to frustrate sound policy and its timely and effective implementation can be seen in relation to immigration and asylum, Northern Ireland legacy cases, the operation of UK forces abroad, and policing of public order amongst other matters. This is not a closed list, as the Strasbourg Court's extraordinary intervention into climate policy last year confirms.

It is important to keep these two points in mind when reflecting on the approach that should be taken to human rights in UK politics and law, and thus on the state of affairs that a programme of human rights law reform should aim to bring about. The point of reform should be to recover and to protect a workable, legitimate set of constitutional arrangements and, relatedly, to free government, with democratic legitimacy, to address the problems that human rights law makes it harder to solve. The proposals for reform that we consider later in this paper should be judged on these two criteria.

The role that human rights should have in Parliament's deliberations

Parliamentarians can and should consider, and debate, human rights in enacting legislation and in holding the government to account. Indeed, this is a routine feature of politics in this country. It is possible, that this

debate might be enriched by references to Convention rights, which would help to signal a range of important human interests. But parliamentary deliberation would be distorted – arbitrarily foreclosed – to the extent that Parliament takes either the Strasbourg Court or the domestic courts to speak with final authority about any or all human rights, and so leaves it as Parliament's role only to identify, or to anticipate, authoritative rulings and to act consistently with them.

The current arrangements, for taking account of human rights as part of the legislative process for primary legislation have their origins in section 19 of the HRA, which requires a Minister introducing a Bill to make either a statement that it is compatible with Convention rights or a statement that he or she is unable to make a statement of compatibility. (Note that this is not the same as a statement that the Minister considers the provision to be incompatible, although the requirements of the section are frequently misrepresented as if it were.)

That section (which came into force before the other substantive provisions of the 1998 Act) has been arguably the Act's most effective provision in advancing the objective of securing the compatibility of domestic legislation with Convention rights. There can be no doubt that it has ensured that Convention rights as such have been taken much more seriously than was previously the case in the preparation of legislation. It was also the trigger for the development of the practice under which the Government prepares a human rights memorandum for each of the Bills it introduces into Parliament and under which that memorandum is referred to and considered by the Joint Committee on Human Rights. The effectiveness of the section in practice does raise a question whether the HRA needed to do anything more in relation to legislation.

Two aspects of the section 19 procedure, however, do require consideration and lead to questions about whether the section, in its present form, is any longer needed and whether its function is not better served by the more detailed and nuanced procedures of Parliament to which it gave rise – whether, in fact, they are not a firmer and more effective way of dealing with human rights in the legislative process. It would be perfectly possible to continue with those other processes even if section 19 were repealed – just as it would be possible (even if this is an idea with little in its favour) to abandon those other processes while retaining section 19 in force.

The two aspects that need to be addressed are the use by section 19 of the concept of legislation being "incompatible with Convention rights" and the way in which section 19 does not in practice operate in a way that is consistent either with the original scheme for the 1998 Act or with what would be ideal legislative practice in any case.

The concept of the compatibility of legislation with Convention rights is a central feature of the scheme created by the HRA, but it is a problematic one. It does not have any direct origin in the ECHR, although the Convention does formulate some of its exceptions so as to require an assessment of the purpose of legislation when it provides that infringements

of human rights under the Convention are, for example, "in accordance with law and… necessary in a democratic society" for permitted purposes (national security, public safety etc).[67] It is these provisions that provide the route by which the Strasbourg Court does conduct assessments of the legislation under which conduct apparently infringing someone's Convention rights is considered and even more inappropriately – certainly in terms of UK constitutional principle – assessments of the processes that resulted in the legislation. Nevertheless, the main focus of the Convention and of the Court's consideration of individual cases is on how an individual has been treated in the specific circumstances of his or her case, not on what domestic law requires or allows. The Strasbourg Court does not engage in the sort of judicial review of legislative provisions, and their potential impact on hypothetical cases comparable to the one before the court, of the sort that is prompted in UK domestic law by the concept of "incompatibility" of legislation or in states with express constitutional constraints on legislative power.

The concept of incompatibility is a concept specifically created for the purposes of, and by, the 1998 Act; and it is a particularly unfortunate innovation in the light of UK constitutional traditions, as well as an unnecessary one. The most damaging effect of the concept arises in relation to the involvement of the courts in the judicial review of legislation (that is, under sections 3 and 4), but its presence in section 19 is the first step to creating that mischief.

In making any structured provision for how human rights inform the legislative process, Parliament should consider the option of dispensing with the concept of legislative incompatibility and, ideally, for the reasons given below, with section 19 itself. Parliament should certainly also consider whether any human rights based scrutiny of legislation for which it makes structured provision should be confined to Convention rights or should be based on a more focused description of the matters that Parliament from time to time might consider give rise to human rights concerns, as they are understood in the UK. That might include some or all of the Convention rights or comparable rights reframed, but it need not. It is an open question whether such structured provision is necessary at all, or whether it should be left to parliamentarians to debate human rights whenever they see fit. In event, whatever (if any) provision is made, Parliament should avoid artificially narrowing the scope of relevant considerations.

When it comes to the second aspect of section 19 that needs to be considered (viz., the way in which the section operates in practice), there are several points of concern.

Successive governments have been partly hamstrung by the Labour Government's decision in the early days of the HRA to certify a Bill as compatible only if there is a more than an even chance that it will be upheld by the courts in the event of a challenge to its compatibility. In practice, this standard makes no distinction between Strasbourg and domestic law expectations, and it is not set out on the face of the statute.

67. See for example Article 8(2) of the ECHR.

It is a self-imposed limitation.

In practice then, a section 19 statement is seen as a binary requirement which government is, for Bill management purpose, very reluctant to satisfy otherwise than with a section 19(1)(a) statement confirming compatibility, even if that means manipulating the grounds for giving it (for example by adopting a very broad view of how section 3 might be applied to ambiguous statutory language).

Were section 19 retained, together with the concept of compatibility, it would still be open to Ministers to change the practice and to decide to certify bills as compatible with Convention rights in other circumstances, such as whenever they consider them compatible, either—

(a) because there is a respectable legal argument to this effect (an argument that may or may not persuade a domestic court in due course); or
(b) because there is a good argument that the proposed legislation is compatible with the terms the UK agreed in 1950 (an argument that may or may not persuade the Strasbourg Court in due course, noting that Court's unpredictability).

While this would be better, the real mischief is that the certification requires a simplistic answer to what is usually a more complicated question. The more nuanced report and consideration that is possible under the procedure involving a human rights memorandum and the JCHR is arguably much more helpful, even though we think it would almost certainly benefit from greater integration into the scrutiny of the policy of legislation overall.

The proposal for such integration is not a proposal for diminishing the importance of human rights based scrutiny; but it does involve questioning whether human rights concerns should continue to be treated as a "siloed" questions of interest only to legal experts, rather than as questions of principle for everyone who is interested in the case for legislating on the matters in question, and in doing so in the most acceptable form.

Ministers and other parliamentarians should operate in a context which accepts that legislation theoretically at risk of being incompatible with human rights law may nonetheless be the right thing to do – not only because "human rights" may be outweighed by the public interest or need to be qualified by reference to it, but also because human rights properly understood are not properly reflected by the way Convention rights are understood by the Strasbourg Court. Again, it should be stressed that European human rights law is a dynamic body of positive law, made and remade by the courts in a succession of cases. It may or may not correspond to the rights that member states affirmed in 1950 and/or to what human rights truly understood require of us today.

There is no section 19 equivalent for subordinate legislation. That is because Convention rights are an aspect of the *vires* under which such legislation is made;[68] and *vires* is an issue that Parliament does not need to be

68. By virtue of section 6 of the HRA.

given any extra reason to consider when scrutinising delegated legislation. That question is already integrated into the Parliamentary scrutiny of delegated legislation. However, if the impact of Convention rights on *vires* were to change – if the HRA were repealed, for example – there would then be a stronger case for having a more focussed consideration of human rights in the case of secondary legislation while retaining its integration into the overall process of scrutiny. In other words, it would be better if the human rights-based scrutiny of statutory instruments was incorporated into the other Parliamentary processes of scrutinising delegated legislation than take the form of a relatively irrelevant formality, like a section 19 statement, or a "siloed" separate scrutiny mechanism.

Similar considerations apply, of course, in the case of devolved legislation for which ECHR compatibility is an element of legislative competence. In the case of the Westminster Parliament, it would be unnecessary and constitutionally inappropriate for the details of any enhanced system of Parliamentary scrutiny of legislation in relation to human rights, or the retention of the procedures involving a human rights memorandum and JCHR consideration (were section 19 repealed), to be incorporated into primary legislation. The processes would belong to Parliament. Putting it in legislation would risk making it justiciable, which would undermine its intended purpose.

The role that human rights should have in UK law

Questions about the merits of human rights law, and about the form that law should take, are – initially at least – questions about whether and to what extent the role that human rights are given in our political processes (including those for changing the law) would fail to produce the most satisfactory outcomes, and so needs to be supplemented by bespoke legal mechanisms. But they also crucially involve a consideration of whether and in what form incorporation of Convention rights into domestic law, or any analogous British Bill of Rights, would be likely to produce better decisions, and whether (even if it did) it would also create a risk of adverse consequences that would outweigh any advantages that might be gained.

Whether and how to incorporate human rights in UK law

The incorporation of enforceable human rights in domestic law is often presented as an indispensable bastion against the rise of tyranny in a constitutional democracy. That argument, however, is overblown and misconceived. Law cannot stop the rise of tyrants determined to ignore the law, and for the determined tyrant the law is a tool not a deterrent. What keeps a polity from tyranny is not first and foremost law but, rather, a culture within society of respect for the law and established norms of behaviour, and with the processes by which the law and those norms are made and established.

It is such a culture that ensures that politicians tempted by aspirations to behave badly will be deterred by the prospect of the political damage that culture will guarantee if they depart from the law and established

norms. The formal sanctions and means of legal enforcement attached to the norms if they are in legal form make no significant difference and are, for practical purposes, irrelevant. On the other hand, the risk of human rights law is that its rule of law and democratic legitimacy problems may end up undermining the culture on which its practical effectiveness may depend, and in that way foster popular support for tyrannical solutions. A culture of respect for law confronted with the, in practice, necessarily retrospective rectification by the courts of political decisions is inherently more at risk of giving way to one that more readily tolerates or even promotes politicians who are willing to game or even defy the law to get things done.

There is another factor that reinforces the risks to our system of democratic governance based on a culture of respect for the law and other established norms of behaviour. That is the fallacy that political and legal accountability can both exist in the same space, so that there can be no reasonable objection to using the law as a back-up for the operation of political accountability – a "belt and braces" approach. In fact, any decision to provide legal accountability on a particular issue necessarily weakens political accountability on that same issue; and, to the extent that it amounts to giving the courts a formal or practical veto on changing the law about that matter, it effectively displaces it altogether. Giving the courts the final say, or creating a political situation in which they are seen to have the final say in practice, enables politicians to dodge accountability with a "no choice" argument, on which they are often, understandably, happy to rely. The consequence, however, is political decision-making that is irresponsible, in every sense of the word.

What, for the purpose of this discussion, do we mean by incorporating human rights into domestic law? We mean creating rules that qualify by reference to very broadly worded principles either the law itself or any decision-making function that falls to be exercised in accordance with the law by or on behalf of the state. Typically, those principles will subordinate the specific to the general with the articulation in general terms of the respects in which individuals need to be protected from unwarranted state interference with their autonomy – principles that, in that way, also identify when such interference may be justifiable.

The history of the incorporation effected by the HRA provides a template as to the different forms of incorporation that may be possible in UK law and need to be considered. The questions about the form of incorporation include, most importantly the following three questions.

(a) Should there be a system for judicially reviewing decisions made in the process of legislating?

This question arises separately, with potentially different answers, in the case of the sovereign Westminster Parliament, devolved legislatures,[69] and Ministers exercising delegated legislative powers subject to parliamentary scrutiny in Westminster or in a devolved legislature.

It also involves considering the questionable features of the concept

69. The Northern Ireland answers to these questions need to take account of the provisions of the Belfast (Good Friday) agreement. See further Conor Casey, Richard Ekins and Sir Stephen Laws, *The ECHR and the Belfast (Good Friday) Agreement* (Policy Exchange, September 2025), https://policyexchange.org.uk/publication/the-echr-and-the-belfast-good-friday-agreement/.

of legislative compatibility that we have already discussed in relation to section 19 of HRA , as well as, where review is allowed, the question of what remedies should be available to litigants in each case. That includes the question of to what extent the judgment on one set of facts should be allowed to benefit, retrospectively or otherwise, potential litigants in other comparable cases or in all cases where the challenged enactment was relied on.

Any discussion of remedies needs to take account of what their likely impact will be in practice as well as in theory. We discuss below how, in practice, the declaratory remedy in section 4 of the HRA has been transformed in practice into something that in effect creates an obligation to remedy the declared incompatibility.

Answering all those questions may involve further questions about the democratic legitimacy of change and the betrayal of legitimate expectations, about the extent to which human rights values, or any remedy in respect of their contravention, can or should be applied retrospectively.

If there is to be judicial review of legislation, consideration needs to be given to the level of deference to be afforded to political decision-making and how the extent of the required deference is to be formulated. This should not be left to courts to decide for themselves.

Depending on the answers given in the case of subordinate legislation, these questions also give rise to issues about where the line should properly be drawn between executive power that is legislative in nature and executive power that is exercised in practice on a case-by-case basis and is thus subject to ordinary judicial review.

(b) Should the interpretation of legislation be qualified by reference to human rights?

This question involves a conceptual problem about whether the process of statutory interpretation should be regarded as equivalent to a statutory power exercisable as a discretion to change the law. In our view it clearly should not. Nor should any interpretative provision be framed to appear as if it confers a discretion.

This question also raises the same questions about different types of legislation, remedies, retrospection and deference to political decision-making as the questions about the judicial review of legislation.

There is a need to reconcile any rule that may be enacted to require rights-consistent interpretation both with the concept of Parliamentary Sovereignty (pursuant to which, the intent of the enacting legislature is the object of statutory interpretation) and with the principle of legality, which enables the court to make assumptions about the matters that Parliament will address expressly if it intends to deal with them, but which should be limited to assumptions that are clear and predictable by legislators when they legislate. There are also questions to be considered about the role of international obligations in identifying Parliament's legislative intent.

(c) Should human rights be separately taken into account in administrative decision-making?

This question also involves issues about remedies and retrospection, which are similar but potentially less problematic than those that relate to reviewing or interpreting legislation.

Questions about deference to political decision-making, including judgements according to legal tests set out in legislation also arise as do questions about remedy and retrospection – which may involve limitation issues.

Additionally, there are the other more practical considerations that affect day-to-day executive decision-making, such as to what extent it is realistic to expect junior servants of the state making decisions on the ground to apply themselves to the questions those decisions involve with the same intellectual acuity and legal expertise (and luxury of time) as a Supreme Court judge or a judge of the Strasbourg Court.

This question also raises issues about decisions that are quasi-judicial in nature and about how and in what respect other decisions that are unequivocally of a judicial nature should be subject to similar constraints, and if they are, how that impacts on the answers to all the other questions.

Each of these three questions can only properly be considered if it recognised that lawmaking, and therefore rules about the interpretation and operation of legislation, should involve an understanding and analysis of the law that goes beyond how legal disputes are likely to be resolved in the courts.

As we have argued above, concentrating solely on what goes on in the courtroom has been a serious error of previous attempts at reform. It is understandable error because evidence of what the courts have decided is much easier to come by than evidence of the wider impact of legal change on behaviour in society or on public decision-making that has not led to litigation, but it is nonetheless misconceived. There is a well-known phenomenon in which false conclusions are reached by giving priority to factors that can be easily ascertained but are only peripherally relevant over matters that are more relevant but are difficult to measure with accuracy. The same problem is at risk of arising here.

What is crucial in lawmaking is to assess what is likely to be the impact of the law on those, the vast majority, who will become the subjects of the law but will not seek to litigate it – indeed will actively seek to avoid litigation about it. In the case of human rights law, where the objective is to influence the conduct of agents of the state for the better, it is the likely impact of the law on the agents of the state that primarily needs to be assessed – and that means their conduct generally, not just in the cases that do reach the courts. Moreover, what is important is their likely conduct in practice not the conduct that theoretical compliance with the law would involve or require.

The history of the practical impact of incorporation

The way in which different approaches to the questions described above can create practical problems has been well illustrated by the history of the incorporation of European human rights law into UK law by the Human Rights Act 1998.

Since 2 October 2000, when the HRA came into force, the UK courts have been grappling with how to receive and apply the Strasbourg Court's case law, and sometimes too with whether and how to elaborate or develop it. In thinking about human rights law reform, it is important to attend to the domestic impact of that case law, which includes not only how UK courts have applied Convention rights in relation to particular controversies, but also how the reception of this body of law has changed the ways in which courts, lawyers, civil servants, ministers, other parliamentarians and members of the public think about law and government decision-making.

In developing a programme for reform, it will be important to trace the history of the domestic reception of European human rights law, to note the range and significance of its impact on how we are governed, and to evaluate the resulting policy choices and patterns of government that have developed – noting in particular the extent to which some questions have become, in effect, subject to veto by litigation, or have been undermined by the delays that litigation necessarily involves. (We made a recent contribution to this process of analysis in publishing our study of twenty-five leading HRA cases, but as we say in that paper, more is needed, not least to go beyond the case law and to consider the ways in which, even if litigation is not commenced, the HRA may distort government decision-making.)[70]

Practical effects are more important than theoretical possibilities. So, the problem is not that the HRA has empowered UK courts to quash Acts of Parliament – it has not – but rather that the HRA has in practice narrowed in important (and damaging) ways the government's freedom, even with the support of Parliament, to make policy and to address social and political problems and to ensure that society adapts appropriately to changing conditions and circumstances.

If elected politicians have failed in practice to make full use of their legal powers for these purposes that may, at least in theory, be as much the fault of parliamentarians themselves, including especially ministers, as it is of the courts (and of the Parliament that enacted the HRA). That said, if the HRA, operating as it does in the shadow of Strasbourg adjudication, in practice sets in motion, and helps to sustain, a political dynamic that enervates government, this cries out for reform. We are entitled to expect elected politicians to act responsibly and not to be deterred by obstacles to good policy (obstacles they are constitutionally entitled to ignore that is) from adopting the best and most effective solutions to the problems they are elected to solve. We should strongly consider reforming any framework that tends to distort their deliberations and thus to discourage them from acting well and from taking responsibility for the effectiveness

70. Conor Casey, Richard Ekins, Sir Stephen Laws, *The Human Rights Act in Twenty-Five Cases* (Policy Exchange, 2024), https://policyexchange.org.uk/publication/the-impact-of-the-human-rights-act-1998-in-twenty-five-cases/.

of the actions they take or choose not to take.

The *Ziegler* debacle, which we discussed above, demonstrates some of what can go wrong on this front. The faltering efforts of successive governments to address the Channel boats crisis is another. After repeated failures to address the problem, the then government did steel itself to confront the challenge that human rights litigation posed to its Rwanda policy. But even then, its actions were incomplete, leaving section 4 of the HRA in play and not adequately addressing the groundlessness of Rule 39 interim measures; and, of course, in the event, delay and prevarication meant the legal changes that were needed were left too late to be put into effect and created a problem which even the current government acknowledges is in some ways aggravated by the ECHR.

In thinking about our domestic human rights law framework, would-be reformers need to consider the structure of the HRA and the way in which some of its key provisions are now understood and may be understood in future. (They need also to consider the implications that the Windsor Framework has for the indirect, but effective, enforcement of European human rights law, a point which we note for attention but do not address further in this paper.)[71]

In reflecting on the HRA, it is imperative that those considering whether and in what form the law should be changed note that the meaning and application of the 1998 Act has scarcely been stable since it came into force. In particular, the way in which the courts have interpreted and applied key provisions of the HRA has changed over time. We commended some of the changes that the Supreme Court appeared to make in 2021 to its understanding and application of the HRA – changes that partly reversed innovations made by other courts across the preceding two decades. But these innovations, and the judicial acceptance of a need to reverse them, also reinforce the point that the HRA must be seen, in important respects and unacceptably, to be a constantly moving target – a target that is quite capable in future, in the course of the adjudication of subsequent cases, of moving in a direction that might well be for the worse. If the HRA is to be superseded by some other legal regime, the replacement needs to be capable of being much more stable and predictable.

Leaving reform to the courts is far from ideal, and not only because it is slow and produces results that are both unstable and unpredictable. It is easy to see why the courts might be tempted to intervene to produce answers when politicians do not accept the responsibility to do so. But in the process they also run a high risk of encouraging or validating that lack of responsibility. That risk will need to be forestalled or at least strongly mitigated in any new constitutional dispensation. The point is often made when other legislation is under consideration that self-regulation can be relied on, and would produce better outcomes than legislative intervention. But the delegation to the courts of a power to change the law, to take responsibility for how the law should be reformed from time to time, is not "self-regulation" but, on the contrary, is constitutionally wrong in principle.

71. But see further Conor Casey, Richard Ekins, Sir Stephen Laws, *The ECHR and the Belfast (Good Friday) Agreement* (Policy Exchange, 2025), https://policyexchange.org.uk/publication/the-echr-and-the-belfast-good-friday-agreement/.

Furthermore, the analytical gymnastics required of the courts to make a significant judicial reform look like the product of the consistent application of existing precedents (which is an inevitable feature of legal development when it is left to the courts) only risks increasing the level of complexity, uncertainty and unpredictability about the law that already a highly undesirable feature of human rights case law in a way that is wholly incompatible with the rule of law. This is particularly evident when, as in the case of the HRA, the reform is apparently still incomplete and is occurring more than two decades after the entry into force of the law, the correct understanding of which is being rearticulated by the courts.

Consider the Supreme Court's 2021 decision in *Re McQuillan*, which attempted to limit, somewhat incoherently, the retrospective application of the HRA, especially to deaths taking placed during the Northern Ireland Troubles. The resolution reached by the Supreme Court, though in one way an improvement on the case law that came before, remains vulnerable to subsequent changes in Strasbourg jurisprudence. It is also vulnerable to a change of opinion in a future panel of the Supreme Court, which might be unwilling to support the failure of the HRA to give a domestic remedy to what, in terms of decisions of the Strasbourg court and international law, may be a UK breach of the ECHR. Likewise, it is far from clear that the relatively deferential approach the Supreme Court adopted to decisions on welfare benefits in its 2021 decision in *SC* will be followed by successive generations of judges. The logic of human rights law, and its interplay with the Strasbourg Court's case law, makes precedents about its application insecure.

Uncertainty, or dynamism over time, in relation to the temporal or spatial scope of the HRA, or about the standard of review it requires, has its counterpart, of course, in the changing understanding of the reach of Convention rights themselves. In addition, it bears stressing the extent to which Convention rights are routinely understood to require judicial discretion in application and thus to militate against general rules – a feature of human rights law that obviously invites inconsistency and uncertainty in adjudication and is inherently incompatible with rule of law standards.[72]

Another important example of this phenomenon may be found in the case law that has emerged in recent years, in which the determination by immigration tribunals of whether the removal of some person, or denial of their entry into the UK, would flout their Convention rights is considered separately from the legislative scheme setting out specific grounds for removal or entry. In tracing the nature and impact of human rights law, would-be reformers need to consider the extent to which this body of law judicializes processes of government and makes the implementation of any policy contingent on a series of case-by-case judicial determinations, which may be difficult to predict or to manage in any effective way. That process is particularly pernicious where it operates, in practice, to require officials involved in day-to-day casework or police officers on the streets to reproduce the decision-making methodology of the judiciary

72. See Philip Sales and Ben Hooper, "Proportionality and the Form of Law" (2003) 119 LQR 439.

in circumstances where that is manifestly impossible – where it does not factor in practical factors such as what can reasonably be expected of the level of staff available to administer the scheme.

It follows that one important objective for reform must be that any new dispensation for the role of human rights in the domestic legal system must be both predictable and stable enough to satisfy the basic standards that law must meet to be compatible with the maintenance of the rule of law. Any reformed body of human rights law must be careful to avoid creating another moving target and certainly must not produce a relatively blank sheet on which the blanks are left to be filled in (and retrospectively crossed out and filled in again differently) by the courts over succeeding decades.

The relevance of "common law rights"

It is important also for any would-be reformers to recognise that, while the HRA is at the centrepiece of our human rights law framework, consideration also needs to be given to the jurisprudence that has emerged in relation to common law rights as an indirect consequence of the incorporation of Convention rights into domestic law. There have undoubtedly been questionable developments in public law driven, in part, by the impact of human rights law in exemplifying a relaxation of the traditional inhibitions on judicial power in the UK constitutional settlement and in part too, perhaps, by an attempt on the part of some jurists to domesticate European human rights law: in order to draw the sting from some of the criticism that is made of it, and perhaps even to prepare the ground so that, in the event of the HRA's repeal a revitalised common law might take its place.

Judicial enthusiasm for such an elaboration of common law rights has, it seems to us, waned in recent years. Still, in thinking about human rights law and its reform, would-be reformers should consider the extent to which UK courts have, or could, develop a new set of rights under the auspices of common law technique, rights that might then be deployed against government policy and administrative decision-making and maybe or even against at least some forms of legislation. This is yet a further factor that reinforces the need for any reform to be built on a vision of what the law after the reform should look like, rather than to assume that what will emerge from the removal of undesirable or damaging aspects of the status quo will inevitably produce something better.

Our point is certainly not that repeal of the HRA would somehow be a futile course of action, an analysis that overlooks the radical limitations that still exist on the extent to which it is open to courts to make new law by way of the common law, and the capacity of Parliament to produce new limitations if the existing ones have lost their force. And we certainly refute the bizarre assertion sometimes heard from opponents of reform that while the incorporation by the HRA of the ECHR into UK law should be seen as an indispensable protection of human rights in the UK, the repeal of the HRA would make no practical difference.

What we do think, though, is that a prudent review of how to reform the status quo requires consideration of the extent to which the common law has been, or might be, developed by reference to human rights law once the reform is in place. It requires any reform to address this body of law and its generative possibilities. This is just another aspect of ensuring that any reform is successful in producing a new legal framework to replace the status quo that is in all respects consistent with the objectives of the reform.

In reforming human rights law, the objective, we think, should include the restoration of UK parliamentary democracy, in which courts do not enjoy any kind of veto power over the merits of policy for which there needs to be political accountability. Ending the incorporation of the ECHR into UK law would be a major change. There is an obvious risk, however, that, as a consequence, litigious energy would then be redirected towards common law adjudication, including weaponizing the principle of legality. That is a risk that reformers must anticipate and address, not least by avoiding any suggestion that the point of reform is to empower UK courts rather than European courts. Any new law must be designed to reverse the culture change that has led opponents of political decisions to assume that the first and most effective means of expressing their opposition is by way of litigation.

The parliamentary dynamics of human rights law

When it comes to the use of human rights law to review legislative decision-making, the promise of the HRA was that it would secure the advantages, as they were imagined to be, of continental European or North American style constitutional rights review without having to abandon parliamentary sovereignty. That is, it would remain for Parliament to decide whether or how to respond to section 4 HRA declarations of incompatibility, as well as whether or how to respond to reinterpretations of the law under section 3 or decisions about statutory instruments under section 6. It is true and important that nothing in the HRA contradicts parliamentary sovereignty and Parliament's freedom to legislate remains unimpaired as a matter of strict constitutional law. But the way in which the 1998 Act has been received and understood is in practice in tension with the principle of legislative freedom and with Parliament's effective capacity to deliberate intelligently about what should be done. And a programme of reform needs to consider how in practice it can be restored.

One particular aspect of the mischief in our constitutional arrangements that has been created by the HRA is the way in which ministers, the members of the Joint Committee on Human Rights (JCHR), and other parliamentarians have understood section 4 declarations and section 10 remedial orders in a way that is unsatisfactory and incompatible both with the original justification for the provision made by the HRA and with its stated objectives .

There is a strong argument to be made, which is important to the case for reform and supports it, that many ministers and other parliamentarians

have failed to understand and rely on how the structure of the HRA was intended to preserve the importance of legislative freedom, and that they have done so because the actual substance and form of the 1998 Act was conducive to producing just that misunderstanding.

They have begun, it seems, to assume that government and Parliament have no choice save to comply with a section 4 declaration, including by making and approving a section 10 remedial order. The present Government's entirely confused conduct in relation to the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, with its false claim that provisions of it had been found to be "unlawful" was a policy rationale for making the draft Northern Ireland Legacy Remedial Order clearly manifests this attitude of unthinking (literally thoughtless) compliance.[73]

Government and Parliament should firmly reject the idea, advanced by some academic lawyers and some practising ones, that there is a constitutional convention that the government and Parliament must "comply with" the declaration by changing the law, either by way of a section 10 remedial order or by way of primary legislation. There is no such convention. If there were, it would be an *unconstitutional* convention in view of its repudiation of Parliamentary sovereignty and its inconsistency with the rationale for the original form of the HRA. That is a fundamental objection whether or not such a convention would prove helpful in persuading the Strasbourg Court that section 4 is an effective remedy for the purposes of Article 13 of the ECHR, (which, it is worth pointing out in this context, was omitted from Schedule 1 to the HRA and so is specifically not incorporated into UK domestic law).

Nevertheless, too many politicians do in fact fail to think clearly about section 4 declarations and thus about section 10 remedial orders. A government intent on reform – or even one seeking to mitigate the conditions under which only a radical solution, involving withdrawal from the ECHR, would be an effective reform – should lead Parliament in rejecting unthinking compliance. And Parliament, in its own defence, should hold government to account for whether and how it protects the legislative freedom that section 4 was intended to preserve. This also calls for the Government to adopt a principled and prudent approach to its section 10 powers, which it may otherwise be tempted, as in the recent past, to misuse.

The more realistic view is probably that the only way to remove the misunderstanding of sections 3, 4 and 10 is to repeal them and to replace them with provisions which cannot be misunderstood in the same way. Any argument for retaining them or anything like them could only be convincing if there were a clear demonstration in the meantime that they would in future be capable of operating as they were intended – that is, to preserve the virtues of legal certainty and the democratic legitimacy of law that results from Parliamentary sovereignty.

It bears repeating too that it is essential for guaranteeing that the Act is compatible with democratic governance and Parliamentary democracy in the UK that it remains open, not only in theory but also in practice, for

73. The claim contradicts the unambiguous effect of section 4(6) of the HRA and the express negation of "unlawfulness" by section 6(2) in the case of provisions in respect of which the only remedy is a section 4 declaration.

a democratic Parliament, at the invitation of a democratically legitimate government, to enact legislation disapplying provisions of the HRA, either in whole or in part.

The challenge for the Government, in proposing legislation disapplying the HRA and in defending it in Parliament and to the country, is and should be the political one of making clear that enacting such legislation (rather than implying a concession that human rights are being improperly violated) is needed to avoid the frustration of Parliament's democratically made choices about where the parameters of human rights should be drawn in particular situations, or about how they should be balanced against other important considerations, including the rights of others, the rule of law requirements of certainty and predictability in the law, and the public interest generally.

Under the law as it stands, a government taking this approach would also need to maintain that it would defend it robustly before the Strasbourg Court. The point is to avoid the unconstitutional state of affairs in which the implementation of government policy, approved by Parliament in legislation, is made in effect subject to judicial veto, not because the UK courts can quash an Act of Parliament – they cannot – but rather because the meaning and application of the legislation remains subject to unpredictable human rights litigation (either domestically or in Strasbourg), which might be fatal to the policy in practice.

This discussion also reinforces the lesson for reformers that the objective should be to end up with law which is understood in practice to have its intended effect and to be politically capable of being understood to confer a capacity on government and Parliament to initiate and enact legal change that could actually be relied on in practice.

There are serious dangers created by a legal regime which paralyses decision-making in government and Parliament, which creates a bias in favour of the status quo and which generates an inhibition on change or a postponement of the moment at which change must be accepted and allowed to work (viz. the time when it is no longer capable of being stopped or mitigated by litigation). Such a regime in practice will dangerously undermine faith in democratic institutions (which are seen to be powerless) and in the judicial system (which is seen to be calling the shots on political issues without democratic legitimacy). Even more dangerously such a regime threatens the cohesion and future of society as a whole by putting the interests of litigious individuals before the interests of the public and by consequentially putting a brake on change for the public benefit and on the essential capacity of a polity to adapt to new conditions to avoid stagnation and entropic decline.

Assisted suicide and disapplication of Convention rights

The risks that human rights litigation can pose to a polity, and the case for legislative disapplication, is manifest, for example, in relation to migration and asylum, but not only there. It has also become apparent in the context of proposed legislation about assisted suicide.

At the present time, the jurisprudence of the Strasbourg Court does not require member states to enable, let alone to facilitate, assisted suicide (or euthanasia). This may change, however, because the Court's case law is unstable and dynamic, which reinforces once again the manifest disconnect between that case law and the notion that there is an immutable, ascertainable and incontestable concept of what human rights truly require. So, any decision by Parliament to reject the current legislative proposal to allow assisted suicide in some circumstances is in one way only contingent on decisions in Strasbourg.

Moreover, if Parliament does legalise assisted suicide but limits eligibility for assistance to a narrow class of persons (say, the terminally ill who are likely to die within six months), then that would still not remove the legal uncertainty and provide a settled rule. It is entirely foreseeable, indeed probable, that campaigners will litigate to challenge this limitation as incompatible with the Article 14 right to be free from discrimination, taken together with Article 8.

The supporters of legalising assisted suicide maintain that it is for Parliament to decide the scope of any relaxation of the prohibition on assisted suicide. But there must be a real risk of litigation that brings significant pressure to bear on Parliament to change the law (or be thought, wrongly, to fail to respect human rights) and, especially, that enables the Government to expand the law by making a section 10 remedial order, with limited parliamentary involvement in the legal change and with any parliamentary opposition to the change wrongly (perversely) decried as an attack on human rights. All of these are appalling prospects for the reform of a subject which affects a life or death question; and it is unlikely to facilitate public acceptance on either side of the argument that where the law ends up is likely to depend on judges rather than accountable politicians, even though public acceptance of whatever law we have on this topic is a matter of the highest importance.

One obvious way to anticipate and to avoid this risk, in the case of the existing legislative proposals, would be to amend any Bill changing the law on assisted suicide to provide that neither section 4 of the HRA nor, especially, section 10 would apply to the legislation once enacted. Such legislation would not concede a breach of Convention rights but would avoid the future of the law on this controversial and important question being settled, or distorted, by the vagaries of litigation. The case for legislative disapplication of the HRA in this context is thus overwhelming, a point that should be accepted regardless of one's views on legalising assisted suicide.

However, the existing legal regime makes it highly unlikely that this will happen. Reformers need to ask why and how that situation should be remedied. Whatever reform is considered and proposed for human rights it must be one that guarantees that these risks are avoided, or which demonstrates that in future they are very significantly reduced to a tolerable and safe level.

Relatedly, it bears noting that as things stand any proposal for Parliament to legislate in a way that risks being found incompatible with the Strasbourg Court's case law is very likely to be decried for the purposes of political debate as an attack on the rule of law, such that Parliament is taken, as a matter either of political morality or of constitutional principle, to have no freedom to legislate otherwise than in a way that avoids any significant risk of incompatibility with European human rights law. All this directly contradicts the prospectus on which Parliament was persuaded to pass the HRA in the first place.

These points about the reception and application of the HRA and the international dimension of the ECHR are highly relevant to how human rights law should be understood and the role it should play in our law in future. They refute the case that is sometimes made for the legal and constitutional status quo, namely that it is an attractive balance of judicial rights protection and parliamentary democracy, which ultimately leaves it to Parliament, accountable to the people, to decide what should be done. That might be a justifiable analysis of the law as it is in theory. It is very far indeed from the practical reality created by the HRA.

There are options available now to government and Parliament to find ways of acting with responsibility and effectively despite this legal framework. Yet they are very seldom resorted to. In past work, as noted above, we have encouraged elected politicians to avoid learned helplessness and to be confident in exercising their legal powers for the common good. But it needs to be recognised that the legal status quo has demonstrated that it is not conducive to facilitating that sort of confident behaviour in practice and so needs to be reformed.

The case for reform is strengthened, as indeed is the case for more radical reform, by the evidence that the elements of the status quo that are supposed to defend our constitutional settlement and legal traditions are in practice being encouraged to wither unused, either consciously or as a result of unexpressed practical inhibitions generated by the political dynamics around the way the HRA works.

In relation to the ECHR itself, and thus to the UK's obligations in international law, it is at least conceivable that the Government, with the support of Parliament, could for the purposes of any reform continue the UK's international commitment to respect the values originally set out in the treaty. But it is difficult to see how any reform could address the rule of law problems, the democratic legitimacy problems and the adverse impact on political culture resulting from incorporation without at least confronting the need to reject the Strasbourg Court's usurpation of

the ECHR by the Courts's dynamic approach to its interpretation and the resulting invention of new obligations that were never agreed, and were sometimes rejected, by member states.

The ECHR and options for reform

A new approach to protecting human rights, which aims to prioritise effective government, political accountability, and the rule of law, will necessarily be in tension with membership of the ECHR and the UK's subjection to the Strasbourg Court's jurisdiction. In addressing (or seeking to manage) this tension, there are three main options. This section explores each option, pointing out the difficulties that arise in relation to each of them, and detailing the considerations that are relevant to which should be adopted or the sequence in which they might reasonably be attempted.

In brief, the question for parliamentarians is whether to try to manage the existing relationship with the Strasbourg Court without treaty change, endeavouring to resist its abuse of its jurisdiction, whether to attempt to work with other member states to change the treaty itself, or whether to withdraw from the Convention altogether. While there is a strong case to be made in principle for each of the first two options, the practical and political difficulties with implementing them do have the effect of making outright withdrawal a relatively more attractive course of action.

Principled defiance and political engagement

The first option for addressing the incompatibility between the Strasbourg Court's case law and a new approach to protecting human rights is to adopt a practice of "principled defiance".[74]

The UK, like other member states, has an obligation, under Article 46, to comply with a final judgment of the Strasbourg Court in a case to which it is a party. (This obligation does not extend to judgments of the Strasbourg Court against other member states, although in practice successive governments and UK courts, have generally sought to produce strict conformity with the Court's case law, regardless of whether the UK has been a party and there is a strong case for arguing that that is the inevitable consequence of section 2 of the HRA, despite attempts to construe it as containing a wide discretion.)

If the UK were to adopt an approach that made it much easier for Parliament and the Government to act on their own views about what rights require (for which they would be accountable to the electorate), rather than maintaining a tacit judicial veto over policy and its implementation, then it is readily foreseeable that opponents of the policy would apply to the Strasbourg Court, whether for a final judgment to which Article 46 would apply or for Rule 39 interim measures.

The UK would have good reason to defy Rule 39 interim measures, which have no foundation in the ECHR, although this might well result in a final judgment against the UK in due course. The UK would have a strong case to make that it need not comply with any final judgment of the

74. See further Policy Exchange's 2019 proposals, on pp. 27-28 above.

Strasbourg Court that clearly and openly goes beyond the terms agreed by the member states and is thus *ultra vires*. Lord Mance articulated just such a line of reasoning in the Supreme Court's *Pham* case in 2015 in the context of the Court of Justice of the European Union and its cavalier approach to the terms of the EU Treaties and the limits on its judicial competence.

The question is not, as government lawyers have tended to assume, whether the Strasbourg Court itself would accept this argument, which of course it would not. The point is that this would be an intellectually and legally defensible view to take of the limits of the UK's obligations in international law, a view that should be advanced in dialogue with other member states, including the Committee of Ministers that is charged with monitoring compliance with the Court's judgments. (Defiance of a final judgment would be more problematic in relation to matters where it is less obvious that the Strasbourg has stepped outside the jurisdiction conferred by the Convention.)

It is improbable that ejection from the Council of Europe would or should follow from non-compliance, particularly in those circumstances. Very many other member states comply much less conscientiously with the Strasbourg Court's case law or with the express terms of the ECHR and the enforcement of compliance, such as it is, is by the Committee of Ministers, and so is a political and diplomatic process. Recall the prison voting saga. It is thus open to the UK, even under the status quo, to stand its ground and in effect to negotiate a settlement. Hitherto it has been very reluctant to do so.

Principled defiance of the Strasbourg Court is, therefore, at least a theoretical option. However, it is far from clear that it would be a politically viable option in the medium term and across a wide range of questions. It is entirely possible that any government that attempted to deploy this option, especially to deploy it repeatedly (that is, in relation to the many topics on which the Strasbourg Court has acted wrongly and in which its case law frustrates the making and implementation of good policy), would come under intolerable pressure in Parliament and from neighbouring states. Putting the point at its lowest, the odds of this course of action proving practicable and then succeeding are at best uncertain.

That said, it bears noting that the Strasbourg Court is not a common law court but rather an international court that is highly political. It responds in part to political cues, which requires and rewards efforts to raise the political costs of wayward judgments. It is not bound by its own or anyone else's' precedents and the Court's case law over time is not always, or maybe even not often, either coherent or recognisably founded on clear principles. That provides opportunities to challenge developments and to reopen past questions, opportunities that any government thinking about the ECHR and its own freedom of action ought to take seriously.

The complication arises from the fact that the UK is a state that rightly takes its obligations in international law seriously and is committed to the common law tradition and the rule of law in the domestic context, and to the rule of international law in international relations. This induces a

misconceived disposition to accept, rather than to challenge, the Strasbourg Court's abuse of its jurisdiction – accepting too quickly case law that might yet be undone were the Court subjected to greater political and legal pressure. With binding precedent such a prominent feature of the common law tradition, the UK is disposed to show the much less binding judgments of the Strasbourg court more deference than they merit. In that way there is a misconceived reluctance even to contemplate a course of action that involves questioning servile adherence to Strasbourg's rulings – even those that the Court clearly had no jurisdiction to make.

The alternative approach would be to recognise the nature of the Strasbourg Court and to engage with it accordingly. This might involve principled defiance, of the kind we outline above, but it could also involve a comprehensive litigation strategy that avoids premature surrender, constantly challenges and aims to reopen past mistakes, and is alert to the possibilities that the Court's vast case load presents in terms of intervening in cases to which the UK is not otherwise a party.

If the UK made the most of the opportunities provided by such a strategy, in cooperation with other member states, it might be able to help shape the Court's exercise of its jurisdiction, limiting, and maybe even correcting, its abuse of it. However, we strongly suspect that the dynamics created by the existing shape of UK law and practice, which are oriented towards securing governmental and parliamentary acquiescence to the Strasbourg Court's case law, would strongly militate against such approach being adopted or being successful in supporting a new approach.

There are good reasons to suspect that the government and Parliament may routinely fail to govern well under the present regime, finding it too difficult to exercise the legal powers that they retain. Good government is inhibited when legislation and policy seem always vulnerable to being misrepresented as a repudiation of human rights or decried as a violation of the UK's international obligations and an attack on the rule of law, or both. While these reactions are often misconceived, they are also predictable, as well as effective at limiting the space within which policy-makers feel free to deliberate and to make the decisions otherwise most conducive to the common good.

ECHR reform

It is of course open to the member states to work together to reform the ECHR in ways that would cease to threaten a more democratic and practical approach to human rights in the UK or in other member states. One possibility would be to negotiate a withdrawal of the UK from the right of individual petition and/or from Article 46. Either change would sharply reduce the UK's exposure to abuse of the Strasbourg Court's jurisdiction, which would be a very significant reform indeed. However, such changes would likely be very difficult to secure insofar as these are central features of the post-1966 ECHR, changes that other states seem still willing to accept and would be most unlikely to undo.

Setting aside the structural points noted above, viz. individual petition

and Article 46, the two main objectionable features of European human rights law are, first, the Strasbourg Court's inconsistent and inadequate deference to domestic political decision-making and, second, the Court's willingness to treat the Convention as a "living instrument" and thence to remake it. Neither of these features are of course found in the text of the treaty, but it would be possible in principle to agree treaty change that would require the Strasbourg Court to adopt different practices.

Reform in either case would prove difficult and slow. In relation to deference to political and local decision-making, an amendment of the Convention has already been tried in the Brighton declaration with respect to subsidiarity and can, we think, be described as a total failure. This is not to say that a much more tightly framed substantive treaty change would necessarily be ineffective, but any change would be at risk of being subverted by the Strasbourg Court itself, which would after all have to apply the new standard of deference that the amended Convention would require.

In relation to interpretative dynamism, there would be a technical challenge in framing the terms of any repudiation of the "living instrument" approach. In addition, one would need to note that dynamism is a problem that is not confined just to the respects in which the Court has developed the living instrument doctrine and thus has gone way beyond what it might reasonably have expected itself to have been authorised to do by the terms of the Convention articles. It is to some extent a more general problem that is inherent in the vague and contestable terms of some of the original Articles. Without a reliable reform on deference – so that local law makers could feel confident making laws that will be certain and predictable and satisfy the standard for law required by the rule of law, it is possible that no reform on dynamism would prove effective.

Treaty change is not the only means to attempt ECHR reform, although it is the most direct and would involve the member states taking direct responsibility for the Convention. It would also be possible, at least in theory, for member states to secure changes in the Strasbourg Court's practice by supporting the appointment of a majority of judges who would eschew the living instrument doctrine, return to the terms of the treaty, and refrain from abusing their jurisdiction or unduly interfering with decision-making in what, after all, are largely democratic states with their own constitutional systems.

Member states do not have power directly to appoint national judges but instead put forward a shortlist of three candidates, with the judge elected by the Parliamentary Assembly of the Council of Europe. The Assembly sometimes rejects all three candidates as unappointable. Judicial appointments are important, and states should take this very seriously. Is a reform of this sort practicable? We suspect not, not least because it would come under significant pressure as an alleged interference with judicial independence.

While Britain has put forward some distinguished jurists to serve on the Strasbourg Court, there are strong reasons to suspect that successive

governments have not given serious consideration to who the UK judge will be and instead have allowed the legal profession and the domestic judiciary to settle who is put forward, with the selection process likely to weed out any candidate who threatens to pose a serious challenge to the Court's malpractice. Would a Sir Gerald Fitzmaurice or a Lord Sumption be appointable under this regime? We note that the UK's last judge on the Court, Judge Eicke, in the recent landmark climate change judgment, has proved to be willing and able to dissent forcefully from a gross abuse of the Court's jurisdiction, and we commend his intellectual and moral courage in so doing. But objecting to a new, especially glaring abuse is one thing; leading or supporting a wider programme of reform, by way of adjudication that is disciplined by reference to the agreed treaty terms and commands a majority on the Court is quite another. It would be likely to prove an impossible task.

If there is to be serious reform of the ECHR regime of any sort, the UK would need to work closely with other member states – intervening in litigation, supporting sound appointments, and exercising intelligently the Committee of Minister's power to supervise compliance with final judgments of the Strasbourg Court.

We will not in this paper set out the detail of the necessary treaty reform, save to say that it must be specific and far-reaching. The lesson of the Brighton Declaration and Copenhagen Declaration is that member states must confront the true nature of the problem, which is not a problem in managing a vast case load, but rather a fundamental failure to adhere to the limits of the Court's jurisdiction.

The practical obstacles to effective ECHR reform are many and varied. Not least amongst the obstacles is the fact that the Strasbourg Court's case law is voluminous and now constitutes a significant barrier to sound government in a whole range of domains. This means that reform and repair would be a major technical challenge, requiring repudiation of a considerable portion of the Court's jurisprudence, as well as its questionable judicial method. Reform is possible in principle, but the scale of the task should not be underestimated.

Other practical obstacles exist and must be considered with care. Treaty reform will fail if it is misdirected, as it may well be by a de facto alliance between the Council of Europe and Strasbourg Court bureaucracies, on the one hand, and diplomats and government lawyers in member states on the other, to produce no more than a vague call for more restraint or deference, especially in relation to immigration. It would be irresponsible to settle for merely cosmetic changes to the Convention or to the Strasbourg Court's own practice, which would not be enough to make it possible to implement a new approach to the protection of human rights in domestic laws. Without very strong political direction, and robust legal advice, a future UK government, not to mention the governments of other member states, would likely in terms of political expediency in accepting only minor changes that would not amount to meaningful reforms. This was in effect what happened in 2024 in relation to minor changes to Rule 39,

which wholly failed to address the problem.

What is needed instead is a clear-eyed focus on the nature and meaning of Convention rights and on the Strasbourg Court's responsibility to uphold the terms member states agree, without glossing them or taking itself to be free to reinvent and elaborate them.

Relatedly, it may be that a reformed ECHR could make express provision for member states to refuse to follow judgments that introduce new understandings of Convention rights.[75]

The member states could also consider far-reaching structural reform. It is far from clear that the reforms of the late 1990s were at all wise and there may be good reason to overhaul the machinery, restoring the Commission.

Reforms of this kind, which might be structured to remove immigration and asylum entirely from the purview of the Court, would likely have the side-effect of greatly easing the case load of the Court, thus enabling it to focus on adjudicating allegations that member states have clearly breached well-established Convention rights.

It is open to question, however, whether any of these other reforms to the ECHR system could meet the objectives of human rights law reform without some constraint either generally or in relation to the UK on the right of individual petition.

Is meaningful treaty reform even achievable? The Attorney General, Lord Hermer KC, has suggested that it is not, implying that the length of time that it would take to secure agreement on treaty changes means that it would be "a political trick" to suggest that ECHR reform is a practicable response to the Channel migration crisis.[76] He has a point. The time it took to ratify the cosmetic Protocol 15 in the wake of the Brighton Declaration confirms the point and there must be a very real risk that any UK attempt to secure treaty reform would not be worth undertaking and would simply waste time and dissipate political capital. The importance of time should not be underestimated: one failing of the Conservative governments between 2010 and 2024 was repeatedly to miscalculate the time that it would take to develop proposals for reform and instead to let the clock be run down. The option of treaty reform would be a trap rather than an opportunity if negotiations were allowed to continue indefinitely towards what might very well prove to be an uncertain or unsatisfactory conclusion.

These risks can only be mitigated by very careful political direction, avoiding the de facto alliance noted above from frustrating meaningful reform. It seems likely that any UK-led reform initiative would only stand any chance of success if it is seized directly at the highest political level by multiple heads of government of member states, if strict time limits are placed on negotiation and agreement, and if strict criteria are placed on what must be agreed if the reformed ECHR is to be acceptable.

75. John Larkin QC, *The ECHR and the future of Northern Ireland's past* (Policy Exchange, March 2020), https://policyexchange.org.uk/wp-content/uploads/ECHR-and-the-future-of-Northern-Ireland%E2%80%99s-past.pdf

76. https://www.thetimes.com/uk/politics/article/promise-of-echr-reform-a-political-trick-says-attorney-general-k6hzkksz0.

ECHR withdrawal

If it proves impossible to reform the ECHR regime from within (option two), and if it proves impracticable (or suboptimal) to find a way to continue trying to live with European human rights law (option one), then the UK should withdraw from the ECHR (option three). Like other member states, the UK is obviously free to withdraw from this treaty if it so chooses. Whether to do so is an important question that warrants careful thought, but in thinking about it one should, again, avoid conflating the ECHR 1950 with the ECHR 2025 or confusing the Strasbourg Court's changeable case law with human rights properly understood.

Policy Exchange's recent paper on UK involvement in the origins of the ECHR makes clear how unenthusiastic UK statesmen were about joining the ECHR.[77] Sir Winston Churchill was supportive, in vague terms, of the Convention, but showed no enthusiasm for subjecting the UK to the jurisdiction of the Strasbourg Court and on the contrary the government he led chose not to accept its jurisdiction. The subsequent 75 years have seen many important changes, including in the structure of the ECHR regime and especially in the Court's approach to its task. There is, quite clearly, a small-c conservative status quo driven argument for remaining in the ECHR in view of the passage of time. But against this, stands the dynamism of the Strasbourg Court's case law and the Court's lack of interest in maintaining fidelity to the legal limits on its jurisdiction. In remaining a member state, the UK avoids the discontinuity of withdrawal but remains exposed to the incoherent and unpredictable development of the Court's jurisprudence.

The argument for withdrawal from the ECHR must turn in part on a close examination of modern European human rights law, of the kind we have sketched above. It must turn also on the conclusions (a) that reform from within, especially treaty reform, is either not viable or not adequate to the scale of the challenge, and (b) that it is unsatisfactory to continue to grapple with the challenges of ECHR membership by way of principled defiance or the like. For the reasons we have set out above, there are strong reasons to think that neither an attempt to secure treaty reform nor a practice of principled defiance are likely to prove adequate means to address the problem.

Our position is that there is a good case in principle for ECHR withdrawal.[78] The UK's subjection to the jurisdiction of an international court of this kind, which hears challenges from individuals (much more often than from other states) to the detail of legislation and government policy, is anathema to our constitutional tradition. There may well be a foreign policy case for undertaking such obligations, for enduring such exposure to a wayward international court, but this is a case that must be set against a powerful constitutional argument. Withdrawal from the ECHR, and thus extrication from the Strasbourg Court's jurisdiction, would make it possible to return to our historic constitutional arrangements. It would also clear the way for Parliament and government to address the practical challenges to which European human rights law is an obstacle,

77. Casey and Zhu, *Revisiting the British Origins of the European Convention on Human Rights*

78. See further Ekins, *The Limits of Judicial Power* (2022), 10-14 and R Ekins "The Case for Leaving the ECHR" *UnHerd* (11 August 2023) https://unherd.com/2023/08/the-case-for-leaving-the-echr/

avoiding the damage to our common good and our capacity to change and adapt to meet future challenges that is otherwise likely to arise from future decisions of the Court. For these reasons, ECHR withdrawal is a direct, straightforward and comprehensive response to the reasons why reform is needed – a response that is therefore much less likely to be frustrated in practice than either a policy of maintaining principled defiance or of seeking treaty reform.

None of this is to say either that the case for ECHR withdrawal is overwhelming (although its shape in principle is clear enough and entirely respectable) or that the Government, with the support of Parliament, should immediately withdraw the UK from the ECHR. Withdrawal would be a significant political decision, much costlier and more controversial than the UK's entry into the ECHR in 1950 or its acceptance of the Court's jurisdiction in 1966. It follows that any government that intends to lead the UK out of the ECHR would need to attempt to anticipate and address the various objections that are likely to be made to withdrawal and thus to build political support for withdrawal – within Parliament of course but also across the country.

The objections that are likely to be made include that ECHR withdrawal would:

(1) place the UK in breach of the Belfast (Good Friday) Agreement and would thus put peace in Northern Ireland in jeopardy,
(2) place the UK in unhappy company with Belarus and Russia, as the only two European states that are not members of the ECHR,
(3) put vulnerable minorities in peril by enabling the tyranny of the majority, and
(4) be a foreign policy blunder, weakening the UK's standing in the world, and relatedly would place us in breach of our agreements with the EU.

Each of these objections is answerable and should be answered. We have addressed (1) in detail, and (4) in part, in a recent paper, and will consider the others closely in future work, articulating the objections fairly and forcefully, before explaining how they can be answered. The point of this exercise, as with our recent paper on the Belfast Agreement, will be to clarify the grounds on which parliamentarians and the public should decide whether the UK should withdraw from the ECHR, clearing away misconceptions about the nature of human rights and human rights law, and thinking through the implications for the devolution settlements and our relations with other European states. In relation to (2) and (3), and in brief, the argument of this paper helps indicate why these objections are so weak. The comparison with Belarus or Russia is specious, with the UK clearly well-placed to protect human rights outside the ECHR, much as is the case with its sister jurisdictions in Australia, Canada and New Zealand.[79]

If a future government accepts and articulates an effective political-

79. There are important differences amongst these jurisdictions, of course, and we have significant concerns about the Canadian Charter of Rights and Freedoms and the jurisdiction exercised by the Canadian Supreme Court. See further R Ekins, "Models of (and Myths about) Rights Protection" L. Crawford et al (eds.), *Law Under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart Publishing, 2019) 224.

constitutional case for ECHR withdrawal, the question may arise *how* withdrawal should be realised. Specifically, should the Government simply exercise the UK's right to withdraw by way of the royal prerogative to conduct foreign policy? Or should it (must it?) invite Parliament to enact legislation requiring withdrawal? Or should that course of action be taken only if the UK people first make clear their support for ECHR withdrawal in a referendum? These are important constitutional questions.

Our provisional answer is that in principle it is open to the Government to effect ECHR withdrawal by way of the prerogative alone. However, in view of the significance of this decision and its political salience, this should only be a course of action taken once the Government has made clear its intentions to Parliament and provided an opportunity for confidence to be withdrawn.

Further, it is likely that any decision to effect ECHR withdrawal by this means would be challenged in the courts, with campaigners arguing that the Supreme Court's 2017 *Miller (No 1)* judgment, which concerned the Government's power to trigger Article 50 of the Lisbon Treaty, had the effect of requiring legislation be enacted before the UK withdrew from the ECHR and/or put an end to the right of individual petition. While this would be a dubious legal argument, the inevitability that it would be argued, and the uncertainty about how it might result, makes it rational for a future government to proceed by way of legislation. In any event any withdrawal is likely to be associated with consequential changes to domestic law repealing or radically modifying the HRA. So, the process of withdrawal could and probably should form a part of any legislation for that purpose.

The Government should of course defend its intentions in the Houses of Parliament and provide an opportunity for political opponents, in Parliament and outside, to make their political case. Still, it seems to us quite wrong to suggest, as former Prime Minister Boris Johnson has done, that ECHR withdrawal would somehow only be legitimate if first supported by a referendum vote. There is a political case to be made for a referendum on this important question. But there is a case to make *against* holding a referendum as well and in general it must be better for the country to avoid a referendum and instead for a government to put its intentions to the people in a manifesto and then to put its plans into action, with the support of Parliament, after an election.

Domestic legal change

For at least a substantial part of the 2010-2024 period, the focus of reform efforts was a vague proposal to replace the HRA with a (British) Bill of Rights. For the reasons we have given, we think that this was an ill-considered proposal, which did not promise to secure meaningful reform and might well have made matters worse in some respects. However, this is not to say that Parliament has no part to play in securing reform, save by authorising ECHR withdrawal or holding the Government to account for its strategy of engagement with the Strasbourg Court, the Council of

Europe, and other member states.

Even if the UK remains within the ECHR, Parliament needs to decide what should happen to the HRA and whether it should be replaced with another legal regime. It is what needs to happen to our domestic regime for human rights protection that will have to form part of the case for withdrawal.

Even without withdrawing from the Convention, Parliament could, in theory, radically amend the HRA, limiting the extent to which it upsets the constitutional balance and making it relatively easier for parliamentarians to act responsibly for common good. There are several options for modifications that would remove the constraints on the adoption of principled defiance and political engagement with decisions of the Strasbourg Court that we have discussed above. It is our view however that these provisions are unlikely to be politically supported or effective unless they involve the acceptance of the need for some supporting reform at the international level or withdrawal.

Whatever shape reform takes, domestic law is likely – for the reasons we have given in relation to the informal effect of the existing regime – to require express legislative clarifications (in positive terms rather than just by the removal of existing rules) of the level of deference for political legislative and administrative decision-making and of the principles of statutory interpretation in relation to international obligations that should adopted under the reformed system.

In considering potential statutory approaches to reform short of withdrawal, Parliament should also take very seriously the option of more regularly enacting legislation disapplying the HRA in this or that context, wherever the risk of disruptive human rights litigation is especially pronounced or where Parliament considers that the Strasbourg Court has expanded its jurisdiction beyond what was originally intended.

Finally, Parliament should continue, in every policy domain, to take responsibility for the statute book and to enact legislation that specifies in rule of law compliant detail how individual persons and groups should be treated. These legislated rights, as they have been termed in relevant scholarly work (jointly authored by one of us), are the principal way in which human rights have been protected in our law over a very long time. The disincentive to following this tradition that is provided by the risk that the detail might be found to conflict with the generality of Convention rights needs to be legislatively repudiated. It is a total misconception for Parliament and the public to assume that the HRA or ECHR provide the main guarantee for human rights in the UK. On the contrary, modern human rights law is at best supplementary or secondary, and in practice it routinely proves distortive and disruptive, adding needless complexity and unpredictability and thus undermining the provision otherwise made in law.

If the UK leaves the ECHR, some jurists and commentators argue that Parliament should replace the HRA with a (British) Bill of Rights, which will help assure the people that human rights will continue to be protected

and will avoid the risk that the UK courts will attempt to compensate for the loss, as they may see it, of the Strasbourg Court's oversight. This line of argument is a serious one, but it seems to us wrongly to accept the conflation of human rights with human rights law and to provide an unnecessary reassurance to the UK people that ECHR withdrawal would not set in motion the abuse of minority rights. A return to responsible politics should be enough for that. It wholly ignores the options of ensuring that political processes are structured to bolster the tradition of "legislated rights".

The major risk of a proposal for a British Bill of Rights is, of course, that it would replace European human rights law, which threatens the common law constitutional tradition, with UK human rights law, which may pose a similar threat to the rule of law, democratic policy making, and respect for the impartiality of the judiciary. Much would turn, of course, on exactly how any legislative replacement of the HRA was framed; and it is possible to imagine better and worse successor legislation. Still, we argue that it is a mistake for any programme of reform to presuppose that ECHR withdrawal would require the enactment of a Bill of Rights, without which the public would fear for their rights.

None of this is to say that Parliament should not make careful provision for the consequences of ECHR withdrawal or for the repeal of the HRA. On the contrary, Parliament should take care to retain any particular proposition of European human rights law that it thinks is well made, putting it in a form that is fit for the rule of law (in contrast to the Strasbourg Court's case law) and making it possible for successive Parliaments to reflect openly on its merits and to adapt, modify or remove it if circumstances make that necessary. Likewise, any repeal or modification of the HRA will obviously require careful transitional provisions to be enacted, which would give certainty and the necessary amount of continuity in the aftermath of its repeal or amendment. This is a technical challenge but a perfectly manageable one. The comparison to Brexit is easily made, but it seems to us that legislating in connection with ECHR withdrawal would be significantly less complex.

Conclusion

If a programme of reform is to be effective and to warrant support, it must be grounded firmly on a principled understanding of both constitutional government and human rights. The uncertainty of aim and inconstancy of method that characterised the 2010-2024 period should not be repeated. In developing a future programme of reform, the pivotal question should be what changes to the law, domestic or international, and to political practice are needed to restore the common law constitutional tradition and the provision that it makes for parliamentary democracy, effective government and the rule of law – each of which is called into question by modern human rights law.

An intelligent future programme of reform must be anchored in a clear-sighted appreciation of the detail of European human rights law and its domestic reception, noting the instability and incoherence of much human rights law, as well as its range and practical impact on law and government.

The case for reform has to consider whether and in what ways in which the Government and Parliament could more easily shoulder its responsibility for governing despite human rights litigation – and the ways in which doing that is routinely frustrated or distorted by such litigation. If it seems unlikely that successive governments and Parliaments will be able to govern well subject to the existing legal regime, then reform is justified, indeed essential. For the reasons we have set out in this paper, and in other work, the existing regime does misdirect and hamstring effective, responsible government. So, far-reaching reform is needed.

It seems clear that reform confined to Government practice or domestic law, or both, though they will both be essential components of any reform, will not be enough to satisfy the need for reform. The shape, though, of what is most desirable at the domestic level needs to lead the approach to what should be accepted at the international level, rather than, as hitherto, vice versa.

The two most significant options for reform at the international level are (a) ECHR reform to restore the limits of the Strasbourg Court's jurisdiction and to minimise the risk of its abuse, and (b) ECHR withdrawal. It is obvious that the case for ECHR withdrawal may turn in part on scepticism about the prospects of success for treaty reform, but equally it may be that there needs to be an attempt at treaty reform before it is going to be possible responsibly to arrive at – or politically to defend – the conclusion that withdrawal is necessary. Treaty reform should be driven by the need to produce the necessary real change to the situation at the domestic

level. If or when a future government attempts ECHR reform, ministers must avoid past failures, not settling for vague assurances about restraint but working very closely with diplomats, government lawyers and their counterparts in other member states to secure detailed treaty changes. They must be constantly alert to the risk that negotiations may simply waste time and political capital.

There is a strong principled case for ECHR withdrawal, which any future government should defend in forthright terms, even if it is at first attempting to secure treaty reform. Indeed, the need to articulate this principled case may be imperative in this context, because this will help to highlight the changes that meaningful treaty reform should help to secure and will make clear to other member states, and the relevant European bureaucracies, that the UK is not afraid to leave if the ECHR regime proves impossible to reform.

The strong practical case for ECHR withdrawal is that, when compared carefully with a policy either of principled defiance or of seeking ECHR reform, it is the course of action that is most likely to make it politically possible and justifiable to do at the domestic level what is needed adequately to repair the damage to our constitutional arrangements that European human rights law has brought about and to make it possible for an effective policy response to some of the many problems that beset our society, a response that human rights law otherwise frustrates.

That said, the merits of any programme for human rights reform that embraces ECHR withdrawal will turn in part on the extent to which it has answers for the various objections that are likely to be made against it, including the argument from the Belfast Agreement and the real or imagined foreign policy drawbacks of withdrawal. These objections are all answerable, as we say, but a responsible programme of reform will carefully and patiently show that each has an answer.

If the UK leaves the ECHR, Parliament should not replace the HRA with a British Bill of Rights, which would risk reproducing, or even worsening, many of the drawbacks of the present regime. That is a solution that derives from letting the international dimension drive domestic reform. Even if the UK were to remain within the ECHR, Parliament would need to consider radical reform to the system established by the HRA (whether by repealing it entirely or by completely modifying the way it works) as well as addressing the way the change it has wrought are capable of having a continuing adverse impact after repeal. As things stand, the structure and detail of the HRA are incompatible with achieving what should be the objectives of reform.

As part of this, Parliament will need, whether or not the UK withdraws from the ECHR, to enact legislation clarifying the level of deference to be afforded by the courts to legislative and administrative decision-making and also clarifying the principles of statutory interpretation in relation to international obligations that should be adopted under the reformed system.

We support far-reaching human rights law reform and take the view

that constitutional principle and the realities of government require a new dispensation. We thus welcome the newfound attention on these matters at the highest levels of public life. This paper has set out some of the key considerations that anyone thinking about human rights law reform ought to consider. In future papers, we will attend in close detail to further points that arise, aiming to help enrich the public conversation.

£10.00
ISBN: 978-1-917201-67-4

Policy Exchange
1 Old Queen Street
Westminster
London SW1H 9JA

www.policyexchange.org.uk