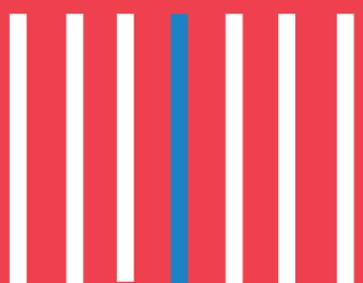


Fighting for freedom?

The historic and future relationship between conservatism and human rights

Sir Michael Tugendhat



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About the author

Sir Michael Tugendhat

Sir Michael Tugendhat was a Judge of the High Court of England and Wales from 2003 to 2014 after thirty-three years as a barrister. From 2010 to 2014 he was the Judge in charge of cases involving freedom of expression and privacy, giving many judgments on these and other human rights claims. He is a Bencher of the Inner Temple, a member of the Executive Board of JUSTICE, and Emeritus Professor of Law at the University of Leicester.

He obtained a BA at Cambridge in Classics and Philosophy, and held a Henry Fellowship at Yale University. He is the author, or co-author of several books and other publications. These include *The Law of Privacy and Media* (Oxford University Press 1st edn 2002), now Dr Nicole Moreham and Sir Mark Warby (eds) *Tugendhat and Christie: The Law of Privacy and Media* (3rd edn OUP 2016); *Consulting Editor to Professor Janet Ulph, Commercial Fraud Civil Liability, Human Rights and Money Laundering* (Oxford University Press 2006); *Consulting Editor to the authors Professor Janet Ulph and Ian Smith The Illicit Trade in Art and Antiquities* (2012 Hart Publishing). His latest book is *Liberty Intact: Human Rights in English Law* (OUP 2017).

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The views in this report are my own and do not necessarily reflect the views of Bright Blue.

Sources and Abbreviations

The UK statutes currently in force are available online at <http://www.legislation.gov.uk/>

The decisions of UK courts are available online at British and Irish Legal Information Institute www.bailii.org.

The Neutral Citation Numbers attributed to each case report - for example, [2013] UKSC 63 - have these meanings:

- UKSC = United Kingdom Supreme Court
- UKHL = United Kingdom House of Lords
- EWCA = England and Wales Court of Appeal
- EWHC = England and Wales High Court.

The decisions of the European Court of Human Rights are available online at <http://hudoc.echr.coe.int/eng>.

Executive Summary

This report explores the development and importance of human rights in England. In particular, it examines the historical and philosophical relationship between conservatism and human rights. Since the current Conservative Government has committed to reviewing the United Kingdom's human rights legal framework after Brexit, this report outlines and assesses different options for reform of human rights.

The report identifies three main options for reforming the UK's human rights legal framework:

1. The UK repeals the Human Rights Act 1998 (HRA), withdraws from the European Convention on Human Rights (ECHR), and adopts a British Bill of Rights and Responsibilities (BBRR)
2. The UK repeals the HRA but does not withdraw from the ECHR, and adopts a BBRR
3. The UK does not pursue the proposal: it does not repeal the HRA and does not withdraw from the ECHR

This report is an argument for the third option: against embarking upon any major legislative reform of the UK's human rights framework, and against withdrawal from the ECHR.

To build the case for this argument, the report is structured as

follows: first, it explores the meaning and history of human rights in England (Chapter Two); second, it examines and exposes the deep philosophical and historical relationship between conservatism and human rights (Chapter Three); third, it considers, and rejects, the main arguments advanced by conservative critics of the HRA (Chapter Four); and, finally, it argues why repealing the HRA and withdrawing from the ECHR would be wrong but, on the assumption that there might, nevertheless, be major legislative reform, it does consider what might be in a BBRR (Chapter Five).

The meaning and history of human rights

The report sets out, in Chapter Two, the meaning and history of human rights in England. This report does not include a detailed consideration of the protection of human rights under the law of the European Union (EU), through the EU Charter of Fundamental Rights, nor under the devolution statutes applicable only to Northern Ireland, Scotland and Wales.

‘Human rights’ was a term that came into use from about the late eighteenth century in England, generally as a synonym for older expressions, such as ‘natural rights’, ‘the rights of mankind’, and ‘liberties’. For the purposes of the report, the definition of ‘human rights’ is taken from the 1948 Universal Declaration of Human Rights (UDHR). They are “a common standard of achievement for all peoples”, which are “the foundation of freedom, justice and peace in the world”. They are principles morally binding upon “every individual and every organ of society”.

Human rights can, and should also, be made legally binding, both under international law in the form of treaties or Conventions, and in national laws, both in Bills (or Declarations) of Rights and ordinary laws.

Human rights can be legally binding in three ways:

- under international law, by treaties such as the ECHR;

- under national constitutions;
- under ordinary national laws.

In England and Wales, human rights were legally binding under ordinary national laws, namely the common law (deriving from the judiciary) and statute law (deriving from the legislature), until the twentieth century. They were then also made binding under international law, in the form of treaties such as the ECHR.

Democracy in the UK is based on two pillars of the constitution: the rule of law (the judiciary) and the supremacy of parliament (the legislature). The rule of law includes the protection of human rights. The rule of law – and human rights – can be traced to Magna Carta 1215, where the liberties, or human rights, recognised included the rights to life, security, physical liberty, property and access to justice, and was developed in the common law by judges thereafter – for example, the remedy of *Habeas corpus*.

The supremacy of parliament over the common law dates from later in the thirteenth century, when parliament developed into a legislature. Since then the king or queen in parliament has enacted statutes which make or change the law.

This development of the common law has been confirmed and enlarged by famous statutes. The recognition of human rights was in many instances associated with the successful rebellions in which rebels invoked human rights to justify their actions. Examples are the rebellions by the Barons against King John in 1215, by parliamentarians against the absolutist Stuart kings in the civil wars in the seventeenth century, by the settlers in the thirteen American colonies in 1776 against George III, and by the Irish in 1922.

But it is important to note that famous statutes such as Magna Carta, the Bill of Rights Act 1689, and the HRA, are not the origin of human rights in England and Wales. They are laws which give legal force to human rights. In most cases they give an extra layer of protection,

additional to the common law and to pre-existing statutes. Such statutes were also enacted to forestall future derogations from rights which were already guaranteed by law.

Judges have developed principles, or rules, which they apply when interpreting statutes to protect human rights. For example, while respecting the supremacy of parliament, judges presume that parliament does not intend a statute to derogate from human rights, unless the words of the statute are clear. This is called 'the principle of legality'.

Judges continue today to develop both the common law, and these principles of interpretation of statutes. Parliament continues to require the judges to keep the common law up to date. Parliament also legislates to change the common law. It does this when the judges have developed the common law in a manner disapproved by parliament, or when they have failed to develop it to meet contemporary needs or standards of justice.

Ultimately, the tension between these two essential pillars of the UK Constitution – the rule of law and the supremacy of parliament – is resolved by parliament voluntarily accepting the restraint of the rule of law and the authority of the judiciary.

The European Convention on Human Rights (ECHR) and Human Rights Act (HRA)

The UK, and other victorious allies in World War Two, signed an international treaty - the ECHR - in 1950. This was not to reform their own laws. It was to secure the future protection of human rights, not only to their own peoples, but also to the peoples in the many European states whose peoples did not enjoy such protection. One of the principal draftsmen of the ECHR was Sir David Maxwell-Fyfe, who from 1954, as Lord Kilmuir, became Lord Chancellor in the Conservative Government.

The ECHR was unique in international law, in giving to individuals (and not just to other state parties) the right to bring a case before a

court – the European Court of Human Rights (ECtHR) – to complain of acts of their own government.

The human rights guaranteed by the ECHR and its Protocols were (with the exception of the rights to education and not to be subject to the death penalty) all recognised to some extent in the law of English and Wales in the sixteenth century, albeit often suspended by parliament, or otherwise poorly enforced. The Articles of the ECHR and its Protocols include the rights:

- to life (Article 2);
- to be free from torture or inhuman or degrading treatment or punishment (Article 3);
- to be free from slavery and forced labour (Article 4);
- to liberty and security of person (Article 5);
- to a fair trial (Article 6);
- to be free from retrospective criminal laws (Article 7);
- to respect for private and family life, home, and correspondence (Article 8);
- to freedom of thought, conscience, and religion (Article 9);
- to freedom of expression (Article 10);
- to freedom of peaceful assembly and freedom of association, including to join a trade union (Article 11);
- to marry and to found a family (Article 12);
- to be free from discrimination (equality) in the enjoyment of these specified rights and freedoms (Article 14);
- to protection of property (First Protocol Article 1);
- to education (First Protocol Article 2);
- to free elections to ensure the free expression of the opinion of the people in the choice of the legislature (First Protocol Article 3);
- not to be subject to the death penalty (Thirteenth Protocol Article 1)

Although the ECHR bound the UK under international law, it did

not at first become a part of UK law. So individuals could not enforce their rights under the ECHR in UK courts in those cases where they claimed that the ECHR right was more favourable to them than the rights under UK common law or statute law. This changed with the introduction of the HRA in 1998.

The HRA did not displace the principle of the supremacy of parliament. It left parliament free to legislate in breach of human rights. But in practice, since the HRA, parliament has almost always sought to make new laws, or to reform existing laws, so as to conform to the rights guaranteed in the ECHR.

The HRA has also had the effect of stimulating the judges to develop the common law to conform to those rights, including developing the rights of freedom of expression and privacy. Indeed, there are other rights recognised by the law of England and Wales which are not, or not fully, guaranteed by the ECHR or the HRA. Examples are the general right of equality under the Equality Act 2010, and the rights to open justice and to trial by jury in serious criminal cases.

The way in which the law has developed, and in which the HRA was enacted, means that if the HRA were repealed, the UK's existing protection of human rights by the common law and by other statutes would remain in place. It is just the important extra layer of protection given by the HRA that would be removed. It follows that, if there were to be a BBRR, it would not decrease the existing protection for human rights given by the common law and other statutes, unless it included clear words to do that.

The relationship between conservatism and human rights

The philosophical and historical relationship between conservatism and human rights is examined in detail in Chapter Three.

Sir William Blackstone is one of the earliest Conservative thinkers. In his 1765 *Commentaries on the Laws of England*, he sought to demonstrate how English law was consistent with the legal protection of natural (or human) rights. Almost all the rights set out in the American

and French Bills or Declarations of Rights drafted in the period 1776 to 1789 are to be found in the contemporaneous law of England as Blackstone explained it.

Edmund Burke MP – one of the greatest conservative thinkers – argued for the human rights of the rebellious British settlers in America, of the people of Ireland suffering the discrimination on grounds of their Catholic religion, and of the people of India against the interference with their property and political liberty by the East India Company.

The Conservative Prime Minister, Benjamin Disraeli, wrote that “Toryism will...bring back...liberty to the Subject”, and under his Government parliament enacted numerous statutes increasing the protection of human rights, both political rights (extending the franchise) and social and economic rights.

Subsequent Conservative Governments have given political rights to the peoples of the British Overseas Territories, and to women.

Between the two World Wars, Conservative Governments introduced measures giving effect to social and economic rights, in particular providing for workmen’s compensation for injuries, national health insurance, and provisions for widows and orphans. Conservative Governments ratified the early international human rights conventions, including the International Labour Organisation Conventions, on the employment of women and children in 1920, and on forced labour in 1931.

During World War Two, Conservatives Sir Winston Churchill and Lord Halifax, as Prime Minister and as Foreign Secretary, made the enthronement of human rights a British war aim. In 1946, Churchill famously spoke in Missouri in the United States of the need for the British and American peoples to never cease to proclaim the rights of man, which, through Magna Carta, the Bill of Rights, *Habeas corpus*, trial by jury, and the common law find their most famous expression in the American Declaration of Independence. The founding of the United Nations Organisation, the UDHR and the ECHR marked the

achievement of this British war aim.

In 1953, the Conservative Government extended the ECHR to virtually all the British Overseas Territories. From 1959 up to the handover of Hong Kong in 1997, they entrenched human rights in their pre-independence or handover constitutions. Under Conservative Governments the UK ratified the major human rights treaties, including those on refugees in 1954, against all forms of discrimination against women in 1986, and against torture in 1988.

In the same period, in response to the threat of socialism and the growing power of the state under Labour Governments, Conservatives extended the rule of law to the making of decisions both by Ministers and by tribunals, when they were administering their new powers to regulate the lives of the people and to deliver new welfare and other benefits to the people.

The conservative case for a Bill of Rights

For most of the twentieth century the judges did little to ensure that government was conducted in accordance with the rule of law. The law itself often provided no remedy for the infringement of human rights. For example, the law provided no remedy for the interference with property rights when Labour Governments nationalised whole industries, using, or abusing, parliamentary supremacy.

By the 1970s the judges resumed their responsibility for judicial review. But the pace of development of the common law was slow. In 1968 Quintin Hogg MP, the future Conservative Lord Chancellor, became the first person to propose that there be a new Bill of Rights incorporating the ECHR into UK law, which would later be realised through the introduction of the HRA by a Labour Government in 1998.

From the late 1970s, the ECtHR made a number of decisions condemning the UK for failure adequately to protect ECHR rights. In many cases these rights were also common law rights, including freedom of expression, access to justice, privacy from government or police surveillance, and equality or non-discrimination. It was in

part for this reason that Quintin Hogg's proposal for incorporating the ECHR into UK law attracted support from other Conservatives, and from distinguished members of the judiciary and of other political parties. After Hogg, Conservatives and others presented Bills to parliament to incorporate the ECHR into UK law.

However, they did not attract sufficient support. It was at first feared that incorporation of the ECHR would draw the judiciary too far into politics. It was on this ground that Conservatives actually opposed Labour's Bill that became the HRA in 1998. Since then, Conservatives have remained sceptical, but for different reasons, explained in Chapter Four.

This paper argues that Conservatives should not be sceptical. The constitution has, for centuries, given legal protection to the rule of law and human rights. It follows that the Conservatives, as the Party that defends the existing order, should be the political party most concerned with human rights.

Human rights today

Chapter Four considers, and rejects, the main arguments advanced by Conservative critics of the HRA.

The seven main criticisms of the HRA by conservatives are:

- Foreign judges telling the UK what to do
- A higher body of law than UK law
- Mission creep and judicial activism of European judges
- Undermining UK courts
- Undermining UK Parliament
- Prisoners' right to vote
- Undermining British security

First, on foreign judges telling the UK what to do: overall, the ECtHR has found against the UK less often than against other comparable member-states of the ECHR. In recent years, the ECtHR has given

very few judgments against the UK, and even fewer controversial ones. Most of the cases decided against the UK in the past either attracted little attention, or were greatly welcomed. Examples are in the fields of freedom of expression, surveillance and non-discrimination.

Second, on a higher body of law than UK law: the idea of a higher body of law enforced by a court can be found in the British tradition, albeit it was not in the constitution of the UK itself before the ECHR. It was the model adopted in 1789 by the formerly British settlers, when they formed the United States of America, and it was what Conservative Governments imposed upon British Overseas Territories, including Hong Kong, in the period 1959 to 1997. It is the model introduced into the devolution statutes since 1998. These incorporate the ECHR, but do not recognise any supremacy in the devolved assemblies.

Third, on mission creep and judicial activism of European judges: judicial activism is not a fault. It is essential if they are to fulfil their constitutional function of keeping the common law up to date. The ECtHR adopts the 'living instrument' doctrine: namely, interpreting the words of the ECHR in their contemporary sense, rather in the sense in which the original framers of 1950 might have intended. Indeed, if judges had not been as activist as they were in the sixteenth to eighteenth centuries, we would not have the common law protection of human rights which was the source for the ECHR.

This 'living instrument' principle has long been used by the Judicial Committee of the UK Privy Council in interpreting statutes of the British Overseas Territories. And it is the only possible principle to adopt in interpreting many precedents of the common law (since there is no one foundational document setting out the common law).

The fact that UK judges were perceived to be too cautious in adopting this 'living instrument' principle for most of the twentieth century was a factor leading to the demand for the HRA. In enacting the HRA, parliament knew, and approved, of the ECtHR adopting that principle of interpretation. The HRA has authorised judges to be more activist

(or less bound by old precedents) than the pre-HRA law was thought to permit, but it is a matter of degree, not a radical change.

Fourth, on undermining UK courts: UK courts have always taken into account judgments of foreign courts. They took into account the judgments of the ECtHR for at least twenty years before the HRA. The HRA s2 only requires that UK courts take account judgments of the ECtHR. It permits UK courts not to follow those judgments.

UK courts usually do follow ECtHR decisions, but the main reason why they do so is not the HRA. They may agree with ECtHR. But even if they do not agree, they follow the ECtHR because it is desirable that a treaty should be interpreted to mean the same thing in each of the states-party. UK courts also, and increasingly, endeavour to keep UK law in line with all the other human rights treaties to which the UK has become party. The ECtHR does likewise. These other treaties often include provisions which mirror, or are more rigorous than the ECHR, and would remain binding on the UK, whether or not the UK were to withdraw from the ECHR.

Fifth, on undermining UK Parliament: no human rights treaty undermines the UK parliament. The rule of law is a pillar of the UK constitution. It is only reconcilable with the other pillar, the supremacy of parliament, if parliament voluntarily exercises restraint in its own legislative activity, to the extent necessary to ensure the rule of law. This was the case before the HRA, but it is strengthened by the HRA s19. This requires ministers to make a formal statement to parliament that a Bill being presented is (or is not) compatible with the ECHR. It cannot undermine parliament if the judges interpret as compatible with the ECHR a Bill which a Minister has certified as compatible.

Sixth, on prisoners' right to vote: in 2005, the ECtHR held that the UK Representation of the People Act 1983 is incompatible with the ECHR in disqualifying all serving prisoners from voting. This is the one decision of the ECtHR which a Prime Minister, and others, have stated will not be complied with by the UK.

The ECtHR's decision is highly controversial, and many think it was wrongly decided. But even if it was, the question is whether all, or only some, serving prisoners should be disqualified from voting. This question is not fundamental to UK law. Disagreement with the ECtHR on this does not justify the UK in interpreting the ECHR to mean something different in the UK from what it has been interpreted to mean by the ECtHR. The few controversial decisions against the UK are to be compared with the many others which were not controversial, or were positively welcomed.

Seventh, on undermining British security: human rights do not undermine British security. Security (of all individuals) is itself a human right which Governments are bound to guarantee (both at common law and under ECHR Article 5). The rights to security, to a fair trial, including the presumption of innocence, and not to be tortured (ECHR Articles 5, 6 and 3), are amongst the human rights long guaranteed by the common law of England and Wales. Torture and unfair trials may increase the numbers of people convicted of crimes, but such convictions may not add to the security of anyone. On the contrary, if the person convicted is in fact innocent, that miscarriage of justice may create a grave danger to the public, at least in cases of serious crime, such as terrorism. It may mean that the real culprit will remain at large, free to offend again, and that the police will not be looking for them.

Moreover, the inability of the Home Secretary to deport foreigners suspected of being a danger to the public is, in many cases, not attributable to the ECHR or the HRA, but to other treaties, notably the Convention against Torture. Since 1950, the UK has become a party to other treaties, including the Convention against Torture. Withdrawal from the ECHR would not release the UK from the obligations in those treaties which are the same as the obligations in the ECHR. In fact, the Immigration Act 2014 has given guidance to the courts as to where the public interest lies in deportation and immigration cases, and is being enforced by the courts.

The UK's future human rights framework

Chapter Five argues that repealing the HRA and withdrawing from the ECHR would be wrong. On the assumption that there might, nevertheless, be major legislative reform, the report considers what might be in a BBRR.

Consideration has been given to alternatives to the UK's current human rights legal framework by people of all parties and of the greatest experience. In 2011, the Coalition Government announced the establishment of a Commission on a Bill of Rights, which reported in 2012. There was – and still continues to be – little agreement on what could be in a BBRR.

If the UK were to withdraw from the ECHR and introduce a new BBRR (option one of this report), the contribution to ECHR law made by the UK judges would be greatly missed, apart from any other consequences for UK foreign policy.

The weaker protection of UK national law would persist. As a result, Governments might feel less restrained to respect the rule of law (as was the case before the HRA). The purpose of incorporating the ECHR into UK law is to add a layer of protection to human rights, additional to that of the ordinary law. In most countries that is done by a codified constitution, which requires more than a simple majority of the legislature if it is to be amended. In the UK there is no such codified constitution. The additional protection afforded by the ECHR derives from the fact that it is a treaty binding in international law, and enforced by a special court set up for that purpose. If those features are rejected, it is not easy to see what a new BBRR would add to the ordinary law, nor how it would restrain a parliament which was minded to undermine the rule of law.

One body of opinion is that any substitute for the HRA should be 'HRA-plus', in other words, that we should have a BBRR while remaining a signatory of the ECHR (option two of this report). The 'plus' would be some modernisation of language, and the additions to (or extensions

of) ECHR rights which have been recognised by the common law and UK statute law, but which were not included in the HRA or any of its Protocols. This could include, as a starting point, what a cross-party committee of distinguished experts on the British constitution set up by JUSTICE in 2007 recommended:

- Reducing current limitations in the ECHR to reflect modern values
- Simplifying limitation clauses in the ECHR to emphasise a culture of rights and doctrine of proportionality
- Updating rights to reflect social and moral attitudes on issues such as sexual orientation, technological advances in areas such as surveillance, together with the growing awareness of environmental issues
- Guaranteeing traditional and common law rights such as access to justice, trial by jury and good administration.
- Protecting certain economic, social and cultural rights, for example a right to free health care which is found in comparative bills of rights.
- Rights contained in international and overseas domestic bills of rights, such as the rights to a clean environment and children's rights.

But the report concludes that a BBRR is unnecessary: the rights in the ECHR and the HRA are expressed in general terms, which were intended to leave states with the means to implement widely differing laws. All but two of the HRA rights are qualified by responsibilities (the two exceptions are the absolute prohibitions on torture and the death penalty). All qualified rights can be exercised only in a manner consistent with the rights of others and other specified public interests. It is for parliament and the courts to give specific meaning to the general terms in which rights and their qualifications are set out in the ECHR. Parliament and the courts do this in ordinary statutes and by

the common law.

Also, a BBRR could be dangerous. Many Conservatives may oppose the inclusion in a BBRR of economic, social and cultural rights. This is not because Conservatives are opposed to such rights in principle. Rather, the objection is more that these rights ought not to be justiciable through the courts, but should rather serve as guidance to the UK parliament.

If the BBRR is to reflect the values of the whole of society, it would not be wise for Conservatives to embark upon the project of a BBRR, when they disagree with the views of what may be a large proportion of the population, and when they may not be able to control the outcome of the process which they set in motion.

In conclusion, therefore, this paper proposes the third option: that the UK does not repeal the HRA and remains a signatory to the ECHR. However, this does not mean nothing can be done to strengthen human rights in the UK.

Most rights expressed in the ECHR are subject to limitations. In addition to clarifying responsibilities with ordinary legislation, the UK Government can seek agreement with the governments of the other state parties to the ECHR as to possible reforms, as it has in the past. Such agreements can be incorporated into a formal Protocol to the ECHR, of which there are already 16. Further, the judges, both in the ECtHR and the UK, may themselves be more cautious in their decisions, taking note of the criticisms that have been made of them.

There is no stand-off between the judges on the one hand and the UK parliament on the other hand. There is a division of opinion amongst judges themselves, and many of the important decisions have been made by a majority of judges, and criticised by the minority in dissenting opinions.

The protection of human rights is the joint responsibility of all those who exercise the powers of the state, and of the people themselves. It follows that members of the government, of parliament, the judiciary,

and public authorities generally, should each exercise their powers with restraint and with respect for the powers of the others.

Chapter 1: Introduction

In 1950 the UK became the first of the victorious allies of World War Two to sign the European Convention on Human Rights (ECHR). Sir Winston Churchill was not then Prime Minister, but the ECHR, together with the establishment of the United Nations (UN), represented the achievement of a war aim that he had proclaimed: the enthronement of human rights in a new world order.

The ECHR largely reflects the principles recognised in the United Kingdom in both the common law¹, and statute law, as those laws had developed over the previous eight centuries. The ECHR is European, not because it brought European rights to the UK, but because it took rights recognised in the UK to European countries, which had either temporarily lost their freedom to tyrannies, or who had never enjoyed democratic freedom at all. By the Human Rights Act 1998 (HRA), the ECHR became enforceable directly in the UK courts with effect from October 2000. Before that individuals seeking to enforce it had to apply to the European Court of Human Rights (ECtHR) in Strasbourg, France.

The principles in the ECHR have never been called into question by the Conservative Party, and they are not called into question now.

1. All references to the common law are references to the law of England and Wales. The laws of Scotland and Northern Ireland are not included solely because the author is not qualified in those two UK jurisdictions. Subject to the effect of the devolution statutes, the laws of Scotland, Wales and Northern Ireland are believed to be the same, so far as material, as the law of England.

On the contrary, Conservative Governments extended the application of these principles to most of the British Overseas Territories before independence, including, most recently, to Hong Kong, before that territory was handed over to China in 1997.

It was in the eighteenth and nineteenth centuries that the Conservative Party emerged. As David Willetts MP recently wrote,² there are two principles at the heart of conservatism. First there is personal freedom. But Conservatives have never settled for classical liberalism. The second principle is harder to pin down. David Willetts suggested it be called belonging, or responsibility. This principle does not regard government as a necessary evil. He wrote: “Burke, Disraeli, Salisbury, Baldwin, Churchill and even Margaret Thatcher would have thought it mad to assume that government is evil. We must limit government”.

The idea of limited government - that is, government limited by the rule of law and human rights - has a long history in England. It appeared in embryo in Magna Carta 1215, and has developed amongst English-speaking peoples ever since. The rule of law, and human rights, are the principles of the UK constitution which limit the powers of all the arms of the state. These rights limit the powers of the government, the legislature and the judiciary - and, indeed, the powers of the police and all other public authorities.

Conservatives have always supported the idea of limited government. Despite this, something has gone wrong. In the period after the HRA came into force, many conservatives became concerned that it had not established the limits to government in the right place. They thought judges in both the ECtHR and the UK courts were exceeding the proper limits of judicial law-making, and encroaching upon the proper sphere of parliament (strengthened, as parliament is, by a regular mandate from the electorate).

2. David Willetts, “Beyond Bare Earth Conservatism” in Ryan Shorthouse and Guy Stagg (eds.) *Tory Modernisation 2.0* (London: Bright Blue, 2013), 26-35.

Conservative proposals for reform

The upshot of this scepticism has been an ongoing promise by the Conservatives, specified in their 2010, 2015 and 2017 general elections manifestos, to replace and repeal the HRA, although the latest manifesto does say this will only be done after the process of Brexit is complete.

Under the previous Prime Minister, the Rt Hon David Cameron, it seemed that repealing the HRA would be done alongside remaining a signatory of the ECHR, through the introduction of a new British Bill of Rights and Responsibilities (BBRR). In a speech in 2006,³ David Cameron accepted the arguments against the UK withdrawing from the ECHR. He did not advocate simply repealing the HRA, but the enactment of a BBRR to reset the limits of judicial law-making power. He recognised the difficulties in drafting such a law, but he expected a draft Bill to be produced.

In 2011, the Coalition Government announced the establishment of a Commission on a Bill of Rights, which reported in 2012. The Commission on a Bill of Rights included members from all the major political parties, including members with significant experience and expertise. There were no agreed conclusions as to the content of a BBRR, nor of how to achieve one, demonstrating the difficulties associated with this plan of action. Two Conservative members of the Commission, Lord Faulks QC and Jonathan Fisher QC, wrote a dissenting report, in which they contemplated withdrawal from the ECHR.⁴

The current Prime Minister – the Rt Hon Theresa May MP – has

3. David Cameron, “Balancing freedom and security – A modern British Bill of Rights”, *Speech to the Centre for Policy Studies*, 26 June, 2006, <http://conservative-speeches.sayit.mysociety.org/speech/600031>.

4. The Report of the Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (London: 2012), 189. Jonathan Fisher QC later made clear that he did not argue for withdrawal from the ECHR, nor for reducing the protection afforded by human rights: Jonathan Fisher QC, *Rescuing Human Rights*, (London: The Henry Jackson Society, 2012), 56-73. Lord Faulks does advocate withdrawal: Edward Faulks, “May must seize chance to repeal Human Rights Act”, *The Times*, 28 April, 2017, <https://www.thetimes.co.uk/article/may-must-seize-chance-to-repeal-human-rights-act-pbvlx57>.

been a vocal critic of the ECHR, arguing that the UK should withdraw from it.⁵ In the recent government white paper, *Legislating for the UK's withdrawal from the European Union*, the Government gave an assurance that there were no plans to withdraw from the ECHR during the Brexit negotiations.⁶ The 2017 Conservative election manifesto does commit the UK to remaining a signatory of the ECHR throughout the next parliament, but it states that the Conservatives will “consider our human rights legal framework when the process of leaving the EU concludes”.

This report, therefore, examines the UK's human rights legal framework and three options for reform in the next parliament. These can be summarised as follows:

1. The UK repeals the HRA, withdraws from the ECHR, and adopts a BBRR
2. The UK repeals the HRA but does not withdraw from the ECHR, and adopts a BBRR
3. The UK does not pursue the proposal: it does not repeal the HRA and does not withdraw from the ECHR.

This report argues that the first and second proposals should not be pursued. In particular, as Bright Blue has been campaigning for, it argues that the UK should not withdraw from the ECHR after Brexit.

A practical problem is that the ECHR rights have been entrenched in the devolution statutes, independently of, and more strongly than under, the HRA.⁷ In 2016, the House of Lords European Union Committee

5. Theresa May, *Speech on Brexit*, 25 April, 2016, <https://www.conservativehome.com/parliament/2016/04/theresa-mays-speech-on-brexit-full-text.html>.

6. Department for Exiting the European Union, “Legislating for the United Kingdom's withdrawal from the European Union” (2017), 18, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf.

7. Northern Ireland Act, 1998, s6, 24, 81 and 83, Scotland Act 1998, ss29 and 57, Scotland Act 2016, s2, and Government of Wales Act 2006, ss81, 108 and 158.

published its report *The UK, the EU and a British Bill of Rights*.⁸ This included consideration of the likely impact of a BBRR upon devolution settlements in Northern Ireland, Scotland and Wales. It concluded that protection of ECHR rights in Northern Ireland, Scotland and Wales was stronger than in England because acts of the devolved legislatures can be quashed by the courts for non-compliance with the ECHR. It also concluded that the difficulties that the Government would face in implementing a BBRR in the devolved nations would be substantial, and that the possible constitutional disruption to the UK involving the devolved administrations should weigh against proceeding with a BBRR.⁹

There could, of course, be a BBRR while the UK remains a signatory of the ECHR. But if there were, it follows that it may well be what has been called ‘HRA-plus’. In other words, it would include all the ECHR rights, together with other rights which have been recognised by UK law such as trial by jury for serious crimes. Certainly, the ECHR was never a complete statement of rights recognised by UK law. And some rights are also binding on the UK in the form of other international treaties entered into since 1950, such as the rights of the child and rights in relation to torture.

But this paper rejects this approach. Keeping the HRA and remaining a signatory of the ECHR does not mean, however, that nothing can be reformed in the UK’s human rights legal framework.

Essentially, it is already true today, and has always been true, that parliament is the ultimate source of legal authority in the UK. But by choosing to make the UK party to a treaty (the ECHR), parliament may voluntarily limit its ultimate legal authority. It may follow that the only way in which parliament may subsequently exercise that ultimate legal authority is by withdrawing from the treaty – which is what parliament

8. House of Lords European Union Committee, “The UK, the EU and a British Bill of Rights” (2016), <https://publications.parliament.uk/pa/ld201516/ldselect/lducom/139/139.pdf>.

9. *Ibid.*, 47–48.

has chosen to do with the EU treaties.

Parliament is supreme. But the supremacy of parliament has never been the only pillar of the UK constitution. The rule of law is another pillar. Parliament voluntarily limits the exercise of its powers to preserve the rule of law. The ECHR and the HRA express that limitation in formal terms. But they are the result of voluntary decisions of parliament.

The European Union and human rights

Human rights are protected in the whole of the UK, not only by the ECHR and the HRA, but also, since 2009 (and for so long as the UK remains a member of the European Union), by the Charter of Fundamental Rights of the European Union (the EU Charter).

The EU Charter is part of EU law, and is authoritatively interpreted by the Court of Justice of the EU in Luxembourg. The rights set out in the EU Charter are wider than those in the ECHR, in that they include economic and social rights, and because, as part of EU law, the EU Charter prevails over UK national laws in accordance with the European Communities Act 1972. But the protection of the EU Charter is narrower than the ECHR, in that its application is limited to the implementation of EU law, and individuals may not petition it directly, as they can the ECtHR.

The House of Lords European Union Committee recently concluded that, in cases in which the EU Charter applied, UK courts could give a more effective remedy than under the HRA, including to disapply a provision of a UK Act of Parliament that is inconsistent with the EU Charter, rather than a declaration of incompatibility under the HRA¹⁰. This was illustrated in July 2017 by the decision of the Supreme Court in *Walker v Innospec* to disapply a provision of the Equality Act 2010 relating to pensions of same-sex couples, because it was incompatible with EU law prohibiting discrimination on grounds of sexual orientation.

10. Ibid.

In its paper *Legislating for the UK's withdrawal from the European Union*, the Government wrote that it is its “intention that the removal of the Charter from UK law will not affect the substantive rights that individuals already benefit from in the UK”. It is not now easy to say how that intention can be realised, unless a new BBRR were to give to the courts a power to the courts to disapply a statute, which is not given by the HRA.¹¹

Nevertheless, this paper does not explore the history and importance of the EU Charter in human rights. This is largely because the Government has stated that, upon leaving the European Union, the EU Charter will no longer apply in the UK.

Structure of this report

The report is structured as follows:

- Chapter Two sets out the meaning and **history of human rights in England**.
- Chapter Three explains in detail **the philosophical and historical relationship between conservatism and human rights in the UK**.
- Chapter Four discusses where human rights in the UK are today, **outlining and critiquing the different objections to the Human Rights Act (HRA)**
- Chapter Five **considers each of the three options (set out earlier in this chapter) for reforming the UK's human rights legal framework**, concluding that repealing the HRA and withdrawing from the ECHR is neither desirable nor necessary to achieve some of the main aims which its promoters seek to achieve.

11. *Walker v Inmospec Ltd & Ors* (Rev 1) [2017] UKSC 47, paragraphs 22-76, and footnote 6 above.

Chapter 2: **The meaning and history of human rights in England**

This chapter discusses the origins and meaning of ‘human rights’, and the different means by which they are made binding in national laws and international law. It then gives a summary of their 800-year history in England, and how they were used by the judges to develop the common law, and by parliament to develop statute law. Towards the end, this chapter explains why, in 1950, the UK and other European democracies came together to produce the ECHR. It explains the effect of the incorporation of the ECHR by the HRA 1998, and lists the rights which the HRA now guarantees.

What are human rights?

The term ‘human rights’ appears to have been first used in 1780. John Cartwright, a campaigner for universal suffrage, used it to refer to liberty and equality in a speech supporting a Bill introduced into the House of Lords in 1780 by the (third) Duke of Richmond. The Bill endorsed the extension of the franchise.¹²

However, the definition of human rights for the purposes of this paper is taken from the declaratory clause of the Universal Declaration

12. John Almon, *The Remembrancer or Impartial Repository of Public Events Vol 10* (London: 1780), 327-8.

of Human Rights of 1948 (UDHR)¹³, on which the ECHR was in part based. The UDHR followed the Second World War. It was intended to stop further wars and rebellions by setting a standard, especially for the majority of the population of the world, who did not then live in democracies. The Preamble states that it was “the foundation of freedom, justice and peace in the world”.

According to the UDHR, human rights are “a common standard of achievement for all peoples”. Human rights were formerly, and sometimes still are, called by other names. These include ‘natural rights’, ‘the rights of mankind’, and ‘liberties’.

Human rights are not themselves legally binding. They are moral principles which bind, not just states, but - in the words of the same clause of the UDHR - “every individual and every organ of society”.

Human rights are the shared ideals or values of society. They are the inspiration for laws. The UDHR was agreed by almost all states in the world in 1948. The person who presided over the conference that produced the UDHR was Eleanor Roosevelt, the United States Delegate to the United Nations General Assembly from 1945 to 1952. She explained that documents such as the UDHR, which express ideals, “carry no weight unless the people know them, unless the people understand them, unless the people demand that they be lived”.¹⁴

But human rights may be made legally binding. And they must be made legally binding in a just society, governed by the rule of law (see Box 2.1 below).

Box 2.1. The rule of law

To quote Lord Bingham, the former Lord Chief Justice and Senior Law Lord, the rule of law means that “all persons and authorities within the

13. UN General Assembly, “Universal Declaration of Human Rights 1948”, <http://www.un.org/en/universal-declaration-human-rights/index.html>. The UDHR was a declaration, not a treaty, and is not legally binding.

14. Michael Tugendhat, *Liberty Intact: Human Rights in English Law* (Oxford: OUP, 2017), 208.

state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts ... [The rule of law] embrac[es] the protection of human rights within its scope”.¹⁵

A part of that definition is best known from the Fifth (and Fourteenth) Amendments to the US Constitution: “No person shall... be deprived of life, liberty, or property, without due process of law”. Those words come from a 1354 English statute ‘The Liberty of the Subject’.

The rule of law is the oldest of the two pillars of the British constitution. It can be traced back to Magna Carta 1215, when kings ruled without parliament.

Since 1928, when women were given the right to vote (political liberty), the UK has been a democracy in the modern sense. The sovereignty of the Queen in parliament became in practice the sovereignty of the people. The advent of democracy exposed judge-made common law to a new criticism, namely that it lacked the democratic legitimacy that parliament had obtained from elections (this is the meaning of references to ‘unelected judges’). Judges have no direct mandate from the people.

The answer to this criticism is that democracies require a separation of powers, so that each power in a state is limited by another. The democratically elected parliament has chosen to keep an independent judiciary. The judges continue to recognise the supremacy of parliament, which can overrule any decision a judge might make. Judges and parliament can each continue to defend liberty, but in doing so each has to accept that their powers are separate, and that, in the case of parliament, it should voluntarily limit the exercise of those powers to respect the powers of the judiciary.

Parliament has also chosen to keep the common law in place,

15. Tom Bingham, *The Rule of Law* (London: Penguin, 2010) 8, 37, 66-7.

under which judges have law-making power, subject to parliament. Parliament could have, but has not, chosen to replace the common law with statutory codes, in the manner of countries such as France and Germany, which do not have the common law.

The Supreme Court recently said, in a case concerning the common law right of access to justice: “At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade.”¹⁶

Human rights in law

Human rights can be legally binding in three ways:

- under international law, by treaties such as the ECHR;
- under national constitutions;
- under ordinary laws, including the common law and laws enacted by national legislatures.

16. UNISON, R (on the application of) v Lord Chancellor [2017] UKSC 51 para 68.

The Constitutions of most modern republics include some human rights: for example, freedom of expression in the USA (in the Federal Bill of Rights, and US state constitutions), and in Ireland (under its constitutions of 1922 and 1937).

Human rights may also be legal rights protected by ordinary national laws. In the UK, which does not have a codified constitution, all human rights are in ordinary national laws. In the USA, which does have a codified constitution, some human rights such as reputation are still protected by national laws, but not by the Constitution.

The main difference between constitutional laws and ordinary laws is that constitutions are usually in a single document which can be amended only by special procedures, which are not required for the repeal or amendment of ordinary laws. Typically, constitutional amendments require a referendum.¹⁷

In the UK the constitution is not in a single document. It is partly in the form of statutes, partly in judge-made case law, and partly in customs (also, confusingly, called conventions). In the UK, all of these can be amended or changed by the same procedure as applies to any statute or case law. Nothing more is required than a new statute passed by a simple majority vote in each House of Parliament.¹⁸

In the UK – the focus of this paper – there are two principal sources, or forms, of law, both them derived from the sovereign.

The first form of law is the common law. That is judge-made law. Its invention is attributed to King Henry II (1154-1189), acting through his judges (as the sovereign today still acts through High Court judges).

The second form of law is statute law. Statutes were originally made by the sovereign alone, in the form of ordinances or proclamations. Since parliament developed into a legislature under King Edward I (1239-1307), statutes have been made by the king or queen in parliament, as

17. For example: "Constitution of Ireland 1937" (2015), 180, http://www.taoiseach.gov.ie/eng/Historical_Information/The_Constitution/February_2015_-_Constitution_of_Ireland_.pdf.

18. Constitutional Reform Act 2005 (<http://www.legislation.gov.uk/ukpga/2005/4/contents>), which modified the office of Lord Chancellor and established the Supreme Court.

they are today.

Human rights recognised by the common law include, for example, the rights to freedom from arbitrary imprisonment (also called false imprisonment or habeas corpus) and freedom of expression (also called freedom of speech or freedom of discussion - it also encompasses freedom of the press). These, and other common-law rights, were first recognised by judges. They were subsequently confirmed or clarified in a succession of statutes, such as the Ordinance for the Justices 1346¹⁹, the Liberty of the Subject 1354, the Habeas corpus Act 1679, the Bill of Rights 1689 and the HRA. The Petition of Right 1628 confirmed earlier statutes which had prohibited taxation without the consent of parliament, and recognised other rights. Some human rights, such as the right to vote in elections and the right to an education to be provided by the state, were not recognised by the common law, but only by statutes.

Since laws started to be made by the king or queen in parliament “lawyers have never doubted the authority of the monarch in parliament to make new laws or clarify old ones, and in so doing to bind all courts, with the exception only of future parliaments”²⁰ This principle is known as the ‘supremacy’ or ‘sovereignty’ of parliament. It is the second pillar of the British constitution. The first pillar is the rule of law.

Box 2.2. Bills or declaration of rights

‘Bills of rights’ and ‘Declarations of rights’ set out human rights, but they are not the origins of human rights. Bills or Declarations of rights have usually been associated with revolutions, attempts to dethrone a monarch, and declarations of independence.

19. This required the judges “to do equal law and execution of right to all our subjects, rich and poor, without having regard to any Person”, thereby confirming equality before the law, and the requirement for judges to be impartial: 20 Ed. 3, c. 1 (1346).

20. Sir John Baker, *An Introduction to English Legal History*. 4th ed. (Oxford: OUP, 2007), 208.

There are many subsidiary forms of law, such as statutory instruments, and bye laws made by local authorities, but all subsidiary forms of law are ultimately made under the authority of parliament.

In 1215, the rebellious barons wanted King John to accept the justice of their complaints about his tyrannical rule. They demanded that he recognise the rights that they had been claiming by executing the charter which King John sealed at Runnymede (later called Magna Carta 1215).

In 1688, the Protestant majority wanted to justify their dethronement of the Catholic James II, to ensure that no monarch should in future suspend the laws as James II had done. The names 'Bill of rights' and 'Declaration of rights' derive from the document prepared by the Protestants who rebelled against the King James II in the Revolution of 1688. The Bill of Rights 1688 was "declaring the Rights and Liberties of the Subject". These were the rights which the rebels claimed that the people of England already enjoyed, but which, they said, King James II had subverted – and which William and Mary, Prince and Princess of Orange, agreed to uphold when they agreed to accept the throne from parliament. Confusingly, however, the laws which James II suspended were themselves infringements of human rights: they discriminated against anyone not a member of the established Church of England.

In 1776, the British settlers in the 13 American colonies wanted to justify their rebellion against what they claimed was the oppression of King George III and the UK Parliament. They complained that they were taxed without their consent.

Historically, the aim of a bill of rights was to complement the duties already laid down in statutory legislation and the common law: "The point was to ensure that certain human rights, that need not be 'earned' were guaranteed and protected against the state's legislative omnipotence"²¹

In France, the Declaration of Rights 1789 was advanced as a justification for the rebellion against the King. But it was both a declaration and a project to reform French law. It was to guarantee

21. JUSTICE, *A British Bill of Rights: informing the debate* (London: JUSTICE, 2007), 50.

what they called ‘the natural rights’ which, they said, had been neglected or forgotten under the monarchy.

In 1975, Sir Keith Joseph - later Secretary of State for Education and Science under Margaret Thatcher, and regarded as a pioneer of Thatcherism - explained additional functions of a Bill of Rights, which he was then advocating: “First, it would outline the division of powers, as far as possible restoring to the courts their function of the protection of the individual and corporate bodies. Second, the Bill of Rights would provide a self-imposed restraint on Parliament. It would subject Parliament to the rule of law”²²

In none of the cases outlined were the bills of rights said to reform the law: they were said to be ‘declarations’ which restated and preserved existing law. They drew on law as explained by William Blackstone - a Conservative, and, before becoming a judge, an Oxford law professor - and they were supported by prominent English politicians, including Edmund Burke.

The development of human rights in England

The origins of human rights in the law of England and Wales arose out of their primary function: to serve as a standard by which peoples judged rulers and justified rebellions. Human rights set the limit to what laws a ruler, or a majority, can, with justice, require individuals to obey.

Since ancient times it has been recognised that, if rulers acted seriously in breach of human rights, they were tyrants. The right of resistance, or self-defence, meant that it was morally justifiable to resist a tyrant, even if it was unlawful.²³ So, too, in modern times. For example, so long as British women were denied the right to vote (part of the human right to ‘political liberty’) many of them claimed the moral right to disobey

22. Sir Keith Joseph, *Freedom under the Law* (London: Conservative Political Centre, 1975), 13.

23. Tugendhat, *Liberty Intact*, 77-83.

the law.

Since human rights could be used as a moral justification for rebellions, it followed that they were also used by kings and legislatures as guidance for the framing of statutes. Similarly, judges used these rights to develop the common law. For example, activist judges in the twelfth to sixteenth centuries used the principle of liberty ('the law favours liberty') to give prisoners a remedy in damages for false imprisonment (usually after release), and, in the sixteenth century, *habeas corpus*, an effective means for people in custody to obtain prompt release from unlawful detention.²⁴

The most famous rights recognised in English common law are the individual rights to life, physical security and liberty, and property (associated with Magna Carta 1215, the Petition of Right 1628, and the Habeas corpus Act 1679), as well as the collective rights to live under a constitutional monarchy (associated with the Bill of Rights 1689). The dates of these Acts mark key moments in English history. But the moments are not key because the rights were first recognised on those dates. Those dates are key because they mark the violent crises in the history of England and Wales when the barons, parliament and the people defeated threats to those rights from absolutist kings. Magna Carta 1215 was re-issued with revisions in 1216, during a civil war and a French invasion which ended with the defeat of the French invaders in 1217; 1628 was in the lead up to the civil war in which Charles I was executed and the monarchy was replaced by Cromwell's republic, known as the Commonwealth, for the years 1649 to 1660; finally, 1688 was the occasion of the invasion by the Dutch under Prince William of Orange who expelled King James II from England without bloodshed, and from his then separate kingdoms of Ireland and Scotland with great loss of life.²⁵

24. Paul D Halliday, *Habeas corpus: From England to Empire* (Cambridge, MA: Harvard University Press, 2010).

25. Tugendhat, *Liberty Intact*, 44.

These important rights are of no value if the law provides that a ruler can kill or imprison a person or take their property as the ruler wills. Effective rights therefore require that those who are to enjoy them should have a further right: a right not just to physical liberty, but also to 'political liberty', that is to liberty in the sense of participating in, or consenting to, the making of the laws, together with a right of access to the court to enforce all these rights.

In the fourteenth and fifteenth centuries, the then kings conceded the principle, first, that no taxation should be imposed, and second, that there should be no legislation of any kind, without the consent of the House of Commons.²⁶ Property was recognised as a fundamental right, because taxation of property is an interference with property, which means that members of parliament could withhold their consent to such taxation until the king was willing to redress their grievances.

From the right to petition the king for redress of grievances (which existed, in theory, from time immemorial), there arose the early recognition (at least in principle) of another famous English common law right: the freedom of expression and of assembly.²⁷ The right to petition, after all, is worthless if petitioners risk being prosecuted for treason and sedition for exercising that right.

Trial by jury also contributed to freedom of expression. The judges invented the criminal trial by jury, to take the place of trial by ordeal or battle. They did this following the decision of the church in 1215, which forbade clergy to take part in ordeals.²⁸ A jury trial automatically guarantees some of the main requirements of a fair trial: it is in public, and the witnesses confront the accused. They also enjoy the right of free expression, because such a trial would not be possible if a defendant or the witnesses risked being sued or prosecuted for what they said in

26. Statutes then represented the terms of the king's decision on a complaint, or petition, which the Commons might present to him in the form of a Bill: Baker, *An Introduction to English Legal History*. 205-7.

27. GR Elton, *The Tudor Constitution*, 2nd ed. (Cambridge: 1982), 265-6, attributed it to the speech of Thomas More in 1523 as Speaker of the House of Commons.

28. Baker, *An Introduction to English Legal History*. 5.; Tugendhat, *Liberty Intact*, 118-9.

court.

For centuries, the right to freedom of expression has been defined mainly by judges. They have done this by making many different decisions on the meaning and scope of the offences of treason, sedition, defamation and other speech offences. Most of these decisions have extended the scope of freedom of expression – for example, by deciding that treason cannot be committed by words alone.²⁹ In addition, there have been important statutes for that purpose, including, in modern times, the Defamation Acts of 1952, 1996 and 2013. These statutes have generally extended the scope of existing defences to claims for libel. For example, they have given new defences to people reporting on various kinds of public meetings, or on proceedings in courts abroad, when those reports were made in good faith on matters of public interest. In modern times, the judges have continued to develop the common law, and have extended freedom of expression in a series of landmark judgments. Examples include: preventing local authorities from suing for libel; giving a public interest defence to claims for libel, which is of particular importance to journalists; and by putting a cap on the damages that can be awarded for libel.³⁰

From at least the sixteenth century, judges read and gave effect to statutes from parliament in a way which is compatible with rights under the common law – lawyers call this rule ‘the principle of legality’.³¹ Judges also struck down, or declared void, local authority by-laws, and other secondary legislation (meaning any legislation not in the form of statute enacted by parliament itself), if those laws purported to derogate from common law rights. So, if a tradesman were imprisoned

29. Tugendhat, *Liberty Intact*, 118.

30. *Derbyshire CC v Times Newspapers Ltd* [1993] UKHL 18 [1993] AC 534; *Reynolds v Times Newspapers Ltd* [1999] UKHL 45 [2001] 2 AC 127; *John v MGN Ltd* [1995] EWCA Civ 23 [1997] QB 586 (in this case the court decided that damages for libel should be proportionate to damages for pain and suffering resulting from personal injuries).

31. Baker, *An Introduction to English Legal History*, 209-10; *Ingenious Media Holdings plc, R (on the application of) v Revenue and Customs* [2016] UKSC 54 [20]; *Miller, R (On the Application Of) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) [83].

for failure to pay a fine imposed upon him by a local authority for breach of the terms of his licence to trade, the tradesman could apply for *habeas corpus*. The court might declare that the terms of the licence were an unreasonable restraint of trade, and order his release.³²

From the early seventeenth century, judges and parliament gave increasing protection to the privacy of the individual against the state. In 1604, this idea was expressed in the words “a person’s home is his castle”.³³ The Petition of Right 1627 reaffirmed the Liberties of the Subject statute of 1354 as it was then understood: no taxation without the consent of Parliament, and no one to be ‘destroyed’ or put to death contrary to the laws of the land. It also included the privacy right not to have soldiers billeted in people’s homes.

The eighteenth century was a notable period of judicial activism. To protect the freedom of expression of radicals the judges extended the right to privacy in respect of their homes and their documents, and the right not to be subject to arbitrary searches and seizures of their papers and other property. Before then, some search warrants had been issued by Ministers, rather than by magistrates or judges, and contained only a general description of who might be arrested. Judges decided in 1765 that a search warrant had to be issued by a magistrate, and it had to name the individual to be arrested.³⁴

The European Convention on Human Rights (ECHR)

In 1950, the rights in English common law were incorporated into a treaty, the ECHR.

The ECHR is a treaty of the Council of Europe (established in 1949). It has been amended by later treaties. These are called “Protocols”, numbered one to 16. The first Protocol was agreed under a Conservative Government (Sir Winston Churchill’s), as some of the later ones have

32. Halliday, *Habeas corpus*, 146, 198; Tugendhat, *Liberty Intact*, 111.

33. *Semayne’s Case* (1604) 5 Coke Reports 91a, 77 ER 194

34. *Entick v Carrington* (1765) 19 St Tr 1029, 1066; 95 ER 807.

been.³⁵

The Council of Europe is not the same as the EU, which owes its origin to the European Coal and Steel Community (ECSC, established in 1950) and the European Economic Community (EEC), established in 1957. When the UK leaves the EU, it will not leave the Council of Europe. There are 28 members of the European Union (including the UK), and these, together with a further 19 states, make up the 47 member states of the Council of Europe.

The UK played a major part in drafting the ECHR, and there was a broad agreement between the major political parties about the need for it (one of its draftsmen, Sir David Maxwell-Fyfe, later became, as Lord Kilmuir, Lord Chancellor in the Conservative Government from 1954 to 1962). The UK was the very first state to ratify it, in March 1951.

The original signatories to the ECHR were the allies in the Second World War: Belgium, Denmark, France, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Turkey and the UK. From a British perspective, “It was... believed that human rights were already adequately respected in member states; the [ECHR]’s function... was in part symbolic and in part an exercise in conservation. Western Europe was anxious to preserve the freedom it currently enjoyed to the full”. Further states joined to make the present 47 members. The function of the ECHR became “a mechanism for changing the political character of the newly admitted states”.³⁶

The ECHR Article 19 provides for the setting up of a court to ensure the observance of the engagements undertaken by the member states. There is one judge from each member state. The court is known as the European Court of Human Rights (ECtHR or the Strasbourg Court).

35. Apart from adding one or more rights to the original ECHR, several protocols amend certain of its provisions with the aim of improving the efficiency of the ECtHR. The ECHR signed under the Labour Government in November 1950 included no right to property. That would have interfered with Labour’s plans for nationalisation. So, the protection of property was introduced in the First Protocol, signed in March 1952, under the new Conservative Government: *The Report of the Commission on a Bill of Rights, A UK Bill of Rights?*, 85-86.

36. AWB Simpson, *Human Rights and the End of Empire* (Oxford: OUP, 2001) 1-2, 5.

In 1966, the UK accepted that individuals could bring a case against the UK in the ECtHR (the right of individual petition). This was a key event: before 1966, a complaint against a member state could only be brought by another member state. Never before had the UK accepted that international law could be enforced against it on the application of private individuals. Successive Governments in the UK have maintained these arrangements.³⁷

The ECtHR is not like a UK national court: a decision by the ECtHR cannot, by itself, change the law of the UK. If the ECtHR decides that the UK has infringed a person's rights under the ECHR, the UK normally changes its own laws and practices to avoid any repetition. If the UK does not do that, the UK will be in breach of its obligation (under Article 46(1)) to be bound by the judgment. Article 46(2) provides for judgments to be submitted to a Committee of Ministers, which shall supervise its execution. The Committee is made up of the Foreign Ministers of each of the member states.

The ECHR was unique in international law, in that it established a court to which individuals could cause their governments to be summoned for the court to hear complaints of violation of human rights. For over twenty years few people in the UK heard anything of the ECtHR. Then, in the 1970s, the ECtHR issued the first of an increasing number of judgments, finding that member states had violated the rights of their citizens. Some of these judgments were against the UK, although fewer than against most of the other states that were parties to the ECHR.

The Human Rights Act (HRA) 1998

The fact that the UK is bound under international law by the ECHR does not mean that the terms of the ECHR become part of the national law of the UK. Under UK law, unless and until a treaty is made part national law by being enacted by parliament as a statute, a treaty does

37. See Home Office, "Rights Brought Home: the Human Rights Bill" (1997), 6, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf.

not create obligations enforceable by individuals in UK courts. So, before the HRA, individuals could not enforce the rights under the ECHR in UK courts, in any case in which those rights were greater than the rights under UK national law. If people wanted to enforce rights under the ECHR, they had to go to the ECtHR in Strasbourg, using the right of individuals to apply to ('to petition') that court. This was slow and expensive.

The HRA, enacted in 1998, changed this. The history of its development is described in Chapter Three, but essentially it enables individuals to enforce their ECHR rights in the UK. It incorporates into UK law most of the rights listed in the ECHR and its Protocols. It does this mainly by the following sections:

- HRA s6(1): "It is unlawful for a public authority to act in a way which is incompatible with a[n] [ECHR] right".
- HRA s19: "A Minister ... in charge of a Bill in either House of Parliament must, before Second Reading of the Bill — (a) make a statement [in writing] to the effect that in his view the provisions of the Bill are compatible with the [ECHR] rights ("a statement of compatibility"); or (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill."
- HRA s3(1): "So far as it is possible to do so, [all UK legislation] must be read and given effect in a way which is compatible with the [ECHR] rights".
- HRA s2(1): UK courts "must take into account" judgments of the ECtHR.

HRA s6(1) is a strong guarantee of the rule of law, backed by effective means of enforcement through the courts under ss7 and 8. It does not apply to parliament.

But HRA s19, which does apply to parliament, may have a comparable

effect in practice, together with ss2 and 3, although it is not enforceable through the courts.

The human rights which are included in the HRA, derived from the ECHR, are listed in Box 2.3 below.

Box 2.3. A list of the human rights in the HRA, which derive from the ECHR

The following human rights are included in both the ECHR and the HRA.³⁸ Each Article from the ECHR or the relevant Protocol is listed after the named human right. They are listed in the order in which they appear in the HRA.

- to life (Article 2);
- to be free from torture or inhuman or degrading treatment or punishment (Article 3);
- to be free from slavery and forced labour (Article 4);
- to liberty and security of person (Article 5);
- to a fair trial (Article 6);
- to be free from retrospective criminal laws (Article 7);
- to respect for private and family life, home, and correspondence (Article 8);
- to freedom of thought, conscience, and religion (Article 9);
- to freedom of expression (Article 10);
- to freedom of peaceful assembly and freedom of association, including to join a trade union (Article 11);
- to marry and to found a family (Article 12);
- to be free from discrimination (equality) in the enjoyment of these specified rights and freedoms (Article 14);

38. Art 1 (Obligation to respect human rights) and Art 13 (Right to an effective remedy) are not listed in the HRA Sch 1 because it was thought that the HRA ss6-8 gave effect to them. The historical origin of each of these rights in the law of England and Wales is explained in Tugendhat, *Liberty Intact*.

- to protection of property (First Protocol Article 1);
- to education (First Protocol Article 2);
- to free elections to ensure the free expression of the opinion of the people in the choice of the legislature (First Protocol Article 3);
- not to be subject to the death penalty (Thirteenth Protocol Article 1)

Two of the rights in Box 2.3 are absolute and unqualified: the rights not to be tortured, and not to be subject to the death penalty.

All the other rights are expressed to be subject to limitations or qualifications. For example, Article 2 provides that the right to life is not infringed when someone is killed by a person acting in lawful self-defence against an aggressor. Articles 3 and 4 provide that the right not to be made to do forced labour, and the right to liberty, are not infringed if the work, or the detention, is part of a sentence imposed on a criminal after conviction by a court. Article 8 provides that the right to respect for private and family life is not infringed if a restriction on a person's private or family life is necessary for the protection of the rights and freedoms of others, and is imposed in accordance with a law. Under the First Protocol, the right to property is not infringed if a person convicted of a crime is required to pay a fine.

The rights in the ECHR, and thus in the HRA, are derived from rights which have been recognised for centuries in the law of England and Wales. The HRA did not repeal or replace any part of the common law or of the statutes protecting human rights. The HRA added another layer of legal protection. And it did not include all the human rights which are protected by the common law and statute law.

A very important consequence follows from this. If the HRA were repealed, or if it were replaced by a different BBRR, the existing common law and statutory protection would remain as they are. If parliament wished to abrogate any of the rights in the ECHR from the law of England

and Wales, it would have to do that by specific legislation: simply removing a right from the HRA would not be enough to take away that right. The HRA has also influenced developments in the common law – for instance, the privacy tort of misuse of private information, and the attitude of the judiciary. These indirect developments would not be reversed by repealing the HRA.

The ECHR, and the subsequent Protocols, do not include all the rights that are recognised in the UDHR and the common law. For example, the ECHR does not include as wide a right to equality as the UK Equality Act 2010, nor the duty of all people towards each other, that are set out in Article 1 of the UDHR, and in the common law.

There are also rights which were not expressed in the ECHR, but which have always been recognised as rights in England and Wales, and which the ECtHR has held to be implied in the ECHR. These include the rights of access to a court, and the right not incriminate yourself.³⁹ There are some rights which were recognised as fundamental in England and Wales, such as freedom from arbitrary searches and seizures⁴⁰, which are in the ECHR, but in such vague terms that few who are not lawyers would recognise them. There are other rights which are not included in the ECHR at all, such as the right to social security and to economic, social and cultural rights recognised in UDHR Articles 22⁴¹ and 25.⁴² This is notwithstanding the fact that most of these rights against the state were already recognised in 1950 by UK statutes on the welfare state and the National Health, and had for centuries been recognised by the Poor Laws.

39. *John Murray v UK* Application no. 18731/91 8 February 1996

40. *Entick v Carrington* (1765) 19 St Tr 1029, 1066; 95 ER 807; Police and Criminal Evidence Act 1984 ss8-18.

41. "Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

42. "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

Conclusion

Human rights are moral standards which, in the last resort, depend upon will of the people themselves, who understand them and demand that they be lived. For over 800 years in England and Wales they have been legally enforced by common law judges, and, at critical dates in our history, confirmed or enlarged by parliament.

Parliament voluntarily accepts the limits to its power that human rights entail. A selection of these rights has been given the added protection of international law by treaties such as the ECHR, entered into, and varied, by the UK, many of them under Conservative Governments.

The HRA confirms by statute the common law tradition of commitment to the rule of law and human rights. It also strengthens long established common law rules and practices used by judges to interpret statutes. These rules include the strong presumption that parliament does not intend statutes to derogate from fundamental rights, and the taking into account of judgments from courts abroad.

Repeal of the HRA would not abrogate the rights it guarantees, nor the pre-existing rules or practices of judges, nor the developments of the common law which were influenced by the HRA. The protection of those rights by the common law and other treaties would remain in force, albeit weaker than under the HRA.

Chapter 3: **The relationship between conservatism and human rights**

This chapter will explain how Conservatives have campaigned for human rights since the eighteenth century. It will recall that, under Conservative Governments, parliament has passed legislation recognising not only civil and political rights, but also economic and social rights, and extended guarantees of human rights to the Overseas Territories and their pre-independence constitutions.

The rule of law is as much a principle of the constitution as the supremacy of parliament.⁴³ The rule of law, as outlined in the previous chapter, requires respect for human rights. So, any political party which did not seek radical change to the UK constitution had to contribute to the development of human rights.

As the party that defended the existing order, the Conservatives had to be the political party which was most concerned with human rights. Indeed, Conservative politicians and thinkers have had an influential role in the development of human rights in England and Wales.

Historical relationship between conservatives and human rights

In 1765, in his *Commentaries on the Laws of England*, the Conservative William Blackstone compared rights under the laws of England to natural (human) rights, and sought to demonstrate how they were consistent. Apart from freedom of religion (which Governments in

43. See Box 2.1 earlier.

England did not respect before the nineteenth century), almost all the rights set out in the American and French Bills or Declarations of Rights drafted in the period 1776 to 1789 are similar to the law of England in the eighteenth century as Blackstone explained it. But he pointed to one vital defect in the law when explaining the right not to be taxed without consent: so few people had the right to vote, that members of parliament did not truly represent more than a tiny fraction of the people who were to be taxed by laws enacted by parliament. So, Blackstone made what proved to be the revolutionary suggestion: that there be “a more complete representation of the people.”⁴⁴

Taxation without consent became one of the central complaints which the British settlers in the thirteen American colonies made in their 1776 Declaration of Independence. The Whig MP Edmund Burke – described as “the great ideologist or thinker for Conservatism”⁴⁵ – supported the rebels in their resistance to taxation without representation.⁴⁶ He argued for the human rights of the people of Ireland to freedom of religion. He also argued for rights for the people of India against the East India Company, which took away their political liberty and their property.⁴⁷ He spoke of the “natural rights of mankind” in 1783, when defending the rights of the people of India against the abuses of the East India Company.⁴⁸

Benjamin Disraeli – a Conservative Prime Minister – referred to

44. William Blackstone, *Commentaries on the Laws of England* (Oxford: OUP, 2016), vol 1, ch 2, 166.

45. Robert Blake, *The Conservative Party from Peel to Thatcher* (London: Fontana, 1985), 6.

46. Edmund Burke, “Speech on Conciliation with America” in Warren Elofson, John Woods and William Todd (eds.) *The Writings and Speeches of Edmund Burke*, Vol III (Oxford: OUP, 1996), 157.

47. Edmund Burke, “Letter to Lord Kenmare” in P.J. Marshall, Donald Bryant and Paul Langford (eds.) *The Writings and Speeches of Edmund Burke*, Vol IX (Oxford: OUP, 2015), 578;

Edmund Burke, “Speech on Opening of Impeachment” in P.J. Marshall and William Todd (eds.) *The Writings and Speeches of Edmund Burke*. Vol VI, (Oxford: OUP, 1991), 346. Thomas Paine and others wrongly attacked Burke for his opposition to the French Revolution. Burke did not dispute the principles of the French Declaration, but rather argued that the revolutionaries acted in breach of those principles, by their confiscations, violence and what he saw as defects in the proposed revolutionary constitution.

48. William Cobbett, *Parliamentary History of England from the Earliest Period until 1803*, Vol XXIII (London: Hansard, 1813), 1299.

what are today recognised as human rights and the rule of law when writing in his book *Sybil* that: “Toryism will... bring back... liberty to the Subject, and... announce that power has only one duty: to secure the social welfare of the people”.⁴⁹ He put these ideas into practice by adopting the suggestion that Blackstone had made a century earlier. Under his Government parliament enacted the Reform Act 1867, which extended the franchise to households in the towns. That parliament also advanced the people’s rights of assembly, and to education, and their social and economic rights, with a series of Trade Union, Education and other Acts.⁵⁰ In 1922, the Coalition Government, which included Conservatives, gave a Constitution to the Irish Free State. This included fundamental rights enforceable through the courts, such as liberty of the person, respect for the home, freedom of conscience, religion, expression and assembly, the right to free elementary education and the right to a fair trial.⁵¹ It foreshadowed the constitutions which Conservative Governments were, from 1959, to give to most of the British Overseas Territories, and the devolution statutes for Scotland and Wales. All of these included human rights.

Under Conservative Governments, parliament gave political freedom to Australia and the other Dominions, and prepared the way for political freedom in India.⁵² The Statute of Westminster 1931 and the Government of India Act 1935 did not include Bills of Rights. But the future Lord Halifax⁵³, the Conservative Foreign Secretary between 1938 and 1940, argued that power should be exercised for the people (even when, in the Empire, it was not exercised democratically by the people).

In 1928, the Conservative Government gave political liberty and

49. Benjamin Disraeli, *Sybil, or, The two nations* (Leipzig: B. Tauchnitz, 1845), 283.

50. Robert Blake, *Disraeli*, (London: St Martin’s Press, 1967), 553.

51. Irish Free State Constitution Act 1922 13 Geo 5 (Sess 2) ch 1 Articles 2-10 and 64-70.

52. The Statute of Westminster 1931 and the Government of India 1935.

53. Simpson, *Human Rights and the End of Empire*, 159.

equality to all British women, in the form of the right to vote.⁵⁴ It also legislated to protect children,⁵⁵ and to ratify early international human rights conventions, including the International Labour Organisation Conventions, on the employment of women and children in 1920 and on forced labour in 1931.⁵⁶

The Conservative Governments between the two World Wars introduced a number of measures giving effect to social and economic rights, in particular providing for workmen's compensation for injuries, national health insurance, and provisions for widows and orphans.⁵⁷ One of the best known is the Education Act of 1944, also known as the Butler Act after RA Butler. He was the future Conservative Chancellor of the Exchequer, who was responsible for it.

Lord Halifax, the then Conservative Foreign Secretary, justified Britain's role in the Second World War by reference to human rights, as did Sir Winston Churchill MP – the then Prime Minister. Churchill made the entronement of human rights in the foreign countries that did not respect them an aim of both the Second World War and, by

54. Representation of the People (Equal Franchise) Act 1928. Further steps towards reducing discrimination against women were made by the Infanticide Acts 1922 and 1938, The Law Reform (Married Women and Tortfeasors) Act 1935 (married women to retain rights they had before marriage) and the Sentence of Death (Expectant Mothers) Act 1931 (a death sentence was reduced to penal servitude instead of being temporarily stayed).

55. The Criminal Law (Amendment) Act 1922 12 & 13 Geo 5 c 56 (sexual offences against children), Bastardy Act 1923 (maintenance) and Children and Young Persons Acts 1932 and 1933.

56. Employment of Women, Young Persons and Children Acts 1920, 1934 and 1938, Hours of Employment (Conventions) Act 1936 (The Night Work (Women) Convention (Revised) 1934 and the Sheet-Glass Works Convention 1934) and see other ratifications of ILO Conventions at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102651. Other human right conventions ratified included: the Treaties of Washington Act 1922 (to protect neutrals and non-combatants at sea, and prohibit the use of chemicals in warfare) and the Geneva Convention Act 1936 (wounded and sick people in wartime).

57. They had been elected on their 1935 manifesto to do this: <http://www.conservativemanifesto.com/1935/1935-conservative-manifesto.shtml>; The Unemployed Workers' Dependents (Temporary Provisions) Act 1921 (which included cohabiting women as dependents); Other social legislation included the National Health Insurance (Prolongation of Insurance) Act 1921, Unemployment Insurance Act 1923, Housing Acts 1923, 1925, 1935 and 1936, National Health Insurance Acts 1928 and 1936, Workmen's Compensation Acts 1923 and 1925, Unemployment Insurance Acts 1925 and 1938, Poor Law Act 1927, Old Age Pensions Act 1936, Public Health Act 1936, Young Persons (Employment) Act 1938 and Holidays with Pay Act 1938.

his famous Iron Curtain speech, of the Cold War.⁵⁸ In that speech in 1946 in Fulton, Missouri, Churchill urged on the British and American peoples that they must never cease to proclaim the rights of man, which, through Magna Carta, the Bill of Rights, *Habeas corpus*, trial by jury, and the common law find their most famous expression in the American Declaration of Independence. He singled out free unfettered elections, freedom of expression, and the rule of law. In particular, he argued that courts of justice independent of the executive should administer laws which have received the broad assent of large majorities or are consecrated by time and custom. “Here”, he said, “is the message of the British and American peoples to all mankind.... Let us preach what we practise and practise what we preach.” The founding of the United Nations, the UDHR and the ECHR marked the achievement of this British war aim.

The judges of the UK Supreme Court established in 2009 (and, before that, of the House of Lords), are also judges of the Judicial Committee of the Privy Council (the Privy Council) when that body sits as a court. Final appeals from the Channel Islands, colonies (and some former colonies) have been heard since the sixteenth century in London, and since 1833 by the Privy Council.⁵⁹ In late 1953, the Conservative Government extended the ECHR to 42 British dependencies. It thus applied the ECHR to virtually all the British Overseas Territories, and, from 1959, entrenched it in their constitutions.⁶⁰ The inhabitants of these territories thus had access to justice to enforce their human rights, albeit that they had come to London to do that.

Box 3.1. Conservative Governments and international treaties

The ECHR was only one of a number of treaties that the UK entered

58. Simpson, *Human Rights and the End of Empire*, 170-174 and Cmnd. 6289 and 558.

59. Sir John Baker, *An Introduction to English Legal History*, 141.

60. Simpson, *Human Rights and the End of Empire*, 6. See, for example, the Bermuda Constitution Order 1968; SA De Smith, *The New Commonwealth and its Institutions* (London: Stevens, 1964), 177.

into to create obligations to uphold human rights. These are all binding upon the parties under international law, although (apart from the EU Treaties) the ECHR is the only one which gives individuals a right to bring a case against the UK in an international court.

Treaties ratified under post-war Conservative Governments included: the Convention Relating to the Status of Refugees 1951 Cmd 9171 ratified on 7 March 1954 (Refugee Convention); the Convention on the Elimination of All Forms of Discrimination against Women 1979 Cm 643 ratified on 7 April 1986 (CEDAW); the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1985 Cm 1775 ratified on 8 December 1988 (the UN Convention against Torture); the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [ETS No 126] 1987 Cm 1634, ratified on 24 June 1988; Convention on the Rights of the Child 1989 Cm 1976 ratified on 16 December 1991.

All these treaties affect UK law. This is so, even if they have not been incorporated into UK law by statute, or incorporated only in part. When UK courts decide on the meaning of UK legislation, they look at the UK's treaty obligations to seek to give effect to parliament's purpose. If language is used whose meaning is not immediately plain, the court looks to the context in order to ascertain the meaning which was intended by parliament. The court will also apply the presumption, which long antedates the HRA, that legislation is not intended to place the UK in breach of its international obligations.⁶¹

These treaties also affect the development of the common law.⁶² The common law gives effect to rules of customary international

61. *ANS v ML* [2012] UKSC 30 para 16; *R (SG) v Secretary of State for Work and Pensions (SSWP)* [2015] UKSC 16, paras 83-4.

62. *R (Chester) v Secretary of State for Justice* [2013] UKSC 63 para 121 ("The courts have for many years interpreted statutes and developed the common law so as to achieve consistency between the domestic law of the United Kingdom and its international obligations, so far as they are free to do so").

law.⁶³ For example, the prohibition on torture is a rule of customary international law.⁶⁴

UK national law after World War Two

The social legislation of the nineteenth and early twentieth centuries greatly expanded the role of the state. This, and the two World Wars, led the state to interfere with the liberty and property of individuals in ways which it had not done before. There were many new regulations and charges, as well as social benefits.

This state expansion led to increasing public concern at the way Ministers, and statutory tribunals, exercised new statutory powers. Ministers, and new statutory tribunals, made decisions without hearing representations from persons who were affected, and without giving reasons. Without a reasoned decision, those who felt aggrieved could not challenge these decisions before the courts.

So, after World War Two, the controls and collectivism of the wartime Coalition, and of the Labour Governments, became increasingly unpopular. When Labour was in office after the War, their socialist programme involved the sacrifice of more rights and freedoms, supposedly for some greater good. The Conservative Party promised the people the restoration of freedom and the rule of law. Sir Winston Churchill's 1951 Conservative Party Manifesto started with the words: "The policy of the Conservative Party... is to restore to our country her economic independence and to our citizens their full personal freedom and power of initiative... Britain can [be]... dedicated to the cause of saving world peace and of preserving democratic freedom and the rule of law." The UK elected a Conservative Government, with Churchill

63. *Belhaj v Straw* [2017] UKSC 3 paras 181-2; *Garland v British Rail Engineering Ltd (No 2)* [1982] UKHL 2.

64. Joint Committee on Human Rights, *The UN Convention against Torture (UNCAT)*, Nineteenth Report of Session 2005-6, vol 1 (London: 2016), 9; HL Paper 185-1 HC 701-1; *ICTY Prosecutor v Furundzija* [1998] ICTY 3, 10 December 1998, paragraphs 147-157), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

returning as Prime Minister.⁶⁵ In the post-war period, the Conservative Party, both in opposition and in office, fought politically to restore to the UK freedom under the rule of law.

One of the most influential advocates of the restoration of liberty was Jack Simon QC MP, the future Conservative Solicitor-General and Law Lord. Sir Jack Simon was one of the main authors of the pamphlet *The Rule of Law* published by the Conservative Political Centre (the CPC, now called the Conservative Policy Forum) in 1955. The authors' concern was that "the individual can suffer substantial loss of rights through the unfettered discretion of Ministers... without hearing the citizen's own point of view, and occasionally on a misapprehension of the true facts". In other words, they deprived people of liberty and property without due process of law. The authors gave examples of scandals in which individuals had lost their liberty or property without having any legal recourse. They argued that arbitrary government by ministerial decision needed to be curtailed, and they proposed a right of appeal to ensure the effective implementation of access to justice.

These policies were taken up in the Conservative Party Manifesto for the General Election held in 1955⁶⁶ and implemented by the Conservative Government through the Tribunals and Inquiries Act 1958. This Act was described as "stemming from Magna Carta" in preserving individual liberties and "a milestone... applying general standards of procedure, based on ideals cherished in the traditional courts of law, to decisions taken by administrative tribunals and by Ministers". The Tribunals and Inquiries Act obliged Tribunals and Ministers to give reasons for their decisions, and there was to be a right of appeal on points of law.

This, and other legislation building upon it, have had a huge impact

65. The Conservative Party, "This is the road: The Conservative and Unionist Party's Policy" (2001), <http://www.conservativemanifesto.com/1950/1950-conservative-manifesto.shtml>.

66. See "Liberty and the Law" in The Conservative Party, *United for Peace and Progress: The Conservative and Unionist Party's Policy* (2001), <http://www.conservativemanifesto.com/1955/1955-conservative-manifesto.shtml>.

on people's lives, extending the rule of law to the poorest and weakest people in the land. Official statistics on the work of tribunals today show hundreds of thousands of cases are submitted to and disposed of by tribunals. The majority of these relate to child support and social security (44%), employment disputes (26%) and immigration and asylum (12%).⁶⁷

A Bill of Rights

Important though it was, this measure still did not satisfy leading Conservatives. One of the Conservatives who was most concerned at the decline in freedom in the UK in this post-war period, and the threat to freedom from future Labour governments, was Quintin Hogg QC MP – Shadow Home Secretary, and, as Lord Hailsham of St Marylebone, the future Lord Chancellor in Edward Heath's and Margaret Thatcher's Cabinets.

To meet this threat, in 1968, Quintin Hogg MP became the first person to propose that there be a Bill of Rights, by which parliament would voluntarily limit its right to legislate to the detriment of the rights of individuals. He also proposed that the judges in the UK should have the powers to adjudicate upon claims that the UK had violated the rights of individuals under the ECHR, so that individuals would no longer have to take such claims to the ECtHR. Essentially, Quintin Hogg MP was the first to propose that there be an Act incorporating the ECHR into UK law – ultimately achieved with the passing of the HRA. In his memoirs, he complained that his ideas had “since been hijacked, at first by the [Social Democratic Party] and the Alliance, and

67. HWR Wade in *The Cambridge Law Journal* (1958) Vol. 16, No 2, 12; Ministry of Justice, “Tribunals and gender recognition certificate statistics quarterly: July to September 2016” (2016), <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-july-to-september-2016>, 7. Statistics for the quarter to September 2016 show that tribunals disposed of over 93,000 cases.

since then by Roy Hattersley”⁶⁸

Quintin Hogg MP’s fears proved well-founded. Many people, for example, were badly affected by the Aircraft and Shipbuilding Industries Act 1977, by which the Labour Government nationalised those industries. The shareholders took their case to the ECtHR. They did not contest the legality of nationalisation as such, but they claimed that the compensation provided to them for the nationalisation of their property was grossly inadequate and discriminatory, and alleged that they had been victims of violations of their right property under the ECHR (Article 1 of Protocol No. 1).⁶⁹ The UK legal principle of the supremacy of parliament meant that (prior to the HRA) the UK courts could not entertain such a claim, however inadequate or discriminatory the compensation for such a seizure of property might be.

Quintin Hogg MP’s proposal for a Bill of Rights attracted support from other Conservative politicians close to Margaret Thatcher MP. In 1975, Sir Ian Percival QC MP – later the Solicitor General from 1979 to 1983 – joined Sir Keith Joseph MP and other Conservatives in calling for individuals to have greater control over government through the courts, and for the enactment of a Bill of Rights.⁷⁰ The proposal for a Bill of Rights had by then been publicly adopted by the future Law Lord, Sir Leslie Scarman, in the Hamlyn Lectures in 1974.⁷¹ Scarman proposed, amongst other reforms, that there be a “new settlement [with] entrenched provisions (including a Bill of Rights), and restraints upon

68. “Mr Hogg’s way to end the tyranny of Whitehall” *The Times*, 12 October, 1968, 10; The Rt Hon Quintin Hogg QC MP, *New Charter: some proposals for constitutional reform* (London: Conservative Political Centre, 1969); “Hogg fears for British constitution” *The Times*, 16 April 1969, 6.; Lord Hailsham, *A Sparrow’s Flight*, (London: Collins, 1990), 292-395. Others calling for incorporation of the ECHR at about that time were Anthony Lester, *Democracy and Individual Rights* (London: Fabian Society, 1969) and John MacDonald, *A Bill of Rights* (London: Liberal research department, 1969).

69. *Lithgow v UK Applications* 9006/80 9262/81 9263/81 8 July 1986. The claim failed before the ECtHR. But it was the ECHR which had given the shareholders of the companies a right to compensation.

70. Ian Percival QC MP, “The freedom of the individual” in *Freedom and Order* (London: Conservative Political Centre, 1975), 35, 42-6.

71. Sir Leslie Scarman, *English Law – The New Dimension* (London: Stevens & Sons, 1974) 76-7, 81-2.

administrative and legislative power, protecting it from attack by a bare majority in Parliament”, and he proposed a supreme court of the United Kingdom charged with the duty of protecting the Constitution. In 1976, even Margaret Thatcher herself made a proposal for “subjecting the use of devolved powers to judicial control by the courts” applying “Bill of Rights clauses in the devolution statute”.⁷² In 1978 Leon Brittan MP, on behalf of the Conservative Opposition, duly moved an amendment to include a Bill of Rights for Scotland.⁷³

In 1978, Quintin Hogg, by then Lord Hailsham of St Marylebone, again publicised his concerns that the power of parliament was so unrestrained that Britain was becoming “an elective dictatorship”.⁷⁴ In 1979 - by then Lord Chancellor in Margaret Thatcher’s Government - he recalled that Conservative Governments had entrenched human rights in the constitutions of virtually the whole empire. He said again that he would like to see a Bill of Rights on the statute book.⁷⁵

In 1979, the Conservative Party included a proposal for a Bill of Rights in their Manifesto as one of the constitutional matters to be discussed with all parties.⁷⁶

In 1984, the CPC published another pamphlet entitled *The Rule of Law*. The author was Sir Patrick Mayhew QC, a future Conservative Attorney-General. He complained that “successive parliaments have in modern times declined to provide for this country any legislative statement determining the fundamental [human] rights of the citizen in relation to the Executive... It is the proper function of the law to be

72. HC Deb 13 January 1976 vol 903 cc207-344 236, where she hinted at a similar proposal for England: “We must face the possibility that any elected Assembly could use its powers in such a way as to deny some of those freedoms which many of us regard as fundamental. Some of us feel that that has already happened to some extent in this Parliament. The way to deal with this is not to have a political veto but to enshrine Bill of Rights clauses in the devolution statute.” See now the Scotland Act 1998 s29(2)(d).

73. *UK Bill of Rights* para 7.7, *HC Deb 01 February 1978 vol 943 c491*

74. Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription* (London: Collins, 1978), 170-174.

75. HL Deb 08 November 1979 vol 402 cc1040-71, 1064.

76. The Conservative Party, “1979 Conservative Party General Election Manifesto” (2001), <http://www.conservativemanifesto.com/1979/1979-conservative-manifesto.shtml>.

the provider, and... of the Judges to be the protector, of the rights and liberties of the individual". Sir Patrick Mayhew cited Margaret Thatcher as an example of how a Prime Minister should respond to a decision of the courts with which she disagreed. In the well-known case about the Government Communications Headquarters (GCHQ),⁷⁷ the Minister had decided that staff at GCHQ would no longer be permitted to belong to national trade unions. At first instance, the judge had held that the decision was unlawful. Mrs Thatcher's response to this disappointment was that: "Every member of the Executive must be subject to the law of the land.... Every Minister would wish to have his actions subject to the law of the land... I, rightly, cannot overturn the decision of a court, and I would not wish to do so. I believe that people should be subject to a court of law... at the end of the judicial process Governments, of course, accept the court's final ruling. That is what the rule of law is all about".⁷⁸

Although the Government was in fact successful in its appeal, the House of Lords held that the courts had the power to judicially review a Minister's exercise of a prerogative power. Mrs Thatcher could, of course, have invoked the supremacy of parliament. She could have asked parliament to reverse that part of the judges' decision (this was over ten years before the HRA). But respecting the rule of law, as she did, she did not ask parliament to do that. The decision has stood to this day.

In 1987, Sir Edward Gardner QC - a Conservative MP and Chairman of the Society of Conservative Lawyers - introduced the first Human Rights Bill in the House of Commons as a private member's bill. His aim was the same as that of the Labour Government which introduced the Bill of the same name in 1998: "to incorporate in British law the [ECHR] so that all of us who enjoy the rights that are set out in the articles of that convention will be able, if the Bill becomes law, to go to

77. *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9, [1985] AC 374.

78. HC Deb 17 July 1984 vol 64 c172.

our own courts”. He said of the ECHR that “It is the language mainly of the English common law. It is language which echoes right down the corridors of history. It goes deep into our history and as far back as Magna Carta”. But neither the Conservative Government, nor the Opposition, supported the Bill.⁷⁹

Under Conservative Governments, the UK continued to ratify treaties to guarantee international protection of human rights, as outlined in Box 3.1 earlier. In the period of Conservative Governments from 1979 to 1992, and the Coalition from 2010, parliament enacted several human rights statutes.⁸⁰

A striking demonstration of the Conservative Party’s belief in the efficacy of international law of human rights was in Hong Kong, immediately before its return to China in 1997. Chris Patten, the former Chairman of the Conservative Party, was appointed the last Governor. He made it a priority to bring Hong Kong’s legislation into line with the UN’s ICCPR. He even took the risk of doing so unilaterally, without the prior agreement of China.⁸¹

It was the following year, 1998, that the recently elected Labour Government introduced Quintin Hogg’s original idea of a Bill of Rights

79. HC Deb 06 February 1987 vol 109 cc1223-89. Prominent Conservative supporters, however, included Sir Geoffrey Rippon QC and Leon Brittan QC.

80. These included: the Contempt of Court Act 1981 (Freedom of Expression ECHR Art 10), the Police and Criminal Evidence Act 1984 (Liberty and right to a fair trial ECHR Arts 5 and 6), Data Protection Act 1984 (Privacy ECHR Art 8), Interception of Communications Act 1985 (Privacy ECHR Art 8), Children Act 1989 (rights of the child), Computer Misuse Act 1990 (Privacy ECHR Art 8), Equality Act 2010, Protection of Freedoms Act 2012 (Privacy ECHR Art 8), Defamation Act 2013 (Freedom of Expression Art 10), and Modern Slavery Act 2014 (ECHR Art 4). Some such as the Contempt of Court Act and the Interception of Communications Act were passed following cases in which the ECtHR had found the UK to have been in breach of the ECHR: *Sunday Times v UK* 6538/74 [1979] ECHR 1 (contempt of court) and *Malone v UK* 8691/79 [1984] ECHR 10 (telephone tapping).

81. Chris Patten, *East and West*, (London: Macmillan, 1998), 80; Chris Patten, *First Confession, A Sort of Memoir* (London: Allen Lane, 2017), 199-205. See Hong Kong Basic Law Articles 25-42. Art 39 reads: “The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”

in the form of the Human Rights Bill. But by that time support for the proposal amongst Conservatives had waned, and the Party opposed it.

The long-standing support for such a Bill was nevertheless represented by some prominent Conservative peers and MPs. These included Lord Simon of Glaisdale, (albeit as an ex-Law Lord, sitting as a crossbencher), and the future Attorney-General, Dominic Grieve MP.

The main grounds on which Conservatives opposed the Bill at the time was that it would politicise the judiciary. Some feared the politicisation of the British judiciary, by judges being appointed for their political views, as American judges are.⁸² Lord Hailsham had also previously conceded the risk of “political judges” becoming “involved in decisions having sensitive political consequences”. But he noted that that had already happened by 1978, citing the then well-known cases challenging government decisions.⁸³ There were many more such cases in the twenty years that followed 1978. But in spite of, or because of, that, the politicisation of the judiciary was the reason given in 1998 by many members of the Conservative party in opposition. The ground of opposition to the HRA amongst Conservatives has since shifted, and is explored in detail in the next chapter.

Conclusion

Conservative writers and politicians have been influential in the development of human rights in the UK since the formation of the party. Under Conservative Governments in the nineteenth and twentieth centuries, the franchise was widened (eventually to include women), and social, economic and welfare rights were secured for children, workers and trade unionists, and women. Political freedom

82. Lord Henley, 3 November 1997, HL 2nd reading 1302. Judicial appointments have since then been taken out of political control by the establishment, under the Constitutional Reform Act 2005, of the independent Judicial Appointments Commission.

83. Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription* (London: Collins, 1978), 172, referring to *Laker Airway Ltd v Department of Trade* [1976] EWCA Civ 10; [1977] QB 643 (unlawful revocation of a licence) and *Secretary of State for Education and Science v Tameside MBC* [1976] UKHL 6; [1977] AC 1014 (unlawful direction by Secretary of State to implement scheme of comprehensive education), *Congreve v Home Office* [1976] 1 QB 629 (revocation of TV licences).

was advanced for the dominions before World War Two, and for most Overseas Territories after the war.

Sir Winston Churchill made the entronement of human rights a war aim, which was achieved, including by the founding of the United Nations, and by the ECHR and other human rights treaties on refugees, equality, torture and children, which the UK entered into under Conservative Governments.

It was Conservatives who successfully campaigned for the rule of law to be extended to the decision making of ministers and statutory tribunals, commencing with the Tribunals and Inquiries Act 1958. The future Conservative Lord Chancellor, Lord Hailsham of St Marylebone, and other Conservatives close to the Rt Hon Margaret Thatcher MP, were early campaigners for incorporating the ECHR into UK statute law, which would eventually be realised with the introduction of the HRA 1998. However, Conservatives today are sceptical of the HRA. The next chapter explores why.

Chapter 4: **Human rights today**

This chapter will outline and consider the criticisms of human rights advanced by those who are sceptical. In particular, it will explore seven main conservatives' criticisms of the HRA.

As outlined in Chapter Three, the Conservative Party was sceptical of the introduction of the HRA in 1998 because of fears about the politicisation of the judiciary. Many Conservatives today remain sceptical, but for different reasons, which will be detailed in this chapter.

Before assessing the current reasons for conservative scepticism of the HRA, however, it is worth clarifying why it was adopted in the first place.

Weaknesses with UK law before the HRA

In 1950 the UK did not adopt the ECHR as a result of any criticism of UK law, but for foreign policy reasons. The ECHR was deemed at the time "alien to the English constitutional tradition" in that "it placed a body of higher law above the traditionally sovereign British legislature". The explanation why the UK nevertheless promoted the ECHR was that: "It was in Britain's interests to take the most prominent part of any of the major powers in the human rights movement, both in Europe and at the United Nations". The Government at the time believed that "Britain was the country which had invented effective protection of fundamental individual rights, or liberties, through the rule of law", and "that she had nothing whatever to fear from a properly drafted

convention”⁸⁴

By 1998, however, the HRA was introduced as a result of criticisms both of the substantive of UK law, and of its application by the judges, including from Conservatives. As explained in the previous chapter, towards the end of the twentieth century, it was felt that people were being deprived of their liberty and property without due process of law, and that the judges were failing in their role of protectors of the weak against the strong. From about 1970, the criticisms focussed increasingly on the state of the law: the fact that Governments controlling parliament with large majorities could impose their policies without any restraint – the supremacy of parliament had become “elective dictatorship”, as Lord Hailsham put it.

Writing in 1974, the distinguished judge Sir Leslie Scarman noted the strengths of the common law system, which explained why it had survived for centuries and spread across the world: it is created by judges independently from governments or parliaments, judges and lawyers are highly professional, and the common law is sufficiently constant to satisfy the need for certainty, while preserving some degree of flexibility to adapt to changing circumstances. But he also noted its weaknesses: it is not easily accessible nor easy to understand when found, it is resistant to change, it prioritises certainty over any flexibility it does preserve, and it is helpless in the face of the legislative sovereignty of parliament. Importantly, it also failed to provide a mechanism for complaints that the UK was in breach of the ECHR, which had therefore to be taken to the ECtHR.⁸⁵ Sir Leslie Scarman’s concern, and that of others, was that – notwithstanding some improvement – the judges remained insufficiently “activist”, or were too timid and inclined to support the

84. Simpson, *Human Rights and the End of Empire*, 12, 18.

85. Scarman, *English Law – The New Dimension*, 7, 15-19, 77.

Government.⁸⁶ As he explained: “Law is in constant need of review: it becomes obsolete if it is not renewed.”

In short, the primary reason for adopting the HRA was not foreign policy, but criticism of the law and of judicial timidity – although judges were becoming more active - in the latter part of the twentieth century. The HRA, it was claimed, would encourage people to see ECHR rights as British rights. The incorporation of these rights in the form of the ECHR would encourage public authorities in the UK to observe basic human rights. It would make it easier for victims to enforce their rights against the state, and it would lead to changes and developments in UK law and practice to reflect changes in society and attitudes. The aim of encouraging the state to observe basic human rights (including by making it cheaper for litigants to sue the government) addresses the point that the common law was powerless before the “elective dictatorship” of governments in control of parliaments with large majorities.⁸⁷

Box 4.1. Human rights culture

Conservatives sometimes criticise human rights for cultivating a focus on the self, rather than on obligations and responsibilities to others. Some lament the predominance of a ‘rights culture’. Although this is not specific to criticisms of the HRA, the HRA is seen as cultivating this. This needs to be challenged.

Human rights are rights of individuals. They are claims by

86. Scarman uses the word “activist” to refer to what judges ought to be at pages 49 and 86 (“Society asks of the judges no more than that they be true to the ideals of Coke and Cromwell”). Edward Coke, the Chief Justice, resisted the tyranny of King Charles I through the law. Cromwell resisted it both by rebellion against the King, and by advocating limits to parliamentary sovereignty. For concerns expressed by others in the 1970s about the timidity of judges and their past record see The Report of the Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us*, 133.

87. Home Office, *Rights Brought Home*, 7-8. As David Cameron said in his 2006 speech, without the ECHR “we would be left with little protection against a government that could at will abrogate or repeal *Habeas corpus* or any other protection of freedom”: David Cameron, “Balancing freedom and security – A modern British Bill of Rights”, *Speech to the Centre for Policy Studies*, 26 June, 2006, <http://conservative-speeches.sayit.mysociety.org/speech/600031>.

individuals not only against the state but also against other individuals. It follows that individuals also have duties or responsibilities. The UDHR Articles 1 and 29(1) set out the moral duties that every individual owes to every other individual, and to the state: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”; and: “Everyone has duties to the community in which alone the free and full development of his personality is possible”. Article 1 is similar to the motto of the French Republic: ‘Liberty, equality and fraternity’. These are vague terms, which have not been incorporated into the ECHR. Particular applications of these duties, however, are defined in the national law of England and Wales. One example is the duty of care upon individuals (and in some cases on the state) not to injure people negligently, together with the duty of the wrongdoer to pay compensation for injuries, both to their persons and to their property.

Typically, the duties or responsibilities that derive from law can be expressed as:

- duties to respect the rights of others (correlative duties);
- duties not to exercise rights contrary to certain state or individual interests (rights limitations); and
- freestanding (non-correlative) duties.⁸⁸

First, on correlative duties; an example is that one individual’s right to freedom of expression means that all other individuals are under a duty to respect that right. The right and duty are two sides of the same coin: there cannot be one without the other. It

88. Ministry of Justice Research Series 18/09 “The relationship between rights and responsibilities” (2009), http://www.matrixlaw.co.uk/wp-content/uploads/2016/03/23_11_2010_05_42_34_research-rights-responsibilities.pdf, 15.

follows that it is not normally necessary to spell out in a Bill of Rights the correlative duties that each individual (and the state) owes to respect the rights of every other individual. The correlative rights are obvious. That was the conclusion reached by the earliest modern writers on human rights. Thomas Paine, wrote in his *Rights of Man* in 1791: “A Declaration of Rights is, by reciprocity, a Declaration of Duties also. Whatever is my right as a man, is also the right of another; and it becomes my duty to guarantee as well as to possess.”⁸⁹

Second, there are rights limitations. An individual’s rights are not unlimited. An individual exercising a right owes responsibilities and duties to others. Such limitations on rights are commonly spelt out in human rights documents.⁹⁰ In the ECHR, for example, Article 10(2) on freedom of expression reads: “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

It is because all of us owe to each other the duty or responsibility to guarantee the rights of others, that, when there is a demonstration in the streets, the majority of the British people voluntarily respect the demonstrators’ freedom of expression, whether they agree with

89. Thomas Paine, *The Rights of Man* (London: Penguin, 1984), 114. The radical Thomas Paine was following the Conservative William Blackstone, who had expressed the same view in his *Commentaries on the Laws of England*, Book 1, Introduction 119.

90. An apparent exception is the US First Amendment, which sets out no limitations (“Congress shall make no law ... abridging the freedom of speech, or of the press...”). However, the US Supreme Court held that some limitations are implicit, in particular to prohibit people from advocating the overthrow or destruction of the Government by force. See footnote 104.

them or not. Toleration means respect for other people's rights. It is not an optional virtue. It is always a moral duty. And, in a free society governed by the rule of law, it is also a legal duty. The police attend demonstrations in case there should be disturbances from the small minority of people who do not respect the demonstrators' right of freedom of expression. The police are officers of the state. The state acts in the name of all the people, to guarantee the right of freedom of expression of the demonstrators. The police also guarantee another aspect of freedom of expression, namely the right of the other members of the public to hear what the demonstrators have to say.

Finally, freestanding duties: one example of these is the duty to serve the state, such as in jury service. Another example is the duty of a witness to a crime to give evidence in court. In the UK, these are also legal duties enforced by penalties. Other freestanding duties are duties to future generations – for example, not to leave them a polluted environment – and duties to animals – for example, to look after their day to day needs, and to refrain from being cruel to them.

Criticisms of the HRA

There are seven main reasons why Conservatives are currently critical of the HRA. These criticisms are derived from analysis of official documents, speeches and writing from conservative politicians and opinion formers. In this section, each criticism is described and critiqued.

The seven main criticisms of the HRA by conservatives are:

- Foreign judges telling the UK what to do
- A higher body of law than UK law
- Mission creep and judicial activism of European judges
- Undermining UK courts

- Undermining UK Parliament
- Prisoners' right to vote
- Undermining British security

Foreign judges telling the UK what to do

The ECHR claims, by its title, to be European, not British. This may convey the false impression that its principles were imported from Europe, whereas they were in fact exported to the non-democratic of European states from the UK and its democratic allies.

It has long been part of British traditions to have foreign judges. As noted in Chapter Three, the Privy Council continues to hear appeals from certain territories, such as Bermuda, Mauritius, and the Caribbean islands. For the peoples of those territories, the judges sitting in London are foreign. In addition, for the people of Hong Kong, judges from other common law jurisdictions (the UK, Australia and New Zealand) sit in the Court of Final Appeal of Hong Kong.⁹¹ Thus for nearly half a century before the HRA came into force in the UK, judges sitting in Bermuda and other territories were bound both by common-law rights, and by provisions taken from the ECHR, as part of the national law of those territories, and British judges sitting in the Privy Council in London enforced those rights.⁹²

Also, relative to comparable states, there are not so many occasions when the UK is told what to do by the foreign judges in the EctHR. In the period 1959 to 2015, for the UK and for the states of comparable size and history which became parties at the same time, the figures for violations found by the ECtHR are as follows: France (708), Italy (1,781) and UK (305).⁹³ The 305 findings of violations for the UK were out of 526 judgments. Of the remaining judgments, in 132 there were

91. The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China Article 92.

92. For example, *Liyanage v The Queen (Ceylon)* [1965] UKPC 39.

93. House of Commons Library, *Note from the House of Commons Library December 6 2016* (London: House of Commons, 2016); Council of Europe, "ECHR violations by country" (2015), http://www.echr.coe.int/Documents/Stats_violation_1959_2015_ENG.pdf.

findings of no violation, and in 67 there was a friendly settlement or other disposal. Most applications to the ECtHR against the UK have been declared inadmissible, and are not the subject of a judgment. These figures suggest that the UK has an excellent record among Western European countries.

In the four years before writing this paper, 2013 to 2016, the ECtHR decided about 50 cases against the UK.⁹⁴ There were also three cases in which removal to Afghanistan was challenged under Article 3 of the ECHR, in all of which the applicant failed.⁹⁵

Apart from the prisoners' voting case, discussed later in this chapter, the last seriously controversial decisions of the ECtHR were those applying the ECHR to British troops in Iraq.⁹⁶ The findings of violations against the UK have, with rare exceptions, aroused little controversy in the UK. In fact, the violations which relate to interferences with freedom of expression have been a matter for celebration, especially amongst the media.⁹⁷ For instance, in 1979, in one of the earliest cases the ECtHR decided,⁹⁸ *The Sunday Times* argued successfully that the law of England and Wales on contempt of court was wrong, because

94. *Eweida v UK* 48420/10 (Art 9 display of religious symbols), *Betteridge v UK* 1497/10 (Art 5 delay in reviewing detention), *Abdi v UK* 27770/08 (Art 5 delay in detention), *Aswat* 17299/12 (Art 3 prison conditions in US if extradited), *McCaughey v UK* 43098/09 and *Hemsworth v UK* 58559/08 (Art 2 investigations into deaths in N Ireland), *MH v UL* 11577/06 (Art 5 detention), *Paulet* 6219/08 (1P-1 confiscation of wages), *McDonald* 4241/12 (Art 8), *Firth v UK* (Art 1p-3 prisoner's voting), *McDonnell v UK* 19663/11 (At 2 investigation of death), *Piper v UK* 44547/10 (Art 6 delayed trial), *RE v UK* 62498/11 (Art 8), *Doherty v UK* 76874/11 (Art 5 delay in detention), and *JN v UK* 37289/12, *VM v UK* 49734/12 (Art 5 detention pending deportation).

95. *SHH* (Application no. 60367/10) and *H and B* (Applications nos. 70073/10 and 44539/11).

96. *Al-Skeini* (Application no. 55721/07) and *Al-Jedda* (Application no. 27021/08) both decided on 7 July 2011. In these cases, the issue was whether the ECHR applied to the deaths of Iraqis during the operation of UK troops in Iraq, and whether the UK was in breach of Article 2 of the ECHR (right to life) by failing to conduct and effective investigation into their deaths. The ECtHR held that the ECHR applied in the circumstances, in addition to the international law in the Geneva Conventions on armed conflict. The decision that the ECHR applied in some circumstances outside the territories of the ECHR member states gave rise to many controversial claims in the UK courts, both by Iraqis against British troops, and by British troops against the Ministry of Defence.

97. *Sunday Times v UK* (1979) - 6538/74 [1979] ECHR 1, *Observer and Guardian v UK* - 13585/88 [1991] ECHR 49, which led to the lifting of the ban on Peter Wright's book *Spycatcher* about the security services; *Goodwin v UK* 17488/90 [1996] ECHR 16, *Financial Times Ltd v UK* - 821/03 [2009] ECHR 2065 (protection of journalists' sources); *Tolstoy v UK* [1995] ECHR (libel damages).

98. *Sunday Times v UK* 6538/74 [1979] ECHR 1.

it prevented them from campaigning for a better settlement for the victims from the manufacturers of Thalidomide (a drug which caused babies to be born with major disabilities). It was a decision by the ECtHR which has not been criticised. As a result, parliament enacted the Contempt of Court Act 1981, extending the right freedom of expression in the UK. In addition, in an important case on private and family life, the ECtHR held that the British police required warrants to justify the interception of telephone communications.⁹⁹ The failure of the law in the UK to protect people from unreasonable interceptions of their telephones by the police (and for that matter by anyone else) is, with hindsight both surprising and alarming.

In spite of this excellent record compared with other similar ECHR member states, the Conservative Party remains concerned about the interference of foreign judges. In response to these concerns, in 2013 Protocol No. 15 was agreed by the Council of Europe. This emphasises the need for the ECtHR to give greater respect to decisions of the authorities and courts of member states such as the UK. Ken Clarke QC MP, the Lord Chancellor at the time, regarded this as a triumph. He wrote: “The United Kingdom only loses about 2% of the small number of cases that go there and they are usually trivial ones about such matters as whether an air hostess can wear a crucifix when wearing her uniform”.¹⁰⁰

A higher body of law than UK law

A ‘higher law’ – in this case, deriving from the ECHR - is not, in fact, entirely alien to British traditions.

The formerly British subjects who constituted themselves citizens of the new United States in 1789 adopted a higher law in the form of their constitution and Bill of Rights (as did the formerly British people who constituted themselves as the Irish Free State in 1922 and the Republic

99. *Malone v UK* - 8691/79 [1984] ECHR 10.

100. Ken Clarke, *A Kind of Blue*, (London: Macmillan, 2016), 457.

of Ireland in 1937).

Moreover, British judges in the Privy Council have, since the 1960s, read and given effect as a ‘higher law’, to the fundamental rights transposed into colonial constitutions from the ECHR. They will continue to do this. That they do this has nothing to do with the HRA.

The fact that there is a final appeal from Bermuda to British judges in the Privy Council in London, and that foreign (British) judges sit in the Court of Final Appeal in Hong Kong, is for a political reason. It provides a form of guarantee to the inhabitants, and to foreigners who do business in those territories, that the rule of law applies.

That the ECHR is both legally binding on the UK, and enforceable through the ECtHR is, at the same time, a strength and a weakness. It is a strength, because it makes it more difficult (although not impossible) for a UK government to abrogate fundamental UK rights. It is a weakness, because it also makes it difficult for the parties to the ECHR, including the UK, to bring about any amendment to the ECHR by democratic means.

Mission creep and judicial activism

From the 1970s, UK judges started to become more activist, albeit not activist enough for critics such as Lord Hailsham and Sir Keith Joseph. In this the judges were influenced by the ECHR. They started to cite the ECHR in their judgments before the HRA was enacted, and have continued to do so. Two areas where this happened are in increasing freedom of expression in relation to matters of public interest (Article 10), and reducing freedom of expression in areas where the public interest was either non-existent or outweighed by the right of privacy of the individual (Article 8). I declare an interest in that some of the decisions upheld by the UK Supreme Court were decisions made by myself when I was a judge.

In 2014, the Conservative Party argued that the ECtHR “expand[ed] the [ECHR] rights into new areas, and certainly beyond what the

framers of the [ECHR] had in mind when they signed up to it”¹⁰¹

It is true that the ECtHR has expanded the scope of the ECHR rights. But it has not been demonstrated that in doing that they have gone beyond what the framers of the ECHR had in mind. As the framers would have understood, the ECHR would have to be applied to circumstances which were unforeseeable at the time. These include, not only changes in attitude to matters such as capital punishment, illegitimacy of children, and discrimination on grounds of gender or sexual orientation, but also to things which did not exist in 1950: CCTV, IVF, DNA, data protection, medical and pharmaceutical advances, and the like.

The ECtHR has expanded the scope of ECHR rights by adopting two principles. One principle is by finding that certain rights, not expressly set out, are nevertheless implied. Another principle is by treating the ECHR as a ‘living instrument’, that is to say, by giving to the words the meaning they bear at the time the ECtHR is making a decision, rather than the meaning that the words might have borne at the time the ECHR was entered into by the framers in the early 1950s, or the original intent of the framers (where that is discoverable).

An example of finding an implied right was in 1975, in the first case which the UK lost. Mr Golder was a prisoner who sought permission to consult a lawyer in order to sue the prison authorities. This was refused by the authorities, with the result that he could not commence proceedings against them in a civil court. The English courts failed to enforce his common law right of access to a court. So he complained that his right to a fair trial under ECHR Article 6 had been infringed. The question for the ECtHR was: does ECHR Article 6 guarantee “the right to a fair trial in legal proceedings which are already pending, or does it in addition secure a right of access to the courts for every person wishing to commence an action in order to have his civil rights and

101. The Conservative Party, “Protecting Human Rights in the UK”, <http://readinglists.ucl.ac.uk/items/0228C3DC-4B76-311C-DEF7-0F12767A4F0B.html> (2014), 3.

obligations determined". The ECtHR held that the additional right to commence an action was implied in Article 6, because, without that additional right, there would be no means of benefitting from the right to a fair trial of an action which had been commenced. The British judge in this case dissented from the majority. He argued that to recognise an implied right to bring a case before a court was not interpretation of the ECHR, but judicial legislation.¹⁰²

The first example of the 'living instrument' principle in the ECtHR was in 1978, another case which the UK lost. The question was whether flogging a young person was "degrading punishment" contrary to ECHR Article 3. The ECtHR had regard to what it said were "the developments and commonly accepted standards in the penal policy of the member States", and decided that, in 1978, flogging was a degrading punishment. The British judge again disagreed with the majority, but he did so on the facts. He made no criticism of the ECtHR treating the ECHR as a "living instrument".¹⁰³ When it enacted the HRA the UK parliament knew, and approved, of the use of this principle by the ECtHR.¹⁰⁴

The 'living instrument' principle had long been adopted by British and American judges.¹⁰⁵

In 1929, the question for the Privy Council was whether women were included amongst "persons" who were qualified to be members of

102. *Golder v UK* 21 February 1975 Application no. 4451/70 para 25. Article 6 reads "In the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Sir Gerald Fitzmaurice did not suggest that the majority were departing from the original intention of the framers: at paragraphs 40 and 41 of his dissenting judgment he accepted that "It is hardly possible to establish what really were the intentions of the contracting States under this head".

103. 25 April 1978 Application no. 5856/72.

104. Home Office, *Rights Brought Home*, 9 states that the ECHR "is often described as a 'living instrument' because it is interpreted by the [ECtHR] in the light of present day conditions and therefore reflects changing social attitudes and the changes in the circumstances of society". See also: HL Deb 3 November 1997 cols 1227-312.

105. The phrase itself can be traced to *Dennis v. United States* 341 U.S. 494 (1951) 523 ("Free speech is subject to prohibition of those abuses of expression which a civilized society may forbid. ... the fact that the First Amendment is not self-defining [does not compel] its paralysis as a living instrument").

the Senate of Canada. In earlier case law women had been held not to be included in “persons”, but in 1929 the Privy Council said that they were, arguing that: “The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. Like all written constitutions it has been subject to development through usage and convention”.¹⁰⁶

Similarly, in 2004 the Privy Council said: “The fundamental rights provisions [of the Constitution of Barbados] ... are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions. The framers... would have been aware that they were invoking concepts of liberty such as free speech, fair trials and freedom from cruel punishments which went back to the Enlightenment and beyond. And they would have been aware that sometimes the practical expression of these concepts—what limits on free speech are acceptable, what counts as a fair trial, what is a cruel punishment—had been different in the past and might again be different in the future.”¹⁰⁷

In essence, without the ‘living instrument’ principle, the ECHR would have become obsolete and ineffective. It is a strength of the ECHR that it is to be interpreted as a ‘living instrument’, meaning that it must be interpreted in the light of present-day conditions at the time the case is decided, rather than in the light of the conditions in 1950 when it was drafted.

The fact that the Privy Council and other UK courts also apply a ‘living tree’ or ‘living instrument’ principle in human rights cases means that, if the HRA were to be repealed (and even if the UK ceased to be a party to the ECHR), UK judges would continue to interpret fundamental rights by reference to contemporary standards of decency,

106. *Edwards v The Attorney General of Canada* [1929] UKPC 86, [1930] AC 124. This and other cases are referred to by the ECtHR in *Mursic v Croatia* 20 October 2016 Application no. 7334/13.

107. *Boyce v The Queen* [2004] UKPC 32, [2005] 1 AC 400 para 28.

and contemporary understanding of the UDHR and the treaties to which the UK remained a party. The common law is itself a body of law which has to develop if it is not to become obsolete, and judges should be activist in order to achieve this.¹⁰⁸ There is no alternative to treating the common law as a “living instrument” because: first, there is no document setting out the common law which was framed, or agreed to, at a particular date; and, second, much of it can be traced back to the thirteenth to sixteenth centuries, when standards were very different from today.

Parliament sometimes reforms parts of the common law. Parliament itself has not attempted to keep statute law as it was in 1950. On the contrary, it is the constitutional duty of both judges and parliament to ensure that the law meets contemporary standards of justice, although the main constitutional responsibility for keeping the common law up to date rests on the judges.¹⁰⁹

It follows, therefore, that those troubled by the activism of the ECtHR may not achieve their aim of a less activist judiciary by procuring that the UK withdraw from the ECHR. Withdrawal from the ECHR should not be expected to make UK judges generally less activist.

Admittedly, judges can exceed the proper limits of what a judge can do consistently with respect for democratic principles. It is possible for judges to reach a decision which, many would say, ought not to be taken by judges, but only by a legislature. A recent example in the USA was the decision of the Supreme Court, by a five to four majority, that a prohibition on same sex marriage was unconstitutional.¹¹⁰ The minority of the judges in that case did not base their dissent on the principle of same sex marriage. They dissented on the ground that same sex marriage was not contemplated by the eighteenth-century framers of the US Constitution, and should be introduced, if at all, by

108. The Supreme Court encourages argument based on the common law: *Osborn v The Parole Board* [2013] UKSC 61 para 62-63; *Kennedy v Charity Commission* [2014] UKSC 20 para 46.

109. *National Westminster Bank plc v Spectrum Plus Limited* [2005] UKHL 41 para [32].

110. *Obergefell v. Hodges*, 576 U.S. ____ (2015).

the legislatures of each of the states (as had already happened in many states, both in the USA and in Europe).

At home, Conservatives have been concerned about what UK judges do. Since the Middle Ages UK judges have seen their role as protecting the freedom of the individual against the tyranny of monarchs. At some periods, the resistance to tyranny by judges became legendary. This happened under the Tudors and Stuarts with activist judges, such as the Chief Justice Edward Coke (who developed *habeas corpus*), and in the eighteenth century, with Lord Mansfield (who contributed to the end of the slave trade) and Lord Camden (who advanced freedom of expression). But in the nineteenth and early twentieth centuries, UK judges were not noted for their defence of liberty. They only seemed to begin to take up that role again in the 1970s. They did so timidly, in 1976, in response to arbitrary measures taken by the Labour Government. But they continued to do so into the 1980s, albeit hesitantly, in response to some measures taken by Conservative Governments.

The examples detailed above show that, for those who see a problem with judges misusing their law-making power, the problem is not confined to the ECHR or HRA.

A related criticism of the HRA is that the ECHR requires UK judges to decide whether there is a reasonable relationship between the objective which is sought to be achieved by, for example, the decision of a Minister, and the means used to achieve that end (the 'principle of proportionality'). Before the HRA, the common law required the court to apply a lesser test in judging the legality of a decision: namely whether it is within the range of rational or reasonable decisions open to the decision-maker. This test was applied with greater intensity to decisions which interfered with a human right.

The lesser test was applied in the case in which there was a challenge to the limitation of homosexuals in the British Army. The English judge who decided the case has illustrated how the need for reform of our law was seen at the time. He has written: "I reluctantly ruled that... under

domestic law their claim had to fail I predicted, however, that their claim would succeed in [the ECtHR] under the [ECHR]. So it did, and few would now question that outcome...” This perceived failure of the common law was one of the reasons for the HRA being enacted.¹¹¹

The introduction of the proportionality test by the HRA undoubtedly leads the judges into areas of policy. But most cases would be decided in the same way whichever proportionality approach is adopted.¹¹²

Undermining UK courts

HRA s2 requires a British court to “take into account” judgments and decisions of the [ECtHR] when “determining a question which has arisen in connection with a [ECHR] right”. The complaint is that “problematic [ECtHR] jurisprudence is often being applied in UK law”.

There are three faults in this argument. First, it was not as a result of HRA s2 that British courts started to take into account judgments of the ECtHR. The HRA gave statutory authority to an existing practice. In difficult cases, British courts always have taken into account judgments from courts anywhere in the world. In recent centuries, British courts have most often taken into account cases from what are now Commonwealth countries. But one of the most famous cases in British legal history is *Sommersett v Steuart*. In 1772 a slave brought to London in an American ship successfully applied for *habeas corpus* in the English court. The judge took into account the arguments used in a similar case in which a French court had freed a slave.¹¹³ The ECtHR has itself adopted this English practice: it takes into account relevant case law, not only from the European member states, but from all over the world.

Second, UK courts took into account ECtHR judgments as soon as

111. *R v Ministry of Defence, Ex p Smith* [1995] EWCA Civ 22, [1996] QB 517, 554, *Smith and Grady v United Kingdom* (Applications nos. 33985/96 and 33986/96); Lord Brown of Eaton-under-Heywood (retired law lord and Supreme Court Justice) in a letter to *The Times*, 29 April. 2017.

112. *R (Daly) v Home Secretary* [2001] UKHL 26 para 27.

113. (1772) 20 St Tr 1; Tugendhat, *Liberty Intact*, 112-3.

that court started to issue judgements, which was long before the HRA was conceived. In his 1987 book *Spycatcher*, Peter Wright disclosed official secrets that he learnt as an officer of MI5. The book was first published in Australia and the USA. The Government tried to ban it in England. The UK courts did ban it for a while, but some of the English judges disagreed. They referred to the ECtHR case law on freedom of expression. One judge said that he could “see no inconsistency between English law on this subject and article 10 of the [ECHR]. This is scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world.”¹¹⁴

Third, HRA s2 only requires UK judges to “take into account”, not to comply with, ECtHR judgements. Article 46 of the ECHR requires the UK to abide by the decision of the ECtHR only in cases to which the UK is a party.

It is true that for some time after the HRA came into force in 2000 the UK courts did closely follow the case law of the ECtHR. But more recently, they have taken a different approach. The UK Supreme Court has said: “This court is not bound to follow every decision of the [ECtHR]. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the [ECtHR] which is of value to the development of [ECHR] law... Of course, we should usually follow a clear and constant line of decisions by the [ECtHR]... But we are not actually bound to do so ... [HRA s2] requires our courts to “take into account” [ECtHR] decisions, not necessarily to follow them.”

Admittedly, disappointed British litigants have taken their cases to the ECtHR, but they have not necessarily won there, as had at first been expected. Instead, the ECtHR sometimes changed its own case law, because it recognised that the UK courts had been right. One example is the case in which the ECtHR held that it was incompatible with the

114. *Attorney General v Guardian Newspapers Ltd (No 2)* [1988] UKHL 6, [1990] 1 AC 109, 283.

right to fair trial to convict a man of sexual assault using a dead victim's witness statement.¹¹⁵ Another is the 2013 decision that murderers could not be sentenced to prison for life. After that decision by the ECtHR, the Court of Appeal in England clarified English law, and in 2015 the ECtHR reached a different conclusion.¹¹⁶ So in these, and similar cases, the HRA worked as it had been intended to work: it enabled British courts to decide the case, and to influence the development of the case law of the ECtHR.

When UK courts follow the ECtHR decisions in cases to which the UK is not a party, they have reasons for doing that, other than HRA s2. These reasons derive from the fact that the UK is party to the treaty that is the ECHR, and, in general, a treaty ought to be interpreted to mean the same thing for all the states which are party to it.

Undermining UK parliament

HRA s3 requires the UK courts to read and give effect to legislation in a way which is compatible with ECHR rights "so far as it possible to do so". It is said that this requires the courts to adopt interpretations of statutes which are inconsistent with the UK parliament's intention when enacting the relevant legislation.

HRA s3 is a provision which is similar to the common law 'principle of legality', referred to in detail in Chapter Two: courts must presume that parliament did not intend to legislate in a way which would defeat fundamental human rights.¹¹⁷ Before the HRA came into force in 2000, the fundamental human rights were the ones recognised in the common law and statutes.

For legislation passed since 2000, this presumption is made explicit

115. *Al-Khawaja and Tahery v UK [GC]* - 26766/05 and 22228/06 15.12.2011 [2011] ECHR 2127; *Horncastle v UK* - 4184/10 16.12.2014.

116. The decision of the Court in 2015 was upheld by the Grand Chamber *Hutchinson v UK [GC]* - 57592/08 Judgment 17.1.2017. In departing from the decision that it had reached in *Vinter v UK* 66069/09 130/10 3896/10 on 9 July 2013, the [ECtHR] took into account the clarification of English law which the English Court of Appeal gave in *R v. Newell; R v McLoughlin* [2014] EWCA Crim 188.

117. See footnote 31.

by the statement of compatibility which HRA s19 requires the Minister in charge of a Bill to make. If, as will normally be the case, the Minister has made a statement of compatibility, it cannot be said that the HRA undermines parliament by requiring the courts (if it is possible to do so) to give effect to legislation in a way that is consistent with the statement of compatibility which a Minister has made to parliament. It is not easy to imagine a case where the Minister has made a statement of compatibility in respect of a Bill that has been enacted, but the courts are unable to give effect to the Act in a way that is compatible with ECHR rights.

The position is more complicated in relation to statutes enacted before the HRA. For these there is no statement of compatibility. An example is a much-criticised case under the Misuse of Drugs Act 1971.¹¹⁸ The Act said that a person possessing an illegal drug was entitled to be acquitted “if he proves that he neither believed nor suspected nor had reason to suspect” that the substance which he had was an illegal drug. The House of Lords judges held that meant that it was enough for defendants to “submit evidence supporting their claim that they did not know”. Critics say that Parliament actually intended that defendants had to satisfy the jury that they probably did not know, so that they could be convicted even if there was a reasonable doubt as to their guilt. The common law presumption of innocence (which was, in the past, often been overridden by parliament) is not only guaranteed by the ECHR Article 6(2). It is also included in ICPR Article 14(2), to which the Court also had regard. The case demonstrates the importance of the HRA in protecting such fundamental British rights as the presumption of innocence. Given how long the HRA has been in force, there are not likely to be many cases in the future arising under pre-HRA statutes.

HRA s3 thus extends another existing common law rule for the

118. *R v Lambert* [2001] UKHL 37; [2002] 2 AC 545 [32]-[33] [84] [88]-[90] [156]. The Scottish judge, Lord Clyde, considered what he would have decided without the HRA, and concluded that he would have reached the same decision under the common law; para [157].

interpretation of statutes. Just as the common law requires judges to presume that parliament does not intend to legislate in a way which would defeat fundamental human rights, so it also requires judges to presume that parliament does not intend to legislate in breach of treaty obligations (assuming, in each case, that the terms of legislation are not clear, but are reasonably capable of more than one meaning). So, even before 2000, the courts were entitled to refer to the ECHR as a guide to the interpretation of statutes which were not clear.¹¹⁹

Parliament has not undermined itself by directing judges to uphold the rule of law. On the contrary, HRA s3 reaffirms the principle that parliament is accountable to the people, not only at elections held every five years, but, at all times, through the courts, which parliament has itself set up for that purpose.

The strongest criticism that the HRA and the ECHR undermine parliament is based on a small number of cases decided by the ECtHR. One is *Hirst* (No 2). In this, and related cases, the ECtHR held that the UK's Representation of the People Act 1983 s3 violated the rights of some, but not all, serving prisoners by disqualifying them from voting. The supposed push from the ECtHR to give all prisoners the right to vote is now a common criticism of the HRA and ECHR, and is assessed below. Another case is *Chahal*, which relates to the deportation of convicted offenders and of persons believed to present a threat to security in the UK. The common criticism that flows from this – that the HRA and ECHR prevent the UK protecting its security – will also be critiqued below.

The right of prisoners to vote

UK law provides that a convicted person during the time that he is serving a sentence of imprisonment is legally incapable of voting at

119. *R v Secretary of State for the Home Department, Ex parte Brind* [1991] UKHL 4 (07 February 1991), [1991] 1 AC 696 718.

any parliamentary or local election.¹²⁰ In *Hirst v UK (No 2)*, the ECtHR decided in 2005, by a majority, that a right to vote is included in ECHR First Protocol Article 3, and that UK law is in breach of it. The ECtHR accepted that depriving prisoners of the right to vote can be justified in serious cases. But it held that the prohibition in the UK violated the rights of some prisoners because the disqualification was “irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances”.¹²¹

As in many cases that come before the higher courts, reasonable people can hold strongly differing opinions as to what is the right outcome of that case. There was a dissenting minority of five of the seventeen ECtHR judges in this case, and different views have been expressed in parliament, and in the UK Supreme Court.¹²² This paper will not attempt to answer the question whether the decision of the ECtHR was right or wrong.¹²³ The question that is relevant to this paper is what difference it might make if the UK repealed the HRA.

One difference of opinion is as to whether, or not, the ECtHR should have been ruling on the case at all. First, there is an argument as to whether a right to vote is included in ECHR First Protocol Article 3. Then there is a further argument that, even if it is included, the disqualification of serving prisoners was within the margin of appreciation (or the range of possible options) open to the democratic legislature. So, there are

120. The Representation of the People Act 1983 s3. This does not apply to imprisonment for contempt of court, nor for defaulting on a fine, but is otherwise unqualified.

121. *Hirst v UK (No. 2)* - 74025/01 [2005] ECHR 681 para 82. For subsequent decisions and events in the ECtHR and in the UK see: *R (Chester) v Secretary of State for Justice* [2013] UKSC 63.

122. HC 22 Nov 2012: Column 745. Lord Sumption disagreed with the decision of the ECtHR, but nevertheless considered that it should be implemented. See *R (Chester) v Secretary of State for Justice* [2013] UKSC 63 paras 137-8: “...we would be justified in departing from the case law of the [ECtHR] only if the disenfranchisement of convicted prisoners could be categorised as a fundamental feature of the law of the United Kingdom. I would regard that as an extreme suggestion, and...I would reject it. A wider and perhaps more realistic assessment of the margin of appreciation would have avoided the current controversy. But it would be neither wise nor legally defensible for an English court to say that article 3 of the First Protocol has a meaning different from that which represents the settled view of the principal court charged with its interpretation, and different from that which will consequently apply in every other state party to the [ECHR].”

123. I would, however, have taken the same view as Lord Sumption.

separate questions: one is whether or not the ban is right, another is whether the ECtHR should have been addressing that question at all.

Whatever the meaning of the ECHR, there is another treaty by which the UK is bound. The ICCPR Article 25 provides that every citizen shall have the right and opportunity to vote. So, the question whether or not the UK is in breach of its treaty obligations arises, whether or not the UK is a party to the ECHR through the HRA (although for the ICCPR there is no enforcement mechanism similar to the ECtHR).

Let it be assumed, for the sake of argument, that there were a BBRR which included the right to vote, and the question of disqualifying prisoners from voting were to come before a UK Court under the BBRR for the first time. The UK Court, applying English law, would take account of the UK's treaty obligations, and of foreign case law. That is also what the ECtHR did. It took account of the ICCPR Article 25 and a decision of the Canadian Supreme Court which struck down the disenfranchisement of all prisoners as too widely drawn.¹²⁴ In *Hirst v UK (No 2)* the ECtHR also had regard to the preparatory work for Article 3 of the First Protocol, as many argue that it should do more frequently.¹²⁵ A UK Court would also take account today of a decision of the highest court of Australia, which came to a similar conclusion, namely that depriving all prisoners of the right to vote was unconstitutional.¹²⁶ What the Canadian and Australian cases show is that judges in the English common law tradition (albeit interpreting different constitutional texts), have reached conclusions similar to the decision reached by the ECtHR on disqualifying prisoners from voting.

124. *Sauvé v Canada (no. 1)* [1992] 2 Supreme Court Reports 438.

125. In *Hirst v UK (No 2)* at para 57, the Court referred back to an earlier case, *Mathieu-Mohin and Clerfayt v Belgium*, (Application no. 9267/81) 2 March 1987 paras 46-51. The preparatory works are at [http://www.echr.coe.int/Documents/Library_TP_P1-3_Cour\(86\)36_BIL.pdf](http://www.echr.coe.int/Documents/Library_TP_P1-3_Cour(86)36_BIL.pdf) (accessed 27/4/2017). The preparatory work can sometimes help to understand the intention of the parties to a treaty. But this will only be so, if the parties actually discussed the point that later becomes contentious. And even then, it must be clear to those who later read the preparatory work that the negotiators agreed on what they meant by the words they used. The meaning of preparatory works can give rise to as much dispute as the meaning of the Article of the ECHR which they are invoked to clarify.

126. *Roach v Electoral Commissioner* [2007] HCA 43.

When the English Courts decided Hirst's case in 2001 they held that his disqualification was lawful under the ECHR and the HRA. But if instead there had been a BBRR including a right to vote in terms similar to ICCPR Article 25, there can be no assurance that UK judges interpreting it would have reached the same conclusion.¹²⁷ They might, or they might not.

At the end of the day, so far as cases similar to that about prisoners' disqualification from voting are concerned, those who disagree with the ECtHR's decision are not certain to achieve what they want from the UK renouncing the ECHR and scrapping the HRA.

Undermining British security?

A central criticism Conservatives deploy against the HRA is about limitations it supposedly puts on the ability of this country to deport foreigners who have been convicted in the UK, and others who have not been convicted, but are suspected of posing a threat to the lives and security of people in the UK.

The principal case decided by the ECtHR on this is *Chahal v UK*.¹²⁸ That court decided that one of the specific rights to security, namely the right not to be subject to torture or to inhuman or degrading treatment or punishment (Article 3), requires that no one may be deported to a country where they will face a real risk of such treatment. Thus, there is a conflict, not between security and human rights, but between the human right to security of the persons who might face deportation, and the human right to security of those members of the public to whose security such persons might pose a threat.

Again, if we did not have the HRA and were not party to the ECHR, UK courts would be likely to reach the same conclusion as the ECtHR in some cases, although not necessarily in all. This is because any other conclusion might put the UK in breach of its obligations under another

127. In *R (Chester) v Secretary of State for Justice* [2013] UKSC 63 paras 98 110 some members of the Supreme Court expressed sympathy for the decision of the ECtHR in *Hirst v UK (No 2)*.

128. Application 22414/93 (15th November 2996) [1996] 23 EHRR 1860 para 74.

treaty, namely the UN Convention against Torture (ratified by the UK under the Conservative Government in 1988). The unconditional prohibition on torture under this Convention was added to the same prohibition under the ECHR Article 3, but this UN Convention against Torture actually goes further. The parties undertake not to expel or deport a person to another State “where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹²⁹

It is true that, without the ECHR, the ECtHR would have no say in the matter of deporting foreigners. But that would not stop the UK court from stating that such deportation was incompatible with the UK’s obligations under the UN Convention against Torture.¹³⁰

Conservatives commonly argue that foreign nationals who have committed very serious crimes in the UK have been able to use the qualified right of Article 8 of the ECHR - respect for private and family life – to stay in the UK. The Conservative Party 2015 election manifesto wanted to stop “terrorists and other serious foreign criminals who pose a threat to our society from using spurious human rights arguments to prevent deportation”.¹³¹ It is true that criminals and terrorists use spurious arguments. So, too, do all sorts of litigants. But no case has been identified in which deportation was stopped by a court upholding a spurious argument. If there were such a case, it would be clear from a published judgment – and most judgements from the ECtHR, as from

129. Joint Committee on Human Rights *The UN Convention against Torture (UNCAT)* 19th Report of Session 2005-6 HL Paper 185-1 HC 701-1 Vol 1, paras 19-27. As English courts have remarked in several cases, no derogation can be justified by any countervailing public interest. In the words of Article 2.1 of the UN Convention against Torture: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”; *Belhaj v Straw* [2017] UKSC 3 para [258].

130. See for example *Boyce v The Queen* [2004] UKPC 32, [2005] 1 AC 400 para 6, in which the Privy Council decided that the death penalty was lawful under the Constitution of Barbados, while also stating that it was “not ... consistent with the current interpretation of various human rights treaties to which Barbados is a party”.

131. The Conservative Party, “Strong leadership, a clear economic plan, a brighter, more secure future”, The Conservative Manifesto 2015, 73, <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf>.

UK courts, are available online.¹³²

Anyway, some limitations on the individual human rights of criminals are in fact already spelt out in general terms in the ECHR. Article 2 provides that the right to life is not infringed when someone is killed by a person acting in lawful self-defence against an aggressor. Articles 3 and 4 provides that the right not to be made to do forced labour, and the right to liberty, are not infringed if the work, or the detention, is part of a sentence imposed on a criminal after conviction by a court. Article 8 provides that right to respect for private and family life is not infringed if a restriction on a person's private or family life is necessary for the protection of the rights and freedoms of others, and is imposed in accordance with a law. Under the First Protocol the right to property is not infringed if a person convicted of a crime is required to pay a fine.

Clarification was also given by parliament in the Immigration Act 2014. That Act included a provision that, in the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless (amongst other conditions) there are “very compelling circumstances”.¹³³

In those cases where the court does accept the right to private life as a reason for not deporting, the ECtHR bases its decision on all of the facts which the parties put before it. These facts may be relevant to what the offender and their family would suffer if deportation went ahead. They may also be relevant to any risk to the rights of others if the offender is not deported. If the offender does pose a risk to the rights and freedoms of others (and not all convicts do), the risk to the public may not be serious enough to outweigh the rights of the offender. Whether or not the Court should apply the qualification to the offender's right to a

132. The fact that Article 8 has been invoked in court on behalf of prospective deportees who have not been deported does not mean that Article 8 is the reason why the court has upheld their claim that they should not be deported. Litigants usually advance several alternative arguments, some of which the court may accept, while rejecting other arguments.

133. The 2014 Act s19 amended the Nationality, Immigration and Asylum Act 2002 ss 117A–117D. *NE-A (Nigeria) v Home Secretary* [2017] EWCA Civ 239, *Entry Clearance Officer - United States of America v MW (United States of America)* [2016] EWCA Civ 1273.

private and family life under Article 8 of the ECHR applies depends on the particular facts of each case.

Box 4.2. Better the guilty go free than one innocent person convicted

It has for centuries been a principle of British justice that it is better that some guilty people go free than that one innocent person be convicted. This is not just a moral principle. It is also a practical one. If a person innocent of a particular crime is convicted and sentenced, the consequences are very serious, both for that person and for the public. First it is a cruel injustice to the innocent person. But for the public, it means the innocent person becomes a victim of injustice by the state. This may give that person, and others, a pretext (and in some serious cases a justification) for disobeying the law. For the public, it also means that the guilty person will remain at large, and that the police will not be looking for them. That means that the public will be likely to suffer from the guilty person's further criminal acts. The more serious the crime, the greater the risk of death or injury to the public if an innocent person is wrongly convicted, leaving the real perpetrator free to offend again.

It follows that, if the human rights of suspects are not respected, more people may be convicted, but, if some of them are innocent, the whole purpose of the fight against crime will be frustrated. This is illustrated by the series of miscarriages of justice in recent decades in cases which included terrorism, such as that of the Birmingham Six. Their 1975 convictions for 21 murders by bombing were set aside in 1991, and the inquests re-opened in 2017.¹³⁴ The more serious the offence of which innocent people are

134. "Birmingham pub bombings: what we know", *BBC News*, 10 July, 2017, <http://www.bbc.co.uk/news/uk-england-35534745>. Police witnesses were found to have deceived the jury about alleged confessions (in a way subsequently made impossible by the audio recording of interviews under the Police and Criminal Evidence Act 1984); *R v McKenny* (1991) 93 Cr. App. R. 287, *Foran v R* [2014] EWCA Crim 2047 para 32.

suspected, the more important it is for them, and for the public at large, that they have the right to the presumption of innocence, the right to silence and other human rights. False confessions and mistaken identifications have proved particularly dangerous for the fight against crime. It was to meet these and other dangers that the Police and Criminal Evidence Act 1984 (giving effect to the human rights of suspects) was passed under a Conservative Government.

For our security, every one of us needs the protection of human rights. To be innocent is not itself enough protection. There have been recent high-profile cases where prominent people have been wrongly accused of being paedophiles. Every innocent person is at some risk of being wrongly accused, whether because of mistaken identity or malice.

It is true that everyone has responsibilities to respect the rights of others. But the fulfilment of responsibilities cannot be a precondition for enjoying rights. If it were, then that would mean that there were no human rights at all, but only privileges which must be earned. Innocent people need their human rights at a time before it has been established that they are innocent.

Conclusion

The public, journalists and politicians sometimes disagree with judgments of courts. That is not surprising. On the contrary, it would be surprising and worrying if the decisions of the courts were always the same as the decisions which the critics claim they should have been. One reason for this is because the courts are independent and impartial. If the critics are concerned for the rights of themselves (or of others for whom they are responsible), they may not be impartial. They may be giving more weight to those rights than to the rights of a convict for whom they have little concern. Or, if they have not given equal consideration to all sides of the case, they may not be impartial for that reason.

The point about having independent and impartial judges is that

they do, and should, come to different decisions from those (such as Ministers) whose decisions they must review, and from those (such as members of the public and their representatives) whose rights the judges have to weigh against the rights of others, including offenders and suspected offenders.

Not all decisions made by judges are right. But if there were no unpopular decisions by judges, some of their judgments would certainly be wrong.

Chapter 5: **The UK's future human rights framework**

The manifesto of the current Government promises to review, after Brexit, the UK's human rights legal framework. This chapter considers each of the three options (set out in Chapter One) for reforming the UK's human rights legal framework.

There are three main options for reform:

1. The UK repeals the HRA, withdraws from the ECHR, and adopts a BBRR
2. The UK repeals the HRA but does not withdraw from the ECHR, and adopts a BBRR
3. The UK does not pursue the proposal: it does not repeal the HRA and does not withdraw from the ECHR

A further possibility might be to add a BBRR to the existing HRA and ECHR. This is a variant of the second and third options above, but is not discussed in this report.

Considering the arguments outlined in Chapter Four, this report argues that the third option is preferable. There are serious reasons for thinking that the second option – of introducing a BBRR, as favoured by the former Prime Minister David Cameron - would not be desirable. But, if the second option were chosen, this chapter details possible provisions which could be included in a new BBRR. The first option is completely undesirable, and a brief summary of the main reasons for this are detailed below.

Why repealing the HRA and withdrawing from the ECHR would be wrong

Chapter Four has already detailed why many of the criticisms of the current human rights framework – specifically the HRA – are wrong. Since there are no fundamental inadequacies with the current human rights framework in the UK, this should be enough for conservatives to not contemplate reform.

Drawing on the conclusions from the previous chapter, there are several specific reasons why Conservatives should not abandon the HRA and ECHR.

First, although doing so would release the UK from the jurisdiction of the ECtHR, it would not release the UK from the obligations under international law to respect the rights set out in the ECHR. This is because those rights, and more, are rights which the UK is bound by other international treaties to respect, including the ICCPR and the UN Convention against Torture, as outlined in Chapter Four.

Second, withdrawal from the ECHR would not address what is said to be excessive judicial activism. In fact, in common law countries, judicial activism is essential if the law is to be up to date. Admittedly, judges can take law-making too far. But the criticism that judges have taken law-making too far is made against UK judges, as well as against ECtHR. Withdrawing from the ECHR would remove the ECtHR, but it not would, of itself, limit law-making by UK judges.

Third, most judgements of ECtHR have been welcomed in the UK. The total number of cases in which the ECtHR has found a violation by the UK is a little more 300 over a period of some fifty years. Many of those findings date from a time when UK judges were slower than they have since become to develop the protection of human rights under the common law. The number of ECtHR judgments which are cited by those who advocate withdrawal from the ECHR is rarely more than a handful, and none of them recent – they are mainly the prisoners' voting case (*Hirst (No 2)*), and the deportation cases where there is a risk of torture or inhuman or degrading treatment (following *Chahal*).

Of these, many deportation cases are wrongly attributed to the ECHR, when they are in fact attributable to the UN Convention against Torture.

Some changes in UK law as a result of judgements from the ECtHR have actually been welcomed. In many of them - particularly those relating to freedom of expression, control over government surveillance, and discrimination - the decision of the ECtHR has prompted parliament to make good failures by the UK courts and parliament itself to keep UK law in line with contemporary British values.

Fourth, the UK judges sitting on the ECtHR have contributed to the case law, both by their high personal qualifications, and by reason of the long tradition of the common law in upholding human rights. If they were absent, their contribution would be missed.

Fifth, if the UK withdraws from the ECHR, the task of deciding what should be in a BBRR would be very complicated. If there were to be a BBRR it would be necessary to agree, not only upon the rights to be included, but also, upon the process by which the new BBRR was to be agreed, how, if at all, it was to guarantee rights, and how disputes were to be adjudicated upon and enforced. If the BBRR is to be more than an ordinary statute (which can be repealed at any time), then something must be found to give the additional guarantee at present given by the ECHR and international law.

Finally, the act of leaving the ECHR would send a message, to all those peoples whom the UK and Conservative Governments encouraged to sign up to it, that they cannot have liberty and security at the same time. Those peoples include not just those of the other 46 members of the Council of Europe, but also all the peoples of the former British Overseas Territories, up to and including Hong Kong. Recent experience has shown that concern for other states' human rights records is not only moral and altruistic. It is also practical. States with a poor record on human rights are a threat to peace and drive refugees and other migrants towards the UK.

The former Conservative Home Secretary, Lord Chancellor and

Secretary of State for Justice, the Rt Hon Ken Clarke QC MP, is the only former minister of his generation to discuss the ECHR in his memoirs. He described himself as “a committed defender of the [ECHR]”, saying that “it is one of the main levers that exists to maintain some liberal and democratic standards and protect the citizens of those countries [such as Russia, Azerbaijan, Ukraine and Georgia] who do submit to its judgments”.¹³⁵

What could be in a BBRR?

Option two for future reform is to repeal the HRA but remain a signatory to the ECHR and introduce a new BBRR. The contents of a possible BBRR, where the UK still remains a signatory to the ECHR, is discussed here. This option would lead to a BBRR which was in effect ‘HRA-plus’, as it would have, as a minimum, to incorporate the ECHR into UK law as the HRA currently does.

A useful starting point for a possible new BBRR is the recommendations from a cross-party committee of distinguished experts on the British constitution set up by JUSTICE in 2007. They were proposing what is option two in this paper, because their report states: “The ECHR rights included in the HRA and adopted in such instruments as the [ICCPR] are the necessary and logical starting point for the architects of a British bill of rights”¹³⁶. Their core recommendations are written in Box 5.1. below.

Box 5.1. Recommendations for the contents of a BBRR from JUSTICE¹³⁷

1. Reducing current limitations

Some of the specific provisions limiting individual ECHR rights

135. Clarke, *Kind of Blue*, 457, referring to *Eweida v UK* 48420/10 HEJUD [2013] ECHR 37 (15 January 2013).

136. JUSTICE, *A British Bill of Rights: informing the debate*, 50.

I declare an interest: since 2016 I have a member of the Executive Board of JUSTICE, but I had no role in the 2007 report.

137. *Ibid.*, 109-110.

now present a problem of language or appear inappropriate in a modern setting. For example, Article 5 (right to liberty) which allows detention of “alcoholics, drug addicts or vagrants”, and Article 16 which allows restriction on political activities of foreigners.

2. Simplifying limitation clauses

Rather than continuing the ECHR’s style of limiting some individual rights, a general limitations clause applying to the qualified rights could emphasise a culture of rights rather than the uncertainties and safeguards in the ECHR which are reflective of its era. A general limitations clause could also make provision for the doctrine of proportionality to indicate the balancing exercise inherent in relation to the enforcement of rights.

3. Updating rights

Social and moral attitudes on issues such as sexual orientation, technological advances in areas such as surveillance, together with the growing awareness of environmental issues all engage rights in a way which could not have been foreseen by the framers of the ECHR in 1950. Nearly sixty years on, there is a case for adapting to a new century and a new political climate.

4. Guaranteeing traditional and common law rights

These might include access to justice - a right firmly embedded in the common law and crucial for non-British nationals who are outside the political process; trial by jury - there is a debate to be had over whether this archetypal ‘British’ right should be explicitly protected; good administration - this broad category reflects the relatively recent and major expansion of the field of administrative justice and encompasses vital due process rights which are guaranteed in many jurisdictions.

5. Protecting certain economic, social and cultural rights

Such protection would be a major step and is likely to prove controversial, though proposals for a right to free health care

remain popular and workable practices are found in comparative bills of rights. Their inclusion would not necessarily entail justiciable rights but could be framed in terms of 'progressive realisation' bearing in mind the resource implications for such rights.

6. Rights contained in international and overseas domestic bills of rights

Examples of progressive bills of rights include those which contain "third generation" rights such as the rights to a clean environment. Another major category of rights currently omitted from the ECHR is children's rights. Such rights merit debate for inclusion in a modern bill of rights which aims to entrench values and principles as well as ensure legally enforceable rights.

Many Conservatives may oppose the inclusion in a BBRR of economic, social and cultural rights. This is not because Conservatives are opposed to such rights in principle. On the contrary, as is shown in Chapter Three, Conservative Governments have introduced legislation to protect such rights since the time of Disraeli, and they have caused the UK to adhere to international treaties that guarantee such rights. Rather, the objection is more that these rights ought not to be justiciable through the courts, but should rather serve as guidance to the UK parliament.

As the report from JUSTICE makes clear, a new BBRR "might also meet the concerns of those who wish to emphasise social responsibility in addition to protection of rights in Britain". But it is worth highlighting what the report then goes on to say: "Responsibilities' which correspond to the core rights must be confined to a preamble. Their force is moral rather than legal".

The purpose of a Bill of Rights is not to provide a summary of the whole law. The purpose is to set the limits to what governments, public authorities, parliament and judges can do by executing or making laws.

Responsibilities are set out in the ordinary law. Thus, an individual who interferes with another person's right to security or to liberty without a legal justification will be committing an ordinary criminal offence, and will be liable to suffer a sentence, and, in most cases, also to compensate the victim.

Some of the earliest Declarations of Rights did include responsibilities. For example the Virginia Declaration of 12 June 1776 (which is still in force), provides: "It is the mutual duty of all to practice Christian forbearance, love, and charity towards each other." This is the 'fraternity', which is in the motto of the French Republic. Duties are also referred to in the preamble to the ICCPR: "The individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant".

It might have been better if there had been a similar provision including responsibilities in the ECHR and the HRA. But, importantly, such a provision would not be directly enforceable through the courts.

In none of the treaties to which the UK is a party are rights expressed to be conditional upon the fulfilment of duties or responsibilities, with the exception of one condition: it is when a person has been convicted of an offence. Certain rights may then be taken away as a punishment, usually liberty (in serious cases), and, in less serious cases, not to be compelled to work (community sentences), and property (fines). Convicts do not then lose all their rights, but the exercise of most other rights (other than the right to life, and not to be subject to torture or inhuman or degrading treatment) will normally be subject to some restriction as a necessary incident of the sentence imposed by the court (even though that is not the purpose of the sentence).

It is not necessary to have a BBRR to give clarification to this. Parliament may also use ordinary legislation to guide courts, and others, in interpreting human rights claims. Indeed, as already mentioned, parliament did this in the Immigration Act 2014, providing

a structured approach to the application of Article 8 (right to private and family life) to decisions about deportation.

The ECHR applies now to 47 member states, but it does not require them all to have the same laws. The rights set out in the ECHR are principles to which the laws of member states must conform. But there are many different ways in which the laws can be framed in conformity with these principles. The rights in the ECHR and the HRA are expressed in general terms, which were intended to leave states with the means to implement widely differing laws. It should not be necessary to have a BBRR to strengthen existing laws setting out responsibilities.

In conclusion, a BBRR is not only unnecessary, but also could be dangerous. If the BBRR is to reflect the values of the whole of society, it would not be wise for Conservatives to embark upon the project of a BBRR, when they disagree with the views of what may be a large proportion of the population, and when they may not be able to control the outcome of the process which they set in motion.

Conclusion

This paper proposes the third option originally outlined in Chapter One: that the UK does not repeal the HRA and remains a signatory to the ECHR. However, this does not mean nothing can be done to strengthen human rights in the UK.

Most rights are expressed in the ECHR to be subject to limitations. In addition to clarifying responsibilities with ordinary legislation, the UK Government can seek agreement with the governments of the other state parties to the ECHR as to possible reforms, as it has in the past. Such agreements can be incorporated into a formal Protocol to the ECHR, of which there are already 16.

Further, the judges, both in the ECtHR and the UK, may themselves be more cautious in their decisions, taking note of the criticisms that have been made of them. There is no stand-off between the judges on the one hand and the UK parliament on the other hand. There is a division of opinion amongst judges themselves, and many of the important

decisions have been made by a majority of judges, and criticised by the minority in dissenting opinions.

It is natural that Ministers and parliament should, from time to time, find human rights frustrating. Human rights set limits to what Ministers may do, and so may prevent them from pursuing policies, or implementing decisions, which they believe to be in the public interest. But it happens from time to time that politicians and others express ridicule or contempt for human rights when explaining to the public why they have been unable to pursue a policy, or implement a decision. In expressing ridicule or contempt for human rights they are undermining the rule of law, a fundamental pillar of democracy.

If Ministers decline to internalise and express ownership of the fundamental principles of democracy and the rule of law, they are encouraging members of the public to do the same.

The protection of human rights is the joint responsibility of all those who exercise the powers of the state, and of the people themselves. It follows that members of the government, of parliament, the judiciary, and public authorities generally, should each exercise their powers with restraint and with respect for the powers of the others.

Annex: Further reading

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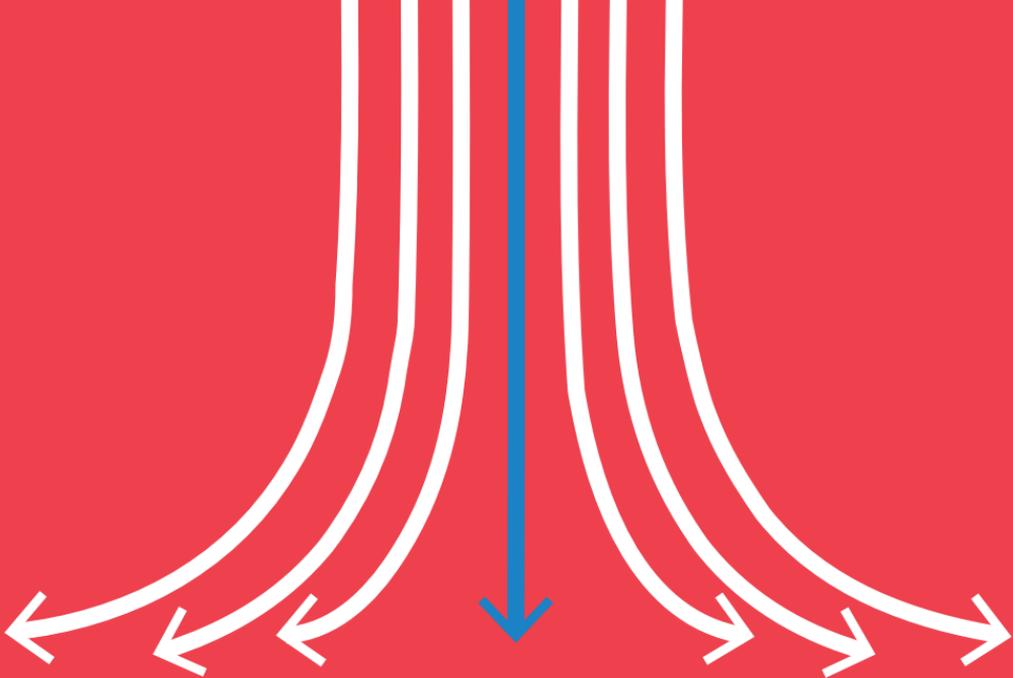
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Conservative writers and politicians have been influential in the development of human rights in the UK for centuries. Sir Winston Churchill made the enthrone of human rights a war aim, which was achieved by the founding of the European Convention on Human Rights (ECHR). It was a Conservative MP in 1968 who was the first to campaign for incorporating the ECHR into UK statute law, which would eventually be realised with the introduction of the Human Rights Act (HRA) 1998.

However, Conservatives today are sceptical of the HRA. The current Government has promised to review the UK's future human rights legal framework after Brexit. This report outlines and assesses different options for reform, concluding that Conservatives should be supporters of the HRA and ECHR.

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