Human Rights Law under Threat – the Challenge to Human Rights Law in the United Kingdom.

Introduction: human rights law under threat

This article deals with political and legal difficulties arising from the integration of European human rights law into the UK constitution.

Human rights law in the UK (UK) has become a matter of political controversy. Powerful elements in the Conservative Party want to remove or at least radically reform the duty, found in domestic law, to abide by "Convention rights" - the human rights, derived from the European Convention on Human Rights (ECHR) and given "further effect" in the UK under the terms of the HRA 1998.

Protection of human rights in the UK – the system

The ECHR is an act of international law. The UK adopts a modified "dualist" theory by which treaty-based obligations are not self-executing. If these obligations are intended to create rights enforceable in the domestic courts, they must be enacted as such by Parliament. Nevertheless the international obligations entered into by the UK (including the ECHR) have a persuasive influence on the way in which domestic courts interpret Acts of Parliament, develop the common law and review the legality of administrative actions.

It follows from this that the substantive rights and freedoms listed in section 1 of the ECHR (articles 2-18) have not been, and still are not, directly enforceable in the domestic courts of the UK. The UK's international obligations under the Convention were, and still are, given effect by executive-led prospective changes to administrative practices , by the introduction of necessary legislation and by the payment of any sums in "just satisfaction" and legal costs ordered by the European Court of Human Rights (ECtHR). But no one has an enforceable, domestic, legal right that such measures be put in place .

The HRA 1998 (HRA) came into force in October 2000. It does not make the ECHR, as such, part of UK law nor does it give the ECtHR jurisdiction in the UK. The HRA is a domestic UK statute applicable only within the "jurisdiction" of the UK.

The Act gives further effect to Convention rights in domestic law in two ways. Firstly, statutes, whenever enacted, must be interpreted "so far as it is possible" in a way which is compatible with "Convention rights[1]"(section 3). This is a power solely of interpretation. The courts do not have the power to invalidate a statute which cannot be read compatibly – the Act recognises the supremacy of Parliament. However, it is a power that the courts can use quite radically. Under ordinary canons of statutory interpretation any ambiguities in statutes can be

[1] Specifically these are rights listed in schedule 1 of the HRA; they have exactly the same text as in the ECHR.

resolved in Convention compliant ways, without reference to the HRA. The section 3 power, therefore, is used where the words in the statute are clear and unambiguous – in the absence of the HRA they would authorise actions incompatible with Convention rights[2]. However the section 3 power cannot be used if the will of Parliament is so clear such that a Convention-compliant reading would involve a court "legislating", doing something different from what Parliament clearly intended, not merely interpreting. In these circumstances even the UK Supreme Court has no power to invalidate a statute. Section 4 HRA authorises the senior courts to make a "declaration of incompatibility" – a statement made with judicial authority that a statutory provision is incompatible with Convention rights. Such a declaration does not alter the domestic legal position of the person under domestic law – they are still denied their human rights.

Section 3 and 4 create what is often called a relationship of "dialogue" between the judiciary, the executive and Parliament[3]. Using section 4 the courts can give a reasoned explanation for why there is incompatibility between a statute and Convention rights. The issue then returns to the elected institutions (Parliament and the executive). They can change the law to remedy the defect or can, because of their view of the public interest, leave the law unchanged.

The problem is that this dialogue really only works domestically. A person whose position is the subject of a declaration of incompatibility, will have exhausted his or her domestic remedies, and is well placed to make an application to the Strasbourg court. If it is successful, the UK is obliged, then, to change the law or administrative practice. Until now, executive and Parliament have responded to section 4 declarations by bringing about such changes. For this reason it has been suggested that, despite the absence of a power of direct invalidation, the HRA brings about something very close to a system of full judicial review on human rights grounds[4] - which undermines in practice the ultimate supremacy of Parliament.

Secondly, the HRA makes it unlawful for a "public authority" to act incompatibly with Convention rights and it provides a cause of action and remedies for an individual victim. This provision is linked with the Convention: public authorities are those bodies for which the state would be responsible at Strasbourg[5], "victims" are those who could apply under article 34 ECHR and, under the Act, and financial remedies are available only under the same principles as apply in Strasbourg.

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[2] For a clear account of the judicial approach see *Ghaidan v Godin-Mendoza* [2004] UKHL 30, paragraph 25-33.
[3] See for example: T. Hickman "Constitutional Dialogue, Constitutional Theories and the HRA" (2005) *Public Law* 306 and A.L. Young *Parliamentary Sovereignty and the HRA* 2009, Oxford: Hart Publishing, chapters 5 & 6. But dialogue theory remains controversial: A.L. Young "Is dialogue working under the HRA" (2011) *Public Law* 773.
[4] *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115, 131-2.
[5] *Aston Cantlow...v Wallbank* [2003] UKHL 37, paragraph 7.

The position of the Conservative critics

The Conservative manifesto in 2010 promised to replace the HRA with a "British bill of rights". The 2010 election, left the Conservative Party governing in coalition with the Liberal Democrats who were, and remain, firmly opposed to any weakening of European human rights protection. The best the Conservative sceptics could achieve was a Commission to inquire into the desirability of a "British Bill of Rights" to replace the HRA[6]; but this was subject to the proviso that any proposals it made had to build on the floor of rights contained in the European Convention and not weaken the guarantees in that Convention. This proviso, of course, avoided the problem of replacing the HRA with a less generous alternative. In that situation applicants could still take their case to the Strasbourg Court. So long as the UK remains bound by Article 1 of the Convention any adverse ruling from the ECtHR will still need to be put into effect. This can only be avoided by renunciation by the UK or radical reform at the Council of Europe – the latter not directly within the control of the UK government.

Experience in government following the 2010 election strengthened Conservative opposition to human rights law. Convention derived restraints on the deportation of foreign criminals or requirements for review of those on the sex offenders' register were amongst issues which caused press-fuelled political storms. At the Conservative Party conference in September 2013 Theresa May, the Home Secretary, revived the party's intention to "scrap" (repeal) the HRA and did so without any compensating commitment to a British Bill of Rights. She went further and accepted that dealing with the human rights problem might require renouncing the Convention – "If leaving the European Convention is what it takes to fix our human rights laws, then that is what we will do".[7]

The Conservative party concern with "human rights" needs to be put into the context of more general Euro scepticism in the UK and also populist and media distaste for a political and legal position which necessarily protects unpopular minorities and individuals. Indeed, the HRA has been controversial from its earliest days. In 2006 the Labour Government (which had introduced the Act) felt compelled to review its operation.[8] The results were generally positive but some critical issues were noted. In particular, it was accepted that sometimes officials had misunderstood the discretion open to them to restrict "qualified rights" (particularly the right to private life in Article 8) and this had led to unnecessarily generous applications of rights.

The main public criticisms come from elements in the Conservative party. The other main UK parties (Labour and Liberal Democrats) remain committed to the current system, as do the nationalist parties in Scotland, Wales and

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[6] Commission on a Bill of Rights – formed March 2011 and disbanded after submitting its final report in December 2012.

[7] Theresa May, speech delivered to the Conservative Party Conference, September 30 2013.

[8] Department for Constitutional Affairs *Review of the Implementation of the HRA 1996* (July 2006)

Northern Ireland. There is also plenty of evidence of significant political, popular and institutional support for the Act[9]. Human rights law divides the electorate.

Two constitutional "hypotheses".

The critique of human rights cannot be properly evaluated without taking into account the major transformation the UK's constitution has undergone in the last five decades. The importance of human rights norms, irrespective of the influence of positive human rights law from the Council of Europe, is fully recognised in the new constitutional arrangements that have emerged.

The traditional "political constitution" has given way to a more legalistic "common law constitution". The process of change has been gradual and informal. No deliberate constitutional Act has brought it about. It has occurred because changes to political culture have been reflected in the way in which the executive, legislative and judicial powers have understood and interpreted their own and each other's roles; and these new interpretations have themselves fed back into political culture. It is a theoretical change in the sense that both its scope (the extent to which there has been change) and its desirability (the extent to which it allows for an acceptable balance of public and private interests) are matters of interpretation and controversy. The difficulties over the reception of human rights law should be understood in this context.

The old, traditional, hypothesis of the "political constitution" has, as its central term, the constitutionally unlimited sovereignty of Parliament. Constitutionally, Parliament can make laws with any content, including laws which violate human rights. However this has always been contrasted with practical (political, economic, cultural, etc) limits to Parliament's legislative freedom. These limits are found in constitutional conventions and political practices which legitimate resistance to oppressive legislative proposals from the executive[10]. Constitutional conventions, the second pillar of the traditional theory, are rules by which offices of state are defined and their powers limited. However, these rules are not enforceable through the courts and their authority, in the end, is found simply in their acceptance by politicians and officials. Thirdly, on the traditional constitutional model, is the importance of the convention of ministerial accountability to Parliament[11]. This is based around the fundamental duty and power of Parliament to have and express its "confidence" in the executive which, if lost, triggers a general election[12]. The strength and significance of ministerial accountability, as a restraint on power, remains ultimately political. It is not a legal duty in the sense of legal norm that can be directly enforced in the courts.

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[9] See Equality and Human Rights Commission *Human Rights Review 2012*. Its conclusions support human rights and gives a detailed, broadly positive, consideration of the extent to which a human rights culture is embedded in the culture of public services in the UK.

[10] See, for example, G. Marshall *Constitutional Conventions* 1984 Oxford: OUP, esp Chapter 1.

[11] E.g. A. Tomkins *Our Republican Constitution* 2005 Oxford: Hart Publishing, Chapter 1.

[12] Which remains the case today despite the Fixed Term Parliaments Act 2011, see section 2.

Ministers refusing to account for the actions of their departments may come under costly political pressure and, depending on how the Prime Minister calculates the balance of political advantage, they would be liable to be dismissed. Fourthly, the traditional hypothesis expresses its ultimate character as a "political constitution" in terms of the relative subordination of the courts. The rule of law, on this view, is assured by a "quietist" judiciary. The common law is subordinate to the sovereignty of Parliament, private law, particularly property, is the main concern and, given the role and importance of ministerial accountability to Parliament, there is no need to develop a strong, interventionist, conception of administrative law[13].

This theory of the "political constitution" has, over recent decades, come under sustained criticism from academics, politicians and also judges. It is widely agreed that, given the enormous changes the UK constitution has undergone, the theory no longer has full explanatory power. A "new British constitution"[14] has emerged. A "different hypothesis" (different from the traditional account above) is necessary to explain the enormous changes to that have occurred over the last decades. Any criticism of the human rights system in the UK can be assumed to take into account these changes.

First and foremost there are important ways in which Parliament, reflecting political choices and economic, social and political reality, has voluntarily limited its authority. Membership of the EU (on terms which must accept the limitation of "sovereign rights"[15]) and devolution of many powers and functions to Scotland, Wales and Northern Ireland are the obvious examples[16]. The HRA, as well, can be seen as part of this process.

Secondly, Parliament has greatly strengthened the mechanisms by which ministers can be scrutinised by Parliament and called to account for their actions and the actions of their department. Through, in particular, a reformed and strengthened system of "select committees", it is no longer appropriate to dismiss Parliamentary scrutiny as weak and merely partisan[17]. Through the select committee system, in particular the Joint Committee on Human Rights, this scrutiny is conducted in a context of awareness of human rights. Of course such awareness is limited by the fact that Parliament never loses its partisan character (though the select committees are designed to enable a non-partisan perspective to emerge) and because Parliament's main function relates to scrutinising policy

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[13] E.g. by confining procedural rights (such as the right to a fair hearing) to judicial and not administrative bodies (*R v Electricity Commissioners* [1924] 1 K.B. 171), and limiting the power to intervene on the substantive exercise of discretionary power only to those situations in which power has been obviously abused (*Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 K.B. 223).

[14] V. Bogdanor *The New British Constitution* 2009 Oxford: Hart Publishing.

[15] *NV.Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] CMLR 105.

[16] Although it remains the case that the applicable legislation (such as the European Communities Act 1972 and the Scotland Act 1998) can be expressly repealed; the legislation pertaining to Scotland, Wales and Northern Ireland reserves the power of the UK Parliament to legislate even over devolved matters.

[17] E.g. Lord Hailsham "Elective Dictatorship" *The Listener* 21 October 1976, 496-500.

and legislating rather than resolving individual disputes. It is when politically unpopular individuals are threatened with the loss of their liberty that careful, fair, independent, impartial and rule-based scrutiny is required.

Thirdly, there is a clear tendency, a "direction of travel", towards a more "legalistic" and written constitution. This is so strong that some commentators refer to a "common law constitution" controlled by the law rather than the supremacy of Parliament[18]. For example, a number of constitutional conventions have been abolished and replaced by statute[19], others have been given statutory form[20], and others reduced to written form (though not enacted as law)[21]. Likewise, power that was originally authorised by the Royal Prerogative, has increasingly been given statutory form[22].

The most important indicator of this "legalising" tendancy is the development of a mature system of "judicial review of administrative action" by which the exercise of public power can be subjected to close judicial scrutiny. The "quietism" of the traditional, "poltical constitution" has been transformed by a series of developments in the common law that date back to the 1960s. First, a strong system of procedural rights has been developed. These require fair hearings before tribunals and other bodies deciding individuals' rights but also, more broadly, require fairness in the exercise of executive power[23]. Secondly, there are "substantive" grounds on which the legality of executive power can be reviewed. The executive must act within its powers, take into account only relevant matters and, even if it has taken only relevant matters into account, not act unreasonably in the sense of abusing its powers. "Relevance", "abuse of power" etc are obviously open textured ideas whose nature and scope is for the judges to decide. Executive decisions are subject to "variable intensity of review" – from the most intense examination of the detail of policy to other cases in which, unless there is evidence of bad faith or irrationality, an executive action is accepted as lawful. The intensity of the review depends upon some (usually unstated and implicit) theory of the appropriate relationship of judiciary and executive in the particular circumstances of a case. In any event, it is clear that the judiciary have developed and expanded the scope of the rule of law and are

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[18] See, for example, Rawlings, R. "Parliamentary Sovereignty under the new constitutional hypothesis" *Public Law* 2006, Autumn, 562-580.

[19] For example, the constitutional convention by which, within a statutory five year limit, the Prime Minister could chose the timing of a general election, has been replaced by the Fixed Term Parliaments Act 2011 which, subject to exceptions, provides for general elections every five years.

[20] For example, the Constitutional Reform and Governance Act 2010 gives statutory effect to Parliamentary rules, in effect conventions, dealing with the "ratification" of treaties.

[21] For example, the relations between the executive and the judiciary are embodied in the "Concordat" (2004); this complements the statutory protection of judicial independence in the Constitutional Reform Act 2005.

[22] For example, the control of the civil service is now based on the Constitutional Reform and Governance Act 2010; the "secret services" were given a statutory recognition by the Security Service Act 1989 and the Intelligence Services Act 1994. Notoriously the power to wage war remains with the Prime Minister, acting under the Royal Prerogative, though there now may be a constitutional convention requiring the support of the House of Commons expressed by Resolution before military action overseas can be udnertaken.

[23] For example: *Bank Mellat v HM Treasury* (2) [2013] UKSC 39 – the Supreme Court required prior notification before the assets of an Iranian bank could be frozen.

prepared to impose values inherent in that concept to control the exercise of executive power in ways that go beyond anything imagined under the constitutional practice of the first half of the Twentieth Century.

The changes mentioned in the previous paragraphs, taken together, describe the new constitutional hypothesis which is the background to criticism of human rights law. It is, perhaps, embodied in this statement by a senior judge in *X v Morgan Grampian* [1991] 1 AC 1:-

> The maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law. They interpret the will of Parliament and do so on the basis of general principles of the rule of law (*per* Lord Bridge).

Of course the "rule of law" and its "principles" are problematic and have different meanings[24]. But it is clear that commitment to "human rights" is essential. This is partly because of the HRA 1998 which gives express Parliamentary authorisation for the courts to develop a human rights jurisprudence based on the European Convention. But it is more than that. As said above, the language of "fundamental rights" entered the common law, on its own authority, in the 1980s[25]. Reflecting this, the judges have developed a concept of "legality". The effect of "legality" as a principle is that only the clearest, most explicit and unambiguous words in an Act of Parliament can authorise executive actions which are incompatible with "fundamental rights". The principle of "legality" leaves the relationship of the courts with the executive and Parliament in a condition similar to what it is under the HRA 1998. Indeed, any repeal of the Act would have no direct impact on this commitment in the common law to human or "fundamental" rights. Thus, even without the HRA, executive actions, authorised by statute, would still need to conform to judicially imposed human rights norms (unless an Act of Parliament could only be interpreted otherwise).

Human (or "fundamental") rights, therefore, now inhabit the common law and influence the way in which, through judicial review of administrative action, it limits executive power. In addition it is clear that there is something like a constitutional convention that Parliament will legislate in a way that is human rights aware. Human rights principles tend to be integrated into legislation either in the original proposals from the executive or by the executive's acceptance of

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[24] See, for example, G. Marshall "The Constitution: Theory and Interpretation" IN V. Bogdonor (ed) *The British Constitution in the Twentieth Century* 2003 London: The British Academy; cf Tom Bingham "The Rule of Law" 2006 Sir David Williams Lecture, Centre for Public Law, University of Cambridge.

[25] *Morris v Beardmore* [1981] AC 446.

human rights amendments coming from Parliament[26]. Again, if the HRA 1998 is simply repealed, this convention, this legislative habit, is likely to remain.

Integration of human rights

Given these fundamental constitutional changes, it is clear that critics of human rights law cannot be seeking a general disapplication of human rights norms from the executive. Human rights norms clearly have weight under this "new hypothesis". The critics' objections are to the form and system by which those norms are enforced; they are about the effects of the European system of human rights protection in a constitutional system that already gives effect to human rights norms.

Those for whom the integration of European human rights law is unproblematic will deny that there are constitutional tensions. European human rights law fits easily into the legalistic, judicially constrained nature of the common law constitution described in the previous paragraphs. But human rights critics, such as the Conservative critics whose views are mainly the subject of this article, are expressing concerns which seem to value elements of the political constitution. For them it is not clear that the UK has simply transformed itself into a common law constitution. The problematic reception of human rights norms indicates the survival of at least aspects of the "political constitution".

Digression: the left critique of human rights.

Criticism of human rights law in the UK is politically and constitutionally important because it is expressed by the current government and also, as we shall see, by senior judges. But there is also criticism from the left. Labour government Home Secretaries, especially after "9/11", were as critical as their Conservative successors of some decisions. There is also a more carefully articulated, academic, critical position which continues to support the "political constitution" and resists the emergence of the "common law constitution"[27]. This left critique sees the HRA as shifting power from an elected Parliament to which the executive is accountable to an unaccountable (because independent) and unelected judiciary. From this position, the development of human rights law is part of a process by which an essentially "political" constitution, based on the ultimate supremacy of Parliament accountable to the electors, is being displaced by a more legalistic set of constitutional arrangements where final authority on what are highly controversial matters lies with the judiciary. They are sceptical of judicial claims to the impartial administration of the law. They point out that

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[26] Section 19 HRA requires ministers presenting a Bill to Parliament to make a statement that the Bill's proposals are compatible with Convention rights or, if they are not, why the Bill should, nevertheless, be supported; the Joint Committee (of the House of Lords and House of Commons) on Human Rights reports to Parliament on its own independent assessment of every Bill.

[27] E.g. A. Tomkins *Our Republican Constitution* 2005 Oxford: Hart Publishing. For discussion and criticism of, specifically, the position on human rights see G. Phillipson "The Legal Protection of Human Rights: Sceptical Essays" 2012 *Public Law* 380 (publication review).

human rights norms are often highly controversial. As such they should be matters of political discourse rather than matters to be removed from the realm of the political. What these critics tend to want is a strengthened Parliament, able to represent the interests of all, including the least well off, and able to stand up to both executive and judicial power. They see such a Parliament as being more effective than the courts in protecting human rights in the light not just of individual freedom but also in the light of the norms and discourse of social equality.

The analysis by the "left" critics of the HRA sees it as "futile"[28]. The Act is good at fiddling at the margins, at protecting the interests of wealthy celebrities seeking to protect their privacy, but, they suggest, it has had little significant effect in areas where it ought really to matter, in particular, the "war on terror". Here, they argue, the judiciary, have, willingly or otherwise, found it too easy to roll over in the face of executive power. Given their powers under the HRA and given the particular text and structure of the Convention rights in issue, they have been unable to protect fundamental rights against serious challenge by the executive pursuing its national security agenda, and this is so, especially, in respect of unpopular individuals and minorities who are precisely the people who require human rights protection.

Specific issues: the deportation of "Abu Qatada".

The deportation of Abu Qatada (Omar Othman) was, more than any thing, the focus of Conservative, executive-led, opposition to European human rights[29]. It involved the frequently heard claim that European human rights law inhibits the executive in the performance of its basic functions, in particular, the protection of the public. But it illustrates a more complex constitutional questioning of the reasons for the ultimate supremacy of European human rights law: the domestic procedure for deportation already accommodated human rights norms and was subject to review on human rights grounds.

The UK wished to deport a man believed to give a religious justification for violent attacks on civilians[30]. Initially the deportation was delayed by both UK courts and the ECtHR on human rights grounds. One reason for delay was because of a real risk, that if deported, Othman would be tortured. After diplomatic agreements were accepted as sufficient to remove this risk, deportation was further delayed by the ECtHR on the grounds of a real risk that Othman would be tried, in Jordan, on the basis of evidence obtained by torture. Eventually that risk, that torture evidence would be used, was acceptably removed on the basis of a treaty between the UK and Jordan. This whole process took

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[28] K. Ewing "The Futility of the HRA" 2004 *Public Law* 828-852; K. Ewing and J-C Tham "The Continuing Futility of the HRA" *Public Law* 668-693.

[29] Theresa May, who is, perhaps, the strongest critic, was Home Secretary at the time.

[30] The conclusion of the Special Immigration Appeals Commission - *Othman v Respondent* SC/15/2005, para 79.

many years, was politically controversial and caused a rift between the UK government and the Strasbourg court.

In respect of the convention of ministerial accountability to Parliament, the deportation of Abu Qatada raised few political difficulties and Parliament was broadly in support of the Home Secretary's actions[31].

In relation to the legal restraints on executive action, based on the rule of law, the situation was wholly different. The Home Secretary used a statutory power to deport a person on the grounds that their presence in the UK is contrary to the public interest[32]. Under the original system, in the 1970s, there was no appeal to the courts but the deportee could make representations to an "independent advisory panel". This panel was established by the Home Secretary using the Royal Prerogative, it had no statutory basis, it acted in secret and its role was merely to advise the minister[33]. Following an adverse judgment by the ECtHR it was replaced by the Special Immigration Appeals Commission (SIAC). Like its predecessor, this tribunal has powers to sit in secret and to decide cases on evidence which is not disclosed to the applicant. Nevertheless its existence demonstrates the changed constitutional culture and acceptance of human rights standards of the modern constitution. Unlike the advisory panel, SIAC has the status of the High Court and can prevent a deportation if it is unjustified or would violate the deportee's human rights. In relation to secret evidence it uses measures which are aimed at counter-balancing[34] what would otherwise be a breach of the basic human right to an adversarial proceeding. Restricting an adversarial process can be compatible with article 5(4) or article 6 of the Convention, so long as there are adequate Counter-balancing measures. These can include the use of "special advocates"[35] which are used by the SIAC and also in other contexts in the UK.

In the Abu Qatada case SIAC, following a closed procedure, found the proposed deportation to be compatible with Convention rights. There was a risk that he would be tried, in Jordan, on the basis of evidence obtained by torture. Following Strasbourg case law, SIAC had to decide whether the materialisation of this risk would, in the circumstances of the case, be a "flagrant" breach of article 6 ECHR. For the SIAC, whose judgment was upheld by the UK Supreme Court, this was essentially a factual matter to be decided by careful examination and weighing of the particular evidence in Abu Qatada's case. It held that, whilst there might be violations of article 6 in Jordan these would not, given all the evidence, be "flagrant"[36]. The ECtHR, however, took a different line. The fact that there

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[31] Sometimes in ways that undermined respect for the rule of law as when some Conservative MPs urged the Home Secretary to deport him even without legal authority.

[32] Immigration Act 1971, section 3(5).

[33] See *R v Secretary of State for Home Affairs exparte Hosenaball* [1977] 1 WLR 766.

[34] *A v UK* (2009) 49 EHRR 29 [205]

[35] Security cleared advocates who represent the interests of the applicant. They are entitled to see the secret evidence but must not discuss it with the applicant. The European Court gave some support to the use of special advocates in *Chahal v UK* (1997) 23 EHRR 413, paragraph 144.

[36] *Othman v Secretary of State for the Home Department* [2010] UKSC 10.

was a "real risk" of the use of torture evidence was, of itself, enough to demonstrate a flagrant breach of article 6. Once this is accepted a more detailed examination of the balance of the evidence was irrelevant. The ECtHR asserted a rule – a real risk of the use of torture evidence is sufficient to prevent a deportation[37]. In contrast, for SIAC, the real risk indicated the need for a more intensive exploration of the evidence to assess whether, in reality and on balance, this risk was so serious as to cause a complete denial of the fairness of Abu Qatada's trial.

A similar contrast between European and UK domestic approaches has arisen in other contexts such as the use of secret evidence in counter-terrorism proceedings and in the use of hearsay evidence in criminal proceedings. The Strasbourg Court has tended to protect the essence of a fair trial in terms of a determining principle (that evidence based "solely or decisively" on secret or hearsay evidence is necessarily a violation) whilst the approach of the UK courts, based on common law principles, gives much greater weight to the capacity of judges, exercising their discretion, to provide a trial which is, overall, fair[38].

Thus is one of the points where the integration of European human rights with the rights-aware common law constitution seems to falter is when the ECtHR lays down an absolute rule. It does this when insisting that allowable interferences with the application of rights are limited by the need to guarantee the "essence", the basic entitlement, of a right. The balancing exercise of the domestic courts mirrors the approach taken by the executive (though it may come to different conclusions). Ultimately this approach is at odds with the more rule bound perspective of the ECtHR when it is expounding the limits of allowable interference with human rights.

Specific issues: Parliament and prisoners' votes.

As well as executive frustration, illustrated by the Abu Qatada affair, a second, constitutionally based, criticism of the application of the European human rights system in the UK relates to Parliament. It raises the question of the proper deference that should be shown, in an human rights context, to the will of an elected assembly.

As with the application of the rule of law to the executive, discussed in the previous section, critics cannot reasonably argue that human rights norms are irrelevant so far as the UK Parliament is concerned because of its "sovereignty" or merely because it is elected. As said above, the traditional theory of the "sovereignty of Parliament" always recognised the limits of culture or "opinion" that would restrain Parliament. It saw Parliament was "self-correcting"[39] in the sense that the effects of oppressive legislation could be remedied through a general election. The constitutional convention that Parliament should not

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[37] *Othman v UK* (2012) 55 EHRR 1.
[38] *R v Horncastle* [2009] UKSC 14; cf *Al-Khawaja v UK* (2012) 54 EHRR 23.
[39] P.P. Craig *Public Law and Democracy in the UK and the USA* 1991 Oxford: OUP, Chapter 1.

legislate tyrannically[40] can be restated, today, as requiring Parliament to legislate in ways that respect human rights norms. For the courts, only the clearest words in a statute can defeat the presumption that Parliament intends to legislate compatibly with the UK's international obligations. And, after all, it was Parliament that enacted the HRA 1998.

The focus of the tension between the Strasbourg institutions and the UK Parliament concerned the UK's ban on prisoners voting. UK legislation removes the franchise from all convicted prisoners. Although the UK courts upheld the ban as being within the UK's margin of appreciation, the ECtHR, held that the absolute nature of the ban violated Article 3 of the First Protocol: the ban applied to all prisoners, it was applied automatically and it was applied without reference to individual factors[41]. Following this judgment, attempts to enforce the right of prisoners to vote through domestic law have failed. This is because, as said above, the HRA 1998 does not give UK judges the power to set aside legislation which is clearly incompatible with Convention rights; nor do judges have authority to lay down any particular scheme for prisoner voting.

The ECtHR has repeated its position and made it clear that the UK must fulfil its obligation to give effect to the rulings of the Court[42]. The UK Parliament, however, has continued to assert its opposition to prisoners voting[43], and this has been the position endorsed by the executive. In accordance with the deadline set by the European Court, the UK government brought forward legislative proposals in November 2012. A Joint Committee of Parliament, considered these proposals for a year and, in December 2013, recommended that prisoners serving a sentence of 12 months or less should be entitled to vote. Whether this becomes law is a matter which, at the time of writing[44], is undecided.

The ban has three characteristics that may explain why, for its opponents, it seems to challenge the democratic authority of Parliament. First, the issue reflects the evolutive nature of human rights law. The text of Article 3 of the First Protocol does not expressly guarantee a general right to vote, let alone a right for prisoners. The right to vote was implied into article 3. For critics it is a requirement that has been developed by the European judges on their own authority – it is not a necessary inference from the text of 1950. Secondly, as an implied or inherent right, it is subject to reasonable restrictions. Over these the ECtHR permits a wide margin of appreciation. It therefore recognises that the scope of the right to vote is an issue over which reasonable people can disagree. The role of the Court is to expound the limits of that disagreement. Thirdly, from

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[40] See fn 10, above.

[41] *Hirst v UK* (2006) 42 EHRR 41. It is the statute, the Representation of the People Act 1983, that is really in issue. Article 3 does not require all prisoners to be allowed to vote and the claimant in *Hirst*, a convicted murderer, would have been denied the vote under a compatible scheme; the European Court, however, did not treat the application as *actio popularis*.

[42] *Greens v United Kingdom* (2011) 53 EHRR 21.

[43] MPs are are not subject to party discipline on the issue and support for the ban comes strongly from both the left and right.

[44] June 2014.

the critics' points of view the Court is imposing an arbitrary rule. It can be agreed that the removal of the franchise from those convicted of criminal offences should not be automatic but should reflect variable factors such as the seriousness of the offence and its circumstances, including the circumstances of the offender. But it is exactly these factors that are already taken into account by the judicial decision on whether to imprison or not. The Court does not seem open to the argument that judicial discretion over whether to imprison or not encompasses the same factors as would be relevant to removal of the franchise[45].

The prisoners' votes issue is significant because there is wide, cross-party, support for the view that the right of an elected Parliament to make laws is being improperly fettered by the ECtHR. In so far as generalisation is possible, the sense of improper interference relates to issues involving implied or inherent rights over which national Parliaments are given a wider margin of appreciation and, critics believe, the ECtHR has exercised its reviewing function over such issues by imposing an arbitrary rule. Of course there are plenty of MPs who either support extending the right to vote to at least some prisoners or who support the role of the European Court of Human Rights. For them the constitutional position is unexceptional.

The UK courts and the European Court of Human Rights.

There is a third, significant, strand of criticism that comes not from the executive or the legislature but is made by some senior judges. It concerns the relationship of the UK courts with the ECtHR after the enactment of the HRA in 1998.

There have been a number of cases in which a careful and thorough analysis of Convention rights by UK courts, including the UK Supreme Court, has been disagreed with by the ECtHR. The latter has then interpreted the Convention text differently. Examples are cases on the data base of DNA profiles held by the police, the policy of random stop and search in the context of anti-terrorism, and the prisoners' votes case (mentioned above). There have also been tensions over the right to a fair trial and issues such as the right to silence and the use of hearsay evidence. The issues may then return to UK courts in later cases which must be decided in the light of the Strasbourg approach. It appears that this is sometimes done with judicial reluctance[46].

Under section 2 HRA British courts must "take into account" the judgments of the ECtHR court when deciding cases under the HRA. There are different judicial views on what this means. The leading judicial interpretation is the so-called "mirror" principle. Under this the HRA authorises British judges to provide the same level of human rights guarantees as is available from the ECtHR – no less (for that would simply encourage any claimant to take his or her case to Strasbourg) but also no more: the "mirror" principle equally resists a more

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[45] This point is made by Sumption SCJ in *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, para 135. For the critics the argument was strengthened by *Scoppola v Italy* (2013) 56 EHRR 19 where Italian restrictions, based on seriousness of offence and personal factors, were allowed.

[46] *Secretary of State for the Home Department v AF(3)* [2010] 2 AC 269; for concern see paragraph 70.

generous interpretation of human rights in the UK. On this basis UK courts will follow the settled, authoritative statements of Convention law given by the ECtHR and will do so even it means overturning their own, recent, carefully reasoned analysis of the same Convention rights. The "mirror" principle, however, does not require UK courts to follow any particular interpretative line where the Strasbourg rulings are not clear or authoritative, where they are based merely on a different assessment of proportionality in a particular case, or where they are based on a misunderstanding of the domestic legal position[47].

A number of British judges, including a recently retired Lord Chief Justice (the effective head of the judiciary), have begun to suggest that British courts could take a more robust, self-assertive, position. In academic writings and lectures these judges have criticised the role of the ECtHR[48] for acting way beyond its original remit of providing a bulwark against totalitarianism. Rather, on this view, it has become a constitutional court for Europe which, without proper constitutional authority, interferes improperly in the decisions of well ordered democracies acting consistently with the rule of law. Other senior judges, also in academic writings and lectures, have suggested that there has been too great a focus in the case law on Convention rights (which are ultimately defined by Strasbourg) and the HRA[49]. This, it is suggested, has undermined the development of the common law. As mentioned above, the common law has a strong presumption in favour of negative liberty and, in recent years, has recognised its own conception of "fundamental rights". In the view of these judges the common law might, in some circumstances, serve as a better basis for the development, in the law, of human rights norms.

This sense, that the common law has a parallel strength to the Convention, has also been reflected in judicial decisions, where judges must speak with the authority of the law rather than their personal opinions. Thus the "mirror" principle, mentioned above, has been qualified, in the law, by the view that fundamental aspects of British law are not to be overturned by Chamber rulings from Strasbourg, and this might also apply even to a clear principle of Convention law laid down by the Grand Chamber (though only as a "theoretical possibility")[50]. More recently the Supreme Court has emphasised that the Convention lays down no more than an abstract range of guarantees and underlying values with which domestic law must be compatible. The way in which those guarantees and met and values upheld is a matter of domestic law, including fundamental principles of the common law. The development and understanding

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[47] *R (Ullah) v Special Adjudicator* [2004] AC 323, paragraph 20.

[48] E.g. Lord Sumption (a serving Supreme Court Justice) The Limits of Law, 27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013; Lord Hoffmann The Universality of Human Rights
Judicial Studies Board Annual Lecture, 19 March 2009.

[49] See for example, Lectures by Lord Judge to the Judicial Studies Board in 2010 and to the Constitution Unit in 2013 arguing against an automatic preference for the Convention over the common law along with Sir John Laws' Hamlyn Lectures arguing that important common law virtues are being lost.

[50] *Manchester CC v Pinnock* [2010] UKSC 45, paragraph 48.

of the domestic law, statute and common law, is, therefore, the primary focus for the courts[51].

There have been cases involving critical and strongly worded disagreements between the UK Supreme Court and the European Court of Human Rights. *R v Horncastle* [2009] UKSC 14, in particular, involved the Supreme Court criticising Chamber judgments. The latter had suggested that a criminal conviction based "wholly or mainly" on hearsay evidence was always going to be in breach of Article 6 no matter what other statutory and common law safeguards there were[52]. Likewise, a preference amongst some judges for a common law approach, rather than one exclusively grounded in Convention rights, can be found in: *Kennedy v Information Commissioner* [2014] UKSC 20. The claimant argued that the right to "receive information", in Article 10 ECHR, gave him a right to obtain information held by a public body which it, the public body, was otherwise unwilling or unable to disclose. In the past, notoriously, the right to receive information under article 10 has only applied to those willing to provide information but who are prevented by law or government policy from so doing. In *Kennedy* there were two options available to the Supreme Court. One was to accept, develop and apply a general, though uncertain, principle, found in recent Strasbourg cases. This principle suggests that, in some circumstances, article 10 could impose duties of disclosure even on unwilling public authorities. But the majority of judges doubted that this new principle had the certainty of law. They were unwilling to specify it and develop it as a principle of UK law. Instead, the majority preferred to apply the principle of "open justice" found in the common law. This, they argued, would provide a solution for the claimant as least as good as, and perhaps more generous than, a solution based on article 10. The minority, on the other hand, were prepared to accept, adapt and apply the Strasbourg developments to the case.

As the difference between the judges in *Kennedy* illustrates, a degree of scepticism about European human rights law is not universal. Plenty of judges are silent on the issue or welcome the power that the HRA gives them to do justice in particular cases and who have no concern about the authority of the ECtHR. Nevertheless the sceptical position expressed by senior judges, has found a place in the case law and, therefore, is part of the more general critique of European human rights law with which this article is concerned. What is also clear from this judicial dimension to the criticism is that the issue is not about a reluctance to accept human rights norms. In *Kennedy* the majority thought the common law offered a simpler and more certain approach and, also, one which provided a potentially more generous outcome or the claimant than available through the

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[51] *Osborn v Parole Board* [2013] UKSC 61, paragraphs 54-63.

[52] Reasons for a deeper constitutional crisis were avoided when the Grand Chamber in departed from the Chamber view that there was an absolute rule against a conviction based upon solely or decisively hearsay evidence - *Al-Khawaja v UK* (2012) 54 EHRR 23.

Convention. This scepticism is, rather, about the form and content of the European approach and the ease with which it integrates with the common law.

Proposed solutions

The criticisms that have been discussed above are part of the political agenda and are likely to stay as live issues past the next general election in 2015. It is the Conservatives, from 2010-2015 the dominant party in the governing coalition, who are pursuing an agenda for changing the UK's approach to human rights law. The Labour and Liberal Democrat parties support reform whilst not seeking radical change.

Repeal of the HRA and renunciation of the ECHR

Suggested reforms are, firstly, those which relate to the HRA. This is an ordinary act of the UK Parliament and so (no matter how fundamental) can be amended or repealed by another Act. Repeal or amendment would not necessarily need the support of the House of Lords (whose support, even on a major constitutional issue, can be dispensed with after a one year delay[53]).

But there would be little point in repeal unless the UK also renounced the Convention and withdrew from the Council of Europe. Otherwise there would still be cases taken to Strasbourg and still, therefore, the duty on the UK to give effect to the ECtHR's judgments, which critics find so difficult to accept. In any case, withdrawal would have huge and unpredictable effects. It is unlikely to be possible if there is a coalition government after 2015. Furthermore it might be impossible (at least difficult) to do whilst remaining a member of the European Union. Under the Lisbon Treaty, membership of the Council of Europe is becoming close to being a condition of membership of the EU. Furthermore, the Union is itself due to accede to the Convention under Lisbon terms. Nevertheless, in 2014, it is one of the options the Conservatives are considering[54].

Replacement of the HRA by a British "Bill of Rights".

A second area of proposed reform is the replacement of the HRA by a so-called "British Bill of Rights" which would be tailored to a distinctly British account of human rights based on distinctively British values. This would, presumably, involve repealing the HRA and departing from the "mirror" principle(described above). The effectiveness of such reform is doubted. Indeed, the Commission, set up in 2010 and charged with considering the evidence for a British Bill of Rights failed to agree on basic principles. First, there is nothing to stop at the moment the UK enacting laws which give effect to an account of Convention rights which is more generous to applicants than Strasbourg would be. A more restrictive interpretation, on the other hand, would simply lead to applicants taking their cases to Strasbourg. A second doubt is whether it is really possible to

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[53] Parliament Acts 1911/1949; cf *Jackson v Attorney General* [2005] UKHL 56.

[54] See the comments of the Justice Secretary on 30 December 2013.

identify distinctly "British" rights. Human rights theory sees them as fundamental and universal entitlements. Such a view sits uncomfortably with the idea of rights predicated on national characteristics. Under the Convention, as under all international instruments, there is already a well developed concept of the "margin of appreciation" by which national differences can be recognised subject to the backstop reviewing power of an international court. There is also an additional problem in the UK. The whole concept of "Britishness" is in dispute. There is an on-going "devolution" of constitutional authority to the "nations" that make up the UK[55]. Indeed the Kingdom is becoming increasingly disunited as claims are made on behalf of a distinctly Scottish, Welsh and Northern Irish culture; and, by default, a distinctly English culture. How all this can be brought together in a "British" bill of rights is unclear. Apart from references to jury trial most of the debate is about giving rights-based weight to social and economic goals such as rights to welfare, housing, etc. This, of course, just raises all the well known questions about whether such goals should be expressed as "rights" given they involve major questions about social policy and the distribution of resources – matters, critics argue, essentially for the political rather than the judicial realm.

Nevertheless some concept of a British bill of rights is likely to be in the manifesto of the Conservative Party in 2015. In 2010 such a reform was accepted by the Liberal Democrat coalition partners but only on the proviso that any British bill of rights will build upon, be more "generous" than, the European Convention. This would mean that the issues which disturb Conservative critics, such as prisoners votes or restrictions on deportation, would remain. So such a proviso is not likely to be in the proposals for after 2015.

Reform of the European Court of Human Rights

The second serious strand of reform relates to the ECtHR. As we have seen it is the judgments of this Court, especially when it imposes a rule based limit to the exercise of a wide margin of appreciation, that seems to be at the heart of much of the criticism.

There are agreed to be major problems, mainly based upon the Court's enormous backlog of cases. The Council of Europe and the signatory states continue to seek solutions through changes, mainly to the admissions process and criteria.

But a more efficient Court is hardly the point from perspective of critics in the UK. For them the Court is moving too far towards introducing common legal/constitutional standards in Europe. This is contrasted to what they allege is its original purpose as a bulwark against potential totalitarian policies. It is clear that from some of its earliest cases the Court has not confined itself to gross and systematic violations of human rights or to state actions which threaten the fundamentals of democracy. Rather it has applied human rights norms in a whole

[55] The full independence of Scotland from the United Kingdom was the subject of a referendum held in Scotland on September 18 2014.

range of ordinary matters arising in societies with effective democratic institutions and, in some states, long standing democratic traditions. In one of these early cases (dealing with the illegitimacy laws of Belgium) the dissenting British judge (Fitzmaurice) argued that there was a threshold of severity that needed to be passed before an issue would even engage human rights; and that Belgium's domestic rules on illegitimacy failed to meet this. His was a dissenting view. The predominant view has always been against confining the jurisdiction of the Court to gross violations. Nevertheless the philosophical issue remains: under what principle (what philosophy of human rights) do we say this is a matter of such fundamental importance that it must be removed from the concerns of the national authorities in a functioning democracy? The positive law of the Court does not provide an answer.

Nevertheless, Protocol 14 has introduced a new admissibility criterion for the Court: that the applicant must have suffered a "significant disadvantage", otherwise an application will be refused unless respect for human rights requires an examination of the merits. It is unclear at the moment whether this new criterion has made much difference.

The UK, under the Conservative coalition, played a full role in the reform process that has resulted in the opening for signing of Protocols 15 and 16. Protocol 15 amends the preamble to the Convention. It affirms the concept of "subsidiarity" as requiring the nation states to have primary responsibility for securing human rights and that, in so doing, they enjoy "a margin of appreciation" but one which remains subject to the "supervisory jurisdiction" of the Court. There is no change to the text of Convention rights. The Preamble has persuasive authority over how Convention rights are interpreted. However the new text is studiedly ambiguous: there is nothing to indicate the scope of the margin of appreciation in any situation, nor the intensity of the Court's supervision. The effect may be symbolic rather than real.

Protocol 16 will permit national courts to seek advisory opinions from the Court. These cannot be general but must be in the context of a case (i.e. not, it seems, in the context of a legislative proposal). If the Court accepts the request, the opinion will be delivered by the Grand Chamber. These advisory opinions are not binding. Protocol 16 may enhance the authority of the national courts; on the other hand it may be seen by critics as a means of further restricting the independent judgment and development of national law by national courts.

The UK pursued other reforms which have not found acceptance. The UK's draft for the Brighton Declaration[56] proposed, inter alia, that the Court's jurisdiction should be confined to those issues in which there is a significant principle of human rights law at stake or which is such a serious matter that the intervention of the Court at the international level is warranted. The UK also proposed that, excepting very serious issues, the acceptance by the national courts

[56] Part of the reform process leading to Protocols 15 and 16. The UK's draft is 23 February 2012; the final Brighton Declaration was 20 April 2012.

of an advisory opinion would mean that the right of access to the ECtHR, involving the matter of the advisory opinion, would be lost. There is no such provision in Protocol 16. The most radical of the UK proposals was to deny the right of application where the issue is the same as a matter that has already been fully reasoned, in human rights terms, by the highest national court (i.e. a supreme or constitutional court). As mentioned above, there are a number of UK cases which, had this proposal been in effect, could not have been heard in Strasbourg.

In the long term, the aim of the proposals from the Conservative government is that the Court be put in a position in which it can focus on widespread and systematic violations, systemic and structural problems in a country's laws, practices or institutions (e.g. its prisons) and important questions of interpretation. The assumption would be that, in well functioning democracies characterised by the rule of law applied by an independent judiciary, the role of the ECtHR would be much diminished. Its focus would be (as it increasingly is anyway) on Russia and eastern European states which are still struggling to give effect to these principles - then the Court would be performing the function it was created for. Defenders of the current system argue that if the range of the court is reduced in this way, democratic countries will cease to be able to show to Russia and eastern European states a good example. They fear that, in reality, the Court would be neutered.

This approach finds some support in the distinction, argued for by academic commentators, between "constitutional" and "adjudicatory" functions. Constitutional functions involve dealing with cases raising novel issues of law, which are important for the state concerned or which involve a serious alleged violation. The adjudicatory function is where the main issue in a case is the application of settled principles – usually the question of proportionality. It is argued that Strasbourg Court should no longer deal with adjudicatory matters - or that they should be the exclusive jurisdiction of chambers with the Grand Chamber being concerned only with constitutional issues. Whether such distinctions are easy to make in practice or whether theyt would lead to endless jurisdictional wrangles, is an open question[57].

CONCLUSION

The HRA 1998 is a form of constitutional compromise. It is one of the central pillars of the UK's "new constitution" which has human rights at its centre and which has involved a significant rebalancing in favour of the rule of law and a more "written" and "legalistic" approach to legitimacy. At the same time the Act accommodates aspects of the traditional "political constitution". Through its

[57] S. Greer and L. Wildhaber "Revisiting the debate about 'constitutionalising' the European Court of Human Rights" HRL Rev 2012, 12(4), 655-687; K. Dzehtsiarou and A. Greene "Restructuring the European Court of Human Rights: preserving the right of individual petition and promoting constitutionalism" *Public Law* 2013, Oct, 710-719.

recognition of the ultimate sovereignty of Parliament and through the device of the declaration of incompatibility, it creates the conditions for a human rights "dialogue" between the courts and Parliament and executive - particular over complex cases where the balance of rights and public interests is controversial.

But the possibility of such "dialogue", with the necessary possibility that, in the end, it is the political judgment of Parliament and the executive that should prevail, is inconsistent with the ultimate authority of the Convention and the ECtHR. The HRA and the UK's obligations under the Convention are, to that extent, inconsistent with each other. Supporters of European human rights see this as unproblematic. They support the new constitutional hypothesis with its assertion of the ultimate primacy of "law" over "politics"; the ultimate supremacy of the ECtHR is a major feature of this. But for the critics, whose views have been the topic of this paper, the problem lies in the Court having the last word (directly or indirectly) in the dialogue. They cannot accept a constitutional restraint that, albeit ultimately, is legal, juridical and not accountable to the elected Parliament.

As has been emphasised, the point is not to deny the significance of human rights in a modern constitution – that would involve nostalgia for a constitution long since gone. As the examples given above demonstrate, criticism is focused on issues where the reasons for the ultimate authority of the ECtHR can be doubted and are contestable. These are issues where the authority of the Court may be clearly found in the positive law (it is acting consistently with international law) but where there are, for critics, reasons to doubt the point of an international court having ultimate, dialogue-resistant, authority over the issue. The pressing human significance of a right (that it is a "human right") may be doubted when it is merely implied from a more abstract text, and over which a wide margin of appreciation is allowed (e.g. prisoners' votes). If this is so then the reasons for the issue to be a matter of human rights, over which an international court has the last word, may also be doubted and the positive law which requires this, criticised. As the examples given above also suggest, another cause of conflict has been where the ECtHR has imposed a fixed, limiting, rule to govern an issue (for example the "sole or decisive" rule or the Court's attitude to the possibility of trial on the basis of torture evidence). This absolute approach is inconsistent with a preference (characteristic of the common law) for finding fairness through the case-specific exercise of discretion. Both systems have their advantages and disadvantages. The former, rule-limited approach, is not obviously better than the latter; it is therefore unconvincing for international law to exclude the latter.

For those supporting the current position, the ECtHR is simply reviewing and laying down ultimate limits to the margin of appreciation. This is the job of any court with constitutional functions. It is what should be expected given the legalistic character of the modern British constitution. Criticism of human rights law in the UK suggests that the full extent of such legalism in the UK is controversial and that aspects of the "political constitution" remain valued.

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