

# 'Common Sense' or Confusion?

*The Human Rights Act and the  
Conservative Party*

Stephen Dimelow  
Alison L Young

THE  
CONSTITUTION  
SOCIETY



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CONSERVATIVE PARTY*

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# Executive Summary

## 1. Introduction

The enactment of the Human Rights Act 1998 (HRA 1998) was undoubtedly a significant moment in the United Kingdom's legal and political history. But while many view it as a positive development, many others view it much more negatively, regularly voicing the need for far reaching reforms. Of the main Westminster parties, unhappiness with it has long been most prominent in the ranks of the Conservative Party. With the publication of a policy document in October 2014 entitled 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws', we are a step closer to understanding both what the Conservative Party believes is wrong with the current regime and how it plans to resolve these perceived problems. This paper scrutinises the Conservative Party's proposals in an attempt to determine a Conservative Government's likely success in both achieving the proposed reforms and addressing the perceived problems.

## 2. The Proposals

If elected in May 2015, the Conservative Party plans to repeal the HRA 1998 and replace it with a British Bill of Rights and Responsibilities with the following features (which are not fully developed in the policy document):

- ◆ Transposing the 'original text' of the European Convention on Human Rights (ECHR) into primary legislation.
- ◆ No additional rights as compared to the ECHR, but inclusion of 'responsibilities'.
- ◆ Altering the language of HRA 1998, s.2(1), requiring that UK courts consider as advisory only (rather than, as presently, take into account) decisions of the European Court of Human Rights etc. A Conservative Government would need to extricate the UK from international obligations under the ECHR system as it currently operates, as well as potential obligations in the context of European Union law.
- ◆ Clarification of what the transposed Convention rights mean and how they should be applied by our domestic judiciary.
- ◆ Removal of the power of the UK courts to read legislation in accordance with ECHR rights unless it is impossible to do so, replacing HRA 1998, s.3(1) with a requirement that UK courts 'interpret legislation based upon its normal meaning and the clear intention of Parliament, rather than having to stretch its meaning to comply with Strasbourg case law'.
- ◆ Reform in the political process: a new parliamentary procedure, instigating formal parliamentary consideration of a judgment that UK law is incompatible with the Convention and coming to a conclusion about whether the judgment will be acted upon; and amendment of the Ministerial Code 'to remove any ambiguity in the current rules about the duty of Ministers to follow the will of Parliament'.

### **3. Could the Conservatives successfully achieve their aims?**

#### *A) Enacting a British Bill of Rights*

It is certainly arguable (although not certain) that, given the current proposals would replace the HRA 1998 with another rights protecting document, and the high political hurdles limiting a finding of 'clear risk of a serious breach' by EU Member States against the UK, the new framework of human rights protections would not cause too many problems for other EU Member States, even if the UK were required to withdraw from the ECHR. However, it is highly likely that the UK will be expected to abide by EU human rights protection whenever applicable so long as the UK remains a Member State of the EU. It seems unlikely that the devolved legislatures would agree to the amendments, which would not necessarily preclude the adoption of the Conservative Proposals, but would leave open the possibility of different human rights protections in different parts of the UK.

#### *B) Resolving the Perceived Problems*

The perceived problems overlap but are broadly classifiable into three main themes:

1. The legal relationship between the UK and Europe, which will primarily be resolved by directing the UK courts to consider decisions of the European Court of Human Rights advisory only. It is doubtful whether such an amendment would affect the influence of Europe over UK human rights law all that radically.
2. The meaning, scope and application of human rights, which will primarily be resolved through clarifying the guidance

about how the rights included in the British Bill of Rights and Responsibilities should be interpreted and applied. Ambiguities will always remain; and one should not assume that these clarifications will necessarily result in the UK courts entirely ignoring decisions of the European Court of Human Rights to develop a completely 'UK' approach.

3. The relationship between UK courts and Parliament when it comes to human rights protection, which will primarily be resolved by modifications to HRA 1998, s.3 and the political branches' human rights protection process, and thus a supposed rebalancing of human rights protection from the judiciary towards Parliament and the Government. The success of such a move depends on the specifics of how it is achieved. A poorly drafted provision could lead to the British Bill of Rights and Responsibilities' operation being fundamentally undermined. It is possible to exaggerate the extent to which an instruction to apply the 'clear intention' of Parliament would necessarily mean the elimination of decisions that a Conservative Government would be dissatisfied with. Further, it would be damaging to promote the idea that human rights are simply what the Government of the day want them to be.

Binding our critique together is a scepticism about the extent to which the proposed reforms will resolve the stated problems, as well as a scepticism about the extent to which some of the supposed problems can really be said to exist at all.

Other reasons for questioning the merits of pursuing reform in the way set out by the Conservative Party are the positive contribution that can be made by the UK within the ECHR system; and the missed opportunity to create a sense of ownership of the HRA 1998 within the four nations which make up the UK.

#### **4. Conclusions**

Although reform broadly within the parameters of that proposed within the policy document is ultimately achievable, it is highly doubtful that such reform would satisfactorily resolve the issues that the Conservative Party perceives to exist. Pursuing the proposals is likely to waste significant political time and is likely to cause damage to the UK's international reputation and standing; to Parliament's relationship with the devolved nations; and to the perception of human rights within the UK. Though improvements could be made to the UK's system of human rights protection, the Conservative Party's current proposals do not provide a satisfactory answer. Notwithstanding this paper's focus on the Conservative Party's plans for the HRA 1998 following the May 2015 General Election, human rights reform of some sort may well follow even if the Conservative Party does not win a majority. Whatever happens, we can only hope that any proposed reforms do not negatively affect human rights protection in the UK or the country's broader national interests.

# PART 1

## Introduction

The enactment of the Human Rights Act 1998 (herein HRA 1998) was undoubtedly a significant moment in the United Kingdom's<sup>1</sup> (herein UK) legal and political history. By incorporating the main substantive provisions of the European Convention on Human Rights (herein ECHR) into domestic law, the Act shifted the UK's approach to the protection of individual liberty from its basis on residual liberties to a basis on positive rights and for the first time ensured that litigants wishing to enforce their ECHR rights in UK courts had a statutory mechanism allowing them to do so. Regardless of how many people would happily accept the HRA 1998's general legal and political significance, however, the issue of whether or not the Act should be seen as having had a positive impact on UK society is a very different matter. While many view it as having become established as an integral part of the UK constitution, and credit it with having revitalised the protection of civil liberties in the UK, many others view it, and its impact, much more negatively, regularly voicing the need for far reaching reforms.

It would be wrong to attribute dissatisfaction with the HRA 1998 to a particular political party or ideology, but it is fair to say that, of the main Westminster parties, unhappiness with it has long

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1 The use of United Kingdom, or UK, throughout this document is preferred because the Conservative Party's proposals focus on reforming human rights laws for the UK as a whole, but we use it subject to the criticisms of the prospect of such UK wide reform that we discuss.

been most prominent in the ranks of the Conservative Party, no doubt at least partly thanks to the scepticism with which some Conservatives approach European institutions and their impact on UK society. As long ago as 2006, for instance, David Cameron suggested that the HRA 1998 'has stopped us responding properly in terms of terrorism, particularly in terms of deporting those who may do us harm in this country, and at the same time it hasn't really protected our human rights' and committed his party to pushing forward with reform.<sup>2</sup> Now, having digested the range of views offered by the Coalition's Commission on a Bill of Rights,<sup>3</sup> this reform project appears to be speedily heading towards its denouement. With the publication of a policy document in October 2014 entitled 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws'<sup>4</sup> we are a step closer to understanding both what the Conservative Party believes is wrong with the current regime and the way that it is currently operating, and, more importantly, how they plan to resolve these perceived problems should they be given the opportunity after the May 2015 General Election.

Simply stated, the purpose of this paper is to subject the Conservative Party's proposals to scrutiny in an attempt to determine a Conservative Government's likely success. By 'success' we mean both how likely a Conservative Government would be to succeed in achieving the reforms which have been proposed, as well as whether or not the proposed changes are likely to resolve the problems that they believe to exist. We will suggest that, although reforms broadly within the parameters

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2 Speech reported here: <http://www.theguardian.com/politics/2006/jun/26/uk.humanrights>.

3 Reports available here: <https://www.justice.gov.uk/about/cbr>.

4 [https://www.conservatives.com/~media/files/downloadable%20Files/human\\_rights.pdf](https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf).

proposed within the policy document are achievable, even if this means prioritising the enactment of a British Bill of Rights and Responsibilities above all else, it is doubtful that such reforms would entirely resolve at least some of the problems that the Conservative Party believes to exist. It is also doubtful whether some of the problems perceived by the Conservative Party exist at all. In fact, not only do we believe that pursuance of the proposals would be likely to waste a significant amount of political time, we also believe that the process of trying to bring about reform in the manner set out in the document has the potential to be highly damaging to the UK's international reputation and standing, both within Europe and further afield; the Westminster Parliament's relationship with the devolved nations which make up the UK; and to the perception of human rights within the UK. We do not disagree that improvements could potentially be made to the system of human rights protection that currently operates in the UK, but firmly believe that the proposals as currently set out do not provide the answer.

Before going any further we must explicitly state a caveat to what follows. As much as a clearer picture has emerged of late as to the future of human rights protection in the UK should the Conservative Party win a majority in May 2015, many ambiguities remain. The policy document itself is relatively short, some of its language appears to be a little loose, and a draft Bill providing further clarification is yet to be published.<sup>5</sup> In an attempt to paint as fair a picture of the Conservative Party's proposals and reasoning as possible we have sought to supplement the material available to us as best we can with information provided by the

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5 A draft Bill was initially promised in the 'New Year' and then before the 2015 General Election. Although the Conservative Party manifesto repeats a promise to repeal the HRA 1998, more detailed proposals now look likely to be released only in the event of a Conservative Government being in power after the General Election.

speeches, sound bites and writings of relevant political actors and, at times, will highlight multiple possible interpretations of the material available. That said, as much as we remain unable to discuss the specific details of the Conservative Party's proposals, unless any future material from the Conservative Party differs significantly in aim and tenor from the details that have already been released, our conclusions are likely to remain unaltered.

## **PART 2**

# **The Proposals**

On the basis of the policy document and other relevant material, the Conservative Party, if elected at the 2015 General Election, plan to repeal the HRA 1998 and replace it with a British Bill of Rights and Responsibilities. The policy document states that this Bill of Rights and Responsibilities will transpose the 'original text of the Human Rights Convention into primary legislation', which is described as both an 'entirely sensible' and 'laudable' statement 'of the principles which should underpin any modern democratic nation'. The meaning of 'original text' is not defined within the document. It is possible the Conservative Party wishes to transpose the original text of the ECHR in its entirety, but, given the practical irrelevance of much of it within the domestic sphere, it seems more likely they mean the rights and freedoms which are set out in Section I of the ECHR as signed by the UK in 1950 and ratified by the UK Parliament in 1951. It is difficult to say for certain whether this would mean only those Section I articles which also form part of the HRA 1998 framework (articles 2–12, 14, and 16–18), or whether at least some of those currently absent under the HRA 1998's scheme will also be included.

Ambiguity also surrounds whether or not those protocols of the ECHR currently included under the HRA 1998's scheme are meant to come within the meaning of 'original text'. With respect to Articles 1–3 of the First Protocol, which provide

rights to peaceful enjoyment of property, education and free elections respectively, it might be argued that, though these provisions came into force with the rest of the ECHR in 1953, the Conservative Party's intention must be to exclude them because 'original text' understood literally means the very first version of the text signed and ratified by the UK in the 1950s. However, it is difficult to square this understanding of 'original text' with other statements in the policy document that a Conservative Government's Bill will look to limit the scope of human rights protection to cover only 'the most serious cases' that include 'the right to property and similar serious matters'. A more convincing argument in favour of an intention to exclude could be made with respect to Article 1 of the Thirteenth Protocol, which abolishes the death penalty. This was signed up to in its original form in 1983 (Sixth Protocol) and in its current form in 2002, and therefore cannot be argued to fall within any reasonable interpretation of the 'original text' or original scheme of the ECHR. For present purposes we will proceed on the basis of the most sympathetic reading, namely that 'original text' is intended to include the same rights that feature in the current HRA 1998 scheme, though it is worth noting the distinct possibility that this is not intended to be the case.

Notwithstanding the difficulties in pinning down exactly what the Conservative Party means by 'original text', we can say for certain that the new Bill will not include any additional rights which do not form part of the 'original text' of the ECHR, such as, for instance, specific 'British' rights or socio-economic rights. There does, however, appear to be an intention to include 'responsibilities' in addition to whatever rights are transposed. As noted already, the full title for the legislative proposal is the 'British Bill of Rights and Responsibilities', rather than just 'British Bill of Rights' or similar, and the policy document

repeatedly mentions an aim to ensure there 'is a proper balance between rights and responsibilities in UK law'. How exactly the Conservative Party envisages such responsibilities operating alongside the rights is, again, not fully developed, but at one point the policy document talks of the 'civic responsibilities' recognised in the ECHR and suggests that the 'new Bill will clarify these limitations on individual rights' so 'for example a foreign national who takes the life of another person will not be able to use a defence based on Article 8 to prevent the state deporting them after they have served their sentence'. This idea that the ECHR recognises 'civic responsibilities' appears to confuse the restrictions which exist under the ECHR, which look to achieve a balance when the rights and interests of one person or group come into conflict with those of another person or group with the very different idea that an individual must adhere to their 'responsibilities' if they are to successfully enforce their ECHR rights. However, read sympathetically, 'it seems that the Conservative Party's most likely meaning is that a list of responsibilities will be included alongside the transposed rights in order to assist the judiciary in applying that right in a particular case. This interpretation is reinforced by other statements in the policy document which link the need to ensure a 'proper balance between rights and responsibilities' is achieved with the clarification of the meaning of the rights and how they should be applied. A possible, though less likely, alternative is that the Conservative Party aims for at least some of the responsibilities to operate at a declaratory level as guidance to citizens about the relationship that they believe to exist between rights and responsibilities and the aim of achieving a 'proper balance between rights and responsibilities' will be achieved through the issuing of a different sort of interpretative guidance to the judiciary.

On top of transposing the 'original text' of the Convention into domestic law and introducing the concept of 'responsibilities' to UK human rights protection, the policy report also suggests that the language of HRA 1998, s.2(1) will be altered as part of an attempt to ensure that the view of the European Court of Human Rights is not considered to bind UK courts and tribunals when it comes to applying the ECHR rights in cases before them, and thus that UK courts 'have the final say in interpreting Convention rights, as clarified by Parliament'. Currently, HRA 1998, s.2(1) regulates the relationship between domestic UK courts and tribunals and the European Court of Human Rights system by instructing domestic courts and tribunals to 'take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights', as well as opinions of the European Court of Human Rights' predecessor (the Commission) and the Council of Europe's Committee of Ministers providing that the information is relevant to the determination of a Convention right issue in proceedings before a court or tribunal. The Conservative Party proposal appears to be that the instruction 'take into account' will be modified on the basis that it currently serves to bind UK human rights law to the jurisprudence of the European Court of Human Rights, even when that jurisprudence is 'problematic'. Instead, the domestic judiciary will be instructed to consider the opinion of these European Convention bodies as 'advisory' only. By 'advisory' we understand the proposal to be that UK courts will not be automatically expected to implement any decisions of the European Court of Human Rights or other relevant body, even if the UK is a party to a particular decision. This seems the most likely interpretation of the policy document, not least because the vast majority of the cases which are highlighted as problematic by the Conservative Party are decisions against the UK and the concerns raised by the Conservative Party more broadly in

relation to the European Court of Human Rights' interpretation of the ECHR are most acute when the UK Government is on the receiving end of a judgment. An important thing to note about this proposed scheme, therefore, is that it appears to continue to allow individuals to petition the European Court of Human Rights, but suggests that any domestic enforcement by an individual who has been successful at the European Court of Human Rights is ultimately reliant on Parliament.

The policy document recognises that, in order to successfully achieve this understanding of advisory, a Conservative Government would need to find a way to extricate the UK from our international obligations under the ECHR system as it currently operates, as well as any potential obligations which might arise in the context of European Union (EU) law under either the Charter of Fundamental Rights and general principles of EU law which protect fundamental rights, or the ECHR should the EU successfully manage to accede to it in due course. The principal solutions provided by the Conservative Party thus far are political. The policy document suggests that any Conservative Government attempting to amend the UK's relationship with these European organisations would pursue political negotiations in an attempt to have its approach validated by both the ECHR institutions and the EU.

In the case of the ECHR institutions, it is suggested that a Conservative Government would 'engage with the Council of Europe' during the Bill's passage in an attempt to establish that the approach taken amounts to 'a legitimate way of applying the Convention' rather than 'renounce the Convention unilaterally'. Should the Council of Europe fail to offer its approval, however, the document goes on to suggest that 'the UK would be left with no alternative but to withdraw from the European Convention on Human Rights at the point at which [the] Bill comes into effect'.

In the case of the EU, the document pays reference to the Conservative Party's widely publicised commitment to alter the UK's relationship with the EU as a whole, noting that 'the Conservatives are clear that our relationship with the EU will be renegotiated in the next parliament, and if there is anything in that relationship which encroaches upon our new human rights framework, then that is something ... for us to address as part of the renegotiation'. It also recognises the fact that the EU's accession to the ECHR relies on 'the unanimous agreement of all Member States' and sees this as providing the perfect opportunity to try and 'ensure that the UK's new human rights framework is respected'.

Unlike their position with respect to the ECHR, there is no mention of what a Conservative Government would do should they be unable to get the agreement of the EU to its proposals. It is possible that they would view such restrictions as of minimal concern when compared to the broader benefits of EU membership. But even if this was the case it is important to note that part of the Conservative Party's commitment to altering the UK's relationship with the EU is a promise of a referendum on the UK's continued EU membership in the next Parliament before the end of 2017, albeit only after the negotiations for a new 'general settlement' for Europe have taken place.<sup>6</sup> Therefore, even if a Conservative Government fails to get the agreement of the EU to accommodate a British Bill of Rights and Responsibilities and, as a consequence, decides to accept any limits on their human rights framework required by the EU, this 'failure' might not end up being significant should the result of that referendum require the UK to pull out of the EU entirely.

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6 David Cameron, Bloomberg speech: <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg>.

A significant part of the justification underlying the Conservative Party's desire to change the status of the European Court of Human Rights' decisions to advisory is a perceived problem with how that court has interpreted ECHR rights. The policy document refers a number of times to the 'living instrument' approach to interpretation which, according to the Conservative Party, concerns a great many because it is at the heart of 'Strasbourg's attempts to overrule decisions of our democratically elected Parliament and overturn the UK courts' careful application of these rights'. It is as a result of this interpretative approach, we are told, that the European Court has expanded 'Convention rights into new areas ... beyond what the framers of the Convention had in mind when they signed up to it', and thus unfairly forced the UK to apply human rights obligations the country has never knowingly signed up to.

An attempt to correct this expansion of the ECHR's meaning, sometimes referred to within the document as 'mission creep', will not only be made on an international level through the removal of any supposed current or future need to religiously apply a European institution's interpretation of the ECHR rights, but also on a domestic level through the clarification of what the transposed Convention rights mean and how they should be applied by our domestic judiciary. How exactly this clarification will be achieved will seemingly vary depending on the right in question, with some rights being accompanied by a 'clearer test' to ensure that a UK Government's obligation is 'in keeping with the approach taken by other developed nations', some rights being more precisely defined, and, as mentioned previously, at least some rights being accompanied by responsibilities which help clarify the limitations which the Conservative Party perceives to exist with respect to when a person can seek the enforcement of a particular right.

Though many of the details when it comes to what these clarifications will look like and how they will operate are left unspecified, the policy document does provide some guidance about the sort of rights interpretation that the Conservative Party is currently unhappy about and would therefore seek to avoid. On a specific level, the policy document mentions the following four examples of excessively expansive interpretation by the European Court of Human Rights: (i) the way in which the Court has interpreted Article 3 of the First Protocol of the Convention to include a right for prisoners to vote in general elections; (ii) the Court's interpretation of Article 8 of the Convention to allow prisoners to undergo artificial insemination to enable them to have children and further their right to family life; (iii) the use of Article 8 to empower foreign nationals who have committed crimes in the UK to remain in the country following the serving of their prison sentence in order to facilitate their right to family life, failing to give proper weight to the restrictions that can be placed on the exercise of that right; and (iv) the ruling by the European Court of Human Rights that prisoners could not be imprisoned for life as this would be contrary to Article 3 of the ECHR. On a more general level, the policy document provides some guidance about the Conservative Party's overall aim in attempting to clarify the meaning of the transposed rights, stating that they wish to 'limit the use of human rights laws to the most serious cases', which the document lists as 'cases that involve criminal law and the liberty of an individual, the right to property and similar serious matters' and ensure that the application of the rights is limited so, for instance, 'British armed forces overseas are not subject to persistent human rights claims that undermine their ability to do their job'.

This attempt to rebalance the scales in favour of the Government and Parliament over the judiciary with respect to who is at the

forefront of UK human rights protection is furthered in the Conservative Party's proposals by a suggestion that they would also look to remove the power of the UK courts to read legislation in accordance with ECHR rights unless it is impossible to do so. Currently, UK courts are required by HRA 1998, s.3(1) to give effect to legislation in a way which is compatible with ECHR rights 'so far as it is possible to do so'. Though accepting that the HRA 1998 'affirms the sovereignty of the UK parliament over human rights matters', the Conservative Party appears to believe that this provision has allowed the judiciary to undermine Parliament's position by permitting them to re-write legislation whenever necessary for the purposes of ECHR compliance, even if the intention of Parliament in enacting the legislation is clearly very different. An example is given from 2001 when the House of Lords is said to have used HRA 1998, s.3(1) to alter the meaning of the Misuse of Drugs Act 1971 from requiring that a defendant accused of possessing an illegal drug prove, on the balance of probabilities, that s/he did not know, suspect or have reason to suspect what s/he had was an illegal drug, to require that a defendant need only submit evidence that s/he did not know or suspect that what s/he had was an illegal drug, after which it fell to the prosecution to prove beyond reasonable doubt that s/he did not know or suspect this. The policy document suggests that a Conservative Government would attempt to prevent this happening under its British Bill of Rights and Responsibilities by replacing HRA 1998, s.3(1) with a requirement that UK courts 'interpret legislation based upon its normal meaning and the clear intention of Parliament, rather than having to stretch its meaning to comply with Strasbourg case law'.

The last set of reforms which the Conservative Party hopes to enact will take effect in the political process, no doubt at least in part to ensure that there is something in the reforms to suggest

that, though attempting to control the meaning of ECHR rights as far as is possible, the political branches would take their responsibility to protect human rights seriously. On the basis of the policy document, it appears that one aspect of these political process based reforms is intended to affect Parliament, and the other to affect Government Ministers. With respect to Parliament, on top of suggesting that the transposed rights will be considered 'in all the legislation it passes', the policy document claims that a new parliamentary procedure will be introduced as a way of instigating formal parliamentary consideration of a judgment that UK law is incompatible with the Convention and coming to a conclusion about whether the judgment will be acted upon. What exactly this new parliamentary procedure will look like or what it is meant to rectify in the current process is not expanded upon, but it would appear that the Conservative Party is unhappy about the more limited role Parliament is expected to perform following a HRA 1998, s.4(2) declaration that a piece of legislation is incompatible with a Convention right.

Under the current scheme, a Minister who considers there to be compelling reasons in favour of amending the piece of legislation in question 'may by order make the amendments to the legislation as he considers necessary to remove the incompatibility' by virtue of HRA 1998, s.10(2). This order must be placed before Parliament, and receive Parliament's approval, but need not pass through the full legislative process. The Government may also propose legislation to remove the incompatibility. The policy document might mean that Ministerial orders to amend legislation in response to a declaration of incompatibility will be examined following a fuller parliamentary procedure, or that a special parliamentary committee of some sort will be set up to look at the issue and be required to report back to Parliament in a manner in some way similar to the Joint Committee of Human Rights at present.

With respect to Ministers, the policy document states that the Ministerial Code will be amended so as 'to remove any ambiguity in the current rules about the duty of Ministers to follow the will of Parliament'. Again, this statement is not expanded upon but it appears that the Conservative Party's primary concern is with the duty placed on Ministers to comply with international law and the country's international treaty obligations, which might be understood as furthering the idea that it is the European Court of Human Rights' interpretation of the ECHR that is of importance, rather than the domestic interpretation of those rights.

Alongside the political negotiations that a Conservative Government would need to enter into with the Council of Europe and the EU, the policy document also recognises the need to 'work with the devolved administrations and legislatures' in order to 'make sure that there is an effective new [human rights] settlement across the UK'. Unlike any negotiations with the two European organisations, which are likely to concern particular aspects of the proposals and an attempt to reach agreement that the new human rights framework reaches the standards required by membership of those organisations, negotiations with the devolved institutions would concern the framework in its entirety and focus on facilitating an agreement that all four countries are satisfied with. What a Conservative Party would do in the absence of such agreement is not currently known, but in some broader debates it has been suggested that the scope of their reforms could be limited to affecting certain jurisdictions. Much like leaving the ECHR system and leaving the EU, however, we can safely assume that this is not their first choice option.

## **PART 3**

# **Could the Conservative Party Successfully Achieve Their Aims?**

The likely success of the Conservatives should they be given the opportunity to implement their proposals is a highly complex issue to unravel. In order to get a sense of the factors involved, and a likely answer, it will be helpful to separate the issue into two separate, albeit interrelated, questions. The first question concerns the Conservative Party's likely success in enacting a document that broadly accords with the details provided in the policy document and elsewhere while remaining part of the Council of Europe and the EU and without damaging the relationship between the various countries which make up the UK. The likelihood of remaining part of these multi-national organisations is important not only because we believe it to be the Conservative Party's first-choice option, but also because there is little doubt that a sufficiently determined Westminster Government could ultimately enact a British Bill of Rights and Responsibilities if they really wanted to, subject to successfully navigating the correct legislative process, even if it meant weakening the UK's ties with the Council of Europe, the EU and the other devolved nations to one degree or another. The second question concerns how successfully a document which broadly accords with the details provided in the policy document and elsewhere would address the issues that the Conservative Party

has highlighted as problematic with the current system, and thus resolve the issues which supposedly underlie our need for a British Bill of Rights and Responsibilities. Unless a strong link exists between the problems perceived by the Conservatives and their proposed solutions, serious doubts arise as to the judiciousness of spending time and effort on bringing the proposals into effect.

### **A) Enacting a British Bill of Rights**

Whether or not the Council of Europe is likely to agree to the Conservative Party's proposals largely depends on the Council of Europe's response to the Conservative Party's desire to make all decisions of the European Court of Human Rights 'advisory', thereby limiting the influence of the ECHR institutions within the UK. Presently, Article 46 requires a High Contracting Party to the ECHR to 'abide by the final judgment of the Court in any case to which they are parties', and gives the Committee of Ministers the power to instigate disciplinary proceedings against any member of the Council of Europe who fails to do so. To achieve their desired change without contravening international law, therefore, a Conservative Government would have to negotiate a reservation to Article 46 which permits them to ignore any such decisions. Whether or not this will be possible is likely to, at least in part, depend on the exact process the UK Parliament promises to go through should it be found to contravene the ECHR, how rigorous that process will be, and just how accessible human rights will be, but it seems highly unlikely that the Council of Ministers would agree to the UK's remaining part of the ECHR while also having a clearly negotiated option to ignore the European Court of Human Rights under all circumstances, especially when one considers the overall aims that the ECHR institutions are supposed to pursue.

Should it prove impossible to get the agreement of the Council of Ministers to renegotiate the Treaty such that the UK Government need not abide by decisions of the European Court of Human Rights in cases concerning the UK, and a Conservative Government decides it is unwilling to limit the scope of its advisory direction to cases that do not feature the UK as a party or to simply ignore judgments that the UK has breached ECHR rights, the UK will be forced to denounce the ECHR following the requirements of Article 58, which requires that a six month notice period must be given to the Secretary General of the Council of Europe and that any final judgment of the European Court of Human Rights against the UK be implemented. As noted above, the policy document expressly states that the Conservative Party would be willing to withdraw from the ECHR on the basis that by introducing the original text of the ECHR into the British Bill of Rights and Responsibilities human rights would still be protected, albeit subject to the sort of restrictions that they want to introduce and the broader will of the UK Parliament.

At present, although there are no provisions in the EU Treaties which specifically and expressly state that current Member States of the EU must have a particular relationship to the ECHR if they are to retain their membership of the EU, the EU does require a certain degree of respect for human rights from its Member States. Article 2 of the Treaty on the European Union (TEU), for instance, clearly establishes the importance of human rights to the EU:

*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*

The values mentioned in Article 2 TEU are bolstered by Article 6 TEU, which provides the EU Charter of Fundamental Rights and Freedoms with the same legal force as the EU Treaties and refers to the fundamental rights of the ECHR as general principles of EU law. In addition, Article 7 TEU sets out a procedure by which Member States of the EU can suspend certain rights of another Member State, including the voting rights of the representative of its Government in the Council, should it be determined that 'there is a clear risk of a serious breach' of the values by a Member State. The procedure can be initiated by either the Commission, the European Parliament, one third of the Member States, or the Council, acting by four-fifths majority after obtaining the consent of the European Parliament, but for a serious and persistent breach to be found the Council needs to act unanimously and obtain the consent of the European Parliament. Whether or not a sufficiently 'clear risk of a serious breach' would arise were the British Bill of Rights and Responsibilities to be enacted depends largely on the quality and effectiveness of the remedies provided for a breach of the human rights protected by the Bill in addition to the range of rights protected. Whether the Conservative Party's proposals would be accepted by the EU as providing sufficient human rights protection depends on whether a Conservative Government can convince the other EU Member States that the new framework adequately protects human rights. It is certainly arguable that, given the current proposals firmly commit to replacing the HRA 1998 with another rights protecting document which includes at least the majority of the main substantive ECHR rights, and the high political hurdles which limit the finding of a 'clear risk of a serious breach', the new framework of human rights protections would not cause too many problems for other EU Member States, even if the UK were required to withdraw from the ECHR. That said, because the success of a Conservative Government's negotiations with

the EU will depend upon the political relationship of the UK with the EU and the other Member States we cannot say this with any certainty. In the very least, any tinkering with the UK's relationship to the ECHR is likely to be closely scrutinised by the EU, not least because the EU itself has committed to acceding to the ECHR and therefore clearly believes the rights protected by the ECHR are of particular importance.<sup>7</sup> Such thinking can be seen in statements made by the Commission that the ECHR is of 'especial importance' to determining the fundamental rights that must be respected by the Member States and that:

*Any Member State deciding to withdraw from the Convention and therefore no longer bound to comply with it or to respect its enforcement procedures could, in certain circumstances, raise concern as regards the effective protection of fundamental rights by its authorities. Such a situation, which the Commission hopes will remain purely hypothetical, would need to be examined under Articles 6 and 7 of the Treaty on European Union.<sup>8</sup>*

Even if there is a reasonably strong possibility that the UK will be able to enact the Conservative Party's proposals while remaining a Member State of the EU regardless of how negotiations with the Council of Europe go, it is important to note that this is highly likely to be on the basis that EU human rights protection

7 Article 6.2 TEU. A draft agreement between the EU and the Council of Europe was recently held to be incompatible with Article 6 TEU by the European Court of Justice. See Opinion 2/13 of 18 December 2014; <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130deacfa9dee3e274f6db153b72e2c47dceb.e34KaxiLc3eQc40LaxqMbn4ObhmKe0?text=&docid=160882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=271730>. See also <http://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/>.

8 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2006-5000&language=EN>.

continues to apply to the UK. Established case law means that EU Member States must interpret national law in a manner consistent with EU law and that directly effective provisions of EU law are to be applied over and above national law,<sup>9</sup> and, as noted above, EU law has come to include rights protection by virtue of both the general principles of EU law and the Charter of Fundamental Rights. As much as the policy document seems to suggest that the Conservative Party presently believes that anything that might infringe on the operation of the new Bill will be up for renegotiation, the increasing importance of human rights protection within the EU legal system makes it highly likely that the UK will be expected to abide by EU human rights protection whenever applicable so long as the UK remains a Member State of the EU.

When it comes to the devolved nations, the situation is somewhat different from the Council of Europe and the EU in that a Conservative Government looking to enact its Bill of Rights and Responsibilities will not need to convince the three devolved nations that the new Bill satisfies the rules of the UK sufficiently to allow (what is in effect) England to remain part of it, but rather that those three other nations should also accept the new Bill, and any associated renegotiated relationships with the Council of Europe and EU, as also providing the basis for their relationship with the European human rights framework. At the moment, as much as it is Acts of the Westminster Parliament which regulate the relationship between the ECHR and EU law and the UK as a whole, and thus the amendment or repeal of those Acts remains an issue for Westminster, because both the ECHR and EU law are also directly incorporated into the devolution schemes through being listed as limitations to the legislative

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9 See, for example, *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33, [2015] All ER (D) 51 (Feb).

competence of the devolved legislatures in the three respective devolution statutes, any amendment to those Acts would appear to trigger the need for a Legislative Consent Motion under the Sewell Convention from all three devolved institutions. In addition to this direct incorporation, it is important to note that in the case of Northern Ireland, the ECHR forms an important part of the Belfast Agreement, which requires both that the UK Government 'complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention' and makes special provision for Northern Ireland to potentially benefit from 'rights supplementary to those in the ECHR, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience'. As such, the ECHR has an additionally important place in the current devolution settlement in Northern Ireland beyond its inclusion in the devolution statute itself.

Is it likely that the devolved legislatures would agree to any amendments necessary for the Conservative Party to implement their proposals? Presently, it seems unlikely if the Conservatives principal aim remains to be to limit the scope and application of human rights and the tenor of their arguments remain squarely premised on a strongly Eurosceptic rhetoric. In discussions about rights protection surrounding the Scottish Independence referendum, for instance, the political debate revolved around how much further rights protection could go in an independent Scotland, rather than how much further Scotland could limit such protection and the unwarranted intrusion of European institutions. In a similar vein, the reports produced by members of the Coalition Government's Bill of Rights Commission suggested that 'there was little, if any, criticism of the Strasbourg Court, of the European label of the Convention, or of human

rights generally in Scotland, Wales or Northern Ireland',<sup>10</sup> and that those interviewed from the devolved regions 'strongly supported' the 'existing arrangements under the Human Rights Act and the European Convention on Human Rights.'<sup>11</sup> In fact, elsewhere Phillippe Sands is quoted as saying that the Commission was 'told in no uncertain terms Wales, Northern Ireland, Scotland do not want to have a United Kingdom Bill of Rights. There were no ifs and buts, it was across the political spectrum.'<sup>12</sup> Inability to reach an agreement between Westminster and the devolved administrations would not necessarily preclude the adoption of the Conservative Proposals, though it would leave open the possibility of different human rights protections developing in different parts of the UK so far as the devolved legislatures can take steps to extend human rights protection with respect to devolved areas. The likelihood of a Conservative Government wishing to push ahead with a strong level of opposition from Northern Ireland, Scotland and Wales depends largely on whether or not they decide enacting their Bill outweighs any damaging consequences which might follow for the relationship between Westminster and the devolved nations and increasing the sense in which it could be argued that core differences exist between the four nations which make up the UK.

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10 Commission on a Bill of Rights, 'A UK Bill of Rights? The Choice Before Us' (Volume I) (December 2012), paragraph 9.3. Document available at: <http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf>.

11 Commission on a Bill of Rights, 'A UK Bill of Rights? The Choice Before Us' (Volume I) (December 2012), p226. Document available at: <http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf> (Baroness Kennedy and Professor Philippe Sands).

12 See eg <http://www.bbc.co.uk/news/uk-politics-20757384>.

## **B) Resolving the Perceived Problems**

The relationship between the problems perceived by the Conservative Party and their proposed solutions is complex, not least because there is a significant degree of overlap between one supposed problem and another, and how exactly particular problems would supposedly be resolved. Notwithstanding this limitation, for present purposes we view their perceived problems as being broadly classifiable into three main themes. The first theme is the legal relationship between the UK and Europe, which will primarily be resolved by directing the UK courts to consider decisions of the European Court of Human Rights as advisory only.<sup>13</sup> A second related theme is the meaning, scope and application of human rights, and will primarily be resolved through clarifying the guidance about how the rights included in the British Bill of Rights and Responsibilities should be interpreted and applied. The third theme is the relationship between UK courts and Parliament when it comes to human rights protection, which will primarily be resolved by modifications to HRA 1998, s.3 and the political branches' human rights protection process, and thus a supposed rebalancing of human rights protection from the judiciary towards Parliament and the Government.

Beginning with the relationship between the UK and Europe, though in theory there is no reason why a provision in the new Bill of Rights and Responsibilities instructing UK courts to consider judgments of the European Court of Human Rights as advisory could not succeed in ensuring UK courts do not consider themselves directly bound to apply that court's

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13 For present purposes, the UK's relationship to other international law human rights commitments it has signed up to is excluded on the basis that these are not highlighted as causing a problem in the Conservative Party document. It is nevertheless important to note their existence and that these too might impact on the success of any British Bill of Rights and Responsibilities.

jurisprudence, it is doubtful whether such an amendment would affect the influence of Europe over UK human rights law all that radically. For reasons of clarity we will separate the discussion between issues falling outside the scope of EU law and issues falling within the scope of EU law.

With respect to issues falling outside the scope of EU law, in the Conservative Party's (albeit unlikely) best case scenario, with the UK still part of the ECHR but with all of its jurisprudence being considered 'advisory' and still a Member State of the EU, as much as UK courts will benefit from having a clearer permission to depart from a final decision of the European Court of Human Rights against the UK than currently exists, in practice it seems likely that this freedom will be used infrequently at best. To a large degree this is because there is likely to be a great deal of overlap between the judgments of the ECHR and UK courts in areas which do not already fall within the UK's margin of appreciation, as the interpretation of rights between similar jurisdictions tend to overlap in core areas, and it is doubtful that UK courts would find the need to depart significantly from the European Court of Human Rights' interpretation especially frequently. Additionally, however, the possibility of a greater freedom developing than currently exists is negated by the fact that UK courts have already shown some willingness to depart from final decisions of the European Court of Human Rights against the UK in the correct circumstances. In the recent Supreme Court case of *Moohan v Lord Advocate*,<sup>14</sup> for instance, Lord Hodge suggests that the judgments of Lords Sumption and Mance in *R (on the application of Chester) v Secretary of State for Justice*<sup>15</sup> view UK courts as being able to depart from final decisions of the European Court of Human Rights against the UK when there is inconsistency

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14 [2014] UKSC 67, [2015] 2 WLR 141.

15 [2013] UKSC 63, [2014] AC 271.

with a fundamental principle of UK law or there has been an egregious oversight or misunderstanding.<sup>16</sup> Therefore, as much as the UK may be bound by Article 46 under international law, and as much as the domestic courts have explicitly recognised the importance of this obligation, the portrayal of the current situation in domestic law as being that UK courts will always apply decisions against it, and that this problem will be remedied by a simple shift in language, is highly misleading.

If the effect of the Bill of Rights and Responsibilities vis-à-vis the ECHR's influence outside the scope of EU law is likely to be limited in the Conservative Party's ideal scenario, what if, as we think seems likely, a Conservative Government falls short of their ideal? In a scenario where the UK remains a party to the ECHR with only decisions that do not directly feature the UK being considered advisory, the picture would, again, look much the same so far as issues outside the scope of EU law go. A review of the HRA 1998, s.2(1) case law clearly shows that, whatever the Conservative Party's policy document suggests, UK courts do not currently consider themselves bound to follow all decisions of the European Court of Human Rights, instead interpreting the Court's case law to determine whether or not any relevant decision should be applied.

As much as the domestic courts will generally apply a line of clear and consistent case law, there are times when, for example, the UK courts have reached conclusions that can be said to protect rights to a lesser degree than that required by the ECHR jurisprudence, and times when they have gone further than the European Court of Human Rights and developed the ECHR in a manner consistent with its underlying principles.

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16 *Moohan* (n 14) [104]-[105] (Lord Hodge).

For example, in *R (On the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport*,<sup>17</sup> the House of Lords, relying in part on parliamentary debates following a statement that the Government could not be certain that the Communications Bill 2003 was compatible with ECHR rights as well as similar statements from the Joint Committee of Human Rights, distinguished their approach from that of the European Court of Human Rights, concluding that the provisions of the Communications Act 2003 prohibiting the broadcasting of political advertisements did not breach Article 10.<sup>18</sup> Additionally in *Re G (Adoption: Unmarried Couple)*, the House of Lords concluded that the tenor of case law in the European Court of Human Rights supported the conclusion that a blanket ban on adoption by unmarried couples would contravene Article 8, even though there was, at that time, no European Court of Human Rights case law which clearly reached that conclusion.<sup>19</sup>

In fact, even if the Conservatives adopt their least preferred option and decide to denounce the ECHR then it is arguable that this alone is unlikely to drastically alter the domestic judiciary's interpretation for, as already mentioned, as much as the reasoning process might differ slightly, there is unlikely to be a great deal of substantive difference between how domestic courts approach the interpretation of the transposed rights under a British Bill of Rights and Responsibilities and how these courts approach the interpretation of the ECHR through the HRA 1998 currently. In the recent decision of the Supreme Court in *Osborn v The Parole*

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17 [2008] UKHL 15, [2008] 1 AC 1312.

18 Decision upheld in *Animal Defenders International v United Kingdom* (App No 48876/08) (2013) 34 BHRC 137.

19 [2008] UKHL 38, [2009] 1 AC 173.

*Board*,<sup>20</sup> for instance, the Supreme Court used the principles of natural justice as found in the common law to determine whether oral hearings were required before the Parole Board, concluding that the same outcome would have been reached when applying Article 6.

Under all possible scenarios in which a Conservative Government enact its Bill of Rights and Responsibilities but the UK remains a Member State of the EU, the application of EU human rights law to the UK has the potential to be a significant limit on any success achieved in limiting the influence of Europe over UK human rights protection. If we are right to think that the EU will not allow the UK to restrict its EU human rights obligations, not only will these EU human rights obligations potentially ensure that EU standards of rights protection continue to be applied within the UK whenever an issue falls within the ambit of EU law, it also potentially provides an avenue for European Court of Human Rights case law to continue to have an effect in the UK. This is because the European Court of Human Rights case law plays an important role in the application and development of human rights norms by the EU judiciary, not least because the Charter of Fundamental Rights and Freedoms includes (though is not limited to) the rights contained in the ECHR.

Of course, whenever the human rights protection afforded by the EU is similar to that provided under any British Bill of Rights and Responsibilities then the application of EU law will be of little practical significance, except perhaps so far as one might complain that European authority is being resorted to. In situations where the protection afforded by the EU differs

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20 [2013] UKSC 61, [2014] AC 1115. See eg *Kennedy v The Charity Commission* [2014] UKSC 20, [2014] 2 All ER 847 and *A v BBC* [2014] UKSC 25, [2014] 2 All ER 1037 for other decisions which emphasise the richness of the common law as a source of fundamental rights and values.

from the protection provided under the British Bill of Rights and Responsibilities, however, problems may arise so far as the UK judiciary will be expected to apply EU law rather than the domestic enactment. Indeed, even in a situation where the UK denounces the ECHR, the primacy given to EU law alongside the fact that the ECHR is utilised by the EU judiciary, will mean that ECHR protection will continue to be applicable in the same way as now, at least so far as an overlap exists between the two.

If a Conservative Government cannot negotiate a restriction to the application of EU human rights laws to the UK, it might be that they will be happy to concede ground in the area of EU law on the basis that, for instance, the scope of EU law is more limited than that of the ECHR or the benefits of remaining in the EU outweigh any negatives caused by the continued applicability of EU human rights protection. If not, one potential solution which would allow the UK to remain in the EU but allow for the application of the British Bill of Rights and Responsibilities to all situations would be for the British Bill of Rights and Responsibilities to be classified as a constitutional instrument or statute by the UK judiciary. In their recent decision in *R (on the application of HS2 Alliance) v Secretary of State for Transport*,<sup>21</sup> the Supreme Court suggested that when directly effective EU law comes into conflict with a domestic constitutional instrument, constitutional statute or constitutional principle, a court should apply the domestic law rather than the EU law unless Parliament has clearly indicated an intention otherwise. If applied to a situation where a British Bill of Rights and Responsibilities has been enacted, and the rights protection under that Bill comes into conflict with the rights protection offered in a piece of directly effective EU law, it would appear to suggest that a domestic court might seek to give effect to the domestic provision as an expression of the UK's

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21 [2014] UKSC 3, [2014] 1 WLR 324.

constitutional values and ignore the EU provision. As much as this is a possibility, however, whether such an understanding would develop in practice is difficult to tell.

At least so far as the success of the British Bill of Rights and Responsibilities outside issues of EU law goes, though possibly also with respect to issues which fall within EU law if the new Bill is classified as a constitutional instrument or statute, proponents might suggest a link to our second thematic group: the meaning, scope and application of human rights. The proposed clarifications to accompany the rights in the new Bill could be argued to be one way of ensuring that UK courts apply the rights in a way which ignores the 'mission creep' caused by the European Court of Human Rights' 'living instrument approach to interpretation' and instead makes sure that rights are employed in accordance with what the Conservative Party believes to be good sense. This, they might add, would assuage any difficulties as far as the continued application of ECHR type reasoning goes whatever the upshot of the Conservative Government's negotiations with the Council of Europe by directing domestic courts to do otherwise, ensuring that the European Court of Human Rights would at most only ever be an 'advisory' body.

The extent to which such thinking is correct is difficult to predict as it partly depends on how exactly this matrix of clarifications operates. As mentioned above, the policy document refers to a wide range of mechanisms which might potentially be relied on to create this added clarity, including, for instance, the use of 'responsibilities' as a counterweight to rights, the introduction of 'a clearer test' as to how the balance between certain rights should be struck, the use of a 'more precise definition' with respect to certain rights, the limitation of rights to the 'most serious cases', and reference to 'the original intentions' underlying the ECHR rights or their 'mainstream understanding'. However a

Conservative Government ultimately attempts to clarify the meaning, scope and application of rights in any new Bill, we can be sure that, if a clear distinction is to develop between domestic interpretation of the transposed rights and their ECHR equivalents, the clarifications will need to be justiciable rather than declaratory in nature.

Even if they are made justiciable, however, some general problems appear to exist which might thwart their plans. For instance, as much as the language of legal terms can be clarified and refined, ambiguities will always remain. This is particularly so in an area like human rights where there is a need for provisions to be broadly drafted to allow for them to be applied to a wide range of situations without regular tinkering. In turn, these ambiguities allow for the domestic judiciary to come to a reasoned decision about what a particular provision means on the basis of the linguistic and contextual factors involved in a particular decision, which happen to include a set of presumptions about the constitutional principles and rights which Parliament is presumed to uphold unless otherwise is made clear. As a result, as much as there might be some scope for carefully crafted clarifications to influence a domestic court's use of the rights transposed into the British Bill of Rights and Responsibilities, one should not assume that these clarifications will necessarily result in the UK courts entirely ignoring decisions of the European Court of Human Rights to develop a completely 'UK' approach.

Proponents of the proposal might respond by saying that they do not have complaints with respect to all of the European Court of Human Rights' case law, just those which, for instance, relate to the cases and issues they include in the policy paper covering prisoner voting rights; artificial insemination for prisoners; the restriction on life sentences; the balance between the protection of justice and the right to family life; the extension of the extra-

territorial application of the Convention and the definition of a 'real risk' that a potential deportee will face torture were s/he to be returned to their country of origin. With respect to a good deal of ECHR jurisprudence, in fact, the proponents could be perfectly happy to accept that a similar approach be taken by the UK judiciary. In addition, they might draw a link to our third thematic group — the relationship between UK courts and Parliament when it comes to human rights protection — and suggest that by proposing that the UK judiciary apply the 'normal meaning and the clear intention of Parliament' and amending Parliament's human rights protection processes the proposals offer protection against this inability to prescribe how each right will be interpreted and applied by reinforcing the position of the political departments of the state against the judiciary. Much like the clarifications as far as the scope, meaning and application of the rights contained in the new Bill, the success of such a move depends on the specifics of how it is achieved.

In theory it is possible for a direction to the judiciary to 'apply the clear intent of Parliament' to alter the domestic judiciary's approach from that which currently exists under HRA 1998, s.3(1), but in practice a poorly drafted provision could lead to the British Bill of Rights and Responsibilities' operation being fundamentally undermined. If, for instance, the provision said something along the lines of 'notwithstanding the rights contained herein, the UK judiciary should apply the clear intention of Parliament' then whenever a right was potentially infringed any protection afforded in the new Bill would be entirely worthless. Alternatively, if the provision said something like 'to the extent that it is possible to do so whilst upholding these rights, the intention of Parliament should always be applied' then it is difficult to see how this would differ radically from what exists currently whereby the UK courts attempt to

protect ECHR rights without going completely against the grain of Parliament's legislative intent.<sup>22</sup>

Even if a suitable provision is drafted and enacted then it is worth noting that it is possible to exaggerate the extent to which an instruction to apply the 'clear intention' of Parliament would necessarily mean the elimination of decisions that a Conservative Government would be dissatisfied with. What Parliament would intend in a particular situation can at times be difficult to decipher, and as much as the judiciary have attempted to develop rules to increase the consistency of their approach to legislation, it is inevitable that there will at times be at least some within Parliament who disagree with the result of a particular case. No doubt this is where the proponents of the proposals would point towards the reforms that are proposed for Parliament's human rights processes, and suggest that these will ensure that there are mechanisms which either make Parliament's intent as clear as possible or ensure that a suitable mechanism is in place to monitor and respond to rights related issues.

Though much could be gained from amending Parliament's human rights processes, and such reforms are perfectly achievable following the correct procedures, we think it is unhelpful to view such reforms as providing a backstop so as to ensure that a Government can get its own way when faced with a judgment it dislikes for a particular reason. Rather than providing two sides of an antagonistic relationship, we prefer to view human rights protections as being the product of a constructive deliberation contributed to by both legal and political actors. As much as Parliament's ability to contribute to that debate could be improved, it would be damaging to promote the idea that human rights are simply what the Government of the day want them to be.

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22 See eg *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

Binding our critique of the problems highlighted by the Conservative Party together is a scepticism about the extent to which the reforms proposed in the policy document will resolve the problems they believe to exist, as well as a scepticism about the extent to which some of the supposed problems can be really said to exist at all. There are other reasons why one might raise questions as to the wisdom of pursuing reform in the way set out by the Conservative Party in their policy document. One reason for this is the positive contribution that can be made by the UK within the ECHR system. One way this has been achieved is through the UK intervening in cases concerning other states, such as in *Scoppola v Italy*,<sup>23</sup> in an attempt to help persuade the European Court of Human Rights to interpret the ECHR in a particular way. Perhaps this can be most clearly seen when the European Court of Human Rights has taken account of decisions of the domestic courts and modified its decisions accordingly. An example of this can be seen in one of the examples mentioned in the policy document: life sentences. The European Court of Human Rights first concluded that the imposition of life sentences breached ECHR rights where there was no clear procedure through which an individual sentenced to life imprisonment could argue that this sentence was no longer justified on penological grounds. Although UK law did provide such a mechanism for extreme circumstances, the European Court of Human Rights held that this was too vague.<sup>24</sup> The Court of Appeal later disagreed with part of the conclusion of the European Court of Human Rights, arguing that the policies were clear and did protect ECHR rights, given that the HRA 1998 would require that the Minister applied these policies in a manner compatible with ECHR rights.<sup>25</sup> The

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23 [2012] ECHR 126/05, (2012) 33 BHRC 126.

24 *Vinter v United Kingdom* [2013] ECHR 66069/09; [2013] All ER (D) 158 (Jul).

25 *Attorney General's Reference (No 69/2013)*; *R v McLoughlin*; *R v Newell* [2014] EWCA Crim 188, [2014] 1 WLR 3964.

conclusion of the Court of Appeal was then referred to and accepted by the European Court of Human Rights which, in a later case, concluded that the UK's rules relating to life sentences did comply with ECHR rights.<sup>26</sup> In our opinion, this provides a better means through which to tackle any potential threat provided by being part of the ECHR system. It provides a means not only to protect British interpretations of Convention rights, but also for these interpretations to influence the development of the law by the European Court of Human Rights.

Those unconvinced that the UK can be a positive contributor to human rights protection at a European level, or at least unwilling to sacrifice any perceived loss of domestic sovereignty over such matters, and unconcerned about any negative consequences that might follow in the UK's international reputation, would at least be wise to briefly consider the potential consequences in the domestic sphere if the Conservative Party pursues its reforms in the manner set out thus far. Though it is widely accepted that there is a lack of respect or ownership of the HRA 1998 in the general UK population, and amendment to the 1998 Act could provide the perfect opportunity to resolve this, the political nature of the proposals as currently detailed, and the fact that they revolve around minimising human rights protection as much as possible, is highly likely to work against this. For instance, by labelling the HRA 1998 as 'Labour's' and suggesting various ways in which a Government can adjust what human rights are and how they are applied, the new British Bill of Rights and Responsibilities will be seen as the Conservative Party's solution, which in turn will likely lead to other political parties discussing human rights protection as if it is just another political policy which can be adjusted and amended as required. As far as creating any sense of ownership within the

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26 *Hutchinson v United Kingdom* [2015] ECHR 57592/08; [2015] All ER (D) 17 (Feb).

four nations which make up the UK is concerned, by failing to see the opportunity of reform as providing a chance to promote the cultural and political similarities between the nations which make up the UK the very nature of the enactment as a 'British' Bill or Rights and Responsibilities will be severely undermined, if it is even possible to get it through the legislative process without its jurisdictional scope being severely reduced.

## **PART 4**

# **Conclusions**

In this report we have sought to scrutinise the Conservative Party's proposals for human rights law reform as principally detailed in its policy document entitled 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws' in an attempt to evaluate the likelihood of the Conservatives being successful both in terms of implementing the proposals in the preferred form and rectifying the problems they perceive to exist with the current system. We have argued that, although reform broadly within the parameters of those proposed within the policy document is ultimately achievable, it is highly doubtful that such reforms would satisfactorily resolve the issues that the Conservative Party perceives to exist. In fact, not only do we believe that pursuance of the proposals is likely to waste a significant amount of political time, we also believe that in trying to bring about reform in the manner set out in the policy document there is a significant chance that the Conservative Party would cause a great deal of damage to the UK's international reputation and standing, both within Europe and further afield; the Westminster Parliament's relationship with the devolved nations which make up the UK; and to the perception of human rights within the UK. Ultimately, therefore, though we accept that improvements could be made to the system of human rights protection that currently operates in the UK, we do not believe the Conservative Party's current proposals provide a satisfactory answer.

Notwithstanding this paper's focus on the Conservative Party's plans for the HRA 1998 following the May 2015 General Election, it is worth noting that human rights reform of some sort may well follow even if the Conservative Party fails in its bid to win a majority. Though not currently proposing the HRA 1998's repeal and replacement, the Labour Party, for instance, has previously explored the possibility of reforming the Act and their current Shadow Secretary of State for Justice and Shadow Lord Chancellor Sadiq Khan has recently suggested that, if elected, the Labour party would look to publish guidance in an attempt 'to assert the role of the British courts vis-a-vis Strasbourg' so as to make it clear 'to the judges that they're free to disagree with Strasbourg, that it's sometimes healthy to do so, and that they should feel confident in their judgments based on Britain's expertise and strong human rights standing'.<sup>27</sup> Indeed, as we noted in the introduction, since its enactment the HRA 1998 and its operation has been subjected to regular criticism from across the political spectrum and so it is more than likely that, whoever ends up in Government, some proposals for reform will be put forward. Whatever happens after the May 2015 General Election, we can only hope that any proposed reforms to the HRA 1998 and UK human rights law more generally do not, to paraphrase a recent speech of former Attorney General Dominic Grieve, negatively affect human rights protection in the UK or the country's broader national interests.<sup>28</sup>

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27 <http://www.telegraph.co.uk/news/uknews/law-and-order/10870113/Labour-will-shift-power-back-to-British-courts.html>.

28 [https://www.ucl.ac.uk/constitution-unit/research/judicial-independence/CU\\_JIP\\_DOMINIC\\_GRIEVE\\_SPEECH\\_3\\_DEC.pdf](https://www.ucl.ac.uk/constitution-unit/research/judicial-independence/CU_JIP_DOMINIC_GRIEVE_SPEECH_3_DEC.pdf).

## 'Common Sense' or Confusion?

*The Human Rights Act and the Conservative Party*

Stephen Dimelow and Alison L Young

The enactment of the Human Rights Act 1998 was undoubtedly a significant moment in the United Kingdom's legal and political history. But while many view it as a positive development, many others view it much more negatively, regularly voicing the need for far reaching reforms. Of the main Westminster parties, unhappiness with it has long been most prominent in the ranks of the Conservative Party. The publication of a policy document in October 2014 entitled 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws', was an important step towards understanding both what the Conservative Party believes is wrong with the current regime and how it plans to resolve these perceived problems. This paper scrutinises the Conservative Party's proposals in an attempt to determine a Conservative Government's likely success in both achieving the proposed reforms and addressing the perceived problems.

This pamphlet presents the personal views of the authors and not those of The Constitution Society or UK Constitutional Law Association, which publish it as a contribution to debate on this important subject.

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