

The complexities of human rights and constitutional reform in the United Kingdom

Brexit and a Delayed Bill of Rights: Informing the Process

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Abstract

A politicised and contested human rights framework in the United Kingdom – constitutional processes during periods of constitutional and political instability – The United Kingdom 2016 referendum on membership of the European Union – delayed repeal of the Human Rights Act 1998 and a British Bill of Rights – European Union law and Council of Europe human rights framework as pillars of human rights and democracy - lack of coherent national structure for substantive rights regime in the UK – lack of clarity in terms of future human rights regime in the UK and devolved regions – lack of safeguards protecting human rights as part of constitutional settlement – reliance on common law rights insufficient - rights and remedies derived from various European sources swept away without sufficient safeguards – loss of rights and remedies without sufficient parliamentary scrutiny - impact at the supra-national level undermining UK as global actor – impact at the devolved sub-national level further fragmenting state unity – sleepwalking into a legal human rights deficit – opportunity to re-imagine human rights structures – processes must be genuinely deliberative, informed, participative and inclusive

INTRODUCTION

This article sets out the highly politicised and contested human rights framework in the United Kingdom in order to assess what kind of space human rights might occupy in the

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UK's unique constitutional framework in the future. It does so in the context of two separate yet intertwined constitutional processes related to broader European frameworks. The first is the decision to leave the European Union, determined by a UK wide popular vote of 51.9% on 23 June 2016.² The second is the UK Government's promise (currently on hold) to introduce a British Bill of Rights to replace the Human Rights Act 1998, the statutory instrument that partially incorporates the European Convention on Human Rights into domestic law.³ The purpose of the paper is to tease out the complexity of the changing human rights frameworks (at the regional/ national and devolved levels) in the context of both constitutional and political instability in the UK. This is of critical importance when the rights and processes associated with change are contested politically and the UK lacks a coherent constitutional human rights overview. The contribution of the article aims to map out the before and after picture for human rights in a country undergoing significant constitutional change and warns against constitutional transitions without adequate safeguards in place to ensure reform happens in a legitimate way.

This article contributes to an understanding of the current human rights framework in the UK by detailing the complexities of the current law and potential effects of the reform processes. Crucially it asks how far this constitutional framework can go when on course to remove existing European pillars of democracy and human rights. It will therefore be of an interest to a wider European and international audience. The contributions of the paper reflect on current reform in the UK whilst also highlighting some key considerations for other liberal democracies revisiting rights and democracy and their connection to supra-national and sub-

² The Electoral Commission, 'EU Referendum Results', www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information, visited October 9, 2016. (England voted to leave with 53.2% vote and Wales with 51.7% vote; whereas, Scotland voted to remain with 62% vote and N.I. with 55.7% vote).

³ THE CONSERVATIVE AND UNIONIST PARTY MANIFESTO 2017, at 37, <https://www.conservatives.com/manifesto>, visited November 18, 2017.

national relationships in the current global climate. This article is divided into four sections. Section one is scene-setting and establishes the constitutional status of human rights relative to the reform processes. Sections two and three look at the EU human rights framework and the Human Rights Act 1998 respectively, and their future reform. The fourth section considers the implications at a devolved level before drawing conclusions on what kind of what kind of space human rights might occupy in the UK's unique constitutional framework in the future. Notably the article cautions against the danger of reforming existing rights and remedies without appropriate constitutional safeguards with an emphasis on how this impacts the UK as both a global player and in terms of maintaining the sanctity of the nation state.

By means of introduction it is important to note the historical and political context of the processes of constitutional change. Both reform processes centre on a desire to re-claim sovereignty by repatriating power from Europe to the UK – the notion of ‘taking back control’ has been consistently invoked before the electorate.⁴ The Queen’s Speech of 27 May 2015 reasoned that a repeal of the Human Rights Act was necessary for the UK to ‘have more control over its affairs’ and to ‘restore common sense to the application of human rights laws’;⁵ while the Vote Leave referendum campaign conducted the following year adopted the phrase as a core mantra.⁶

It is a sovereignty that traditionally (and consistently) is understood to rest with the Westminster Parliament, though both reform discourses also include the desire to see UK

⁴ ‘Taking Back Control’ Vote Leave Briefing, www.voteleavetakecontrol.org/briefing_control.html. For a discussion see Sarah Longlands, *Taking back control – one year on. But control of what?*, LSE British Politics and Policy Blog, June 23, 2017, <http://blogs.lse.ac.uk/politicsandpolicy/taking-back-control-one-year-on/>, visited November 18, 2017.

⁵ The Queen’s Speech 2015, Briefing Notes, May 27, 2015, at 6 and 75.

⁶ See www.voteleavetakecontrol.org/

courts as the highest judicial authority.⁷ Yet the weeks and months that have followed the EU referendum, suggest another conception of sovereignty at play in the minds of the electorate, that of popular sovereignty. The arguments which preceded the *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, [2017] 2 W.L.R. 583, jurisprudence⁸ have served to highlight this dichotomy of perception, whereby the popular vote (as an exercise of direct democracy) is set at odds with parliamentary approval for major constitutional change.⁹ Polarising forms of direct and representative democracy, if not accommodated carefully, can threaten processes of constitutional change – such as was evident in the *Miller* case. The media portrayal of this contest vilified the judges as ‘enemies of the people’ by handing back the decision to trigger Article 50 to Parliament following the referendum.¹⁰ Processes that involve amending the constitution tend to follow robust constitutional frameworks governed by a written constitution that carefully accommodates and entrenches rules regarding amendments through formal means subject to scrutiny through formal institutional processes.¹¹ In the UK referendums are fairly new constructs of an unwritten constitution. The flexibility of this polity perhaps left the door open to a cascade of constitutional disorder when a process of direct democracy was not only at odds with the representative makeup of parliament but also rejected the very nature of the constitution in

⁷ It should be acknowledged here that while a contested framework is at play at the national level surrounding concepts of sovereignty there is also sub-national frameworks at play further complicating the landscape. Scotland, for example, claims another form of constitutional sovereignty more firmly rooted in civic republican theory. For further discussion, see Sionaidh Douglas-Scott, *A UK exit from the EU: the end of the United Kingdom or a new constitutional dawn?*, University of Oxford, Legal Research Paper series, 8-9 (March 2015).

⁸ *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 W.L.R. 583 (appeal taken from Eng. & Wales, and N.I.).

⁹ On the contested and confused nature of these concepts during the EU Referendum campaign, see Sionaidh Douglas-Scott, *Brexit, the referendum and the UK parliament: some questions about sovereignty*, U.K. Const. L. Blog, June 28, 2016, www.ukconstitutionallaw.org/2016/06/28/sionaidh-douglas-scott-brexit-the-referendum-and-the-uk-parliament-some-questions-about-sovereignty/, visited 8 August 2017.

¹⁰ See for example the headlines dominating the front pages following the decision: Claire Phipps, *British newspapers react to judges' Brexit ruling: 'Enemies of the people'*, The Guardian, November 4, 2016, www.theguardian.com/politics/2016/nov/04/enemies-of-the-people-british-newspapers-react-judges-brexit-ruling, visited August 8, 2017.

¹¹ Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 Wake Forest L. Rev. 913, 913 (2014).

and of itself.¹² Indeed, Gordon has recently highlighted the threat exiting the EU poses for the very foundation of the UK constitution as a challenge both for - and of - the UK constitution.¹³

With that in mind, there is a notable lack of clarity in the two human rights reform processes forming the subject of this article. The debate predating the referendum did little to inform the electorate of the full consequences of human rights change;¹⁴ a situation that has continued post vote. The Joint Committee on Human Rights reported its regret that the Government ‘has not been able to set out any clear vision as to how it expects Brexit will impact the UK’s human rights framework.’¹⁵ Separately, the House of Lords EU Committee was left ‘unsure why a British Bill of Rights was really necessary.’¹⁶ This lack of clarity at the national level has undoubtedly inhibited the ability of the electorate and public at large to engage in the discourse in an informed way. It also poses problems in terms of adherence to the rule of law (another fundamental concept in the UK’s constitution) which in its substantive definition includes a commitment to human rights.¹⁷

¹² See for example Martin Loughlin, *The End of Avoidance*, 38 *London Rev. of Books* 12, 12 (2016).

¹³ Michael Gordon, *Brexit: a challenge for the UK constitution, of the UK constitution?*, 12 *EuConst* 409, 435 (2016).

¹⁴ See Katie Boyle & Leanne Cochrane, *Rights Derived from EU Law: Informing the Referendum Process*, U.K. Const. L. Blog, May 6, 2016, <https://ukconstitutionallaw.org/2016/04/13/katie-boyle-and-leanne-cochrane-rights-derived-from-eu-law-informing-the-referendum-process/>, visited August 8, 2017; Katie Boyle & Leanne Cochrane, *Brexit and a British Bill of Rights: Four Scenarios for Human Rights - Explainer*, UK in a Changing Europe, May 17, 2016, <www.ukandeu.ac.uk/explainers/brexit-and-a-british-bill-of-rights-four-scenarios-for-human-rights/>, visited October 15, 2016; LSE European Institute, *The implications of Brexit for fundamental rights protection in the UK*, February 25, 2016, <www.lse.ac.uk/europeanInstitute/LSE-Commission/Hearing-6--The-implications-of-Brexit-for-fundamental-rights-protection-in-the-UK.pdf>, visited October 9, 2016.

¹⁵ JOINT COMMITTEE ON HUMAN RIGHTS, *THE HUMAN RIGHTS IMPLICATIONS OF BREXIT*, 9 (HL Paper 88, HC Paper 695, December 19, 2016).

¹⁶ HOUSE OF LORDS EU COMMITTEE, *THE UK, THE EU AND A BRITISH BILL OF RIGHTS*, 46 (HL Paper 139, May 9, 2016).

¹⁷ For a substantive view see, TOM BINGHAM, *THE RULE OF LAW*, ch. 7 (Penguin, 2011). Note however, wider criticisms that a fully substantive approach to the rule of law ‘rob[s] the concept of any function which is independent of the theory of justice which imbues such an account of law’. See, for detail Paul Craig, *Formal and substantive conceptions of the rule of law: an analytical framework* *Public Law* 467, 487 (1997).

The negativity underpinning the discourse on the current human rights framework, which sets it at odds with the UK's legal sovereignty, is fuelling age-old perceptions of a tension between democracy and human rights with human rights regarded as a threat to the national interest.¹⁸ Indeed, the rule of law has long been recognised as not an 'entirely harmonious bedfellow' with parliamentary sovereignty.¹⁹ On analysis, this perception appears to arise on the basis of only a narrow set of issues, namely terrorism, crime and immigration.²⁰ Yet, the current human rights framework focuses on issues far beyond this realm, not least with developments in the area of socio-economic rights. There is in fact an under-expressed link between the socio-economic rights legal framework and the topics that generate some of the greatest passion within UK policy debates, especially when debated in terms of the minimum level of subsistence.²¹ Examples include healthcare, economic opportunity and social welfare.²² Leaving the EU is likely to lead to a loss of the EU solidarity rights framework and the potential implications of this require further attention.²³

Adding to these complications is the divergence of perspectives over the two reforms among the UK's constituent parts. The negative human rights discourse is predominantly

¹⁸ See DAVID FELDMAN, *Democracy, Law, and Human Rights: Politics as Challenge and Opportunity* in PARLIAMENTS AND HUMAN RIGHTS: REDRESSING THE DEMOCRATIC DEFICIT, 95–96 (Murray Hunt, et. al. eds. Hart, 2015) (a viewpoint Feldman links with the media). See also THE CONSERVATIVE PARTY MANIFESTO 2015, at 73, <https://www.conservatives.com/manifesto2015>, visited November 18, 2017.

¹⁹ Bingham, *supra* n. 17, p. ix. For another perspective on this tension see, T.R.S. ALLAN, *THE SOVEREIGNTY OF LAW*, ch. 5 (OUP, 2013).

²⁰ See the perceptions of Feldman *supra* n. 18 p. 95–96.

²¹ See for example reference to the minimum income when assessing the lawfulness of Employment Tribunal fees in the recent seminal case *R (on the application of UNISON) v. Lord Chancellor* [2017] UKSC 51, [2017] 3 W.L.R. 409 (appeal taken from Eng. & Wales).

²² William Jordan, *Health overtakes immigration as an issue for voters*, YouGov, April 15, 2015, yougov.co.uk/news/2015/04/15/health-tops-immigration-second-most-important-issu/, visited August 8, 2017. See also the list of issues raised as of main concern to voters in the UK EU referendum: Electoral Commission, *Referendum on membership of the European Union Assessment of the Electoral Commission on the proposed referendum question*, para. 3.80, September 2015, http://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/192127/2015-08-17-EC-59a-15-Question-assessment-report-draft-FULL.pdf, visited August 8, 2017.

²³ Boyle & Cochrane, *Brexit and a British Bill of Rights: Four Scenarios for Human Rights*, *supra* note 14.

demonstrated by the UK Government and elements of the media.²⁴ Prior to the referendum both the Scottish and Welsh Governments supported the retention of the role played by both EU law and the European Convention on Human Rights in the devolution settlements.²⁵ The Welsh vote in favour of leaving the European Union by 51.7% has determined the Welsh Government's embracing of Brexit²⁶ but the overwhelming vote to the contrary in Scotland (62% voted to remain) has strengthened the Scottish Government's resolve to forge an independent settlement deal for Scotland.²⁷ These positions are of course influenced by the diverging jurisdictional perspectives on the constitutional status of the Union itself: the Scottish Government desire for independence; the Welsh First Minister's proposals for a "new Union" or quasi-federalist state;²⁸ and a Northern Ireland of diminishing but continuing binary political divides, where approximately half the power-sharing Government (when in existence) also desire to be free from the Union. This has become all the more complicated under the most recent political alliance with the majority unionist party in Northern Ireland, the Democratic Unionist Party ('DUP'), now lending a majority to a minority Conservative Government having lost its majority in the 2017 snap election. Whilst the DUP and the Conservative parties are firmly committed to reforming the human rights landscape in the UK (with a view to removing the UK from the ECHR framework) as a government they are bound to comply with the British-Irish Agreement 1998 – the international treaty guaranteeing equality and human rights by embedding the ECHR in Northern Ireland after the Good Friday Agreement was reached in 1998 (a deal the DUP opposed).

²⁴ See for example Tony Blair's recent comments on the role of the media in misleading voters pre and post Brexit, blogs.spectator.co.uk/2017/02/full-transcript-tony-blairs-brexite-speech/, visited August 8, 2017.

²⁵ House of Lords EU Committee, *supra* note 16, at 181.

²⁶ WELSH GOVERNMENT WHITE PAPER, SECURING WALES' FUTURE: TRANSITION FROM THE EUROPEAN UNION TO A NEW RELATIONSHIP WITH EUROPE, (2017).

²⁷ SCOTTISH GOVERNMENT WHITE PAPER, SCOTLAND'S PLACE IN EUROPE (2016).

²⁸ Carwyn Jones, Institute for Government speech, October 15, 2014, www.instituteforgovernment.org.uk/events/keynote-speech-rt-hon-carwyn-jones-am-minister-wales-our-future-union-%E2%80%93-perspective-wales, visited March 23, 2017.

Each of these issues are considered within the wider discussion in the following sections as we set out the complex human rights landscape in a *sui generis* constitutional framework and ask where next for UK human rights in a post-Brexit landscape.

THE UK CONSTITUTION AND HUMAN RIGHTS REFORM

Human rights protections within the UK derive from both statutory and common law provisions. Rights emanating from the common law primarily concern civil rights and liberties such as the freedoms of expression and assembly, along with the rights to life, liberty and of access to justice. Until relatively recently, the development of such rights was superseded by the emphasis on the statutory rights protections provided by the Human Rights Act 1998, which incorporates the European Convention on Human Rights into domestic law and, albeit to a lesser extent, the rights contained within EU law. The past few years has however witnessed a resurgence in judicial reliance on common law rights protection.²⁹

Since the UK's constitution is famously unwritten, it operates by a set of constitutional principles, most notably that of parliamentary sovereignty. Professor Dicey delivered the orthodox exposition of this principle when he defined it to mean that Parliament has 'the right

²⁹ *Kennedy v. The Charity Commission* [2014] UKSC 20 para 46, [2015] A.C. 455 (appeal taken from Eng. & Wales): 'As Toulson LJ also said in the *Guardian News and Media* case, para 88: "The development of the common law did not come to an end on the passing of the Human Rights Act 1998. It is in vigorous health ...". Greater focus in domestic litigation on the domestic legal position might also have the incidental benefit that less time was taken in domestic courts seeking to interpret and reconcile different judgments (often only given by individual sections of the European Court of Human Rights) in a way which that Court itself, not being bound by any doctrine of precedent, would not itself undertake.' See also e.g. *R (Evans) v. Attorney General* [2015] UKSC 21, [2015] A.C. 1787 (appeal taken from Eng. & Wales); *O (A Child) v. Rhodes* [2015] UKSC 32, [2016] A.C. 219 (appeal taken from Eng. & Wales), and comments of Lady Hale in Lady Hale, *UK Constitutionalism on the March?* Constitutional and Administrative Law Bar Association Conference 2014 (2014).

to make or unmake any law whatever; and further, that no person or body is recognised by the law [...] as having the right to override or set aside the legislation of Parliament'.³⁰ As will be seen from the discussion of *Miller* below, parliamentary sovereignty remains the enduring constitutional paradigm within UK law. In terms of the protection of human rights however, the principle has been subjected to judicial rules of interpretation, such that common law rights and certain statutes which protect rights are today considered to have a degree of superiority over other more 'ordinary' legislative provisions. Such rights have in effect taken on a constitutional status.

In *R v. Lord Chancellor, ex parte Witham*, [1997] EWHC Admin 237, [1998] QB 575, for example, a case which concerned the common law right of access to the courts, the England and Wales Court of Appeal announced that such rights 'cannot be abrogated by the State save by specific provision in an Act of Parliament...[g]eneral words will not suffice.'³¹ Two years later, in *R v. Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115 (appeal taken from Eng. & Wales), Lord Hoffman for the House of Lords drew parallels between this approach, known as the 'principle of legality', and the principles of constitutionality applied in countries that possess a written constitution: noting there to be 'little differen[ce]'.³² Lord Hoffman further identified the principle of legality's importance as a check on unintentional interference with fundamental rights by Parliament when he considered its effect to mean that 'Parliament must squarely confront what it is doing and accept the political cost... there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process'.³³

³⁰ A. V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, 40 (10th edn, Macmillan 1965).

³¹ *R v. Lord Chancellor, ex parte Witham*, [1997] EWHC Admin 237, [1998] QB 575, at 13.

³² *R v. Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115 (appeal taken from Eng. & Wales).

³³ *Id.*

Following the *Simms* jurisprudence regarding common law rights, a further principle of statutory construction was developed in the case of *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] Q.B. 151 whereby legislation that ‘(a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights’ would not be subject to the doctrine of implied repeal.³⁴ To repeal such statutes, the more recent statute must do so expressly. In *Thoburn*, the Laws LJ of the Court of Appeal referred to such legislation as ‘constitutional statutes,’³⁵ a term that while by no means abandoned by the UK courts, is being gradually recrafted into a more general focus on ‘constitutional principle(s)’³⁶ or the ‘constitutional character’ of a particular provision.³⁷ What is significant is that both the Human Rights Act 1998 and the European Communities Act 1972 - the legislative ‘conduit pipe’ through which EU law and accompanying rights form part of domestic law³⁸ - have been consistently recognised by the UK courts to have the necessary constitutional character to elevate them above other statutes.³⁹ The decision of the UK Government in October 2016, based on the referendum vote, to notify the EU of its

³⁴ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] Q.B. 151, at 62. The doctrine of implied repeal presumes that subsequent primary legislation will repeal earlier conflicting provisions, and applies in the ordinary case.

³⁵ *Id.*

³⁶ *R (HS2 Action Alliance Ltd) v. Secretary of State for Transport*, [2014] UKSC 3, at 79, [2014] 1 W.L.R. 324 (appeal taken from Eng. & Wales).

³⁷ *R (Miller) v. Secretary of State for Exiting the European Union*, *supra* note 8, at 67. See also, Lord Neuberger’s reluctance to comment on whether the Government of Wales Act 2006 should be approached as a constitutional enactment in the reference *Local Government Byelaws (Wales) Bill 2012 - Reference* [2012] UKSC 53 at 69, [2013] 1 A.C. 792 (AG reference under section 112 of the Government of Wales Act 2006).

³⁸ *R (Miller) v. Secretary of State for Exiting the European Union*, *supra* note 8, at 65 (adopting the term of Professor Finnis).

³⁹ In the HS2 case, the UK Supreme Court appeared to suggest that among competing constitutional provisions, there is also a hierarchical structure pertaining to the fundamentality of the underlying constitutional norm at issue. See, *R (HS2 Action Alliance Ltd) v. Secretary of State for Transport*, *supra* note 38, at 207. For a detailed discussion see, Mark Elliott, *Constitutional legislation, European Union law and the nature of the United Kingdom’s contemporary Constitution* 10 (3) EuConst 379 (2014).

intention to leave the Union but without the authorisation of Parliament⁴⁰ challenged this established approach.

R (Miller) v. Secretary of State for Exiting the European Union

The process by which the UK will leave the EU is set out in Article 50 TEU. According to paragraph 1, any member may leave ‘in accordance with its own constitutional requirements’. In terms of EU engagement, the UK Government must first ‘notify’ the European Council of its intent.⁴¹ The EU and UK will then negotiate and conclude an agreement for withdrawal.⁴² From the EU side, any withdrawal agreement will be concluded by a qualified majority of the Council, after obtaining the consent of the European Parliament.⁴³ In the event that no withdrawal agreement is reached within two years from the point of notification, the EU Treaties will automatically cease to apply to the UK, unless the Council and the UK unanimously decides to extend that period.⁴⁴ This would require each of the remaining 27 Member States to approve any extension of the two year timeline.

The applicants in *R (Miller) v. Secretary of State for Exiting the European Union*,⁴⁵ questioned the UK’s ‘constitutional requirements’ concerning the role of Parliament, partly in relation to rights established in statute. They argued that the prerogative power held by the UK Government to make and resile from treaties could not be legally exercised to trigger Article 50 TEU because that power does not in fact exist where its exercise would nullify or

⁴⁰ Theresa May, BBC ‘Andrew Marr Show’, October 2, 2016.

⁴¹ Article 50(2) TEU.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Article 50(3) TEU.

⁴⁵ *R (Miller) v. Secretary of State for Exiting the European Union*, *supra* note 8.

frustrate domestic law. This was particularly the case where domestic law involves rights or a scheme created by Parliament, based in part on the principle of Parliamentary sovereignty.⁴⁶

The majority of the court accepted the core argument of the applicants.⁴⁷ Since EU law had become a source of UK domestic law by virtue of an Act of Parliament, the UK Government could only exercise its prerogative powers in the intended manner if Parliament had first made clear its intention for this to be the case.⁴⁸ Parliamentary sovereignty was after all ‘conclusively established’ as ‘a fundamental principle of the UK constitution.’⁴⁹ Resting on *the Simms* jurisprudence the Court stated that:

... we cannot accept that, in ... the 1972 Act, Parliament “squarely confront[ed]” the notion that it was clothing ministers with the far-reaching and anomalous right to use a treaty-making power to remove an important source of domestic law and important domestic rights.⁵⁰

A key presumption underpinning the *Miller* jurisprudence was the irrevocability of Article 50 TEU,⁵¹ an issue on which the Treaty is silent and which could only be finally determined by the CJEU.⁵² That is, once a state notifies it is leaving the EU, it cannot take this notification

⁴⁶ Lord Pannick QC, oral argument for the applicants. See, hearing footage, Part 4 of 8, www.supremecourt.uk/watch/uksc-2016-0205/061216-pm.html, visited August 6, 2017.

⁴⁷ *R (Miller) v. Secretary of State for Exiting the European Union*, *supra* note 8, at 83.

⁴⁸ *Id.*, at 87.

⁴⁹ *Id.*, at 41-43.

⁵⁰ *Id.*, at 87.

⁵¹ *Id.*, at 169.

⁵² An application was filed in January 2017 by London barrister Jolyon Maugham QC with the Dublin High Court seeking a legal ruling on whether the UK (or any other Member States) can unilaterally withdraw its notification under Article 50 once made (the ‘Dublin case’). This case was however discontinued in May 2017 citing lack of Irish Government support and timing concerns. See, Jolyon Maugham, *Sometimes you try and you do not succeed* Waiting for Godot, May 29, 2017, waitingfortax.com/2017/05/29/sometimes-you-try-and-you-do-not-succeed/, visited August 5, 2017.

back. It has been a point of criticism that the Supreme Court chose not to seek a preliminary reference on the revocability of Article 50 before issuing its judgment.⁵³ Incidentally, the Court was also quick to dismiss any suggestion that the EU referendum had dispensed with the requirement for Parliamentary authority.⁵⁴

The UK Government responded swiftly to the Supreme Court's decision by introducing skeletal legislation to Parliament. The European Union (Notification of Withdrawal) Act 2017 simply provides that the Prime Minister may notify, under Article 50(2) TEU the UK's intention to withdraw from the EU; and that no provision made under the European Communities Act 1972 may affect that power. Amendments made by the House of Lords during legislative passage to safeguard the rights of EU citizens' residing in the UK and to require approval of the negotiation agreement from both Houses of Parliament were rejected by the Commons.⁵⁵ As such the Act does not include any specifications on the changes to the rights framework which may arise from Brexit - a missed opportunity to engender goodwill with the EU prior to the start of the negotiations. Neither did the Act commit Parliament to rights scrutiny. Despite the higher status accorded to rights protections within the UK's constitutional framework, such rights can still be overridden by a simple Act of Parliament with express language. The sufficiency of political will within Parliament is therefore crucial to ensuring adequate rights protections within UK law. At present, despite an awareness of the issue among the parties, Parliamentary will on the matter is languishing behind the populist calls to assert national sovereignty, and is moreover being mistakenly positioned as in opposition to that objective.

⁵³ See for example, Philip Allott, *Taking Stock of the Legal Fallout from the EU (Notification of Withdrawal) Act 2017*, U.K. Const. L. Blog, February 2, 2017, ukconstitutionallaw.org/2017/02/02/philip-allott-taking-stock-of-the-legal-fallout-from-the-eu-notification-of-withdrawal-act-2017/, visited August 5, 2017.

⁵⁴ *R (Miller) v. Secretary of State for Exiting the European Union*, *supra* note 8, at 38.

⁵⁵ HC Deb 13 March 2017, vol 623, cols 73-77 (Division 178) and cols 78-82 (Division 179).

EU HUMAN RIGHTS LAW AND BREXIT

So what are the human rights implications of Brexit? The intention of the government has been to maintain a degree of legal certainty for UK citizens by ensuring that pre-Brexit EU law remains in force in the UK, where practicable, until such a time as it can be individually reviewed and potentially repealed.⁵⁶ As such, some aspects of EU law, we are told, will remain part of UK law for the foreseeable future – until such time as parliament expressly repeals it. In fact the Government’s White Paper has explicitly promised to protect and enhance EU derived workers’ rights.⁵⁷ Nonetheless, concrete proposals on how this will be achieved are yet to be provided. In addition, and on closer inspection, we can see that the impact may indeed be much more serious for human rights protections in the UK with the inevitable loss of rights and remedies derived from the much broader EU framework. In particular the rights at risk include equality provisions⁵⁸, the right to a fair trial;⁵⁹ and social rights under the solidarity framework.⁶⁰ Furthermore, the existing rights of non-UK EU citizens living and working in the

⁵⁶ UK GOVERNMENT, THE UNITED KINGDOM’S EXIT FROM AND NEW PARTNERSHIP WITH THE EUROPEAN UNION (CM 9417),

www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf at 1.1, visited March 15, 2017.

⁵⁷ *Id.*

⁵⁸ UK equality law derives significantly from the EU legal framework, including the general treaty provision

⁵⁹ The jurisprudence of the ECJ on remedies and Art. 47, CFR, through cases such as, Judgment of 22 December 2010, Case C-279/09 “*DEB*” (OJ 2010 C 55, p. 9), Judgment of 18 March 2010 Case C-317-320/08, “*Alassini*”, (OJ 2010 C 134, p. 3-4) and Judgment of 14 June 2011 Case C-360/09, “*Pfleiderer*” (OJ 2011 C 232, p. 5-6). The original jurisprudence of the CJEU on remedies started from the principle of national procedural autonomy with limited harmonisation. This was true subject to the principles of ‘effectiveness’ (national law should not make it virtually impossible to bring an EU law) and ‘equivalence’ (national law should not treat the EU claim any less favourably than a claim brought under national law). In the *DEB* case, the ECJ started a shift from the traditional approach towards a focus on Art. 47. In *Alassini*, the ECJ applies both approaches, ie. the principles of ‘effectiveness’ and ‘equivalence’ first and then after that, Art. 47. The nature of the jurisprudence and the tests applied under Art. 47 are different from the traditional approach to remedies. In *Pfleiderer*, the ECJ had the opportunity to apply Art. 47 but choose not to – again reflecting an oscillating jurisprudence.

⁶⁰ The EU Charter of Fundamental Rights will not be incorporated into UK law post-Brexit.

UK who were not part of the EU referendum plebiscite now feature as a ‘bargaining chip’ in the post-referendum negotiations.⁶¹

In the *Miller* case, the Supreme Court emphasised the centrality of rights to the process of Brexit – finding that the triggering of Article 50 by notifying withdrawal from the EU would result in a fundamental change in the constitutional arrangements of the United Kingdom.⁶² This fundamental change occurs because the process of exiting the EU results in the loss of rights and remedies deriving from EU law.⁶³

EU rights continue to be in a state of constant flux. In fact, the ambit of the rights and remedies which are incorporated into domestic law under section 2 of the 1972 Act varies with the UK’s obligations ‘from time to time’ under the treaties.⁶⁴ Their interpretation relies significantly on the jurisprudence of the European Court of Justice (ECJ). This comes as no surprise given, for example, the absence of clearly defined rights, as opposed to principles, in the European Charter of Fundamental Rights.⁶⁵ Relying on courts to give meaning to rights is not unusual practice and it would seem this ad hoc formation of rights through the jurisprudence of the ECJ and national courts was perhaps deliberate if not unavoidable.⁶⁶ De Vries has indeed argued that the court may be ‘generating its own meaning’ for rights.⁶⁷ The UK government has established a consistent line in negotiations to ‘bring an end’ to the jurisdiction of the ECJ in

⁶¹ Ruvi Zeigler, *Logically flawed, morally indefensible: EU citizens in the UK are bargaining chips*, Brexit Blog LSE, February 16, 2017, <http://blogs.lse.ac.uk/brexit/2017/02/16/logically-flawed-morally-indefensible-eu-citizens-in-the-uk-are-bargaining-chips/>, visited August 8, 2017.

⁶² *R (Miller) v. Secretary of State for Exiting the European Union*, *supra* note 8 at 78-81.

⁶³ *Id.* at 80.

⁶⁴ *Id.*, at 76; European Communities Act 1972, section 2.

⁶⁵ Koen Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights* 8 *EuConst* 375, 375 (2012).

⁶⁶ *Id.*, at 399.

⁶⁷ SYBE DE VRIES ET AL. (EDS.) *THE EU CHARTER OF FUNDAMENTAL RIGHTS AS A BINDING INSTRUMENT—FIVE YEARS OLD AND GROWING* (Hart Publishing 2015).

Britain post-Brexit⁶⁸ and that the EU Charter of Fundamental Rights is not to be incorporated into UK law.⁶⁹ The President of the UK Supreme Court has called on parliament ‘to be very clear’ in explaining what UK judges are to do with decisions of the ECJ, or any other EU topic, after Brexit indicating that the proposed EU (Withdrawal) Bill is not yet fit for purpose.⁷⁰

Before the referendum took place we argued that greater attention on the implications for rights protection was required in order to support an informed and deliberative referendum process.⁷¹ Others too cautioned that the discourse had not yet engaged with the vast potential consequences of Brexit on the UK constitutional framework – particularly in relation to the implications for human rights protection.⁷²

In April 2016 we noted four areas of major concern in the post-Brexit rights landscape: the loss of citizenship rights; the loss of rights derived from general principles of EU law; the loss of rights derived from EU treaties including the loss of rights derived from the EU Charter of Fundamental Rights; and the loss of rights derived from regulations and directives which engage with human rights either directly or indirectly.⁷³ Rights deriving from regulations

⁶⁸ Tobias Lock, A Role for the ECJ After Brexit?, *European Futures Forum*, 3 July 2017.

www.europeanfutures.ed.ac.uk/article-4872, visited August 7, 2017: citing the Theresa May Lancaster House speech where she promised to ‘bring an end to the jurisdiction of the European Court of Justice in Britain’.

⁶⁹ DEPARTMENT FOR EXITING THE EUROPEAN UNION, LEGISLATING FOR THE UNITED KINGDOM’S WITHDRAWAL FROM THE EUROPEAN UNION, 2.25 (March 2017).

⁷⁰ Clive Coleman, *UK judges need clarity after Brexit - Lord Neuberger*, BBC news, August 8, 2017, <http://www.bbc.co.uk/news/uk-40855526>, visited August 8, 2017.

⁷¹ Boyle & Cochrane, *Brexit and a British Bill of Rights: Four Scenarios for Human Rights and Rights Derived from EU Law: Informing the Referendum Process*, *supra* note 14.

⁷² See for example Sionaidh Douglas-Scott, *What Happens to ‘Acquired Rights’ in the Event of a Brexit?*, U.K. Const. L. Blog, May 16, 2016, <https://ukconstitutionallaw.org/2016/05/16/sionaidh-douglas-scott-what-happens-to-acquired-rights-in-the-event-of-a-brexit/> visited August 8, 2017; Piet Eeckhout, *The Real Record of the EU Charter of Fundamental Rights*, U.K. Const. L. Blog, May 6, 2016, <https://ukconstitutionallaw.org/2016/05/06/piet-eeckhout-the-real-record-of-the-eu-charter-of-fundamental-rights/> visited August 7, 2017.

⁷³ For further discussion of these various categories see Boyle & Cochrane, *Rights Derived from EU Law: Informing the Referendum Process*, *supra* note 14.

include, for example, rights engaging with the coordination of national security systems⁷⁴ and the corresponding right to social security.⁷⁵ Rights deriving from directives include, by way of example, directives on child sexual abuse,⁷⁶ trafficking in human beings,⁷⁷ data protection,⁷⁸ gender equality in employment,⁷⁹ and racial equality.⁸⁰ We noted that the remedies currently available under EU law for breach of an EU right will also no longer be available. Remedies include the disapplication of primary law.⁸¹ This is a much stronger remedy than available under the Human Rights Act for a violation of an ECHR right.⁸²

We argued that the consequences were so vast and potentially so far reaching the complexity of disentangling the UK from the EU framework whilst also dealing with potential changes to the partially incorporated nature of the European Convention of Human Rights under the Human Rights Act 1998 was incredibly problematic (if not careless). This argument was contextualised as part of a broader concern that it was becoming increasingly difficult to ensure that voters had access to the necessary information for an informed vote and that this in turn may have a significant detrimental impact on the deliberative quality of the constitutional referendum process in and of itself. The same can be said of the post-vote negotiation process. It is entirely unclear what kind of post-Brexit rights landscape might exist and whether the UK will indeed continue to protect existing rights and if so to what extent. Inevitably some rights

⁷⁴ For example, Regulation (EC) 883/2004 of the European Parliament and of the Council (29 April 2004), on the coordination of national security systems falling within the framework of free movement of persons and contributing towards improving their standard of living and conditions of employment.

⁷⁵ Article 34 of the Charter of Fundamental Rights.

⁷⁶ Directive 2011/92/EU of the European Parliament and of the Council (13 December 2011).

⁷⁷ Directive 2011/36/EU of the European Parliament and of the Council (5 April 2011).

⁷⁸ Directive 95/46/EC of the European Parliament and of the Council (24 October 1995).

⁷⁹ Directive 2006/54/EC of the European Parliament and of the Council (5 July 2006).

⁸⁰ Council Directive 2000/43/EC (29 June 2000).

⁸¹ See *R v. Secretary of State for Transport, ex p. Factortame (No 2)* [1991] 1 AC 603 at 658 – 659, [1990] 3 W.L.R. 818 (appeal taken from Eng. & Wales, reference made to E.C.J.); *Benkharbouche v. Embassy of Sudan* [2015] EWCA Civ 33, [2016] Q.B. 347; and *Google Inc v. Vidal-Hall* [2015] EWCA Civ 311, [2016] Q.B. 1003.

⁸² See ‘*Hirst*’ discussed below – the strongest remedy available under the HRA for an incompatible primary legislation is a declaration of incompatibility which has no impact on the operative provision.

and remedies will be lost irrevocably – others may be protected in the immediate aftermath but could be eroded over time. There will be no obligation on subsequent administrations to retain the same level of protection that the current government might guarantee – given the nature of the UK constitution and parliament’s prerogative to repeal – even if this includes regressive measures on fundamental rights.

In any event, there is no provision made for the vast array of EU derived rights in the European Union (Withdrawal) Bill (also known colloquially as the ‘Great Repeal Bill’).⁸³ The use of (or abuse of) delegated legislation risks undermining parliamentary oversight even further.⁸⁴ The UK constitution facilitates a form of legislation which allows parliament to pass primary legislation which thereafter enables secondary legislation to be passed by the executive without the need to go through full parliamentary scrutiny. These delegated powers, also known as Henry VIII powers, can undermine parliamentary scrutiny of potential changes to the human rights regime. Whilst the EU (Withdrawal) Bill places the Human Rights Act 1998 outside the remit of delegated legislation⁸⁵ the vast array of rights derived from other sources of EU law is not guaranteed by this exemption. Notably the same exemption is not applied to the Equality Act 2010 which largely implements the EU equality related directives.

Nonetheless, the EU human rights framework will most likely retain continuing relevance. As part of the negotiation process the EU may seek to ensure that any future agreement with the UK does not compromise its own human rights standards. This has often formed a pre-requisite

⁸³ European Union (Withdrawal) Bill <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf>

⁸⁴ See the evidence session to House of Lords Constitutional Committee, February 1, 2017, <http://parliamentlive.tv/event/index/75194d6a-b303-436b-8bd8-e4b1dec58b3f>, visited August 8, 2017.

⁸⁵ Ss.8, 9, 12, 21 of the EU (Withdrawal) Bill.

of negotiation with third country agreements with other countries outside of the EU.⁸⁶ It may form part of a pre-requisite for future trade negotiations.⁸⁷ Whilst the general ambivalence towards social rights in the EU is noted⁸⁸ there is also a need to reflect on the fact the Charter places civil and political rights on the same footing as economic and social rights – even if this equality is more ‘apparent than real’.⁸⁹ That is not to say the direction of the court may change in the future – particularly with the introduction of the EU Social Rights Pillar. The EU may therefore have a role to play in guiding the direction of the UK in terms of upholding existing rights and remedies in so far it is possible to do so. The position of the UK signals to the international arena a disregard (if not, a careless approach) towards EU and national citizenship in terms of the domestic enforcement of rights and ensuring their continuation. This position undermines the UK on the global stage as concessions are made to assuage nationalist demands at the expense of global relationships.

The conclusion therefore is that the picture is much more complex than a simple repeal and replace scheme. The danger is that the current trajectory risks sleepwalking into a human rights legal deficit with many EU rights swept away with inadvertent measures or deliberate erosion. Yet again we highlight here the importance of genuine and informed deliberation on the consequences of Brexit on existing rights and remedies. More so we emphasise the potential impact that such a loss will have on those rights holders who are no longer able to seek a remedy for a breach of EU derived human rights law when this source of law has for decades

⁸⁶ LORAND BARTELS, HUMAN RIGHTS AND DEMOCRACY CLAUSES IN THE EU’S INTERNATIONAL AGREEMENTS (European Parliament 2005), www.europarl.europa.eu/meetdocs/2004_2009/documents/nt/584/584520/584520en.pdf, visited August 8, 2017.

⁸⁷ Joint Committee on Human Rights *supra* note 15, p. 9.

⁸⁸ As discussed by CATHERINE BARNARD, ‘The Silence of the Charter: Social Rights and the Court of Justice’ in THE EU CHARTER OF FUNDAMENTAL RIGHTS AS A BINDING INSTRUMENT—FIVE YEARS OLD AND GROWING, 173 (Sybe de Vries et al. (eds.), Hart Publishing 2015).

⁸⁹ *Id.*

provided a constitutional pillar of a domestic rights regime. This is a constitution in transition without the appropriate safeguards.

REPEAL OF THE HUMAN RIGHTS ACT AND A BRITISH BILL OF RIGHTS

The Human Rights Act 1998 which came into force in 2000 brought most of the rights contained within the European Convention on Human Rights into domestic law. The Act represents the core of the UK's human rights scheme as the primary domestic instrument enacted by the Westminster Parliament with the objective of enhancing human rights protection.⁹⁰ Since it incorporates rights contained within the European Convention on Human Rights, it is an instrument that protects essentially civil and political rights, though these can have implications of a social or economic nature.⁹¹

An oft celebrated aspect of the Human Rights Act is the structural respect it accords to parliamentary sovereignty, and in turn the will of the UK electorate as expressed through representative democracy. This effort manifests in particular in how the statute deals with legislation through sections 3 and 4 of the Act. Section 3 requires courts to interpret legislation in 'so far as it is possible to do so' in a manner compatible with European Convention rights. Where this is not deemed possible, section 4 provides that the courts (High Court and above) can make a 'declaration of incompatibility' between UK primary legislation and the Convention. As such the legal validity of the legislation remains intact, unlike with secondary legislation, which the courts do have the power to strike down. This

⁹⁰ See, UK GOVT, RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL, ch. 1 (1997, Cm 3782).

⁹¹ See e.g. *Stec v UK* (Admissibility decision), 2005-X Eur. Ct. H.R. 321, at 52.

model of rights protection applied by the Act is commonly conceived as a hybrid which sits somewhere between a model which rests all the powers of adjudication in the courts with one where the legislature has the final say on rights matters.⁹² There is also a substantial body of literature which compliments the ‘dialogue’ encouraged between the legislature and the courts by sections 3 and 4 of the Act. Indeed, a significant benefit said of dialogic models is their ability to facilitate public deliberation and debate. Interactions between the courts and the legislature can for example serve to highlight a matter in the public domain.⁹³

In 2015 the Cameron Government, elected with a majority, achieved a political mandate for its pledge to ‘scrap the [Act] and introduce a British Bill of Rights.’⁹⁴ Theresa May, a long-time critique of the Human Rights Act and the Convention, readily inherited this commitment, and until early 2017 consultation proposals toward that end were awaited.⁹⁵

According to the Conservative Party’s 2017 Manifesto, which preceded the snap election held in June, the UK Government no longer intend to repeal or replace the Human Rights Act ‘while the process of Brexit is underway’ but promise to ‘consider [the] human rights legal framework when the process of leaving the EU concludes’.⁹⁶ Such a consideration post-

⁹² The approach of the Act has been said to sit between the political constitutionalism/legal constitutionalism dichotomy and has been called a ‘parliamentary bill of rights’, ‘statutory bill of rights’, ‘weak form judicial review’ as well as the ‘new commonwealth model of constitutionalism’. See, for respective examples, JANET HIEBERT AND JAMES B. KELLY, *PARLIAMENTARY BILLS OF RIGHTS: THE EXPERIENCES OF NEW ZEALAND AND THE UNITED KINGDOM* (Cambridge University Press 2015); JAMES ALLAN, *Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament’s Clear Intention and You Shake It All About - Doin’ the Sankey Hanky Panky*, in *THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS* (Tom Campbell et al. (eds.) Oxford University Press 2011); JEREMY WALDRON, *The Core of the Case against Judicial Review* in *POLITICAL POLITICAL THEORY* (Harvard University Press 2016); STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* (Cambridge University Press 2013).

⁹³ For discussion see, SANDRA FREDMAN, *From Dialogue to Deliberation: Human Rights Adjudication and Prisoners’ Rights to Vote* in *PARLIAMENTS AND HUMAN RIGHTS: REDRESSING THE DEMOCRATIC DEFICIT*, 152-156 (Murray Hunt et al (eds.) Hart Publishing 2015), p. 296-297; ALISON YOUNG, *DEMOCRATIC DIALOGUE AND THE CONSTITUTION* (Oxford University Press 2017).

⁹⁴ The Conservative Party Manifesto 2015, p 73. See also, CONSERVATIVES, *PROTECTING HUMAN RIGHTS IN THE UK – THE CONSERVATIVES’ PROPOSALS FOR CHANGING BRITAIN’S HUMAN RIGHTS LAWS* (2014), www.conservatives.com/~media/files/downloadable%20files/human_rights.pdf, visited August 8, 2017.

⁹⁵ See, former Justice Secretary Liz Truss interview, Radio 4, August 22, 2016. It first appeared the proposal to repeal the Human Rights Act would receive a temporary stay in January 2017. See, comments of Sir Oliver Heald, Justice Minister, HC Deb, January 24, 2017, Vol 620, Col 153.

⁹⁶ The Conservative and Unionist Party Manifesto 2017, p. 37.

Brexit is not indeed a bad thing. By that stage, the constitutional protection of rights will have changed significantly with, at a minimum most likely, the loss of the EU Charter of Fundamental Rights from domestic law. Further, given the importance of the values at stake and potential constitutional impact of any reform, there would be wisdom in ensuring that adequate Government resources are available to inform, deliberate and interrogate the potential options. The concern that presently exists however is that the negativity and oscillation as to the UK's human rights legal framework is indicative of an intention to undermine the current human rights protection. In the very least it is stifling progress as civil society organisations redirect their efforts to maintaining the status quo as opposed to re-imagining a more progressive legal framework.

The most detailed account of the criticisms levelled against the Human Rights Act remains to be found in the February 2016 evidence delivered by the then Justice Secretary Michael Gove to the EU Committee. The substantive changes suggested by Gove involve three possible clarifications to the law as it stands. First, it is proposed that a British Bill of Rights would ensure that the jurisprudence of the European Court of Human Rights is advisory only. Section 2 of the Human Rights Act presently requires that domestic courts 'take into account' relevant Strasbourg jurisprudence and opinion. This requirement was interpreted in 2004 by the House of Lords as a 'mirror' principle: that is, having placed a 'duty [on] national courts [...] to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.⁹⁷ The domestic courts have however since distanced their approach from this position, interpreting section 2 as instead requiring something more akin to *consideration* of the Strasbourg position.⁹⁸ When queried therefore by the Committee on the continuing

⁹⁷ *R v Special Adjudicator ex p Ullah* [2004] UKHL 26 at 20, [2004] 2 A.C. 323 (appeal taken from Eng. & Wales).

⁹⁸ For an overview, see BRICE DICKSON, *HUMAN RIGHTS AND THE UNITED KINGDOM SUPREME COURT*, 39-43 (Oxford University Press 2013).

relevance of this suggestion, the Justice Secretary expressed a desire to avoid future courts returning to the ‘mirror’ interpretation. A second substantive change may involve specifically derogating from Convention rights in times of war. This desire appears to focus on British troops in overseas combat zones and derive from concerns over the extraterritorial application applied to the Convention by Strasbourg.⁹⁹ Although Gove drew possible parallels with the French Government’s Convention derogations in the aftermath of the Bataclan tragedy.¹⁰⁰ In October 2016, the UK Government announced its formal intention to introduce ‘a presumption to derogate from the [European Convention] in future conflicts’.¹⁰¹ The final substantive clarification concerns a proposed adjustment of the balance accorded to the qualified rights by, for example, placing more emphasis on freedom of expression than the right to privacy; these were referred to as ‘glosses’ and said to better mimic the difference in approach between the UK and continental jurisdictions.¹⁰²

Based on this evidence, it was apparent to the EU Committee that the motivations behind repealing the Human Rights Act were directed at ensuring human rights had a greater national identity rather than increasing human rights protection in the UK. Gove referred to human rights as having developed ‘a bad name in the public square’ due to associations with claims by ‘unmeritorious individuals’ and with ‘foreign intervention’ on British courts.¹⁰³ In the end, the Committee concluded that in light of the relatively minor alterations, it was

⁹⁹ Conservatives (2014), *supra* note 97, at 7.

¹⁰⁰ See, Press Release, Council of Europe Secretary General, November 25, 2015, www.coe.int/en/web/secretary-general/news-2015/, visited August 6, 2017. Article 15(2) ECHR however states: ‘No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.’

¹⁰¹ Ministry of Defence, ‘Government to protect Armed Forces from persistent legal claims in future overseas operations’ Press Release October 4, 2016, www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations, visited August 6, 2017.

¹⁰² House of Lords EU Committee, *supra* note 16, ch. 3.

¹⁰³ See Michael Gove evidence, EU Committee, Inquiry into ‘The Potential Impact on EU Law of Repealing Human Rights Act’, February 2, 2016, Q 79-90.

‘unsure why a British Bill of Rights was really necessary’, nor was it clear how a British Bill of Rights would address the Justice Secretary’s concerns any more than the Human Rights Act.¹⁰⁴

Though the headline of the Justice Secretary’s evidence was on giving more control to British courts as compared to the Strasbourg court, a significant, if not predominant feature of the proposals, is on giving more control to Parliament.¹⁰⁵ Yet despite a number of earlier creative interpretations under section 3,¹⁰⁶ the domestic courts are generally considered respectful of the doctrine of parliamentary sovereignty. In Dickson’s comprehensive review of the UK Supreme Court, he refers for example, to the ‘sense’ that the judiciary prefer to issue incompatibility declarations which do not change the law, over section 3 compatible interpretations which would directly contradict the wording of the legislation, or indeed to strike down secondary legislation.¹⁰⁷ On a whole the judiciary is cognisant of the democratic arguments and so deferential to the views of the legislature. A more curious observation is that Parliament has not, on a whole, been challenging the judicial determination on rights. Since the Human Rights Act came into force in October 2000 until end of July 2016, there have been 22 final (i.e. not the subject of further judicial proceedings) declarations of incompatibility. Of these 22, only one has not been either remedied, or planned to be remedied by Parliament.¹⁰⁸ One reason for such a high uptake of judicial recommendations could be the force behind the ‘ultimately binding nature’ of the Convention, and the

¹⁰⁴ House of Lords EU Committee, *supra* note 16, at 46 and 49.

¹⁰⁵ See e.g. Conservatives (2014), *supra* note 98, p. 4 (also p. 6).

¹⁰⁶ For a common example, see *Ghaidan v Godwin-Mendoza*, [2004] UKHL 30; [2004] 2 AC 557, which gave tenancy rights to unmarried gay couples despite the legislation applying only to married couples.

¹⁰⁷ Dickson (2013), *supra* note 98, p. 376-377.

¹⁰⁸ MINISTRY OF JUSTICE, RESPONDING TO HUMAN RIGHTS JUDGMENTS: REPORT TO THE JOINT COMMITTEE ON HUMAN RIGHTS ON THE GOVERNMENT’S RESPONSE TO HUMAN RIGHTS JUDGMENTS 2014-2016, Annex A (November 2016),

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/570753/responding-to-human-rights-judgments-2014-to-2016.pdf visited February 25, 2017.

availability of the European Court of Human Rights as an alternative forum for remedy.¹⁰⁹ Another reason could be the simple fact that the issues raised by the incompatibility declarations relate to matters not initially considered in the development of the legislation. The one outstanding declaration of incompatibility on the other hand, suggests a tenacious Parliament that refuses to be acquiesce to the pressure of the domestic courts or more realistically, the European Court of Human Rights (since the latter has also ruled on the matter). In *Hirst v UK (No. 2)*, 2005-IX Eur. Ct. H.R. 187, the European Court of Human Rights determined a blanket ban on prisoner voting rights, as per section 3 of the Representation of the People Act 1983, to be incompatible with the right to vote as protected by Article 3 of Protocol 1 of the Convention. Over a decade since this ruling, the UK has yet to alter this legislation (though draft legislation has been discussed¹¹⁰) on the grounds of Parliament's continuing objection to the enfranchisement of prisoners.¹¹¹

The UK Government's Human Rights Act proposals, such as we understand them, appear then to be directed at increasing parliamentary control of human rights. Yet the above discussion understands the Human Rights Act as structurally respectful of parliamentary sovereignty and in practical terms notes the strength of Parliament to defy international courts should it choose to do so. It is also ironic then that the proposals in so far as they might suggest a more restricted role for the judiciary in rights adjudication, may serve to decrease public involvement in rights deliberations. That is because on one view, as the domestic

¹⁰⁹ Mark Elliott, *Beyond the European Convention: Human Rights and the Common Law*, 68 *Current Legal Problems* 85, 111 (2015)

¹¹⁰ See the JOINT COMMITTEE ON THE VOTING ELIGIBILITY (PRISONERS) DRAFT BILL, DRAFT VOTING ELIGIBILITY (PRISONERS) BILL, (2013/14 HL 103, HC 924).

¹¹¹ COUNCIL OF EUROPE, COMMITTEE OF MINISTERS DOCUMENT, DH-DD (2016)1201 (November 4, 2016).

judicial role is restricted, any push into the public domain which occurred by virtue of the dialogic nature of rights adjudication in the UK is limited.¹¹²

While the Human Rights Act may not be repealed in the immediate future, the persistent undermining of the framework has caused legal academics to consider whether the common law could fill the gap left by such a repeal. The consensus appears to be that it would not, at least in the short term.¹¹³ Elliott comes to this, perhaps reluctant conclusion, based on all three vectors of his comparative analysis - the normative reach, the rigour of protective techniques, and resilience in the face of adverse legislative and administrative action.¹¹⁴ One aspect in which Elliott considered that the common law could hold par with the Act was in the context of protective techniques and namely the interpretive obligation under section 3 with the process of statutory construction required by the principle of legality.¹¹⁵

Finally, in suggesting that human rights have a ‘bad name in the public square’, it must be said that the Justice Secretary’s evidence made no mention of the contribution made by the UK Government to the public tone and debate concerning human rights. Elements of the Government have on occasion made unhelpful and inaccurate contributions to the human rights discourse.¹¹⁶ Considering the exponential influence that can be wielded by state authorities, the importance of the provision of accurate information should be impressed upon

¹¹² See e.g. (in the context of the Canadian Charter), Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such A Bad Thing After All)*, 350 Osgoode Hall L.J. 75 (1997).

¹¹³ Elliott (2015), at 115-116, *supra* note 109; BRICE DICKSON, *Repeal the HRA and Rely on the Common Law?* in THE UK AND EUROPEAN HUMAN RIGHTS: A STRAINED RELATIONSHIP?, 124 and 131 (K. S. Ziegler et al. (eds.), Hart Publishing, 2015).

¹¹⁴ *Id.*

¹¹⁵ *Id.*, at 100.

¹¹⁶ See, Press Association, *Theresa May claims cat prevents immigrant’s deportation – video* The Guardian, October 4, 2011, www.theguardian.com/politics/video/2011/oct/04/theresa-may-human-rights-cat-video, visited August 6, 2017.

the UK Government to ensure that the public mood is not unduly manipulated in this reform process.

UK HUMAN RIGHTS LAW AND DEVOLUTION

The devolved legislatures cannot amend the Human Rights Act 1998¹¹⁷ nor can either the devolved executives or legislatures act in a manner that is incompatible with EU law or the Convention rights.¹¹⁸ Beyond this however it is generally considered the case that the Scottish and Northern Irish legislatures have the power to legislate on human rights because it is not a matter that has been ‘reserved’, or in the case of Northern Ireland also ‘excepted’, to the Westminster Parliament.¹¹⁹ Wales presently operates under a conferred powers model and cannot therefore exercise a general competence on human rights; a situation that is due to change once section 3(1) of the Wales Act 2017 comes into force.¹²⁰

The devolved legislatures and the Westminster Parliament avoid stepping on each other’s toes by operation of a political convention known as ‘Sewel’. Recently enshrined in Scottish and Welsh devolution legislation¹²¹, the Sewel Convention means that the Westminster Parliament ‘will not normally legislate with regard to devolved matters without the consent’ of the devolved legislatures via a Legislative Consent Motion.¹²² Additionally, Cabinet

¹¹⁷ Scotland Act 1998, Schedule 4; Northern Ireland Act 1998, section 7(1); Government of Wales Act 2006, Schedule 5.

¹¹⁸ See, Scotland Act 1998, sections 29 and 57(2); Northern Ireland Act 1998, sections 6 and 24 (also 81 and 83); Government of Wales Act 2006, sections 81, 94 and 108. ‘Convention rights’ is to be interpreted as having ‘the same meaning as in the Human Rights Act 1998’.

¹¹⁹ Scotland Act 1998, section 29 and Schedule 5; Northern Ireland Act, sections 5-8 and Schedules 2 and 3.

¹²⁰ Wales currently operates under a conferred powers model. See, the Government of Wales Act 2006, section 108.

¹²¹ Scotland Act 2016, section 2; Wales Act 2017, section 2.

¹²² See, ‘Memorandum of Understanding and Supplementary Agreements’ (October 2013), at 14, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf. See also Scotland Act 2016, section 2; Wales Act 2017, section 2;

Guidance directs that when Westminster primary legislation seeks to *alter the competences* of the devolved legislatures and of the devolved Ministers (as opposed to legislating on a devolved matter), the consent of the devolved legislature should normally be sought.¹²³

Devolution and Brexit

In the recent *Miller* jurisprudence, the UK Supreme Court was asked to determine whether the Westminster legislation it had deemed to be necessary before Article 50 TEU could be triggered should be preceded by a legislative consent motion from the devolved legislatures.¹²⁴ Despite the Sewel Convention gaining legislative entrenchment, the Court determined that the consent of the devolved legislatures was not required. The rationale being that the Convention nevertheless remained of a political nature and as such ‘the policing and scope of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law’.¹²⁵ Thus the futility of the Sewel Convention’s legislative entrenchment is a frustrating addition to already unhappy relations between, in particular, the Scottish and UK Governments. The Prime Minister has committed that no decisions currently taken by the devolved administrations will be removed from them and that they will be fully involved in the Brexit process.¹²⁶ However, the return of EU competencies does not necessarily mean that the devolved competence will expand on a ‘repatriation’ of power from Europe. Similar to the potential use (or abuse) of delegated

and Cabinet Guidance, Devolution Guide Notes 8 and 10, <https://www.gov.uk/government/publications/devolution-guidance-notes> .

¹²³ See Devolution Guidance Note 8 at 4-5; Note 9 at 49 (see also 51 for a caveat); Note 17; and Note 10 at 4-6.

¹²⁴ The question was initially raised in two NI High Court applications, see *Re McCord* and *Re Agnew and Others*, [2016] NIQB 85, [2017] 2 C.M.L.R. 7.

¹²⁵ *R (Miller) v. Secretary of State for Exiting the European Union*, *supra* note 8, at 151.

¹²⁶ Theresa May, ‘The government’s negotiating objectives for exiting the EU’ Lancaster House, January 17, 2017, <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>, visited August 8, 2017.

legislation enabled through the EU Withdrawal Bill, the devolved legislatures may not have much say in where this power goes even for those areas of their devolved competence, not least because the Sewel Convention does not apply even in a political sense to secondary legislation.

What has been apparent is that Brexit poses major constitutional challenges to the future of the UK as a unitary state. In the *Miller* judgment the Court referred to Dicey in describing the UK constitution as ‘the most flexible polity in existence’.¹²⁷ Likewise, the UK Government suggests in its White Paper on Brexit that the UK’s constitutional framework reflects the unique circumstances of the world’s most successful and enduring multi-nation state.¹²⁸ Yet constitutional unrest is becoming ever more evident in the devolved jurisdictions. Following an unsuccessful attempt in 2014, the UK wide decision to leave the EU, which was not supported by the majority in Scotland, prompted the Scottish Government to call for a second referendum on independence, a plan that has been postponed on the back of Scottish National Party losses to pro-Union parties in the 2017 General Election.¹²⁹ Further, there is a need to resolve border issues with Ireland post-Brexit in a manner that does not destabilise Northern Ireland’s peace settlement. The fragility of this process is underscored by the fact that Northern Ireland has been without an effective Executive since January 2017 due to domestic discord over where the responsibility lies regarding a failed clean energy scheme resulting in significant losses to the public purse.¹³⁰ While both the Scotland and Welsh Governments have proactively published White Papers on Brexit, albeit that certain suggestions such as

¹²⁷ *R (Miller) v. Secretary of State for Exiting the European Union*, *supra* note 8, at 40.

¹²⁸ UK Govt., Cm 9417, *supra* note 56.

¹²⁹ Severin Carrell, *Nicola Sturgeon shelves second Scottish independence referendum* (video), The Guardian, June 27, 2017, www.theguardian.com/politics/2017/jun/27/nicola-sturgeon-shelves-second-independence-referendum, visited August 7, 2017.

¹³⁰ An Inquiry was announced into the matter on January 24, 2017. See, <https://www.rhiinquiry.org/> visited August 7, 2017.

Scotland staying within the single market have been rejected by the UK Government,¹³¹ the people of Northern Ireland are largely reliant upon the UK and Irish Governments to assert their interests rather than any local representation. The constitutional climate is such that despite the blow dealt by *Miller* to any legal requirement to obtain consent from the devolved legislatures, a prudent UK Government seeking to solidify the unitary arrangements would regard genuine dialogue and the Sewel arrangement of upmost political and practical importance.

Devolution, repeal of the Human Rights Act and a British Bill of Rights

One of the greatest issues concerning any potential repeal of the Human Rights Act is the risk it would run in undermining the Northern Ireland peace settlement. The Good Friday Agreement 1998 is committed to by the UK and Irish Governments in an international treaty lodged with the UN, and promises the incorporation of the European Convention and direct access to the courts for Convention breaches.¹³² It is also the view in many quarters that an indigenous Bill of Rights for Northern Ireland has been outstanding for almost twenty years; a view that emanates from provisions within the Agreement.¹³³ Calls for a Northern Ireland Bill of Rights have grown stronger in the wake of efforts to progress a British Bill of Rights.¹³⁴ The proposals to repeal the Human Rights Act and establish a British Bill of Rights therefore have the potential for serious constitutional and political disruption for

¹³¹ Letter from David Davis MP to Michael Russell MSP, dated March 29, 2017, www.parliament.scot/S5_European/General%20Documents/CTEER_Minister_M.Russell_2017.04.27.pdf, visited August 7, 2017.

¹³² Good Friday Agreement 1998, Strand Three. See Joint Statement of IHREC and NIHR, 25 June 2015, <http://www.nihrc.org/news/detail/joint-statement-of-irish-human-rights-and-equality-commission-and-northern>

¹³³ Good Friday Agreement 1998, Strand Three.

¹³⁴ See for discussion Anne Smith et al., *Does Every Cloud Have a Silver Lining?: Brexit, Repeal of the Human Rights Act and the Northern Ireland Bill of Rights* 40 (1) Fordham Intl L.J. 79 (2016).

Northern Ireland in exchange for what appears to be a limited benefit in terms of rights protections.¹³⁵

More generally, the strongest political case for a legislative consent motion rests with the establishment of any *new* human rights framework, such as a British Bill of Rights. This is because first, human rights are a devolved matter, and second, a new British Bill of Rights would inevitably alter the competences of the devolved Ministers and legislatures.¹³⁶ There has been a clear divergence of trajectories across the UK in terms of the protection of human rights. In Scotland, there is a commitment to an extended version of socio-economic rights protection and a new power has been devolved to Scotland which will allow the Scottish Parliament to enforce a socio-economic equality duty in devolved matters.¹³⁷ The power has also been devolved to Wales under the Wales Act 2017 though that provision has not yet commenced.¹³⁸ The Northern Ireland Bill of Rights proposals drawn up by the Northern Ireland Human Rights Commission also contain many more rights than are currently protected under the ECHR or EU system (including better protection of economic, social and cultural rights). Despite the lack of general competence in Wales, the Welsh Assembly has been able to develop legislation which actually increases the protection of human rights by incorporating a duty to have due regard to the UN Convention on the Rights of the Child.¹³⁹ Each of the devolved regions is on a very different human rights trajectory, all with moves

¹³⁵ House of Lords EU Committee, *supra* note 16, at 183.

¹³⁶ Note that arguments also exist that a legislative consent motion is required to repeal the Human Rights Act 1998.

¹³⁷ Scotland Act 2016, section 38. The Scottish Government is currently consulting on bringing the power into operation, see SCOTTISH GOVT, CONSULTATION ON SOCIO-ECONOMIC DUTY (July 2017), <http://www.gov.scot/Publications/2017/07/8131>, visited August 7, 2017. The duty was first established under the Equality Act 2010, section 1 but was never commenced.

¹³⁸ Section 45.

¹³⁹ Children and Young Persons (Wales) Measure 2011. This was made possible through the conferred power on social welfare which included ‘securing the [] rights’ of children. See, The National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 (SI 2008/3122). See also subsequent moves in Scotland, Children and Young People (Scotland) Act 2014, sections 1 and 2.

towards stronger enforcement. Constitutional reform may therefore risk further fragmenting an already fragmented UK and could potentially leave those living in England with even less access to rights or remedies compared to other parts of the UK.¹⁴⁰

CONCLUSION

The constitutional character of both the Human Rights Act 1998 and the European Communities Act 1972 are now well-established pillars of the UK domestic constitution and together form a critical foundational framework for fundamental rights in the UK. The common law, while recently reasserting itself as another source of rights protection,¹⁴¹ is not sufficient to substitute the pillars of the long established European frameworks.¹⁴²

Worryingly the UK risks sleepwalking into a legal deficit sooner rather than later with the Brexit process potentially sweeping away – either inadvertently or deliberately – the existing EU human rights regime without adequate parliamentary scrutiny.

The UK must take time to assess the potential pitfalls and introduce appropriate safeguards when engaging with constitutional and human rights reform – not least in relation to the sanctity of the nation state in and of itself. Interestingly the withdrawal from European legal frameworks by the UK demonstrates that it is not just a matter of renegotiating relationships at a supra-national level. Pursuing constitutional reform also requires careful consideration of

¹⁴⁰ For a discussion on this see Katie Boyle, *What are the consequences for human rights if we change our relationship with the EU?*, Economic and Social Research Council - Explainer, April 2016, ukandeu.ac.uk/explainers/what-are-the-consequences-for-human-rights-if-we-change-our-relationship-with-the-eu/, visited August 8, 2017.

¹⁴¹ See for example, Lady Hale, *supra* note 29.

¹⁴² See, Elliott (2015), *supra* note 109. See also, Brice Dickson (2015), *supra* note 113.

the impact on each of the constitutional components of the nation at the sub-national level. The UK devolved entities each carry their own distinct constitutional character. Failure to take these positions into account could be perilous – particularly in the context of the Scottish independence debate and the Northern Ireland peace process.

The proposal to revisit the future of human rights in the post-Brexit landscape need not however be viewed entirely negatively. Taking the above cautionary warnings into account, there is the possibility of increasing the accessibility and public understanding of UK human rights law by opening the debate for genuine informed, participative and inclusive deliberation on potential reform creating a space for ownership of human rights amongst the UK public. The constitutional principle of the rule of law includes a commitment to human rights and future reform should present as an opportunity to ask to what extent human rights protections might be increased rather than diminished. Lord Bingham’s assessment of the concept considers the rights protected by the Human Rights Act 1998 to be an appropriate starting point: ‘[t]here are probably rights which could valuably be added to the Convention, but none which could safely be discarded.’¹⁴³ There could be, for example, an opportunity to genuinely embrace stronger protections for socio-economic rights – something which is already happening at the devolved level. We propose therefore that the opportunity to re-imagine a constitutional settlement for rights across the UK should be grasped with the existing substantive rights acting as a minimum threshold (an ‘ECHR-EU +’ model). In other words – the nature of the UK constitution means that leaving the EU and reforming the human rights structure should not, as a matter of principle and a matter of law, result in the diminishing of rights unless parliament expressly says so. Whilst Westminster parliamentary

¹⁴³ Bingham, *supra* note 17, p. 84. See also, Dickson (2013), *supra* note 98. Dickson argues that there is a need for greater clarity on the rule of law.

committees have already commenced scrutiny of human rights reform and should continue to maximise their available resources in this regard more needs to be done to introduce safeguards in the legislative process. For example, a presumption against any delegated legislation that engages with the broad EU human rights framework – meaning a much wider exemption than currently exists in the EU (Withdrawal) Bill. Whatever form human rights take in the UK’s future constitutional makeup, political legitimacy in a difficult and polarised constitutional climate means reform must be preceded by a lengthy deliberative process across the jurisdictions that is fair, participative, democratic and informed.