THE THOMAS MORE LECTURE 2022

The Protection of Rights – this way, that way, forwards, backwards ….

The Rt. Hon. The Lord Mance

1. The Thomas More lecture is traditionally devoted to a European theme. I was originally due to give it in 2016 and selected a European Union theme. The Brexit referendum occurred. I pulled out. Looking back, my 2016 draft does not seem particularly controversial. It was on the future of international cooperation in the areas of jurisdiction and judgments. There, the European dimension has, at least for now, largely fallen away and ancient statutes and old and new Hague Conventions come to the fore. So times have moved on.

2. When asked again to speak, I therefore chose another theme: our relations with the European Convention on Human Rights (the ECHR), and the new Bill of Rights, proposed by Mr Johnson's Secretary of State for Justice, Mr Dominic Raab. No sooner than I had written my lecture, but Ms Liz Truss's government replaced Mr Raab, withdrew the Bill, and focused attention on a yet further area of European interest – the Retained EU Law (Revocation and Reform Bill). I began to feel like the boy in a favourite grand-children's song who, jumping aboard a pirate ship, was told by the captain that "we're going this way, that way, Backwards, Forwards, Up and Down". The song actually continues: "over the Irish Sea", but I did not want my audience to come thinking that I shall address the Protocol. I did consider addressing the ship of state's new direction towards a Retained EU Law Bill. That will merit close analysis, if the heroic task which it announces means what is says. But perhaps there will now be a rethink about its utility.

3. In the event, I thought it still relevant to look at the proposed Bill of Rights. The thought is perhaps confirmed by Mr Raab's return this week his former office. But

the Bill's objectives and principles are said to remain valid and Mr Raab's predecessor stated, at a Policy Exchange Forum on 2 October, that the aim would probably be to introduce key points piecemeal.

4. First, however, a word about Thomas More. I am indebted to Michael Massing's epic book, *Fatal Discord Erasmus, Luther and the Fight for the Western Mind*, in which there is much also about Erasmus's great friend and fellow humanist, Thomas More. More was a member of Lincoln's Inn and for four years Lord Chancellor. Learned, humane and affectionate to family and colleagues, More was a hugely productive scholar and lawyer, an upright and efficient public servant, a just judge and author of the book Utopia, the title of which is a play on the Greek "ou-topos" (nowhere) and "eu-topia" (good place).[1] That the European Union has not made more of the serendipity of "EU-TOPIA" is probably because a firm of consultants or lobbyists got there first.

5. More was famously described as a "man for all seasons".[2] But there was also a steeliness about him. He wore a hair coat underneath his robes, and was consistent in his loyalty to Rome to the point where it carried him to the scaffold. He refused to take an oath under the Act of Succession delegitimising Princess Mary and confirming the Crown's supremacy over Rome in religious matters. He was executed after being convicted of treason in proceedings instigated by another lawyer, Thomas Cromwell of Gray's Inn. He has in consequence remarkable recognition as a saint by the Roman Catholic Church and in 1980 as a "martyr of the Reformation" by the Anglican.

6. Hearing of More's execution, Erasmus said "In the death of More, I feel as if I had died myself". He added however that he "wished More had left theology to the

[1] In *Utopia*, More described a world in where there are no lawyers because of the laws' simplicity and because social gatherings are in public view (encouraging participants to behave well), communal ownership supplants private property, men and women are educated alike, and there is almost complete religious toleration (except for atheists, who are allowed but despised). The first two characteristics were no doubt dialectical. But More genuinely believed that education should be available to men and women, practised this domestically and demonstrated it to his friend and fellow humanist Erasmus.

[2] More fully, the admittedly probably patronage-seeking contemporary said that he was: "a man of an angel's wit and singular learning. I know not his fellow. For where is the man of that gentleness, lowliness and affability? And, as time requireth, a man of marvelous mirth and pastimes, and sometime of as sad gravity. A man for all seasons".

theologians". One also wishes that More had exhibited less zeal in his relentless pursuit of reforming theologians like William Tyndale and his enthusiastic endorsement of their horrific fate. In contrast, Erasmus readily acknowledged that he was not the stuff of which martyrs are made, and was criticised by both Lutherans and Catholics alike for sitting on the fence. His philosophy of moderation, toleration and free will fitted ill with the religious passions inflaming Europe (though it has to be said that Erasmus shared, if less virulently, the anti-Judaism of More, Luther and many other Europeans of that epoque).[3]

7. In the last century, and after two world wars and the atrocities of fascism and totalitarianism, it is not More, but Erasmus, the more complete humanist, who became an icon for the European Union - symbolising an important educational exchange programme to which the UK no longer subscribes. When our last but two Prime Ministers mocked the idea of citizenship of the world, it was, whether she knew it or not, at a statement by Erasmus that she was aiming.[4]

8. The United Kingdom has presently decided that citizenship of Europe, in the sense of the European Union, is a bad idea. But there is a wider Europe, represented by the Council of Europe, to which the United Kingdom still belongs. Quoting Massing again, one can say that "Since World War II, Europe [which I take in the sense of this wider Europe] has embraced a creed founded on many of the same principles" as the humanism endorsed by Erasmus, and largely shared by More. One significant aspect of this is the continuing bond represented by the ECHR.

9. The impetus for the Convention came from the horrors of the Second World War and the threat to democracy posed not just by Nazi-ism but also communism. The United Kingdom played an important role in the Convention's development.[5]

[3]Erasmus's general philosophy of moderation and toleration was for long rejected by both Lutheran and the Catholic Church (the latter notably at the Council of Trent 1545-1563 The Council did however notably depart from both Augustinian and Lutheran doctrine by declaring that it was anathema to deny the existence of free will.

[4] Even if Erasmus, whose foreign languages included Greek and Hebrew as well as Latin, may well himself have been drawing on Diogenes – cosmou polites).

[5] The Congress of Europe which took place from 7 to 10 May 1948 at the instance of politicians including Churchill, Mitterrand and Adenauer and a wide variety of other civil leaders, gave rise to a Pledge stating: "We desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as right to

It has been party to the ECHR from its outset, and has long recognised a right of individual access to the ECtHR The Convention rights have since 2000 been incorporated as domestic rights into the laws of the United Kingdom, as provided by the Human Rights Act 1998 (the HRA). The HRA was well-prepared, and its implications well-debated.[6] It had cross-party support. One Conservative MP, Sir Edward Gardner QC, ringingly endorsed the Convention rights as "language which echoes right down the corridors of history. It goes deep into our history and as far back as Magna Carta".[7]

10. The 1997 White Paper *Rights Brought Home* identified the case for incorporation as "very practical". The rights, "originally developed with major help from the United Kingdom Government", would be "woven into our law" and British judges would be able to make a distinctively British contribution to European human rights jurisprudence. Cases where UK law did not match ECtHR jurisprudence, as it developed to reflect changes in society and attitudes, would diminish, and victims of violations would be able to claim redress domestically. Whatever one thinks of the practical effects of domestication, the HRA[8] has been generally regarded as a cleverly constructed framework, explicitly designed to respect both the UK's international and its constitutional arrangements, in particular the principle of Parliamentary supremacy. And, at least in its stated aims, it has very largely succeeded.

11. The scheme of the HRA is clear:

- The Convention rights are incorporated as domestic rights: s.1.

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form a political opposition. We desire a Court of Justice with adequate sanctions for the implementation of this Charter." In 1949, parliamentarians from the twelve member states of the Council of Europe meeting in Strasbourg drafted a charter of human rights, with Sir David Maxwell-Fyfe, a prosecutor at the Nuremberg Trials, playing a leading chairing role. The draft was sent to the Council's Committee of Ministers, and further reviewed by a group of experts, and the final version emerged in the form of the ECHR, enforced by the ECtHR.

[6] Before the 1997 election the Labour Party had published a consultation document. Its election manifesto stated: "We will by statute incorporate the ECHR into UK law to bring these rights home and allow our people access to them. The White Paper Rights Brought Home (October 1997) then made proposals closely echoed in the ensuing Bill. It noted: "the Government has paid close attention to earlier debates and proposals for incorporation" – a reference to two bills for incorporation: one recently introduced by the Liberal Democrat Peer, Lord Lester of Herne Hill QC, the other a private member's bill introduced in 1987 by the then Conservative MP Sir Edward Gardner QC.

[7] Hansard, 6 February 1987, col.1224.

[8] Fashioned under the aegis of a mighty figure, then Lord Chancellor, Lord Irvine of Lairg.

- Their content or interpretation is therefore a matter for the domestic courts:

- Courts are not *bound* by any interpretation put on the rights by the ECtHR, but they are required to take into account any such interpretation: s.2.

- Parliamentary supremacy remains, so primary legislation can override or be otherwise incompatible with the Convention rights.

- But the significance of the rights is marked by a requirement that a minister in charge of any Bill must state before its second reading either that the Bill is compatible, or that he cannot make such a statement.

- Further, courts have "so far as it is possible to do so" to interpret primary and subordinate legislation compatibly with the Convention rights, interpreted in the way already stated: s.3.

- Where subordinate legislation cannot be interpreted compatibly, it is pro tanto invalid. Where primary legislation cannot be interpreted compatibly, the court may only make a declaration of incompatibility, but this empowers a Minister to make corrective amendments, if he considers there to be compelling reasons for this, or may lead to Parliament correcting the position: s.4 and 10.

- Breaches of the Convention rights by public authorities constitute unlawful acts (but do not include cases of incompatibility of primary legislation or cases where the authority was acting to give effect to incompatible primary legislation): s.6

- Victims of unlawful acts, in accordance with the ECHR definition, may bring proceedings against the offending authority within 1 year or such longer period as the court considers equitable:: s.7 and ECHR Article 34

- The court may grant such relief or remedy in respect of unlawful act as it considers just and appropriate, including damages if the court "is satisfied that

this is necessary to afford just satisfaction" to the claimant, and the court must "take into account the principles applied by the ECtHR in relation to the award of damages under Article 41 of the ECHR": s.8.

- Finally, the HRA contains a few, limited guidelines regarding courts' exercise of their role under in the HRA, couched in injunctions to have "particular regard" to for example the importance of freedom of expression and of thought, conscience and religion.[9]

12. In most democracies, this would probably be regarded as a modest scheme. It eschews the *Marbury v Madison* type of judicial review of primary legislation that we ourselves assisted to develop in many current or former overseas jurisdictions as well as in Germany. It relies on mutual respect and political moderation to ensure the harmonious co-existence of the principles identified by Dicey of Parliamentary sovereignty and the rule of law. I use that last phrase in the full sense in which Eleanor Roosevelt[10] used it when she described it as "essential …. that human rights be protected by the rule of law" and which Tom Bingham also described in his chapter 7 of his book The Rule of Law. The rule of law has in this sense a qualitative element that the rule by law, as practised in authoritarian jurisdictions, lacks.

[9] More particularly:

- S.12 contains guidelines in the area of freedom of expression. These limit ex parte applications to **cases where it is not practicable to notify, or there are compelling reasons for not notifying, the** respondent – an unsurprising provision. They limit prior restraint of publication to cases where it is shown that the applicant is likely to succeed at trial. They require the court to "have particular regard to the importance" of freedom of expression, and, where the material is journalistic, literary or artistic, the public availability of, or public interest, in the material to be published.
- Under s.13, the court must also "have particular regard to the importance of "the right to freedom of thought, conscience and religion, in any question which might affect the exercise by a religious organisation or its members collectively of that right.
- Finally, s.7A, introduced by the Overseas Operations Act (Service Personnel and Veterans) Ac 2021 requires a court, when considering whether to extent whether to extent the one year period for proceedings in respect of overseas armed forces proceedings, must "have particular regard" to the effect of delay on the cogency of the evidence likely to be adduced by the parties and the likely impact of the proceedings on the mental health of any witness or potential witness who is, or was at the time of the relevant events, a member of Her Majesty's forces.

[10] Chair of the United Nations Commission on Human Rights, which drafted the Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December.

13. But the last twelve years have seen repeated, if varying, moves to change the scheme. A Bill of Rights Commission set up by the Coalition government failed to agree on the content of any new legislation. David Cameron's 2015 manifesto promised nevertheless not only the Brexit Referendum but, five times over, three in bold, to "scrap" the Human Rights Act and to introduce a British Bill of Rights. Boris Johnson did not however stand for election in 2019 on the same basis. The Conservatives' 2019 manifesto has renewed topicality in recent days, and all we find in it is a single pledge to "update" the HRA. It was said this would "ensure a proper balance between the rights of individuals, our vital national security and effective government".

14. On 7 December 2020, the government, through the then Secretary of State for Justice, Mr Robert Buckland QC, duly announced an Independent Human Rights Act Review, chaired by a retired CA judge, Sir Peter Gross, to "provide the government with the options for updating the Human Rights Act". The Review published in December 2021 is notable for its general conclusion that the HRA is operating satisfactorily. Its recommendations for updating can be viewed as minor.[11] It was not commissioned to examine either repeal of the HRA or the scope of rights as recognised in Strasbourg.

15. On 15 September 2021, Mr Buckland was replaced by Mr Dominic Raab, and the publication of the Gross Review was in December 2021 accompanied by the issue of a Consultation Paper, the stated object of which was now to set out and seek views on the government's proposals to "revise and replace the Human Rights Act with a modern Bill of Rights". While the Foreword stated that it had "been informed by", it is not evident that the Paper had been much uninfluenced by, the Gross Review. The government was equally uninfluenced by calls by Parliamentary committees, including the Joint Committee for Human Rights in a

[11] Under sections 2 and 3 ("taking account" and "so far as possible") courts should start by considering the common law and with the natural meaning of the words without any special interpretive rule. Under section 3, they should also make clear the natural meaning, before resorting to the special rule of "interpretation so far as possible" compatibly. There were recommendations for increased Parliamentary scrutiny involving the Joint Committee on Human Rights and for a governmental discretion to make ex gratia payments where a declaration of incompatibility is made Notably, the Review recommended no change to section 2 in respect of the margin of appreciation, rejecting Policy Exchange's criticism of the jurisprudence developed in this connection.

detailed report of 13 April 2022, for pre-legislative scrutiny of the proposed Bill of Rights.[12]

16. The call for pre-legislative scrutiny having been rejected[13], the Ministry in June 2022 responded formally to the Gross Review and on 22 June 2022 laid the Bill with its detailed terms before Parliament. On 13 July 2022 the government responded to the Joint Committee report. It said that the Consultation had provided "valuable input", and repeated that the Bill's proposals "build on" the Gross review. The reality is, however, one of substantial disconnect between the Bill, on the one hand, and (a) the Gross Review, (b) the majority responses to the Consultation paper and (c) the Joint Committee's report, on the other.

17. Let us then look at the Bill. It would repeal and replace the Human Rights Act. Its provisions mix the polemical or political with the substantive. Substantively, it was designed, first, to open up potential water or space between Strasbourg and UK jurisprudence and, secondly, to mould the approach of UK courts and the resulting jurisprudence in a manner viewed by more acceptable to those proposing the Bill.

18. The unusually polemical aspect of the Bill may have contributed to its downfall. The drafters seem to have seen the Human Rights Act as a modern Hydra which, for its effective despatch, required not only a double statement that the Act was repealed (clause 1(1) and Schedule 5(2)), but in addition a further express proclamation that courts were no longer (therefore) to be required, under that already repealed Act, to construe legislation "so far as possible" compatibly with the Convention rights (clause 1(2)(b)). We are also unused to triumphalist proclamations like clause 1(2), stating that the Bill "clarifies and re-balances the relationship" between UK courts, the ECtHR and Parliament; or like clause 1(3), stating that ECtHR judgments are "not part of domestic law" and "do not affect the right of Parliament to legislate" – statements beating the air, since the

[12] The Chairs of the Public Administration and Constitutional Affairs Committee. The Joint Committee on Human Rights, the Justice Committee and the Lords Constitution Committee wrote a joint letter to that effect on 27 May 2022. The Joint Committee on Human Rights in a full report of 13 April 2022 concluded that no case had been made out for the proposed Bill of Rights to replace the Human Rights Act.
[13] By Parliamentary answer on 9 June 2022.

contrary has never been suggested. On the contrary, although the whole point of the HRA was to achieve greater assimilation of UK and Strasbourg jurisprudence, there are well-known examples of the Supreme Court declining to adopt Strasbourg caselaw, and actually persuading Strasbourg to modify its jurisprudence: see e.g. *R v Horncastle* [2009] UKSC 14 and *R (Hicks) v Commissioner of Police [*2017] UKSC 9, leading to the Grand Chamber decisions in respectively *Al-Khawaja and Tahery v UK*[14] and *S, V and A v Denmark* (22 Oct 2018)[15]. As to clause 1(2)(a)'s statement that "it is the UK Supreme Court" that determines the meaning and effect of the Convention rights for the purposes of domestic law, that would be a fine sentiment, if the Bill did not go on persistently to constrain ordinary judicial approaches.

19. There are other provisions which appear to be there for essentially political or presentational reasons. What, for example, was the point of clause 9 on jury trial? It would in effect simply record that we have jury trial when we have it, and (uncontroversially) that jury trial is capable of providing a fair trial under Article 6. And what about Clause 14? This would have purported to reverse the ECtHR's extension in *Al-Skeini v UK* (App No 55721/07) of the Convention concept of jurisdiction to cover certain overseas military operations.[16] But, under clause 39(3), clause 14 it could not be brought into effect unless and until the Secretary of State is satisfied, "whether on the basis of provision made in an Act passed after this Act or otherwise", that "doing so is consistent with the UK's obligations under the Convention". This is a very odd, indeed on its face meaningless, clause, since doing so cannot be consistent with the Convention unless the ECtHR undergoes a Damascan conversion to UK governmental pipe-dreams by reversing its Grand Chamber decision in *Al-Skeini v UK*.[17]

[14] *Al-Khawaja and Tahery v United Kingdom* (26766/05) [2012] 2 Costs L.O. 139 (ECHR (Grand Chamber).
[15] App. No. 35553/12; [2018] ECHR 856.
[16] Accepted by the Supreme Court domestically in *Smith (No 2) v Ministry of Defence* [2013] UKSC 41.
[17] The Convention means, as defined in clause 36(1), the ECHR. The UK's obligation under the ECHR is to adhere to *Al-Skeini v United Kingdom* (app. No 55721/07), so long as the ECtHR adheres to *Al-Skeini*. No future domestic Act can alter the UK's international obligations under the ECHR - unless clause 36(1) is contemplating a Looking Glass world, in which Parliamentary supremacy is used to declare in a fashion binding on UK courts that international law – here ECHR law as declared by the ECtHR – is something other than it is.

20. The Bill would, more notably, have omitted the current section 2 obligation on courts to take account of ECtHR jurisprudence. But how significant would that prove? The courts would still be free to take account of such jurisprudence, and the normal presumption would be that Parliament by introducing the Convention rights domestically was intending that they should be given the same effect as they have internationally. The Bill's proposed injunction on courts to have particular regard to the text and preparatory work of the Convention and to common law development in the same field could operate as a small qualification or incentive to differ, but hardly a significant one in most cases.

21. The Bill did however propose one exception to the courts' ability to have regard to the international legal position. Clause 24 provided that, both for the purpose of determining any rights and obligations under domestic law or when considering whether to grant any relief which might affect the exercise of a Convention right: "no account is to be taken of any interim measure issued by the European Court of Human Rights". The Bill's publication took place on 22 June 2022. That happens to be eight days after the European Court of Human Rights (the ECtHR's) issue on 14 June of a first controversial interim measure temporarily restraining removal to Rwanda of asylum seekers. On the day after that interim measure (15 June), the ECtHR's intervention was criticised forcefully by Professor Richard Ekins and his provocatively named Judicial Power Project as "a remarkable abuse of judicial power, which discredits human rights law". The rights or wrongs of that criticism are not my concern. Whether clause 24 was invented in the eight days before the Bill's publication, I also cannot say.

22. Leaving such matters aside, it is extraordinary to see legislation proposing to forbid *any* domestic court in future taking *any* account of *any* interim measure issued by the ECtHR. Under the Convention, the ECtHR has jurisdiction to issue such measures "to preserve an asserted right before irreparable damage is done to it". Such measures are, when issued, legally binding on States, by reason of States' undertaking in Article 34 of the Convention "not to hinder in any way the effective exercise" by a victim of a claim before the ECtHR to be a victim: see

Mamatkulov and Askarov v Turkey (2005).[18] The ECtHR's issue of such a measure would normally be expected to be relevant at least to consider. The Bill proceeds on the basis that judges can and would conscientiously ignore the relevant. That is, at least, a welcome tribute by the government to judicial integrity and objectivity. But it seems clear that the prohibition in clause 24 could potentially put the United Kingdom in breach of the Convention.

23. I come to Bill's proposed repeal of section 3 of the HRA, that is repeal of the requirement to interpret domestic legislation "so far as possible" compatibly with the Convention rights, as interpreted domestically.[19] Again, the Bill does not quite give the whole picture. It would leave unmentioned – and presumably untouched - the "strong presumption" at common law in favour of interpreting an English statute consistently with the United Kingdom's international obligations: see *Assange v The Swedish Prosecution Authority* [2012] UKSC, 22, [122] per Lord Dyson[20]. This is not as cogent a presumption or tool as section 3, but the Bill would bring its role to the fore.[21]

24. The Bill also addressed the *Ullah* principle. Under the *Ullah* principle, as reformulated by Lord Brown in *Al-Skeini*[22] [106], courts were encouraged to go no less far, but no farther than the ECtHR would do. Clause 3(3) of the Bill would now expressly prohibit any court from going farther by adopting an interpretation of a Convention right that "expands the protection conferred by the right" unless the court had "no reasonable doubt" that the ECtHR would itself adopt this expanded interpretation. Courts would also be expressly permitted (indeed tacitly encouraged) to go less far. The one exception is that the courts would, by clause 4, be given explicit permission to go further than the ECtHR in the field of freedom of expression, to the importance of which courts would by clause 4 be bidden to give "great weight". Thomas More, Erasmus and Luther would all have

[18] App. No. 46827/99.
[19] So that courts would no longer be required to strive to find consistency, where to find it would not go against the grain of the legislation: Gaidan v Gaidan-Mendoza [2004] UKHL 30.
[20] Lord Dyson cited Lord Hoffmann in R v Lyons [2003] 1 AC 976, [27], and Lord Bingham said in Office of the King's Prosecutor, Brussels v Cando Armas [2006] 2 AC 1, [8].
[21] In Elan-Cane, [90], Lord Reed said that section 3 "on any view extends the common law principle under which international conventions can influence the interpretation of legislation, but its effect is confined (but for the dicta in Re G) to cases where there would otherwise be a breach of international law".
[22] R (Al-Skeini) v Secretary of State for Defence [2007] UKSC 26.

welcomed this endorsement of freedom of speech - at least as regards their own freedom to speak, and in Erasmus's case more generally.

25. As it happens, Clause 3(3) would in reality do little more than restate existing law, by crystalising the *Ullah* approach into hard law, and making it clear that this applies even in cases within the margin of appreciation. The Supreme Court had already decided as much in a significant judgment issued only six days before the Gross Review last year: *Elan-Cane v Secretary of State for the Home Department* [2021] UKSC 56 (15 December 2021).[23] Those relying domestically on the Convention rights in situations like those illustrated by the *Nicklinson* case on assisted dying[24] or the *Northern Ireland Human Rights Commission* case on abortion[25] may find a very real additional obstacle to their domestic pursuit in future to consist in the likelihood that they would fall within the margin of appreciation in Strasbourg.

26. The requirement in clause 4 to give "great weight" to freedom of expression is benign, even if it also heralds a profusion of adjectival activity which follows in the Bill. The use of "great weight" in clause 4 invites us to ponder what difference there might be between the existing requirement in section 12(4) of the Human Rights Act to "have <u>particular regard</u> to the importance" of the right to freedom of expression and the Bill's requirement to "give <u>great weight</u> to the importance of protecting" the right of freedom of speech (clause 4).

27. "Great weight" also re-appears in clause 5, relating to positive obligations. The Bill's premiss is that these have been taken too far, and should go no further[26]. Clause 5 distinguishes between positive obligations recognised by pre-

[23]The judgment reverses an approach to the domestic Convention rights that I with others including Lords Hoffmann and Hope took in in re G [2009] AC 173 and later cases, and which the Gross report, chapter 3, endorsed. According to that approach, it was for domestic courts to determine the domestic significance of the Convention rights within that margin. Elan-Cane now excludes this, independently of the Bill.

[24] Nicklinson v Ministry of Justice [2014] UKSC 38.

[25] In re an application by the Northern Ireland Human Rights Commission for judicial review [2018] UKSC 27.

[26] 1. I am myself on record as having subjected the ECtHR's approach to the expansion of such obligations to critical analysis. But my plea in DSD v Commissioner of Police of the Metropolis [2018] UKSC 11 [141]-[153] was for greater consistency and clearer analysis in the caselaw of the ECtHR, rather than for the law necessarily to come to a stand-still under a Convention the object and purpose of which are recognised as being to cater for evolving societies and newly emerging issues.

commencement and post-commencement interpretations.[27] Clause 5 prohibits the court *post-commencement* from recognising any new positive obligation not covered by a *pre-commencement* interpretation. Further, "in deciding whether to apply a *pre-commencement obligation*", it must give "great weight" to various listed factors, including

- the impact on the or any other public authority's ability to perform its functions,

- the public interest in allowing public authorities to use their own expertise and professional judgment and

- the extent to which it would require the police to protect individuals involved in criminal activity.

"Apply" is an odd word, but it presumably means "adopt as the correct interpretation generally", rather than "apply in the circumstances of the particular case"? The factors prescribed as relevant would, on any view, seem a recipe for arguments, at least if intended to allow anything beyond the general assessment of such matters as any court will undertake before recognising a new or expanded duty.

28. Clause 6 introduces a new adjectival gradation: "the greatest possible weight". Where a person is subject to a custodial order, and breach of a Convention right is alleged, particularly in relation to a decision about release from custody or placement in a particular part of a prison, the "*greatest possible weight*" must be given to the importance of reducing the risk to the public from such persons. What does the "*greatest possible weight*" mean? Probably, no more than a lot of weight. It cannot mean weight outweighing all other factors. And, if the stress is on the word "possible", the weight that a court gives to any factor does not exist on a purely discretionary scale, like the volume control on a radio. Ultimately, even if one factor is by itself particularly weighty, it must always be evaluated in context, by a balancing of all the factors in play. That balancing exercise lies at

[27] A pre-commencement interpretation is, in summary, a superior court or ECtHR decision which (a) recognises a particular positive obligation as implied by the Convention rights and (b) has not been not overruled or resiled from.

the heart of the Convention. As the ECtHR said in *Soering v UK* (1989) 11 EHRR 439, [89]: "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights". Abstract attempts to weight the balance in advance risk inconsistency with this search.

29. More fundamentally, clauses 1(2)(c) and 7 raise, on the larger canvass of Parliament supremacy, the same concern about potential unbalancing of the balancing exercise. Under these clauses, courts, when determining whether a statutory provision is compatible with the Convention rights, "must (a) regard Parliament as having decided, in passing the Act, that [it does] and (b) give the *greatest possible weight* to the principle that, in a Parliamentary democracy, decisions about how such a balance should be struck are properly made by Parliament". Taken literally, Parliament can no doubt be presumed to think that any Act it passes strikes the right balance; and it is certainly Parliament's proper role is to strike such a balance. Moreover, the principle of relative institutional competence is well-recognised, and courts are fully prepared to attach "great weight" to Parliament's judgment in appropriate circumstances. There are indeed circumstances in which they will, to all intents and purposes, simply defer to Parliament. The House of Lords, in a judgment approved by the ECtHR, did precisely this in 2013 in the *Animal Defenders* case, in relation to a ban on political advertising on television and in circumstances where (to quote Lord Bingham) "it was reasonable to expect that democratically-elected politicians would be "peculiarly sensitive" to the measures necessary to safeguard the integrity of democracy".[28] Or take a more recent case, *R (SC, CB and others) v*

[28] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKSC 15, and *Animal Defenders International v UK* (app. no 48876/08). Giving the main judgment upholding the ban on political advertising on the television, Lord Bingham said: "While the JCHR had requested a compromise solution, the Government had judged that no fair and workable compromise solution could be found which would address the problem, "a judgment which Parliament accepted. I see no reason to challenge that judgment". Parliament's judgment was to be given "great weight" for three reasons. In the first place, it was reasonable to expect that democratically-elected politicians would be "peculiarly sensitive" to the measures necessary to safeguard the integrity of democracy. Secondly, while Parliament considered that the prohibition might "possibly although improbably" infringe Article 10, Parliament had resolved to proceed because of the importance it attached to the prohibition and its judgment which should not be "lightly overridden". Thirdly, legislation could not be framed to address particular cases but had to lay down general rules and Parliament would decide where the line would be. While that inevitably meant that hard cases would fall on the wrong side of the line, "that should not be held to invalidate the rule if, judged in the round, it is beneficial.""

Secretary of State for Work and Pensions [2021] UKSC 26, where a balance had to be struck between the interests of children and their parents in receiving state support and the community's interest in placing responsibility for the care of children upon their parents. Lord Reed said:

> "208. The assessment of proportionality, therefore, ultimately resolves itself into the question as to whether Parliament made the right judgment. That was at the time, and remains, a question of intense political controversy. It cannot be answered by any process of legal reasoning. There are no legal standards by which a court can decide where the balance should be struck between the interests of children and their parents in receiving support from the state, on the one hand, and the interests of the community as a whole in placing responsibility for the care of children upon their parents, on the other. The answer to such a question can only be determined, in a Parliamentary democracy, through a political process which can take account of the values and views of all sections of society. Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies."

What more or new is the Bill, particularly by the words "*give the greatest possible weight"*, intended to achieve? It seems in effect to be that all primary legislation is, by its nature and whatever the circumstances (even if they concern matters like liberty, equality of treatment or fair process, where courts have real institutional competence), are henceforth to be regarded as Parliament's pitch; keep off.

30. At the Policy Exchange event on 2 August 2022, our last Secretary of State for Justice seems to have expressed the underlying thinking: "If Parliament has expressed a view through legislation, courts should <u>always</u> respect that view when implementing the law that has been passed"; "the rule of law is what recognises the sovereignty of Parliament. …. Our democracy is founded on the sovereignty of Parliament. Without that, our democracy suffers". Such statements raises concerns. First, what evidence is there that courts have been ignoring or disrespecting Parliament's sovereignty, either at all and still less systematically, and in what way? This is not however the forum to repeat the sort of objective

analysis of the operation of the HRA that the Gross Review undertook.[29] The Gross Review and the Joint Committee on Human Rights' Report speak for themselves.

31. Second, taken literally, statements that the rule of law means no more than always giving effect to Parliament sovereignty leave us with only one constitutional pillar. They would lead logically to removal of the right even to declare an Act of Parliament incompatible with the Convention rights. The evident aim behind clauses 1(2)(c) and 7 - to make Parliament the only decisive arbiter of fundamental rights in all circumstances - could also abrogate or seriously weaken the principle in *R v Secretary of State for the Home Department, ex p. Simms* [1999] UKHL33, whereby an Act will not be taken to be intended to infringe a fundamental right, unless it makes this explicit.

32. There is no absolute constitutional rule or principle, even in this country with the long and liberal traditions of which we are proud, that whatever a democratically elected Parliament enacts as law is necessarily compatible with fundamental rights. As I have said earlier in this talk, with reference to Eleanor Roosevelt and Tom Bingham, that would be rule by law, but it is not what the rule of law means. We are not so exceptional as to be exempt from some risk that our legislature, still less of course our subordinate law-makers, may inadvertently infringe rights in the measures passed. That is particularly so with an electoral system which produces both the advantages and the risks which attach to clearcut overall Parliamentary majorities (not necessarily reflecting any overall majority of voters or views) and which attach to substantial executive control over legislative activity – what Lord Hailsham called our "elective dictatorship". In any democracy, the judgment whether legislation complies with fundamental rights must ultimately depend on the fair balance of relevant considerations which is at the heart of the Convention. And, unless we are going to leave that balance purely to Strasbourg, as was the position before the HRA, that judgment can only be made by a

[29] But one may note in passing that two of the decisions which seem to have attracted executive comment ire were actually reinforcing Parliament's role. Of course there are other individual decisions that have attracted executive comment. But can it really be said that there is a general picture of judicial over-reach in the field of human rights?

domestic court. On their face, clauses 1(2)(c) and 7 are difficult to square with this.

33. Two related points relating to Parliament are worth mention here. First, contrary to the Gross review and the Joint Committee report, the Bill omitted any requirement for a Minister introducing a bill to Parliament to certify its compliance with the HRA or its replacement, or state that s/he cannot so certify. (The Minister did, interestingly, give a certificate for the Bill itself.) That omission would seem retrograde. Second, if courts are to assume the Parliamentary care and wisdom postulated by clauses 1(2)(c) and 7, Article 9 of the original Bill of Rights 1688-89 will of course continue to prohibit them from testing, by reference to actual events or debates, the level or force of whatever Parliamentary attention as has actually been given. But Article 9 is not a bar that will necessarily impress or influence the ECtHR.

34. This takes us to the remedies available in respect of an unlawful act in breach of the Convention rights. Under the Convention, any victim must have the right of access to a domestic court in respect of any breach of their ECHR rights: see ECHR Articles 6 and 13 and *Golder v UK* (app no 4451/70 dd 21 Feb 1975). The Bill retains the Convention limitation of recourse to victims. But it requires any victim proposing to claim against a public authority for an alleged unlawful act to obtain permission from the court (clause 15(1)); and it precludes the court from granting such permission unless it considers that the victim has suffered or would suffer a "*significant disadvantage*", with the only let-out being where the court considers it inappropriate to require the victim to establish "significant disadvantage" "for reasons of wholly exceptional public interest" (clause 15(3) and (4)).

35. This new test of permission raises a concern regarding access to justice. It adds an extra stage, and its impact will depend on what courts view as "significant disadvantage". The Government in its response of 13 July 2022 to the Joint Committee said that the new test mirrored that applicable when seeking

permission to claim before the ECtHR in Strasbourg.[30] This is true as far as it goes. However, it ignores the difference between first instance access to justice and review jurisdiction. The ECtHR's test is for review at the international level. The Convention contemplates no such test for a first instance domestic claim. Admissibility criteria commonly differ at first instance and on review.[31] The Ministry's explanation is no justification for this new test.

36. Clause 18 would also preclude the making of any award of damages to victims not suffering "loss or damage", save in cases of liberty and security. Any award would still be limited by reference to any amount that the ECtHR would award. But clause 18 also requires the court to have regard to any conduct of the victim that the court considers significant, whether or not related to the unlawful act – a provision which calls for some thought, when those who most need human rights protection are quite often unpopular minorities, including of course criminals. More significantly, it requires the court in subsection (6) to give "*great weight*" to the importance of minimising the impact of any contemplated award (and any future awards in similar cases) of damages on the ability of the or any other public authority to fulfil its functions. That again could involve complex argument, but, more fundamentally, it is wrong in principle that otherwise appropriate compensation for an established breach of human rights should be restricted by public authority pleas, let along from the public authority responsible, that proper compensation would impact their ability to perform their functions. On this approach, the greater the number of victims, the less each would receive by way of what would otherwise be his or her entitlement.

37. There are two further areas in which the Bill sought to control or influence the balancing exercise at the heart of the Convention: *(1) Deportation and private/family life.* Clause 8 addresses the frequent and long-resented reliance on the right to private and family life to resist deportation of a foreign criminal

[30] The response read: "Following further policy development and analysis, we have modelled the permission stage on the Strasbourg Court's own admissibility criterion, in particular by adopting the concept of 'significant disadvantage' in Article 35 of the Convention, linking the grant of any such permission to the suffering of "a significant disadvantage in relation to the act".

[31] The Supreme Court's general test for permission (that cases coming to it be involve a point of law of general public importance) would, for example, be wholly unsuited as a test for permission to pursue a first instance claim.

("P").[32] Such reliance is only to be possible where the deportation would involve "*manifest* harm to a qualifying member of P's family that is so extreme that the harm would override the other paramount public interest in removing P" and harm is "extreme only if (a) it is *exceptional and overwhelming*, and (b) it is *incapable of being mitigated* to any significant extent or is *otherwise irreversible*". Further, it is only "*in the most compelling circumstances* that (a) the court could consider that removing P …. would cause *extreme* harm to a member of P's family other than a qualifying child, and (b) the *court could not reasonably conclude* that the strong public interest in removing P …. outweighs harm to a member of P's family other than a qualifying child."[33]. Dictionaries are clearly put to good use in the Ministry.

38. *(2) Deportation and fair trial abroad.* Clause 20 addresses a second, governmentally resented form of reliance on the Convention rights, that is by tribunal appeals against deportation orders on the ground that the deportation order "would result in a breach abroad of the right to a fair trial". The clause states that such an appeal must be dismissed unless there would be a breach "so fundamental as to amount to a nullification of the right"; and that, where such an order is made by the Secretary of State following assurances from the relevant foreign state, the tribunal must presume that the Secretary of State's assessment of such assurances is correct and dismiss the appeal unless it "*considers that it*

[32] This is presently addressed by section 117C of the Nationality, Immigration and Asylum Act 2002 in language, measured by comparison with that proposed, reading:
"*Article 8: additional considerations in cases involving foreign criminals*
(1) The deportation of foreign criminals is in the public interest.
(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
(4) Exception 1 applies where—
(a) C has been lawfully resident in the United Kingdom for most of C's life,
(b) C is socially and culturally integrated in the United Kingdom, and
(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."
[33] Emphasis added in these quoted passages.

could not reasonably conclude that the assurances would be sufficient to prevent a breach so fundamental as to amount to a nullification of the right. The requirement of "nullification of a right" can, though extreme, find support in international caselaw[34]. The requirement that the tribunal must consider, not the adequacy of the assurances as such, but whether "it could not reasonably conclude" them sufficient would seem in contrast to reflect a significant change.[35]

39. As clause 5 highlights in the area of positive obligations, the many new prescriptive rules regarding interpretation and application of the Convention rights[36] would require to be applied in any future dispute, even if, indeed because, they may lead to an interpretation differing from that applicable pre-commencement. A period of legal instability would thus lie potentially ahead.

40. The position regarding past judgments arrived at in reliance on section 3 of the HRA is specifically addressed in clause 40 of the Bill. This is another unusual provision, with potential complications. Under it, the Secretary of State is given power "to amend or modify any primary or subordinate legislation so as to preserve or restore (to any extent) the effect of a relevant judgment of a court". "Relevant judgment" here means

> "a judgment that—
>
> (a) decides that one or more provisions of primary or subordinate legislation are to be interpreted or applied in a particular way, and
> (b) appears to the Secretary of State to have been made in reliance on section 3 of HRA 1998 (interpretation of legislation)."

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[34] Various phrases can be found in international caselaw to express the standard of justice to be tolerated as between states. "Flagrant denial of justice" is a phrase found in ECtHR authority, and, as the ECtHR said in *Al Nashiri v. Poland*, no. 28761/11, [563]:

> "….. "flagrant denial of justice" is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article (see *Othman (Abu Qatada) v UK* [App. No. 813/09; (2015) 55 EHRR 1, 189, § 260."

In *Othman* at [60], the ECtHR actually observed that that "It is noteworthy that, in the twenty-two years since the Soering judgment, the Court has never found that an expulsion would be in violation".

[35] See e.g. the approach taken by the ECtHR and domestic courts, as indicated *in RB (Algeria) and OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 10, [106]-[125].

[36] For example those requiring "great" or the "greatest possible" weight to be placed on Parliament's imputed judgment and other factors.

41. The background is that, with the repeal of HRA, pre-commencement interpretations or applications of any legislative provision based on section 3 will no longer be valid. But, where any pre-commencement judgment "appears to the Secretary of State" to have been based on section 3, the Secretary of State is able to preserve or restore it to any extent that s/he decides. There is a two-year sunset period for the Secretary of State to act. What is evidently envisaged is a Ministry of Justice review of all judgments interpreting any legislation, primary and secondary, which have been handed down since the HRA came into force in 2000, followed by a statutory instrument. One hopes that there will be plenty of capacity for so easy a task, alongside that envisaged by the EU Retained Law bill. Clause 40 would be likely to be controversial, at every stage, from enactment to implementation.

42. But why is clause 40 confined to section 3 interpretations? There are other pre-commencement interpretations, which could differ in future as a result of the Bill's prescriptions regarding the correct approach to interpretation. See e.g. the interpretive guidelines in clause 3 or indeed clause 7, since incompatibility inevitably depends on interpretation. These clauses are, presumably, envisaged as having some real effect, and not as mere cosmetics. So what will be the position in future in cases where they have some effect? The Secretary of State is not given any power to address these cases, and far be it from me to suggest any expansion of his Henry VIII law-making capacity.

43. Clause 40 gives rise to further potential incongruity. The Secretary of State is empowered to preserve or restore the effect of a relevant judgment "to any extent" if it "appears" to the Secretary of State to be based on section 3. Suppose it appears to the Secretary of State that a judgment was made in reliance on section 3, and the Secretary of State preserves or restores it to a qualified extent, by amendment or modification to the relevant legislation. Suppose however that the Secretary of State is wrong and the judgment was not on analysis based on section 3, but was reached independently of that section, e.g. by applying ordinary common law presumptions regarding statutory intention. What would a court do in a subsequent case? On the face of clause 40, the Secretary of State's modification would be valid, because it did "appear" to him or her that the

prior judgment was made in reliance on section 3. The Secretary of State would however have changed the law, as a result of an incorrect understanding or analysis of the prior judgment. Perhaps the Secretary of State's exercise of the clause 40 power might be judicially reviewable, at least if one reads in the word "reasonably" before the word "appears"?

44. Standing back, the Bill would have heralded a substantive shift at two levels. Its intended effect would be (as the Secretary of State also confirmed on 2 October) to require or influence the courts to "diverge more freely" from Strasbourg, and (one may add) from the decisions they would otherwise have reached. At the domestic level, the Bill's provisions would in the area of fundamental rights reframe the established relationship between Parliament, the executive and the courts, introducing a variety of constraints, some of which give rise to a clear risk that they are incompatible with the Convention. At the international level the Bill would change this country's relationship with the ECHR and with the ECtHR in particular. United Kingdom jurisprudence has over time proved outstandingly influential in Strasbourg, in assisting mutual understanding, in helping shape the development of Convention law and in avoiding situations where the UK is at risk of being found in breach of the Convention.

45. The Bill would in short risk undermining what used to be the accepted – and successful - object of the HRA, to bring rights home. It also ignores the very significant dialogue and changes of approach that can be and have been achieved – by past UK governments through the 2012 Brighton and 2018 Copenhagen processes and Declarations; and by UK courts, by carefully reasoned judgments engaging with Strasbourg jurisprudence as well as by informal exchanges; both factors which have led to the fulfilment of the goal of the HRA - to influence Strasbourg jurisprudence and to eliminate almost entirely the occasions when victims have to go to Strasbourg and when the UK is found there to have violated Convention rights. A prime example of such influence, given in the Gross Review[37] and already mentioned[38], is the ECtHR's change of mind as to the basis of preventive detention in *S, V and A v Denmark* (22 Oct

[37] Chap. 4 para 35.
[38] Paragraph 18 above.

2018)[39] by reference to the UK Supreme Court's reasoning in *R (Hicks) v Commissioner of Police* [2017] UKSC 9.

46. Domestically, the Bill invokes the Parliamentary democracy of which we are proud, and which I believe that our courts also recognise, as witness cases such as *Animal Defenders*, *Nicklinson* and *Elan-Cane*. But, we should remember that our democracy rests on two pillars, Parliamentary sovereignty and the rule of law, of which respect for fundamental rights is a most basic element. In the absence of any written constitution establishing a formal relationship between these two pillars, we rely on tradition, mutual respect and general societal values and attitudes, to ensure their consistent inter-action. The United Kingdom has, in common with all member states of the Council of Europe supported the rule of law by, amongst other ways, subscribing to the ECHR, and it is welcome that there is no intention of going back on this.

47. At the heart of the Convention, is the desirability of the striking of a fair balance by a neutral arbiter in the field of human rights, and this was at the heart of the carefully constructed domestic scheme of the HRA. The danger of some of the provisions in the Bill of Rights Bill was that they were designed to and could bias or distort the proper striking of that balance. Governments can always point to particular judicial decisions that irritate or incommode them. So too can judges. No court, judge, person or institution is perfect. But that is not a reason for abandoning or damaging a generally sound system, still less a hitherto sound institution or relationship.

[39] Apps. Nos. 35553/12, 36678/12 and 36711/12).