The United Kingdom's Human Rights Act as a Catalyst of Constitutional Migration: Patterns and Limitations of Rights Importation by Design

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The United Kingdom Human Rights Act 1998 – constitutional migration – impacts of legislative design and process on the internalisation of international standards – a taxonomy of migratory patterns under the Human Rights Act – constitutional migration as a source of constitutional instability – proposals for a British Bill of Rights.

INTRODUCTION

The UK's Human Rights Act 1998 – through giving international human rights norms effect in municipal law – was a notable piece of constitutional engineering in a system which had previously eschewed granting individuals a catalogue of legally-enforceable rights. Implementation of the Act also precipitated a significant instance of 'constitutional migration',[1] facilitating reliance on rights originating in the European Convention on Human Rights[2] and decisions of the European Court of Human Rights across domestic adjudication relating to statutory interpretation,[3] the activities of public authorities,[4] and (indirectly) in litigation between private parties.[5] Given this undeniable reach – and for the reason that the Convention rights could *not* be routinely relied upon in domestic litigation prior to the Act's implementation[6] – the Human Rights Act was said to hold the potential to 'subject the *entire legal system* to a fundamental process of review and, where necessary, reform'[7] by reference to previously 'external' norms enforceable only against the state. Importation of the 'Convention rights' and the influence of their attendant case-law provided the central pillar of this new architecture. The Act has generated a substantial literature relating to both its constitutional[8] and substantive[9] effects. Despite this – and although the Act manufactured a

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[1] For an introductory sample of a sizeable literature see: S. Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006); V. Perju, 'Constitutional Transplants, Borrowing and Migrations' in M. Rosenfeld and A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012); G. Halmai, 'Constitutional Transplants' in R. Masterman and R. Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press, 2019).

[2] Human Rights Act, s.1 and sched.1.

[3] Human Rights Act, ss.3 and 4.

[4] Human Rights Act, s.6.

[5] Human Rights Act, s.6(3). Though the Human Rights Act does not create new causes of action permitting reliance on the Convention rights in common law litigation between private parties, the duty on the courts as public authorities themselves has led to existent causes of action being interpreted and applied in a manner consistent with the Convention rights (on which see: G. Phillipson and A. Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74(6) MLR 878).

[6] *R* v *Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.

[7] *R* v *Director of Public Prosecutions, ex parte Kebiline* [2000] 2 AC 326, 374-375 (emphasis added).

[8] For instance: A. Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart, 2008); A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009); T. Hickman, *Public Law After the Human Rights Act* (Hart, 2010).

[9] For instance: J. Beatson, S. Grosz, T. Hickman, R. Singh and S. Palmer, *Human Rights: Judicial Protection in the United Kingdom* (Sweet and Maxwell, 2008); M. Amos, *Human Rights Law* (3rd ed) (Hart, 2021).

significant ingress of externally-generated standards into the national legal system – the Human Rights Act has not been the subject of sustained examination as an explicit prompt of constitutional migration.[10]

This piece seeks to address that lacuna through examination of the United Kingdom's Human Rights Act experience as precipitative of the movement of constitutional norms across jurisdictional boundaries.[11] Focusing primarily on the (vertical) importation of European Convention on Human Rights influences into the domestic order, the piece examines the design of the Act, and the process of constitutional exchange it prompts, identifying trends in judicial reasoning which variously emphasise: (i) the extent to which the Convention rights have resulted in the internationalisation of domestic law; (ii) an opposing trend towards emphasising the continuing municipality of UK human rights law; and (iii) a liminal approach which – in keeping with the objectives of the Act's framers and with the subsidiary position of national authorities vis-à-vis the Strasbourg court – envisages the interactions between domestic law and the Convention jurisprudence as a dialectical process. Finally – against the backdrop of repeated efforts to unpick the connection between domestic and international human rights norms in the UK – the piece examines the constitutional migration engineered by the Human Rights Act as a source of ongoing instability in the UK's human rights project.

Examination of the Human Rights Act as a catalyst of constitutional migration serves a number of objectives. First, it provides a counterpoint to accounts of constitutional migrations which exclude the importation by state institutions of authorities from international law on the basis that the latter are 'deemed to be held in common.'[12] Secondly, it will enrich discourse on constitutional migration by elaborating the predominant approaches taken to rights-importation under the Human Rights Act model by UK judges. Thirdly, recognition of the Act as a driver of constitutional migration will, in turn, support the situation of the UK's experience within the broader literature concerning the transnational influences of legal authorities and norms.

An examination of this sort is particularly appropriate at the current juncture. The coming into force of the Human Rights Act was a landmark in the 'Europeanisation' of UK constitutional law.[13] The early years of the twenty-first century have since been punctuated by occasionally fractious, and now fractured, relations between UK and European institutions.[14] Brexit marks a significant point of departure from the integrative patterns which characterised the late twentieth and early twenty-first century experience of international norms in UK constitutional law. And while the UK remains formally committed to ongoing membership of the European Convention system,[15] the Human Rights Act remains subject to political opposition, with the specific linkage it establishes between the European Court of Human

[10] Alternative dimensions of the relationships between national and international norms which surround the Human Rights Act have been examined in detail. For a sample of perspectives see: D. Feldman, 'The Internationalization of Public Law and its Impact on the UK' in J. Jowell and C. O'Cinneide (eds), *The Changing Constitution* (9th ed) (Oxford University Press, 2019); L. Graham, 'The Modern Mirror Principle' [2021] PL 523; H. Tyrrell, *Human Rights in the UK and the Influence of Foreign Jurisprudence* (Hart, 2018).

[11] An experience which – in turn – should be appreciated against a broader backdrop, the longer-term 'ebb and flow' of UK public law (on which see: C. Harlow, 'Import, Export. The Ebb and Flow of English Public Law' [2000] PL 240).

[12] C. Saunders, 'Transplants in Public Law' in M. Elliott, J.N.E. Varuhas, and S. Wilson Stark, *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart, 2018), p.260.

[13] Lord Steyn, *The Constitutionalisation of Public Law* (Constitution Unit, 1999), esp. pp.4, 6, 13-14.

[14] On which see: J.E.K. Murkens, 'The UK's Reluctant Relationship with the EU: Integration, Equivocation, or Disintegration?' in R. Schütze and S. Tierney, *The United Kingdom and the Federal Idea* (Hart, 2018); K.S. Ziegler, E. Wicks and L. Hodson, *The UK and European Human Rights: A Strained Relationship?* (Hart, 2015).

[15] Joint Committee on Human Rights, Oral Evidence from Robert Buckland QC (Lord Chancellor and Secretary of State for Justice), 14 July 2021; Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights*, CP 588 (December 2021), p.3.

Rights (and that Court's jurisprudence) – the nature of which characterises the migrations initiated by the Act – a topic of recurring controversy.[16]

THE HUMAN RIGHTS ACT AS A CATALYST OF CONSTITUTIONAL MIGRATION

Constitution *migration* is one of several metaphors – along with constitutional *transplants* or constitutional *borrowing* – commonly employed to articulate the movements of legal standards between jurisdictions. Amongst these labels the metaphor of constitutional migration is apposite in relation to the Human Rights Act experience; the 'fluidity'[17] of the idea of migration permits its use as an encapsulation of multi-directional 'movements across systems' that might be – among other things – 'overt', 'incremental', 'planned,' 'adopted or adapted' or concerned with institutional competence, constitutional design or attitude.[18] The idea of migration is – in the context of analysis of the changes initiated by the Act – to be preferred to its alternatives. The metaphor of 'transplantation' is excessively rigid and (as we will see below) fails to capture the extent to which the Human Rights Act framework adapts and provides for the domestic deployment of the Convention rights.[19] The notion of 'borrowing', meanwhile, is suggestive of both a relatively linear process and of a constitutional movement subject to temporal limitation.[20] Neither alternative effectively captures the interdependency which characterises the relations between the European Court of Human Rights and its member states.[21]

It is also apparent that the design of the Human Rights Act reflected motivations for constitutional migrations that are evident elsewhere. Perju has summarised three core stumuli for such constitutional movements, labelling them functionalist, reputational, and normative (or universalist).[22] Each is visible in the design experience of the Act. First, enactment of the Human Rights Act was a functionalist, or essentially pragmatic, step; the UK had been a state party to the European Convention on Human Rights since 1951 – permitting individual petition to the European Court of Human Right since 1966 – and was already bound as a matter of international law to uphold its terms. The UK's adherence to the Convention's requirements, the then Government argued therefore, demonstrated that the Convention rights represent 'tried and tested' standards, with which the 'the people of this country are plainly comfortable.'[23] Secondly, the reputational issue to be addressed via the enactment of the Human Rights Act can be found in the acknowledgement that – contrary to the occasional protestations of the

[16] Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (December 2012); Independent Human Rights Act Review, Terms of Reference, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/953347/human-rights-review-tor.pdf; Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights*, CP 588 (December 2021).

[17] V. Perju, 'Constitutional Transplants, Borrowing and Migrations' in M. Rosenfeld and A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012), p.1307.

[18] N. Walker, 'The Migration of Constitutional Ideas and the Migration of the Constitutional Idea: The Case of the EU' in S. Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006), p.320-321.

[19] The notion of legal 'transplantation' has been subject to comparable criticism for its failure to fully account for the role of local context in the recipient state (see: S. Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law' in S. Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006), pp.17-19).

[20] K. Scheppele, 'The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency' in S. Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006), pp.347-348.

[21] On which see: R. Masterman, 'Federal Dynamics of the UK/Strasbourg Relationship' in R. Schütze and S. Tierney (eds), *The United Kingdom and the Federal Idea* (Hart, 2018).

[22] V. Perju, 'Constitutional Transplants, Borrowing and Migrations' in M. Rosenfeld and A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012), pp.1317-1319.

[23] *Rights Brought Home: The Human Rights Bill*, Cm.3782 (October 1997), [1.3].

judges[24] – domestic law's inability to respond to the demands of the Convention had contributed to the UK's (then) poor record before the European Court of Human Rights.[25] Finally, the Government acknowledged that the UK's failure to permit litigants to utilise the Convention rights in domestic courts left it a constitutional outlier amongst the member states of the Council of Europe: 'almost all' other member states, the Government suggested, had 'gradually incorporated [the Convention] into their domestic law in one way or another.'[26] In responding to this state of non-conformity with the majority of state parties to the European Convention on Human Rights, the Act's implementation of human rights norms can also be viewed as a migratory act designed to bring about a degree of constitutional convergence.

While the exchanges between national law and the Convention rights lie at the heart of the Human Rights Act, the Act is in fact a component of a broader set of constitutional relationships. At the macro level, the Act can be positioned within late twentieth century cross-jurisdictional patterns of constitutionalisation, more specifically as a key illustration of the spread of 'new Commonwealth' model constitutionalism.[27] As such, the Act is part of the family of rights instruments which reject the supremacy of judicial interpretations of individual rights and aspire to the coexistence of judicial review with the maintenance of a sovereign legislature. The structural approach taken by the Act to reconciling judicially-protected rights with the ongoing supremacy of statute owes much to its predecessor instruments the Canadian Charter of Rights and Freedoms and, in particular, to the New Zealand Bill of Rights Act 1990.[28] Both instruments employ mechanisms designed to uphold the primacy of legislative decision-making; the former via the adoption of a notwithstanding clause,[29] the latter through the direction that legislative interpretations should be consistent with the protected rights.[30] In turn, design features of the Human Rights Act have been further refined and adapted in the statutory Bills of Rights adopted in a number of Australian states,[31] and have been influential on judicial decision-making under the New Zealand Bill of Rights Act 1990.[32]

As a tool of national constitutional law, the Human Rights Act exhibits a legislative policy choice in favour of internalising many of the (previously external) guarantees found in the European Convention on Human Rights, as well as directing that domestic adjudication relating to rights-compliance be guided by reference to the jurisprudence of the European Court of Human Rights.[33] The Act is therefore illustrative of a 'vertical'[34] migration from the

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[24] *Attorney-General* v *Guardian Newspapers (No.2)* [1990] 1 AC 109, 283-284; *Derbyshire* v *Times Newspapers* [1993] AC 534, 551. Cf. *Kaye* v *Robertson* [1991] FSR 62, 71; T. Bingham, 'The European Convention on Human Rights: Time to Incorporate' (1993) 109 LQR 390.

[25] *Rights Brought Home: The Human Rights Bill*, Cm.3782 (October 1997), [1.16]. See also: Lord Irvine of Lairg QC, 'The Impact of the Human Rights Act: Parliament, the Courts and the Executive' [2003] PL 308, 309.

[26] *Rights Brought Home: The Human Rights Bill*, Cm.3782 (October 1997), [1.13]. The other exception – at the time – was Ireland, which implemented the European Convention on Human Rights Act in 2004.

[27] S. Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013). See also: S. Gardbaum, 'How Successful and Distinctive is the Human Rights Act? An Expatriate Comparatist's Assessment' (2011) 74(2) MLR 195; A. Kavanagh, 'A Hard Look at the Last Word' (2015) 35(4) OJLS 825; C. Geiringer, 'A New Commonwealth Constitutionalism?' in R. Masterman and R. Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press, 2019).

[28] See for instance: HL Debs, Vol.583, Cols.533-535 (18 November 1997) (Lord Cooke of Thorndon and Lord Lester of Herne Hill QC); *R* v *A (No.2)* [2002] 1 AC 45, [44] (Lord Steyn).

[29] Canadian Charter of Rights and Freedoms 1982, s.33.

[30] New Zealand Bill of Rights Act 1990, s.6.

[31] See the ACT Human Rights Act 2004: the Victorian Charter of Rights and Responsibilities 2006; the Queensland Human Rights Act 2019.

[32] See *Taylor* v *Attorney-General* [2015] NZHC 1706.

[33] Human Rights Act, s.2(1).

[34] A.-M. Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99, 106-111.

supranational to the national in two core senses: first, it is the product of a design process focused upon the domestication of international human rights ('bringing rights home' in the words of the then UK Government[35]); secondly, its operation in practice is (to potentially varying degrees) contingent on the influence of decisions of the European Court of Human Rights.[36] Both are considered below.

Behind the formal, 'vertical', linkage to the jurisprudence of the Strasbourg Court which is established by the Human Rights Act, less obvious forms of constitutional importation are also potentially visible. The jurisprudence of the European Court is, of course, parasitic upon the legal systems of the Convention's member states; both individual judgments and the direction of the Court's jurisprudence broadly considered respond to developments in states within the Court's jurisdiction.[37] As McCrudden has observed, the reliance placed by the European Court on consensus across the member states in – among other things – establishing whether a purported limitation on rights is necessary in a democratic society means that 'comparative method is … explicitly built into the fabric' of its decision-making.[38] In considering – or 'taking into account' – decisions of the European Court of Human Rights, UK courts are themselves facilitators of a more complex (potentially pan-European) form of constitutional migration. This form of migration may be either be direct – involving UK courts reasoning by reference to decisions of other national courts in adjudication concerning the Convention rights[39] – or indirect – using the comparative and/or consensus analysis carried out by the European Court of Human Rights as a proxy for engagement with the rights jurisprudence of other member states.[40] Either way, UK courts might play a role in facilitating the movement of constitutional reasoning from one state party into the jurisprudence of another (potentially via adjudication at the European Court of Human Rights).

The further consequence of domestic courts' obligation to 'take into account' decisions of the European Court of Human Rights in domestic litigation is an increased propensity for the Strasbourg Court to, in turn, rely on and engage with decisions of the UK courts in its own decision-making. Again, this form of constitutional exchange was anticipated by the architects of the Act: 'British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.'[41] This upward flow of constitutional influence from domestic human rights decisions back to the Strasbourg court – while often expressed as a 'dialogue' between national and supranational institutions[42] – falls within the dynamic exchanges contemplated by the migration metaphor. Indeed, such exchanges are essential to the Convention system, given the European Court's view that the

[35] *Rights Brought Home: The Human Rights Bill*, Cm.3782 (October 1997).

[36] Human Rights Act, s.2(1): 'A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any [judgments of the European Court of Human Rights or decisions of the Strasbourg organs] whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.'

[37] On which see: K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press, 2015).

[38] C. McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Human Rights' (2000) 20 OJLS 499, 522. See also: A.-M. Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99, 120-121.

[39] For instance in relation to domestic application of the proportionality test, where the jurisprudence of the *Bundesverfassungsgericht* has proven influential (see: *R (Keyu)* v *Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355, [134] and *Pham* v *Secretary of State for the Home Department* [2015] UKSC 19, [96]).

[40] H. Tyrrell, *Human Rights in the UK and the Influence of Foreign Jurisprudence* (Hart, 2018), ch.7, esp pp.141-148.

[41] *Rights Brought Home: The Human Rights Bill*, Cm.3782 (October 1997), [1.14].

[42] M. Amos, 'The Dialogue between United Kingdom courts and the European Court of Human Rights' [2012] 61 ICLQ 557.

'… the machinery of protection established by the Convention is subsidiary to the national systems regarding human rights.'[43] Though the focus of this piece is on the direct – or 'vertical' – influence of the Convention rights in domestic law, the Human Rights Act provides on closer inspection an example of what Slaughter categorises as 'mixed vertical-horizontal communication'[44] though which constitutional norms are both disseminated and distilled via a feedback loop established between international and national institutions.

INTERNALISING THE EXTERNAL

Design

It might be tempting to categorise the design and implementation of UK's Human Rights Act as an instance of constitutional *transplantation*, given that the domestic application of the pre-existing European Convention standards was the primary objective of the implementation exercise. The term 'transplantation', however, suggests both a wholesale adoption of the Convention into domestic law, and a displacement of those municipal protections for human rights which pre-dated the Human Rights Act. Neither suggestion is accurate (though, as we will see, both feed into political debates surrounding the future of the Act).

As to the first, the UK's dualist system required that the Convention rights be translated into domestic law by statute to be enforceable in domestic litigation. The Human Rights Act uses the Convention rights as the structural underpinnings of a framework which provides for statutory compliance with those rights, public authorities' obligations in relation to those rights, remedies for breaches of the protected rights, and so on. The Convention rights do not have *direct* effect in domestic law – their purchase in the domestic sphere is contingent on the operation of the Act's core provisions (ss.3, 4 and 6) – and nor do they apply in the manner of binding precedents.[45] The Act also gives only partial effect to the European Convention on Human Rights in domestic law: neither the preamble to the Convention nor Article 13 are given domestic effect. Both omissions provide evidence of 'constitutional nonborrowing'[46] – the deliberate choice not to adopt or adjust a particular external constitutional authority or provision. This adaptation, particularly in relation to the failure to give domestic effect to the right to an effective remedy, was required in order to preserve the legislature's (sovereign) right of inaction in the face of a declaration of incompatibility.[47] In addition to these modifying measures, the place of the Human Rights Act on the 'New Commonwealth' continuum further illustrates that it is misleading to simply view the Act as serving to import European constitutional influences into the UK's domestic system. As Lord Hoffmann therefore recognised in *McKerr*, to say that the Act straightforwardly 'incorporated' the Convention into domestic law fails to recognise more complex constitutional dynamics.[48]

Secondly, nor did the Human Rights Act displace pre-existing protections for human rights in domestic law. Indeed, the Act specifically provides that a litigant's reliance on the Convention rights will not limit access to any other legal right they may enjoy in domestic

[43] *Handyside* v *United Kingdom* (1979-1980) 1 EHRR 737, [48]. See also: Article 1 of Protocol 15 to the European Convention on Human Rights.
[44] A.-M. Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99, 111-112.
[45] Human Rights Act, s.2(1).
[46] On which see: L. Epstein and J. Knight, 'Constitutional Borrowing and Nonborrowing' (2003) 1(2) *International Journal of Constitutional Law* 196.
[47] HC Debs, Vol.317, Cols.1366-1368, 21 October 1998; HL Debs, Vol.583, Cols.567-481, 18 November 1997.
[48] *In Re McKerr* [2004] UKHL 12; [2004] 1 WLR 807, [65]. See also *R* v *Lyons* [2002] UKHL 44; [2003] 1 AC 976, [27].

law.[49] Instead, the Act operates as a constitutional overlay, subjecting domestic law – for the most part[50] – to the meta-condition of Convention-compliance. The statute book was made subject to the Act's interpretative clauses, allowing judges – in cases of incompatibility with the Convention rights – to achieve compliance through interpretation[51] or to issue a declaration of incompatibility[52] resulting in remedial responsibility for the alleged inconsistency reverting to the elected branches.[53] Pre-existing protections for rights existent at common law also survived enactment of the Human Rights Act; common law causes of action are rendered susceptible to judicial development in the light of the requirements of the Act, and common law rights have latterly served as influential foils to the more substantial and wide-ranging protections afforded by the Convention rights.[54] As the UK Supreme Court has recognised, the common law did not ossify as a source of rights protection on the enactment of the Human Rights Act.[55]

Process

In practice, the framework established by the Human Rights Act facilitates an ongoing process of migration via the stipulation – in s.2(1) of the Act – that domestic courts 'take into account' Strasbourg jurisprudence in adjudication in which the Convention rights are engaged.[56] From the point at which the Act became operable, domestic courts were able to draw upon the corpus of Strasbourg case law – 'whenever made or given' – in domestic adjudication concerning the Convention rights. That considerable discretion was afforded to domestic courts to consider, or be to some extent influenced by,[57] Strasbourg decisions is illustrated by the fact that the Act stipulates only that the Convention case-law be 'relevant' to the domestic dispute.

The open text of s.2(1) implicitly acknowledges that while some Strasbourg jurisprudence may be relevant to the resolution of the domestic dispute it may require modification by domestic judges or may not be strictly applicable for reasons of – inter alia – institutional competence. It suffices at this point to note that the task for UK courts in integrating the Convention rights into domestic law was not likely to be a mechanical exercise. For both methodological reasons – including that the Strasbourg court's decision-making is not governed by a principle of *stare decisis*[58] – as well as on substantive grounds – including that certain principles employed by the Strasbourg court result from its pan-jurisdictional

[49] Human Rights Act, s.11.
[50] The Act retains – or at least envisages – the ability of Parliament to legislate in apparent contravention of the Convention's requirements (s.19) and places neither Parliament nor government under any legal obligation to remedy a judicially-identified incompatibility between statute and the Convention rights (s.4(6)).
[51] Human Rights Act, s.3(1).
[52] Human Rights Act, s.4(2).
[53] Human Rights Act, s.10 (and see also Human Rights Act, s.4(6)).
[54] On which see generally: M. Elliott and K. Hughes (eds), *Common Law Constitutional Rights* (Hart, 2020).
[55] *Kennedy* v *Information Commissioner* [2014] UKSC 20; [2015] AC 455, esp [133]; *R (on the application of Osborn)* v *Parole Board* [2013] UKSC 61; [2014] AC 1115, [54]-[63].
[56] For commentary on s.2(1) see: R. Masterman, 'Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the Convention rights in domestic law' in H. Fenwick, G. Phillipson and R. Masterman (eds) *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007); J. Lewis, 'The European Ceiling on Rights' [2007] PL 720; R. Masterman, 'Deconstructing the Mirror Principle' in R. Masterman and I. Leigh (eds), *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford University Press, 2013); L. Graham, 'The Modern Mirror Principle' [2021] PL 523.
[57] On which see generally: Lord Irvine of Lairg, 'A British Interpretation of Convention Rights' [2012] PL 237.
[58] On which see: R. Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a "Municipal Law of Human Rights" under the Human Rights Act' (2005) 54 ICLQ 907, 915-917.

institutional position[59] – preserving a sphere of domestic judicial discretion was an essential pragmatic step. As Colin Warbrick has written, in the process of utilising the Convention jurisprudence at the domestic level, '[t]he Strasbourg case-law itself needs interpretation.'[60]

The Human Rights Act provides legislative licence to a potentially variable – or fluid – form of constitutional migration, with judicial responses to the s.2(1) obligation conditioning the extent to which the importation of Strasbourg case law directs, influences or is merely considered in the process of articulating the Convention right's requirements at the domestic level. Judicial interpretations of the requirements of s.2(1) have – over time – shaped the extent to which the Strasbourg case-law penetrates and influences the domestic sphere.

A Taxonomy of Migratory Patterns under the Human Rights Act

While the application of the Human Rights Act has impacted across a wide range of fields, the importation process has not followed a linear pattern. Three distinct modes of migration are observable: a trend of strong adherence to the Strasbourg case-law, resulting in an internationalisation of domestic law; a counter-trend, emphasising either the status of the Act as a domestic instrument or the rights-protecting capacity of municipal law; and a liminal approach which promotes a dialectical relationship between domestic laws and Convention norms. While the first two trends, respectively, maximise and minimise the capacity of the Human Rights Act to act as a driver of constitutional migration, the third approach represents a mode of migration better equipped to deliver Convention-consistent protections without sacrificing the integrity and distinctive character of the national legal system.

Internationalisation

The internationalisation of the UK's emerging human rights protections driven by, and articulated in close accordance with the jurisprudence of, the Strasbourg Court was suggested by the early Human Rights Act case-law. This internationalisation saw the Human Rights Act's protections closely track those afforded by the Strasbourg court in terms of their substantive content and remedial scope. As to the former, Lord Bingham in *Ullah* found that domestic courts were under a duty to 'keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'[61] As to the remedial scope of the Act, Lord Nicholls in *Quark* said the following:

> The [Human Rights] Act was intended to provide a domestic remedy where a remedy would have been available in Strasbourg. Conversely, the Act was not intended to provide a domestic remedy where a remedy would not have been available in Strasbourg.[62]

Both stipulations view the purpose of the Human Rights Act as giving 'effect in domestic law to an international instrument … which could only be authoritatively interpreted by the

[59] D. Feldman, 'The Internationalization of Public Law and its Impact on the UK' in J. Jowell and C. O'Cinneide (eds), *The Changing Constitution* (9th ed) (OUP, 2019), p.142: '[T]he notion of the "margin of appreciation"', for instance 'cannot be transferred to municipal law' for this reason (a point acknowledged in *R* v *Director of Public Prosecutions, ex parte Kebeline* [2000] 2 AC 326, 380).

[60] C. Warbrick, 'The European Convention on Human Rights and the Human Rights Act: The view from the outside' in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007), pp.36-37.

[61] *R (Ullah)* v *Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, [20].

[62] *R* v *Secretary of State for Foreign and Commonwealth Affairs, ex parte Quark Fishing* [2005] UKHL 57, [34].

Strasbourg court.'[63] The resulting practical reflection of the Strasbourg jurisprudence in domestic law was underpinned by a normative view that there *should* be a clear 'correspondence' between the rights available domestically via the Act, and those as articulated in the jurisprudence of the Strasbourg court.[64]

The 'internationalist'[65] vision of the Human Rights Act represents an understandable strategy in the light of the transformative potential of the Act; an explicit objective of the Act was, after all, to give 'further effect' to European Convention rights in domestic law. Given the functionalist objectives behind the enactment of the Act, close adherence to the Convention case-law also acted as a counter to accusations of excessive judicial activism or unwarranted creativity on the part of domestic judges as the Act bedded down. The relative stability provided by 'mirroring'[66] the requirements of the Convention rights in domestic law, provided predictability during the period following implementation.[67]

Given that judicial consideration of external authorities is not only mandated by, but an essential component of the Human Rights Act architecture, the archetypal concern regarding constitutional migrations – that they 'facilitate the erosion of sovereignty' by transforming courts into 'agents of outside powers'[68] – remains pertinent. While experiences of constitutional borrowing elsewhere have been used to enhance the legitimacy of local judicial decision-making, the close – almost precedential[69] – adherence to the Strasbourg jurisprudence that typified the Act's early life prompted legitimacy concerns of a different order.

This internationalist reading of the courts' obligations under the Act tended towards emphasising the essentially determinative status of the Strasbourg case law in domestic Human Rights Act disputes and – in turn – the position of the Strasbourg court as the ultimate authority responsible for the interpretation of the Convention's requirements.[70] Though s.2(1) provides that domestic courts are not bound to follow the Convention case law, the combined effects of the United Kingdom's international obligations under the Convention and s.6(1) of the Act – which positions courts themselves under an obligation to act compatibly with the Convention rights – resulted a strong judicial presumption that clear and consistent lines of Strasbourg authority should be followed. Such an approach was entirely consistent with the functionalist objectives of the Human Right Act, and indeed remains a governing principle of the UK Supreme Court's approach to construction of the Convention rights.[71]

The structure of the Human Rights Act suggested that constitutional transplantation was an overly simplistic encapsulation of its intended effects, yet the dominant approach of appellate courts during the Act's lifespan has confirmed a clear tendency towards the adoption of applicable Strasbourg jurisprudence via the vehicle of the Act.[72] Rather than seeing the

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[63] *R (AB)* v *Secretary of State for Justice* [2021] UKSC 28, [54].
[64] *R (AB)* v *Secretary of State for Justice* [2021] UKSC 28, [55].
[65] B. Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press, 2013), p.56.
[66] This particular metaphor is from J. Lewis, 'The European Ceiling on Rights' [2007] PL 720.
[67] *R (SB)* v *Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100, [29].
[68] S. Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law' in S. Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006), p.7-8.
[69] R. Masterman, 'Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg?' [2004] PL 725.
[70] *R (Animal Defenders International)* v *Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [37] and [53].
[71] *R (AB)* v *Secretary of State for Justice* [2021] UKSC 28, [54]-[60].
[72] *R (Elan-Cane)* v *Secretary of State for the Home Department* [2021] UKSC 56, [87]: 'The Act therefore defines the Convention rights to which it gives effect in domestic law as the rights which are enforceable against the United Kingdom under international law. It follows that the rights given effect in domestic law have the same content as those which are given effect under international law, although they are enforceable before domestic courts rather than the European court, and against public authorities rather than the United Kingdom as a state.

Convention rights 'woven into' domestic law as the Act's parent administration had hoped,[73] this approach gave rise to suggestions that the Convention rights were alien impositions[74] and – unfortunately – chimed with caricatures of expansionist, imperialising decision-making by the European Court of Human Rights.[75] It is undeniable that the approach has also contributed to the political instability of the Human Rights Act, and what the current UK Government regards as 'an over-reliance on Strasbourg case law.'[76]

Municipality

At the opposing end of the spectrum, a number of approaches have sought to emphasise the national character and properties of the Human Rights Act and its attendant rights, and to correspondingly curtail the inward migration of constitutional influences from the European Court of Human Rights. Both involve domestic courts approaching their rights protecting functions as a distinctly *domestic* enterprise. The first of these approaches invokes a dualist conceptualisation of the Human Rights Act as a conspicuously national instrument. Following the implementation of the Act, Lord Hoffmann – in *McKerr* – described the Act as a direction to courts to apply a distinctly national scheme of rights protection:

> What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention … their meaning and application is a matter for domestic courts, not the court in Strasbourg.[77]

This approach – expanded upon extra-judicially as a theory of human rights that are 'universal in abstraction but national in application'[78] – maintains a clear division between the national and the international dimensions of the United Kingdom's rights regime; although the Human Rights Act adopts rights terminology which owes its heritage to the European Convention on Human Rights – and may be inspired in practice by the Convention case-law – the provisions of the Act have translated those rights into principles of domestic law, to be enforced by domestic courts. Hoffmann's perspective on the Human Rights Act minimises its external dimension; rights adjudicated upon in the domestic context are the products of legislative direction, not of an international agreement. While this distinction may appear somewhat artificial – perhaps especially so in the context of an implementing measure which was explicitly contingent on an integral linkage between the domestic and international human rights regimes – it sought to preserve those dualist elements of the constitution that the Human Rights Act threatened to dissolve, and in doing so emphasised that the role of the domestic courts was to enforce the Act itself, rather than to position themselves as domestic proxies for the Strasbourg Court.[79]

A similar distinction was drawn by Lord Rodger in *Animal Defenders International*. In that decision, Lord Rodger noted that the Human Rights Act – implicitly at least – contemplates

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Since the rights have the same content at the domestic level as at the international level, it follows that the relevant articles of the Convention should in principle receive the same interpretation in both contexts.'

[73] *Rights Brought Home: The Human Rights Bill*, Cm.3782 (October 1997), [1.14].

[74] Commission on a UK Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (December 2012) [24]–[40].

[75] See, eg M. Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK* (Policy Exchange, 2011).

[76] Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights*, CP 588 (December 2021), [190].

[77] *In re McKerr* [2004] UKHL 12, [65].

[78] Lord Hoffmann, 'The Universality of Human Rights' (2009) 125 LQR 416, 422.

[79] *R* v *Secretary of State for Foreign and Commonwealth Affairs, ex parte Quark Fishing* [2005] UKHL 57, [2006] 1 AC 529, [34].

the possibility of divergence between the views of domestic courts and European Court of Human Rights as to the requirements of the Convention rights. This is the case, Rodger continued, because the Convention rights have a dual status. As a result of the Act, the Convention rights are 'part of domestic law'; their meaning and application in this context falls – subject to legislative override or reversal – to the UK apex court. By contrast, '[i]n so far as the articles are part of international law they are binding on the United Kingdom as a signatory of the Convention and the European Court is, for the purposes of international law, the final arbiter of their meaning and effect.'[80] It should be noted that, even if such dual status claims are accepted, the UK Supreme Court has recently cautioned against domestic courts adopting interpretations of the Convention rights which do not find support in the jurisprudence of the European Court of Human Rights.[81]

The second municipalising approach involves affording a structural prioritisation to the common law (or broader domestic rights framework) in Human Rights Act decision-making. As we have already seen, implementation of the Act did not formally override pre-existing protections for rights in domestic law. Nonetheless, following implementation the Convention rights assumed the position as the primary tools via which individual freedoms might be protected. In the face of the 'catalogue of enforceable rights, (semi-)structured tests of necessity and proportionality, and remedial provisions provided by the Convention rights'[82] the comparative imprecision and remedial weakness of the common law saw it – post-implementation of the Human Rights Act – practically side-lined.[83]

As political opposition to the internationalising tendencies of the Human Rights Act grew, the UK Supreme Court lamented that enforcement of the Act had led to a 'baleful and unnecessary' tendency – on the part of advocates and judges alike – to overlook the rights-protecting capacity of municipal law.[84] In a series of cases, the Supreme Court reasserted the place of common law rights as amongst the means by which individual rights might be vindicated in the UK system. A partial linkage with broader patterns of constitutional migration may be evident here. As McCrudden has noted '[t]he purpose of using foreign decisions is in order to fill a vacuum left by the absence of (preferred) indigenous jurisprudence. In this context, the assumption is that when national jurisprudence is sufficiently plentiful and sophisticated, the use of foreign law will decline significantly.'[85] An 'over-reliance' on the Strasbourg case law might be counteracted by a normative preference for reliance on indigenous common law authorities. In treating the common law's protections for human rights as being sequentially preferable to the Convention rights,[86] the trend towards deployment of the common law in rights adjudication is potentially inhibiting of the Convention's ability to permeate the domestic constitutional order. However, the common law's range of protected rights is – at least in comparison to the catalogue of rights contained within the Convention and its protocols – somewhat limited, and lacks the legislative underpinning enjoyed by the Human Rights Act.[87] Moreover, the common law's rights jurisprudence functions primarily as a tool of statutory interpretation, which cannot resist incursions into the rights it recognises when

[80] *R (Animal Defenders International)* v *Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [44].
[81] *R (Elan-Cane)* v *Secretary of State for the Home Department* [2021] UKSC 56.
[82] R. Masterman and S. Wheatle, 'A Common Law Resurgence in Rights Protection?' [2015] EHRLR 57, 59.
[83] Lord Neuberger, 'The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK Experience' (August 8, 2014), [29].
[84] *Kennedy* v *Information Commissioner* [2014] UKSC 20, [133]
[85] C. McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Human Rights' (2000) 20 OJLS 499, 523.
[86] R. Masterman and S. Wheatle, 'A Common Law Resurgence in Rights Protection?' [2015] EHRLR 57, 59.
[87] For a recent illustration see: *R (O (A Minor))* v *Secretary of State for the Home Department* [2022] UKSC 3.

those incursions are explicitly mandated by legislation.[88] As a result of this, the Supreme Court has recognised that – 'although the Convention and our domestic law give expression to common values' – the common law may not be the substantive equivalent of the Convention rights, and that where domestic law is incapable of providing a remedy 'effect must be given to the Convention rights in accordance with the Human Rights Act 1998.'[89] This statement makes clear that – consistently with the traditional tendencies of dualism – the common law and Human Rights Act may be complementary, but they are also remain distinct. Adopting an approach to rights adjudication which explicitly prioritises domestic sources – to the potential exclusion of potentially applicable Strasbourg authorities – limits the potential for the Convention to infiltrate the internal constitutional order.

Critical Assimilation

Lying between the internationalisation and municipality approaches introduced above, some judges – Laws LJ initially chief among them – saw the enactment of the Human Rights Act as a confirmation of the common law's burgeoning jurisprudence of constitutional rights,[90] and sought to explain the advent of the Act as an endorsement of a trend already evident in common law reasoning. On this view, the relationship between the common law and the Convention rights was to be substantively complementary, with the emergence of a 'municipal law of human rights' a product of the incremental blending of the two sources of rights jurisprudence.[91] This approach sought to portray the Convention case law and pre-existing common law rights jurisprudence as a part of a coherent whole and, as such, encouraged domestic courts:

> …not simply to add on the Strasbourg learning to the corpus of English law, as if it were a compulsory adjunct taken from an alien source, but to develop a municipal law of human rights, by the incremental method of the common law, case by case, taking account of the Strasbourg jurisprudence as [Human Rights Act] s.2 enjoins us to do.[92]

This vision of the courts' function under the Human Rights Act preserved the institutional autonomy of the domestic court in relation to human rights claims, denying that adjudication under the Act required the courts to play the role of 'Strasbourg surrogate.'[93] It simultaneously preserved the decisional autonomy of the domestic courts in the local application of the Convention rights, recognising that 'treating the [Convention] text as a template for our own

[88] *R* v *Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131: 'Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.'

[89] *A* v *British Broadcasting Corporation* [2014] UKSC 25, [57].

[90] *International Transport Roth GmbH* v *Secretary of State for the Home Department* [2003] QB 728, [71].

[91] *Runa Begum* v *Tower Hamlets London Borough Council* [2002] 2 All ER 668, [17]. See also *R (ProLife Alliance)* v *British Broadcasting Corporation* [2002] 2 All ER 756, [33]–[34].

[92] *Runa Begum* v *Tower Hamlets London Borough Council* [2002] 2 All ER 668, [17].

[93] *R (ProLife Alliance)* v *British Broadcasting Corporation* [2002] 2 All ER 756, [33]-[34].

law runs the risk of an over-rigid approach'.[94] As such, this liminal approach provided greater scope for principled departures from the Strasbourg case law while paving the way for the emergence of a dialectical relationship between domestic courts and the European Court of Human Rights.

The extent to which the external requirements of the Convention rights might infiltrate the UK constitution might – as a result of this approach – be militated by a number of potential factors designed to uphold the integrity of the national legal order. The Strasbourg jurisprudence may then not be determinative of a domestic dispute if – for instance – it were to compel an outcome which would be 'fundamentally at odds' with the United Kingdom's separation of powers,[95] if it is 'inconsistent with some fundamental substantive or procedural aspect of our law'[96] or if the court opts to defer on democratic grounds to the legislature's considered view as to the appropriate balance to be struck between individual rights and societal interests.[97] The internal impact of the Convention case-law is also contingent on the domestic court's assessment of the relevance and qualities of the Strasbourg Court's decision-making. The age of a Strasbourg authority may affect its potential domestic influence.[98] So too may the absence of a 'clear and consistent' position on the part of the Strasbourg Court. Increasingly, perceived deficiencies in the reasoning of the Strasbourg Court may also reduce the applicability of the relevant case law; UK Supreme Court authorities highlight that incoherence or confusion[99] and a lack of justificatory reasoning[100] will also diminish the likelihood of straightforward application of Strasbourg decisions in the domestic context. What is clear is that the s.2(1) duty is 'context specific'[101] and that the applicability of the Strasbourg case-law is displaceable presumption rather than overriding imperative.

An approach to the domestic application of the Convention rights which straddles internationalism and municipality has therefore emerged – at least since 2009[102] – as the constitutionally preferable approach to the Human Rights Act's migratory mandate. This approach ought to be differentiated from the approaches outlined above. Critical engagement with questions of domestic integration and with the qualities of the Strasbourg case law operates as a process of filtering which serves to reduce the potential for unquestioning adoption of the jurisprudential requirements of the Strasbourg authorities. The liminal approach differs from the municipality approach in that it does not necessarily view the rights protected via the Act and those emanating from the Convention as being conceptually distinct. As a result, rights protection under the Human Rights Act is in practice best understood as an amalgam of the domestic and international, of the Convention rights and of municipal law. On this approach, the constitutional migration precipitated by the Human Rights Act is fluid, being contingent – among other things – on the context of the domestic dispute and on the court's assessment of the applicability of the available Strasbourg case-law.

Even in the light of this however, the difficulty faced under the Human Rights Act regime is that the extent to which domestic rights can shift away from their Strasbourg counterparts is somewhat limited. Domestic courts may, for instance, enjoy limited room for (variable and context-specific[103]) manoeuvre in those circumstances in which national

[94] *R (ProLife Alliance)* v *British Broadcasting Corporation* [2002] 2 All ER 756, [33]-[34].
[95] *R* v *Secretary of State for the Environment, Transport and the Regions, ex parte Alconbury* [2001] UKHL 23, [76]
[96] *Manchester City Council* v *Pinnock* [2010] UKSC 45, [48]
[97] *R (Animal Defenders International)* v *Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [33]
[98] *R (Quila)* v *Secretary of State for the Home Department* [2011] UKSC 45, [43].
[99] *R (Hallam)* v *Secretary of State for Justice* [2019] UKSC 2, [85] and [90].
[100] *Commissioner of Police for the Metropolis* v *DSD* [2018] UKSC 11,
[101] *R (Haney, Kaiyam and Massey)* v *Secretary of State for Justice* [2014] UKSC 66, [21].
[102] *R* v *Horncastle* [2009] UKSC 14.
[103] *R (Elan-Cane)* v *Secretary of State for the Home Department* [2021] UKSC 56, [35], [55]-[56], [77].

authorities might enjoy a margin of appreciation.[104] Similarly, if the European Court of Human Right has not confronted the specific issue before the domestic court, the court 'can and should aim to anticipate, where possible, how the European Court might be expected to decide the case, on the basis of the principles established by its case law.'[105] But as a general principle, 'alignment between interpretation [of the Convention rights] at the international and domestic levels'[106] is regarded as being a clear objective.

THE INTERNATIONAL AS A SOURCE OF DOMESTIC CONSTITUTIONAL INSTABILITY

It is perhaps unsurprising that the Human Rights Act provoked (initially at least) such a strongly internationalist response from the courts; it is an explicitly internationalising measure. Among comparable instruments, the Human Rights Act compares favourably with the most strongly internationalist Bills of Rights,[107] explicitly using identified treaty rights – reinforced by mandatory consideration of the Strasbourg jurisprudence – as its substantive sub-structure. It is similarly unsurprising that patterns of internationalisation visible in other constitutions (especially perhaps those in which the influence of international norms has had a significant or transformative effect) have similarly prompted 'pressures to shift from broadly internationalist constitutional practice toward more parochial policy.'[108]

The umbilical linkage between the Human Rights Act and the jurisprudence of the European Court of Human Rights is therefore simultaneously the Act's core strength and its key – potentially fatal – weakness. It is the jurisprudence of the Strasbourg court that provides the Human Rights Act with much of its normative backbone. Yet the centrality of the European Court's jurisprudence to the Human Rights Act scheme also feeds those sovereignty-based critiques of the Act which suggest that decisions of the European Court are permitted excessive influence in the domestic constitutional order. Though the internationalising narrative of the Act's migratory effects is – as we have seen – but one of a range of responses adopted by the domestic judiciary, and something of an oversimplification of judicial practice since the Act's implementation, it retains a dominant position within debates surrounding the future of the Human Rights Act regime.

Though the statutory direction to 'take into account' decisions of the Strasbourg Court in domestic human rights adjudication sanctions the iterative process through which international authority is imported into domestic adjudication and satisfies the formal niceties of the dualism concept, it has not prevented criticism of the extent to which the Human Rights Act scheme permits the external influence of the Strasbourg case-law from unsettling domestic decision-making. The backdrop to this criticism is the alleged 'empire building' and excessive creativity of the European Court of Human Rights.[109] The current domestic regime – it is argued – fails to sufficiently curb these influences; the scheme and textual direction provided by the Act inadequately regulates the extent to which Strasbourg decisions might impact on domestic litigation while domestic courts have allowed themselves to be co-opted as domestic agents of the Strasbourg court.

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[104] *Re G* [2009] UKHL 26, [31-[32].
[105] *R (AB)* v *Secretary of State for Justice* [2021] UKSC 28. [59].
[106] *R (Elan-Cane)* v *Secretary of State for the Home Department* [2021] UKSC 56, [87].
[107] For instance, Constitution of the Republic of South Africa, s.39(1).
[108] T. Ginsburg, S. Chernykh and Z. Elkins, 'Commitment and Diffusion: How and Why National Constitutions Incorporate International Law' (2008) *University of Illinois Law Review* 201, 237.
[109] For a sample of relevant critical literature see: D. Raab, *The Assault on Liberty: What Went Wrong with Rights* (London: Fourth Estate, 2009); M. Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK* (London: Policy Exchange, 2011); Lord Sumption, 'The Limits of Law', 27th Sultan Azlan Shah Lecture (20 November 2013).

The result is that the Convention rights have been 'viewed as a "foreign import" rather than as a step in the evolutionary development of domestic rights protection.'[110] In spite of the absence of direct effect,[111] and efforts on the part of the drafters of the Human Rights Act to insulate parliamentary – therefore national – sovereignty in the design of the Act, the internationalising dimension of the Act has proven to be its core destabilising feature; as Lord Lester commented in 2011, 'the Human Rights Act has an alienating effect, especially among those for whom "Europe" is a dirty word.'[112] There is little sign – even in the UK's post-Brexit landscape – of this concern diminishing

Discussion relating to the reform or replacement of the Human Rights Act has therefore coalesced around the interplay between the domestic and the international in the Human Rights Act model: the Conservative/Liberal Democrat Coalition Government (2010-2015)) appointed a Commission to examine the case for a Bill of Rights designed to uphold and protect '*British* liberties';[113] a 2014 Conservative Party policy paper proposed 'break[ing] the formal link between British courts and the European Court of Human Rights;'[114] and the 2020 Independent Human Rights Act Review was specifically tasked with examining the 'relationship between domestic courts and the Strasbourg court'. Most recently, the UK Government has proposed a Bill of Rights which would 'repeal and replace'[115] the Human Rights Act in order to avoid 'over-reliance on the Strasbourg case law, at the expense of promoting a home-grown jurisprudence tailored to the UK tradition of liberty and rights.'[116]

The Bill of Rights Bill 2022 explicitly seeks to – inter alia – 'rebalance' the relationship between domestic courts and the European Court of Human Rights.[117] While the Bill of Rights Bill proposes to retain the Convention rights as its framework of protected rights,[118] it contains no s.2(1) Human Rights Act equivalent. Instead, the Bill, as introduced, directs that in 'determining a question that has arisen in connection with a Convention right', a court 'must' have regard to the text of that right and 'may' have regard to the Convention's *travaux préparatoires*. The Bill of Rights Bill makes little explicit reference to the Strasbourg case law as a potential source of the domestic variants of the Convention rights (the meaning and effect of which are to be determined, 'for the purposes of domestic law', by the UK Supreme Court[119]). Exceptions are found in cl.1(3)(a) – which states that decisions of the European Court of Human Rights would not be 'part of domestic law' – and cl.3(3)(a) – which directs that domestic courts may not adopt expansive readings of the Convention rights 'unless the court had no reasonable doubt that the European Court of Human Rights would adopt' that same interpretation.[120] A series of additional clauses aim to reduce the bite of the Convention (and its case law) in specific fields by – inter alia – precluding judicial imposition of positive obligations on public bodies[121] limiting the scope for proportionality analysis in respect of

[110] *The Independent Human Rights Act Review*, CP 586 (December 2021), [13].
[111] See: R. Masterman, 'A Tale of Competing Supremacies' UK Const L Blog (30 September 2013).
[112] Commission on a UK Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (December 2012), p.233 (Lord Lester).
[113] HM Government, *The Coalition: Our Programme for Government* (May 2010), p.11 (emphasis added).
[114] *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (2014), p.6.
[115] Bill of Rights Bill 2022, cl.1(1).
[116] Ministry of Justice, *Human Rights Reform: A Modern Bill of Rights* (December 2021), CP 588, [114].
[117] Bill of Rights Bill 2022, cl.1(2).
[118] Bill of Rights Bill 2022, cl.2.
[119] Bill of Rights Bill 2022, cl.1(2)(a) and cl.3(1).
[120] A position already evident in the Human Rights Act case law: *R (Elan Cane)* v *Secretary of State for the Home Department* [2021] UKSC 56.
[121] Bill of Rights Bill 2022, cl.5.

decisions 'properly made by Parliament'[122] and curtailing the ability of Article 8 arguments to influence compatibility decisions relating to legislation concerning deportation.[123]

By contrast with the position under the Human Rights Act, at the general level, judicial consideration of the case law of the European Court of Human Rights under the Bill of Rights Bill – aside from in the circumstances specified by cl.3(3)(a) – is presented as being optional. The objective of the Bill is clear; to engineer a partial divorce from the Strasbourg system in the name of reducing the influence of the Strasbourg case law in domestic rights adjudication.

The prospects for the Bill of Rights Bill remain – at the time of writing – unclear. On the appointment of Liz Truss MP in September 2022, the proposed Bill of Rights was displaced by the policy objectives of the new Prime Minister. Following Truss' resignation in October 2022, the reappointment – by Prime Minister Rishi Sunak MP – of Dominic Raab MP as Lord Chancellor and Secretary of State for Justice suggested that the Bill of Rights might be reinstated into the new Government's legislative timetable. In the light of the longstanding anti-Human Rights Act sentiment in recent Conservative governments, uncertainty surrounding the future of the Bill of Rights Bill should perhaps be better regarded as amounting to a stay of execution for the Human Rights Act rather than its reprieve.

CONCLUSION

David Feldman has captured the risks associated with the internationalization of national laws laws in the following terms: 'first, … a borrowed solution will not be workable in a constitution with the special balance of power and democratic accountability found within the state, and, secondly, that reasoning relying on foreign thinking will not be regarded as a legitimate way of deciding public law cases under the constitution.'[124] The Human Rights Act scheme has been blighted by both difficulties. The extent to which courts have been empowered by the Human Rights Act provides a focal point for ongoing internal debate concerning judicial power[125] and the constitution's institutional 'balance'.[126] At the interface of the internal and external, the Act has also provoked opposition to the extent to which it permits 'foreign' authorities to influence domestic judicial decision-making. The consequence of the international heritage of the Convention rights and the courts' internationalist approach to their application has been a significant convergence between the substance of Convention norms and protections at the UK national level. This is, first, attributable to the design of the Human Right Act which – in the views of Lord Bingham, one of the key drivers of the internationalist approach – leaves 'little scope' for divergence between the Strasbourg Court and UK apex court in relation to the definition and meaning of the Convention rights.[127] It is secondly, a product of the cumulative judicial approach to 'taking into account' the Convention case-law under s.2(1) of the Act which has generated a perception of domestic courts abdicating decision-making responsibility as regards the substance of the domestically-applicable rights and remedial extent of the Act.[128] A narrative of legal subjection to the European Court of

[122] Bill of Rights Bill 2022, cl.7.
[123] Bill of Rights Bill 2022, cl.8.
[124] D. Feldman, 'The Internationalization of Public Law and its Impact on the UK' in J. Jowell and C. O'Cinneide (eds), *The Changing Constitution* (9th ed) (Oxford University Press, 2019), p.150.
[125] For a critical survey see: R. Ekins, *The Dynamics of Judicial Power in the New British Constitution* (London: Policy Exchange, 2017)
[126] The Conservative and Unionist Party General Election Manifesto 2019, p.48.
[127] *R (Animal Defenders International)* v *Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [37].
[128] The clearest suggestion of the 'powerlessness' of domestic courts in the face of a clear and applicable decision of the Grand Chamber of the European Court of Human Rights can be found in the dictum of Lord Rodger in *Secretary of State for the Home Department* v *AF (No.3)* [2009] UKHL 28' [2010] 2 AC 269, [98]: 'Even though

Human Rights – of transplantation and overweening influence – is firmly embedded in UK human rights discourse. This is even though the Human Rights Act facilitates a fluid and multi-directional migration of authorities; it has not operated to the exclusion of the common law (or other foreign[129]) authorities in rights adjudication and has empowered domestic courts to interact with Strasbourg jurisprudence in ways which allow it to be integrated with – rather than supplant – domestic laws. Yet in the UK's post-Brexit constitution, the curtailment of external influences in the domestic order remains an objective which is seen to hold significant political capital. The ongoing project to replace the Human Rights Act with a Bill of Rights seeks to reverse the internationalising trends of the Human Rights Act era and release domestic courts from the apparent strictures currently imposed by the Strasbourg jurisprudence. While the Human Rights Act scheme holds the potential to allow for the critical assimilation of domestic and international norms – to facilitate a context-sensitive rather than overriding migration of constitutional standards – the tenor of recent reform proposals points towards a future parochialisation (and significant dilution) of the UK's legal rights regime and a further post-Brexit step towards insulating the domestic legal order from external influences.

we are dealing with rights under a United Kingdom statute, in reality, we have no choice: Argentoratum locutum, iudicium finitum – Strasbourg has spoken, the case is closed.'

[129] H. Tyrrell, *Human Rights in the UK and the Influence of Foreign Jurisprudence* (Hart, 2018).