

**Response to Commission on a Bill of Rights Discussion Paper:  
*Do we need a UK Bill of Rights?***

## **1 Introduction**

The following is the response of members of the University of Cambridge Centre for Public Law to the consultation paper, *Do we need a UK Bill of Rights?*, issued by the Commission on a Bill of Rights. Our response focuses principally upon the first two questions posed by the Commission, viz:

- Do you think we need a UK Bill of Rights?
- If so, what do you think a UK Bill of Rights should contain?

The structure of this paper does not, however, sharply distinguish between those two questions, since, as will become apparent, our view is that they can only be considered in tandem. In particular, whether the UK needs a ‘Bill of Rights’ depends in part upon whether it is considered desirable for such legislation to say anything that the Human Rights Act 1998 (‘HRA’) does not already say.

In this paper, we address three issues which appear to us to be central to the questions whether a Bill of Rights is necessary and, if so, what it should contain:

- The role of the European Convention on Human Rights (‘ECHR’) and its significance in framing any debate concerning a domestic Bill of Rights
- The relationship between a domestic Bill of Rights and the ECHR
- The role of the European Court of Human Rights (‘ECtHR’) and the relationship between that court’s jurisprudence and decisions on ECHR points by UK courts

## **2 Framing the Bill of Rights debate: the role of the ECHR**

We begin with some straightforward and uncontroversial but nevertheless important points concerning the nature of the ECHR and its role in framing any debate about the adoption of a UK Bill of Rights. As a state party to the ECHR, the UK is bound in international law to ‘secure to everyone within [its] jurisdiction’ the Convention rights,<sup>1</sup> and to abide by the judgments of the ECtHR.<sup>2</sup> It is also important to bear in mind that the UK is bound in international law by other human rights instruments to which it is a state party, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Moreover, whenever

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<sup>1</sup> Article 1, ECHR.

<sup>2</sup> Article 46, ECHR.

the implementation of the law of the European Union is at stake, the UK is bound by EU human rights law, which extends to the rights contained in the ECHR and such rights as 'result from the constitutional traditions common to the Member States'.<sup>3</sup> The UK is also at least to that extent bound by the rights set out in the Charter of Fundamental Rights.<sup>4</sup> It is worth adding that, when applicable to acts of UK authorities (including Parliament), EU law, including EU human rights law, is supreme, meaning that it takes priority over conflicting domestic laws.

Any debate about the need for and content of any domestic Bill of Rights cannot therefore take place in isolation from the broader legal context in which the United Kingdom is fixed with a series of interlocking obligations to respect a wide range of fundamental rights. It follows that while the notion of a 'UK' or 'British' Bill of Rights is likely to be cosmetically attractive to those who are skeptical about 'European' (or 'international') law, there are considerable limits upon the extent to which such a Bill of Rights could be framed in terms much different from those of relevant international instruments. It is also worth pointing out that while individual countries and (legal) cultures inevitably place particular emphasis upon certain rights, the notion that a UK Bill of Rights should be concerned with a peculiarly *British* set of rights sits uncomfortably with the notion of fundamental rights as *universal* values.

While these points may seem obvious, they are worth reiterating in the light of the nature of the political debate that prefigured the establishment of the Commission on a Bill of Rights. In particular, it has been (at the very least) strongly implied that the adoption of a UK Bill of Rights would result in a body of human rights law that constrained state action in a different—'better'—way. Take, for instance, the Prime Minister's reaction to the Supreme Court's decision in *R (F) v Secretary of State for the Home Department*<sup>5</sup> in which a declaration of incompatibility was upheld in respect of s 82 of the Sexual Offences Act 2003. The requirement that certain sex offenders be indefinitely subject to 'notification requirements', with no prospect of reprieve in the event of rehabilitation, was held to be a disproportionate breach of Article 8 ECHR. This judgment, said the Prime Minister, was 'offensive' and flew 'completely in the face of common sense'. He also said that a Bill of Rights commission would be 'established imminently because I think it's about time we started making sure decisions are made in this Parliament rather than in the courts'.

The implication was that a future Bill of Rights might reduce domestic courts' capacity to pronounce upon the compatibility of national law with Convention rights—perhaps by means of manipulating the rights constituting the subject of domestic adjudication or diluting the courts' (already limited) remedial powers. Yet while the ECHR does not prescribe any particular approach that state parties are required to take to the incorporation of the Convention rights into domestic law, it does, as noted above, require states to secure those rights to those within their jurisdiction,<sup>6</sup> as well as requiring that '[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority'.<sup>7</sup> These obligations necessarily constrain the extent to which it would be possible to erode the powers that domestic courts presently possess under the HRA without incurring liability in

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<sup>3</sup> Article 6, Treaty on European Union.

<sup>4</sup> The Government seems now to have accepted that Common Protocol No. 30 to the Treaty on European Union and the Treaty on the Functioning of the European Union does not exempt the UK from complying with these rights: see *R (NS) v Secretary of State for the Home Department* [2010] EWCA Civ 990.

<sup>5</sup> [2010] UKSC 17, [2011] 1 AC 331.

<sup>6</sup> Article 1, ECHR.

<sup>7</sup> Article 13, ECHR.

international law for breaching the UK's legal obligations, enforceable before the European Court of Human Rights ('ECtHR').

### **3 The relationship between a domestic Bill of Rights and the ECHR**

As foreshadowed in our introduction, a UK Bill of Rights can only be regarded as necessary if it is considered to be necessary to have a piece of human rights legislation that differs in some way from the HRA. In this part of our paper, we identify and briefly analyse several ways in which a UK Bill of Rights might differ from the HRA.

#### **3.1 Additional rights**

First, a British Bill of Rights may confer broader rights on individuals than those which they enjoy under the ECHR. One possibility is that a domestic Bill of Rights might include a right to trial by jury (although we note in passing that successive governments have in fact shown considerable enthusiasm for eroding this right). Or a Bill of Rights might flesh out entitlements already present to some extent in the ECHR, by, for instance, conferring specific rights pertaining to such matters as the exercise of police powers and civil and criminal procedure. Another possibility might be to include a right to administrative justice, or some social rights,<sup>8</sup> for example to adequate housing or health care.

While an 'ECHR-plus' model would be legally straightforward in that the ECHR sets only *minimum* standards for human rights protection, difficulties could nevertheless arise in respect of the relationship between domestically enhanced rights and standard ECHR rights. For example, if a domestic Bill of Rights conferred a right to respect for private life broader than that recognised under the ECHR, this may lead British courts to make decisions placing greater restrictions on the right to freedom of expression than those permitted under the Convention, raising the prospect of subsequent challenges in the . Conversely, an attempt to confer protections upon freedom of expression exceeding those mandated by the Convention might result in decisions by UK courts at odds with the right to respect for private and family life. It should not, therefore, be assumed that an approach that confers greater protection upon certain rights would necessarily be compatible with the Convention taken as a whole.

#### **3.2 Fewer or narrower rights**

A UK Bill of Rights might instead differ from the HRA by conferring fewer or narrower rights upon individuals. This would be more obviously problematic in that individuals would remain able to enforce their ECHR rights but would have to do so in the ECtHR, thus undermining the HRA's central objective of 'making more accessible the rights which the British people already enjoy under the Convention'—'[i]n other words, ... bring[ing] those rights home'.<sup>9</sup> Removing the jurisdiction of UK courts to enforce the full range of Convention rights would be a retrograde step, returning people in the UK to a situation in which many would be unable to obtain a remedy in our courts for violations of Convention rights, and would frequently have to follow what the government in 1997 called the 'long and hard' 'road to Strasbourg', the existence of which, according to the white paper which made the case for the HRA, would serve the interests of a 'government which was half-hearted about the Convention'.<sup>10</sup> Moreover, as noted above, the Convention itself confers a right to effective domestic remedies.

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<sup>8</sup> As set out in the Council of Europe's European Social Charter 1961 (which the UK has ratified), or its revised version 1996 (which the UK has not yet ratified).

<sup>9</sup> Cm 3782, *Rights Brought Home: The Human Rights Bill* (London 1997) at 7.

<sup>10</sup> *Ibid.*

### 3.3 'Better'-defined rights

The current Prime Minister, when he was Leader of the Opposition, called for '[g]reater clarity and precision' in this area, 'as opposed to vague general principles, which can be interpreted in many different ways'.<sup>11</sup> Such views were echoed by the Brown government's green paper on constitutional reform, which also emphasised the need for human rights to be defined with greater clarity.<sup>12</sup> The argument that the law should be clear is an obviously attractive one, but any suggestion that a UK Bill of Rights should define rights in ways that differ from those adopted by the Convention would require careful thought.

If the intention was to produce a text that would in itself be sufficient to convey to citizens and public authorities the precise content and limits of relevant human rights, this would require a Bill of Rights drafted in highly detailed terms which would risk making it inflexible, potentially necessitating regular amendment. An innovation of this kind would require an extensive and expensive programme of education and training for officials to make them understand their detailed obligations under the new statutory scheme; the level of detail in the Bill of Rights would make this far more demanding than the training on the operation of the broad, principled Convention rights which was provided before the HRA came into force.<sup>13</sup> Such an approach would also raise the prospect of a disjunction between a domestic Bill of Rights and the ECHR, as it is possible to envisage circumstances in which a detailed domestic instrument laid down clear restrictions on a given right which later turned out to go beyond the restrictions permissible under the ECtHR's developing case law. The UK would be bound under international law by the ECtHR's construction of the right, but UK courts would presumably be bound by the less generous domestic provisions.

Finally, we note that calls for rights to be defined more clearly overlook a more fundamental difficulty. However a bill of rights is framed, there will always be intricate questions of interpretation to be resolved in the context of practical instances; and when courts embark on this task they do so against the background of the values already embedded in the common law, legislation and international rights treaties. In a common law constitution like that of the UK, the common law itself is inevitably a key repository of the most important and pervasive values and rights. The assumption that the reach of individuals' rights can be prescribed through the precise wording of a bill of rights therefore implies an incomplete understanding of the nature of our common law constitution.

## 4 Domestic courts, remedies and the ECtHR

In this final section of the paper, we consider how a UK Bill of Rights might differ from the HRA in relation to the powers of domestic courts and the way in which national courts' approach to the Convention relates to that of the ECtHR.

### 4.1 Domestic courts and remedies

As is well-known by now, the HRA makes provision for domestic courts to uphold Convention rights in several interlocking ways. In particular, the courts are empowered

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<sup>11</sup> David Cameron, 'Balancing freedom and security – A modern British Bill of Rights', speech to the Centre for Policy Studies, London, 26 June 2006.

<sup>12</sup> Cm 7170, *The Governance of Britain* (2007) at 61.

<sup>13</sup> A related point is that any deviation from the HRA model would, at least in the short term, introduce considerable uncertainty. Transitional uncertainty is, of course, a cost associated with many changes in the law—but it is not self-evident that the incurring of such a cost could be rationally justified in the present context, given that the scope for legitimately deviating in substance from the HRA model is relatively limited.

(indeed required) to subject legislation to rights-consistent interpretation where possible;<sup>14</sup> certain courts may declare that legislation is incompatible with one or more of the Convention rights;<sup>15</sup> and public authorities are placed under an enforceable duty to act compatibly with Convention rights.<sup>16</sup> In terms of practical impact, it is the latter aspect of the HRA machinery that has proven to be of greatest significance. What scope is there for a Bill of Rights that constitutes the courts' remedial powers on a different basis? In an article published in 2009, Dominic Grieve, now the Attorney-General, addressed this matter (among others).<sup>17</sup> Here, we address and contest two of the points he made.

First, it was suggested, in relation section 10 of the HRA,<sup>18</sup> which provides, in certain circumstances, for executive amendment of primary legislation that has been judicially found to be incompatible with Convention rights, that: 'It is wrong that primary legislation can be altered by Statutory Instrument if found incompatible with the Human Rights Act.' This is an odd aspect of the HRA with which to take issues for two reasons. On the one hand, these powers have rarely been used: the vast majority of corrective action taken in response to declarations of incompatibility and adverse ECtHR judgments is effected by means of primary legislation. On the other hand, while it is arguable that Henry VIII powers are egregious *per se*, it is hard to see why their availability is *especially* egregious in the present context. It is also worth noting that the power under sections 14 and 15 to give domestic effect by statutory instrument to reservations and derogations, which limit rather than increase people's rights, is subject to far fewer procedural checks than the power to change municipal law to protect such rights under section 10 of and Schedule 2 to the Act.

Second, it was suggested that courts' interpretative powers under section 3 should be limited so as to ensure that courts do not 'have power to stand a statute on its head'. Of course, the proper reach of the interpretative obligation is a contentious matter, and it is not the case that the courts have so far adopted what is indisputably the 'correct' approach in this sphere. But the debate about the lengths to which courts are (under section 3) or should be (under a Bill of Rights) required to go in terms of rights-consistent interpretation is not one that can take place in isolation from the wider context. Under the present scheme, if consistent construction is impossible, a declaration of incompatibility under section 4 may be issued. And although issuing such a declaration triggers no domestic legal obligation to amend the offending provision, such a declaration in effect foreshadows the likely outcome of litigation in Strasbourg. It follows that, subject to what we say in the next section, to contend that the courts' interpretative powers should be weakened is to presuppose that this would carve out for lawmakers a degree of latitude for which the Convention simply does not provide.<sup>19</sup>

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<sup>14</sup> HRA, section 3.

<sup>15</sup> HRA, section 4.

<sup>16</sup> HRA, section 6.

<sup>17</sup> 'It's the interpretation of the Human Rights Act that's the problem - not the ECHR itself', ConservativeHome website (<http://conservativehome.blogs.com/platform/2009/04/dominic-grieve.html>).

<sup>18</sup> On which see further Joint Committee on Human Rights, *Making of Remedial Orders 2001* (HL58/HC473 2001-2); Feldman (ed), *English Public Law* (Oxford 2009, 2<sup>nd</sup> ed) at 357-9.

<sup>19</sup> This is not to suggest that weakening the interpretative obligation would in itself place the UK in breach of its international obligations under the ECHR. Rather, such a step would presumably result in the making of more declarations of incompatibility. To suppose, however, that this would supply the political branches with greater legal freedom to decide whether UK law should be brought into line with the Convention (as distinct from freedom to decide *how* that should be accomplished) would be to overlook the fact that the scope of that freedom is constrained not only by domestic but also by international law.

## 4.2 Domestic courts and ECtHR jurisprudence

The extent to which UK courts are required to adhere to interpretations of the Convention rendered by the ECtHR is a matter of some controversy at present, and the Commission on a Bill of Rights will doubtless wish to consider whether the relationship between domestic courts and the ECtHR should be recalibrated. At present, section 2 of the HRA requires domestic courts to 'take into account' ECtHR case law. In fact, United Kingdom courts have arguably gone further than the text of the Act requires.<sup>20</sup> For instance, in *Alconbury*, Lord Slynn, while acknowledging that the HRA does not make United Kingdom courts bound by the ECtHR's decisions, said: 'In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights.'<sup>21</sup> And in *Ullah*, Lord Bingham said that national courts 'should not without strong reason dilute or weaken the effect of the Strasbourg case law'.<sup>22</sup> Against this background, four issues arise.

First, what scope is there for UK courts to follow Strasbourg case law less rigidly without placing the UK in breach of its international obligations? This depends upon the extent, in any given situation, of the margin of appreciation. There are many contexts in which the ECtHR emphasizes the notion of subsidiarity by extending a substantial margin of appreciation.<sup>23</sup> For instance, in relation to social security benefits and taxation issues the Court has been notably reluctant to intervene in domestic arrangements.<sup>24</sup> Clearly, then, it is perfectly proper for a UK court to adopt a view at odds from one discernible in the ECtHR's case law if it can be shown that the matter falls within the scope of the margin of appreciation afforded to domestic authorities. If, however, the ECtHR has rendered an interpretation in a case that is salient and to which the UK was a party, it is hard to see what latitude an appeal to the margin of appreciation would be capable of creating. This explains why British judges have sometimes reluctantly followed on-point Strasbourg jurisprudence with which they disagree.<sup>25</sup>

Second, is there scope for UK courts to exploit the margin of appreciation to a greater degree than at present? Here, it is important to recognize that the existence and extent of a margin of appreciation may itself be uncertain in some situations, in the sense that the line demarcating prescriptiveness by the ECtHR and latitude on the part of domestic courts may emerge only through a process of judicial dialogue. Within this framework, it is to be expected that domestic courts will stake out positions which may be at or beyond the outer perimeter of acceptability (in Convention terms); but the precise location of that perimeter becomes apparent only through back-and-forth dialogue between the national and European courts. Take, for instance, *MGN Ltd v UK*,<sup>26</sup> in which the ECtHR adopted a notably restrained approach when called upon to address the proper balance between privacy and freedom of expression. As Skinner has explained, 'The Court stated that it would only interfere with the decision of the House of Lords if the relevancy and sufficiency of the House's decision were such that there were "strong

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<sup>20</sup> See *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529 at [34] per Lord Nicholls; *Re McCaughey* [2011] UKSC 20, [2011] 3 All ER 607 at [59] per Lord Phillips.

<sup>21</sup> *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 at [26].

<sup>22</sup> *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 at [20].

<sup>23</sup> For recent examples, see *Carson v UK* (2010) 51 EHRR 13; *Mosley v UK* (ECtHR, 10 May 2011, 48009/08).

<sup>24</sup> See, eg, *Carson v UK* (2010) 51 EHRR 13; *Stec v UK* (2006) 43 EHRR 47; *Burden v UK* (2008) 47 EHRR 38.

<sup>25</sup> Eg *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269 at [70], per Lord Hoffmann.

<sup>26</sup> (2011) 53 EHRR 5.

reasons” for it to substitute a different view. Albeit couched in rather different terms, this must constitute a standard of review at least approaching, if not quite, *Wednesbury* unreasonableness.<sup>27</sup> Against this background, it would, for instance, be possible for a Bill of Rights (or, for that matter, an amended section 2 of the HRA) to emphasize that domestic courts should take heed of the margin of appreciation doctrine (by recognizing that their judgments will not invariably be subject to rigorous review on ‘correctness’ grounds) in deciding the extent to which it is necessary to follow Strasbourg jurisprudence. A related point is that, in the light of (at least the appearance of) a measure of judicial discord in this area, the possibility of a Practice Direction might be considered (by the judiciary).

Third, whereas the margin of appreciation is concerned with the ECtHR recognizing a principle of subsidiarity that creates space for some diversity of national authorities’ views and approaches, there is also scope for differences of opinion in situations where the ECtHR’s grasp of domestic law is in question. Both the UK courts and the ECtHR recognize that the Convention regime provides some scope for inter-institutional dialogue in such circumstances. This is evident both in the ECtHR’s demonstrated willingness to revise its own jurisprudence when it is persuaded (for example) that it has proceeded on the basis of a misapprehension about domestic law or practice,<sup>28</sup> and in the preparedness of the UK Supreme Court to refuse to follow Strasbourg jurisprudence which it considers to be based upon such a misapprehension.<sup>29</sup>

Fourth, as well as considering how domestic courts might exploit the margin of appreciation to the extent that such a margin presently exists, the Commission will no doubt also wish to give further thought to what steps might be taken to secure the concession at the European level of a more generous margin of appreciation. We recognize that, in some areas, the ECtHR’s case law tends towards prescriptiveness, which is arguably problematic in contexts in which there is a legitimate diversity of national approaches. We note, however, that producing this sort of change at the level of the ECtHR—by means of introducing a notion of subsidiarity transcending the effects of the present margin of appreciation doctrine—is not something that could be accomplished through the adoption of a UK Bill of Rights, and would, instead, require institutional reform. As such, this matter falls outside the range of issues specifically raised by the questions posed for the purpose of the present consultation exercise.

## 5 Conclusions

Much of the debate concerning the HRA—and so the resulting debate about whether a replacement Bill of Rights is needed—is skewed by popular misconceptions about what the Act and the Convention require. The media and politicians, for instance, tend to focus on decisions in which the ECtHR finds a violation, largely ignoring the many decisions in which UK courts’ decisions are upheld in Strasbourg.<sup>30</sup> The impression is thus given of a heavily ‘top-down’ relationship in which British politicians and judges are constantly being overruled by a ‘foreign’ court. The reality is, of course, far more subtle than this caricature implies. This is so not least because the relationship between

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<sup>27</sup> ‘Freedom of expression, subsidiarity and “no win no fee” agreements: *MGN Limited v United Kingdom*’ [2011] EHRLR 329 at 331–2.

<sup>28</sup> For instance, compare *Osman v UK* (2000) 29 EHRR 245 and *Z v UK* (2002) 34 EHRR 3.

<sup>29</sup> Eg in *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373 the Supreme Court refused to accept the ECtHR’s view in *Al-Khawaja v United Kingdom* (2009) 49 EHRR 1 concerning the compatibility with the right to a fair trial of domestic law regarding the admission of hearsay evidence.

<sup>30</sup> Notable examples include: *Evans v UK* (2008) 46 EHRR 34 (inability to use frozen embryos without the consent of her former partner); *Pretty v UK* (2002) 35 EHRR 1 (assisted suicide); *SW v UK* (1996) 21 EHRR 363 (rape in marriage); *Donaldson v UK* (2011) 53 EHRR 14 (PSNI policy concerning wearing of Easter lily).

the ECtHR and domestic courts is a two-way one. The quality of the UK judiciary is widely recognized, and the ECtHR has shown itself willing to place substantial weight upon the reasoning and decisions of UK courts.<sup>31</sup> In this way, the approach of the British courts is capable of influencing the development of human rights jurisprudence at a European level. It is, of course, inevitable that the ECtHR and the British courts will not always be in agreement—but this should not be perceived as an inevitably negative phenomenon. There are, for instance, areas in which British courts have gone *further* than the Strasbourg jurisprudence requires, thereby demonstrating that British courts are able and willing, on occasion, to be in the vanguard of the development of ECHR jurisprudence.<sup>32</sup> Equally, it is clear that there have been occasions on which the ECtHR has made decisions that, although at the time ahead of national law and attitudes, can be seen in historical perspective to have been played a fundamental part in the development more progressive positions at the domestic level. Examples include ECtHR decisions on homosexuality,<sup>33</sup> gender reassignment<sup>34</sup> and corporal punishment.<sup>35</sup>

One of the ambitions of the HRA was to enable human rights issues to be litigated in domestic courts and thereby to enable our courts to contribute to the development of pan-European human rights jurisprudence. This ambition has been realized, even though the substantial mythology surrounding the HRA has distorted public perceptions of its effects. Against this background, there is certainly a case for promoting better understanding of the UK's obligations under the ECHR—a point which is, we note, reflected in the Commission's terms of reference. Whether the adoption of a 'UK Bill of Rights' would be of a piece with the ambition to demystify human rights law is, however, open to doubt, given that, as we noted at the beginning of this paper, the UK's position is informed by a series of interlocking international obligations. None of this is to suggest that the HRA is beyond improvement. But the legitimate scope for deviating from the HRA model is limited, and it is crucial that the debate concerning the adoption of a Bill of Rights takes full account of that fact.

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11<sup>th</sup> November 2011

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<sup>31</sup> See, eg, *Pretty v UK* (2002) 35 EHRR 1; *N v UK* (2008) 47 EHRR 39; *Goodwin v UK* (2002) 35 EHRR 18. The common law's influence upon the interpretation of Convention rights can also feed through into other jurisdictions. See, eg, amendments to Articles 63-64 of the French Criminal Code concerning access to a lawyer during police questioning.

<sup>32</sup> See, eg, *R (on the application of Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396; *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, [2009] 1 AC 1198; *In re P (A Child) (Adoption: Unmarried Couples)* [2008] UKHL 38, [2009] 1 AC 173.

<sup>33</sup> *Dudgeon v UK* (1981) 3 EHRR 40.

<sup>34</sup> *Goodwin v UK* (2002) 35 EHRR 18.

<sup>35</sup> *Tyrer v UK* (1979-80) 2 EHRR 1.