Human rights in the UK

From international obligations to everyday protections

Strengthening international human rights law and mechanisms – UNA-UK briefing report no.2

UNA-UK

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About this report

This report was written by Hayley Richardson, UNA-UK's Policy & Advocacy Manager, as part of the Association's 'Fairer World' policy programme. This programme seeks to safeguard international laws and norms, and secure human rights for all through lobbying, education and grassroots initiatives.

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INTRODUCTION

Human rights have become a hotly debated issue in the UK in recent years. Arguments around how best to properly balance certain rights against others have taken place for as long they have been written down. But disagreement over how to incorporate human rights into domestic legislation, and what to do when the state is found to be in breach of its legal obligations, has become something of a fault line in British politics.

Following the Conservative Party's election victory in May 2015, the Government was expected to make good on its manifesto pledge to repeal the UK's Human Rights Act (HRA) and replace it with a British Bill of Rights.[1] Yet the first Queen's Speech of the new Parliament did not include any immediate move to repeal the HRA but instead promised to "bring forward proposals".[2]

There have also been indications that the UK's commitment to the European Convention on Human Rights (ECHR) could be in doubt. In his first address to Parliament's Justice Committee as Secretary of State for Justice and Lord Chancellor, Mr Gove carefully stated that he "could not give a one-hundred per cent guarantee" that the UK would not ultimately withdraw from the ECHR.[3]

This briefing seeks to respond to this debate by summarising the background to human rights protections in the UK, assessing the strengths and weaknesses of the current system and providing analysis of the Government's proposals to date.

[1] The Conservative Party, *The Conservative Party Manifesto 2015*, p.58, at www.conservatives.com/manifesto
[2] Prime Minister's Office, *The Queen's Speech 2015,* p.75, at www.gov.uk/government/uploads/system/uploads/attachment_data/file/430149/QS_lobby_pack_FINAL_NEW_2.pdf
[3] House of Commons Justice Committee, *Oral evidence: The work of the Secretary of State for Justice*, 17 July 2015, at data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-work-of-the-secretary-of-state-for-justice/oral/18738.html

BACKGROUND

The origins of human rights in this country can be traced back as far as 1215 and the issuance of the Magna Carta.[4] This document, for the first time, asserted the principle that all people should be subject to the rule of law.

Considered by many to be the international Magna Carta for all mankind, the Universal Declaration of Human Rights (UDHR) has much more recent origins. Adopted by the UN General Assembly in 1948, the Universal Declaration of Human Rights (UDHR) is considered to be the cornerstone of human rights around the world.[5] Drafted in the aftermath of the appalling atrocities of the Second World War, states wished to establish a framework which would uphold the dignity and freedom of all people everywhere.

The UDHR's 30 articles span the gamut of the human condition – from the right to work and education to freedom of thought, conscience and religion – and form the basis of numerous subsequent UN conventions. However, the UDHR's influence is ultimately symbolic. It lacks any kind of legal or political oversight mechanism which could monitor or enforce its implementation.

Mindful of this lacuna, the ECHR was drafted two years later to give teeth to a number of the UDHR's provisions concerning civil and political rights.[6] The UK was instrumental to the ECHR's initial creation, largely down to the involvement of the British lawyer and Conservative politician, Sir David Maxwell Fyfe, and former Prime Minister Sir Winston Churchill.

Both were closely involved in the negotiation of the Convention's language, incorporating into this fledging regional system many of the UK's own legal traditions. Carefully and deliberately constructed, it balances an individual's rights against their responsibilities. For example, freedom of expression may not be used to incite violence, and can therefore be restricted under such circumstances.

The UK was one of the first states to sign the ECHR, which it did in 1951, and actively encouraged others to do the same. In 1966, the UK also signed up to the European Court of Human Rights (ECtHR) in Strasbourg, which was established to rule on cases of violations of the Convention. For the first time people in the UK whose rights had been abused could seek justice and recompense.

However, it became apparent that this situation was not ideal. Such cases had to go all the way to Strasbourg to be heard, as British courts had no legal jurisdiction over the Convention and no domestic human rights legislation which to refer. For victims of rights abuses this process was both time-consuming and costly, taking on average seven years, sometimes even 10, to complete.[7]

The introduction of the HRA in 1998 was billed as "rights brought home".[8] Brought forward by the Labour Government and passed by Parliament with broad cross-party

[4] See British Library, at www.bl.uk/magna-carta
[5] See United Nations, at www.un.org/en/universal-declaration-human-rights/
[6] Council of Europe, *European Convention on Human Rights,* at www.echr.coe.int/Documents/Convention_ENG.pdf
[7] Guardian, *Scrapping the 1998 Human Rights Act: what would it mean?*, 1 October 2014, at http://www.theguardian.com/law/2014/oct/01/scrapping-human-rights-act-british-bill-of-rights
[8] Home Office, *Rights brought home: the Human Rights Bill,* at www.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf

support, it incorporated the ECHR's provisions into UK law. Put simply, it enabled people in the UK to claim the legal rights they had enjoyed since the 1950s under the British court system. Public bodies now had a legal obligation to ensure that they complied with these rights and treated all people fairly and with dignity.

It also effectively changed the UK's relationship with Strasbourg from a court of first resort for human rights cases to a court of last resort. Rather than pass over these cases to Strasbourg, British judges were now asked to undertake two important considerations: to assess whether a UK law is compatible with the ECHR "so far as it is possible to do so", and to "take into account" ECtHR jurisprudence in their own decisions.[9]

[9] The National Archives, *Human Rights Act 1998,* at www.legislation.gov.uk/ukpga/1998/42/pdfs/ukpga_19980042_en.pdf

THE UK DEBATE

Fuelled by the media's perception that it acted as a "charter for criminals" (see page 13),[10] political support for the HRA began to fracture soon after its adoption. Under the 2010-15 Coalition Government of the Conservatives and the Liberal Democrats, there were a number of significant developments in this debate.

Council of Europe

In 2011, the UK took its turn as Chair of the Committee of Ministers at the Council of Europe (CoE), the parent organisation of the ECtHR. The UK used this six-month position, which rotates amongst the CoE's 47 member states, to put forward an ambitious reform agenda. Key amongst the proposals was an initiative to tackle the Court's overwhelming backlog of cases, reducing it from 160,000 in 2011 to 84,500 in 2014.[11]

In addition, under what is now known as the Brighton Declaration,[12] the UK called for the principle of subsidiarity and the margin of appreciation to be inserted into the ECHR's preamble. These are, respectively, the legal concepts that ensure the primary responsibility for fulfilling human rights falls to the state, and that the ECtHR allow a degree of discretion for national context when considering judgments on which there is no European consensus. This was achieved in 2013 through the adoption of Protocol 15 to the ECHR.[13]

Whilst their long-term impact remains to be seen, both initiatives can be regarded as examples of the reform that can be achieved from within the European human rights system. In a 2014 speech, Judge Robert Spano of the ECtHR commented that:

> "The Court has demonstrated its willingness to defer to the reasoned and thoughtful assessment by national authorities of their Convention obligations. It is important to stress that this development does not introduce, in essence, any novel feature into Strasbourg jurisprudence, but constitutes rather a further refinement or reformulation of pre-existing doctrines, influenced by recent declarations of the member states."[14]

Commission on a Bill of Rights

In the same year, an independent Commission on a Bill of Rights was established by the Coalition Government to investigate "the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights".[15] The Commission's focus on building on, rather than withdrawing from, the ECHR was

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[10] The Daily Mail, *Human rights is a charter for criminals and parasites our anger is no longer enough*, 15 uly 2012, at www.dailymail.co.uk/debate/article-2173666/Human-rights-charter-criminals-parasites-anger-longer-enough.html

[11] UK Human Rights Blog, *The European Court of Human Rights: anti-democratic or guardian of fundamental values?,* 19 November 2014, at ukhumanrightsblog.com/2014/11/19/the-european-court-of-human-rights-anti-democratic-or-guardian-of-fundamental-values-judge-robert-spano/

[12] See Council of Europe, at www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf

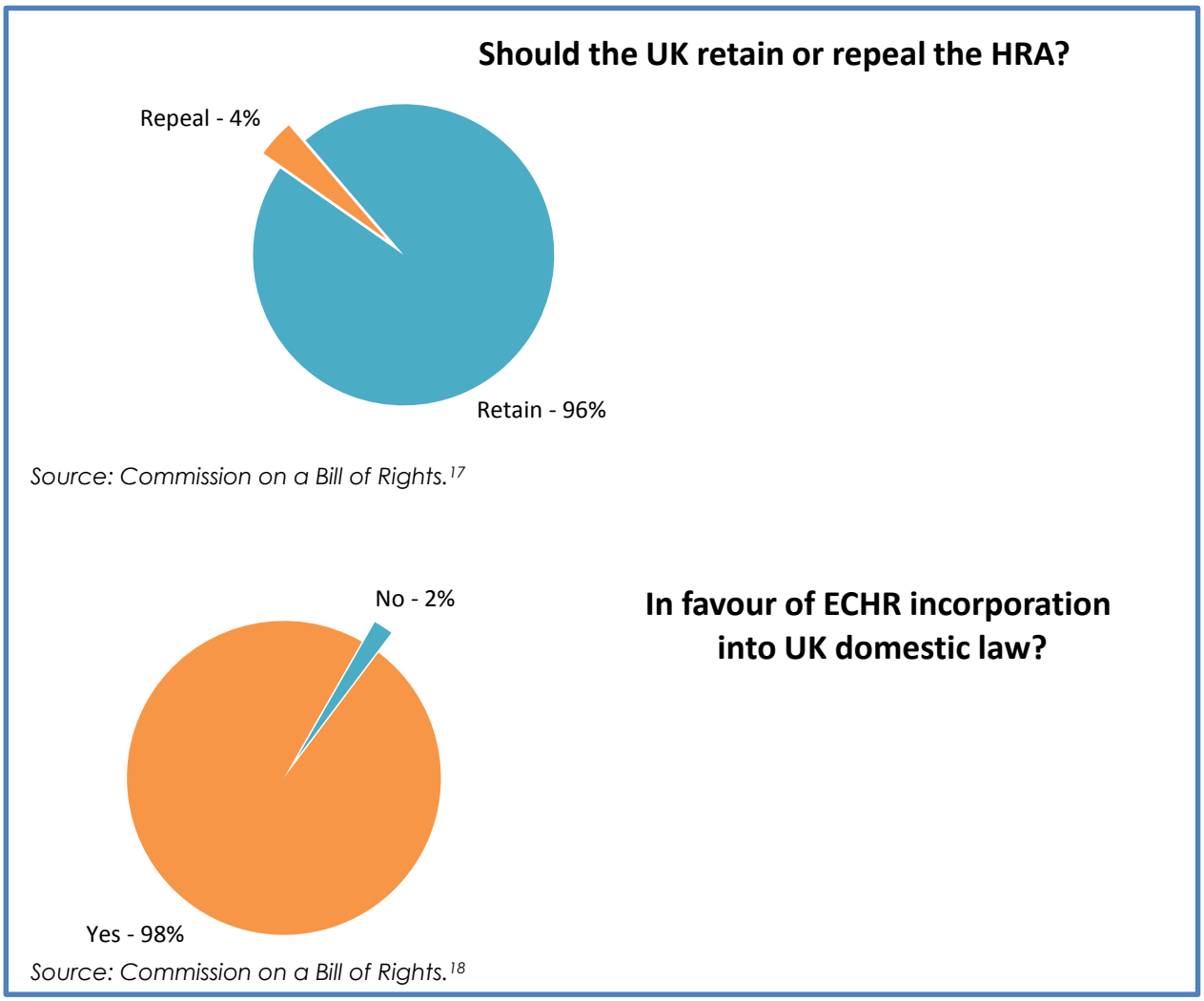
[13] See Council of Europe, at www.echr.coe.int/Documents/Protocol_15_ENG.pdf

[14] Judge Robert Spano, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity,* 10 July 2014, at hrlr.oxfordjournals.org/content/early/2014/07/10/hrlr.ngu021.full

[15] The National Archives, *Commission on a Bill of Rights, Volume 1,* p.5, at webarchive.nationalarchives.gov.uk/20130128112038/http:/www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf

included the 2010 Coalition Agreement, and used as a minimum standard for discussions of future proposals.[16]

The Commission undertook two extensive consultation exercises, gathering the views of over 2,000 people, and met with 120 individuals and organisations from around the country. The graphics below set out two of the key questions from these consultations:



Source: Commission on a Bill of Rights.[17]

Source: Commission on a Bill of Rights.[18]

In addition to this, 87 per cent of respondents advocated expanding the rights currently included in UK legislation, and 100 respondents argued in favour of incorporating further international instruments, such as the UN Convention on the Rights of the Child.[19]

In its final report, seven of the Commission's nine members were in favour of exploring a new Bill of Rights, primarily as a 'rebranding' exercise which could overcome the

[16] Cabinet Office, *The Coalition: our programme for Government*, at www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf

[17] The National Archives, *Commission on a Bill of Rights, Volume 2,* p.120, at /webarchive.nationalarchives.gov.uk/20130128112038/http:/www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf

[18] The National Archives, *Commission on a Bill of Rights, Volume 2,* p.133

[19] The National Archives, *Commission on a Bill of Rights, Volume 2,* p.150

growing divisiveness of the HRA debate. The Commission stated that "a majority of members believe that the present position is unlikely to be a stable one. Some of the voices both for and against the current structures are now so strident, and public debate so polarised, that there is a strong argument for a fresh beginning".[20]

Others felt this to be a drastic action, however. The most vocal defenders of the current system, Baroness Kennedy of The Shaws QC and Professor Philippe Sands QC, argued that "our colleagues in the majority have, in our view, failed to identify or declare any shortcomings in the Human Rights Act, or in its application by our courts".[21]

Furthermore, those in the Commission who did favour change, could not reach agreement on a specific way forward, with devolution presenting a particular obstacle (see page 16). The eight separate papers published by the Commissioners evidenced these divisions, with two going beyond their terms of reference and arguing that withdrawal from the ECHR must be considered.[22]

General election

This debate also featured prominently in the run up to the 2015 general election. Pledges to retain the HRA and ECHR were made in the Labour, Liberal Democrat, Scottish Nationalist Party, Plaid Cymru and Green Party manifestos. Whilst the Conservatives and the United Kingdom Independence Party both promised repeal of the HRA and reform of, or withdrawal from, the ECHR.

Signalling the political capital being invested in this issue, it was the Prime Minister who announced the Conservative Party's plans to repeal the HRA at the 2014 autumn party conference.[23] Soon after, the Conservative Party published its plans in a policy paper entitled: *Protecting human rights in the UK: the Conservatives' proposals for changing Britain's human rights laws.*[24] In lieu of any draft Bill, promised in the policy paper and other forums, this is the most substantive proposal published by the party to date.

This document reasserted the Conservative Party's "commitment to fundamental human rights" but stated that there have been "significant developments which have undermined public confidence in the human rights framework" which must be addressed.[25]

However, the paper should be viewed as highly politically charged – note the repeated references to "Labour's Human Rights Act" – and contained a number of inaccuracies (see page 13).

[20] The National Archives, *Commission on a Bill of Rights, Volume 1,* p.30
[21] The National Archives, *Commission on a Bill of Rights, Volume 1,* p.31
[22] The National Archives, *Commission on a Bill of Rights, Volume 1,* p.182
[23] Conservative Party, *David Cameron speech to Conservative Party Conference 2014*, 1 October 2014, at press.conservatives.com/post/98882674910/david-cameron-speech-to-conservative-party
[24] The Conservative Party, *Protecting human rights in the UK: the Conservatives' proposals for changing Britain's human rights laws*, at www.conservatives.com/~/media/files/downloadable%20Files/human_rights.pdf
[25] Ibid

DECADES OF PROTECTION

What have the HRA and ECHR achieved for people in the UK, and what is the UK's record like at the Strasbourg court?

The Human Rights Act
Human rights are vital to ensuring that everyone gets treated fairly, with dignity and can seek access to justice if needed. The HRA provides legal protection for this, making sure that every public authority respects the:

- ✓ Right to life
- ✓ Right to live free from torture or inhuman treatment
- ✓ Right to live free from enslavement
- ✓ Right not to be detained without proper cause
- ✓ Right to a fair trial and legal process
- ✓ Right to fair punishment if you break the law
- ✓ Right to lead your private and family life without interference
- ✓ Right to think and believe what you choose
- ✓ Right to express yourself freely
- ✓ Right to peaceful assembly and protest
- ✓ Right to an appropriate remedy if your rights have been infringed
- ✓ Right to marry who you want
- ✓ Right to live your life free from discrimination

Bringing a case under the HRA not only provides justice to those who have been wronged, but can help bring about changes to ensure that no one else will suffer the same treatment in the future.

CASE STUDY

<u>The right to private and family life</u>
In 2002, a case was brought forward by Mrs Bernard, a severely disabled person, using the HRA.[26] After receiving accommodation from the local council, it was found to be unsuitable for her condition. It had not been adapted for her disability and she could not access the bathroom, often confining her to living in one room downstairs. Even after raising complaints, the local council failed to settle Mrs Bernard and her family in suitable accommodation.

After taking their case to the High Court, the local council was found to have breached Article 8 of the HRA, which places a positive obligation on the state to respect the right to private and family life. Mrs Bernard was awarded damages.

In the 15 years since it has been in force, some remarkable things have been achieved under the HRA. For example, the Act has:

- Triggered an inquiry into deaths at Staffordshire General Hospital where patients faced appalling treatment, which led to NHS-wide reforms.[27]

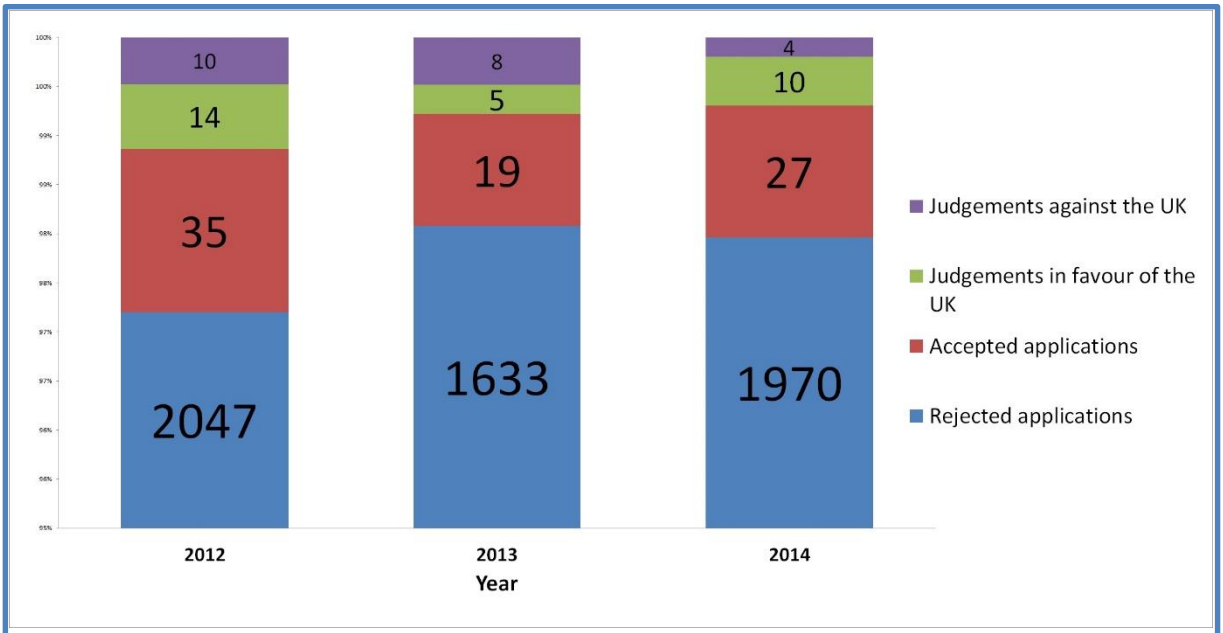
[26] See Our Human Rights Stories, at www.ourhumanrightsstories.org.uk/case-study/using-human-rights-act-challenge-failure-provide-adequate-community-care-services
[27] Leigh Day, *Judicial reviews and the Mid Staffordshire inquiries*, 12 May 2010, at www.leighday.co.uk/Asserting-your-rights/Human-rights/Mid-Staffordshire-Inquiry/Judicial-reviews-and-the-Mid-Staffordshire-inquiri

- Ensured that police forces follow up on all allegations of rape, after two women's claims were ignored and their attacker went on to assault others.[28]
- Asserted that authorities caring for people with mental health problems cannot confine them in institutions indefinitely, with the onus placed on the state, not the individual, to prove if someone has a mental disorder.[29]

The European Convention on Human Rights

Over the decades, the ECHR has contributed greatly to the protection and promotion of human rights for Europe's more than 700 million residents. The Court in Strasbourg safeguards these rights, and has acted as a 'back stop' for the excesses or inadequacies of 47 member states.

The UK has an excellent record at the ECtHR, particularly compared to states such as Turkey, which accounts for 17 per cent of all cases brought to the Court.[30] Of the 12,000 applications submitted against the UK between 1999 and 2010, just 1.8 per cent found a violation.[31] In 2014, there were just four cases where the UK was judged to have broken the Convention, compared with 122 violations in Russia, 94 in Turkey and 74 in Romania.[32]



Cases brought against the UK at the ECtHR, 2012-14.[33]

According to Rights Info, a public information campaign on human rights in the UK, the vast majority of the UK's violations – 45 per cent – were concerned with either the right to a fair trial or unlawful detention.[34]

[28] See Rights Info, at rightsinfo.org/stories/the-black-cab-rapist/
[29] See Rights Info, at rightsinfo.org/stories/prove-it-or-let-me-go/
[30] See Rights Info, at http://rightsinfo.org/infographics/human-rights-uncovered/
[31] Equality and Human Rights Commission, *The UK and the European Court of Human Rights*, at www.equalityhumanrights.com/sites/default/files/documents/research/83._european_court_of_human_rights.pdf
[32] See Council of Europe, at www.echr.coe.int/Documents/Stats_violation_2014_ENG.pdf
[33] See Council of Europe, at http://www.echr.coe.int/Documents/CP_United_Kingdom_ENG.pdf
[34] See Rights Info, at http://rightsinfo.org/infographics/human-rights-uncovered/

CASE STUDIES

Freedom of expression

In 1958, a morning sickness drug called Thalidomide was released in the UK. The drug had a devastating effect on thousands of children, who were born with severe birth defects. The Sunday Times launched a campaign in support of the victims, however the Attorney-General blocked the publication of an article which detailed the manufacturers' negligence. The Government argued that it would unfairly influence proceedings between the victims and the drug company.

The ECtHR decided that in doing so the Attorney-General violated the Sunday Times' right to freedom of expression, and that the newspaper was right to publish the facts on "a matter of undisputed public concern".[35]

Prohibition of torture

In 1978, a case was brought against the UK by the Government of Ireland using the ECHR – the first inter-state case of its kind.[36] It concerned the UK Government's use of interrogation tactics against suspected members of terrorist organisations operating in Northern Ireland. These practices included the hooding of suspects, being forced to maintain stress positions for extended periods of time, subjection to noise and the deprivation of sleep, food and drink.

In a landmark ruling, the ECtHR decided that this was inhuman treatment resulting in intense mental and physical suffering, and was therefore a violation of Article 3. Such is the enduring significance of this case that in December 2014 the Government of Ireland announced that it may request that the ECtHR reconsider this judgment in order to argue that these practices constitute the higher crime of torture.[37]

And as can be expected when dealing with such sensitive issues, governments of every persuasion have publicly and angrily condemned rulings found against them. Certain examples – such as the decriminalisation of homosexual acts conducted in private in Northern Ireland[38] – were considered highly controversial at the time but are now held up as some of the Court's most significant achievements.

[35] See Rights Info, at rightsinfo.org/stories/free-to-report/

[36] See Rights Info, at rightsinfo.org/stories/the-five-techniques/

[37] BBC News, *Hooded men: Irish government bid to reopen 'torture' case*, 2 December 2014, at www.bbc.co.uk/news/uk-northern-ireland-30296397

[38] See Rights Info, at rightsinfo.org/stories/being-gay-is-not-a-crime/

TIME TO CHANGE?

Of course, the UK's record at Strasbourg has not been entirely straightforward. Three cases in particular have captured people's attention in recent years.

CASE STUDIES

Voting rights
In the highly contentious case of *Hirst v UK* in 2005, a UK prisoner claimed that the Government's ban on prisoner voting had breached Article 3 of Protocol 1 of the ECHR.[39]

The Strasbourg Court accepted that the state may revoke the right to vote in certain defined circumstances, but concluded that the Government's blanket ban on all convicted prisoners, regardless of their crime or sentence, was indiscriminate. The Court strongly emphasised that voting is a right granted to all citizens, not something to be conferred by the state in return for good behaviour. More than 10 years after the judgment was made, the Government still has not implemented this decision.

The right to a fair trial
In 1994, Abu Qatada fled his home country of Jordan where he had been tortured, and was granted asylum in the UK. Whilst residing in the UK he was dubbed a 'hate preacher' and was considered to be highly involved in terrorist activity (although he was never charged with any crime). When sentenced to life imprisonment in absentia by a Jordanian court, the UK Government sought to deport him. However Qatada took his case to the ECtHR, claiming that doing so would place him at real risk of torture.[40]

The ECtHR ruled that despite assurances from Jordan that Qatada would not be subjected to torture, his deportation would breach Article 6 on the right to a fair trial as the authorities would likely use evidence gathered through torture against him. After a drawn-out legal battle, the case was subsequently settled through diplomacy. The UK secured Jordan's agreement, set down in an international treaty, that its courts would never again accept evidence obtained through torture. Qatada was voluntarily deported in 2013.

The prohibition against inhuman and degrading treatment
In 2013, three convicted murderers serving life sentences argued that whole life tariffs without any prospect of release constituted inhuman and degrading treatment under Article 3 of the ECHR. Although the Justice Secretary has the power to release a whole life prisoner, the ECtHR agreed that there was a significant lack of clarity around the circumstances in which this may occur.[41]

However, earlier this year, the ECtHR reversed its previous position and deferred to a UK Court of Appeal decision given in February 2015, in which it clarified the Justice Secretary's discretionary powers to release such prisoners in exceptional circumstances.[42] This case has come to exemplify what can be achieved by the current system of dialogue between British courts and the ECtHR.

[39] See Rights Info, at rightsinfo.org/stories/civil-death/
[40] See Rights Info, at rightsinfo.org/stories/terror/
[41] See Rights Info, at rightsinfo.org/stories/throwing-away-the-key/
[42] See Council of Europe, at hudoc.echr.coe.int/eng?i=001-150778#{"itemid":["001-150778"]}

Largely as a result of these, very few, controversial cases, the UK's human rights framework has come under intense scrutiny. For some, they are clear signals that the system needs radical reform. Typical suggestions have included:

1. *Repeal the HRA and replace with a British Bill of Rights*

At a minimum, proposals for change have focussed on 'rebranding' the UK's human rights legislation. Typically such suggestions have asserted that a Bill of Rights would be made up of the same rights as currently contained in the HRA. However these have also been coupled with proposals for restricting the rights of those considered "unmeritorious".[43]

2. *Break the link between British courts and the ECtHR and make their rulings advisory*

This proposal aims to ensure that British courts are no longer required to take into account rulings from the ECtHR. However, there is nothing which legally-binds judges to ECHR decisions. Under the HRA, they must simply consider Strasbourg jurisprudence when forming their own conclusions. It has been the case, however, that British judges have often (but not always) chosen to rule in line with ECtHR jurisprudence.

Article 46 of the ECHR places a legal obligation on the UK *state* – not UK judges – to abide by ECtHR decisions. If the UK remains party to the ECHR this would not change, regardless of any attempts to amend this under a Bill of Rights.

3. *Prevent laws from being re-written through judges' interpretation*

Though intended as a way of upholding the 'sovereignty' of Parliament's decisions on legislation – this suggestion is a red herring.

Under current arrangements, neither British nor European judges can re-write or repeal UK legislation. British judges can make 'declarations of incompatibility', which ask that Parliament consider amending the legislation to come in line with the HRA. Likewise, European judges can find a violation of human rights, but it cannot force a change in the law (which is why the prisoner vote ruling of 2005 has still not been implemented).

Furthermore, any attempt to 'clarify' how human rights law or judges' rulings should be implemented would be equally unappealing. Should the Government's own interpretation of human rights differs to ECtHR case law, it would likely mean an increase in judgments found against the UK in Strasbourg.

4. *Limit human rights laws to serious cases only*

Often suggested as a way of ensuring that 'trivial' human rights cases are struck out whilst leaving more time for more 'important' issues, there is no evidence provided as to how this would work or why this would be necessary.

Firstly, the issues included in the HRA and ECHR have long been considered a bare minimum amongst a far wider spectrum of human rights commitments the UK is signed up to. Which rights listed on page 10 could be considered trivial? And courts already do a good job in prioritising those claims which are legally credible – in 2014, 99 per cent of cases against the UK at the ECtHR were rejected as inadmissible.[44]

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[43] House of Lords Constitution Committee, *Oral evidence session with the Rt Hon. Michael Gove MP, Lord Chancellor and Secretary of State for Justice*, 2 December 2015, at www.parliament.uk/documents/lords-committees/constitution/AnnualOralEvidence2014-15/CC021215-lord-chancellor.pdf

[44] See Council of Europe, at www.echr.coe.int/Documents/Stats_analysis_2014_ENG.pdf

5. *Limit the extra-territorial application of human rights law*

In an attempt to stymie allegations of misconduct made against the Ministry of Defence, it has been suggested that blocking the application of the HRA outside of UK territory would reassure British Armed Forces serving abroad that they won't face litigation (excluding, presumably, violations of the Geneva Conventions and other laws of war).

However, doing so would also remove the human rights protections usually available to the men and women serving in the forces, some of whom have died or been injured due to dangerous failings of the state.[45]

6. *Amend the Ministerial Code*

Another previous suggestion was to amend the Ministerial Code – the guidelines which regulate the conduct of government ministers – to "remove any ambiguity in the current rules about the duty of Ministers to follow the will of Parliament in the UK".[46]

This was implemented by the Government on 14 October 2015, when it removed the "overarching duty on Ministers to comply with the law including international law and treaty obligations and to uphold the administration of justice and to protect the integrity of public life"[47] and replaced it with an "overarching duty on Ministers to comply with the law and to protect the integrity of public life".[48] In response, UNA-UK policy adviser and former legal adviser to the Foreign & Commonwealth Office, Sir Frank Bermann QC, said "it's impossible not to feel a sense of disbelief at what must have been the deliberate suppression of the reference to international law in the new version".[49]

In summary:

- It is not acceptable for a Bill of Rights to remove any of the rights currently in the ECHR, or to remove rights from particular groups of people
- As a matter of international law, ECtHR rulings place an obligation on the state, not judges, to address human rights violations
- It is incorrect to say that judges can change the law themselves – only Parliament can do that
- There is no such thing as a 'trivial' human rights case – the ECHR lists a number of vital protections we each rely on every day
- Limiting the extra-territorial application of human rights law would also take away the protections of British soldiers
- Amending the Ministerial Code devalues the important role of international law in placing a check on those serving in public office

[45] See Rights Info, at rightsinfo.org/stories/the-soldiers-did-their-duty-they-were-entitled-to-proper-equipment/

[46] The Conservative Party, *Protecting human rights in the UK: the Conservatives' proposals for changing Britain's human rights laws*

[47] See Westminster Training, at westminstertraining.org.uk/resource/ministerial-code-may-2010/

[48] Cabinet Office, *Ministerial Code*, at www.gov.uk/government/uploads/system/uploads/attachment_data/file/468255/Final_draft_ministerial_code_No_AMENDS_14_Oct.pdf

[49] The Guardian, *International law and the ministerial code*, 25 October 2015, at www.theguardian.com/law/2015/oct/25/international-law-and-the-ministerial-code

POTENTIAL OBSTACLES

There are a number of potential obstacles to the Government's plans. These can be broadly defined as legal difficulties, rule of law concerns and the current political dynamic in Westminster.

Legal difficulties
The establishment of a Bill of Rights would require addressing a number of much broader questions around the UK's constitutional arrangements – something which falls outside of the remit of the Ministry of Justice and is within the scope of the Cabinet Office.

The ECHR's provisions are currently hard-wired into devolution legislation, which in turn is governed by a number of complex conventions. Any attempt to tamper with these arrangements must be done carefully, particularly so soon after a referendum in 2014 nearly broke up the Union. So tricky is this problem that the nine expert members of the Commission on a Bill of Rights could not solve it in their 21 months of review.

Take Scotland, for example. At present, the UK Parliament is still legally authorised to make UK-wide law – it does not give this up under devolution. But typically, when considering legislation which relates to a devolved matter, the UK Parliament would normally seek the consent of the Scottish Parliament. This delicate balance of power has become known as the Sewel Convention,[50] and is also set out in the Memorandum of Understanding which shapes the relationship between the UK Government and the devolved institutions.[51] Any attempt to impose new human rights legislation against the will of the Scottish Parliament could cause a constitutional crisis.

The case of Northern Ireland is even more complicated, as human rights are woven into the Belfast Agreement 1998 which ended decades of internal conflict.[52] Supported in an all-Ireland referendum and deposited at the UN, this treaty invokes the ECHR as an essential safeguard against future hostilities, and is legally incorporated through the HRA. Any change to Northern Ireland's human rights arrangements risks seriously undermining the legacy of this peace process.[53]

There is much debate, therefore, over whether the repeal and replacement of the HRA – against the devolved nations' wishes (see page 18) – could be considered either constitutional or legitimately possible. There is the possibility that the Government could, for example, leave the HRA intact whilst pursuing a separate arrangement for England. However the popular rhetoric around a 'British' Bill of Rights would in this case be a misnomer, for there would then instead be a patchwork of human rights standards that differ in different parts of the country.

There are suggestions that this hierarchal approach to human rights could go even further. Martin Howe QC (a former member of the Commission on a Bill of Rights who has been closely involved in writing the Conservatives' draft Bill) has previously suggested

[50] The Scottish Government, *The Sewel Convention: Key Features*, at /www.gov.scot/About/Government/Sewel/KeyFacts
[51] Her Majesty's Government, *Memorandum of Understanding and Supplementary Agreements*, at www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf
[52] Her Majesty's Government, *The Belfast Agreement*, at www.gov.uk/government/publications/the-belfast-agreement
[53] Northern Ireland Human Rights Commission, Joint Statement of IHREC and NIHRC, 25 June 2015, at www.nihrc.org/news/detail/ni-human-rights-commission-expresses-concernover-the

that a tiered system of human rights could be used to differentiate between the protections granted to UK citizens and people of other nationalities.[54]

This proposal runs contrary to international law and is of serious concern to all those committed to safeguarding "the equal and inalienable rights of all members of the human family".[55] It also implies that human rights are a pick and mix menu of privileges, subject to change with the particular tastes of the government of the time, rather than essential and intrinsic protections.

Rule of law concerns

Numerous lawyers and judges have voiced their concern that changes to the HRA or ECHR may adversely affect access to justice in this country – a human right in its own respect. Any scenario where judges' freedom to fairly interpret human rights is curtailed, or where a Bill of Rights is restricted to particular groups of people, may lead to a situation where some people in the UK are unable to hold the state to account in a court of law.

In practice, this would mean returning to pre-2000 circumstances, before the HRA came into force, where the only recourse to justice available to victims of human rights violations was a lengthy and costly application in Strasbourg. Set amongst the wider context of Ministry of Justice restrictions to legal aid and judicial review, access to justice issues are an especially potent argument in this debate.[56]

This may also result in more violations being found against the UK in Strasbourg. This would be in direct contradiction to the Government's aim of returning power from Strasbourg to British courts. Tensions between the UK and the ECtHR would inevitably become even more strained.

The Government has also declared its interest in using a Bill of Rights as a precursor for tackling what it describes as the ECtHR's "mission creep": the principle of judges using the ECHR as a "living instrument" where it is interpreted according to present day attitudes and circumstances.[57] Such debate is not new, nor confined to the ECHR, but upon closer scrutiny does not hold up. Confining the ECHR to how it was applied in 1950 would be highly regressive, removing the rights of LGBT people, persons with disability and victims of domestic violence.

What the Government may view as 'activist' or 'interventionist' judgments are often simply the result of a judge assessing a law using a modern day understanding of human rights. What's more, they are a sign of a well-functioning relationship between a sovereign parliament and an independent judiciary, where all legislation can and should be "scrutinised by the courts".[58]

Political dynamic

Another major obstacle to any proposed changes will be the political opposition formed against it. Already each devolved administration in Scotland, Wales and Northern

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[54] The National Archives, *Commission on a Bill of Rights, Volume 1,* p.192

[55] See the United Nations, at www.un.org/en/universal-declaration-human-rights/

[56] The Guardian, *Legal aid cuts threaten our very democracy*, 1 May 2015, at www.theguardian.com/law/2015/may/01/legal-aid-cuts-threaten-very-democracy

[57] The Conservative Party, *Protecting human rights in the UK: the Conservatives' proposals for changing Britain's human rights laws*

[58] Dominic Grieve QC MP, *Speech to BPP Law School on Parliament and the judiciary*, 25 October 2012, at www.gov.uk/government/speeches/parliament-and-the-judiciary

Ireland has spoken against repeal of the HRA. In Scotland, where the Scottish National Party's electoral dominance has shone an even greater spotlight on devolution debates, pledges to oppose the UK Government's plans have been made at the highest levels.[59]

In addition to this, the Government may also find opposition from within its own party. Media reports have identified a number of back benchers – such as David Davis MP – who may resist the proposals, particularly if they affect the UK's standing under the ECHR.[60] Mr Davis is joined by previous frontbench colleagues: former Attorney-General Dominic Grieve QC MP and former Lord Chancellor Ken Clarke QC MP, both of whom are vocally opposed to changes to the UK's human rights framework.[61] With a slim House of Commons majority of just 12 seats, and the majority of political parties in favour of retaining the current arrangements, a Bill of Rights could face stiff opposition.

In the House of Lords, where the Government does not enjoy a majority, there will be even greater resistance. The shadow Lord Chancellor, Lord Falconer, has already indicated that the Chamber would be willing to throw out any measures which "strike at fundamental constitutional rights".[62] This is despite the Salisbury Convention, which has traditionally ensured that any Government action to fulfil a manifesto pledge would not be blocked by the House of Lords.[63]

Finally, the Government may also be found to lack allies at the Council of Europe, which has repeatedly chastised the UK for "delaying full implementation of Strasbourg Court judgments with respect to politically sensitive issues".[64] Though it is under no obligation to do so, the Government has previously said it will "seek recognition that our approach is a legitimate way of applying the Convention".[65] The possibility that 46 member states would formally approve the non-compliance of just one member state seems unthinkable, and could even precipitate the collapse of the entire system.

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[59] The Guardian, *Nicola Sturgeon rules out Westminster deal to scrap Human Rights Act*, 23 September 2015, at www.theguardian.com/law/2015/sep/23/nicola-sturgeon-rules-out-westminster-deal-to-scrap-human-rights-act

[60] David Davis, *In defence of the European Court of Human Rights*, 5 October 2015, at www.politicshome.com/home-affairs/articles/house/david-davis-defence-european-court-human-rights

[61] The Guardian, *Eurosceptic David Davis could oppose government on human rights reform*, 15 May 2015, at www.theguardian.com/law/2015/may/15/eurosceptic-david-davis-could-oppose-government-on-human-rights-reform

[62] The Guardian, *Attempt to scrap Human Rights Act will not get past Lords, Falconer warns Gove*, 22 May 2015, at www.theguardian.com/law/2015/may/22/falconer-scrap-human-rights-act-thrown-out-house-of-lords-gove

[63] The Salisbury Convention has arguably already been breached in the 2015-16 Parliament, when the House of Lords sent back a statutory instrument on tax credits on 26 October. BBC News, *Government to review Lords powers after tax credits defeat*, 29 October 2015, at http://www.bbc.co.uk/news/uk-politics-34651772

[64] Council of Europe, Implementation of judgments of the European Court of Human Rights 7th report, 9 November 2010, at assembly.coe.int/nw/xml/News/FeaturesManager-View-EN.asp?ID=956

[65] The Conservative Party, *Protecting human rights in the UK: the Conservatives' proposals for changing Britain's human rights laws*

THE RESPONSE

This ongoing debate has provoked a strong response from a number of different quarters. Summarised below are just some of the numerous campaigns, online petitions and wider discussions that have taken place in the media, Parliament and further afield.

NGO sector
Amnesty International UK has created a campaign that explains how the HRA acts as a crucial safety net for society's most vulnerable people.[66] It also argues that the UK's position as a defender of fundamental rights will be undermined in the international arena if it repeals the HRA. As of November 2015, Amnesty's petition, addressed to Mr Gove, has received over 89,000 signatures of the 100,000 target.

In addition to this, Amnesty has released the findings of a new survey which found broad support for human rights in the UK. Nearly 80 per cent of respondents believe that human rights have to apply to all people equally, and just three per cent of people thought that repealing the HRA should be a priority for the Government.[67]

The British Institute of Human Rights, a UK-based charity, has convened 150 organisations from across the country – including UNA-UK – as part of its Human Rights Alliance. This diverse group of voluntary organisations, service providers, think tanks, campaigning NGOs and charities, has joined forces to oppose any changes to repeal or weaken the HRA or ECHR.

Media
The British press has an unusual relationship with the UK's human rights framework. A number of the daily newspapers have themselves relied on the HRA in court,[68] yet in 2013 over 70 per cent of all media coverage of human rights used negative language and messaging.[69]

Opinion on a Bill of Rights, however, is divided. The Mirror has strongly criticised the Government's approach to the human rights debate, including a speech made by Prime Minister Cameron on the 800th anniversary of the Magna Carta.[70] It argues that instead of simply pulling from Europe human rights system, the UK should seek ways to reform the system from within.

On the other hand, the Daily Mail has vigorously campaigned against both the HRA and the ECHR, choosing to highlight a handful of examples where criminals have invoked human rights in court.[71]

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[66] See Amnesty International UK, at http://savetheact.uk/
[67] Kate Allen, *The public's message in new poll: Keep your hands off the Human Rights Act*, 9 November 2015, at www.amnesty.org.uk/blogs/yes-minister-it-human-rights-issue/public-message-new-poll-keep-your-hands-human-rights-act?utm_source=TWITTER&utm_medium=Social&utm_content=20151126173000&utm_campaign=Amnesty
[68] Independent, *The Sun launches human rights legal challenge against Metropolitan Police over phone records search*, 20 July 2015, at www.independent.co.uk/news/uk/home-news/the-sun-launches-human-rights-legal-challenge-against-metropolitan-police-over-phone-records-search-10401999.html
[69] Rachel Krys, Research-based messaging changes public support for human rights, 3 July 2015, at www.opendemocracy.net/openglobalrights/rachel-krys/researchbased-messaging-changes-public-support-for-human-rights
[70] Mirror, *Fury as David Cameron 'hijacks' Magna Carta anniversary to urge scrapping of Human Rights Act*, 15 June 2015, at http://www.mirror.co.uk/news/uk-news/fury-david-cameron-hijacks-magna-5887433
[71] The Daily Mail, *Human rights is a charter for criminals and parasites our anger is no longer enough*

Parliament
Since May's general election, a number of debates and Parliamentary questions on the UK's human rights arrangements have taken place. On 30 June, a Westminster Hall debate was held on the future of the Human Rights Act.[72] MPs from across the devolved nations and of various parties came together to debate the Government's proposals, with the majority in favour of retaining both the HRA and the ECHR.

This was followed just a few days later by a House of Lords debate on human rights and civil liberties.[73] Lord Cashman, a Labour Peer, explained why it was so important to resist any regression of the UK's human rights framework:

> "We have seen the least favoured defended – people like me in the 1980s, having no rights as a gay man – through Stonewall and through courageous individuals pursuing their cause, literally dragging their cases through the courts of the United Kingdom to prove that they could go to the court in Strasbourg and achieve a judgment. That is one of the reasons why I can now stand in the United Kingdom and almost enjoy equality."[74]

On 6 November, Parliament's newly formed Joint Committee on Human Rights – a cross-party body with members from both Houses – wrote to the Lord Chancellor requesting clarification on the Government's plans in five key areas:[75]

- Can the Govt confirm that it has officially ruled out withdrawing from the European Convention on Human Rights (ECHR)?
- Is the Govt ruling out ending the UK obligation under international law (ECHR Article 46) "to abide by the final judgment of the European Court of Human Rights in any case to which they are parties?"
- What consideration has been given to the possible impact of changes to human rights framework on Britain's standing abroad, and role of the Foreign and Commonwealth Office in the consultation?
- What are the proposals – and budget – for wider public consultation?
- What approach will the Govt take to consultation of devolved institutions and ensuring that views of different parts of the UK are heard?

In addition to this, both Labour and the Liberal Democrats have issued their own online petitions, calling on the Government to drop their plans for repealing the HRA. Over 35,000 people have signed the Liberal Democrat petition,[76] whilst Labour's campaign was launched shortly after the election by interim Party Leader Harriet Harman.[77]

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[72] See They Work For You, at www.theyworkforyou.com/whall/?id=2015-06-30a.406.1
[73] See Hansard record, at www.publications.parliament.uk/pa/ld201516/ldhansrd/text/150702-0001.htm#15070243000898
[74] See Hansard record, at www.publications.parliament.uk/pa/ld201516/ldhansrd/text/150702-0001.htm#15070243000898
[75] Joint Committee on Human Rights, *Letter to Michael Gove MP,* 6 November 2015, at www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2015/bill-of-rights-correspondence-15-16/
[76] See Liberal Democrat Party, at www.libdems.org.uk/stop-the-conservatives-from-scrapping-the-human-rights-act
[77] See Labour Party, at http://www.labour.org.uk/w/human-rights

International reaction

The UK's ongoing human rights debate has not gone unnoticed by other countries and in international fora. The UN High Commissioner for Human Rights recently expressed his concerns over the UK's plan to repeal the HRA at a UNA-UK event celebrating the UN's 70th anniversary. He stated:

> "Recently, the Government has announced plans to "scrap" the Human Rights Act. These proposals may have very significant impact on access to remedy for victims of human rights violations within the jurisdiction of the UK. If Britain – a key member of the Human Rights Council; a founding member of the UN; and a privileged, Permanent Member of the Security Council – is considering a move that will potentially weaken a key regional institution upholding fundamental human rights guarantees, this would be profoundly regrettable; damaging for victims and human rights protection; and contrary to this country's commendable history of global and regional engagement. Moreover, many other States, where civil society is currently threatened, may gleefully follow suit. Surely this is a legacy no British Government would wish to inspire."[78]

This view was reinforced by the UN Human Rights Committee in its recent review of the UK under the International Covenant on Political and Civil Rights. In its concluding observations, the Committee recommended that the UK Government:

> "Ensure that any legislation passed in lieu of the Human Rights Act 1998, were such legislation to be passed, would be aimed at strengthening the status of international human rights, including the provisions of the Covenant, in the domestic legal order and provide effective protection of those rights across all jurisdictions."[79]

And already, states with poor records on human rights have sought to highlight the UK example as justification for their own regressive action. In a speech denouncing the war crimes charges held against him at the International Criminal Court, President Kenyatta of Kenya stated:

> "The push to defend sovereignty is not unique to Kenya or Africa. Very recently, the Prime Minister of the United Kingdom committed to reasserting the sovereign primacy of his parliament over the decision of the European Human Rights Court. He has even threatened to quit that court."[80]

Earlier this year, Russian politician Alexander Tarnavsky made a veiled reference to the UK's relationship with Strasbourg:

> "It turned out that a number of decisions by the European Court of Human Rights were not being implemented on the European continent."[81]

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[78] See United Nations Association – UK, at www.una.org.uk/news/15/10/un-rights-chief-speaks-out-refugee-crisis-and-uk-plans-scrap-human-rights-act

[79] See Office of the High Commissioner for Human Rights, at tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGBR%2fCO%2f7&Lang=en

[80] See UK Human Rights Blog, at adam1cor.files.wordpress.com/2014/10/hansard-report-monday-6th-october-2014-1.pdf

[81] Yahoo News, Russia says it can override European rights court rulings, 14 July 2015, at news.yahoo.com/russia-says-override-european-rights-court-rulings-183245358.html

Russia's lower house of parliament, the Duma, has since adopted a law "giving the constitutional court the right to declare international court orders unenforceable in Russia if they contradict the constitution".[82] It has been suggested by the Lord Chancellor that this example is also being explored for the UK.[83]

[82] BBC News, *Russia passes law to overrule European human rights court*, 4 December 2015, at www.bbc.co.uk/news/world-europe-35007059

[83] House of Lords Constitution Committee, *Oral evidence session with the Rt Hon. Michael Gove MP, Lord Chancellor and Secretary of State for Justice*

CONCLUSION

For more than 60 years, the UK has been at the forefront of promoting and protecting human rights. It has helped shape a body of law which provides vital avenues of redress for all people within its borders, and served as an example to countless other states looking to strengthen their own rights systems.

Though the Government has yet to publish its draft Bill of Rights, UNA-UK believes that as yet, no one has made an effective case for abandoning this system, or explained why it cannot be strengthened through reform.

The proposals discussed so far are, at best, a divisive and costly exercise in 'rebranding' human rights in the UK. At worst they constitute the first step towards the dilution of rights and state accountability in this country.

There are three major concerns which underpin UNA-UK's position:

- First, the proposals discussed so far have politicised an issue which must be above politics, and not treated as something at the largesse of those in power.

- Second, the options discussed offer a confused legal position – often counter to international law. Human rights are universal, inalienable and indivisible and any future changes must ensure they are protected as such.

- Third, undermining the international framework of human rights in this way sets a worrying precedent for more repressive states which would eagerly follow the UK's example. It would also diminish the UK's standing in the world. The UK must live up to its reputation as a global champion of human rights by protecting them at home and making itself fully accountable.

UNA-UK is committed to the principle and practice of incorporating international obligations into domestic law. While we are not wedded to particular mechanisms, we believe the HRA and ECHR have, on balance, operated effectively. We therefore support the retention of them both. For many years the HRA and ECHR have built up crucial case law and provided people in the UK with important avenues for redress.

We support the future incorporation into law of all the UK's international human rights obligations. Regular reviews of the UK's compliance with the seven core UN human rights treaties it has ratified have repeatedly urged the Government to ensure that all of these treaties' provisions are found and upheld within domestic law.

In addition, we strongly recommend that the Government ratify the optional protocols that allow for individual petitions to be made to the relevant UN treaty bodies. This view was recently endorsed by Parliament's Joint Committee on Human Rights in its inquiry on the UK's compliance with the UN Convention on the Rights of the Child. The Government is right to point out that the Committees do not have the authority of a court, but they do offer an important avenue for redress, particularly when access elsewhere may be limited.

Ultimately, any process and potential changes to UK human rights protections should be measured by the extent to which they strengthen the voice and agency of the marginalised, and further the progression of human rights law as an essential tool with which to hold a powerful state to account.