International Law Programme
Meeting Summary

CHATHAM HOUSE
The Royal Institute of International Affairs

What Would a British Bill of Rights Mean for the UK?

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Introduction

This is a summary of an event held by the International Law Programme at Chatham House on 5 November 2015.[1] The meeting considered the implications for the UK of replacing the Human Rights Act 1998 (HRA) with a British Bill of Rights. Seven major themes arose during the discussion:

1. Is there a case for a British Bill of Rights to replace the HRA?
2. Is there a problem of judicial overreach at the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU)?
3. What would a British Bill of Rights look like?
4. Would the UK be able to remain fully committed to its other international human rights obligations, such as those under UN instruments and customary international law, in the event that the HRA was repealed?
5. What effect would repealing the HRA have on the UK's international reputation?
6. What would be the implications of a British Bill of Rights for Scotland, Wales and Northern Ireland?
7. Is access to justice under threat?

The meeting was held under the Chatham House Rule.[2]

Is there a case for a British Bill of Rights to replace the HRA?

It was suggested that the key benefit of replacing the HRA with a British Bill of Rights would be the removal of any reference to Europe in the enforcement of rights, making human rights more acceptable to the British public. A Bill would also provide an opportunity to introduce additional rights not found in the European Convention on Human Rights (ECHR) and to reinvigorate the common law as a means of enforcing human rights.

Two polls were cited in support. One, conducted by Liberty and ComRes in September 2011, found that 93 per cent of respondents thought it was important that there is a law that protects rights and freedoms in Britain.[3] The other, conducted by the *Sunday Times* and YouGov in April 2012, found that 70 per cent of respondents thought that the ECtHR has too much power.[4] A conclusion that might be drawn from the two polls read in combination was that as soon as a 'Europe' label is attached to the protection and enforcement of human rights, attitudes in the UK in terms of the support of human rights change dramatically. Indeed, Lord Lester of Herne Hill, described by some as the 'father of the HRA', has stated that the HRA's weakness is that it depends on the ECHR to define the rights and freedoms of the British people. Instead of asking what *constitutional* rights have been infringed, the HRA asks whether our *convention* rights have been infringed. Lord Lester, writing in the report produced by the Commission on a Bill of Rights, noted that other European and Commonwealth countries have their own national constitutions that protect human rights, and concluded that instead of bringing rights home, the HRA has had an alienating effect.[5] It was argued at the meeting that this supported the case for enacting a British

[1] This summary was prepared by Jack Stewart.
[2] When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.
[3] http://www.comres.co.uk/wp-content/themes/comres/poll/Liberty_HRA_Tracker_Public_Poll_Sept_2011.pdf. The sample size of the survey was 1007 people, from all parts of the UK excluding Northern Ireland and across all age ranges.
[4] https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/skmim3awcy/YG-Archives-SundayTimes-results-200412.pdf. The sample size of the survey was 1715 people, from all parts of the UK excluding Northern Ireland and across all age ranges.
[5] http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf.

Bill of Rights that would contain rights similar, if not identical, to those in the ECHR, but as the UK's own constitutional rights.

In response, the point was made that those in government and elsewhere who are driving human rights reform are not seeking to replace the HRA with something stronger and more protective of human rights. Rather, the intention is to weaken the protection of rights in the UK. It was noted that modern human rights law is a response to the atrocities of the Second World War, through the creation of international instruments such as the Universal Declaration of Human Rights 1948. Historically, it was understood that each region would use this universally recognized international instrument to draw up its own human rights instrument. The ECHR is the European version of those universal standards agreed in 1948. Moving away from universality pulls dangerously at a thread that could unravel the entire human rights project.

As for the argument that repeal of the HRA would allow common law protection of rights to develop, it was noted that before 1998 the common law failed to do this adequately. Just before the enactment of the HRA, gay members of the military were at risk of summary dismissal on grounds of sexuality. The common law did not protect those individuals; only the ECtHR in Strasbourg provided them with a remedy.[6] The HRA has significantly enhanced the protection of victims of crimes such as sexual violence and child abuse, and has not become the 'villains' charter' that some predicted at the time. The case for repeal of the HRA has failed to be made. Suggestions that something equally as good or better would replace it are baseless.

Is there a problem of judicial overreach at the ECtHR and the CJEU?

It was argued that the ECtHR has overreached itself, taking decisions on issues that are properly within the domain of the elected legislature, both in its approach to the extraterritorial application of the ECHR and in the development of its 'living instrument' doctrine. The CJEU has also exceeded its mandate in relation to its consideration of the Data Retention Directive.[7]

Treaties are interpreted in accordance with the rules of interpretation found in the Vienna Convention on the Law of Treaties (VCLT). These rules provide that a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.[8] As a supplementary means of interpretation, recourse may be had to the preparatory works of the treaty.[9] Interpretation of the ECHR should be in accordance with these principles. By contrast, the 'living instrument' approach to interpretation, whereby the ECtHR interprets the ECHR in the light of present-day conditions, significantly exceeds domestic theories regarding statute interpretation, and also goes beyond the approach set out in the VCLT.

The ECtHR was criticized not only for its methods of interpretation but also for its decisions. Article 1 ECHR provides that parties shall secure to everyone 'within their jurisdiction' the rights and freedoms defined in the Convention. Article 56 allows for the possibility that a state may extend application of the ECHR to all or any of the territories for whose international relations it is responsible. In *Bankovic v Belgium,* the ECtHR stated that the ECHR must be interpreted according to the rules in the VCLT and concluded that Article 1 sets a territorial limit on the reach of the ECHR.[10] Yet in its subsequent decision in *Al-Skeini v UK*, the ECtHR found that the UK was subject to ECHR obligations extraterritorially even

[6] See *Smith & Grady v UK*, Application Nos. 33985/96 and 33986/96, 27 September 1999.
[7] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006.
[8] Article 31 VCLT 1969.
[9] Article 32 VCLT 1969.
[10] *Bankovic and Others v Belgium and Others*, Application No. 52207/99, 12 December 2001.

in the early weeks of its operations in Basra, Iraq.[11] The decision made no reference to the Court's VCLT reasoning in *Bankovic*, and gave no explanation as to why it was effectively overruling its previous approach. As a result of *Al-Skeini*, there have been several domestic decisions holding that the ECHR is capable of applying wherever the UK armed forces operate.[12]

As for the CJEU, it was applauded for making what one speaker regarded as 'good law', for example in its fashioning of remedies to ensure compliance with matters that were unquestionably EU law. However, it was argued that since the recognition of the EU Charter of Fundamental Rights in the Treaty of Lisbon, the CJEU had assumed jurisdiction to strike down validly enacted Community legislation. The principal example was the *Digital Rights Ireland* case of 2012, in which the CJEU held that the Data Retention Directive, which had been made by the EU Council and European Parliament, was invalid.[13] As a result of this decision, there was no longer an EU law governing the matter and the UK government was forced to enact emergency surveillance legislation.[14] However, this legislation was recently held by the High Court to be inconsistent with EU law as a result of the *Digital Rights Ireland* judgment and therefore invalid.[15] It was argued that this raises issues of national security and amounted to judicial overreach by the CJEU. The court had to weigh up competing interests when taking a decision about the proportionality of the legislation made by the European Parliament and EU Council. But given that the issues involved required difficult decisions about security and privacy, in a mature democracy shouldn't such decisions be taken by the elected legislature rather than supranational courts?

In response to these points about judicial overreach, it was noted that the vast majority of applications brought against the UK before the ECtHR are struck out as inadmissible without receiving a full hearing.[16] Thus, only a few judgments of the ECtHR have led to problems at the domestic level, and even in those cases the judgments have often led to positive improvements in domestic law. One example is the outlawing of corporal punishment.[17] It was further argued that even in the cases on prisoners' voting rights, had there been swift and decisive action by the UK government at the time of the original judgment in 2005[18] this would not be the politically controversial issue that it is today.

It was suggested that the ECtHR's 'living instrument' approach to interpretation means that the ECHR is not frozen in time. Rather, it is applied according to evolving standards, with the result that it has made a huge difference to people's lives today. Two notable examples are the outlawing of the English law defence of reasonable chastisement in *A v UK*,[19] and the decision in *Smith & Grady v UK* referred to earlier, in which the Court found that the discharge of personnel from the Royal Navy on the basis of their sexual orientation was a breach of their right to respect for their private life under Article 8 ECHR. It was noted that at the time of drafting the ECHR, homosexuality was a criminal offence in most countries. Without the 'living instrument' approach, the ECHR would be of little worth to the people that rely on it today.

It was suggested that the tension between the UK courts and Strasbourg was essentially a problem confined to the past: the ECtHR now gives significant regard to the judgments of UK domestic courts, and

[11] *Al-Skeini and Others v United Kingdom*, Application No. 55721/07, 7 July 2011.
[12] See *Smith and Others (FC) v the Ministry of Defence* [2013] UKSC 41; *Serdar Mohammed and Others v Secretary of State for Defence* [2015] EWCA Civ 843.
[13] *Digital Rights Ireland Ltd v Minister for Communications*, Marine and Natural Resources and Others, C-293/12 and C-594/12, 8 April 2014.
[14] The Data Retention and Investigatory Powers Act 2014.
[15] *David Davis and Others v Secretary of State for the Home Department*, [2015] EWHC 2092 (Admin).
[16] http://echr.coe.int/Documents/Facts_Figures_2011_ENG.pdf.
[16] *Tyrer v UK*, Application No. 5856/72, 25 April 1978; A v United Kingdom, Application No. 100/1997/884/1096, 23 September 1998.
[17] See *A v United Kingdom*, Application No. 100/1997/884/1096, 23 September 1998.
[18] *Hirst v UK (No. 2),* Application No. 74025/01, 6 October 2005.
[19] *A v United Kingdom*, Application No. 100/1997/884/1096, 23 September 1998.

UK courts have tended to adopt a more flexible approach to the extent to which they must follow ECtHR judgments. Moreover, the mere fact that judges make decisions that some politicians do not like or agree with is not of itself a reason to remove these issues from the jurisdiction of judges. At the time of the Second World War, oversight of human rights by politicians did not work. Any step in that direction today should be resisted. There is nothing unusual about an international court discharging its mandate in relation to the obligations of a treaty to which the UK is a party. There are many examples of international courts doing so. The ECtHR is not special in this regard.

What would a British Bill of Rights look like?

There was little agreement at the meeting as to what a British Bill of Rights would look like. On the one hand, it was suggested that the essential change would simply be to remove the word 'Europe'. It was stated that the specific reference in section 2 of the HRA, which requires UK courts to take account of judgments of the ECtHR, could be changed either by removing this requirement altogether or by adding to the list the judgments of, for example, the CJEU and other constitutional courts. The argument was made that it would be preferable to allow the UK courts to treat as persuasive authority the decisions of international courts and courts of other national jurisdictions, much like the Supreme Court does currently. It should be the quality of the reasoning, and not whether the court appears in section 2 or not, that should determine whether a particular judgment should be followed.

A further change suggested was to section 3 of the HRA, which currently allows UK courts, so far as it is possible to do so, to read and give effect to domestic legislation in a way that is compatible with the ECHR. It was argued that unreasonable interpretations should not be imposed on domestic statutes in order to make them compliant with the ECHR.

More radical change?

In response, it was argued that the real intention of the government was to change how we interpret human rights, in order to change the results of cases decided under the ECHR. It was observed, as an example, that ministers wish to make it easier to deport foreign nationals who have committed crimes in the UK. In order for this to be achievable, the Bill would necessarily have to address the interpretation of rights and restrict some rights for certain categories of people. If these are the true aims of the government, to achieve them would necessarily entail politicians telling judges how to interpret rights for people in those categories. This is a matter of serious concern. Provisions of the ECHR that protect foreign nationals from deportation if this puts them at risk of torture provide protection for victims of trafficking. Several participants emphasized that the concept of universality was integral to the human rights movement since its establishment after the Second World War. Any attempt to restrict the enjoyment of rights based on the identity or conduct of the beneficiary is a threat to this principle.

The question of how a new Bill of Rights could affect the application of human rights law to the armed forces abroad was also raised, with discussion of the litigation against the UK government regarding its actions in Iraq in 2003. Extraterritoriality is likely to be a big issue in the debate over the reform of the HRA, particularly given the lack of coherence in the case law in this area.

An opportunity for new rights

While both speakers considered that the introduction of new rights into UK law would be a positive step, there was disagreement as to whether a Bill of Rights would actually do this. Possible suggestions for new rights included the right to a jury trial or a free-standing right to equality, as the UK has not ratified

Protocol 12 to the ECHR on equality and non-discrimination.[20] It was suggested that new rights could be introduced into a Statute of Union that would consolidate devolution legislation. Another alternative was to retain the HRA and instead introduce a Bill of Rights Additional Provisions Act.

Would the UK be able to remain fully committed to its other international human rights obligations?

It was observed that if the intentions of the government are to facilitate the deportation of non-British nationals who have been convicted of a crime in the UK but who are either at risk of torture or ill-treatment abroad if deported or who have family in the UK, other international obligations to which the UK is subject will also be relevant. ECHR obligations applicable in this area are similar to the provisions of the UN Convention against Torture, under which it is prohibited to expel, return or extradite a person to another state where there are substantial grounds for believing that person would be in danger of being subjected to torture.[21] Similarly, the UN Convention on the Rights of the Child gives primacy to the best interests of the child in decisions that affect them, as does ECtHR jurisprudence on whether the deportation of a foreign criminal would breach the right to respect for family life contained in Article 8. It was noted that these two treaties are among the most widely ratified across the world. Concerns were raised that if the UK was to attempt to loosen the constraints of ECtHR jurisprudence on these matters when enacting a British Bill of Rights, it would also risk the UK acting incompatibly with its other international obligations under these and other treaties to which it is a party.

However, this characterization of the Bill's objectives and its consequences was questioned. In this respect, it was noted that there is support for a British Bill of Rights from individuals across the whole political spectrum, and that the proposals for reform may not be as radical as feared by some. It was also argued that simply because there is an international obligation on the UK, it does not inevitably follow that the UK must abide by that obligation in all circumstances; it is for parliament to decide whether or not to comply with such an obligation.

What will be the effect on the UK's international reputation?

The effect on the UK's reputation will depend both on what is in the Bill and on the real driving force behind it. If, as was suggested by some during the meeting, the main changes are simply to remove references to Europe, it was accepted that there would be little damage to the UK's reputation because almost no case would be decided differently. However, if some of the more radical changes outlined above are proposed, two key risks were highlighted. First, it could lead to the UK withdrawing from the ECHR because it would be at odds with the operation of the ECHR. Second, many countries across the world would relish the opportunity to copy a model of human rights in which politicians tell judges both how to interpret the law on human rights and also who the beneficiaries of particular rights should be. It was argued that if the UK attempts to distance itself from its international human rights obligations, its reputation would decline and other countries could follow suit.

In response, it was noted that the reputation of a country is highly dependent on context, and that inevitably there will be competing views about whether the actions that a particular state takes are correct. Current speculation about possible damage to the UK's reputation should not be given undue weight, and the issue should instead be considered on its merits. It was noted that many countries are

[20] Protocol No. 12 to the ECHR: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680080622.
[21] Article 3 UNCAT.

under obligations with which it may be awkward to comply, but that it is in the UK's interest to foster a climate in which such obligations are upheld.

There was general regret regarding the UK's lack of compliance with the ECtHR's decision on prisoner voting rights. It was argued that a British Bill of Rights could in fact be used to induce members of parliament to agree to act on such issues, and therefore to increase domestic compliance with international obligations.

What would be the implications of a British Bill of Rights for Scotland, Wales and Northern Ireland?

The majority of people in Northern Ireland, Scotland and Wales appear satisfied with the HRA. One speaker noted the positive impact that the HRA has had on policing in Northern Ireland, particularly during marching season, when police officers had found that the requirement to consider the proportionality test provided a useful decision-making framework.

It was suggested that the introduction of a new British Bill of Rights ought to be developed as part of a more coherent approach to the UK's constitution. Under the Sewel Convention, it would be wrong to make such changes without the agreement of the devolved institutions. One solution proposed was that each country, including England, could have a distinct charter of rights in relation to its devolved functions. Examples of this elsewhere include Germany, where each of the *Länder* has its own distinct charter of rights; or Victoria in Australia, which has its own Charter of Human Rights and Responsibilities. Scotland and Wales have both enacted their own legislation adding new rights, such as due regard to be paid to the rights of the child. It is therefore a conceivable model for them to maintain the same standards while England has its own charter of rights. However, it was argued that it may not be sensible to have a system where rules on issues such as surveillance may be different purely as a result of crossing one of the UK's internal borders.

Is access to justice under threat?

Several participants noted that whatever form it took, even the finest Bill of Rights would be worthless if the protections contained within it were not accessible because of the rising costs of access to justice. It was noted with concern that changes to legal aid risk denying justice to those who most need it.