

Response to Commission on a Bill of Rights discussion paper: Do we need a UK Bill of Rights?

Introduction

We are responding to this consultation in our capacities as Director (Professor Philip Leach) and Senior Research Fellow (Alice Donald) at the Human Rights and Social Justice Research Institute, London Metropolitan University. Our submission is in two parts.

The first part addresses the following questions posed in the discussion paper:

- (1) do you think we need a UK Bill of Rights?
- (2) what do you think a UK Bill of Rights should contain?
- (3) how do you think it should apply to the UK as a whole, including its four component countries of England, Northern Ireland, Scotland and Wales?

It is based largely on research we conducted between 2008 and 2010 on behalf of the Equality and Human Rights Commission (EHRC). Specifically:

- ***Developing a Bill of Rights for the UK:***¹ this research examined the processes that had been used to develop bills of rights (or proposed bills) in other common law jurisdictions (principally, Australia, Canada, New Zealand and Northern Ireland). Drawing upon this evidence, it aimed to identify key principles that should underpin the development of a UK Bill of Rights.

¹ A. Donald with the assistance of P. Leach and A. Puddephatt (2010), *Developing a Bill of Rights for the UK*, Research Report No. 51, Manchester: Equality and Human Rights Commission; available at: http://www.equalityhumanrights.com/uploaded_files/research/developing_a_bill_of_rights_for_the_uk_report_51.pdf.

- ***Human Rights in Britain since the Human Rights Act 1998: a critical review***:² this research identified and reviewed evidence relating to the implementation and impact of the HRA, particularly in the context of public services. It was commissioned to determine the scope of the EHRC's statutory Human Rights Inquiry.³

In addition, Annex 1 relates to this part of the submission and proposes key principles which should underpin the creation of a Bill of Rights based upon the evidence from experience in other jurisdictions.

The second part of the submission addresses the other part of the Commission's mandate, which is to advise the government on reform of the European Court of Human Rights.

PART ONE: DEVELOPING A UK BILL OF RIGHTS

Question 1: Do you think we need a UK Bill of Rights?

Making the case for a new UK Bill of Rights

A key finding of our research on developing a Bill of Rights for the UK was that a convincing case has not yet been made as to why the UK needs one. It is striking that political discussion of this topic rarely acknowledges that the HRA is, by most authoritative definitions, itself a Bill of Rights since it was designed as a higher law to which other law and policy should conform. Internationally, the terms 'Human Rights Act', 'Charter of Rights' and 'Bill of Rights' are used interchangeably. The HRA is widely referred to as a 'Bill of Rights', including by constitutional experts,⁴ UK

² A. Donald, P. Leach and J. Watson (2009) *Human Rights in Britain since the Human Rights Act 1998: a critical review*, Equality and Human Rights Commission Research Report No. 28, Manchester: Equality and Human Rights Commission; available at http://www.equalityhumanrights.com/uploaded_files/human_rights_in_britain_since_the_human_rights_act_1998_-_a_critical_review.pdf.

³ See <http://equalityhumanrights.com/human-rights/our-human-rights-inquiry/>.

⁴ P. Alston (1999) *Promoting Human Rights through Bills of Rights*. Oxford: Oxford University Press, p.11

government ministers⁵ and by actors in other jurisdictions who seek to emulate the UK legislative model.⁶

Despite this, much political (and especially Conservative) discourse about the need for either a 'British' or 'UK' Bill of Rights is predicated on the assertion that we do not already have one. This assertion obscures both the origins and the nature of the HRA and produces ill-informed debate about the options available. This is not to suggest that a convincing case **could** not be made for developing a new Bill of Rights; for example, one that affords domestic recognition to economic and social rights. However, we suggest that a convincing case has not been articulated by those who have initiated the process of reform - including the Labour government in respect of its consultation in 2009 on a 'Bill of Rights and Responsibilities'.⁷

Creating a sense of popular ownership

The Attorney General, Dominic Grieve, has stated that one of the most compelling reasons given for introducing a new Bill of Rights is 'so that all British citizens of different backgrounds feel ownership of it'.⁸ This is a laudable aim. It places a considerable onus on the process of creating a UK Bill of Rights to help engender that sense of ownership. This must first entail a clear and honest analysis of whether the HRA has enjoyed such a sense of public ownership, and if not, why not.

The unpopularity of the HRA is widely assumed but should not be over-stated or misconstrued. In broad terms, evidence from quantitative and qualitative surveys over the past decade suggests that negative attitudes towards human rights and/or the HRA are not immutable and that people tend to become more positive about human rights and the HRA the more they know about them.⁹ Polling data suggests that hostility towards the HRA itself is not due to its content but to the way in which is

⁵ Joint Committee on Human Rights (2008) *A Bill of Rights for the UK?* Twenty-ninth report of Session 2007-08, Vol. II, Oral and Written Evidence, London: The Stationery Office, Ev 127

⁶ National Human Rights Consultation Committee (2009) *National Human Rights Consultation Report*, Canberra: Commonwealth of Australia, p. 263

⁷ *Developing a Bill of Rights for the UK*, pp. 59-65

⁸ Dominic Grieve, 'Liberty and Community in Britain', Speech for Conservative Liberty Forum, 2 October 2006

⁹ For an analysis of this evidence, see *Human Rights in Britain since the Human Rights Act 1998: a critical review*, pp. 161-183.

perceived to be implemented so as to protect ‘undesirable’ or ‘undeserving’ groups more than others.¹⁰ There is evidence that the specific rights enshrined in the HRA are almost universally popular. For example, in the Liberty Human Rights Act Poll in 2010, 95 per cent of respondents believed the right to a fair trial is vital or important; 94 per cent believed that respect for privacy and family life is vital or important; and 96 per cent supported the existence of a law ‘that protects rights and freedoms in Britain’.¹¹ A survey commissioned by the Ministry of Justice produced similar results.¹² This survey also indicated very low levels of public awareness about the Act.¹³

The relative unpopularity and lack of public understanding of the HRA have been attributed to several factors. These include the lack of public engagement in its creation, combined with the absence until 2007 of a commission to promote understanding and implementation of it in Britain.¹⁴ Other factors are a lack of consistent government leadership to champion and explain the HRA; hostile and erroneous reporting from some sections of the press; and a political discourse which has at times distorted the purported impact of the Act or made it a scapegoat for unrelated administrative failings.¹⁵

The Commission’s mandate is to advise on a Bill of Rights that ‘incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties’. It is not evident why a new Bill of Rights that fulfils this mandate will necessarily enjoy a greater sense of popular ownership than the HRA, unless these underlying reasons for the unpopularity and misunderstanding of the

¹⁰ *Human Rights in Britain since the Human Rights Act 1998: a critical review*, pp. 174-77

¹¹ See http://www.comres.co.uk/polls/Liberty_HRA_poll_27.09.10.pdf

¹² Ministry of Justice (2008) *Human Rights Insight Project*, London: MoJ

¹³ *Human Rights Insight Project*, p.27

¹⁴ A. Donald, P. Leach and J. Watson (2009) *Human Rights in Britain since the Human Rights Act 1998: a critical review*, Equality and Human Rights Commission Research Report No. 28, Manchester: Equality and Human Rights Commission, pp.178-81

¹⁵ See, for example, F. Klug (2007) ‘A Bill of Rights: Do we need one or do we already have one?’ Irvine Human Rights Lecture 2007, Human Rights Centre, University of Durham, pp. 12-14; F. Klug (2009) “‘Solidity or Wind?’ What’s on the Menu in the Bill of Rights Debate?’, *The Political Quarterly*, 80, 3: 420-26; Joint Committee on Human Rights (2006) *The Human Rights Act: The DCA and Home Office Reviews*, Thirty-second report of Session 2005–06.

Act are addressed. Certainly, cosmetic ‘rebranding’ of the Act (for example, as being based on ‘British’ values) is unlikely to shift public attitudes or understanding and would, in any event, be an insufficient reason to embark on such a significant process of constitutional change.

The conduct of public debate about human rights and the HRA

Participants in our research argued that the political debate about a new UK Bill of Rights has generally not been commensurate with the gravity and complexity of the project. Many expressed disquiet about the prevalence of language and stories which had at times distorted the alleged effects of human rights and the HRA; for example, by suggesting that it benefits only (or disproportionately) unpopular or ‘undeserving’ groups.¹⁶ These observations were made in 2009-2010. There are few grounds for revising this assessment in 2011. Indeed, opportunistic attacks on the HRA as a contributory cause of the English riots of August 2011 might be seen as a nadir of domestic human rights debate.¹⁷ Recent months have also seen the erroneous assertions by senior Conservative politicians that the HRA bars police from publishing photographs of fugitive criminals¹⁸ and that an illegal immigrant could not be deported because he had a cat.¹⁹

Much political discussion about the relationship between the UK and the European Court of Human Rights (ECtHR) has also been tendentious. This has been most evident in debate about the appropriate response to the ECtHR’s decisions on the right of convicted prisoners to vote.²⁰ This debate has come at a time when some parliamentarians and commentators have made the highly unusual move of calling

¹⁶ See also Department for Constitutional Affairs (2006) *Review of the Implementation of the Human Rights Act*, pp 29–30.

¹⁷ See, for example, ‘David Cameron: Human rights in my sights’, *Sunday Express*, 21 August 2011.

¹⁸ *PM statement on violence in England*, 10 August 2011

¹⁹ See <http://www.politics.co.uk/comment-analysis/2011/10/04/theresa-may-speech-in-full>.

²⁰ *Hirst v UK* (74025/01, 6.10.2005); *Greens and MT v UK* (60041/08 and 60054/08). For example, the Daily Express referred to the ‘unelected and alien tribunal’ in Strasbourg (‘The Prime Minister must defy the European Court’, 11 February 2011), ignoring the fact the judges of the European Court are elected while domestic judges are largely not democratically accountable. The populism of much political debate was exemplified by David Cameron’s comment that complying with the ECtHR judgments made him feel ‘physically sick’.

for the UK to contemplate breaking treaty obligations²¹ or even withdraw from the European Convention on Human Rights (ECHR) altogether.²² Still other commentaries have greatly distorted the purported cost to the UK of complying with Strasbourg judgments.²³

Dominic Grieve noted in October 2011, 'We need to challenge the myths, some of them ludicrous, that have grown up about human rights, particularly in some sections of the media'.²⁴ His observation underscores the importance in the UK Bill of Rights process of providing impartial information and promoting measured debate about **existing** human rights standards and mechanisms, as well options for new ones. A key lesson from other jurisdictions is that informed public debate about the available options and their relative merits is a prerequisite for creating a new human rights instrument which hopes to enjoy a sense of popular ownership and democratic legitimacy.²⁵

Proposal for a concordat

A proposal that emerged from our research on developing a Bill of Rights was for a concordat that would bind all parties that signed it to certain rules of engagement; principally, an agreement not to use language or bring stories into the public domain that knowingly distort the purported impact of human rights and the HRA. This would help to ensure that all parties buy into a process which is avowedly educative and

²¹ See, e.g., David Davis MP, 'Today's vote on prisoners' rights is an historic opportunity to draw a line in the sand on European power', Conservative Home, 10 February 2011

²² The Policy Exchange paper *Bringing Rights Back Home: making human rights compatible with parliamentary democracy in the UK* describes the ECtHR (in keeping with all supra-national institutions) as 'remote, unaccountable and, therefore, comparatively inefficient' (Pinto-Duchinsky 2011: 18), suggesting it cannot satisfactorily be reformed. See also Lord Hoffmann (2009) 'The Universality of Human Rights', Judicial Studies Board Annual Lecture London: Judicial Studies Board.

²³ A report for the Taxpayers' Alliance estimated the total cost of complying with judgments at £17.3 billion to date and the cost of the "compensation culture" fostered by the Court' at a further £25 billion. See L. Rotherham (2010) *Britain and the ECHR*, London: Taxpayers' Alliance. The report is methodologically flawed; it extrapolates from analysis of relatively few cases and includes compensation claims that are not related to human rights.

²⁴ 'Attorney General: European Convention on Human Rights - current challenges', 24 October 2011, Dominic Grieve QC MP speaking at Lincoln's Inn, London; available at <http://www.attorneygeneral.gov.uk/NewsCentre/Speeches/Pages/AttorneyGeneralEuropeanConventiononHumanRights%E2%80%93currentchallenges.aspx>.

²⁵ *Developing a Bill of Rights for the UK*, pp. 45-47

non-partisan and does not trade in myths or seek to use the Bill of Rights debate as a proxy for unrelated issues. Parties which declined to sign the concordat would be answerable to the public for their conduct.

Public enthusiasm for a new Bill of Rights

Opinion surveys suggest that support for a new Bill of Rights in the abstract is unproven.²⁶ Moreover, there is no discernible civil society momentum behind the idea of a UK Bill of Rights as presently articulated. This contrasts with the processes in, for example, Australia and Northern Ireland, where civil society networks were influential in initiating, energising and informing Bills of Rights processes and remain instrumental in lobbying for the implementation of the outcomes of consultation.²⁷ As the Joint Committee on Human Rights noted in 2008, any UK government will have an 'uphill task to stimulate and inspire public debate' on the issue.²⁸ This was certainly the experience of the Labour government in its consultation on a Bill of Rights and Responsibilities, which took place largely unnoticed by the media and the wider public.²⁹

In summary, our research suggests that current circumstances for a process to create a UK Bill of Rights are unfavourable. A convincing case has not yet been made as to why the UK needs a new Bill of Rights when it already has one in the HRA. Public enthusiasm for the project is uncertain and there is no

²⁶ Evidence from polling data is contradictory. In 2006, an ICM *State of the Nation* survey reported that 77 per cent of those polled agreed that 'Britain needed a bill of rights to protect the liberty of the individual'. However, the Hansard Society's 2008 *Audit of Political Engagement* found that the issue of 'whether Britain needs a new Bill of Rights' scored third lowest out of 11 constitutional issues for public understanding at 28 per cent. The 2006 ICM poll gauged support for a bill of rights in the context of specific rights it might contain, including, for example, the right to hospital treatment on the National Health Service within a reasonable time (supported by almost 90 per cent). The Hansard survey did not discuss specific rights; it found that, compared with other constitutional issues, the question of whether Britain needs a new bill of rights is 'among the most technical and the vaguest' and lacks 'real resonance, at least when stated in these terms'. See Joseph Rowntree Reform Trust (2006) *State of the Nation 2006: summary results*, York: JRRT; and Hansard Society (2008) *Audit of Political Engagement 5: the 2008 Report with a special focus on the constitution*, London: Hansard Society.

²⁷ *Developing a Bill of Rights for the UK*, pp. 10-20

²⁸ Joint Committee on Human Rights (2008) *A Bill of Rights for the UK?* Twenty-ninth report of Session 2007-08, Vol. 1. Report, together with formal minutes, London: The Stationery Office, p.79.

²⁹ *Developing a Bill of Rights for the UK*, pp. 59-65

civil society momentum behind the idea. Much political and media debate about human rights is tendentious and partisan and is unworthy of a project of such gravity and complexity.

Question 2: What do you think a UK Bill of Rights should contain?

The principle of non-regression

Our research on developing a UK Bill of Rights did not address directly the question of what a new bill should contain. However, our findings in relation to Bills of Rights processes in other jurisdictions have implications for the content of any future UK Bill. A key finding was that **all** Bills of Rights created in democracies in the post-war era have been designed either to supplement existing human rights protection or to incorporate international human rights into domestic law – in other words, to expand rather than reduce human rights protection.³⁰ No Bill of Rights process has permitted even the **possibility** of regression, either in terms of standards; mechanisms and institutions for enforcement; or the groups protected by the law. The way in which governments initiated reform, either through a draft bill and/or through the terms of reference or mandate established for a participatory process of consultation, expressly excluded this option.³¹

The majority of participants in our research argued that national Bills of Rights derive an essential element of their legitimacy from their explicit or implicit foundation in international human rights treaties.³² For example, the Canadian Charter of 1982 built upon the 1960 Bill of Rights, itself largely based on the International Covenant on Civil and Political Rights (ICCPR). The New Zealand Bill of Rights Act 1990 expressly affirmed New Zealand's commitment to the ICCPR. The South African Bill built upon the Canadian Charter, the ICCPR and the International Covenant on Economic and Social Rights (ICESCR). Bills of Rights which have been enacted or recommended at federal or state/territory level in Australia have drawn explicitly on the ICCPR and in some cases the ICESCR, as well as on models of enforcement from jurisdictions including the UK.

³⁰ *Developing a Bill of Rights for the UK*, pp. 22-25

³¹ For analysis of the terms of reference or mandates of the processes in South Africa, Australia and Northern Ireland, see *Developing a Bill of Rights for the UK*, pp. 23-24.

³² *Developing a Bill of Rights for the UK*, p.23

This trend in the way that governments have initiated reform is consistent with the principle of non-regression – a principle established by, among others, United Nations bodies that monitor states’ compliance with their international human rights obligations. This broadly requires that standards for the protection of the individual that have already been adopted should not be undone at a later date.³³ This principle has gained cumulative force as successive jurisdictions have, building on each other’s experience and on international human rights treaties, enacted national Bills of Rights to strengthen human rights protection.

In summary, a UK Bill of Rights that narrowed human rights protection - either in terms of standards; mechanisms and institutions for enforcement; or the groups protected by the law - would disturb norms established across the democratic world and set a damaging precedent internationally.

Question 3: how do you think it should apply to the UK as a whole, including its four component countries of England, Northern Ireland, Scotland and Wales?

Legal and constitutional obstacles

Devolution presents potential obstacles to the creation of a UK Bill of Rights.³⁴ If the HRA were amended or repealed and/or if a Bill of Rights was enacted covering the devolved jurisdictions, the devolution statutes would need to be amended.³⁵

JUSTICE notes that any such decision would almost certainly require the consent of the Scottish Parliament and the Northern Ireland Assembly, as well as being likely to breach both the Belfast (Good Friday) Agreement and treaty obligations owed to the Republic of Ireland as a guarantor of that Agreement.³⁶ David Russell, Deputy Director of the Northern Ireland Human Rights Commission (NIHRC), has argued that the operating procedures of the Northern Ireland Assembly may, in addition, require concurrent majorities from both main communities (British unionist and Irish

³³ See, for example, Committee on Economic, Social and Cultural Rights (1990) *The nature of States parties’ obligations (Art 2, par 1)*. 14/12/90, CESCR General Comment No 3, para. 9.

³⁴ For an authoritative overview of the legal, constitutional and political issues created by devolution, see JUSTICE (2010) *Devolution and Human Rights*, London: JUSTICE.

³⁵ *Devolution and Human Rights*, p.3

³⁶ *Devolution and Human Rights*, p.23

nationalist) represented in the Assembly for the motion of consent to pass.³⁷ He notes that, 'There is a risk therefore that a UK Bill would be vetoed by the Northern Ireland Assembly ... thus forcing the Westminster government to take the unpalatable decision of trying to force legislation through in accordance with the doctrine of parliamentary sovereignty'.

The intractability of these problems is a matter of debate. Former Labour ministers spoke of 'tricky' drafting issues, rather than matters of fundamental principle, arising from devolution.³⁸ Conversely, JUSTICE argues that, 'Amendments to the HRA or legislating for a bill of rights would be dangerous and risky – to the protection of rights, to the constitution of the UK, and to the Union itself'.³⁹ Clearly, at a minimum, these legal and constitutional issues must be negotiated with caution and sensitivity.

Political obstacles

The creation of a new UK Bill of Rights risks inflaming sections of opinion in the devolved nations. In Northern Ireland, sensitivities are particularly acute. Members of the unionist community will not wish Northern Ireland to be excluded from any process designed to reinforce 'British' values or identity, while Irish (and Scottish) nationalists will not want to be included.⁴⁰ David Russell of the NIHRC noted that in Northern Ireland, 'the very notion that any UK Bill should reinforce a sense of Britishness is geographically nonsense and politically loaded'. There has been more than a decade of widespread consultation and deliberation on a Northern Ireland Bill of Rights which builds on the ECHR and HRA.⁴¹ Polling data has consistently shown cross-community support for a Bill of Rights reflecting the particular circumstances of Northern Ireland (though not cross-party consensus as to its contents).⁴² In Scotland, the politically contested nature of devolution also creates a difficult environment in which to pursue a UK or British Bill, which could become a proxy for other issues relating to the Union.

³⁷ *Developing a Bill of Rights for the UK*, p.75

³⁸ *A Bill of Rights for the UK?*, p.28

³⁹ *Devolution and Human Rights*, p.27

⁴⁰ *Devolution and Human Rights*, pp. 24-25

⁴¹ This is described in detail in *Developing a Bill of Rights for the UK*, pp.17-21.

⁴² For a summary of polling data, see *Developing a Bill of Rights for the UK*, pp.18-19.

Certainly, there is an onus on the consultative process to create a UK Bill of Rights to take account of the sensitive and dynamic context created by devolution. Participants in our research suggested that this should involve tailored consultations in each devolved nation, with terms of reference and a methodology agreed between the UK Government and the devolved authorities – an objective the Labour Government’s 2009 consultation on a Bill of Rights and Responsibilities singularly failed to achieve.⁴³ Participants stated that the absence of clear terms of reference for a UK-wide debate about a Bill of Rights (such as that contained in the NIHRC’s mandate), combined with the lack of an agreed methodology for conducting consultation or deliberation, had exacerbated a sense of unease and disengagement in the devolved nations. Our findings suggest that the process of creating a UK Bill of Rights should be premised on the principle that choice should reside with the devolved assemblies and that the process should respect their competency and self-determination.

In summary, devolution presents considerable legal, constitutional and political obstacles that, while they may not be insuperable, must be negotiated sensitively if UK parties are to progress the Bill of Rights project. Participants in our research reported scepticism and unease in the devolved nations about the competing political agendas underpinning the UK Bill of Rights project.

PART TWO: REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS

As regards the reform of the European Court of Human Rights, we would refer you to three documents:

- (i) The letter from seven NGOs⁴⁴ to the Commission of 26 October 2011;
- (ii) Joint Statement on the United Kingdom’s Priorities and Objectives for its Chairmanship of the Committee of Ministers of the Council of Europe, 4 November 2011;⁴⁵ and

⁴³ *Developing a Bill of Rights for the UK*, pp.77-81

⁴⁴ AIRE Centre, Amnesty International, European Human Rights Advocacy Centre (EHRAC), Interights, International Commission of Jurists, Human Rights Watch, JUSTICE and Open Society Justice Initiative. Philip Leach is Director of EHRAC.

- (iii) P. Leach, 'Opinion: On Reform of the European Court of Human Rights', [2009] EHRLR 725-735 (which is attached).

We adopt the points made in the documents referred to above, and accordingly will not repeat them in this submission. In this document, we would wish, briefly, to emphasise the following points:

- The Court plays a vital role as a 'safety net' for the victims of human rights violations across the continent. Although, in the domestic context, there may be a tendency to view the Strasbourg Court 'through a UK lens' the importance of the court as a **European** institution should not be forgotten. It was established directly as a response to the atrocities committed during World War Two, and since it was established in 1959 it has been critical in upholding the rights of some of the most vulnerable people in Europe, including: for example, Roma victims of discrimination; Chechen and Kurdish families whose relatives have been 'disappeared' by state security forces; and detainees held in appalling conditions and/or subjected to ill-treatment. More recently, the Court has made significant decisions protective of the victims of rape,⁴⁶ domestic violence,⁴⁷ domestic servitude⁴⁸ and human trafficking.⁴⁹ The Court has defended the freedom of speech of journalists, and the independence of the media, in the face of repressive regimes, and it has sought to uphold democratic freedoms by sanctioning states for closing down political parties or for preventing peaceful protest. These are just some

⁴⁵ Statement adopted by: AIRE Centre, Amnesty International, European Human Rights Advocacy Centre (EHRAC), Helsinki Foundation for Human Rights, Interights, International Commission of Jurists, Human Rights Watch, JUSTICE and Liberty. Available at: www.londonmet.ac.uk/fms/MRSite/Research/HRSJ/EHRAC/NGO%20joint%20statement%20on%20UK%20Chairmanship%20priorities.pdf.

⁴⁶ *MC v Bulgaria*, ECtHR, Application No. 39272/98, Judgment of 4 December 2003

⁴⁷ See, e.g., *Opuz v Turkey*, ECtHR, Application No. 33401/02, Judgment of 9 June 2009; *E.S. and others v Slovakia*, ECtHR, Application No. 8227/04, Judgment of 15 September 2009; *A v Croatia*, ECtHR, Application No. 55164/08, Judgment of 14 October 2010; *Hajduová v Slovakia*, ECtHR, Application No. 2660/03, Judgment of 30 November 2010.

⁴⁸ *Siliadin v France*, ECtHR, Application No. 73316/01, Judgment of 26 July 2005.

⁴⁹ *Rantsev v Cyprus and Russia*, ECtHR, Application No. 25965/04, Judgment of 7 January 2010.

examples of the Court's work. The short point here is that we need to take a long view, in order that the independence and integrity of the Court is maintained.

- The principle of subsidiarity is often referred to, but rarely clearly defined. It should mean that the domestic authorities and institutions have the primary role of upholding human rights standards. However, where they fail to do so, the European Court has an important role to play. Subsidiarity should not be interpreted as meaning 'the European Court should not interfere with our national decisions'.
- The European Court has consistently allowed states a 'margin of appreciation', the breadth of which is variable, depending on the particular context. Where a particularly important facet of an individual's existence or identity is at stake the margin allowed to the state will be more restricted, but where cases are considered to raise sensitive moral or ethical issues, the margin will be wider.⁵⁰
- The European Convention on Human Rights is interpreted by the European Court as a 'living instrument'. This evolutive approach is an essential feature of the mechanism, allowing the Convention rights to be applied in the context of present day conditions (their meaning is not limited to the conceptions of those who drafted the Convention in the 1940s). An evolutive approach is of course also well known to the common law.⁵¹
- Domestic courts are not bound, as such, by the decisions of the European Court, they are simply required by section 2 of the Human Rights Act 1998 to 'take account' of Strasbourg decisions.⁵² This has always provided domestic judges with discretion to decide whether there are reasons *not* to follow a previous European Court judgment on point.

⁵⁰ Two examples: *Evans v UK*, No. 6339/05, Judgment of 10 April 2007; *A, B & C v Ireland*, No. 25579/05, Judgment of 16 December 2010.

⁵¹ See, for example, Baroness Hale, 'Common Law and Convention Law: The Limits to Interpretation' (2011) EHRLR 534-543.

⁵² See F. Klug & H. Wildbore, 'Follow or Lead? The Human Rights Act and the European Court of Human Rights' (2010) 6 EHRLR 621-630.

- Although the European Court may on occasion take a different line to the domestic courts in the UK, it is highly respectful of the decisions and reasoning of the domestic courts, and, in the great majority of cases, it follows the line they have taken.⁵³
- Further reforms to the European Court system are undoubtedly needed, to reduce the backlog of 153,000 cases and to speed up the processing of cases. Many reforms have been adopted in recent years, including allowing single judges to rule on inadmissible cases, adding a further admissibility criterion, adopting a new case priority procedure and applying the pilot judgment procedure to situations arising from systemic human rights violations. There needs to be an evidence-based approach to the analysis of the effectiveness of these reforms, and also of any reforms proposed in future. One of the greatest problems facing the Court is the number of similar cases being brought (sometimes in their thousands). This reflects the failure of many states to resolve systemic or widespread violations at the national level. It also demonstrates that the system for the implementation of Strasbourg judgments (which is supervised by the Committee of Ministers) needs to be overhauled, and strengthened.

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⁵³ For a recent discussion, see: Sir Nicolas Bratza, 'The relationship between the UK courts and Strasbourg' (2011) EHRLR 505-512.

Annex 1: principles underpinning the creation of a UK Bill of Rights

In this annex, we propose key principles which should underpin the creation of a Bill of Rights.⁵⁴ These principles are drawn from evidence about the design and conduct of Bills of Rights processes in jurisdictions outside Britain. They are consistent with, and build upon, those established by the Equality and Human Rights Commission⁵⁵ and the ‘non-negotiables’ advocated by the Joint Committee on Human Rights (JCHR) in its inquiry into a UK Bill of Rights.⁵⁶

We propose that the process of creating a Bill of Rights should be:

Non-regressive

Any future UK Bill of Rights should not dilute existing protection provided by the HRA, either in relation to the specific rights protected; or by weakening the existing machinery for the protection of Convention rights; or by narrowing the categories of people who enjoy legal protection of their rights. Any process that starts from a premise of diminishing human rights protection would set a damaging precedent internationally. Any future government must commit unequivocally to retaining the HRA unless and until a new Bill of Rights, protecting human rights to at least the same extent as the HRA, is enacted.

Transparent

Politicians should be transparent about the purpose of a Bill of Rights and the terms of reference and methods of the process by which they propose to create it. This entails a clear procedural commitment to act on the results of public consultation and deliberation within clearly articulated parameters.

Independent

The body running the process should be demonstrably non-partisan, independent of government and have no vested interest in the outcome.

⁵⁴ These principles are discussed in detail in *Developing a Bill of Rights for the UK*, pp. 81-85.

⁵⁵ See <http://www.equalityhumanrights.com/legal-and-policy/bill-of-rights/four-principles-of-the-bill-of-rights-debate/>.

⁵⁶ *A Bill of Rights for the UK?*, pp. 91-92

Democratic

For the outcome to be seen as having democratic legitimacy, the process must also be democratic. This principle recognises that Bills of Rights are not only a constraint on the exercise of arbitrary power; they are also a positive instrument to enable relatively powerless groups to have an effective say in the democratic process.

Inclusive

The process should place the highest premium on eliciting the views and experiences of groups whose human rights are most vulnerable to being breached, and should give those voices an elevated status in the assessment of responses and in the final outcome.

Deliberative and participative

The process should be an exercise in building citizenship, not merely 'market research'. It should provide multiple opportunities for participation and, ideally, properly constructed forum(s) for deliberation which should be used to educate and invigorate the wider consultation.

Educative

The public should be informed to the greatest extent possible about existing human rights protections and options for building on them, and about their duty to respect the rights of others. A minimum requirement is the provision of accessible and impartial information and the correction of myths and misperceptions about human rights and the HRA.

Reciprocal

The process should be a two-way dialogue in which the government, too, is educated. The imprint of the process must be visible and acknowledged in the final outcome.

Rooted in human rights

The process of creating a Bill of Rights must be consistent with human rights principles. These include respect for the dignity and autonomy of individuals and the right to participation. These principles are internationally recognised and not subject to political whim or contingency; nor can they be trumped by considerations such as public safety or security or requirements to exercise individual responsibility.

Timed

Any process should have a clear timeframe with, at a suitable juncture, a momentum-building phase. It should not be indeterminate.

Symbolic

The process should be suitably ambitious for the undertaking of a constitutional enterprise. A Bill of Rights that aspires to last for generations requires a process that is compelling to the public.

Designed to do no harm

The process should be adequately resourced and there should be a political commitment to act on the outcome of consultation. A process is better not done at all than done badly. Disillusionment is contagious and corrosive; trust in the political process is fragile.

Respectful of the devolution settlements

Choice should reside with the devolved assemblies and the process should respect their competency and self-determination.