Stick or Twist?

A Christian Response to the proposed repeal of The Human Rights Act 1998

David McIlroy, Alasdair Henderson

with the assistance of Tom Andrew

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Summary and key questions for any reform proposals

- Human rights are an attempt to protect people against the abuse of power by governments and in particular against actions which treat people as worthless.
- Human rights theory has several problems when God is not the foundation, primarily a tendency towards excessive individualism and the fostering of a selfish, litigious culture.
- However, human rights in practice can be a very useful tool for protecting unpopular or minority groups (including Christians) and restraining the State.
- Leaving the ECHR would have sent a disastrous signal to other countries. Christians should be thankful that the Government has ruled out leaving the ECHR.
- The HRA is unpopular, but in fact there are really only two issues that have caused concern (prisoner voting and deportation of foreign criminals), both of which have been significantly overplayed and misrepresented in the media.
- It may be helpful to reform the HRA in order to correct the public perception that it is a European imposition and improve the public image of human rights.
- A British Bill of Rights would only be a better alternative to the Human Rights Act if there was a widespread consensus about the rights contained within it.
- Christians should engage constructively with any consultation, and seek opportunities to make the positive case for increasing protections for freedom of expression and freedom of religion and belief in particular.
- Christians should ask the following questions when considering any proposal
    - Can cross-party, widespread support be gathered for the proposal?
    - Will the proposed replacement to the HRA have any benefit compared with the HRA itself?
    - What 'gloss' will be put on any rights and why?
    - Does the proposal make it easier or harder for unpopular and minority groups to exercise their rights?

Introduction

We have been asked to produce a paper on behalf of the Lawyers' Christian Fellowship and the National Club to help Christians think about how they might respond to the proposal to repeal the Human Rights Act 1998 and replace it with a 'British Bill of Rights'. Could this lead to more restrictions on individual freedom in the UK (especially religious freedom) and fewer safeguards for the poor and vulnerable? Or is it an opportunity which Christians should seek to engage positively with, in an attempt to secure firmer protection for key freedoms and greater justice for the disadvantaged?

This project was initially conceived in the summer of 2015, when it seemed that the new Conservative Government was likely to implement speedily the following manifesto promise:

> "*The next Conservative Government will scrap the Human Rights Act, and introduce a British Bill of Rights. This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK.*"[1]

It seemed that this issue would be one of the first major concerns of the new Parliament and that it would be pursued with some urgency by the new Lord Chancellor, Michael Gove, and his ministers. In fact, the Government appears to have realised that replacing the Human Rights Act 1998 ("HRA") is easier said than done, perhaps for some of the reasons outlined below, and at the time of writing the latest news is that a consultation exercise has now been pushed back until mid-2016.

However, two other significant issues of particular concern to Christians have arisen in the intervening period – the attempt in September 2015 to legalise assisted suicide and the launch in October 2015 of the Government's Counter-Extremism Strategy. These two matters have provided a stark reminder of both the great value, and the very real limitations, of human rights as a means of protecting freedoms and promoting the common good.

In the assisted suicide debate arguments based on human rights were a key plank of the proponents' case. In particular the assertion of a 'right to die' at the time and in the manner one chooses (somewhat ironically, given that there is no 'right to die' in any of the international human rights treaties, but there is a 'right to life' in them all), and a reliance on

[1] https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf, p60

individual autonomy as an all-important principle or value. On the other hand the arguments of opponents, which were thankfully successful, were based on ideas and principles that cannot be captured easily in the language of human rights: concerns to protect vulnerable people from themselves (as well as those who would prey upon them), the importance of declaring as a society that we value all human life, and the possibility of tempering justice with mercy in individual cases. This debate was a very good example of how human rights are not always the end of the story, or even the central narrative, when it comes to complex, sensitive matters of public policy.

In contrast, the outworking of the Counter-Extremism Strategy, and in particular the current suggestion by the Department for Education that informal education, including religious instruction, in 'out-of-school settings' should be subject to registration and inspection by Ofsted, is a good example of how important human rights arguments can be in restraining an over-weaning state and preserving key freedoms. Although these proposals are at an early stage of development, it is likely that reliance on the right to freedom of thought, conscience, religion (and belief) under Article 9 of the European Convention on Human Rights ("ECHR"), the right to freedom of expression under Article 10, the rights to freedom of association and assembly under Article 11, and the right of parents to have their children educated in conformity with their own religious and philosophical convictions under Article 2 of Protocol 1 will be crucial in ensuring that they do not impinge on Christians' ability to teach and model the gospel to our children.

These two recent examples show, therefore, that although the suggested repeal of the HRA and its replacement with a new framework for defining and protecting basic freedoms in the UK would not necessarily constitute the seismic change in British politics or society that some commentators have suggested, it is nonetheless a very important matter with potentially wide-ranging ramifications, which Christians would do well to think deeply about. It is hoped that the following paper will be of some help in assisting such thought. At the time of writing the details of the Government's plans had not been made public, although certain ideas have been ruled out. This paper therefore takes a general approach to inform Christians, starting with a brief history of human rights and explanation of the underlying philosophy, followed by a primer in how the HRA currently operates in practice and an attempt to identify the problems with this. There is then a consideration of what the Government has said it does *not* propose to do and why, along with a short synopsis of what possibilities are still currently on the table. Finally, we conclude with some suggested core

issues to think about when evaluating any specific forthcoming proposal and some key questions to ask of it.

A very short history of human rights

The ECHR was adopted in the aftermath of the horrors of Hitler's and Stalin's regimes. Millions of people had been dehumanized, tortured, enslaved and exterminated. There was widespread agreement that such atrocities must never be allowed to happen again. What was needed was a set of standards to which governments were held accountable.

The Universal Declaration of Human Rights 1948 had already produced a list, which included the right to periodic holidays with pay (Article 24) and the right to enjoy the arts (Article 27(1)), alongside the rights to life (Article 3), to a fair trial (Article 10), and the right to freedom of thought, conscience and religion (Article 18). As the examples given show, the Universal Declaration includes a wide range of rights, some of which were clearly aspirational.

The list of rights in the ECHR is somewhat narrower than that in the Universal Declaration. The rights and fundamental freedoms protected are:

- Right to life (Article 2)
- Prohibition on torture or inhuman or degrading treatment or punishment (Article 3)
- Prohibition on slavery or forced labour (Article 4)
- Right to liberty and security of person (Article 5)
- Right to a fair trial (Article 6)
- Prohibition on criminal punishment other than under a prospective law (Article 7)
- Right to respect for private and family life (Article 8)
- Freedom of thought, conscience and religion (Article 9)
- Freedom of expression (Article 10)
- Freedom of assembly and association (Article 11)
- Right to marry (Article 12)
- Prohibition on discrimination (Article 14)
- Right to peaceful enjoyment of property (Article 1 Protocol 1)
- Right to education (Article 2 Protocol 1)
- Right to vote (Article 3 Protocol 1)
- Abolition of the death penalty (Article 1 Protocol 13)

All of these rights are civil and political rights, sometimes called 'first-generation' rights. Although they apply to everyone, their primary purpose is to protect those who are unpopular or on the fringes of society (such as minority groups, criminals) from being excluded, ill-treated or persecuted by the State. The ECHR does not contain any social or

economic rights, sometimes called 'second-generation' rights, such as a right to housing or welfare, which seek to guarantee positive treatment by the State.

Some of the first-generation rights protected by the ECHR (such as the right to life or prohibition on torture) are 'absolute' rights, which the State cannot interfere with in any circumstances. Others, such as the right to freedom of expression or right to respect for private and family life, are 'qualified' rights, which means they are defined in such a way as to allow interference or restrictions where this is 'in accordance with the law' and 'necessary in a democratic society' in the furtherance of various interests, such as national security, public safety, prevention of crime, protection of health or morals, or the protection of the rights and freedoms of others.

What was really new about the ECHR was that it contained an effective enforcement mechanism for the rights and freedoms it listed (on which, see further below).

The term "human rights" was not, however, invented in the twentieth century but in the seventeenth and eighteenth centuries. It was brought to the fore in three revolutionary documents.

The first document, the English Bill of Rights of 1689, was drafted in the aftermath of the Glorious Revolution of 1688, in which James II was overthrown and replaced by William of Orange, who agreed to reign as a constitutional monarch accountable to Parliament. This enshrined a number of basic freedoms, such as the right to trial by jury, prohibition on cruel and unusual punishment, and freedom of speech.

The French Revolution produced a Declaration of the Rights of Man 1789 as part of the new social order which was to replace a royal tyranny in which the people were oppressed by kings who were the super-rich of their day, living in obscene luxury whilst people starved to death. The Roman Catholic Church was condemned by the revolutionaries as a major supporter of the royal tyranny. The French Declaration of the Rights of Man was therefore a rejection of both God and master, of the idea that there were any given authorities who were entitled to decide how we should live.

The third revolutionary document, the American Declaration of Independence 1776, also declared that men had "unalienable Rights", including life, liberty and the pursuit of happiness, but it stated that these rights were gifts from God. In saying this, the American

Declaration of Independence drew upon the 1689 Bill of Rights, which itself was drawing heavily on the ideas of the English philosopher John Locke, who in the seventeenth century had argued for the equality of men and women and for religious toleration. One of Locke's major concepts was the idea of "natural rights", the rights that nature had given to human beings and which government could not, therefore, take away.

Locke was writing in a context where his political opponents believed that the divine right of kings meant that kings were accountable *only* to God and had an obligation to enforce religious conformity. The idea of natural rights was a means of insisting that rulers were accountable instead to the people they governed and that each of us should be free to discover for ourselves what God wants.

Locke's idea of natural rights was already a significant development. Before the Reformation, most political theorists saw the government as having responsibility to enforce the natural law, to comply with natural justice, and to respond to God's law. Because government had those responsibilities, subjects had rights. The responsibilities of government were primary; the rights of subjects were secondary. Locke reverses the order: for Locke, and then for the Bill of Rights and the American Declaration of Independence after him, men have rights and the responsibility of government is to secure those rights.

Human Rights ← Natural Rights ← Natural Law

The philosophy of human rights

The problem of God

When the HRA was introduced, Francesca Klug captured the mood by entitling her book "Values for a Godless Age". One way of understanding human rights theory is as an attempt by human beings to design a system of values without reference to God. From a Christian perspective, such an attempt is doomed to failure, and bound to lead to distortions in our understanding of our relationships and duties to one another (see Romans 1:21-22). More than that, in one sense the original sin committed by Adam and Eve was to try to define good and evil for themselves, apart from God (Genesis 2:17, 3:6).

Human rights theory is not an adequate or comprehensive means of articulating morality for at least five reasons. First, God is the ultimate arbiter of good and evil, and humanity has

no rights against God.[2] Secondly, all human relations are ultimately reflections of our relationship with God,[3] such that rights cannot capture the entire moral content of any act or omission. Thirdly, some aspects of morality – such as love towards another or sins committed solely against oneself – cannot be cast in terms of rights.[4] Fourthly, rights language privileges individual claims above common benefits.[5] Fifthly, rights can create an over-reliance on self-interest as a means of enforcing morality, which has a tendency towards fostering a litigious, selfish culture.[6] These last two problems are explored further below.

However, as the American Declaration of Independence shows, it is not inevitable that a theory of rights leaves God out of the picture. Moreover, one of the urgent needs in Britain today is to find an understanding of what it means to be a British citizen which people of different faiths and no faith at all can share. Such an understanding does not need to be, indeed should *not* be, a comprehensive doctrine which claims to answer all the big questions of life. What is needed is simply a shared set of expectations about the duties which we owe to our country and to those who live in it along with us and about the protections we can expect from and against those who rule over us.

The bathwater which needs to be thrown out

There *is* a problem with human rights as a theory. It is a problem with the way in which our culture thinks about human rights. H. L. A. Hart, the greatest legal philosopher of the twentieth century, explained the concept of rights in this way: 'Rights are typically conceived of as *possessed* or *owned by* or *belonging to* individuals and these expressions reflect the conception of moral rules as not only prescribing conduct but as forming a kind of moral property of individuals to which they are as individuals entitled; only when rules are conceived in this way can we speak of *rights* and *wrongs* as well as right and wrong actions.'[7]

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[2] See, for instance, Romans 9:14-21 or the book of Job, especially chapters 38-41.
[3] This is a consistent theme in Scripture – see e.g. Proverbs 17:5, Ephesians 3:15, Psalm 51:4.
[4] E.g. Romans 12:9-13, 1 Corinthians 6:18.
[5] Whereas, of course, the Christian ethic is of course to give up our rights and freedoms for the sake of others and use our gifts to serve the whole church – see e.g. Matthew 5:38-42, 1 Corinthians 9, 1 Corinthians 12:12-31, Romans 14.
[6] Julian Rivers, 'A Bill of Rights for the United Kingdom?', *Christian Perspectives on Law Reform* (1998, Paternoster Press, Cumbria).
[7] H. L. A Hart, 'Are There Any Natural Rights?', *Philosophical Review* 64 (1955), 182.

Translated into the language of the street, it comes to this, human rights are "things which belong to me". This idea of human rights as "things which belong to me" firstly emphasises individualism at the expense of community; it becomes all about "me and my rights". This leads to the second emphasis on possessiveness. Rights are seen as rights of ownership; so the more rights I can claim, the more things I own. It is this idea of rights as rights of ownership which finds expression in slogans like "It's my body so I can do what I like with it". The third result of this idea of human rights is that whenever we find ourselves in conflict with other individuals or with groups, we "go legal". Instead of seeking to find a practical compromise, disputes arise which get quickly reduced to arguments about rights and all other dimensions of the relationship get forgotten about.

The individualism and possessiveness in this conception of rights combine to create the view that other people in society are my rivals and social institutions exist to fulfil my needs. When they fail to do so, the solution is to appeal to the government and to the courts to vindicate my rights. Instead of finding our place in society through our membership of a network of social institutions such as the family, the workplace, the trade union, the Scouts, the church, the political party, the bowling club, the Rotary Club etc., we treat such institutions as existing solely to fulfil our own ambitions. And when our expectations are disappointed, we sue.

Interestingly, this was the danger identified by Michael Gove (who was yet to be elected to Parliament) at the time the HRA came into force:

> *"The Human Rights culture is already spreading in our society, uprooting conventions on which our stability has rested…It supplants common sense and common law, and erodes individual dignity by encouraging citizens to see themselves as supplicants and victims to be pensioned by the state."*[8]

The concept of human rights can therefore lead to people seeing themselves as individuals with demands and needs which the government ought to guarantee and everyone else ought to fulfil, rather than as contributors to society, with responsibilities to care for others.

The idea of human rights as individual possessions leads to consequences which are unsustainable. There have to be limits to what we do with our bodies and with the things we own. Our rights cannot be absolute but must be balanced against the needs and interests

[8] Hansard, House of Commons, 8 September 2015, at column 207. Accessed at http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150908/debtext/150908-0001.htm

of others. Writing as long ago as 1978 the Soviet dissident and survivor of the gulag Aleksandr Solzhenitsyn said, 'The defence of individual rights has reached such extremes as to make society as a whole defenceless. It is time to defend, not so much human rights, as human obligations'.[9]

These dangers are noticeable in how the ECHR and HRA has operated in practice. For instance, despite the fact that many of the rights in the ECHR are 'qualified' and that means courts do engage in a balancing act between the right of an individual and competing communal interests, some of these interests such as 'the protection of morals' are very rarely invoked, if ever.

The baby that needs to be looked after

But although this way of thinking about human rights carries with it some very significant dangers, the consequences of which we are experiencing in a cultural shift which has taken place and continues to take place all around us, there are important values that human rights theory seeks to protect. And, as with many aspects of law, the practice can be better than the theory. In particular, human rights are a useful means of seeking to address two fundamental concerns: the de-humanization of certain persons or groups and the tyranny of government.

Many of the atrocities which occurred in the twentieth century happened because the perpetrators had convinced themselves that their victims were not human beings who counted, that they were worthless or at least worth less than the perpetrators. In biblical terms, they denied or suppressed the truth that all humans are made in the image of God (Genesis 1:26-27). The idea of human rights is one way, and quite an effective way, of affirming the fact that all human beings are equal in worth and dignity.

Human rights also act as a means of checking the power of governments. They are one tool, and quite an effective tool, which can enable judges to make decisions about whether a government is mistreating people or abusing its powers. They are not, however, the only means by which the over-reach of governments can be restrained. Long before the declarations of human rights, the common law developed alternative mechanisms for keeping rulers in check, such as the writ of habeas corpus or the principle of the rule of law.

[9] A. Solzhenitsyn, *A Warning to the West* (Hill & Wang, 1976), 64.

What is the Human Rights Act 1998 and how does it work in practice?

The Human Rights Act 1998 is a piece of legislation which has the effect of requiring all public bodies to act in a way that is compatible with human rights and enabling the courts to enforce this. The courts are given three main duties/powers: (i) to interpret all legislation, insofar as it is possible to do so, in a way which is compatible with human rights; (ii) to declare an action of a public body which breaches a person's human rights to be unlawful and/or order the payment of compensation; and (iii) where a public body has acted in breach of human rights but was required to so by an Act of Parliament, to make a 'declaration of incompatibility' that the relevant statutory provision is in breach of human rights. If a declaration of incompatibility is made, it is then up to Parliament to amend the law to make it compatible.[10]

Since the HRA came into force on 2 October 2000, only 29 declarations of incompatibility have been made, of which 20 have become final. Moreover, the rate has tapered off. In the 2010-2015 Parliament only 3 were made, one of which is still subject to appeal. All final declarations have been resolved through subsequent legislation.

Because it was introduced at the start of the New Labour years, the HRA was not the product of prolonged cross-party discussion or of an extensive consultation process. Instead, the actual rights and freedoms which the HRA protects are lifted directly from the ECHR. One of the few ways in which the HRA differs from the ECHR is in section 13. This ostensibly gives special protection to religious organisations, but that section has been entirely ignored by the courts since its introduction, for reasons which are not entirely clear.[11]

Why was the HRA drafted in this way? After the Second World War, Britain had been instrumental in the adoption of the ECHR as an international treaty which European countries were encouraged to sign up to. Unlike many other international human rights

[10] The position is slightly different in each of the nations of the UK. Although the Westminster Parliament can ignore a declaration of incompatibility made by a court, the devolved governments in Scotland, Northern Ireland and Wales cannot do so as the respective devolution Acts constrain them to comply with the ECHR.

[11] It may be that most of the case-law in the UK courts thus far relating to Article 9 ECHR has involved individuals, and so s.13 does not apply (see the Court of Appeal in the bed and breakfast sexual orientation discrimination case, *Hall v. Bull* [2012] 1 WLR 2514 at [53, 67], for instance), but given that s.13 also applies to the members of a religious organisation it should still have some bearing on such cases.

treaties the ECHR had an enforcement mechanism. There was a Commission on Human Rights which would police complaints against signatory states and provide a route of appeal: if an individual or a state did not like the decision of the Commission on Human Rights, that decision could be appealed to the European Court of Human Rights.[12]

For many countries, the moment they signed up to the ECHR the provisions of the Convention became part of their domestic law, so that their citizens could raise human rights arguments in their law courts. Not so in Britain. In Britain, even though the British government was obliged to comply with the ECHR as a matter of international law (see below), the British courts could not directly apply the Convention to any questions which came before them.

The result, argued the Labour Government, was that the European Commission and Court of Human Rights often made decisions on cases without any help from the British courts because the British courts had never thought about the case in terms of human rights. The Labour Government therefore claimed that introducing the HRA would "bring rights home", and lead to fewer decisions in which the European Court of Human Rights found the British government to have violated the Convention.

What are the problems with the HRA?

Politicians and newspapers frequently give the impression that the will of the British people and their elected representatives is constantly being frustrated by decisions from the European Court of Human Rights which undermine the British way of life and the right of (the politicians elected by) the people of Britain to determine matters for themselves. On 12 January 2012, the *Daily Mail* claimed that the UK was losing 3 out of 4 cases in the European Court of Human Rights, a figure subsequently repeated by *The Telegraph*. *The Sun* claimed in August 2014 that the figure was 3 in 5. What the newspapers conveniently ignored was the vast number of cases which the European Court of Human Rights rejects at a preliminary stage before they are even considered at a hearing. In reality, only 0.6% of the total number of applications against the UK in 2012 and 2013 were successful.[13]

It is, in fact, difficult to find any decision made by the European Court of Human Rights which the British government has been unwilling to comply with, other than the decision

[12] In 1998 Protocol 11 to the ECHR replaced the Commission with an enlarged, two-tier Court.
[13] See the Human Rights Joint Committee 7th report of 2014-15, paragraph 2.2, based on the Government's report 'Responding to human rights judgments'.

that not all prisoners could be denied the right to vote. Even here, however, once you get behind the headlines, the European Court of Human Rights still left the British Parliament quite a lot of room for manoeuvre.[14]

Apart from prisoner voting, our research suggests that the only other substantive issue which has caused regular and widespread upset is the use of the HRA by foreign national criminals to avoid deportation to their home countries, particularly through reliance on the right to private and family life under Article 8 of the Convention. However, the extent to which this actually occurs in practice has been significantly over-stated by some in the media and politics. In 2007, for instance, the *Daily Mail* reported that Learco Chindamo, having served 12 years in jail for the murder of a head teacher, could not be deported to his native Italy on Human Rights grounds.[15] While human rights had been mentioned in the Judge's ruling as an alternative basis for refusing deportation, it was EU migration law that in fact formed the basis for the ruling.[16] In 2011 the Home Secretary, Theresa May, referred to an illegal immigrant who could not be deported because he had a pet cat, which was in fact a gross misinterpretation of the actual decision.[17] Following changes to the Immigration Rules in 2012 and the passage of the Immigration Act 2014 it is now extremely difficult for a foreign criminal to use Article 8 as a basis for resisting deportation, and these changes have been upheld by the courts as compatible with human rights.

Moreover, British courts have shown more willingness in the past couple of years to think independently to the European Court case-law on some human rights issues. In turn, the European Court recently appears to have responded to some of the criticism of its judgments by showing greater deference to British courts or entering into more of a dialogue with them. This follows a meeting of the Council of Europe which the UK hosted in Brighton in 2012, the result of which was a declaration that emphasised the so-called 'margin of appreciation' (i.e. scope for differences in approach) given to Member States in interpreting the ECHR.[18] Perhaps the most obvious example is the ruling by the Court of Appeal in February 2014 that whole life tariffs for convicted murderers were not in contravention of the ECHR, despite a previous European Court judgment saying they were.

[14] For example, the UK could prevent prisoners serving long-term sentences from voting provided it allowed those serving short-term sentences to vote.
[15] http://www.dailymail.co.uk/news/article-476633/When-human-rights-insult-all.html
[16] http://www.politics.co.uk/news/2007/8/22/chindamo-deportation-barred-under-eu-law
[17] http://ukhumanrightsblog.com/2011/10/04/cat-had-nothing-to-do-with-failure-to-deport-man/
[18] http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf

This was then followed by the European Court revising its earlier decision.[19] A string of cases in the last 12 months have arguably demonstrated a similar trend.[20]

If a single decision of the European Court of Human Rights about prisoner voting and some (largely overplayed) concerns about deportation of foreign criminals were the only real issues which have arisen in the 17 years that the HRA has been in force, there would be no justification whatsoever for re-visiting it.

However, there are some more general problems with the HRA, mainly on a presentational level. First, it is not particularly popular with the public at large. There is relatively little good-quality data on public perception of the HRA, the Convention, or the European Court but what little there is suggests the British public is ambivalent towards the current framework at best.[21]

This lack of public support is undoubtedly due in part to the effect of misleading reporting of many human rights cases in the media, and the hostility of certain elements of the right-wing tabloid press to anything 'European' and in particular to the HRA. That said, it is also likely to be related to the second fundamental problem with the HRA, which is that most people are deeply ignorant about its content and effects. Because it was not a cross-party project, but was rather the brainchild of New Labour alone, at a time when it had a large majority in Parliament, the HRA was not the subject of extended consultation in advance of it being proposed nor did it benefit from any significant public education campaign after it came into force. Outside the narrow circle of lawyers, politicians and civil servants who deal with its provisions on a daily basis, the HRA is thus very poorly understood. Combined with the fact that it is to a large extent a 'cut and paste job' from the ECHR, there is a widespread idea that it is a 'European' imposition. For such a landmark piece of legislation, which has relevance to so many areas of public policy, plays a quasi-constitutional role, and is referred to in a huge variety of legal disputes, this is a real hindrance.

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[19] *Hutchinson v. United Kingdom* [2015] ECHR 111, http://www.bbc.co.uk/news/uk-31110814

[20] See recent analysis here - http://johnwadham.com/2016/01/29/bending-the-jurisprudence-and-uk-threats-to-leave-the-echr/

[21] A YouGov poll in July 2014 found that 41% of respondents thought Britain should withdraw from the ECHR, 38% thought not, and 21% were not sure. (http://cdn.yougov.com/cumulus_uploads/document/5a36trmrkq/InternalResults_140718_Human_Rights_W.pdf). A subsequent YouGov poll in October 2014 found that even among Labour and Lib Dem voters only 50-55% thought incorporating the Convention into British law had been a good thing, and only 19% of Conservative voters agreed. (http://cdn.yougov.com/cumulus_uploads/document/5a36trmrkq/InternalResults_140718_Human_Rights_W.pdf)

Anecdotal evidence suggests that the HRA has until recently been even less popular with Christians, and especially with evangelicals, than with the general public. This may be due to a sense that it fosters a selfish, litigious culture and possibly more directly because the courts in adjudicating human rights cases have not been sympathetic to Christian moral viewpoints and concerns. For the reasons set out above, there is a fair amount of truth behind these concerns.

That said, human rights (even as currently formulated and applied in the HRA framework) are probably easier for Christians to accept than for people of other faiths. Muslims, for instance, struggle much more than Christians to accept a human rights discourse which does not explicitly place God at the centre (and the Islamic Declaration of Human Rights, sometimes called the Cairo Declaration, is a very different document to the ECHR). Some parts of the wider church, such as Catholics, have been much more at ease with human rights. Moreover, the perception of human rights is changing amongst British Christians in light of recent developments such as the Government's counter-extremism agenda at home and increased news about the plight of persecuted Christians abroad. In a recent piece of research by the Evangelical Alliance some 85% of respondents said they were worried that civil liberties were under threat, and anecdotally there is increased appreciation that the HRA and human rights language more broadly, for all its faults and limitations, may be an important protection from attempts to restrict freedom of religion and freedom of expression.

Proposals the Government has ruled out and why

Proposals in the lead-up to the 2015 General Election

The Coalition Government from 2010-2015 was split on the issue of whether or not to reform the HRA (the Conservatives wanted to, and the Liberal Democrats did not). As a result, the issue was kicked into the long grass for the duration of the Parliament. There were, however, two proposals during this period. The first was the report of the British Bill of Rights Commission, which was set up in 2012. The Commission's terms of reference did not make any provision for leaving the ECHR, so the question posed was whether a 'British Bill of Rights' would be a better way of incorporating the ECHR into UK law than the HRA. The Commission was split 7:2 on the answer, with the majority verdict being that there was a strong argument for a British Bill of Rights to replace or supplement the HRA. The primary reason for their conclusion was based on a perceived widespread public distrust of the

HRA, and the Commission's feeling that only brand new legislation would be able to reclaim human rights language for the British people[22] (interestingly, this was in direct disagreement with an earlier 2008 report from the Joint Committee on Human Rights, who felt this was a poor reason for new legislation).

The second proposal was contained in a document entitled 'Protecting Human Rights in the UK' which was published on 3 October 2014 by Rt. Hon. Chris Grayling MP, and which set out the Conservative Party's initial ideas for replacing the HRA. This paper stated that the primary objective of any reforms would be to limit the jurisdiction of the European Court of Human Rights, rather than to effect any substantial change in the UK's terms of agreement under the Convention, and "*end the ability of the European Court of Human Rights to force the UK to change the law*".

It is difficult to understand how the Conservatives hoped to do this and remain within the terms of the ECHR. Article 46 of the ECHR states that: "*The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties*," meaning that the UK Parliament is obligated, under the terms of the treaty, to change the law to bring it into line with the ruling of the European Court where there is a direct incompatibility. The 'problem' is not with the wording of the HRA, but with the ECHR itself. No real explanation was offered as to how the UK could escape her commitments under the ECHR, without being forced to withdraw from the treaty and resign from the Council of Europe.

The Conservative proposals did not, however, stop at limiting the reach of the European Court (although this was clearly their primary aim). As Toby Young put it in The Spectator: "*The bill of rights wouldn't simply reproduce the convention in every particular. Rather, it would seek to define the rights enshrined in the convention in a way that made it harder for left-wing jurists to impose their political views through the court. In short, the bill of rights would put a conservative spin on the convention*."[23] According to the proposals, the Conservatives planned to 'clarify' the Convention rights where they believe the wording leaves too much room for interpretation. Examples of such clarifying points include:

[22] webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf

[23] http://www.spectator.co.uk/2014/10/youll-regret-not-having-a-human-rights-act-when-labour-get-back-in/

- Clarifying some of the terms used in the Convention, for example 'degrading treatment or punishment', which the Conservatives argue has been give an excessively broad meaning by the Court; and
- Clarifying the limits of rights, particularly when people have forsaken their civic responsibilities. So the right to a family life would be curtailed in cases where a foreign national has taken the life of someone else.

The Conservative proposals also included two limitations on the application of ECHR rights:

- The first is a limitation of human rights laws applicability to only "the most serious cases" – cases involving criminal law, individual liberty, the right to property etc. "Trivial cases" (no examples were given) would therefore be stuck out by the courts.
- The second limitation will be to limit the reach of human rights cases to the UK, meaning that the British Armed forces operating overseas are exempt from human rights claims.

The 'Protecting Human Rights in the UK' paper ended by saying that whilst the Conservatives' desire was to remain within the European Convention, they were willing to withdraw from the treaty, should their approach be considered illegitimate by the Council of Europe.

Problems with these earlier proposals

'Protecting Human Rights in the UK' promised a draft of the legislation would be published by Christmas 2014, but this was not forthcoming. Because there was a Coalition government, the Conservatives were unable to use the Civil Service to flesh out their proposals into legislation, which created several problems, and there were rumoured to be numerous failed drafts. It was perhaps for this reason that the Conservatives were decidedly more muted about their reform proposals in the 2015 Manifesto, which made no mention of actually withdrawing from the ECHR.

Leaving the ECHR would legally be possible – the Westminster Parliament is sovereign in all matters, including international treaties, and could pull out at any time if it wished to. That said, if the UK remains a member of the EU it would limit the legal effect, as the EU Charter of Fundamental Rights contains the same rights as the ECHR (and many others),

and it applies directly in the UK courts insofar as they deal with matters 'within the scope of EU law' (a phrase which has been widely interpreted). Indeed, the Charter has a more powerful impact than the HRA, as the courts can strike down an Act of Parliament if it conflicts with Charter rights, whereas they can only make a declaration of incompatibility under the HRA.

It is really in terms of our diplomatic clout and foreign relations that the UK would have significant difficulties leaving the ECHR. As discussed above, human rights laws exist as a means of holding governments to account. The Council of Europe and the ECHR system includes many countries, particularly in the former Soviet bloc, where the respect for the rule of law and basic civil liberties is not nearly so well established as in the UK. If the UK withdrew from the ECHR or repudiated the jurisdiction of the European Court of Human Rights, the signal that we send to other members of the Council of Europe like Russia, and also to the wider international community, is that the UK is no longer as serious about protecting human rights. We may not intend to give any such impression, but that is undoubtedly the message that would come across and it would weaken the ECHR framework.

This would let down our brothers and sisters in Christ in many Eastern European countries, in particular. For evangelical and other Protestant Christians in these countries, the ability to appeal to the European Court of Human Rights has been a valuable source of protection of their religious liberties, in the face of governments which seek either to control or to suppress religion.

Finally, it is easy to be complacent about the extent to which the UK Parliament and UK courts have made, and in future will make, the right judgment calls about the protection of fundamental liberties. For instance, there were a series of cases in the 1970s and 1980s in which the UK was condemned by the European Court of Human Rights for actions taken during the Troubles in Northern Ireland. Whilst it may be understandable that at that time it was felt that UK security required suspected IRA members to be treated harshly, some of the measures taken fuelled support for the IRA, were counter-productive in the long term, and complicated the task of bringing a sustainable peace to one corner of the UK. Our own courts were unable to see that, or unwilling to prevent the government from taking those actions, but the European Court could and did.

There may be trouble ahead

A much more recent issue, flagged up at the start of this paper, is the current counter-extremism strategy and attempts to impose ill-defined 'British values' on various institutions, including schools, universities and even potentially churches. We may well yet be grateful for the oversight of a supranational court like the European Court of Human Rights if that agenda continues along its present trajectory.

It is notable that the Christian MP, Dominic Grieve, was sacked as Attorney General because he thought that any plan which involved repudiation of the jurisdiction of the European Court of Human Rights was a profound mistake, for many of these reasons.

In addition, there is at least one further reason for Christians in particular to be pleased, on balance, with the Government's decision not to pursue any reform of the HRA that would lead to the UK leaving the ECHR. Although European Court case-law has not been particularly strong on the protection of freedom of religion, it has been better than UK case-law. A recent example of this was the case of *Eweida*, in which the Court found there was a breach of the rights of a Christian lady who was disciplined at work for wearing a cross. It seems that judges from the nominally Catholic countries of southern Europe and from the former Communist countries of Eastern Europe tend to be more conservative on social issues and more understanding of the importance of religious liberty. Were our own Supreme Court the final arbiter of cases involving religious rights, it is unlikely (on current trends) that Christians would get a 'better deal'.

That all being said, the 2015 Conservative manifesto did still contain the promise to '*scrap the Human Rights Act, and introduce a British Bill of Rights*'. It must be assumed, despite the considerable delays thus far, that there will be an attempt to legislate on the matter during this Parliament.

However, apart from the problems noted above, there are very real political difficulties in passing a Bill. The Conservatives' majority in the House of Commons is small (16 MPs) and they do not have a majority in the House of Lords. Peers are generally opposed to any effort to weaken the HRA framework. The Lords would not be free, under the Salisbury convention, to block a manifesto commitment, but if there were an attempt to water down existing human rights protections significantly or put the UK at risk of expulsion from the Council of Europe, then they may well feel this was not part of the manifesto.

More problematic than the House of Lords is the position of the devolved administrations in Scotland, Wales and Northern Ireland. Both the SNP and Plaid Cymru have voiced total opposition to any repeal of the HRA, and most of the Northern Irish parties are also hostile to reform (with the exception of the DUP, who are more open-minded). Amending the Good Friday settlement on such a sensitive issue in the teeth of opposition from the Northern Irish parties could place further strain on the fragile peace process. Given Northern Ireland's history, discussed above, there is understandable concern from nationalists about a constitutional settlement which would make British judges the ultimate guardians of human rights.

The SNP has claimed that, because human rights matters were devolved to Scotland by the Scotland Act 1998, repeal of the HRA would require the consent of the Holyrood Parliament. This is probably not correct. Section 4 of the Scotland Act protects the HRA from the interference of Holyrood, but not from the Westminster government. Human rights matters *are* devolved, but not the mechanism of the HRA itself. So Westminster could legislate to repeal the HRA.

However, the Sewell convention states that Westminster will only act on Scottish matters with the consent of Holyrood. Because human rights matters are devolved and the repeal of HRA, although not devolved, would undoubtedly affect the way in which the Scottish government operates with regards to these devolved matters, the general legal consensus is that repeal of the HRA would require the agreement of the Holyrood Parliament. This will only be strengthened by the introduction of the Scotland Bill, which will enshrine the Sewell Convention (currently only included within a memorandum of understanding) within law.

Therefore, it is not only the SNP's 56 MPs standing in the way of a British Bill of Rights, but also the Scottish Parliament. Should the UK government attempt to ride roughshod over the will of the Scottish Parliament on such a sensitive matter, it would pose a great danger to the sustainability of the Union.

Seemingly in recognition of the devolution dangers of a British Bill of Rights, there were rumours in May 2015, shortly after the election, that Michael Gove was considering allowing the devolved nations to retain the HRA and introduce an 'English Bill of Rights'.[24] In response to these rumours, Nicola Sturgeon maintained that the SNP would oppose the

[24] http://www.independent.co.uk/news/uk/politics/michael-gove-determined-to-scrap-human-rights-act-even-if-scotland-retains-it-10286974.html

repeal of the HRA across all of Britain, indicating that SNP MPs would vote against repeal, even if Scotland was exempt from the repeal.[25] She said "*there are no circumstances in which my party's MPs will choose to see this as English only issue and opt to abstain.*"

What is still on the table?

Michael Gove, the Lord Chancellor/Secretary of State for Justice, and Dominic Raab MP, the Parliamentary Under-Secretary State for Justice, appeared before the EU Justice Sub-Committee in Parliament on 2 February 2016 to give evidence about the latest plans for the repeal of the HRA. This hour-long session was revealing about the Government's latest position.

The first rationale for the repeal of the HRA was consistency. Mr Gove pointed out that all of New Labour's other constitutional reforms in 1998-2000 have been revisited since, so why not the HRA as well? The second reason was that human rights have a bad name in the public square, which is a source of regret to the Government, and are seen as a foreign intervention rather than something which UK has been involved in from the beginning and is fully committed to.

Mr Gove made it clear that there is no intention to leave the ECHR, to pull out of the jurisdiction of the European Court, or to derogate from any of the ECHR rights. The primary aim of reform would be to allow temporary derogations for British troops when operating abroad, and to put a British 'gloss' on some of the qualified rights. The example he gave of such a gloss was freedom of expression, because traditionally in the UK a greater weight has been accorded freedom of speech as opposed to privacy rights compared with other countries in Europe.

Finally, Mr Gove suggested that the reform of the HRA might be an opportunity to clarify that the UK Supreme Court could declare that where EU law is in conflict with basic constitutional principles it does not apply in the UK. This is a significant further issue for any legislation to address, and a British Bill of Rights is not the most obvious place to do it given that the interaction between EU law and the ECHR is not that extensive, save for the Charter of Fundamental Rights. It may be that this suggestion is more a piece of political manoeuvring in advance of the EU referendum rather than a concrete proposal.

[25] http://www.bbc.co.uk/news/uk-scotland-scotland-politics-34331682

Mr Gove and Mr Raab said that they intended to consult widely in order to achieve a consensus amongst all the countries of the UK, but no timescale for the start of the consultation was offered. It will be sensible to await the consultation document before trying to deal with the detail of any of the possible suggestions. However, some initial observations can be made.

First, the desire to derogate temporarily from the ECHR, so that British soldiers in occupation of a foreign country do not need to comply with all its requirements, is an understandable one. Indeed, there is provision for this within the ECHR itself already, and France recently temporarily derogated from certain obligations in response to the Paris terrorist attacks in November 2015, in order to implement a state of emergency. The extension of the jurisdiction of the ECHR to the operation of Armed Forces in other countries such as Iraq and Afghanistan was a development of the case-law that came as a surprise to many, and seems fraught with obvious practical problems. As a direct result of the extension of ECHR jurisdiction there have been some legal claims brought by Iraqi civilians that cost the UK Government a great deal of money to investigate, only for them eventually to be found bogus, the Al-Sweady Public Inquiry being the prime example.[26]

That said, there have also been some complaints that were true and claims that were valid, which have brought shame to our Armed Forces. The most prominent of these involved the Baha Mousa, an Iraqi man who died following beating and ill-treatment in British Army custody in Basra in September 2003.[27] The perception that it is a significant additional burden on soldiers to have to comply with human rights law as well as international humanitarian law ('the law of war') must be balanced with the contrary view of well-informed individuals like Lieutenant Colonel Nicholas Mercer, the former commander legal of the British land forces in Iraq (now a vicar in the Church of England). He accused the Ministry of Defence and British Army of a 'moral ambivalence about human rights' in 2011.[28] Lt Col Mercer has publicly stated that his proposals for legal and safe detention of prisoners in Iraq were rejected by the MOD, because they claimed an exemption from the ECHR. He suggests that had his proposals been followed, deaths like that of Baha Mousa (who died after 36 hours of beatings and abuse in the custody of British soldiers) would

[26] One of the authors of this paper, Alasdair Henderson, represented several hundred British soldiers in this Inquiry.

[27] http://webarchive.nationalarchives.gov.uk/20120215203912/http://www.bahamousainquiry.org/

[28] http://www.channel4.com/news/top-army-lawyer-slams-mod-over-human-rights-abuses

have been prevented, and the MOD would have saved millions in litigation costs and preserved the Army's reputation.

As for the suggested 'glossing' of some of the ECHR rights in a British Bill of Rights, this could be either a very positive opportunity or a dangerous move, depending on what exactly is proposed. If the suggestion, as in the Conservatives' 2014 paper, is to put a right-wing spin on human rights, this would be unprincipled and unworkable. The opposition parties would immediately become suspicious or attempt to put their own alternative spin on human rights as soon as they regained power. Human rights would become highly politicised, rather than remaining a non-political basic guarantee of the rules of the game for everyone, and would lose a great deal of their value and purpose as a result. On the other hand, if the example given by Mr Gove to the EU Justice Sub-Committee is anything to go by the idea is subtly to redress the balance on certain qualified rights in favour of the historical British approach to matters such as freedom of expression. For Christians, the possibility that freedom of expression would be more robustly protected by the courts is an attractive one. It would provide a great deal of comfort to evangelists and preachers.

Mr Gove might also be open to lobbying to do the same kind of 'rebalancing' or 'glossing' on freedom of religion and belief as well. In particular, this might be an opening to push for 'reasonable accommodation' of religion and belief in the workplace. This is the idea that there should be a duty on employers to take reasonable steps to modify or adjust their working practices so as to ensure people of different faiths can do the job. The principle could also apply more widely than the employment context. Alternatively, there could be strengthened protections for conscientious objection. Any suggestions along these lines by Christians should not come across as special pleading, but should be for the benefit of all faiths. That does mean, however, that care should be taken to consider whether there would be any unintended consequences, such as giving more space for Sharia law.

The idea of stating that the UK Supreme Court can ignore EU law in certain circumstances is a much more complex one, and it is difficult to see how it could be effectively pursued without taking considerable steps towards the drafting of a written constitution. This would be a major change, and touch on all kinds of other issues. There must be considerable doubt about whether a British Bill of Rights is the correct means of doing this, and whether it could lead to an unintentional altering of the existing careful array of checks and balances in our unwritten constitution. That is particularly the case when the current counter-extremism

strategy and the push to impose 'British values' has taken such a worryingly vague course, which is potentially hostile to all forms of religion, including Christianity.[29]

Key principles to have in mind when considering any reform proposals

It is on that note that we conclude this paper. We suggested earlier that there was a need for a shared understanding of the relationship between people living in the United Kingdom and the political authorities. David Cameron often refers, when speaking in response to the challenges of terrorism, to 'British values'. Unfortunately, politicians usually take it for granted that their latest ideas amount to 'British values' which everyone should de facto accept.

There is no comprehensive set of 'British values' which everyone living in the UK accepts. In a sadly post-Christian and ever pluralising British society a joint sense of common identity and values, which we may have taken for granted in the past, is continually being eroded. People place value on different things, and weigh competing values differently. That is why we end up with differing life-goals. What is important, for freedom of all kinds to flourish, is that there is agreement about the degree of respect which government and others will give to me, and the circumstances in which I can be called upon to respect the demands of government and of others.

The identification of the fundamental expectations of the UK from those who live within its borders would be an important task for any government which wished to replace the HRA with a British Bill of Rights. The HRA was pushed through Parliament quite quickly and was the brainchild of one party – New Labour. To achieve a lasting settlement there needs to be considered discussion and cross-party support. But it seems the Conservatives may be on track to repeat New Labour's mistakes and even compound them. The opposition to repeal of the HRA is considerable, most of the other parties are opposed, the Government has a very slim majority and even some Conservative MPs have significant reservations.

The British have always wrinkled their noses at countries where new constitutions are introduced with the support of just the ruling party. If it is going to have the authority it

[29] The Evangelical Alliance has a critique of 'British values' in the context of the Department of Education's recent 'out-of-school settings' consultation here – http://www.eauk.org/current-affairs/politics/evangelical-alliance-calls-members-to-respond-to-extremism-consultation.cfm. And the Revd Mike Ovey has written a helpful short piece here - http://oakhill2.ablette.net/blog/entry/who_counts_as_an_extremist/

needs, to command respect, a British Bill of Rights needs to be credible as an expression of common 'British values' to which we are all prepared to be ruled by and full discussion, consultation and consideration of what 'British values' might be. But there seems to be little prospect of an SNP led by Nicola Sturgeon, a Labour party led by Jeremy Corbyn and a Conservative party led by David Cameron agreeing on what those values are, let alone the rest of British public.

To the extent that it is possible to do so, a British Bill of Rights should be the product of a widely shared understanding of the relationship between people living in the United Kingdom and the political authorities. It should not attempt too much. It should not attempt to set out a comprehensive blueprint for a British way of life.

In particular, it would be unwise to expand the list of rights to include social or economic rights. Although it is clearly a good aspiration to ensure everyone has access to a decent standard of housing, for instance, human rights are not the best tool, or even a particularly effective or helpful tool, to achieve this. Law cannot enforce love of neighbour. Moreover, classifying matters such as housing, healthcare or social security as 'rights' reduces room for budgetary manoeuvre and constrains innovative policy-making. Historically only totalitarian regimes such as the USSR and other Communist countries pushed for socio-economic rights to be recognised in a legally-binding way.[30]

In addition, it would probably not be a good idea to include a declaration of responsibilities as well as rights, unless this were simply in the form of a preamble. Whilst Christians would agree that there needs to be a re-focussing on responsibilities and would wish to avoid the extreme individualism of a possessive approach to human rights, codifying responsibilities is almost certainly not the best way to do it. Such an approach may make rights contingent on responsibilities and this could prove very difficult for Christians if, for example, religious freedom were to be made contingent on having an ill-defined respect for 'other faiths' (as opposed to people of other faiths) or 'equality' (especially on grounds of contentious

[30] South Africa is a more recent example of a democratic country which has included rights to housing, healthcare, sufficient food and water and social security in its post-apartheid Constitution. However, these rights are in a highly qualified form (the relevant provisions all read 'the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights' and are subject to a general limitation clause as well, which means they have little real effect in court).

protected characteristics like sexual orientation). In this we would be in strong agreement with the report of the Joint Committee on Human Rights published in 2008.[31]

Overall, we consider that reform of the HRA may be an opportunity for Christians, but only insofar as there is proper time and space for considered reflection of any detailed proposals and a Government commitment to educating the public about the issues being discussed before draft legislation is brought forward. As a first step, we should strongly encourage the Government to undertake a wide and deep consultation, and not to rush any legislation. We should insist that any proposed reform does not water down any of the rights or make it harder for unpopular or minority groups to exercise their rights. We should then be willing to offer positive contributions to any consultation, and in particular to suggest that both freedom of expression and freedom of religion and belief would benefit from a 'gloss' that emphasises their importance and raises the threshold before interferences with them can be justified.

[31] *A Bill of Rights for the UK? – see* http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/16502.htm