



# Can the proposed British Bill of Rights and Responsibilities command greater respect than the UK Human Rights Act 1998?

by Natalie Kyneswood

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## Abstract

This article<sup>1</sup> discusses the UK Government's proposals to reform human rights legislation in England and Wales, Scotland and Northern Ireland by repealing the Human Rights Act 1998 and introducing a British Bill of Rights and Responsibilities. It discusses the reasons behind the perceived unpopularity of the Human Rights Act 1998 and concludes that an alternative British Bill of Rights and Responsibilities would be no more popular or effective and that therefore proposals for reform are misconceived.

## I. Introduction

*What's in a name? That which we call a rose  
By any other name would smell as sweet.<sup>2</sup>*

The Act designed to 'bring rights home'<sup>3</sup> is no longer seen as sufficiently 'British' but rather as a means of Strasbourg meddling in British affairs. The Conservative Government believe the British Bill of Rights and Responsibilities (BBRR)<sup>4</sup> is the 'common sense' means of redressing this imbalance and sense of impotence, even if that means withdrawing from the CoE<sup>5</sup> and even possibly the EU.<sup>6</sup> Others say the BBRR is a reckless, divisive and myopic re-branding exercise.<sup>7</sup> This essay will argue that, in spite of the 'PR disaster' surrounding the Act, the bill envisaged by the Conservative Government is unlikely to command greater respect. For, if the UK were to remain a signatory to the ECHR, the BBRR would be unnecessary, since the Act is already 'our bill of rights'.<sup>8</sup> On the other hand, if the BBRR led to the UK withdrawing from the ECHR, it is argued that the cost to democracy, security and the development of human rights law would outweigh any perceived cultural ownership or political advantage. Furthermore, in view of the complex web of UK constitutional and international arrangements that the Human Rights Act sufficiently provides for, it is difficult to foresee any creative or clever solution that could ensure that the BBRR commanded any greater respect; at home or abroad.

<sup>1</sup> This paper is an edited version of the essay that won the Middle Temple Lechmere Prize, September 2015. <http://www.middletemple.org.uk/lechmere-prize-essay-natalie-kyneswood>

<sup>2</sup> Shakespeare W (1847) 'Romeo and Juliet: The Illustrated Shakespeare' Act II, Scene ii p 23.

<sup>3</sup> Labour Government White Paper (1997) 'Rights Brought Home: The Human Rights Bill' Cm 3782.

<sup>4</sup> The Government's proposals for the BBRR are outlined in the Conservative Government Strategy Paper (2014) 'Protecting Human Rights in the UK: The Conservative's Proposals For Changing Britain's Human Rights Laws' p 5. The full draft of the BBRR is yet to be published.

<sup>5</sup> Ibid, p 8; Press Association (2013) 'Cameron: I'd Withdraw From Human Rights Convention 'To Keep UK Safe' *The Guardian* 29 September.

<sup>6</sup> See Rozenberg J (2013) 'Judges Would Regret Human Rights Act Repeal, Warns Lady Hale', *The Guardian* 14 March.

<sup>7</sup> See Lord Falconer, House of Lords Hansard, Queen's Speech Debate, 1 June 2015 c 167.

<sup>8</sup> See Donald A (2013) 'A Bill of Rights for the UK? Lessons from Overseas' in Masterman R & Leigh I (eds) *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (OUP Oxford).

## II. Why has the Human Rights Act 1998 become so politically unpopular that the Government may seek to have it repealed?

*[For] a variety of reasons, the Human Rights Act has been a public relations disaster (though in substance a relative success) for our civil liberties in Britain. Rights, and the enforcement of rights, which were once seen as being entirely, indeed distinctively, British, are now popularly regarded as a foreign imposition, beneficial only to foreigners and criminals.<sup>9</sup>*

Since the Human Rights Act was introduced there have been numerous Labour, Conservative, cross-party and interest group plans to create a British Bill of Rights.<sup>10</sup> Firstly, there was a notion that such a bill presented a positive opportunity to define British values, aspirations and identity at a politically uncertain time whereas the Act merely transplanted international law. Secondly, there was a growing sense, fuelled by a concerted media campaign, that the Act failed to adequately protect British citizens and that the Government was powerless to intervene; that Convention rights, through the Act, have been interpreted in a way that was never intended and that the ECtHR had overstepped its jurisdictional boundaries.<sup>11</sup>

The juxtaposition of these two themes was articulated by David Cameron on the 800<sup>th</sup> anniversary of the Magna Carta when he spoke of how the 'good name of human rights' has become 'distorted and devalued' under the Act and how the BBRR would safeguard the legacy of the charter.<sup>12</sup> In particular, the Conservative Government ramped up the anti-Human Rights Act rhetoric in response to a number of controversial judgements regarding article 3 and 8 that prevented the deportation of illegal immigrants,<sup>13</sup> foreign criminals<sup>14</sup> and suspected terrorists<sup>15</sup> and permitted the extra-territorial application of the Act in Iraq.<sup>16</sup> Therefore the populist idea that the Act favoured foreigners, criminals and terrorists provoked plans to prioritise the protection and security of British citizens.<sup>17</sup> The sense that people were taking liberties with their liberties justified the call for duties and responsibilities in return for rights. There no longer seemed the political appetite to use a British Bill of Rights to ratify further international conventions into UK law or to augment existing rights, as some committees and human rights groups had suggested.<sup>18</sup> Indeed such is the strength of the Conservative Government's attack against the Act and the adoption of a British Bill of Rights in recent years that the other main political parties have rushed to defend the Human Rights Act and prevent its repeal.<sup>19</sup>

<sup>9</sup> Dinah Rose QC, quoted from Zander M, 'OK a PR Disaster, But...' 164 NLJ 7630, 13.

<sup>10</sup> Labour Government Green Paper (2007) 'The Governance of Britain' CM7170; Labour Government Green Paper (2009) 'Rights and Responsibilities: Developing Our Constitutional Framework' CM7577; Joint Committee on Human Rights (2008) 'A Bill of Rights For the UK?' Twenty-ninth Report of Session 2007-2008 HL Paper 165-I, HC 150-I; 2012; Commission on a Bill of Rights (2012) 'A UK Bill of Rights? The Choice Before Us' Vol 1-2 December.

<sup>11</sup> Cameron D (2006) 'Balancing Freedom and Security: A Modern British Bill of Rights', Centre for Policy Studies 26 June; see also Jack Straw's address to the House of Commons recorded regarding the ECtHR's decision on prisoners' voting rights: House of Commons Debates 10 February 2011, Vol 523 pt 116 c 502.

<sup>12</sup> Wintour P (2015) 'David Cameron: British Bill of Rights Will 'Safeguard Legacy' of Magna Carta' *The Guardian* 15 June; Conservative Government Strategy Paper (2014) fn 3.

<sup>13</sup> For example, Chahal v United Kingdom (1996) 23 EHRR 413.

<sup>14</sup> See R (Chindamo) v Secretary of State for the Home Department [2006] All ER (D) 342 (Nov).

<sup>15</sup> Most notably Othman (Abu Qatada) v UK 8139/09 [2012] ECHR 56; (2012) EHRR 1 overturning the House of Lords decision RB (Algeria) v Secretary of State for the Home Department [2009] UKHL 10, [2010] 2 AC 110.

<sup>16</sup> Al-Skeini v UK 55721/07 [2011] ECHR 1093, (2011) 53 EHRR 18 overturning the House of Lords decision, in part, in R (Al-Skeini & Ors) v Secretary of State for Defence [2007] UKHL 26, [2008] AC 153.

<sup>17</sup> See Cameron D (2006) 'Balancing Freedom and Security: A Modern British Bill of Rights', Centre for Policy Studies 26 June.

<sup>18</sup> Joint Committee on Human Rights (2008) 'A Bill of Rights For the UK?' Twenty-ninth Report of Session 2007-2008 HL Paper 165-I; HC 150-I, 5-6; Liberty (2011) 'Human Rights or Citizens' Privileges - Liberty's Response to the Commission on a Bill of Rights Discussion Paper: Do we need a UK Bill of Rights?' The National Council for Civil Liberties, December.

<sup>19</sup> See Bowcott O (2012) 'Bill of Rights Long Awaited Report To Put Fresh Strain on Coalition' *The Guardian* 17 December.

### III. What if anything could ensure that a British Bill of Rights commended any greater respect than the HRA?

The Government's desired outcome is to repeal the Act and redefine our relationship with the ECtHR while still remaining party to the ECHR.<sup>20</sup> One of the ways the Government plans to fulfill its objective is to '*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*'.<sup>21</sup> However, under the Act, as well as the ECHR, the UK Supreme Court is already the ultimate arbiter of human rights in the UK. Section 2 of the Act requires British courts '*to take into account*' decisions of the ECtHR when adjudicating matters before the UK courts; they are not bound by its judgements but may use them to support or further their reasoning.<sup>22</sup> Furthermore, the ECtHR developed the principles of subsidiarity and the margin of appreciation to reflect the fact that,

*...the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions.*<sup>23</sup>

In fact the pre-amble to the Convention is currently in the process of being amended to give these principles greater 'prominence' at the behest of the Government.<sup>24</sup>

Nonetheless, repealing the Act whilst remaining a signatory to the ECHR would not prevent people from appealing directly to the ECtHR under article 34 once they had exhausted their domestic appeal rights. If the aim is to reduce Strasbourg's grip, the Government's BBRR will be ineffectual since the President of the UK Supreme Court has argued it is likely to increase the numbers of cases appealing to the ECtHR, if only on the basis that Convention rights can no longer be enforced in British courts.<sup>25</sup> It may also be a source of great political and legal embarrassment if the rights under the BBRR or even the BBRR itself became subject to an appeal to the ECtHR on the basis that they were contrary to UK international law obligations.<sup>26</sup> Therefore commentators warn that a BBRR would produce an additional layer of human rights jurisprudence that would further complicate the interpretation and application of human rights and confuse the public.<sup>27</sup>

Perhaps an unintended consequence of the proposed 'break' between the British courts and the ECtHR would be the diminished role of the UK judiciary on the international stage. Indeed, the Act gives British courts not only the ability to adjudicate on human rights standards in national courts but also the ability to influence the development of European human rights law in Strasbourg and the jurisprudence of other member states. This is only because, presently, UK and European human rights standards are coordinated. Decisions such as the Grand Chamber judgement in *Al-Khawaja v UK*<sup>28</sup> demonstrates how current arrangements under the Act promote a dialogue between the two courts<sup>29</sup> and a healthy exchange of ideas about human rights standards that legitimises judicial

<sup>20</sup> The Conservative Government's Commission on a Bill of Rights' terms of reference were to '*investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties*'. Commission on a Bill of Rights (2012) fn 9.

<sup>21</sup> Conservative Party Manifesto (2015) 'Stronger Leadership, A Clear Economic Plan, A Brighter Future' p 60.

<sup>22</sup> See *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373.

<sup>23</sup> The Brighten Declaration 2012 para 11.

<sup>24</sup> *Ibid*, para 12(a)-(b).

<sup>25</sup> See Gibbs F (2014) 'Appeals will Soar if Tories Scrap the Human Rights Act' *The Times* 16 October; see also Gearty C (2014) 'The Tories' Proposal for a British Bill of Rights is Incoherent, But They Don't Care' *The Guardian* 3 October.

<sup>26</sup> For example, the BBRR may be challenged under article 17 on the basis that it is an activity to destroy or limit the rights contained in the Convention or article 14 of the Convention on the basis that it is discriminatory or under article 1 on the basis that the rights under the BBRR would not apply to everyone (see further the discussion at p 7-8 of this essay).

<sup>27</sup> See the comments attributed to Sir Nicolas Bratza, former President of the ECtHR in Bowcott O (2012) 'Bill of Rights Long Awaited Report To Put Fresh Strain on Coalition' *The Guardian* 17 December.

<sup>28</sup> (2012) 54 EHRR 23. The Grand Chamber revised its previous ruling in *Al-Khawaja v UK* (2009) 49 EHRR 1 in response to *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373.

<sup>29</sup> See *R v Horncastle* [2010] 2 AC 373 per Lord Phillips, para 11;

institutions as well as human rights law.<sup>30</sup> Strasbourg also benefits from the ‘prestige’ of UK voluntary involvement and observance, giving the Court influence over more ‘unsavoury regimes’.<sup>31</sup>

Nor would repeal affect the UK’s obligations under article 46 if the UK were to remain in the Convention.<sup>32</sup> The effect of article 46 of the Convention is that states are bound to ‘*abide by the final judgment of the Court in any case in which they are parties*’ i.e. once the case has gone beyond the UK court system and as a matter of international law. To date the UK has declined to observe article 46 and amend UK law in view of the ruling in *Hirst v UK* (No 2) regarding the ban on prisoner voting rights.<sup>33</sup> This judgement is demonstrative of how our link with the ECtHR has the potential to spark national debate, raise awareness and increase democratic accountability. It has resulted in proposals to change the law relating to prisoners’ rights and pre-legislative scrutiny,<sup>34</sup> a report from the Parliamentary and Constitutional Reform Committee,<sup>35</sup> and a House of Commons debate culminating in a vote *against* changing the law.<sup>36</sup> It is erroneous therefore to allege that the Act ‘*undermines the sovereignty of Parliament, and democratic accountability to the public*’.<sup>37</sup> Indeed, this ten-year old ruling illustrates how Strasbourg has little means of enforcing such judgments,<sup>38</sup> however lamentable to the rule of law this may be.<sup>39</sup> The ECtHR therefore cannot ‘*order a change in UK law*’.<sup>40</sup> Rather, the ECtHR recognises that it is for member states to decide on the appropriate measures to introduce.

It is therefore a myth that the Act or the ECHR usurps Parliament or that the BBRR would produce a different effect if the UK were to remain in the ECHR.<sup>41</sup> For example, responses to the Commission on a British Bill of Human Rights were overwhelmingly in support of preserving section 4 of the Act, amongst others, which enables courts to issue a declaration of compatibility where primary legislation is incompatible with a Convention right.<sup>42</sup> Whilst it is true that, wherever possible, section 3 of the Act requires courts to interpret legislation ‘*in a way which is compatible with the Convention rights*’, this section does not affect the validity, operation or enforcement of incompatible primary legislation.<sup>43</sup> Indeed, it is the principle of parliamentary sovereignty and section 3 that would permit the enactment of the BBRR even though it may be ‘incompatible’ with the Act.

Consequently, it is perhaps regrettable the BBRR would be another Act of Parliament and not, as its name implies, comparable to the United States’ written constitution: it could therefore be just as easily repealed. Scrapping the Act after just 15 years in force would demonstrate how volatile its successor would be to the whims of successive governments.<sup>44</sup> However, the opposite would be

<sup>30</sup> Amos M (2013) ‘From Monologue to Dialogue: The Relationship Between UK courts and the European Court of Human Rights’ in in Masterman R & Leigh I (eds) *The United Kingdom’s Statutory Bill of Rights: Constitutional and Comparative Perspectives* (OUP Oxford); Rozenberg J (2011) ‘At Last, Strasbourg Heeds our Supreme Court’ *The Guardian*, 15 December.

<sup>31</sup> See Wolchover D (2015) ‘Jury Trial Putin Style’ 179 *JPN* 361; Equality and Human Rights Commission (2012) ‘The UK and the European Court of Human Rights’ Research Report 83, Ch 8.

<sup>32</sup> See Starmer K (2015) ‘The Case For the Human Rights Act’ *Counsel* 1 January.

<sup>33</sup> In *Hirst v UK* (No 2) [2005] ECHR 681 the ECtHR ruled that the UK ban on prisoners from voting contravened ECHR Article 3 of Protocol No 1 (right to free and fair elections).

<sup>34</sup> Voting Eligibility (Prisoners Bill) 2012; Joint Committee on the Draft Voting Eligibility (Prisoners) Bill (2013) ‘Draft Voting Eligibility (Prisoners Bill)’ Session 2013-2014 HL Paper 103, HC 924 18 December.

<sup>35</sup> House of Commons Parliamentary and Constitutional Reform Committee (2011) ‘Voting by Convicted Prisoners:’ Fifth Report of Session 2010–11, HC776 9 February.

<sup>36</sup> A backbench debate on a motion to support the continuation of the ban proposed by David Davis was agreed by the House of Commons on 10 February 2011, see House of Commons Debates, Backbench Business: Prisoners Voting Vol 523 pt 116 c 493.

<sup>37</sup> Conservative Government Strategy Paper (2014) fn 3, p 4.

<sup>38</sup> Article 46(5) of the Convention provides that states in violation of their obligation to be bound by the ECtHR shall be referred to the Committee of Ministers ‘*for consideration of the measures to be taken*’. Michael Zander QC has noted that, apart from expulsion, there is no effective mechanism against a state that refuses to abide by a decision of the ECtHR and that a state is more likely to receive some form of reprimand: Zander M, ‘OK a PR Disaster, But...’ 164 *NLJ* 7630, 13.

<sup>39</sup> See the comments of the former Attorney General Dominic Grieve QC in response to the ECtHR’s decision on prisoners’ voting rights: House of Commons Debates 10 February 2011, Vol 523 pt 116 c 512.

<sup>40</sup> Conservative Government Strategy Paper (2014) fn 3, p 5.

<sup>41</sup> *Ibid*, p 4.

<sup>42</sup> Commission on a Bill of Rights (2012) ‘A UK Bill of Rights? The Choice Before Us’ Vol 1 para 55-56.

<sup>43</sup> HRA 1998, s 3(2)(b)-(c).

<sup>44</sup> See Chakrabarti S (2011) ‘Our Human Rights Are Not a Fad. We Don’t Need this Botox Bill’ *The Guardian*, 13 November; Joint Committee on Human Rights (2008) ‘A Bill of Rights For the UK?’ Twenty-ninth Report of Session 2007-2008 HL Paper

true if the BBRR were a formal written constitution, as the Liberal Democrats and others have suggested,<sup>45</sup> and the UK Supreme Court promoted to the ranks of a constitutional court with the ultimate authority to interpret the BBRR.<sup>46</sup> Although this is quite the opposite of what the Conservative Government propose and the 17<sup>th</sup> Century doctrine of parliamentary supremacy, a written constitution would engender greater respect than a regurgitation of the Act.

Indeed, it is difficult to appreciate how the BBRR could better the provisions of the Act. The various, carefully balanced mechanisms provide important constitutional checks and balances on the legislature (whether the laws it enacts are compatible with human rights), the executive (whether the way the police and the armed forces exercise their power is compatible with human rights) and also the judiciary (whether judges are interpreting and applying the law in line with human rights – with the ultimately remedy of applying to a supranational final court of appeal on the issue) without the need for a written constitution or usurping parliamentary supremacy. It is entirely democratic and regarded as an ingeniously drafted piece of legislation.<sup>47</sup>

Yet rather than focus on how the Act and the ECHR have advanced our legal landscape, the Government argues there is a need to '*restore common sense to the application of human rights laws...and better protect against abuse of the system and misuse of human rights laws*'.<sup>48</sup> However, in doing so there is distrust and suspicion that the Conservative BBRR will undermine the full-range and universal application of human rights;<sup>49</sup> that it will be regressive rather than progressive;<sup>50</sup> that it would seek to dilute rights relied upon by suspected terrorists, minorities and prisoners in order 'to keep Britain safe'.<sup>51</sup> It is well observed that states have historically used the rhetoric of fear and counter-terrorism to justify downgrading human rights, particularly the rights of minorities or those suspected of crime.<sup>52</sup> The BBRR is no exception.

For example, the BBRR proposes that those who do not adhere to their 'responsibilities' may forfeit their rights and rights would only apply in sufficiently 'serious' cases to be decided by the Government.<sup>53</sup> It would also seek to prevent the extra-territorial reach of human rights law that not only applied in respect of the treatment of Iraqi civilians but highlighted the inadequate equipment and training given to British soldiers.<sup>54</sup> There have also been early drafts of the BBRR that restrict human rights according to national 'status', i.e. British citizens, EU citizens, non-citizens (others).<sup>55</sup> This three-tier hierarchy does not reflect the reality that the UK is an increasingly diverse and globalised

<sup>45</sup>I, HC 150-I, Written Evidence, 22 Memorandum from Liberty para 9: '*Basic human rights and civil liberties must be given a chance to "bed down" if they are to stand any chance of being understood, appreciated and owned by the public.*'

<sup>46</sup> See Liberal Democrats General Election Manifesto (2015) 'Stronger Economy, Fairer Society, Opportunity for Everyone' p 133; see Dominic Grieve QC's speech to the Franco-British Council Conference 2015 'Magna Carta and the Déclaration des Droits de l'Homme et du Citoyen: Past, Present and Future' 11 June, reported in Bowcott O, 'Tory Plans will Destroy Human Rights Across Europe, Warns Dominic Grieve', *The Guardian* 11 June.

<sup>47</sup> The UK Supreme Court is not a constitutional court in so far as its primary role is not to interpret a written constitution, give preliminary rulings on difficult points of law or overturn legislation, see the Department for Constitutional Affairs (2003) *Constitutional Reform: A Supreme Court for the United Kingdom*, Consultation Paper 11/03 July p 8.

<sup>48</sup> See the comments attributed to Sir Nicolas Bratza, former President of the ECtHR in Bowcott O (2012) 'Bill of Rights Long Awaited Report To Put Fresh Strain on Coalition' *The Guardian* 17 December; see also the Commission on a Bill of Rights (2012) 'A UK Bill of Rights? The Choice Before Us' Vol 1 para 27.

<sup>49</sup> Prime Minister's Office, Queen's Speech 2015, 27th May 2015.

<sup>50</sup> See the International Bar Association (2015) 'Open letter to UK's Prime Minister and Justice Secretary from International Bar Association's Human Rights Institute' 14 May.

<sup>51</sup> See the Joint Report of the UK Children's Commissioners (2015) 'UN Committee on the Rights of the Child Examination of the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland' 15 August, para 1.6 & 2.8.

<sup>52</sup> Press Association (2013) 'Cameron: I'd Withdraw From Human Rights Convention 'To Keep UK Safe' *The Guardian* 29 September.

<sup>53</sup> International Commission of Jurists (2009) 'Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights' Geneva.

<sup>54</sup> Conservative Government Strategy Paper (2014) fn 3, p 6-7.

<sup>55</sup> See Smith & Ors v Ministry of Defence [2013] UKSC 41, [2014] AC 52.

<sup>56</sup> See 'A UK Bill of Rights' drafted by Martin Howe QC in Commission on a Bill of Rights (2012) 'A UK Bill of Rights? The Choice Before Us' Vol 1 December, Individual Papers From Members p 214. Martin Howe QC is drafting the BBRR, see Bowcott O (2015) 'Lawyer Urges Release of Tories' Proposals for British Bill of Rights' *The Guardian* 11 May.

community nor that some of the most insidious terrorist plots are from within – from British citizens.<sup>56</sup> Furthermore, it is discriminatory and dangerously Orwellian to label some human beings more ‘equal’ than others. The international principles that the UK committed to in 1950 in solidarity with other European nations were to prevent wars and atrocities caused by the unfettered power and dangerous ideologies of national governments. The BBRR not only has the potential to thwart the rights of British people, it has the potential to destabilize European security and affect the rights of other European citizens who would be second-class citizens under Conservative proposals.<sup>57</sup> Moreover it sets a dangerous precedent for other European countries seeking to downgrade their own human rights instruments.<sup>58</sup>

There is also Government misconception regarding the complicated and tangled relationship between EU law and the ECHR.<sup>59</sup> The Government recognises that there will be ‘*legal implications for our approach once the EU accedes to the ECHR*’<sup>60</sup> but nevertheless will rather arrogantly attempt to limit the EU’s interaction with the ECtHR when EU member states negotiate the terms of the accession agreement.<sup>61</sup> However, the UK cannot separate the ECtHR from the ECHR anymore than it can separate the ECHR from the EU:<sup>62</sup>

...under the terms of Protocol 11 of the ECHR (which Britain signed in 1994), acceptance of the jurisdiction of the court is now an integral part of the treaty. Therefore, the UK can no longer leave the jurisdiction of the European Court of Human Rights without also rejecting the ECHR treaty.<sup>63</sup>

As well as creating discord in Europe, the BBRR may cause division within the UK. The Act’s repeal is further complicated by the fact that it forms part of Scotland and Wales’ devolved constitutional settlements and is also embedded into the Northern Irish Good Friday Agreement. Since the Act is UK legislation its repeal would apply throughout the UK. However, the Act is a protected enactment under Schedule 4 of the Scotland Act 1998 and therefore would require Holyrood’s consent under the Sewel Convention – consent that it has indicated would not be forthcoming.<sup>64</sup> Consequently, it is difficult to imagine how there could be a ‘British’ Bill of Rights since none of the UK devolved governments support proposals to repeal the Act.<sup>65</sup> It would seem therefore that the UK does not actually want the BBRR. Rather, in truth the proposals to scrap the Act emanate from the English Conservative Government and therefore might properly be termed the ‘English Bill of Rights and Responsibilities’. If the repeal of the Act is forced through without the devolved parliaments’ consent, different citizens of the UK will have different human rights.<sup>66</sup>

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<sup>56</sup> Three of the four bombers that carried out the terrorist attacks in London on 7 July 2005 were second generation British citizens, see House of Commons (2006) ‘Report of the Official Account of the Bombings in London on 7th July 2005’ HC 1087 11 May p 31.

<sup>57</sup> Sands P & Kennedy H (2013) ‘In Defence of Rights’ *London Review of Books* Vol 35 No 1, 19.

<sup>58</sup> See Equality and Human Rights Commission (2012) ‘The UK and the European Court of Human Rights’, Research Report 83, ch 8.

<sup>59</sup> See David Cameron’s comments regarding R (Chindamo) v Secretary of State for the Home Department [2006] All ER (D) 342 (Nov) which was decided primarily on the basis of the applicant’s rights under EU law rather than the Human Rights Act 1998, eg: Hope C & Gammel C (2007) “David Cameron: Scrap the Human Rights Act”, *The Telegraph* 22 August.

<sup>60</sup> EU commitment to ensure greater cohesion between the EU Charter of Fundamental Rights and Freedoms and the ECHR resulted in a commitment to accession to the ECHR in article 6(2) of the Lisbon Treaty 2009.

<sup>61</sup> Conservative Government Strategy Paper (2014) fn 3, p 8: ‘We are mindful that there may be legal implications for our approach once the EU accedes to the ECHR. We will therefore ensure this is reflected in the rules that will govern the EU’s interaction with the Court. The EU’s application to join the Convention requires the unanimous agreement of all member states, which will allow us to ensure that the UK’s new human rights framework is respected.’

<sup>62</sup> Membership of the EU is dependent on membership of the ECHR, see the evidence of Professor Francesca Klug and the former Lord Chancellor Lord Falconer presented to the House of Commons Home Affairs and Constitutional Affairs Committee on 31 October 2006, Questions Numbers 17 & 96.

<sup>63</sup> Pinto-Duschinsky M (2011) ‘Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK’ Policy Exchange, p 50.

<sup>64</sup> BBC Scotland (2015) ‘Governments in Human Rights Row’ 12 May; Brooks L & Watt N (2015) ‘Scotland Bill May Give Holyrood Veto Over Human Rights Act Repeal’ *The Guardian* 28 May.

<sup>65</sup> Commission on a Bill of Rights (2012) fn 9, para 30.

<sup>66</sup> Sands P (2015) ‘This British Bill of Rights Could End the UK’, *The Guardian* 14 May; Bowcott O (2015) ‘Lawyer Urges Release of Tories’ proposals for British Bill of Rights’ *The Guardian* 11 May.

#### IV. Conclusion

*Any bill of rights worthy of the name, whilst protecting everyone's liberties, gives most succour to the marginalised and unpopular – or controversial causes and questions – precisely because these are the people and issues with least protection from other legislation and policy. When this happens, you will never eradicate negative headlines – they can still dog the Canadian Charter of Rights and Freedoms, more than 25 years after it was enacted.<sup>67</sup>*

*Prima facie*, the BBRR is promoted as a home-grown remedy to the perceived lacuna in British identity and threat to our security, legal heritage and power that Strasbourg, immigrants and terrorists represent – all rolled into one. However, the BBRR could only command greater respect if it is progressive and prevents further human rights PR disasters while maintaining UK domestic and international relations. Herein lies the rub: these aims are not necessarily reconcilable or within the Government's power to control. A British Bill of Rights that is irreconcilable with the ECHR may lead to conflict and expulsion from European institutions yet the Government is determined to press on with bringing forward its proposals for reform, despite the cost. Ironically, perhaps withdrawal is the only meaningful way that the BBRR could be considered indigenous and enable the Government to make the reforms they truly wish to make. However, superficial credibility in England risks alienating us from the rest of the UK, Europe and the world which will only reduce our security not increase it.<sup>68</sup>

In short, there is no lasting or profitable way for the Conservative Government's BBRR to deliver greater credibility. It is based on a number of myths, including that human rights are peculiarly English<sup>69</sup> or extricable from our international law agreements. If the Government's claim that the common law already provides the safeguards that ECHR contains were true,<sup>70</sup> there would be no need for further primary legislation and yet the proposed BBRR relies on the language of the ECHR to flesh out its substantive law rights.<sup>71</sup> While England can be proud of its legal heritage, human rights law is international in nature because it transcends boundaries and applies universally; indeed it is necessary for our human dignity and survival that it does so.

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<sup>67</sup> Klug F & Wildbore H (2009) 'Protecting Rights: How Do We Stop Rights and Freedoms Being a Political Football?' *Unlock Democracy*, 3.

<sup>68</sup> President Obama has stated that, 'Having the UK in the European Union gives us much greater confidence about the strength of the transatlantic union'. BBC News (2015) 'Obama Urges UK to stay in European Union' 24 July.

<sup>69</sup> See the Commission on a Bill of Rights (2012) fn 9, para 8: 'In many ways, therefore, the foundation on which today's human rights edifice rests is not the European Convention on Human Rights nor the Human Rights Act but an unbroken tradition going back at least some 800 years of both statute and common law providing protection against the arbitrary acts of those in power.'

<sup>70</sup> The Lord Chancellor and Secretary of State for Justice Michael Gove MP's gave the following evidence to the House of Commons Justice Committee: '...even before the incorporation of the Human Rights Act, we had active judges who were standing up for liberty and occasionally checking the Executive, when the Executive overreached itself. ...Everyone recognises that the administration of justice in British courts...sets a gold standard, and did so before the Human Rights Act was passed and before our adherence to the convention. ...a previous Lord Chief Justice, Lord Judge—has said that there is nothing in the convention that is not in common law; it has grown out of that.' House of Commons Justice Committee (2015) 'Oral Evidence: The Work of the Secretary of State for Justice' HC 335 15 July, answers to Q57 and Q58.

<sup>71</sup> Conservative Government Strategy Paper (2014) fn 3, p 5.