The Law Society
of England and Wales

The Graham Turnbull Essay Competition 2015

‘The roots of many of our basic rights go back to the Magna Carta whose 800th Anniversary is being celebrated in 2015.

Given this important legacy, to what extent would proposals to repeal the Human Rights Act 1998 and pull out of the European Convention on Human Rights impact on the protection of human rights in the UK and around the world?’

Human Rights Committee
of The Law Society of England and Wales

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The Human Rights Committee of the Law Society has traditionally run an annual human rights essay competition for law students across England and Wales. The competition is named after Graham Turnbull, an English solicitor, who did much to promote respect for human rights. Graham was killed in February 1997, aged 37, while working as a human rights monitor on the United Nations Human Rights Mission in Rwanda. The Human Rights Committee founded the competition in 1998 to honour Graham's commitment to human rights. It aims to encourage awareness and knowledge of international human rights issues and remedies among young lawyers. The topic for the competition in 2014/2015 was:

'The roots of many of our basic rights go back to the Magna Carta whose 800th Anniversary is being celebrated in 2015.

Given this important legacy, to what extent would proposals to repeal the Human Rights Act 1998 and pull out of the European Convention on Human Rights impact on the protection of human rights in the UK and around the world?'

The essay competition was open to all students from around the world who were less than three years' qualified at the closing date. Six essays were shortlisted from the entries by a panel from the Human Rights Committee. The winner and runner-up were chosen from the shortlist by this year's judge, former Attorney General, Dominic Grieve.

This short booklet reproduces the winning essay, the runners-up essay and summaries of the remaining four shortlisted essays. The summaries were written by the shortlisted authors and are published in alphabetical order.

The author of the winning essay was Ian Robert Mcdonald who will be awarded a prize of £500, funded from the Graham Turnbull Memorial Fund.

The runner-up was Anna Dannreuther who will be awarded book tokens to the value of £250 kindly donated by LexisNexis Butterworths.

Programme

18.00: Registration

18.30: Welcoming remarks: Andrew Caplen, President of the Law Society

18.35: Presentation to winners by former Attorney General Dominic Grieve (Final Judge)

18.50: Speech by the winner of competition

19:00: Guest Speaker Conor Gearty, professor of human rights law at LSE

Chaired by : Stephen Grosz, Chair of the Law Society's Human Rights Committee

19.30: Questions and discussion
19.50: Drinks reception
20.30: Close

’The roots of many of our basic rights go back to the Magna Carta whose 800th Anniversary is being celebrated in 2015.

Given this important legacy, to what extent would proposals to repeal the Human Rights Act 1998 and pull out of the European Convention on Human Rights impact on the protection of human rights in the UK and around the world?’

By

Ian Robert Mcdonald

Winning Essay by Ian Robert Mcdonald

On 1 April 1998, Christopher Alder—a former British Army paratrooper, decorated for his service—was assaulted, and taken to hospital with a head injury. He was visited by police as a victim, but arrested when his behaviour became 'troublesome'. After just five minutes in a police vehicle Christopher emerged unconscious, with his trousers at his knees. He was dragged into the station and left, for 11 minutes, gasping for life. As nearby police watched and joked, reportedly making monkey noises, Christopher choked to death in his own blood, urine and excrement.[1]

An inquest held that his life was unlawfully taken, but no officer was ever convicted or even disciplined. His sister, Janet, had one hope: our human rights framework. However, as Christopher died before the Human Rights Act was introduced, she had to take her case to the European Court of Human Rights in Strasbourg. Consequently, Janet's ordeal lasted 13 years. The Government fought her at every stage, before eventually admitting violations of Articles 2 (right to life); 3 (no inhuman or degrading treatment); and 14 (no discrimination) of the European Convention on Human Rights.[2]

Janet's story is tragic, but sadly not unique. I open with it not for hyperbole but because it illustrates, I think, the true importance of human rights, and the significance of the European Convention's long-overdue incorporation into British law via the Human Rights Act. Clearly, had the Act been in force when Christopher died, the Government would have struggled to deny Janet the justice she deserved for so long.

The Convention is regularly derided as some foreign concoction, foisted upon us by Europe. Nothing could be further from the truth. After the horrors of the Holocaust, it was Winston Churchill who called for 'a Charter of Human Rights'; and largely British lawyers who drafted the Convention itself. In so doing they drew inspiration from the Common Law, and entirely British principles of due process and equal treatment dating back to Magna Carta. The United Kingdom was the first State to ratify the Convention, in 1951; however, without its incorporation, instances of British law failing to provide sufficient protection were not uncommon, and this country's record in Strasbourg was not overly favourable.[3]

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1 'Government issues landmark apology over Christopher Alder's death in custody' (*Liberty*, 22 November 2011) <https://www.liberty-human-rights.org.uk/news/press-releases/government-issues-landmark-apology-over-christopher-alder%E2%80%99s-death-custody> accessed 24 January 2015.

2 ibid.

3 See, for example, *Malone v UK* (1983) 5 EHRR 385; or *Smith and Grady v UK* (1999) 29 EHRR 493.

Thankfully, on 2 October 2000, the Human Rights Act was passed, 'bringing rights home' by making Convention freedoms directly enforceable in British courts. It has achieved so much in its short tenure, from safeguarding service personnel[4] to providing redress for rape victims.[5] The legislation has also, I would suggest, made a less obvious, but no less meaningful, contribution outside the courtroom, shaping attitudes and raising standards. It can be no coincidence that this country's performance in Strasbourg has improved accordingly; in 2014, the United Kingdom lost just four of 1,997 cases lodged against it.[6]

Like the Convention, the Act too has been plagued by mistruths. But its protections are truly the most basic; those that every human being should enjoy. As Lord Bingham put it, they are not trivial, unnecessary or 'un-British'.[7] He rightly asked which of the Act's small selection of rights its critics would relinquish. The right to life? The right to a fair trial? The right not to be tortured? It is doubtful many would wish to live in a country where these most fundamental freedoms were not properly protected.

Yet that is the reality we now face. The Conservatives have vowed to repeal the Act, and replace it with a 'British Bill of Rights and Responsibilities'.[8] The Bill would, we are told, limit human rights law only to those cases the Government deems 'most serious'. Elsewhere, with CIA torture in the spotlight and the United Kingdom's own role in that practice wholly unclear, the absolute protection against inhuman treatment would be diluted in certain cases. And the right to a private and family life would be 'radically' restricted in deportation appeals, for both criminals and mere 'suspects'.[9]

In current form, then, the Bill would weaken the rights of everyone in this country—vulnerable minorities and innocent children in particular. And it would transform previously inalienable freedoms into fragile privileges, conditional on citizenship and conduct. Such linking of rights with 'responsibilities' is not desperately novel, and may sound tempting. But our criminal and civil law is already full of duties and obligations, owed by 'the people' to the

[4] See, for example, *Smith & Ors v Ministry of Defence* [2013] UKSC 41.
[5] See, for example, *DSD & NBV v Commissioner of Police of the Metropolis* [2014] EWHC 2493 (QB).
[6] Owen Bowcott, 'UK broke law in fewer than 1% of European human rights cases in 2014' *The Guardian* (London, 29 January 2015) <http://www.theguardian.com/law/2015/jan/29/uk-broke-law-european-human-rights-cases-2014> accessed 30 January 2015.
[7] Lord Bingham, 'Keynote Address' (Liberty's Anniversary Conference, London, 6 June 2009) <https://www.liberty-human-rights.org.uk/sites/default/files/lord-bingham-speech-final.pdf> accessed 24 January 2015
[8] The Conservatives, 'Protecting Human Rights in the UK' (2014) <https://www.conservatives.com/~/media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf> accessed 24 January 2015.
[9] Frances Gibb, 'Dangerous inmates to be stripped of human rights' *The Times* (London, 20 January 2015) <http://www.thetimes.co.uk/tto/law/article4328312.ece> accessed 24 January 2015.

State. The Human Rights Act, conversely, is one of the few tools allowing ordinary citizens to hold the powerful to account for abuse and neglect.

The potential impact of the proposals extends beyond the individual, though. Repeal of the Act, which underpins the United Kingdom's devolution agreements, would also threaten our wobbling Union, and the still-fragile peace settlement in Northern Ireland. Indeed, the Scottish Government has recently pledged its support for the Act.[10] Meanwhile, diminishing Convention protections at home would surely increase the prospect of the European Court ruling against this country—feeding a retreat to the nocuous pre-incorporation position that one must travel overseas for justice.

Astonishingly, however, the Bill would go further still, by treating Strasbourg judgments as merely 'advisory' until approved by Parliament. This is undoubtedly driven by a perception that the European Court is somehow 'changing British laws'. Much has been made, for instance, of the Strasbourg ruling on prisoner voting.[11] But the United Kingdom is yet to implement that decision; there has been no change in British law. The Human Rights Act, after all, is careful to preserve Parliamentary Sovereignty.

In ratifying the Convention, though, this country *has* agreed to comply with its obligations under international law—including respecting the European Court. It is inconceivable that Strasbourg judgments could be downgraded in the United Kingdom, but remain binding upon other signatories; it would destroy the Convention. The Bill's stance, therefore, would lead not only to this country's departure from the Convention but possibly the Council of Europe itself, which has rejected the proposals.[12] Such a withdrawal would align the United Kingdom alongside only Belarus and Kazakhstan, and cast doubt over its future within a European Union insistent on Member States belonging to the Council of Europe also.

As well as damaging its global reputation and influence, this country's exit would undermine the cause of those in younger democracies still striving for the freedoms the Bill seeks to discard. The message to nations with far worse human rights records would be simple: the European Court is worthless. It is difficult to imagine the result being anything other than the

[10] 'Shared commitment to Human Rights Act' (*The Scottish Government*, 29 January 2015) <http://news.scotland.gov.uk/News/Shared-commitment-to-Human-Rights-Act-1562.aspx> accessed 30 January 2015.

[11] *Hirst v the United Kingdom (No. 2)* [2005] ECHR 681.

[12] Peter Dominiczak and Bruno Waterfield, 'Tory plans to 'ignore' European human rights rulings rejected by Strasbourg' *The Daily Telegraph* (London, 3 October 2014) <http://www.telegraph.co.uk/news/politics/conservative/11139924/Tory-plans-to-ignore-European-human-rights-rulings-rejected-by-Strasbourg.html> accessed 30 January 2015.

corrosion of international human rights. Predictably, British talk of deserting the Convention has caused alarm—including amongst bereaved families of the 2004 Beslan school massacre, who have brought a case in Strasbourg. Two of the relatives, Ella Kasayeva and Emma Tagayeva, have warned that the United Kingdom's departure would be a 'catastrophe':

> The UK must not think only of itself, because this will lead to other countries completely disregarding the rule of law…It is hard to overestimate the significance of the European Court of Human Rights for the Russian people. It is the only deterrence from this lawlessness. It is our only hope.[13]

That all of this comes as the United Kingdom prepares to celebrate Magna Carta's 800th anniversary—eight centuries at the forefront of the fight for rights and freedoms—makes the betrayal all the greater. If that famous document's ultimate lesson was that no power is absolute, the Human Rights Act keeps that flame alive today by exercising constraint over an ever-larger Executive. So the Act should be regarded, as Magna Carta still is, as a statement of basic principles and law—not some temporary dalliance, ripe for tinkering with by passing administrations.

Regrettably, though, many Conservatives clearly consider their promise to scrap the Act a potential vote-winner. This is a sad status quo, borne chiefly out of a lack of public education. Incorporation of the Convention was arguably one of Labour's finest achievements but, amidst the so-called 'War on Terror', Ministers swiftly disregarded the Act in favour of authoritarianism—leaving it to be warped and discredited. A new securitised discourse instead emerged, fuelling dichotomies of 'us and them' and depicting fundamental freedoms as enemies of sense and safety.

The British Bill of Rights and Responsibilities fits neatly into this new epoch. Its title alone is illustrative: people are no longer judged purely by the fact they are human; but by where they are from, or what they have done. 'Rights' become the sole preserve of the law-abiding, British-born majority, at whom the Bill is targeted—those who believe, often misguidedly, that their liberty is threatened by alleged 'outsiders'. In an increasingly uncertain world, such an approach may hold some appeal. But modern life's inevitable challenges cannot excuse the abandoning of values for which our predecessors fought and

[13] Dr Alice Donald, 'UK must not think only of itself' (*UK Human Rights Blog*, 24 October 2014) <http://ukhumanrightsblog.com/2014/10/24/uk-must-not-think-only-of-itself-massacre-families-urge-uk-not-to-leave-echr-alice-donald/> accessed 29 January 2015.

died. Values which are *universal*; not dependent on nationality, behaviour or status. Values which will be forever lost in an era of 'British' Bills for British people.

Were the proposals enacted tomorrow, most of us would likely not face being returned to places of torture, or separated from our families. Admittedly, it is often the vulnerable and undesirable—immigrants, asylum-seekers, prisoners, criminals—to whom human rights matter most. But history reminds us that we can all become society's outcast. Just ask Jenny Paton, a mother-of-three spied upon because her local Council wrongly thought she was lying about living in a certain catchment area; or Gary McKinnon, who faced decades in a United States 'supermax' jail for looking for 'little green men' on the Internet—despite never leaving his London bedroom.

Thus we must all retain some imagination, because it can, and does, happen to anyone. If we simply nod along as politicians exploit fear and prejudice to dismantle basic freedoms—allowing ourselves to be persuaded that the handful of rights we enjoy is apparently a bad thing—how can we expect any proper protection when it is us, or our loved ones, bearing the brunt of the State's excesses?

Janet, of course, need not imagine. Her brother Christopher served this country with distinction, and yet his life was treated with complete contempt because of the colour of his skin. I began this essay with Janet's experience; I leave its final word to her also. For she offers, I think, a more compelling argument for human rights than I ever could:

> The whole experience has emphasised to me that everybody's got human rights; everybody's entitled to justice…I don't think people understand the Human Rights Act—it affects every single one of us. To scrap it would be dangerous—there wouldn't be justice in this country for a lot of people.[14]

[14] Corinna Ferguson, 'My HRA: Janet Alder' (*Liberty*, 15 February 2013) <https://www.liberty-human-rights.org.uk/news/latest-news/my-hra-janet-alder> accessed 3 February 2015.

Runner-Up Essay by Anna Dannreuther

Introduction

In recent years, concern over the UK's relationship with Europe has reached such a level that repealing the Human Rights Act 1998 ("the HRA") and leaving the European Convention on Human Rights ("the ECHR") have been presented as desirable and viable political options.[15] This has much to do with what Professor Conor Gearty has termed 'the fantasy of English exceptionalism';[16] the idea that the UK's unique and influential history makes it somehow 'apart' from Europe, an idea strengthened by the global impact of constitutional documents such as Magna Carta.

In this essay I argue that the UK will lose a vital safeguard in its human rights protection if it lets the fantasy of exceptionalism prevail by repealing the HRA and leaving the ECHR, which will lead to a worsening in the quality of human rights both domestically and internationally, and will weaken the UK's presence in international human rights discourse. I first examine the capacity of the common law to provide adequate human rights protection post-HRA before considering the beneficial impact Strasbourg rulings have had on the human rights standards of its signatory states. I then look at the UK's global influence and the effects of its departure on the wider legal community. I finally discuss the implications of EU law. I conclude that for the UK to maintain its legacy as international human rights leader, it must engage in an active, robust dialogue with Strasbourg, drawing equally on its long history of rights protection and Strasbourg's modern principled body of human rights jurisprudence.

Common Law Protection

Reach

Strasbourg and common law rights are not co-extensive.[17] In certain areas Strasbourg jurisprudence goes further than the common law, and it is those rights that would be lost following HRA repeal unless the common law evolved to fill the gap. The recent Supreme Court judgments in *Kennedy, A v BBC,* and *Osborn* seem to suggest that, left on its own, the common law would indeed fill any resulting rights gap.[18] By emphasising that the common law is 'in vigorous health and flourishing' post-HRA, that it sometimes goes further than

[15] See eg, 'Protecting Human Rights in the UK, The Conservatives' proposals for changing Britain's human rights laws', <https://www.conservatives.com/~/media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf>

[16] See <http://ukconstitutionallaw.org/2014/11/13/conor-gearty-on-fantasy-island-british-politics-english-judges-and-the-european-convention-on-human-rights/>

[17] See Dr. Elliot's comments: <http://publiclawforeveryone.com/2014/12/17/moohan-prisoner-voting-the-independence-referendum-and-the-common-law/>

[18] See *Kennedy v Information Commissioner* [2014] UKSC 20 at [46], *A v BBC* [2014] UKSC 25 at [56,57], *Osborn v Parole Board* [2013] UKSC 61 at [61].

Strasbourg jurisprudence, and that the natural starting point for disputes is to survey the 'common law scene',[19] the Supreme Court appears to suggest that the common law is sufficiently resourceful and the judges sufficiently willing to make up for any lost rights on departure from Strasbourg.

However, as Lady Hale has noted, '[i]f this is seen as a renaissance of UK constitutional rights, it is important not to overstate its reach'.[20] The rights being protected in the decisions mentioned above are largely procedural rights relating to access to the courts, which have a long history of protection in the UK.[21] Cases where the rights invoked have a less strong history of protection in the common law may not fare so well. This is evidenced in the more recent judgment of *Moohan v Lord Advocate*[22] where the Supreme Court failed to find any common law right to vote, let alone one that the prisoners in the case could rely on.

Moreover, the common law's flexibility and resourcefulness for which it is often commended may, in certain cases, result in unpredictability and infringe the fundamental right of legal certainty. As David Anderson QC pointed out in a recent panel discussion, in *Osborn* the common law position on procedural fairness was found by citing a dictum of 1748 in a case of 1863.[23] Far better to rely on Strasbourg's modern and constantly updated jurisprudence.

Limitations

Furthermore, even where a right is recognised in the common law, the latter's inherent limitations may operate to prevent its protection. For example, the common law's inability to create a new cause of action may prevent protection of a right even where the common law declares itself willing and in a position to protect that right.[24] In the pre-HRA case of *Malone* this limitation prevented Megarry V-C from recognising a right to privacy where the government had intruded unwarranted into an individual's phone calls as it was 'no function of the courts to legislate in a new field'.[25] The HRA's obligation to take into account Strasbourg jurisprudence radically improved this position. It meant that the Court of Appeal in *Douglas v Hello!* was able to read the cause of action breach of confidence in line with

[19] *Kennedy* at [46].
[20] Lady Hale, 'Keynote Address' (Administrative Law Bar Association Conference, London, 12 July 2014) <https://www.supremecourt.uk/docs/speech-140712.pdf>, p.8.
[21] See *Kennedy* on the principle of open justice, *A v SSHD* [2005] UKHL 71 on rejection of evidence procured by torture, *Al Rawi v Security Service* [2011] UKSC 34 on the right to know and effectively challenge an opposing case.
[22] [2014] UKSC 67.
[23] 'Brick Court Event' <http://www.brickcourt.co.uk/document-uploads/Is_it_time_for_the_common_law_to_break_free_from_Europe_Transcript_08.10.2014.pdf>, p.16.
[24] See *Douglas v Hello!* [2000] EWCA Civ 353 at [111].
[25] *[1979] Ch. 344, 372.*

Articles 8 and 10 of the ECHR.[26] It thus took into account the right to control the use of one's own image from *Vonn Hannover v Germany* and accordingly found a breach of the Douglases' privacy rights.

Secondly, the UK's system of parliamentary sovereignty means that Parliament is always able to overrule that right by producing primary legislation to that effect. It did this following the *Al-Rawi* judgment, when it swiftly introduced a statutory procedure for closed material procedures despite the Supreme Court's ruling in which nine Justices found that the common law did not recognise a right to such a procedure as it would invade one's right to a fair trial and the right to confront one's accusers.[27] Both the HRA's conferral on the courts of the power to make declarations of compatibility, and Strasbourg's powers to find pieces of legislation in violation of the ECHR provide valuable safeguards against the abusive potential of Parliament's limitless sovereignty.

Further, without external monitoring from Strasbourg, claimants would be subject to the whim of domestic judges, who cannot be invariably relied on to rule in favour of an individual's human rights. In *Elias v Pasmore*[28] for example, the court justified a clearly unlawful seizure of documents on the grounds that it was in the interests of the state to do so.

External Monitoring

Rulings of the European Court of Human Rights ("ECtHR") against the UK have served to highlight and rectify some of the UK's most glaring holes in its human rights protection. It is the result of the UK's duty under Article 46 of the ECHR to abide by such rulings that private homosexual acts are no longer criminalised in Northern Ireland,[29] that young offenders can no longer be 'birched',[30] and the ages for consenting heterosexuals and homosexuals are now the same.[31]

On the international scene, adverse ECtHR rulings have been of even greater importance. As former Attorney-General Dominic Grieve notes, for countries previously governed by 'communist tyranny':

[26] [2005] EWCA Civ 595.
[27] [2011] UKSC 34, Justice and Security Act 2013.
[28] [1934] 2 KB 164, 173.
[29] *Dudgeon v UK*, 1981.
[30] *Tyrer v UK*, 1978.
[31] *Sutherland v UK*, 1997, Sexual Offences (Amendment) Act 2000.

> […] the Convention and the Strasbourg court have been instrumental in facilitating the creation of the Rule of Law in environments where it has never previously existed.[32]

The ECHR has proved an extremely effective mechanism of bringing the human rights standards of the formerly inaccessible Eastern bloc countries in line with Western countries subject to Strasbourg's external control for over fifty years. This is particularly important given the grave nature of human rights abuses in those countries. For example, since ratifying the ECHR in 1998, Russia has been found in violation of the Article 2 right to life no less than 244 times.[33]

Influence

The UK has an enviable status as a legal authority. Its rulings are used as persuasive authorities in the jurisdictions of the Commonwealth countries, in international tribunals, and in European Courts.[34] Its history of legal reasoning and treatment of ECHR jurisprudence and values make it easier for jurisdictions around the world to digest Strasbourg case law. If it leaves the ECHR and repeals the HRA its role as vehicle for global dissemination of Strasbourg values will cease. This will be particularly damaging for human rights law as this area of law arguably benefits more than any other from comparative analysis by virtue of the rights in question being attributable to anyone who is human.[35] It also risks undermining the UK's status as legal authority, as it might make the UK seem 'isolationist, exceptionalist, self-referential and parochial'.[36]

Further, the UK's status as a political authority could mean that the UK's leaving the ECHR would be seen as validating such a move. This is unlikely to affect long-standing adherents to the ECHR such as France and Italy, but it might destabilise the loyalty of newer signatories such as Azerbaijan and Bosnia and Herzegovina, which, as described above, would be detrimental given their lower human rights standard. This idea is not mere conjecture. The present government's desire to leave the ECHR is being used even now as

[32] Dominic Grieve, 'Why human rights should matter to Conservatives' (London, 3 December 2014) <https://www.ucl.ac.uk/constitution-unit/research/judicial-independence/CU_JIP_DOMINIC_GRIEVE_SPEECH_3_DEC.pdf >("Grieve's Speech").
[33] See http://www.echr.coe.int/Documents/Stats_violation_1959_2014_ENG.pdf
[34] See eg, *A v SSHD* [2005] UKHL 71, which is cited in Australia, Botswana, USA, the International Criminal Court and ECtHR: <http://www.worldlii.org/cgi-bin/LawCite?cit=[2005]%20UKHL%2071>.
[35] See eg 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, Lord Hoffman 19 March 2009 <http://www.brandeis.edu/ethics/pdfs/internationaljustice/biij/BIIJ2013/hoffmann.pdf>.
[36] As Gráinne de Búrca argues will happen to the European Court of Justice due to its judgments lacking reference to other legal sources <http://podcasts.ox.ac.uk/european-court-justices-treatment-eu-charter-fundamental-rights>.

an excuse by Ukraine for not implementing Strasbourg judgments,[37] and to promote questionable ideas of national sovereignty by Kenya's morally dubious former President.[38]

EU law

In the envisaged scenario, any areas of law falling within the scope of EU law are subject to review by the EU's Charter of Fundamental Rights.[39] The Charter is more extensive than the ECHR, and where violations are found the supremacy of EU law means that the domestic remedies are much stronger than the HRA remedies, involving the possible disapplication of Acts of Parliament.[40] Unless the UK leaves the EU, this would result in an arbitrary two-tiered system of human rights standards – one for areas of law falling within the scope of EU law, and one for those falling outside. As Dominic Grieve notes, in this instance, the European Court of Justice might consider it its duty to expand its competences so as to provide an external check on the UK.[41] If previous frustration at creeping competences is anything to go by, this could ultimately lead to the UK leaving the EU. The UK would then join Belarus as the only two countries between Ireland and Asia to forego external monitoring by either the EU or ECtHR.

Conclusion

In order for the UK to maintain its legacy as international human rights leader and ensure the highest level of human rights protection globally, it must continue to draw on both its long history of fundamental domestic rights protection as enshrined in documents such as Magna Carta, and the modern principled body of Strasbourg case law dedicated exclusively to human rights. The ECtHR's recent decisions in *Horncastle v UK* and *Hutchinson v UK* illustrate Strasbourg's receptiveness to the UK's suggestions for improvement in its jurisprudence. The UK should thus in general follow Strasbourg as international human rights expert, yet strive for its continual improvement by imbibing it with centuries-old fundamental common law values.

[37] 'Lavrynovych believes that the judges of the European Court must take into account Ukrainian realities' (Glavcom, 23 October 2013) <http://glavcom.ua/news/161473.html>.
[38] President Uhuru Kenyatta 'Presidential Address' (Parliament of Kenya, Joint Sitting of the National Assembly and the Senate, 6 October 2014) <https://adam1cor.files.wordpress.com/2014/10/hansard-report-monday-6th-october-2014-1.pdf >.
[39] C-617/10 *Åklagaren v Hans Åkerberg Fransson.*
[40] As illustrated *by Benkharbouche and Janah v SSFCA* [2015] EWCA Civ 33.
[41] Grieve's Speech, p.26.

Essay summaries of the shortlisted candidates

Summary of essay by Joseph Mulhern

My essay focused on an analysis of the Conservative Party's proposals for reform of the human rights legislative framework in the UK contained in their 2014 strategy paper *'Protecting Human Rights in the UK'*. In considering the question I also attempted to draw historical and legal comparisons with the Magna Carta.

I argue that the proposals not only to repeal the Human Rights Act 1998 ('HRA'), but also to renege on obligations under the European Convention on Human Rights ('ECHR') may well lead to the UK's withdrawal from the ECHR.

The intention of the proposals is clear; for Parliament, and therefore, (given the nature of our political system) the government, to take back control of the interpretation of the ECHR from our domestic courts and the European Court of Human Rights ('ECtHR').

In my view, although it has been of concern when the ECtHR has given contradicting judgements to those of the House of Lords and the Supreme Court, the problems have been greatly overstated and conflicts are relatively rare. Further, such conflicts seem less likely in the future in light of the reform of the ECtHR through Protocol 15 of the ECHR which will emphasise the principles of subsidiarity and the margin of appreciation.

If the proposals were to be implemented, the government would be under no obligation to abide by any decision of the ECtHR. They would also be free to legislate as they wished if they disagreed with a domestic court's human rights decision, so that the same decision could not be made again.

In my view this points to the Conservatives' intention to ensure that the protection of the rights of individuals under the HRA can no longer interfere with implementing policy, particularly relating to immigration and criminal justice. A withdrawal from the ECHR would also mean that there would no longer be the 'safety net' of individual petition to the ECtHR.

In addition, refusing to be bound by the ECHR and/or withdrawing from it would send a destabilising message to the other members of the Council of Europe, who may also take their obligations under the ECHR less seriously. The ECHR could become simply a statement of principles, which signatory States may choose to comply with as they wished.

The UK's stance could also undermine the efforts of human rights campaigners in States with poorer human rights records than our own.

It is hardly surprising that the executive wish to remove a check on their powers. However, the very purpose of the HRA and the ECHR itself, drafted in response to the tyranny in Europe which preceded it, is to protect individuals from the arbitrary exercise of power by the State. Therefore, it must be independent, impartial judges who determine questions of human rights, rather than a self-regulating State.

Summary of essay by Angelica Rokad

Today, basic rights have evolved and are embodied in two fundamental pieces of law: the "European Convention on Human Rights and Fundamental Freedoms 1950"[42] and "The Human Rights Act 1998". This essay concludes that these rights would receive continued protection by the English courts, were the United Kingdom[43] to pull out or repeal them. However, it also concludes that the lack of a legislative framework would leave UK citizens substantially disadvantaged in applying for relief from state violations of their human rights.

This essay answers this question by considering the premise that UK courts are as effective as the Convention in safeguarding human rights. If the answer is no, pulling out would substantively effect fundamental rights. If yes, it is clear that the common law was already adapting to protect them: the effect of repeal minimal. This essay believes it is the later.

Consideration of judgments from the (former) House of Lords and ECtHR[44], makes it clear that the Convention does provide a base to assist UK courts in protecting key human rights. Further, certain rights in UK courts have been held inherent to the rule of law, even *without* the application of the Convention. In any event, pulling out would not affect an individual's right to bring a petition alleging violation domestically, by virtue of section (2)(1) of the HRA 1998.

This essay goes on to consider the effect of repealing the HRA 1998. The consequence? UK nationals would be denied a direct remedy to address Convention Rights in UK courts, forced to pursue legal redress for rights violations at Strasbourg instead, jeopardising recent trends to engage in a rights-based dialogue.

However, what this essay finds most concerning about recent rhetoric to abandon both the Convention and the HRA 1998 is the compromise it could have on constitutional checks and balances. Doing so would send a clear message to the wider world that the rule of law was not sacrosanct, but subject to the whim of the executive. Should other countries follow in the UK's footsteps, human rights protection across the world may be threatened. It concludes a repeal would create an ideological reversion into an era where the rule of law could *never* be as important as Parliament sovereignty: an age prior to the Magna Carter itself.

[42] ECHR, ("the Convention").
[43] UK.
[44] The European Court of Human Rights, ("the ECtHR").

Summary of Essay by Jake Rylatt:

The essay argues that proposed reforms to repeal the Human Rights Act ("HRA") and withdraw from the European Convention on Human Rights ("ECHR") would have a serious adverse impact on human rights protection, both in the UK and internationally. With regards to the former, the essay argues that the post-reform residual 'rights' regime would be both uncertain and unsatisfactory, with weakened judicial and legislative accountability mechanisms. With regards to the latter, the essay argues that reforms would leave individuals with no effective machinery to bring human rights claims, a concern particularly acute in cases regarding extraterritorial human rights violations. Additionally, the legitimacy of the European human rights regime would be undermined.

Human Rights Protection in the UK

The analysis commences by noting that, fundamentally, the repeal of the HRA would reverse the incorporation of ECHR rights into UK domestic law, thus preventing direct reliance on such rights by individuals before domestic courts resulting from the UK's dualist approach to international law. Such reasoning also precludes the direct effect of comparable obligations under human rights treaties to which the UK would remain a party, such as the International Covenant on Civil and Political Rights ("ICCPR"). In considering whether individuals would retain any justiciable 'rights' protection, it is submitted that neither the reinvigorated doctrine of common law constitutional rights, nor the possibility of reliance on customary international law conceptions of human rights, would provide a certain and predictable alternative to the HRA and ECHR, consequently undermining the Rule of Law.

The essay continues by arguing that, assuming justiciable sources of rights or liberties would remain post-reforms, judicial power to protect human rights would be severely curtailed. Specifically, repeal of the HRA would include removal of the powers of the judiciary to: interpret domestic legislation in conformity with Convention law 'so far as it is possible to do so'; issue declarations of incompatibility where harmonious interpretation is not possible; and 'take into account' the decisions of Strasbourg. Additionally, the statutory requirement of formal consideration of a Bill's compatibility with Convention rights within the UK legislative process would be removed.

International Protection of Human Rights

Moving beyond the domestic sphere, the analysis continues by arguing that while the reforms would leave the UK a party to further human rights treaties such as the ICCPR, the UK has failed to accede to any of the accompanying Optional Protocols granting individuals a right of petition to the relevant international treaty bodies. Consequently, withdrawal from the ECHR would remove the only option for individuals to submit complaints to international tribunals regarding UK human rights abuses. Alternatives in the form of diplomatic protection claims for foreign nationals, alongside the Universal Periodic Review process, do not remedy the lack of readily available international judicial processes.

The essay next contends that despite the UK's human rights obligations continuing to apply extraterritorially, by virtue of the ICCPR, the practical effect of the proposed reforms would be to prevent such claims being justiciable at the national or international level. Finally, the essay highlights the UK's status as a pioneer of human rights protection, and argues a UK withdrawal would consequently undermine the overall legitimacy of the ECHR regime.

In concluding, the essay contends that at a time where human rights face immense pressure from attempts to combat terrorism, the proposed reforms would provide a further great challenge to effective human rights protection. On the 800th Anniversary of the Magna Carta, a historical step forward in protecting liberty, it would be disastrous to take the two proposed almighty steps back.

Summary of Essay by Rachel Sullivan:

This essay locates human rights in a political context, looking at the increasing domestic controversy surrounding the issue. Although Britain was key in establishing the concept of universal and international human rights in aftermath of the Second World War, it has become a topic of political dissension. The current government has outlined plans including repeal of the Human Rights Act 1998 and possible withdrawal from the European Convention on Human Rights (ECHR) itself. Against such a background, this essay contends there are clear benefits of being a member of such an international system, before turning to address the potential consequences of leaving.

It is suggested in is necessary to have regard to the historical contribution the ECHR has made to our conception of human rights and indeed human dignity. Cases such as *Dudgeon v UK* [1981] ECHR 5 have improved the level of human rights discussion in this country, protecting and promoting rights now seen as uncontroversial. The Convention has provided a layer of protection above and alongside the common law in the past, and it is submitted that it continues to do so and offer protection not otherwise available: see for instance the Supreme Court's differing treatment of claims in negligence/Article 2 in the recent police case of *Michael v Chief Constable South Wales Police* [2015] UKSC 2. The essay further argues that if one needs to view the ECHR in its historical context to understand its real benefits, one also needs to view it against the background of the work it does protecting rights internationally. The essay examines some recent jurisprudence of the Strasbourg court concerning breaches of the right to life or the prohibition against inhuman or degrading treatment, and suggests. that this case law demonstrates the continuing necessity of the Convention as an international instrument.

Against this background, it is contended that withdrawal from the Convention has ramifications both here and abroad. It threatens to lead to the impoverishment of discourse on human rights at home, and abroad the undermining of the very basis of the system. The Convention derives its force through the fact of agreement: it is a system based on consensus and of which the primary enforcement mechanism is moral disapproval. Withdrawal undermines this consensus and leaves the system unworkable, but perhaps more damagingly also undermines the theoretical considerations of universality and common dignity on which human rights depend.

In light of these conclusions, the essay turns to consider the reasons advanced for withdrawing from the Convention, noting in particular the views that the Strasbourg court has extended its remit far beyond intention of founders, and that the Convention system is unnecessary since the common law provides adequate protection for human rights. It is suggested that neither of these positions are wholly unfounded, and that there is legitimate discussion to be had about the nature of the Convention as a living instrument, and how the Convention and the HRA fit with our understanding of the constitution. In the final analysis however the effects of withdrawing altogether are wholly disproportionate: although reform might well be needed, withdrawal is not.

Notes