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Human Rights Reform and the UK's International Human Rights Obligations

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Introduction

The 2015 UK General Election, which returned a majority Conservative government, has placed reform of the UK's human rights regime firmly on the political agenda.[1] Two possible areas of reform have surfaced in political discussions: a) repeal of the Human Rights Act 1998 (HRA) and its replacement with a 'British Bill of Rights'; b) withdrawal of the United Kingdom from the European Convention on Human Rights (ECHR).

In terms of the actual content of a British Bill of Rights, the Queen's speeches in 2015 and 2016 remained vague and merely promised that 'proposals will be brought forward for a British Bill of Rights.'[2] One can, however, find some indications as to the substance of such a Bill in a policy document entitled 'Protecting Rights in the UK' published by the Conservative Party in 2014[3] and in that Party's 2015 election manifesto.[4] The election manifesto promises to 'scrap' the HRA and replace it with a British Bill of Rights and to 'curtail the role of the European Court of Human Rights'.[5] In particular, it 'aims to break the formal link between British courts and the European Court of Human Rights'.[6]

In terms of substantive rights protection, the manifesto promises a protection of 'basic rights like the right to a fair trial, and the right to life, which are an essential part of a modern democratic society', but equally promises to 'reverse the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society.' In particular, it aims to make deportation of terrorists and other serious foreign criminals easier[7] and to 'ensure our Armed Forces overseas are not subject to persistent human rights claims that undermine their ability to do their job.'[8] While this suggests that the British Bill of Rights would result in an overall reduction of human rights protection, former Justice Secretary Michael Gove contended before the Joint Committee on Human Rights that the aim is to strengthen the rights of individuals and minorities.[9] News reports appearing over the summer of 2016 suggested that plans to introduce a British Bill of Rights had been put on hold due to the 'leave' vote in the EU referendum of 23 June 2016.[10] These reports do not, however, reflect current thinking in the Government. This was made clear by the new Justice Secretary Liz Truss, who – giving evidence to the House of Commons Justice Committee – confirmed that proposals for a British Bill of Rights had not been set aside.[11]

There do however appear to be no current plans to withdraw the UK from the ECHR. Prime Minister (then Home Secretary) Theresa May said on 25 April that the UK should leave the Convention,[12] but seems to have retracted from this in her bid to become Conservative party leader explaining that there was no majority in Parliament for taking this step.[13] This was confirmed by the new Justice Secretary.[14] Equally, the party's election manifesto did not repeat the prospect of ECHR withdrawal, which had been raised in the 2014 Conservative party policy document.[15]

This briefing paper aims to place these reform proposals into the broader context of the UK's international obligations.

The paper will do this in three steps:

1) it will show that the UK is enmeshed in a complex web of international human rights treaties;
2) it will demonstrate the greatly differing impact of these international obligations in the domestic law of the UK and how this may inform human rights reform; and
3) it will try to gauge the impact that human rights reform in the UK might have on the system of international human rights protection.

1. The UK's international human rights obligations

Under international law, the UK is subject to numerous treaties and other (binding and non-binding) instruments that protect all three 'generations' (or types) of human rights. Though queried by some scholars,[16] human rights lawyers have traditionally drawn a distinction between, on the one hand first generation rights, which are civil and political rights, such as the right to life, right to liberty, free speech, or freedom of religion, and, on the other, economic, social and cultural rights belonging to the second generation, such as the right to health, just working conditions, the right to collective bargaining, and the right to education. Third generation rights tend to be collective rights, such as a people's right to self-determination, the right to development, or the right to a healthy environment. As a broad generalisation, it seems fair to say that states tend to be most accepting of obligations relating to first generation rights – which can often be found in their domestic constitutions as well – and least accepting of binding obligations relating to third generation rights.

The UK's treaty obligations can further be distinguished as to whether they were concluded at a global level – usually under the auspices of the United Nations (UN) or at a regional, European level. There are significant substantive overlaps between the various instruments. For instance, the right to free speech can be found amongst others in the Universal Declaration of Human Rights,[17] the International Covenant on Civil and Political Rights,[18] the ECHR,[19] and the EU Charter of Fundamental Rights.[20] As will be shown, there are significant differences in the enforceability of these different instruments.

Global human rights instruments

A large number of human rights are protected at the UN-level. The UN Charter itself fails to enumerate concrete human rights guarantees and largely restricts itself to formulating the promotion of human rights as one of the purposes of the UN.[21] Yet only three years after the UN was founded, the Universal Declaration of Human Rights was proclaimed by the UN General Assembly on 10 December 1948.[22] Even though it is not legally binding, it is of particular significance as it constitutes the first global pronouncement of human rights and as such is the basis for subsequent developments resulting in binding human rights treaties. The UK has ratified many of these treaties, some of which are worth mentioning here.[23] The International Covenant on Civil and Political Rights (ICCPR) concretises the first generation rights contained

in the Universal Declaration and protects them in a binding manner. The concomitantly adopted International Covenant on Economic, Social and Cultural Rights (ICESCR) does the same for second generation rights.[24] The three instruments are collectively known as the International Bill of Human Rights.[25]

The International Bill of Human Rights is flanked by a number of more targeted treaties, which the UK has ratified:[26] the Torture Convention,[27] the Convention on the Rights of the Child,[28] the Convention on the Rights of Persons with Disabilities;[29] the Convention on the Elimination of All Forms of Racial Discrimination;[30] and the Convention on the Elimination of All Forms of Discrimination against Women.[31] By contrast, third generation rights have not received the same amount of legal recognition.[32]

European human rights instruments

Parallel developments took place at the regional European level under the auspices of the Council of Europe (CoE).[33] Founded in 1949, the aim of the CoE is 'to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress', which shall be pursued amongst others by a 'further realisation of human rights and fundamental freedoms'.[34] The CoE currently has forty-seven member states.[35]

Apart from the ECHR – the CoE's signature treaty, discussed in greater detail below – the UK has ratified the European Social Charter of 1961.[36] It guarantees many second generation rights, including workers' rights, a right to the protection of health, rights of access to social security and welfare as well as rights for children and disabled persons. The other human rights instruments ratified by the UK are the European Charter for Regional and Minority Languages and the Framework Convention for the Protection of National Minorities.[37]

The UK was amongst the first states to sign up to the ECHR, the CoE's main human rights instrument. In fact, British lawyers were instrumental in the drafting process and the ECHR is said to be very much inspired by principles of English law.[38]

The original ECHR protects key civil and political rights, such as the right to life, the right not to be subjected to torture, the rights to liberty, to a fair trial and to an effective remedy, the prohibition of punishment without law, the right to family life, as well as freedom of speech, religion and assembly. It also contains a limited right against discrimination. The ECHR features a number of optional protocols, which protect additional rights. The UK has ratified Protocols 1, 6 and 13.[39] The first of these guarantees the protection of property, a right to education and the right to free elections. While the second and third deal with the death penalty.

In addition, the UK is at the time of writing still a Member State of the European Union (EU), an organisation to be distinguished from the CoE. Consequently, the UK is also bound by the EU Charter of Fundamental Rights. The Charter guarantees the rights contained in the ECHR – often in an updated manner – and a number of other rights, such as a right to the protection of personal data, a right to asylum, rights of EU citizens, and numerous social and economic rights.[40] The Charter is only of limited applicability to EU Member States, however. They are only bound by the rights it guarantees 'when implementing Union law'. This phrase has given rise to a growing body of case law on the precise meaning of this limitation,[41] but for the purposes of this paper this need not be discussed in great detail. Suffice it to say that whenever the UK is acting within the scope of EU law, it must abide by the rights laid down in the Charter. By contrast, it must abide by the rights guaranteed in the ECHR and other human rights treaties at all times.

The Charter continues to apply to the UK even after the 'leave' vote in the EU referendum of 23 June 2016 as the UK will only be relieved of its obligations under EU law once it has formally ceased to be an EU Member State. This will first require the UK to notify the European Council under Article 50 of the Treaty on European Union, which will be followed by a presumably prolonged negotiating period.[42] It is likely that the UK and the EU (with its remaining twenty-seven Member States) will agree on some sort of future relationship between them. It is unlikely, however, that the Charter will continue to bind the UK in that event given that there is currently no non-EU Member State bound by it.

Enforcement and effectiveness

Having provided an overview of the international human rights landscape in which the UK finds itself, it is apposite to discuss how the enforcement of these international human rights treaties works. Both parties' concrete obligations under these treaties and their enforcement mechanisms differ greatly. The resulting differences in effectiveness help explain why there are so many parallel human rights regimes to which the UK is signed up.

As has already been anticipated above, human rights treaties differ with regard to the intensity of the obligations placed upon their parties. For instance, while the ICCPR obliges parties 'to respect and to ensure to all individuals within [their] territory […] the rights recognized'[43] in it, the ICESCR merely requires them 'to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.'[44] This difference in obligations can be explained by the nature of the rights – first generation versus second generation – protected in each of the covenants. Nonetheless a comparison between the ICESCR and other instruments protecting second generation rights such as the European Social Charter with its concrete obligations to protect certain social rights shows that stronger commitments in this regard do exist.

The greatest differences between the various human rights regimes to which the UK is a party concern the procedures on monitoring and enforcement. One can distinguish the following types of procedures prevalent in international human rights law: reports, procedures of inquiry, inter-state complaints, and individual complaints.[45] The reports system is quite a common feature of international human rights law and largely relies on internal reflection and self-regulation by the states concerned.[46] For instance, the ICCPR established the UN Human Rights Committee (HRC) as a monitoring body.[47] Parties to the ICCPR must submit 'reports on the measures they have adopted which give effect to the rights recognized' in the ICCPR at regular intervals. Having examined the state reports, the HRC then issues 'concluding observations', which detail positive achievements and point out negative developments (known as 'principal subjects of concern and recommendations') relevant to a country's human rights record. The concluding observations are then communicated to the state concerned. They usually list a number of issues of particular priority, for which there is a follow-up procedure. The reports system relies on the cooperation of the states concerned both as regards the submission of regular reports as well as a willingness to engage with these and make the changes recommended.

The Torture Convention additionally includes a procedure of inquiry, which allows the Committee against Torture to investigate 'reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party.'[48] The Committee's findings in this regard are then transmitted to the state concerned including recommendations. This procedure has been used on a number of occasions in the past.[49]

Inter-state procedures are instigated by state parties to a human rights treaty arguing that another party is in violation of its obligations.[50] These procedures can take different forms. For instance the inter-state procedure before the HRC – which is not compulsory – is not judicial and results in a report by the HRC.[51] By contrast, the inter-state procedure under the ECHR is a contentious procedure before the European Court of Human Rights (ECtHR). If a violation is found, it results in a judgment binding on the parties. Inter-state procedures are, however, very rare in practice. They have never been used under the UN human rights system and only on a handful of occasions under the ECHR.[52] Inter-state procedures are not available under every human rights instrument; and where they are available, their admissibility can depend upon the states concerned having opted into the procedure.[53]

The most effective way of enforcing a state's human rights treaty obligations is by allowing individuals to complain that their rights have been violated. They can usually do this after having exhausted domestic remedies.[54] This not only has the advantage of making human rights violations more easily detectable by involving those who suffered from them, but it also removes diplomatic and other considerations, which account for the paucity of inter-state complaints in practice, from the decision to launch a complaint. The UK is subject to a number of individual complaints procedures under specialised UN human rights treaties.[55] Notably, however, it did not opt into the individual complaints procedure offered by the Optional Protocol to the ICCPR. Nor did it that offered by the Torture Convention[56] or the collective complaint procedure under the European Social Charter.[57]

The individual application procedure before the ECtHR under the ECHR is open to any victim of a violation of the rights guaranteed by the Convention attributable to a contracting party.[58] Importantly, such an application can only be brought after remedies at the domestic level, i.e. in the respondent state, have been exhausted.[59] This reflects the subsidiary character of the Convention system: the ECtHR will only decide after the national courts have been given the opportunity to remove the human rights violation complained of.[60] The procedure before the ECtHR is contentious. Its judges are independent and hearings take place in public.[61] The procedure before the ECtHR results in a judgment. If a violation is found, the respondent state is obliged to abide by the judgment and remove the violation.[62] The ECtHR can additionally order that the respondent state pays 'just satisfaction' – usually a sum of money, but also non-pecuniary remedies – to the applicant.[63]

Compared with other human rights treaties, the procedure before the ECtHR is therefore very effective. Not only does it allow victims to directly access an impartial court procedure, it also results in a binding judgment. This explains why the procedure is so popular with individuals who believe that their human rights have been infringed.[64] And it also explains why it has led to the political controversies that have given rise to heated discussions about reforming human rights in the UK:

- by allowing individuals to challenge acts of the UK's institutions, including Parliament, before an international court the ECHR system places traditional conceptions of sovereignty and the legitimacy of decision-making under the pressure of external scrutiny.

2. The impact of human rights reform on the UK's international obligations

Having sketched the extent of the UK's human rights obligations under international law, the following part of this briefing paper addresses the potential impact that a reform of human rights law might have on them if:

a) the Human Rights Act is repealed and replaced with a British Bill of Rights; and

b) if the UK decides to withdraw from the ECHR.

Domestic effect of international human rights law

Before being able to address these concrete questions, it should briefly be pointed out that when it comes to international treaties the UK is a dualist state.[65] This requires that a strict distinction is drawn between the UK's external obligations under international law and UK public bodies' internal obligations under domestic law. Treaties are concluded (signed and ratified) by the UK government exercising the Royal Prerogative.[66] They are thus binding on the UK under international law. However, they can only be adjudicated by domestic courts if they have been incorporated into domestic law by an Act of Parliament. Until this is the case, they are not part of UK law.[67]

The ECHR was only incorporated into UK law with the HRA, which entered into force on 2 October 2000. Before that date, the UK was bound by the ECHR under international law, but the ECHR could not be directly invoked in the courts of the UK as it was not part of domestic law. Where domestic UK law, e.g. the common law, did not provide a remedy in case of a human rights violation, the victims of such a violation usually lost their case in the UK courts and, having exhausted all domestic remedies, were then able to launch individual complaints to the ECtHR.[68] The lack of a domestic remedy in some cases resulted in victims of human rights violations having to resort to the ECtHR as the only court competent to assess their case in light of the ECHR. Part of the rationale for introducing the HRA was that this – in the words of Ed Bates[69] – 'curious position' should be reversed and British courts should be empowered to adjudicate these cases.[70] By contrast to the ECHR, other human rights treaties to which the UK is a party have not been directly incorporated into domestic law.[71]

The current system of human rights protection in the UK

As mentioned previously, the HRA incorporates most of the rights in the ECHR into UK law.[72] The HRA is binding on all acts of 'public authorities',[73] but cannot be used to override Acts of Parliament in order to preserve the sovereignty of Parliament.[74] Where an Act of Parliament is contrary to one of the rights protected by the HRA, higher courts can make a 'declaration of incompatibility'. This leaves the Act of Parliament intact, but serves the purpose of pointing out that the legislation is problematic in human rights terms and gives Parliament the opportunity to rectify this. The HRA also provides for a fast track procedure to remove the incompatibility by way of a remedial (ministerial) order if there are compelling reasons for this.[75]

The situation is different where the EU Charter of Fundamental Rights is concerned. EU law takes primacy over conflicting domestic law including Acts of Parliament.[76] This does not mean that an Act of Parliament violating Charter rights is void. It means, however, that it is 'disapplied' in the concrete case.[77] As explained in the introduction, the Charter only applies where an EU Member State acts within the scope of EU law.[78] Obviously, once the UK has formally left the EU, the Charter will cease to have to be binding on the UK and to have effect in its domestic law.[79] The rights contained in the Charter will therefore no longer protect individuals in the UK. Given that the Charter protects a greater number of rights than the ECHR and given its greater effectiveness, this will lead to a tangible lowering of human rights protection.

Additionally, the common law continues to protect so-called civil liberties.[80] There is a developing tendency in the courts to increasingly reference common law rights in their judgments alongside of or in lieu of rights protected by the HRA and that these common law rights have developed since the entry into force of the HRA. Nonetheless, common law rights cannot currently act as a full substitute for an enacted catalogue of human rights, chiefly because Acts of Parliament can override them when they are clear and express.[81] In addition, common law rights are difficult to identify and to define.[82]

Effects of a repeal of the UK Human Rights Act and replacement with a British Bill of Rights

What would be the effect of a repeal of the HRA and its possible replacement with a British Bill of Rights? Would the UK be in breach of its international law obligations? And would it make any difference in light of the EU Charter of Fundamental Rights and the common law?

In order to answer these questions, it is necessary to clarify the UK's exact commitments under international law. These will be illustrated by reference to the ECHR, but this analysis applies by extension to other human rights treaties as well.[83] The ECHR obliges its parties to comply with the rights it guarantees, but it leaves it to their discretion how this is done internally. The most straightforward way of securing ECHR compliance is by mirroring it in the domestic legal order. This is what the UK has done with the HRA. It not only makes the rights contained in the ECHR part of domestic law and thus a standard for judicial review, it even goes so far as to require judges interpreting these rights to 'take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights'.[84] After all, under international law a state cannot invoke provisions of its domestic law in order to justify non-compliance with its treaty obligations.[85]

This kind of mirroring however is by no means required by the ECHR itself. In fact, most European countries have their own domestic system of human rights protection. For instance, in Germany these domestic rights – many of them equivalent to those in the ECHR – are enshrined in the [86] and can be used to judicially review legislation. By contrast, the ECHR has the – compared with the constitution – lesser status of a statute in the German legal order and is not referred to very often in practice.[87] Nonetheless, Germany is not in breach of the ECHR and neither would be the UK if it decided to repeal the HRA. In fact, before the HRA came into force, UK law did not contain equivalent human rights guarantees. Nonetheless the UK was not as such in breach of the ECHR although the lack of legal remedies at the domestic level resulted in the UK regularly being found in breach of the ECHR by the ECtHR.[88]

If the HRA were to be replaced with a British Bill of Rights, this would therefore not have immediate consequences for the UK's international obligations. What it might result in, however, is a possible shortfall of the human rights protection available at the domestic level compared with what is required by the UK's international obligations, notably the ECHR. The extent of that shortfall depends upon the exact content of the Bill of Rights and on whether the common law has developed far enough to make up for it. In the absence of a concrete proposal, it is impossible to pass a definite judgment on this, but for illustration purposes the suggestions made in the Conservative Party's manifesto and in its policy paper quoted in the introduction are of help. If domestic courts are no longer bound to take account of ECtHR case law, for instance, it is likely that there might be more cases in which rights guaranteed both in the ECHR and in the British Bill of Rights are interpreted more restrictively by the British court.[89] If this happens, the person who was not granted the level of protection required by the ECHR is likely to make an individual application to the ECtHR, which would probably result in a finding that the UK was in breach of the Convention.

Much the same can be said of the other suggestions, which, if included in a British Bill of Rights, might restrict domestic courts' jurisdiction in cases dealing with human rights violations attributable to the armed forces when deployed overseas or in cases concerning the deportation of serious criminals and terrorists. In some of these cases the ECHR applies and requires parties to it to provide a remedy.[90] If domestic courts are unable to provide a remedy in such cases, individuals would have to resort to making individual applications to the ECtHR and would probably be successful.

Depending on the exact content of a British Bill of Rights, there is thus a danger that a situation resembling that before the entry into force of the HRA would be created. The case of Smith and Grady v UK serves as an illustration of this.[91] The applicants before the ECtHR had been discharged from the UK armed forces in 1994 – i.e. before the entry into force of the HRA – because of their homosexuality based on an absolute policy against homosexuals in the military. Proceedings for judicial review before the High Court of England and Wales and the Court of Appeal remained unsuccessful chiefly because the right to private life guaranteed by Article 8 ECHR was not enforceable in the domestic courts. For this reason, the domestic courts were restricted in reviewing the measure for its 'unreasonableness', which meant that to be quashed the decision to discharge the applicants would have had to have been 'beyond the range of responses open to a reasonable decision-maker.'[92] This very high threshold resulted in the case being dismissed. The subsequent judgment of the ECtHR, by contrast, found a violation of the applicants' right to private life given that in order to justify interference with a most intimate aspect of a person's life, such as their sexuality, required a state to put forward 'particularly serious reasons.' The ECtHR concluded that reasons of that importance had not been offered by the Government so that the applicants succeeded in their challenge.

A lack of domestic remedies would therefore most probably lead to an increase in cases before the ECtHR being lost by the UK. This might then be regarded by some as 'undue meddling' in the domestic affairs of the UK and might lead to renewed or reinforced calls for a withdrawal from the ECHR.

Withdrawal from the European Convention on Human Rights

Withdrawal from the ECHR is possible under the procedure laid down in Article 58 ECHR. That article stipulates a six-month notice period, after the expiry of which the denunciation of the ECHR becomes effective. The UK would remain responsible for all violations that occurred before this date.

Would withdrawal from the ECHR conflict with any of the UK's other international obligations? As far as its international human rights commitments under the UN system are concerned, there is nothing to suggest any direct breaches resulting

from a withdrawal. It is of course conceivable that in the long run withdrawal from the ECHR might result in an overall deterioration of human rights standards in the UK, which might then be considered to be incompatible with the UK's remaining human rights obligations, e.g. under the ICCPR. But this is by no means certain.

There is, however, some discussion as to whether a withdrawal from the ECHR would be compatible a) with the UK's EU membership; and b) with its membership of the CoE – the organisation to which the ECHR and the institutions involved in its realisation belong.

EU membership requires prospective Member States to show that they respect human rights.[93] This obligation continues once a Member State has been admitted to the EU. While there is no express requirement to be a party to the ECHR, the European Commission's practice in assessing the degree to which candidate countries are prepared to become Member States in this regard relies heavily on compliance with the ECHR and ECtHR judgments.[94] While this is evidence of a legal requirement of being signed up to the ECHR during a country's EU membership, this evidence is not entirely conclusive and there is room for debate. After the 'leave' vote of 23 June 2016 and a likely 'Brexit' in the not too distant future, this has now become a largely academic question as far as the UK is concerned.

There is equally not a conclusive answer as to whether it would be compatible with the UK's continued membership of the Council of Europe if it withdrew from the ECHR. The separate denunciation clause in the ECHR suggests that this would be the case. After all, why would the CoE members have considered it necessary to allow for separate denunciation of the ECHR? It is, however, now a pre-condition for membership of the CoE that a state signs up to the ECHR. Consequently, there is currently no member of the CoE that is not bound by the ECHR and subjected to the jurisdiction of the ECtHR. It can therefore be argued that the ECHR is integral to the CoE and that membership of the CoE requires being signed up to the ECHR.[95] As there is neither an express clause to this effect in the Statute of the CoE, nor a precedent of a state leaving the ECHR and wanting to stay in the CoE[96], there is still room for debate on this point. Suffice it to say, however, that a UK withdrawal from the ECHR would send a very strong political message that could lead to an overall weakening of human rights protection in Europe and possibly world-wide. This will be addressed in the next part.

3. The impact of human rights reform in the UK on international law

The final point this research briefing aims to address is how the UK's plans for of reforming its human rights law internally and reviewing its external commitments might affect international human rights protection as such.

The UK understands itself as a promotor of human rights worldwide. International human rights protection is one of the policy fields of the Foreign and Commonwealth Office. It releases an annual Human Rights and Democracy Report, which details the Foreign and Commonwealth Office's human rights activities and identifies a number of 'human rights priority countries' where the UK judges that it 'can make a real difference'.[97] The UK's role in this regard is well-established. After all, the UK was a driving force behind the establishment of the CoE and the ECHR shortly after the Second World War. The ECHR was a central pillar in the process of bringing (West-)Germany back into the fold of civilised and democratic nations and was seen by Sir David Maxwell-Fyfe – one of its creators – as 'a passport of return to our midst' for those countries behind the iron curtain, a role it would start to fulfil from 1990 onwards.[98]

The question therefore is whether the possible reforms of the UK's own human rights commitments– repeal of the HRA and replacement with a British Bill of Rights and withdrawal from the ECHR – would find any resonance in the international community and in particular whether they would have a negative effect on human rights protection outside the UK's borders.

Except for a denunciation by the Greek military junta in 1969,[99] no country has ever withdrawn from the ECHR. There is thus no precedent of an established and in many ways exemplary democracy (and permanent member of the UN Security Council) known for its respect for the rule of law renouncing its human rights obligations in this manner.

It may, however, be possible to draw some conclusions as to the wider effects of such a move from international reactions to the non-implementation of judgments of the ECtHR by the UK. The decision of the Grand Chamber in Hirst v UK (No 2) on prisoners' voting rights has gained notoriety in this regard.[100] The ECtHR decided in 2005 that the UK's blanket ban on prisoner voting was disproportionate and incompatible with the right to free elections laid down in Article 3 Protocol No 1 to the ECHR. In order to comply with that judgment Parliament would need to amend the Representation of the People Act 1983 and enfranchise at least some prisoners. This still has not happened. In fact, the judgment in Hirst gave rise to a lively debate in the House of Commons in which the House voted by a majority of 234 to 22 not to change the law in this regard.[101]

Given that the ECtHR has not overruled Hirst,[102] this means that the UK has been in breach of its obligations in this regard for over ten years. In fact, the ECtHR expressly asked the UK to bring forward 'legislative proposals intended to amend the 1983 Act […] in a manner which is Convention-compliant'.[103]

There is evidence that the UK's refusal to comply with Hirst and the political debates around the ECHR have been used by other states to justify non-compliance with their human rights obligations. For instance, a senior Ukrainian official was quoted as justifying Ukraine's non-implementation of ECtHR judgments by pointing to the UK and stating that 'Great Britain would very much like to leave the European Convention on Human Rights.'[104] Furthermore, on the same day that the CoE's Committee of Ministers – the body monitoring the implementation of ECtHR judgments – considered Hirst in December 2015, it also considered the failure of Azerbaijan to comply with the judgment in Mammadov finding an unlawful detention of an opposition politician in violation of Article 5 ECHR.[105] At the time of writing (August 2016) he is still detained. Suggestions that the UK's refusal to implement Hirst 'saps the Convention's authority when it comes to the insistence that cases such as Mammadov are also implemented'[106] are therefore not implausible. Moreover, Russia recently passed a law that allows its constitutional court to declare the orders of an international court unenforceable within Russia if it contradicts the Russian Constitution. It is reported that this law is designed to curb the influence of the ECtHR.[107] Whether this is a sign of 'spreading contagion'[108] from the UK or an isolated development, is not entirely clear.

What is clear, however, is that the UK's non-compliance with Hirst seems to have been noted in Russia's highest judicial circles. In a recent judgment on prisoner's voting rights, the Russian Constitutional Court promptly considered it impossible for it to comply with a judgment similar to Hirst asking Russia to relax its total ban on prisoner voting given that that ban was laid down in the constitution itself.[109] The Russian Constitutional Court even went so far as to suggest that the solution to this impasse could only be resolved by the ECtHR given that the Russian Constitutional Court was open for compromise 'whose bounds are outlined by the Russian constitution'. The last word would have to belong to the Russian court and not the international court.[110] Again, it is not surprising that parallels to the UK's stance on Hirst are being drawn, even though the details of these various acts of defiance differ.[111] Remarkably, the Russian Constitutional Court referred to the prisoner voting ban still in force in the UK in order to demonstrate that this was a relatively common practice in Europe and to thus question the reasoning of the ECtHR in matters of prisoner voting.

Finally on this point, Switzerland will soon hold a referendum on whether the Swiss constitution should expressly prevail over international law. The campaign collecting signatures in order to obtain a nation-wide referendum was very much concerned with the perceived prevalence of 'foreign judges' – the ECtHR – over Swiss sovereign law-making.[112] If successful, this referendum might result in a withdrawal of Switzerland from the ECHR.[113] While no direct connection with the discussion in the UK has been made, this example shows that the ECHR system is under severe pressure.

The CoE's Commissioner for Human Rights Nils Muižnieks had warned before the Russian court's decision:

- No surprise, then, that the current debate in the UK has broader European ramifications. Every step of this debate and its outcome is closely scrutinised by other European states, in particular those with a much less flattering performance in protecting human rights. Many are in fact eager to exploit any backsliding in Westminster's commitment to the Convention system to justify measures reducing their own citizens' and residents' ability to obtain justice through the Convention system.[114]

It would seem as though these warnings have been vindicated. Given that non-compliance with ECtHR judgments – based on arguments questioning the legitimacy of the ECtHR – is likely to undermine the system of human rights protection in Europe, it is perhaps not too far-fetched to suggest that a wholesale withdrawal from that system by a leading democracy would cause serious harm.

While withdrawal from the ECHR would be the most obvious act of defiance against the ECHR system, the political discussion around domestic reform, i.e. repeal of the HRA and replacement with a British Bill of Rights, was triggered by a perception that the ECtHR had too much influence on British law. As the prisoner voting case shows, reforms deliberately aiming at curbing its influence may find similar resonance in other CoE member states. They might additionally cause damage to the UN system.[115]

Of course, whether these implications should be a decisive factor in whether the UK embarks upon human rights reform at home and in its relations with the rest of the world, is a different matter. The political argument revolves around concerns over the sovereignty of Parliament and the legitimacy of the ECtHR – both in and of themselves valid issues. Some have therefore argued that remaining in the Convention system is a price too high to pay given that what is 'at stake is the welfare and integrity of the UK's system of justice and democracy'.[116] Nonetheless, it is submitted here that not only would any such move would mark a significant U-turn in the UK's foreign policy tradition, but its consequences for the CoE system as a whole might prove to be a high price to pay for ridding the country of the odd unpalatable judgment.

Conclusion

Human rights reform in the UK cannot be seen in isolation from its international legal context. Should reform efforts result in a substantive reduction of human rights protection within the UK's domestic legal order, which falls short of the many international obligations undertaken by the UK, this would place the UK in breach of international law. This would in turn result in a higher number of successful cases brought to the ECtHR against the UK, which might sour relations between the UK and the ECHR system of human rights protection further. While similar consequences are unlikely with regard to other international obligations undertaken by the UK due to the weaker enforcement mechanisms of other international human rights treaties, a backsliding in human rights protection by a leading member of the international legal community is unlikely to go unnoticed and might do damage to international human rights law as such. The prisoner voting saga offers a glimpse at developments in this direction.

Regular adverse human rights judgements by the ECtHR due to the shortfalls in protection created by a reformed domestic human rights law in the UK, might reinforce calls by those wishing to withdraw from the ECHR system as a whole. While this is legally possible, the damaging effects such a step might have on human rights protection in Europe and on the stability of constitutional democracy in many European states need to be carefully considered. The legitimacy of the ECHR system is being questioned in many countries and withdrawal by one of its founders might lead to a domino effect with unforeseeable consequences for the rule of law and democracy in many (mainly, but not exclusively Eastern) European countries. It is questionable whether the restrictions that the ECHR and ECtHR decisions have placed on Parliament and the UK government are so great as to justify a step with such far-reaching consequences, which might counteract much of what UK foreign policy has tried to achieve since the end of World War II.

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1. A summary of the criticism concerning human rights in the UK can be found in Colm O'Cinneide, Human rights and the UK constitution (British Academy Policy Centre Report, 2012), pp 22-25.
2. Queen's Speech of 18 May 2016, available here: https://www.gov.uk/government/speeches/queens-speech-2016. An almost identical formulation can be found in the Queen's Speech of 27 May 2015, available here: https://www.gov.uk/government/speeches/queens-speech-2015.
3. Available at: http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/03_10_14_humanrights.pdf.
4. Available at: https://www.conservatives.com/manifesto.
5. Ibid, page 73
6. Ibid, page 60
7. Ibid, page 73
8. Ibid, page 77; also repeated by then Justice Secretary Michael Gove in evidence before the House of Lords EU Justice Sub-Committee on 2 February 2016, available here: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/potential-impact-of-repealing-the-human-rights-act-on-eu-law/oral/28347.html.
9. See the transcript on page 2 responding to a question by Lord Lester, available at: https://www.parliament.uk/documents/lords-committees/constitution/AnnualOralEvidence2014-15/CC021215-LC.pdf.
10. Oliver Wright, 'Shake-up of human rights laws "is dead in the water"' The Times (10 August 2016).
11. House of Commons Justice Committee, Oral evidence: The work of the Secretary of State, 7 September 2016, available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-work-of-the-secretary-of-state/oral/37565.html.
12. 'Theresa May: UK should quit European Convention on Human Rights' BBC News http://www.bbc.co.uk/news/uk-politics-eu-referendum-36128318.
13. Jessica Elgot and Rowena Mason, 'Theresa May launches Tory leadership bid with pledge to unite country' The Guardian (30 June 2016) http://www.theguardian.com/politics/2016/jun/30/theresa-may-launches-tory-leadership-bid-with-pledge-to-unite-country.
14. Oral evidence to the Justice Committee, see fn 11.
15. See fn 3.
16. The classification is not uncontroversial as it can be misunderstood to accord greater value to first generation rights compared with others; the Vienna Declaration and Programme of Action of 1993 – endorsed by the UN General Assembly in resolution 48/121 – therefore made it clear that 'all human rights derive from the dignity and worth inherent in the human person' and are therefore of equal value, see http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx; for further academic discussion see e.g. Francesca Klug Values for a Godless Age (Penguin 2000) 9-10.
17. Article 19.
18. Article 19.
19. Article 19.
20. Article 11.
21. Article 1 UN Charter; further mentions of human rights are made throughout the UN Charter, but they do not add anything substantial; it had originally been envisaged that the UN Commission on Human Rights (in existence until 2006) would formulate an international bill of rights, which did not happen as such. Instead the UN Commission was instrumental in drafting the ICCPR and ICESCR, Philip Alston and Ryan Goodman, International Human Rights (OUP 2013) 694. The UN system further encompasses an institutional framework for human rights with the Human Rights Council and the UN High Commissioner for Human Rights at its helm. There is no world-court for human rights, however, and the International Court of Justice's jurisdiction is limited to inter-state cases.
22. See resolution 217 (III) by the UN General Assembly, 10 December 1948.
23. An overview of treaties at the UN-level and the status of their ratification by the UK can be found here: http://www.ohchr.org/EN/Countries/ENACARegion/Pages/GBIndex.aspx.
24. Both adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.
25. See e.g. Rhona Smith, Textbook on International Human Rights (6th edn, OUP 2014) 37.
26. The UK has not signed the Convention for the Protection of All Persons from Enforced Disappearance and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; note that in addition the UK has made a number of reservations to the human rights treaties ratified.
27. Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, United Nations, Treaty Series, vol. 1465, p. 85; in addition, the UK has signed up to the optional protocol.
28. United Nations, Treaty Series, vol. 1577, p. 3; including two optional protocols.
29. United Nations, Treaty Series, vol. 2515, p. 3.
30. United Nations, Treaty Series, vol. 660, p. 19.
31. United Nations, Treaty Series, vol. 2131, p. 83.

32. There are a number of global pronouncements of such rights, in particular the right to a healthy environment. Yet these tend to be embodied in non-binding declarations only, see e.g. the Stockholm Declaration of 1972 and the Rio Declaration of 1992 and binding provisions can be found at the regional level, e.g. in the EU Charter of Fundamental Rights.
33. There are also other forms of European collaboration with human rights angles to them, such as within the Organization for Security and Co-operation in Europe (OSCE).
34. Article 1 Statute of the Council of Europe.
35. All European states bar Belarus and the (not universally recognised) Kosovo.
36. Note that the UK has signed but not ratified the revised European Social Charter of 1999.
37. By contrast the UK has not signed the European Convention on the Exercise of Children's Rights and the Convention on Human Rights and Biomedicine.
38. See O'Cinneide (fn 1), 26; Ed Bates, The Evolution of the European Convention on Human Rights (OUP 2010); A. W. Brian Simpson, Human Rights and the End of Empire: Britain and the Genesis of the European Convention (OUP 2004).
39. The UK has signed, but not ratified Protocol No 4 (containing a prohibition of imprisonment because of debt; a right to move freely within the territory of a country; and rights not to be expelled from a country); it has not signed Protocols No 7 (prohibiting amongst others double jeopardy) and No 12 (prohibiting discrimination); the UK has further ratified a number of protocols that do not guarantee additional rights, but reformed the ECHR system of human rights protection as such, e.g. Protocols No. 11 and No. 14.
40. Note, however, that some of these are not guaranteed as rights, but as mere principles, which makes it more difficult to invoke them in the courts. They can only be relied upon once they have been implemented in some shape or form. In the absence of authoritative pronouncements by the Court of Justice of the EU, the exact meaning of the distinction between rights and principles in the Charter is still not clear.
41. The leading case is Case C-617/10 Åklagaren v Hans Åkerberg Fransson ECLI:EU:C:2013:105.
42. For an overview of the process: Steve Peers, 'What next after the UK vote to leave the EU?' http://eulawanalysis.blogspot.co.uk/2016/06/what-next-after-uk-vote-to-leave-eu.html.
43. ICCPR, Article 2.
44. ICESCR, Article 2.
45. See Smith (fn 25) 154-157; one can additionally identify special procedures, such as rapporteurs and special investigators, ibid, 157-158.
46. See e.g. the justification for the reporting process in 'Concept Paper of the High Commissioner's Committee on Economic, Social and Cultural Rights, proposal for a unified standing treaty body' HRI/MC/2006/2, p 5.
47. An equivalent body, the Economic and Social Rights Committee, was established by the ICESCR; both bodies also publish so-called general comments on the interpretation of the rights contained in the two Covenants.
48. Article 20 of the Convention against Torture.
49. See here for details: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Inquiries.aspx.
50. In theory such cases could also be brought before the International Court of Justice if both states accept its jurisdiction.
51. ICCPR, Article 41.
52. An overview can be found here: http://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf.
53. E.g. under the ICCPR.
54. See e.g. Article 35 ECHR.
55. These are the Convention on the Elimination of All Forms of Discrimination against Women (Optional Protocol) and the Convention on the Rights of Persons with Disabilities (Optional Protocol).
56. An overview of the UK's obligations in this regard can be found here: http://www.ohchr.org/EN/Countries/ENACARegion/Pages/GBIndex.aspx.
57. See http://www.coe.int/en/web/turin-european-social-charter/collective-complaints-procedure1.
58. See Article 34 ECHR; not that under Article 1 ECHR the parties 'shall secure to everyone within their jurisdiction' the rights and freedoms contained in the ECHR.
59. See Article 35 ECHR, which contains more admissibility criteria.
60. Protocol No 15 to the ECHR, which is currently open for ratification, will expressly enshrine the principle of subsidiarity in the Convention. It will add that the parties to the ECHR 'have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation'. On the margin of appreciation in general see O'Cinneide (fn 1) 26-27.
61. Note, however, that most cases are dealt with in a written procedure.
62. See Article 46 ECHR.
63. See Article 41 ECHR.
64. As of 30 June 2016 there were 71050 cases pending before the ECtHR, see http://echr.coe.int/Documents/Stats_pending_2016_BIL.pdf.
65. Note that the meanings of 'dualist' and 'monist' are not entirely clear, and that the UK is only partially a dualist state. It is accepted that unincorporated treaties may have some legal effects, for example in relation to statutory interpretation where there is a defensible assumption that the Queen in Parliament does not legislate incompatibly with the UK's international legal obligations, and in relation to the interpretation of Convention rights under the HRA, see e.g. David Feldman, 'The internalization of public law and its impact on the UK' in Jowell J, Oliver D and O'Cinneide C, The Changing Constitution 8th edn (OUP 2015).

66. Note, however, that under s. 20 of the Constitutional Reform and Governance Act 2010, Treaties must be laid before Parliament before ratification. Both the House of Commons and the House of Lords are given a chance to resolve that the treaty should not be ratified. In case of the House of Commons, this procedure can in effect be used to block ratification of a treaty. However, this procedure changes nothing with regard to dualism: in order to make a treaty binding in domestic law an Act of Parliament continues to be required.
67. J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry ('International Tin Council') [1990] 2 AC 418 (per Lord Oliver); note, however, the speech by Lord Kerr in R (SG & Ors) v Secretary of State for Work and Pensions [2015] UKSC 16, who argued that an exception to this principle should be made for human rights treaties. However, this is (still) a minority view on the Supreme Court.
68. Note that before the entry into force of Protocol 11 to the ECHR on 1 November 1998, there was no direct access to the ECHR. Applicants first had to apply to the (now no longer existing) European Commission of Human Rights, which could refer cases to the ECtHR.
69. Ed Bates, 'The UK and Strasbourg: A Strained Relationship - the Long View' in Katja S. Ziegler, Elizabeth Wicks and Loveday Hodson (eds), The UK and European Human Rights (Hart 2015) 39, 47.
70. See Secretary of State for the Home Department, Rights Brought Home: the Human Rights Bill (Command Paper No Cm 3782, 1997).
71. This does not mean that the UK does not comply with them or that there is no remedy available under domestic law, however. Many of the UK's international commitments are reflected in domestic law – either legislation or the common law. For instance the UK's obligations under the Convention against Torture are largely implemented through the HRA, which contains an absolute prohibition on torture, and also through criminal law. Further, the Conventions against discrimination can largely be said to be implemented through the Equality Act 2010. There are discussions ongoing about incorporating the Convention on the Rights of the Child into Scots law.
72. The only exception being Article 13 ECHR on the right to an effective remedy as the HRA is said to provide just that, see e.g. https://www.equalityhumanrights.com/en/human-rights/human-rights-act.
73. Section 6 HRA.
74. Sections 3(2), 6(2) HRA. The situation differs for the devolved (and non-sovereign) Scottish parliament, the Northern Ireland Assembly and the National Assembly for Wales: if their acts are contrary to the ECHR, they are not law, see s. 29 Scotland Act 1998; s. 6 Northern Ireland Act 1998; s. 94 Government of Wales Act 2006.
75. See sections 4 and 10 HRA.
76. First established by the Court of Justice of the EU in Case 6/64 Costa v ENEL ECLI:EU:C:1964:66 and accepted for UK law by the House of Lords in Regina v Secretary of State for Transport, Ex parte Factortame Ltd. and Others (No. 2) [1991] 1 AC 603 (HL) (per Lord Bridge); the Charter also has direct effect, which means that it is not necessary to pass a specific Act of Parliament allowing for the applicability of the Charter. Due to direct effect individuals can rely on Charter rights directly before the domestic courts, see Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration ECLI:EU:C:1963:1.
77. An example for the differing effects of the HRA and the EU Charter is the case of Benkharbouche v Embassy of the Republic of Sudan; Janah v Lybia [2015] EWCA Civ 33.
78. Note that the Court of Justice has held that Protocol No 30 to the Lisbon Treaty does not give the UK a full opt-out from the Charter, see Joined Cases C-411/10 and C-493/10 N.S. v Secretary of State for the Home Department ECLI:EU:C:2011:865; a more detailed discussion of the Protocol see Anthony Arnull, 'Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom' in Steve Peers and others (eds), The EU Charter of Fundamental RIghts (Hart 2014) available at: http://pure-oai.bham.ac.uk/ws/files/24106310/Arnull_A_Protocol_No_30_CFR.pdf.
79. A much more detailed discussion of EU fundamental rights and the implications of Brexit can be found here: Tobias Lock, The Human Rights Implications of the European Union (EU) Referendum (2016) http://www.scottishhumanrights.com/news/latestnews/euref.
80. An at times polemical attack on their value in protecting individuals can be found here: Conor Gearty, 'On Fantasy Island: British politics, English judges and the European Convention on Human Rights' (2014) https://ukconstitutionallaw.org/2014/11/13/conor-gearty-on-fantasy-island-british-politics-english-judges-and-the-european-convention-on-human-rights.
81. For details see Kanstantsin Dzehtsiarou and Tobias (eds.) Lock, The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights (2015) pp 15-17, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605487.
82. Richard Clayton, 'The empire strikes back: common law rights and the Human Rights Act' (2015) Public Law 3, 7-8.
83. Note in particular the discussion around the UK's commitments under the Belfast (Good Friday) Agreement, see Colin Harvey, Northern Ireland and a Bill of Rights for the United Kingdom (British Academy, 2016).
84. Section 2 HRA; on the interpretation of this clause see Dzehtsiarou and Lock (fn 80) 21-23.
85. See Article 27 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).
86. Articles 1-19 of the Basic Law.
87. For details see Tobias Lock, 'Human Rights and EU reform in the UK and the "German question"' (2015) https://ukconstitutionallaw.org/2015/11/25/tobias-lock-human-rights-and-eu-reform-in-the-uk-and-the-german-question/.
88. See Bates, 'The UK and Strasbourg: A Strained Relationship – the Long View' (fn 68) 47-48.
89. This is in no way certain though: even without an express obligation UK courts might well consider and follow ECtHR case law.
90. For the extraterritorial application of the ECHR see e.g. Al-Skeini and Others v. the United Kingdom ECHR 2011 and the discussion by Cedric Ryngaert, 'Clarifying the Extraterritorial Application of the European Convention on Human Rights' (2012) 28 Utrecht Journal of International and European Law 57; and for extradition cases see the limits arising from cases such as Chahal v United Kingdom ECHR 1996-V and Babar Ahmad and Others v United Kingdom App nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09 (ECtHR, 10 April 2012).
91. Smith and Grady v United Kingdom ECHR 1999-VI.
92. R v Secretary of State for Defence ex parte Smith and others [1995] EWCA Civ 22 (per Lord Bingham).
93. See Articles 49 and 2 TEU.
94. See Dzehtsiarou and Lock, fn 80, 30-31.

95. For an argument in this direction, see ibid 29-30.
96. When denouncing the ECHR, Greece also withdrew from the CoE.
97. The reports can be found here: https://www.gov.uk/government/collections/human-rights-and-democracy-reports.
98. Quote in Bates, The Evolution of the European Convention on Human Rights (fn 38) 5.
99. Greece re-ratified the ECHR after the return to democracy in 1974.
100. Hirst v United Kingdom (No 2) ECHR 2005-IX. [Perhaps a sentence on the section grand chamber distinction?]
101. http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110210/debtext/110210-0004.htm#column_584.
102. Despite the UK urging it to do so in Scoppola v Italy (No 3) App no 126/05 (ECtHR 22 May 2012).
103. Greens and M. T. v United Kingdom ECHR 2010.
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108. See Leach and Donald (fn 5).
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113. Markus Hofmann, 'Zündeln mit Menschenrechten' http://www.nzz.ch/meinung/kommentare/zuendeln-mit-menschenrechten-1.18596347.
114. Nils Muižnieks, 'Reforms to UK Human Rights Laws Must Not Weaken Protection' Huffington Post http://www.huffingtonpost.co.uk/nils-muiznieks/uk-human-rights_b_9150042.html; he issued similar warnings in August 2016 and pointed explicitly to the non-implementation of the prisoner voting judgments by the UK, see http://www.coe.int/en/web/commissioner/-/non-implementation-of-the-court-s-judgments-our-shared-responsibility.
115. A repeal of the HRA and possible withdrawal from the ECHR may also have consequences for the UK's devolution settlement. These are set out in separate papers appearing in this series.
116. See Policy Exchange, Bringing Rights Back Home (2011) available at: http://www.policyexchange.org.uk/images/publications/bringing%20rights%20back%20home%20-%20feb%2011.pdf.

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