An *Institute for Human Rights* Brief

Submission to the Commission on a Bill of Rights public consultation

Institute for Human Rights, University College London

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Preface

This is a brief submitted by the *Institute for Human Rights* (University College London), to the *Commission on a Bill of Rights* in its consultation process.

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Abbreviations

BR – Bill of Rights
BBR – British Bill of Rights
ECHR – European Convention on Human Rights
ECtHR – European Court of Human Rights
HRA – Human Rights Act (1998)
CBR – Commission on a Bill of Rights

Executive Summary

There are many issues that the Commission may confront in considering the possibility of a British Bill of Rights. This brief focuses on five central areas of controversy:

I. Benefits of continued commitment to the ECHR system
II. Benefits of the Human Rights Act worth preserving
III. What would a Bill of Rights mean for the sovereignty of Parliament?
IV. An opportunity for adding value: incorporating Social Rights in a BBR
V. Avoiding constitutional disruption: limiting civic responsibilities in a BBR
VI. Encouraging native human rights jurisprudence after Ullah by positive provisions in a BBR

Under these headings we outline six recommendations we suggest the Commission could make, for reasons given in the corresponding sections below. To do so we have drawn on expert understanding of contemporary legal scholarship and constitutional practice.

Suggested recommendations

1. The Commission can assert the benefits of continued commitment to the ECHR system, including the avoidance of worrying disruptions to UK external relations and policy interests. Should the Commission endorse an approach which involves renunciation of the United Kingdom's obligation to adhere to the minimum standard set down by the Strasbourg Court, such an approach will have important negative consequences for the United Kingdom's role in the EU and its broader foreign policy goals. Such a recommendation will need to be accompanied by measures to take account of the following factors:

I. Consideration of alternative measures to compensate for the reduction in the ability of the Convention to protect liberal democratic standards in less stable democracies in Central and Eastern Europe.
II. Renunciation of the duty to uphold the Convention as interpreted by the Strasbourg Court is incompatible with EU membership and in all likelihood with membership of the European Economic Area. In which case, consideration of the impact of withdrawal from the EU on the United Kingdom's interests will also be necessary.
III. Such a renunciation will require changes in United Kingdom foreign policy standards currently encouraging states to sign up to binding internationally defined human rights standards.

IV. The subsidiarity provisions of the Lisbon Treaty relate to proposed legislation and therefore do not provide a valid analogy for a procedure to override judgements of the Strasbourg Court. EU law does not permit judgements of the Court of Justice of the EU to be overridden in this way.

2. The Commission can assert the benefits of retaining the HRA. A strong case exists for retaining the HRA as it stands. In the alternative, if a new Bill of Rights framework is introduced, it should at a minimum provide that the Convention rights remain incorporated into UK law and ensure the link with the Strasbourg jurisprudence as currently set out in s. 2 HRA is retained.

3. The Commission can assert the need to preserve the correct relationship between parliamentary prerogative and human rights adjudication by recommending: (1) giving effect to a Bill of Rights either in a manner akin to the HRA <u>or</u> by way of the introduction of a limited judicial strike-down power that can be amended or circumvented with the assent of a simple majority of the Houses of Parliament; and (2) that the HRA not be repealed unless it is replaced with a Bill of Rights that includes nearly identical substantive coverage.

4. The Commission can recommend that a BBR improves on the ECHR through the inclusion of protection of new rights. A recommendation to include new rights, like social rights, in a BBR would show the Commission was bringing added value to the status quo. Within the Commission's terms of reference, adding protections against social neglect by protecting social rights would be a positive step, and one that has tested precedent in liberal democratic constitutional regimes.

5. The Commission could recommend the inclusion of general statements on civic responsibility in BBR, but not as a list of enforceable duties with judicial effect that may act to limit Convention rights. Reference to civic responsibilities could be incorporated into a BR with least constitutional disruption if included as statements of general principle. Including civic duties as enforceable provisions with judicial effect that modifies the scope of individual rights is an unprecedented, and so untested, move for a liberal democratic state. It would be the most constitutionally disruptive option with worrying consequences for the separation of powers and individual protections. This option would face the additional difficulty of making a BBR incompatible with ECHR standards, triggering an increasing number of unfavourable Strasbourg judgements.

6. The Commission can recommend the encouragement of more home-grown jurisprudence on human rights, above the ECtHR 'floor' of protections: by retaining the existing wording of s. 2(1) HRA but adding a new provision to the effect that nothing in this Act is to be read as precluding a court or tribunal in determining a question that has arisen in respect of a Convention right from interpreting that right so as to provide a more generous level of rights protection to the person relying on that right than that currently afforded by any judgment, decision, declaration or advisory opinion of the European Court of Human Rights, or words to similar effect.

Section I

Benefits of continued commitment to the ECHR system

1. The primary responsibility for protecting the rights set out in the European Convention has always been borne by signatory states. The role of the European Court of Human Rights is to provide definitive interpretations of the Convention in order to enable states to discharge this responsibility.
2. The maintenance of a uniform minimum standard of liberalism, democracy and pluralism within Europe is a core aim of the Convention. There is no means of achieving this minimum standard without the existence of a Court empowered to provide definitive interpretations of the Convention and the rights it protects. Without such a Court, the Convention will not be able to achieve its function of setting basic minimum standards and acting as a bulwark against the re-emergence of un-democratic totalitarian regimes and the political instability such regimes cause.
3. The European Court of Human Rights is perhaps the most respected international human rights body in the world. Its jurisprudence has attracted praise from leading academic commentators in the US and elsewhere,[1] while the manner in which European states respect the Court's authority is regularly held up as an example for states in other parts of the world to follow.
4. Any proposal for a UK Bill of Rights that would risk damage to the status and authority of the Court would therefore represent a major undermining of the ability of the Convention to achieve the goals it was established to pursue, and weaken respect for one of the world's leading human rights institutions.

5. **Impact on Foreign Policy:** No democracy has ever withdrawn its recognition of the jurisdiction of the Court of Human Rights to interpret the Convention. The only country to effect such a withdrawal was the military dictatorship that took power in Greece in 1967.
6. Such a withdrawal would have serious consequences for British foreign policy, most notably its ability to advocate for greater respect for the rights contained in international human rights instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.
7. Britain's reputation as a leading country in relation to the promotion and protection of human rights would be severely undermined by withdrawal. It is unlikely that the United Kingdom could effectively encourage countries such as China and Russia to adhere to internationally defined human rights standards after it has become the only member of the Council of Europe to refuse to be bound by the regionally defined human rights norms of the Convention.

[1] See e.g. A. Stone-Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP, 2008).

8. **Other Policy Goals:** It is important to bear in mind that the United Kingdom and the Strasbourg Court are not in a purely bilateral relationship. British rejection of the jurisdiction of the Court would severely undermine other policy goals. The Court's credibility would be severely dented and other states with less-impressive human rights credentials than the UK would feel emboldened to defy its judgments.
9. The Court and Convention have been major elements in the stabilization of Central and Eastern Europe. In the recent past conflict and human rights abuses in Central and Eastern Europe have produced major inflows of asylum seekers to the United Kingdom. British withdrawal from the jurisdiction of the Court of Human Rights would undermine the ability of the broader community of democratic nations to promote the democratic and liberal values of the Convention. It would also increase the likelihood of the United Kingdom experiencing significant inflows of asylum-seekers from Central and Eastern Europe in the future.
10. Some commentators argue that the potential impact of undermining the Convention system in this way should not be taken into account in debating whether the UK needs a new Bill of Rights.[2] However, this argument is too simplistic. If one is committed to enhancing democratic self-governance and respect for rights and rule of law in the UK, then it is only logical to be concerned with the health of other democratic societies across Europe. It is important that the UK debate on a Bill of Rights takes into account the impact of developments in Britain on the wider European context. Furthermore, there are good reasons why the UK should not be seen to undermine the ECHR system of rights protection: if decisions taken in London weaken the world's most successful system for promoting rights, democracy and rule of law, this would destroy the UK's credibility as a country committed to these values.[3]

11. **The Court and EU Membership:** In any event, withdrawing from the Convention would appear to be incompatible with continued membership of the European Union and also with the kind of external membership currently held by states such as Norway and Switzerland.
12. The European Union is in the process of acceding to the European Convention on Human Rights. As the text of the Treaties and the jurisprudence of the Court of Justice make clear, the rights guaranteed by the Convention are "general principles of EU law" which the Union and Member States must respect when they act within the field of application of EU law (this includes when they derogate from EU law obligations).[4] National legislation that removes the duty to adhere to the Convention as interpreted by the Strasbourg Court would not affect or alter this obligation, which would remain in force.
13. The European Convention on Human Rights is a vital element both of admission to and continuing membership of the EU. The Union has required all new members to join the Council of Europe and abide by

[2] See e.g. M. Pinto-Duschinsky, *Bring Rights Back Home: Making human rights compatible with parliamentary democracy in the UK* (London: Policy Exchange, 2011) 65.
[3] It would make it very difficult for the UK to argue that Russia should adhere to the Convention, for example, or that Zimbabwe should respect the decision of the Southern African Development Court in *Campbell v Zimbabwe* [2008] SADCT 2 that its land seizure policy was discriminatory.
[4] Case C-260/89 *ERT* [1991] ECR I-4685

decisions of the European Court of Human Rights.[5] The Union's own Charter of Fundamental Rights will be interpreted in the light of the ECHR and the jurisprudence of the Strasbourg Court.[6]

14. Adherence to commonly defined human rights standards is vital to the Union. Member States of the Union agree to be bound by each other's decisions in a range of areas. States can only undertake to be so bound if they have confidence that their fellow Member States share a common commitment to fundamental rights and principles. The United Kingdom would never agree to be bound by the decisions of states that do not share its fundamental values such as belief in democracy, equality and the rule of law. The stipulation that all states joining the Union recognize and abide by judgments of the Strasbourg Court is a key method of ensuring that Member States can hold sufficient trust in the applicant state in order that they are confident in according them a say over the making of EU-wide legislation that membership brings.
15. Therefore, accession standards are not intended to apply only at the moment of entry but are meant to apply on an on-going basis. Indeed, recent treaty revisions have strengthened the requirements for Member States to adhere to common human rights standards.[7] The treaties now envisage loss of voting rights for Member States found to violate such standards.[8]
16. It is difficult to see how the Union would permit an existing Member State to openly flout the human rights standards applied to applicant states. To do so would undermine the Accession process and the mutual trust needed for the Union to function.
17. All of the countries that have privileged access to the EU's common market are members of the Council of Europe and recognize the jurisdiction of the Court. Human rights conditionality is a key element of all EU commercial treaties with its neighbours.[9] In the event that the United Kingdom chose to leave both the Union and jurisdiction of the Strasbourg Court, it is unlikely that the Union would be willing to grant the UK privileged access to the Common Market without requiring the same standards it requires of its other privileged partners.

18. **Subsidiarity:** The question of how the UK might appeal to the principle of subsidiarity has recently received some attention through the representations of the Attorney General, Dominic Grieve (see paras. 63 & 64 below). Analogies to the subsidiarity provisions of the Lisbon Treaty in relation to proposals to permit the Committee of Ministers to decide not

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[5] See the "Copenhagen Criteria" European Council in Copenhagen, 21-22 June 1993, Conclusions of the Presidency, SN 180/1/93 REV 1.
[6] See Article 52(3) of the Charter of Fundamental Rights of the European Union. See also "Explanations Relating to the Charter of Fundamental Rights of the European Union", Brussels 11 October 2000. http://www.europarl.europa.eu/charter/convent49_en.htm
[7] See Articles 2, 3, 6 and 7 of the Treaty on European Union.
[8] See Articles 6 and 7 of the Treaty on European Union.
[9] See preamble to the *Agreement on the European Economic Area (OJ No L 1, 3.1.1994, p. 3; and EFTA States' official gazettes)* and *Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Members of the Other Part, Signed in Cotonou, Benin on 23 June 2000,* Preamble and Articles 8 and 9.

to enforce a judgment are misplaced. The relevant powers in the Lisbon Treaty relate to challenges to *proposed legislation* on grounds that it breaches subsidiarity. The Union has no mechanism permitting political institutions such as the EU Council of Ministers to set aside *judgments* of the Court of Justice. Such an arrangement would violate the Union's commitment to the rule of law[10] and the fundamental principles of direct effect of Union law within national legal systems.

Suggestion 1: The Commission can assert the benefits of continued commitment to the ECHR system, especially the avoidance of worrying disruptions to UK external relations and policy interests. Should the Commission endorse an approach which involves renunciation of the United Kingdom's obligation to adhere to the minimum standard set down by the Strasbourg Court, such an approach will have important negative consequences for the United Kingdom's role in the EU and its broader foreign policy goals. Such a recommendation will need to be accompanied by measures to take account of the following factors:

I. Consideration of alternative measures to compensate for the reduction in the ability of the Convention to protect liberal democratic standards in less stable democracies in Central and Eastern Europe.

II. Renunciation of the duty to uphold the Convention as interpreted by the Strasbourg Court is incompatible with EU membership and in all likelihood with membership of the European Economic Area. In which case, consideration of the impact of withdrawal from the EU on the United Kingdom's interests will also be necessary.

III. Such a renunciation will require changes in United Kingdom foreign policy standards currently encouraging states to sign up to binding internationally defined human rights standards.

IV. The subsidiarity provisions of the Lisbon Treaty relate to proposed legislation and therefore do not provide a valid analogy for a procedure to override judgements of the Strasbourg Court. EU law does not permit judgements of the Court of Justice of the EU to be overridden in this way.

Section II

Benefits of the Human Rights Act worth preserving

19. The case law of the European Court of Human Rights (ECtHR) has exerted a very positive impact on UK law over the last few decades. Judgments of the Court have regularly identified gaps in how British law protects individual rights and liberties. In particular, the Court has often lead the way in responding to shifting social attitudes as to how national law should protect and give effect to the principle of human dignity, while UK law has at times lagged behind. The Court's jurisprudence has played a

[10] See Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

key role in particular in enhancing protection for freedom of expression,[11] privacy,[12] freedom from inhuman and degrading treatment[13] and the right to life,[14] while its decisions form the basis for contemporary British law on a variety of issues ranging from the partnership rights of gay, lesbian and transsexual persons[15] to the protection of children's rights.[16]

20. The Human Rights Act 1998 in its turn ensures that UK courts are able to protect individual rights while applying national law. It also provides a mechanism through which the British Courts may protect Convention rights within the domestic legal system, rather than requiring individuals to petition the Strasbourg Court. The HRA is a well-designed piece of legislation, which respects the sovereignty of Parliament while providing courts with a clear legal framework to apply in human rights cases. Before the HRA came into force, UK courts applied more inchoate and uncertain common law principles to decide this type of case. This often generated controversy between Ministers and the courts. Now, the HRA provides a far more transparent set of legal rules, while ensuring that Parliament retains the final say.
21. In addition, the requirement in s. 2 HRA for the UK courts to 'take into account' the jurisprudence of the ECtHR enables British law to stay in touch with developments in Strasbourg. This strengthens the prestige and authority of UK court judgments in the eyes of the Strasbourg Court and other international courts. It also ensures that the UK is not seen to be lagging behind other Council of Europe member states in giving effect to human rights principles: every other member state has now incorporated the Convention rights into their national legal systems.
22. Recent attacks on the HRA and the European Court of Human Rights often overlook much of this important background context, and to expert eyes can often appear to be based on highly questionable assumptions. For example, the quality of both the judgments of the Strasbourg Court and its judges has been subject to criticism from a variety of sources. Not every judgment of the Court is entirely satisfactory, and concerns remain about the process whereby judges are appointed to the Court. However, academic commentary has regularly praised the coherence, integrity and rigour of the jurisprudence of the Court taken as a whole. Furthermore, many of the judges on the Court have very impressive legal backgrounds, which indicate a high level of expertise.[17] Similarly, much of the criticism that has been directed at specific HRA decisions by UK courts and

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[11] See e.g. *Tolstoy v UK* (1995) 20 EHRR 442 (excessive damages in libel actions); *Steel and Morris v UK* (2005) 41 EHRR 22 (inequality of arms in defamation actions).
[12] See e.g. *Malone v United Kingdom* (1984) (No.282), 4 EHRR 330 (privacy of telephone communications); *S and Marper v UK* (2009) 48 EHRR 50 (DNA evidence).
[13] *Price v UK* (2002) 34 EHRR 1285 (treatment of a disabled person in prison).
[14] *McKerr v UK* (2002) 34 EHRR 20 (inquests).
[15] *Dudgeon v United Kingdom* (1981) (No.45), 4 EHRR 149 (criminal prohibition on homosexual acts); *Goodwin v UK* (2002) 35 EHRR 447 (marriage rights of transsexual persons).
[16] *Z v UK* [2001] 2 FCR 246 (liability of public authorities for failure to prevent child abuse).
[17] For example, the current Slovenian judge on the Court, Judge Zupančič, one of those whose credentials were criticised by commentators in the UK, served on the Slovenian Constitutional Court and the UN Committee Against Torture before joining the Strasbourg Court, and has both a LLM and a SJD from Harvard Law School. Many of the judges are world experts in their fields and a clear majority are no less highly-qualified than their counterparts in the British judiciary.

tribunals has often been based on distorted accounts of the reasoning underlying the judgments in question.[18]

23. All of the above suggests that there exists little or no real reason to amend or repeal the provisions of the HRA as it currently stands, or to seek a change in relationship between UK law and the case-law of the ECtHR. Indeed, the existing *status quo* balances respect for parliamentary democracy with the provision of effective legal protection for fundamental rights and liberties. It also ensures that the UK remains in conformity with its international law obligations.
24. In contrast, repealing the HRA, or amending it to de-incorporate the Convention rights or to break the link established by s. 2 HRA with the Strasbourg jurisprudence, would in all likelihood be a damaging development. It would create legal uncertainty, as UK judges would have to fall back on the underdeveloped and vague common law jurisprudence to resolve cases that are currently handled through the HRA framework. It would also conflict with the provisions of the Belfast Agreement, unless special arrangements were made to keep Convention rights as part of Northern Irish law: this in turn would generate an unstable situation where individuals in Northern Ireland could challenge both devolved and non-devolved laws despite this being unavailable elsewhere in Britain.
25. In general, a strong case thus exists for retaining the HRA as it stands, along with the UK's current relationship with the Strasbourg Court. However, this would not be incompatible with incorporating or re-acting the HRA as part of a new Bill of Rights framework, or retaining it as a separate legal instrument while introducing new forms of enhanced legal rights protection to supplement its provisions.

Suggestion 2: The Commission can assert the benefits of retaining the HRA. A strong case exists for retaining the HRA as it stands. In the alternative, if a new Bill of Rights framework is introduced, it should at a minimum provide that the Convention rights remain incorporated into UK law and ensure the link with the Strasbourg jurisprudence as currently set out in s. 2 HRA is retained.

Section III

What would a Bill of Rights mean for the sovereignty of Parliament?

26. The traditional conception of parliamentary sovereignty, as espoused by Albert Venn Dicey, is that the Queen-in-Parliament has 'the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having the right to override or set

[18] By way of example, political and media criticism of the decision of the Upper Tribunal in the case of *The Secretary of State for the Home Department v Respondent* [2010] UKUT B1 (the case involving an attempt to deport a non-national who had run over and killed a young girl, Amy Houston) has tended to overlook the key fact that the Article 8 analysis in question turned principally on the right to family life of the wife and four children of the non-national in question.

aside the legislation of Parliament.'[19] The second of these two aspects (the power to set aside legislation) is now qualified explicitly by the supremacy of European law in the United Kingdom. However, the first remains intact. Parliament has the legal power, with a simple majority of both Houses, together with royal assent, to make or unmake any law.

27. A bill of rights could be given legal effect in at least four different ways, each of which would have different constitutional implications for this principle. The *first* is to adopt a statutory bill of rights that allows courts (1) to declare executive action and secondary legislation illegal and of no effect if it contravenes the stipulated rights, and (2) to apply a strong interpretive presumption of compatibility of legislation with the stipulated rights, but not (3) to find legislation incompatible with the rights. This is the model currently employed under the New Zealand Bill of Rights Act 1990.[20]
28. The *second* option would be to adopt a statutory bill of rights that operates in a manner similar to the Human Rights Act 1998 (HRA). This would allow (1), (2) and (3) of the powers referred to above, but under the third, courts would be able to declare legislation incompatible with the rights but not dis-apply or nullify that legislation. Such a system would function like the HRA, which, as noted recently by Lord Neuberger MR in his extra-judicial capacity, 'goes nowhere near to imposing a limit on parliamentary legal sovereignty.'[21]
29. A *third* option is for a bill of rights to be adopted as a statute that enables courts to dis-apply legislation inconsistent with a stipulated set of rights. This is a limited power of strong judicial review. It would confer a power akin to that found in section 2(4) of the European Communities Act 1972, which the House of Lords interpreted as imposing a duty upon the courts to give supremacy to European community law over conflicting acts of the UK Parliament.[22] This power could be revoked by an Act of Parliament passed with a simple majority in the House of Commons. Such a power is generally regarded as consistent with Parliament's power to make or unmake any law whatsoever. It would also be possible under this option to provide for a procedure by which a law can be enacted 'notwithstanding' the provisions of the Bill of Rights, similar to the so-called 'notwithstanding clause' provision of the Canadian Charter of Rights and Freedoms.[23] This option is sometimes referred to in the UK as a 'legislative override.'[24] Though the value of this option is more questionable under a model similar to the HRA (as in option two above), it would be more appropriate under this option due to the courts' stronger power to dis-apply legislation.

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[19] Dicey, *An Introduction to the Study of the Law of the Constitution* (8th Edn, London: MacMillan, 1915) Chapter I.
[20] See esp. sections 4 and 6 of the Act.
[21] Lord Neuberger of Abbotsbury, MR, 'Who are the Masters now?' The Second Lord Alexander of Weedon Lecture (6 April 2011, available at: http://www.judiciary.gov.uk/NR/rdonlyres/F402769A-196C-47E3-B5D9-AAA1EEE096F3/0/mrspeechweedonlecture110406.pdf).
[22] *R v Secretary of State for Transport Ex p. Factortame Ltd (No.2)* [1991] 1 AC 603.
[23] Section 33 of the Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act 1982, being Schedule B of the Canada Act 1982 (UK), c.11,
[24] Joint Committee of Human Rights, Twenty-Ninth Report, 2008, Chapter 7, paras. 221-223.

30. A *fourth* option is for the bill of rights to be entrenched and thus protected by an amendment procedure that would require more than a simple majority of the Commons before an amendment could take effect. This option would bring the United Kingdom into line with the majority of states worldwide, but would be an unprecedented step constitutionally and would need, in all likelihood, to be studied as an option situated within a wider process of constitutional reform.
31. We take no formal view on which of the above modes of protection is optimal. However, it does appear clear that the first of these forms of protection would provide considerably less legal protection than currently available under the HRA, and the last would raise the question of a more comprehensive constitutional reform. The other two options would not offend the existing doctrine of parliamentary sovereignty, but offer limited protection against a majority of the Commons enjoying strong popular support.

32. **Repeal of the HRA and the Impact of the Strasbourg Court on UK Law and Policy.** The Institute recognises that many regard the repeal of the HRA as a means for limiting the influence of Strasbourg judges over domestic law and policy. In our view, the repeal of the HRA is likely to produce the opposite result unless it is replaced with a bill of rights that offers equal or greater substantive coverage.
33. Under the current system, UK courts are required to interpret the same text and case law as the Strasbourg Court will when the case reaches it. In practice, this enables UK input into the decision-making process in Strasbourg in at least three ways:

    i. UK judges act at first instance to give rulings that are often comprehensive and authoritative, which prevents cases being taken to Strasbourg, or increases their likelihood of being struck out as manifestly ill-founded in Strasbourg. Under the present system, UK judges may pre-empt a development in Strasbourg, even where the trend of jurisprudential development in Strasbourg suggests an outcome contrary to that chosen by UK judges. This was the case in *Animal Defenders International*,[25] where the House of Lords found that a ban on political advertising was sound and that no workable exception could be made for non-governmental organizations. In *Ali v Birmingham*,[26] the Supreme Court held that a duty to house the homeless under Part VII of the Housing Act 1996 was not to be considered to confer a 'civil right' within the meaning of Art 6 ECHR, and thus did not engage strong procedural rights. In both cases, Strasbourg decisions had implied the contrary, but they were carefully distinguished by the UK courts.

    ii. The judgments of UK courts are given considerable weight in Strasbourg decisions. This is evident in cases where the UK is successful in Strasbourg, such as in *Carson v United Kingdom*, where

[25] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15. See esp. [32] (distinguishing Strasbourg authority).
[26] *Ali v Birmingham City Council* [2010] UKSC 8.

the UK system for up-rating pension benefits for UK nationals residing abroad was challenged. The Strasbourg Court cited Lord Hoffmann's judgment at length, and considered it crucial to its decision against the claimant.[27] Similarly, in *N v United Kingdom*, the Strasbourg court came to a similar conclusion to the House of Lords in finding that the deportation of a woman who would lose medical treatment for HIV/Aids was not cruel, inhuman or degrading treatment under Art 3 ECHR.[28] Even when the Strasbourg Court finds against the UK, it may give considerable weight to the approach offered by UK judges. This occurred in the *Tsfayo* v UK and *Kay v UK* cases, where in both cases the Strasbourg Court adopted the judgments of Lord Bingham.[29] Both these cases are now also accepted as good law by UK courts.[30]

iii. Section 2 of the HRA requires that Strasbourg judgments be taken into account by UK courts when interpreting Convention rights. But as Lord Neuberger MR recently held for the unanimous Supreme Court, '[t]his court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law.'[31] Examples of this constructive dialogue are not hard to find. In *Z v United Kingdom*, the Strasbourg court expressly reversed its view taken in an earlier case due to explanations given in a decision of the House of Lords.[32] The same process is now underway in the *Horncastle* case,[33] where the Supreme Court expressly disagreed with the Strasbourg Court and took care to give detailed legal argument. The case is now on its way to Strasbourg.

34. Since the repeal of the HRA might close off these avenues, the Institute is convinced that it would be counter-productive to the declared goal of limiting the influence of uninformed Strasbourg judgments on UK law and policy.
35. There is an important proviso to this claim. The adoption of a bill of rights that subsumed Convention rights but went beyond them would not prohibit UK judicial input into Strasbourg decisions, even if the HRA were repealed. The common law requires that domestic law be interpreted in

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[27] ibid [35] (citing 9 paragraphs of Lord Hoffmann's judgment in) and [84]. See also [71] (adopting the reasoning of Stanley-Burton J. in the High Court judgment).
[28] *N v United Kingdom* [2008] ECHR 453 at [17], and cf [42] and [43].
[29] *Tsfayo v United Kingdom* [2007] LGR 1; 48 EHRR 457 at [31] and [45]; *Kay v United Kingdom* [2010] ECHR 1322 at [72]-[74].
[30] *Manchester City Council v Pinnock* [2010] UKSC 45 at [49] ('Even before the decision in *Kay v United Kingdom* […] we would, in any event, have been of the opinion that this court should now accept and apply the minority view of the House of Lords in those cases. In the light of *Kay v United Kingdom* that is clearly the right conclusion.')
[31] *Manchester City Council v Pinnock* [2010] UKSC 45 at [48].
[32] *Z v United Kingdom* [2001] ECHR 333 at [100].
[33] *R v. Horncastle* [2010] UKHRR 1 (refusing to follow *Al-Khawarja v UK* [2009] ECHR 110, giving detailed reasons for disagreement with Strasbourg).

light of relevant international law to which the state is bound.[34] Therefore, any domestic bill of rights enshrining similar or identical substantive rights will almost certainly be interpreted in light of Strasbourg jurisprudence anyway. Judges would not, in that scenario, be any more or less bound to apply Strasbourg jurisprudence than they already are. In this sense, to adopt a UK bill of rights that included the rights set out in the ECHR but went beyond them would not preclude the benefits of dialogue set out above. Those benefits would only be lost if the bill were less protective or hedged the rights in a way that alters the legal interpretive questions. So-called 'rebalancing' of the statement of rights by adding responsibilities would be likely to have this effect, and thereby nullify the benefits of constructive dialogue for the 'rebalanced' rights.

Suggestion 3: The Commission can assert the need to preserve the correct relationship between parliamentary prerogative and human rights adjudication by recommending: (1) giving effect to a Bill of Rights either in a manner akin to the HRA or by way of the introduction of a limited judicial strike-down power that can be amended or circumvented with the assent of a simple majority of the Houses of Parliament; and (2) that the HRA not be repealed unless it is replaced with a Bill of Rights that includes at least the same degree of substantive coverage.

Section IV

An Opportunity for adding value: incorporating Social Rights in a BBR

36. Enacting a British Bill of Rights presents a valuable opportunity for greater protection of social rights. Rights such as the right to housing or the right to work are already constitutionally protected in many jurisdictions, in countries, such as South Africa, Denmark, Finland, Portugal, Brazil and India. Academic commentators have persuasively argued that there are no sharp conceptual differences between civil and political rights, on the one hand, and economic and social rights, on the other.[35] The United Kingdom itself has ratified international treaties incorporating social rights, such as the International Covenant on Economic, Social and Cultural Rights[36] and the European Social Charter,[37] and is therefore committed to the idea of social rights as human rights.
37. The inclusion of social rights in a Bill of Rights means that Courts will have power to monitor compliance with the corresponding duties. This is important because the judicial avenue serves a crucial accountability

[34] See generally, Shaheed Fatima, *Using International Law in Domestic Courts* (Oxford: Hart, 2005) esp. Part III. The presumption applies to the extent that Parliament has not legislated to the contrary.
[35] See generally the analysis in M Langford (ed), *Social Rights Jurisprudence* (CUP, 2008) and D Barak-Erez, A Gross (eds), *Exploring Social Rights* (Hart, 2007).
[36] International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec 1966, GA Res 2200 (XXI), UN GAOR, 21st Sess, UN Doc A/6316 (1966), 993 UNTS3, (entered into force 3 January 1976).
[37] European Social Charter, CETS No 035, (entered into force 26 February 1965).

function. It forces Government to give reasons for its actions, and justify its decisions, and often triggers debate between Courts, Parliament and other actors, which is essential in a democracy.[38]

38. That social rights are constitutionally guaranteed does not mean they should always be protected through strong judicial review.[39] The South African Constitution, for example, protects socio-economic rights alongside civil and political rights. Even though the South African Constitutional Court has sometimes ruled that legislation or administrative action is not compatible with constitutional social rights, it is fair to say that generally the judiciary has not been overly intrusive when looking at Government action.[40] In the fifteen years since the new Constitution has been in force, there have been less than ten important cases before the Constitutional Court, and only one of these imposed a marginal financial strain on the government of the day.[41] At the same time, a judicial decision that finds a breach of social rights will not always provide an individual remedy. The Court may declare that there is a breach, and leave it to the Government to consider how to comply with its human rights obligations. It is important to highlight that in South Africa, there is no evidence of governmental dissatisfaction with the Bill of Constitutional Social Rights. It should also be noted that the UK Joint Committee on Human Rights endorsed the South African model of social rights adjudication in its Twenty-Ninth Report, and put forward for consideration a similar model of social rights protection.[42]
39. We take no formal view on which of the models on the relationship between the judiciary and Parliament, outlined in Section III, is optimal. We take the view, though, that particularly the second and third option would be acceptable in a liberal democracy that recognises a role for the judiciary, showing due respect at the same time to the doctrine of parliamentary sovereignty.
40. Social rights adjudication will not be new territory for the judiciary. Social rights are already protected in English administrative law. In this context, courts have had to address questions that involve resource allocation, and have done so successfully for many years.[43] At the same time, the Human Rights Act itself has been interpreted by UK Courts as having certain socio-economic aspects. The European Court of Human Rights has taken a similar approach in interpreting the European Convention on Human Rights.[44]
41. The protection of social rights in a Bill of Rights does not mean that courts will be the only bodies with a mandate to address questions of socio-economic deprivation. The 'legalisation' of social rights will not only be

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[38] See S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP, 2008).
[39] See generally the discussion in M Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2009).
[40] See, for instance, *Soobramoney v Minister for Health*, CCT 32/97, 27 November 1997.
[41] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development*, CCT 13/03, CCT 12/03, 4 March 2004.
[42] Joint Committee of Human Rights, Twenty-Ninth Report, 2008, Chapter 5, para. 192.
[43] J King, 'The Justiciability of Resource Allocation', (2007) 70 *Modern Law Review* 197.
[44] C O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights', (2008) 5 *European Human Rights Law Review* 583.

backward looking; it will also be forward-looking.[45] The role of non-judicial bodies, such as the *Equality and Human Rights Commission*, will also be enhanced, as they will have a clearer mandate to monitor whether the authorities comply with their duties. At the same time, this can also give Parliament a more visible role in the social rights arena in scrutinising proposed legislation. The Joint Committee on Human Rights has already considered the question of the UK's compliance with its social rights obligations in international law, and an expanded remit in this regard is wholly within its competence.[46] It would strengthen Parliament's role in protecting fundamental rights. It will also improve compliance with international obligations of the UK under documents, such as the European Social Charter.

Suggestion 4: The Commission can recommend a BBR improves on the ECHR through the inclusion and protection of new rights. A recommendation to include new rights, like social rights, in a BBR would show the Commission was bringing added value to the status quo. Within the Commission's terms of reference, adding protections against social neglect by protecting social rights would be a positive step, and one that has tested precedent in liberal democratic constitutional regimes.

Section V

Is there a place for civic responsibilities in a British Bill of Rights?

42. This section addresses the radical proposal to give civic responsibility a role in in a BBR, by adding obligations to the rights in the Bill.[47] Civic responsibilities might include duties to vote, look after one's family, obey the law, pay taxes, respect the environment, and undertake military service. They are proposed with the aim, however, of having some effect on the interpretation of ECHR rights –limiting or conditioning individual rights, or acting as a 'prism' through which those rights are understood.[48] This is different from limitations already present in the ECHR: those corresponding to upholding the rights themselves, and legitimate state aims which are given explicit weight in defining many ECHR rights.[49]
43. Five considerations follow showing that the incorporation of such duties with constitutional strength on a par with HRA rights as "strong interpretive obligations," would create deep problems of constitutional coherence and negatively disturb the separation of powers. [50]

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[45] V Mantouvalou, 'In Support of Legalisation' in Gearty and Mantouvalou, *Debating Social Rights* (Hart, 2011) p 85.
[46] M Hunt, 'Enhancing Parliament's Role in Relation to Economic and Social Rights', (2010) *European Human Rights Law Review* 242.
[47] E.g., Fisher, Jonathan, QC, *A British Bill of Rights and Obligations*, (2006) Conservative Liberty Forum.
[48] Fisher, ibid., 17 ff.
[49] See for example the limitations on the rights to privacy and family life, Article 8.2, *ECHR*.
[50] Joint Committee on Human Rights, *Twenty-ninth report*, (2008) London: Joint Committee on Human Rights Publications, Section 238.

44. Our recommendation is that giving civic responsibility anything more than a symbolic, aspirational role in a BBR should be avoided in order to avoid deep, and unwanted constitutional problems.

45. **Consideration 1: Giving constitutional effect to individual civic duties, on a par with individual rights is an untested constitutional measure in liberal democracies.** A number of authoritarian, undemocratic states incorporate enforceable lists of citizen duties in their constitutions (Lazarus et al., 2009). However liberal democratic states have not accorded responsibilities an equal footing with individual rights in their constitutional documents.
46. Apart from stressing the duties corresponding directly to rights, constitutional documents of liberal democracies feature explicit civic duties in one of three ways. They contain symbolic, aspirational statements; general principles that legitimate more specific primary legislation, limited by individual rights; and in some cases as a list of duties not directly enforceable against individuals without primary legislation, but treated as the legitimating source of primary legislation. There is no suggestion of the specific duties in the associated primary legislation acting as a limit on citizen rights.[51] The only exception to this is where a duty actually corresponds to securing the rights of others, as with responsibilities in the upbringing of children in the German constitution.[52]
47. There is no precedent for civic duties with a constitutional status in UK law. Legislation and the common law specify citizen duties, but none of these have ever implied a "strong interpretive obligation" with regard to other areas of law. Nor are individual civic duties given any special role in UK constitutional principles. A 2009 Ministry of Justice document on 'Rights and responsibilities' could only appeal to standard legal obligations, the ECHR itself, and even 'ethical codes of behaviour', to try to make a case for a civic duties tradition in the UK constitution.[53] The statutory obligation to educate children in 'Citizenship' highlights education in civic duties, such as the above mentioned.[54] But once again the duties are those specified in legislation and the common law, and certainly no statutory direction exists implying these have any strength to condition individual rights.
48. Without a significant comparative body of constitutional material against which a proposed list of responsibilities can be evaluated, incorporating civic duties is an untested measure with untested consequences. We outline some of the more worrying potential implications below.

49. **Consideration 2: Too broad to have an effect or so specific as to replace the role of primary legislation?** A key feature of the way civic duties appear in the constitutional documents of liberal democracies is

[51] Lazarus, L., Goold, B., Rajendra, D., and Qudsi, R., 'The relationship between rights and responsibilities,' (2009) *Ministry of Justice Research series*, 18/09, London: Ministry of Justice Publications 18-23.
[52] ibid.
[53] Ministry of Justice, *Rights and responsibilities*, (2009) London: Ministry of Justice Publications 16.
[54] *Education Act*, (2002) London: UK Government Publications, Section 85.

their generality. Specifying individual obligations so they may be justiciable, on the other hand, has been the work of primary legislation. This is no accident.

50. Individual rights have a key, defined function intended to be stable in changing circumstances: the protection of individuals against arbitrary exercises of power (especially political power) and against social neglect. This aim is not intended to be sensitive to changing social priorities, and so is not intended for regular review. The aim is to have a safeguard against changing priorities. Specific citizen responsibilities, however, are fundamentally changeable in a democratic system. This is to be expected, given the changing needs and aims of the public interest, and the changing priorities set by democratic processes.
51. At different times, and in different contexts, Parliament introduces duties and responsibilities for citizens in the form of legislation specifying, for example, liability for private loss, the provisions of civil law and especially tort law, detailed obligations relating to the interests of children in family law, and continually refined prohibitions in the criminal law.[55] The relative specificity of these provisions reflects their responsiveness to changing circumstances, and social need, but also to cultural changes and democratic will.
52. Consider the duty of national service, this is a changing need, and to constitutionally enshrine it would tie the hands of the legislature. In fact, enshrining any set of 'values' to be pursued as specified, enforceable, obligations in this way would presume to define our social values once and for all.[56] This would be a serious limitation on parliamentary sovereignty and democracy in its own legitimate domain.
53. To state a set of responsibilities, on the other hand, that do not bind the hands of Parliament, would require very general statements of aims, rather than specified and enforceable individual duties. For example, a preamble could refer to the 'responsibility of all citizens to uphold the constitution and the public interest'. This has been described as the aspirational part of a BBR and would not have sufficient specificity to be given weight in limiting justiciable individual rights.[57]
54. The appropriate place for specifying citizen responsibilities with judicial effect, then, would seem to be as it has always been, Parliament. That power to establish civic duties is not altered by HRA rights. It is merely limited by individual protections against abuses of power and neglect of citizens' welfare.

55. **Consideration 3: ceding more powers to the judiciary?** If individual rights, through the HRA, give additional powers to judges, then a list of civic duties with constitutional force in relation to individual rights will multiply those powers.
56. Given that the extent and limits of any list of civic duties requires interpretation, this would inevitably be worked out in the courts. Judges would be asked to put meat on the bones of a duties stated as a plain list

[55] Ministry of Justice, ibid., 16.
[56] Cf. Fisher, ibid., 17.
[57] Joint Committee on Human Rights, *Twenty-ninth report*, (2008) London: Joint Committee on Human Rights Publications, Section 69.

when dealing with specific cases. This will include deciding where these civic duties genuinely clash with individual rights claims and what weight if any they should be given against those claims. The extent of constitutional duties to be a good citizen, vote, or look after one's family would be in the hands of the judiciary. The interpretation of these duties would also potentially limit legislation creating a "strong interpretive obligation" when reading that legislation.[58] Judges would be placed in a very powerful, and difficult, position, empowered to specify the content and limits of our civic responsibilities through interpretation by having to decide their guiding aim at any juncture. That is a prerogative that currently resides with Parliament.

57. If the interpretive weight of duties versus rights is not specified in a BBR, this gives an extraordinary degree of discretion to judges, given the absence of a body of jurisprudence and a clear, *stable*, constitutional aim when specifying these duties. On the other hand, if a BBR will specify a priority relation, making the enjoyment of rights conditional on duty fulfilment, each decision of this kind will successively undermine individual protections. Not only that, but the aim of such protections would become unclear as judges moved away from protecting rights to balancing two sets of considerations: rights and public contribution. Little sense would remain of an unequivocal protection to all persons in society solely on the basis that they are human.

58. **Consideration 5: Potentially ceding more powers to the executive rather than the legislature.** For civic duties to have judicial effect, there must be an identifiable party that can require enforcement, or on behalf of whom representations can be made for enforcement. To make civic duties distinct from individual rights, this party would have to be an agency representing the public interest. If the judiciary is not to play this role, and be a party in its own adjudication, the most likely agency would be a branch of the executive. Proposals have been aired for a 'democratic override'.[59] But this is distinct from enforcing civic duties in a court. It is rather an arrangement to balance judicial powers (see s.29 above).[60] Furthermore that proposal would both threaten the operation of the rule of law in the UK system and is not a measure adjudicating constitutional provisions, but rather for limiting the adjudicative effect of a constitutional provision in special circumstances.[61]

59. If the point of incorporating civic duties is to 'rebalance' or counterweigh individual rights, including civic duties in a constitutional document will

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[58] Cf. on the paternalism this might involve see P Eleftheriadis 'On rights and responsibilities', (2010) *Public Law*, 31-43.

[59] Commission on a Bill of Rights (2011) Letter to Ministers of 28 July 4-6.

[60] In the Canadian Constitution (Article 33), the South African Constitution (Article 36), and the Charter of Human Rights and Responsibilities Act 2006, Victoria, Australia (Article 31), a parliamentary override provision is made. However, such overrides are not methods of enforcing articles already in the constitution, or an alternative list of civic duties. They serve a similar role to the limitations contained in the individual rights in the ECHR that give due weight to legitimate social goals in the interpretation of the rights themselves. Only in this case, weight would be given to Parliamentary will under special circumstances.

[61] And even as such the provision is deeply problematic. See Julie Debeljak, 'Balancing rights in a democracy: The problems with limitations and overrides of rights under the Victorian Charter of Human Rights and Responsibilities Act, 2006.' (2008) 32 *Melbourne University Law Review* 452 ff.

not have the desired effect. Rather it will imply greater powers for the executive. For example, the Home Office could seek limitations on the exercise of rights by appeal to claims of civic responsibility, and the judiciary would have a "strong interpretive obligation" to give the say of the executive some weight. This represents a further blurring of the division of powers, with the executive branch being given an excessive say in judicial processes supposedly designed to protect individuals from its far reaching powers. In deciding what to pursue in this way, the executive would potentially have a free hand. Constitutional civic responsibilities, then, could potentially play the role of a Trojan horse, giving the executive additional powers to challenge individual protections.

60. **Consideration 5: ECHR Incompatibility.** The limitation or re-interpretation of ECHR rights by civic responsibilities, the ceding of power to the judiciary to enforce these responsibilities in a way that may clash with ECHR rights, and the ceding of powers to the executive to seek judicial enforcement, are all ECHR-incompatible measures. The rights in the ECHR and their limitations are already given in the Convention and no alternative list of civic duties would be admissible in this regard. The limitation clauses identify the needs of democratic societies, security, public order, public health and morals, as legitimate considerations for limiting rights.[62] These limitations have never been interpreted to admit the imposition of civic duties as conditions on enjoying protection of the rights.[63] Rather, the limitation clauses treat the State protection of public health and morals, say, as a legitimate aim defining the content and extent of the enjoyment of a right. They do not define who may or may not enjoy it given his or her past civic record. The margin of appreciation doctrine makes room for the former consideration but not the latter.

Suggestion 5: The Commission could recommend the inclusion of general principles of civic responsibility in a BBR, but not as a list of enforceable duties with judicial effect that may act to limit Convention rights. Reference to civic responsibilities could be incorporated into a BR with least constitutional disruption if included as statements of general principle. Including civic duties as enforceable provisions with judicial effect that modifies the scope of individual rights is an unprecedented, and so untested, move for a liberal democratic state. It would be the most constitutionally disruptive option with worrying consequences for the separation of powers and individual protections. This option would face the additional difficulty of making a BBR incompatible with ECHR

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[62] These public interest limitations are set out in Articles 8, 9, 10, and 11, of the ECHR, but do not apply to core rights, such as freedom from torture (viz. Articles 2-7).

[63] In some cases the limitation clauses have been used in favour of domestic provisions where these are deemed "fundamental principles of the state," viz. *Leyla Sahin v Turkey* [2004] ECHR, GC at [99]. Nevertheless, the court has been clear that these principles must be in conformity with the rule of law and with human rights (ibid), and they are necessary to the protection of equality and democracy in Turkey (ibid., 104-6), underpinning individual rights protections. They are not, in essence, limitations on those protections.

standards, triggering an increasing number of unfavourable Strasbourg judgements.

Section VI

Encouraging native human rights jurisprudence after *Ullah*

61. A Bill of Rights could be an opportunity to encourage UK courts to develop more of a 'home-grown' jurisprudence when it comes to the interpretation of Convention rights.[64] The interpretation of Convention rights by domestic courts must not offer individuals a lower level of protection that that afforded by the ECtHR in its jurisprudence: this would create a gap in the system of rights protection, and make it necessary for individuals to make unnecessary journeys to Strasbourg to seek redress. However, a case can be made for conferring explicit authority on UK courts to extend rights protection beyond that afforded by Strasbourg in appropriate cases.
62. At present, the courts have adopted a self-denying approach in judgments such as *Ullah*, which constrains their ability to expand and deepen the Strasbourg case-law, even in areas such as free expression, equality and non-discrimination and fair process rights where the ECHR jurisprudence is arguably underdeveloped: however, a Bill of Rights could encourage the adoption of a new approach, if it re-enacted the Convention rights in accordance with the current provisions of the HRA but clarified that the current reference in s. 2 HRA to taking the Strasbourg jurisprudence 'into account' did not preclude the UK courts providing a deeper level of rights protection where it would be justified to do so.

63. **Subsidiarity - A Red Herring:** In outlining the above argument, it is important to distinguish the argument being made here from other claims that have been advanced in recent months about the UK's relationship with the ECHR. The principle of subsidiarity in the ECHR system provides that the principal responsibility for protecting Convention rights falls on state parties to the Convention. The point of this principle is that the best place for enforcement of rights in the first instance is through domestic legislative, executive and judicial mechanisms. However, this principle defines responsibility for enforcement, *not* responsibility for interpretation of the rights. While national authorities are entitled to develop their own interpretations of Convention rights and how they should be applied in concrete cases, the ultimate responsibility for providing the definitive and binding interpretation of Convention rights is clearly conferred by the Convention on the European Court of Human Rights, in line with standard practice in international human rights law.

64. In other words, the Court is charged with determining the scope and content of Convention rights, and assessing whether states have fulfilled their duties and obligations under the Convention, including their

[64] Cf. Suggestion at: Commission on a Bill of Rights (2011), 'Letter to ministers' of 28 July, p. 6.

responsibility to ensure redress is provided for breach of any Convention right in line with Article 13 ECHR. The Strasbourg Court may determine that an issue falls within the 'margin of appreciation' by finding that the absence of a pan-European 'shared understanding' of the scope of a Convention right means that states are entitled to apply their own understanding of how the right in question is to be applied in the specific type of case at issue. However, whether this test is satisfied or not is a matter that the Strasbourg Court retains the ultimate competency to judge, and the notion of 'subsidiarity' does not affect this. Even national decisions that appear to come within the margin of appreciation still remain subject to review by the Court, as of course do national decisions that relate to matters that lie outside its scope.[65]

65. **Removing the self-denying ordinance and making room for more protection?** The Strasbourg thus retains the ultimate authority to review domestic decisions, and that its jurisprudence therefore sets interpretive limits (the 'floor') on UK jurisprudence, has been accepted in UK law. In *Ullah*, reaffirmed in *Clift*, the Judicial Committee of the House of Lords established what is now called the 'mirror principle', namely that domestic judges should not offer less than Strasbourg interpretations of Convention rights and UK judges should keep pace with Strasbourg jurisprudence. Whilst that decision is correct when it comes to the obligation of the UK not to provide a lower level of rights protection than that offered by the Strasbourg jurisprudence, it also acts as a self-denying ordinance (in the words of Lady Justice Arden). This is because the principle also holds that domestic judges should not generally give greater protection to Convention rights than a claimant is likely to obtain in Strasbourg.[66] That is, it places not only a bottom limit, but also a top limit on 'home-grown' jurisprudence.[67]
66. This upper limit is not required by the Convention. In fact, the courts of many European countries go further than Strasbourg in providing for enhanced protection of rights, either through their own domestic constitutional rights instruments or through how they interpret and give effect to Convention rights.
67. In the recent *Ambrose* case,[68] Lord Kerr in his dissenting opinion at para. 128 suggested that the duty to maintain the Strasbourg jurisprudence as a 'floor' of rights protection should not inhibit UK courts from giving effect to Convention rights, even where Strasbourg had yet to pronounce on the correct interpretation of the Convention rights at issue. There is much to commend this approach, not least because it prevents UK courts from having to wait for Strasbourg jurisprudence to evolve, and also opens up the possibility of allowing for forms of rights protection to evolve which

[65] E.g., Leyla Sahin, ibid., s. 100.
[66] *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para. 20, reaffirmed in *R (on the application of Clift) (FC) v Secretary of State for the Home Department* [2006] UKHL 54, para. 49.
[67] Lord Bingham in para. 20 of *R (Ullah) v Special Adjudicator* [2004] UKHL 26 stated that 'duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less', while Lord Brown in *R (Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL 26 suggested that the final clause of this sentence could have been re-worded as 'no less, but certainly no more.'
[68] [2011] UKSC 43.

better reflect British understandings of how rights should be protected, especially in the realm of criminal justice. However, any such 'home-grown' jurisprudence would still have to respect the obligation to maintain the 'floor' of protection afforded by the Strasbourg jurisprudence in place, to ensure conformity with the requirements of Article 13 ECHR and other provisions of the Convention.

Suggestion 6: The Commission could recommend that A UK Bill of Rights 'adds value' by clarifying that UK courts could go beyond existing Strasbourg jurisprudence and provide enhanced rights protection through the interpretation and application of Convention rights, as long as the 'floor' of Strasbourg jurisprudence was respected. This could be achieved through retaining the existing wording of s. 2(1) HRA but adding a new provision to the effect that nothing in this Act is to be read as precluding a court or tribunal in determining a question that has arisen in respect of a Convention right from interpreting that right so as to provide a more generous level of rights protection to the person relying on that right than that currently afforded by any judgment, decision, declaration or advisory opinion of the European Court of Human Rights, or words to similar effect.

End of Submission by the Institute for Human Rights, University College London, to the Commission on a Bill of rights, 11 Nov 2011