



The UK – A case of democratic backsliding? Human rights reforms: a JUSTICE paper for the University of Exeter conference April 2022

1. This conference on democratic backsliding comes at an important time. As atrocities are being committed daily by Russia in Ukraine which we can feel powerless to stop, a conversation about the enforcement and practical benefits of human rights seems essential. Closer to home, it feels that we are now at a crossroads in how human rights are respected in the UK. Decades of negative rhetoric and misinformation are culminating in the most serious attempt yet by the state to weaken human rights protection in this country by repealing the Human Rights Act 1998 ('HRA'). In this paper, I want to explore how we have got here and what we face losing.

Background: The European Convention on Human Rights and the Human Rights Act 1998

2. To place where we are in its full context, it is useful to first set out a brief history. The European Convention on Human Rights ('ECHR') was drafted, with a leading role by British lawyers, in response to the horrors of the Second World War. The rights set out in the ECHR are a combination of absolute rights which member states cannot restrict under any circumstances (such as the prohibition on torture) and qualified/limited rights (such as the right to a family life) which can be interfered with so long as that is proportionate with a wider legitimate aim of a democratic society, such as the prevention of crime or national security.¹
3. Sir Winston Churchill helped to promote the Convention which was first signed by the United Kingdom on 4 November 1950.² On 14 January 1966, the United Kingdom accepted the jurisdiction of the European Court of Human Rights ('ECtHR') and the right of UK nationals to bring claims to the court. However, individuals could not rely on ECHR rights in UK courts and tribunals. To pursue a human rights claim, an individual had to apply directly to the ECtHR which was time-consuming and

¹ [The European Convention on Human Rights](#)

² Natasha Holcroft-Emmess, ['How British is the European Convention on Human Rights?'](#) (EachOther website, 3 September 2016)

expensive. The average cost of an application to the ECtHR was £30,000 and the average time to resolve a claim was five years.³

4. The Human Rights Act 1998 ('HRA') was therefore the logical next step. It allowed, for the first time, people in the UK to raise human rights grounds in domestic legal disputes and allowed UK judges to determine human rights cases. It also imbued a human rights culture upon public authorities. Through Section 6 HRA, all public authorities are required to act in a way which was compatible with the ECHR. Section 4 HRA also gives the courts the power to determine whether primary legislation was compatible with the ECHR. However, to protect Parliamentary sovereignty, the Courts could only make a declaration of incompatibility with the ECHR and politicians thereafter decide how to respond. As the then Labour government said when introducing the HRA, the aim was '*to make more directly accessible the rights which the British public already enjoyed under the Convention. In other words, to bring those rights home*'.⁴

Practical impact of the Human Rights Act

5. At this stage, it would be useful to demonstrate a few practical examples of how the HRA has helped people achieve justice since its incorporation. These are stories which sadly do not always make the front-pages of newspapers but provide a more complete picture about the accountability which the HRA has provided for a wide variety of different people since its introduction.
 - a. [Commissioner of Police of the Metropolis v DSD and another \[2018\] UKSC 11](#)

Several victims of sexual offences committed by John Worboys sued the Metropolitan Police and were awarded compensation as investigative police failures had constituted a violation of their Article 3 ECHR rights not to be subject to ill-treatment. The case shows how the HRA protects the victims of serious crime by imposing duties on the state to carry out competent criminal investigations.
 - b. [LW and Others v Sodexo and Secretary of State for Justice \[2019\] EWHC 367 \(Admin\)](#)

Four prisoners were subject to illegal strip searches at HMP Peterborough, a prison run by the private company Sodexo. Sodexo had admitted the strip searches followed incorrect procedure and were a breach of Article 8 ECHR, the right to privacy. However, the judgment also emphasised the importance of oversight from the Secretary of State for Justice when outsourcing to private companies and that human rights responsibilities could not be delegated away.
 - c. [Rabone and another v Pennine Care NHS Foundation Trust \[2012\] UKSC 2](#)

A patient's family successfully sued an NHS Trust after their seriously mentally unwell daughter was released from hospital, despite serious concerns, only to kill themselves a day later. It was found that Article 2 ECHR meant that the state owed the patient a

³ [The Independent Human Rights Act Review](#) (December 2021), p8

⁴ Home Office, [Rights Brought Home: The Human Rights Bill](#) (October 1997), para 1.19

duty to take reasonable steps to protect them from the real and immediate risk of suicide.

Human rights and democracy: is there a tension?

6. Since we are discussing democratic backsliding, we should address at this stage an argument which is made against human rights legislation; that there is a democratic deficit when decisions on issues are taken by “unelected judges”. For example, Suella Braverman MP argued before she was appointed Attorney General that ‘*the political has been captured by the legal. Decisions of an executive, legislative and democratic nature have been assumed by our courts...The catalyst for this proliferation was the Human Rights Act which came into force in 2000.*’⁵
7. In response, first, it must be emphasised that the rule of law requires the judiciary to interpret and apply UK law. The HRA itself was passed by Parliament and so must be interpreted and enforced by the judiciary. Whilst areas such as immigration and the release of prisoners are areas of political controversy, the role of the judiciary is to consider all legal provisions and apply them to the facts of a particular case. It is deeply cynical for elected lawmakers to criticise judges for undertaking their constitutional role of applying legal tests, without fear or favour, which politicians set.
8. However, more widely, as the late Lord Bingham set out in a 2008 lecture, the purpose of human rights legislation is to give ‘*a measure of protection to minorities who lack the strength and the representation to obtain protection through the political process: prisoners, mental patients, gypsies, homosexuals, asylum-seekers, despised racial or religious minorities and the like.*’⁶ He also noted pointedly that ‘*there are countries in the world where all judicial decisions find favour with the powers that be, but they are not countries where one would wish to live*’.⁷
9. A wider and more comprehensive understanding of what it means to be a democracy requires us to focus on ensuring state power is held accountable and that minority rights are respected. In particular, the rule of law can only be said to be in place when everyone is subject to it, including those with political power. Such an approach to democracy is something which the government have repeatedly emphasised in its foreign policy output. For example, a 2019 Foreign and Commonwealth Office report⁸ emphasised that ‘*democracy and respect for human rights are...the foundations on which strong institutions, responsible and accountable government, a free press, and equal rights for all people are built*’.⁹ We could not agree more, but too often domestically we hear a different story of how human rights conflict with the public interest.

⁵ Suella Braverman MP, [*‘People we elect must take back control from people we don’t. Who include the judges’*](#) (ConservativeHome website, 27 January 2020)

⁶ Lord Bingham, [*‘Dignity, Fairness and Good Government: The Role of a Human Rights Act’*](#) (Speech to Human Rights Law Resource Centre, Melbourne, 9 December 2008)

⁷ *Ibid.*

⁸ With a foreword from Dominic Raab MP, then Foreign Secretary and now Justice Secretary and Lord Chancellor

⁹ Foreign and Commonwealth Office, [*Human Rights and Democracy: the 2019 Foreign and Commonwealth Office report*](#) (16 July 2020)

Backsliding rhetoric: how we talk about human rights

10. It is hard to think of a piece of legislation that has been criticised as vehemently by politicians and the media in recent years. This paper would argue that misinformation around the HRA has fuelled increasing calls for its replacement and, ultimately, with the present government's policy. It was notable that the Independent Human Rights Act Review, commissioned by the Government and published in 2021, supported an '*effective programme of civic and constitutional education*' on human rights.¹⁰
11. A telling early example of this is media reports from 2006¹¹ which stated how the HRA had meant that serial killer Dennis Nilsen was successful with a human rights challenge to a prison governor's decision to deny him access to pornography. However, the legal challenge in question had been unsuccessful; it was refused permission to proceed to a substantive hearing.¹² This did not stop the Shadow Home Secretary at the time from citing the case as an example of a "spurious" human rights claim which had been permitted by the HRA.¹³
12. Infamously Theresa May MP, as Home Secretary in 2011, told Conservative party conference how the HRA had meant that there had been an "*illegal immigrant who cannot be deported because, and I am not making this up, he had a pet cat*".¹⁴ Within minutes of that speech, the Judicial Office issued a statement confirming that the reality was that '*this was a case in which the Home Office conceded that they had mistakenly failed to apply their own policy*' and that '*the cat had nothing to do with the decision*'.¹⁵ But, the damage had already been done.
13. This rhetoric is not confined to any political party. Despite passing the HRA, Tony Blair as Prime Minister stated in 2006 that it was '*clear*' that British judges sometimes did not take the balance between individual rights and wider community security into consideration¹⁶.
14. In a recent Parliamentary debate on the HRA, the rhetoric reached a new nadir. The Lord Chancellor, whose responsibilities include upholding the rule of law, said that a question from a Conservative MP about how human rights laws stopped the UK from deporting '*foreign criminals including rapists and murders, much to the delight of the leftie lawyers*' was '*bang on*' and suggested that an opposition MP who cited legal bodies' concerns about reform to the HRA was '*on the side of the criminals*'.¹⁷

¹⁰ [The Independent Human Rights Act Review](#) (December 2021), p21

¹¹ Daily Mail, ['How do you label a goat?'](#) (20 November 2006)

¹² Department for Constitutional Affairs, ['Review of the Implementation of the Human Rights Act'](#), (July 2006), p30

¹³ Nigel Morris, ['Tories push to scrap Human Rights Act'](#) (Belfast Telegraph, 4 July 2008)

¹⁴ Dominic Casciani, ['The case of the cat deportation tale'](#) (BBC News website, 6 October 2011)

¹⁵ *Ibid.*

¹⁶ Ned Temko and Jamie Doward, ['Revealed: Blair attack on human rights law'](#) (The Observer, 14 May 2006)

¹⁷ UK Parliament Hansard, ['Bill of Rights and Human Rights Act 1998 debate'](#), (House of Commons, 22 March 2022)

15. Misinformation has seeped into the national dialogue on human rights, creating a narrative where judges and human rights lawyers are in conflict with the public interest. This dangerous narrative has culminated in the government's proposal to replace the HRA.

JUSTICE's response to the proposal to replace the HRA

16. In 2006, David Cameron proposed a Bill of Rights but made clear that he did not '*for a moment imagine that this is something that can be drafted by a few politicians in Westminster*'.¹⁸ Sadly, the present proposal for a Bill of Rights, set out in a recent consultation, is exactly this. For a fundamental constitutional change, it has little support from charities, legal bodies, opposition MPs and has significant opposition within the Conservative party. The previous Conservative Lord Chancellor Robert Buckland has said he does not support the proposed approach.¹⁹ It is of particular concern that the replacement of the HRA is not supported by any of the UK's devolved administrations, especially when the HRA is embedded within the UK's devolved legal framework.²⁰
17. The consultation itself, whilst committing to remain within the ECHR, sets out the Government's plan to repeal and replace the HRA with a British Bill of Rights. The proposals intend, among other things, to introduce further procedural hurdles to bringing a human rights claim, to narrow how the courts can interpret certain human rights, to restrict the ability to challenge secondary legislation and to limit the ability of UK courts to use human rights laws to impose 'positive obligations' on public authorities. There are also proposals to restrict human rights protections for certain individuals solely due to their criminal history (for example, foreign national offenders) and to limit the principle of "proportionality" when applying qualified or limited rights. They set the UK on a collision course with the ECtHR and our international obligations.
18. A repeated theme of the consultation is that human rights are frustrating the ability of governments to deport foreign national offenders, investigate serious criminals and that there has been an '*incremental expansion of rights without proper democratic oversight*'.²¹ This is a direct consequence of the misinformation which surrounds the HRA and which has been set out in this paper. Immigration cases summarised in the consultation misleadingly ignore key facts which show the compelling circumstances of a case. Little information is provided about how the HRA has helped victims of crime challenge the police for inadequate investigations or placed positive duties on health authorities to protect mentally unwell patients.
19. JUSTICE has concluded that there is little evidence or support in the consultation for the repeal and replacement of the HRA. Even proposals to strengthen certain rights such as freedom of expression and jury trials lack proper detail and explanation. Our

¹⁸ David Cameron MP, ['Balancing freedom and security – A modern British Bill of Rights'](#) (Centre for Policy Studies, 26 June 2006)

¹⁹ Robert Buckland MP, ['Human Rights reform: getting the focus right'](#) (UK in a Changing EU, 30 March 2022)

²⁰ See the [Joint Statement on Human Rights Act reform from the devolved Scottish and Welsh governments](#) (4 March 2022)

²¹ Ministry of Justice, ['Human Rights Act Reform: A Modern Bill of Rights – A consultation to reform the Human Rights Act 1998'](#) (December 2021)

position is that the proposals will ‘weaken rights protection in the UK by unduly restricting the content of rights and putting up additional procedural barriers to enforcement’²². It is an extension of the human rights caricature which has been created by various governments and aspects of the press ever since the HRA came into law.

Conclusion

20. The Government’s position is a direct result of years of misinformation and unhelpful politicisation of the HRA. The lack of evidence and mischaracterisation within the consultation paper shows how thin the case is for the HRA’s repeal. Far from conflicting with democracy, as some have suggested, human rights protections strengthen our democratic system and ensure that everyone enjoys a basic level of protection under the law. These proposed reforms to the HRA are a clear example of democratic backsliding and undermine our position as a country that upholds international law.

²² JUSTICE, [‘Justice calls on the Government to abandon its plans to replace the Human Rights Act with a Bill of Rights’](#) (8 March 2022)