BRIEFING FOR PARLIAMENTARIANS
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THE HUMAN RIGHTS ACT

THE REAL STORY

The UK government is committed to scrapping the Human Rights Act (HRA) and replacing it with a British Bill of Rights aimed at 'curtailing the role of the European Court of Human Rights'. This would have damaging and far-reaching repercussions for people's rights in the UK, the UK's relationship with the European Court of Human Rights (ECtHR) and the European Union, and the UK's international reputation.

Amnesty International believes the HRA is an excellent example of national human rights protection. It is designed to suit and support the UK's democratic system, protecting universal rights while preserving parliamentary sovereignty. However, it is rarely championed, often attacked, and much misunderstood. This briefing cuts through the myths, rebuts some common criticisms, and highlights the positive impact of the HRA and the ECtHR.

Amnesty International

HOW THE ACT WORKS

Requiring public authorities to respect human rights
The Human Rights Act incorporates most of the European Convention on Human Rights (see below) into UK law. It works in two key ways.

- It improves lawmaking: the government must explain how proposed new legislation complies with human rights. All law must be interpreted compatibly with human rights as far as possible, although it is left to parliament to decide whether and how to fix any incompatible primary legislation.
- It brings human rights into all state decisions: all public authorities – for example ministers, local councils, the police and hospitals – must ensure their actions do not violate the protected rights.

Enabling people to claim their rights in the UK
Before the HRA came into force, people in the UK could not claim their Convention rights in a UK court. They had to go all the way to the ECtHR in Strasbourg to have their case heard, which was difficult, time-consuming and expensive.

The HRA brings human rights home, giving people the ability to challenge decisions by public authorities in UK courts. However, the vast majority of HRA cases never reach a court room: they are settled through the public authority coming to an agreement with the individual concerned.

Improving human rights standards
Thus the HRA makes it easier for people in the UK to ensure their rights are protected, seek justice and hold decision makers to account. It has had a hugely positive impact, enabling individuals to exercise their rights more easily and instilling human rights into the decision-making culture at all levels of the state.

The requirement for public authorities to refrain from creating policy or taking actions incompatible with human rights forces them to think before they act. This in turn reduces the number of inadvertent rights abuses and, therefore, the need for litigation. It has led to progressive improvement in human rights standards in all areas of life in the UK.

Supporting victims of crime
The HRA obliges the government and public authorities to take positive steps to protect victims of serious crime in certain circumstances. It has been used to ensure that allegations of crimes such as rape and murder are properly investigated. In deaths where state officials are implicated, it generally requires the authorities to involve the victim's family in the investigation.

Investigating rape effectively
In 2009, John Worboys, the 'black cab rapist', was found guilty of sexually assaulting 12 women. Police now believe he used 'date-rape' drugs to attack over 100 female customers between 2002 and 2008. Early on, two women reported him to the police, but neither woman felt the police took them seriously.

When the two women took the police to court using the HRA, the Court found that police failure to treat the women as potential victims of serious crime resulted in 'inhuman and degrading treatment'. This outcome recognises women's legal right to be heard and should mean that reports of sexual violence will be properly investigated in future. **Source:** rightsinfo.org

Images iStock

Families can stay together
A husband and wife had lived together for over 65 years. He was unable to walk without her help. She was blind and used him as her eyes. They were separated after he fell ill and was moved into a care home. She wanted to stay with him but was told she did not fit the criteria. After she used the HRA to challenge that decision, the council agreed to reverse it and allowed her to join her husband.
Source: British Institute of Human Rights

Gay people can inherit from loved ones
A gay man was prevented from inheriting a council flat after his male partner died because only a husband or wife could do so. He used the HRA to challenge this and his case changed the law well before equal rights were fully introduced.
Source: rightsinfo.org

Applying human rights to everyone
The Human Rights Act protects everyone from abuse. The tiny minority of controversial cases – such as those involving convicted criminals or alleged terrorists – are dwarfed by the vast number of ordinary people who benefit from its invisible saefty net every day and rely on it to secure justice and protection.

To suggest that certain people – whoever they are or whatever they may have done – are less entitled to human rights is fundamentally at odds with the concept of human rights: that all people have these rights because they are human. This principle, that human rights are universal, also guards against the persecution and abuse of unpopular minorities. It is no accident that the United Nations adopted it (as Article 1 of the Universal Declaration of Human Rights) in the aftermath of World War II.

The government of the day cannot be allowed to decide who has rights and who does not. Undermining the rights of one group of people undermines the rights of everyone.

This does not mean that criminals and terrorists have more rights than anyone else, or that their rights are more important than those of victims. In each specific case, judges consider whether the state has a legitimate reason for interfering with a person's rights, and whether the intervention is lawful, necessary and proportionate given that aim.

Hospitals must not issue 'do not resuscitate' orders without consultation
An elderly man with dementia was admitted to hospital and placed on a ward in which every patient had a 'do not resuscitate' (DNR) order automatically placed on their file. He was not aware of the DNR, even though his advocate believed he had the capacity to take the information on board. His two daughters visited him but were also not consulted or informed. His advocate used the HRA to challenge this and the DNR was withdrawn.
Source: British Institute of Human Rights

MISREPRESENTATION AND MISUNDERSTANDING

Misrepresentation and misunderstanding of the HRA is damaging the credibility of human rights. Successive governments and civil society have done too little to defend and celebrate the Act, which has been subjected to a sustained campaign to undermine it. A handful of unrepresentative cases are repeatedly brought up to undermine the HRA and even the European Convention on Human Rights, with the facts often distorted (see box).

Cat among the pigeons
In 2008 a man won his appeal* against being deported because he was the unmarried partner of a person resident in the UK and the Home Office had failed to apply its own guidance for such cases. However, initial media reports ignored the partner and the Home Office's failures, and politicians took up the claim that the man was allowed to stay 'because he had a pet cat'. The cat was mentioned in the case only as an example of his private and family life in the UK and had nothing to do with the final decision.
***Source:** Asylum and Immigration Tribunal Appeal number IA/14578/2008

An avoidable death
Anthony Rice was given a life sentence for rape, but was released on licence after 16 years, in November 2004. Nine months later, he killed a woman called Naomi Bryant. Media stories claimed Rice was released 'because of human rights'. But the report by the Inspectorate of Probation* found that the release was actually because of a series of errors by various public authorities. In fact Naomi's family had to use the HRA to secure a full investigation into Rice's release.
***Source:** HM Inspectorate of Probation (2006) Serious Further Offence review: Anthony Rice

THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The ECtHR is in effect the guardian of the European Convention of Human Rights. It hears cases alleging that member states have violated their human rights obligations and it issues judgments that they have a duty to abide by. The Court is based in Strasbourg, in a building designed by British architect Lord Richard Rogers.

The Court provides an essential common standard

The ECtHR provides a common interpretation across member states of the minimum protections provided by Convention rights. The UK is free to give more rights if it chooses, but is expected not to fall below that minimum standard. The only reason not to take those judgments into account, therefore, would appear to be if the intention was to give a lower standard of human rights protection than the rest of the continent.

UK judges can and do diverge from ECtHR rulings

The HRA does not force UK judges to do exactly as ECtHR judges say. Section 2 of the Act says only that UK courts should take ECtHR rulings into account, so that UK court rulings do not fall below the minimum standard set by the ECtHR.

However, on rare occasions, when they had good reason, UK courts have decided against following ECtHR rulings. Sometimes they interpret Convention rights more generously. Sometimes they disagree. The divergent rulings contribute to a positive dialogue between the UK courts and the ECtHR, leading to improved standards of justice in both.

Diverging from the ECtHR

In the case of Horncastle (and others) in 2009, the UK decided against following an earlier ECtHR decision (on the same issue) saying that the use of untested hearsay evidence breached Article 6 of the Convention, the right to a fair trial. The UK Supreme Court ruled that the ECtHR had relied on case law that was inappropriate for the UK's common law jurisdiction, and had not properly considered English law on the admissibility of evidence. When the issue went back to the ECtHR, the Court in Strasbourg accepted the Supreme Court's approach and ruled in favour of the UK.

ECtHR rulings give the UK considerable leeway

The ECtHR provides a common interpretation of the minimum protections provided by Convention rights, with a 'margin of appreciation' for national differences where appropriate. The Court generally gives a wider 'margin of appreciation' where political considerations, such as resource allocation, are involved.

Allocating scarce resources

A woman with severely limited mobility complained about her local authority reducing her weekly care allocation. They decided her night-time care needs could be met by giving her incontinence pads and absorbent sheets instead of a night time carer to help her use the commode. (She was not incontinent, but could not physically get to the toilet.) The ECtHR ruled that for most of the period in question, her rights had not been violated. It said that states retain wide discretion in making decisions about allocating scarce resources, and had considered and drawn the balance properly here.

McDonald v UK (Application No 4241/12) judgement of 20.8.2014

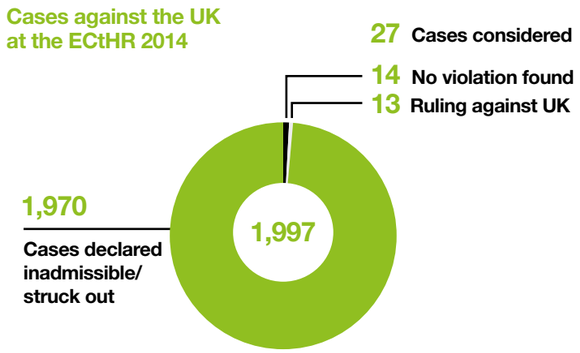
Keeping public order

A group of demonstrators complained they had not been allowed to leave a police cordon for seven hours during an anti-globalisation protest in London. The ECtHR found this was not a deprivation of liberty, but the least intrusive and most effective way to protect the public from violence.

Austin & ors v UK (2012) SSEHRR14

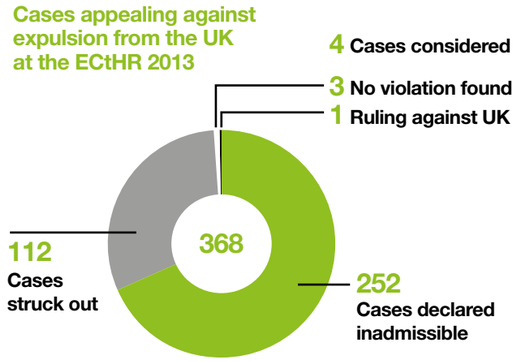
The Court throws out the vast majority of cases against the UK

Out of 1,997 cases lodged against the UK in 2014, the ECtHR ruled against the UK in only 13 of them: 0.7 per cent (see chart). The vast majority of cases were declared inadmissible or struck out and did not even receive a full consideration.



The Court throws out the vast majority of appeals against expulsion from the UK

It is particularly rare that the ECtHR opposes expulsion from the UK on human rights grounds. In 2013 the Court ruled against expulsion in only one out of 368 cases: 0.3 per cent.



The Court provides access to justice for people across the continent

The Court provides an essential mechanism for people across the continent to access independent justice and redress for human rights violations when national systems fail. As of August 2014 only 1.5 per cent of pending cases at the Court were against the UK. Most – some 60 per cent – were against Italy, Ukraine, Russia and Turkey.

ECtHR judges are appointed by MPs

Judges of the ECtHR must hold legal qualifications to be appointed. Each member state has a judge in the Court and the UK nominates its own candidate. The judges are then elected by the Council of Europe's Parliamentary Assembly, which is made up of representatives from all member states, including 18 UK MPs. Thus UK MPs have more power over the appointment of ECtHR judges than they do over domestic judges, who are independently appointed.

German courts do follow ECtHR rulings

Germany's relationship with the ECtHR and the Convention is very similar to what the HRA provides in the UK, despite claims to the contrary by some UK politicians. Moreover, Germans have constitutional rights that generally give their citizens more protection than the rights provided by the Convention.

It was the *Gorgulu* case (see below) that gave rise to the perception that German courts do not have to follow the ECtHR. However, in that case the German Constitutional Court ruled that German courts had to 'take into account' European Court judgments, which is exactly what the HRA says. Amnesty cannot find a single case in which a German court refused to follow an ECtHR ruling. In practice, the usual position is that ECtHR rulings should be followed, unless they would restrict or reduce rights already protected under German Basic Law. The UK proposals seen so far seek to achieve the opposite: to go against the ECtHR in order to restrict or reduce rights ensured under the Convention. In some countries, like the Netherlands, the Convention has precedence over any domestic law, including the Constitution – going much further than the UK.

The Gorgulu case

In 2001 a man seeking custody of his son, or failing that at least visiting rights, filed a case with the ECtHR. The Strasbourg Court ruled that the father must at least have access to his child. Subsequently, a German regional court claimed that although the Federal Republic of Germany was bound by the Convention, the regional court, as an independent body, was not. The case eventually went to the German Constitutional Court, which rejected the regional court's argument and ruled that German courts must take ECtHR decisions into account.

The Constitutional Court said that non-compliance with ECtHR judgements was justifiable in certain circumstances – as is recognised in the UK. It also repeatedly stated that German law should be interpreted in harmony with the Convention.

Source: Felix Muller and Tobias Richter, Report on the Bundesverfassungsgericht's (Federal Constitutional Court Jurisprudence in 2005/2006, German Law Journal Vol 09 No 02 2008

MORE MISUNDERSTANDINGS

Like the Human Rights Act, the ECtHR and some of its more controversial decisions have been the subject of ill-informed comment.

Prisoner voting

The ECtHR ruled that an unconsidered blanket ban on prisoners voting was disproportionate and that the UK parliament should review the law. The UK parliament needs only to ensure that it takes a more nuanced approach. For example, a decision that prisoners convicted of driving offences or those spending less than a month in custody could vote, but no others could, would probably comply with human rights. The Court did not rule, or even suggest, that every prisoner must be allowed to vote.

Abu Qatada

The ECtHR ruled that Abu Qatada could not be deported to a country where evidence obtained through torture might be used against him and he would not receive a fair trial. The right to a fair trial and the absolute prohibition against torture are long-standing British principles, not only laws introduced by the HRA or the Convention. The bottom line is that human rights are for everyone, not only the people we all like.

THE IMPORTANCE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

'I am troubled by discussion of plans to scrap the United Kingdom's Human Rights Act… I am worried by the impact of this initiative both in the UK and in other countries… the UK should set an example at home by ensuring that human rights protection, once brought in, is not subsequently weakened,'

UN High Commissioner for Human Rights, June 2015

The European Convention on Human Rights was inspired by the desire to prevent a recurrence of the atrocities witnessed in Europe and beyond in World War II. The UK played a key role in its creation: much of the Convention was drafted by British experts and the UK was the first country to sign up in 1951.

A flexible instrument

The Convention was written 60 years ago when the world was a very different place. It was intended to be a simple, flexible encapsulation of universal rights (the United Nations had adopted the Universal Declaration of Human Rights just three years earlier) whose meaning could grow and adapt to society's changing needs. The Convention was always intended to be a 'living instrument' that would be interpreted depending on the context. If we still interpreted human rights as written decades ago, for example, gay people probably would not have been allowed to serve in our military and it is difficult to see how freedom of expression on the internet could be protected, because the internet itself did not exist then.

An international commitment to human rights

Remaining a signatory to the Convention is critical, not only to protecting the rights of ordinary people, but also for the UK's international reputation and standing. To leave the Convention would make the UK the first European democracy to pull back from its international human rights commitments: to Amnesty's knowledge North Korea and Venezuela are the only other countries to have done something similar.

How could the UK promote human rights abroad or champion the rule of law if it abandoned the universal human rights project that has achieved so much?

International responsibilities

Curtailing the role of the ECtHR would breach the UK's international obligations, because Article 46 of the Convention requires states to abide by the Court's rulings. Amnesty believes that any such move, or a threat to leave the Convention altogether, sends a dangerous signal to other countries – particularly those that frequently violate the Convention, such as Russia. It gives them the green light to do the same and implies that it is acceptable to pursue a narrow, local concept of human rights decided by the government of the day and claim that it is Convention compliant.

The UK is extremely unlikely to be granted a special exemption from Article 46, or to secure its removal from the Convention. Moreover to achieve either, or to simply ignore the obligation, would be likely to prompt other countries also to disregard ECtHR rulings, critically undermining the Convention. The unravelling of our internationally agreed human rights structures could follow.

If the UK left the Convention, or was forced out because of its unlawful approach to Article 46, it is difficult to see how it could remain in the Council of Europe, or indeed the European Union. Being a Convention signatory is generally treated as a prerequisite of becoming an EU member, and the EU itself is in the process of becoming a signatory to the Convention. Moreover, the UK would remain bound by the EU Charter of Fundamental Rights, which contains similar protections. This would create much confusion and set a bad precedent for others.

A Chechen mother's painful fight

Fatima Bazorkina, from Ingushetia, Russia, whose son disappeared in Chechnya in 1999 (pictured below left with her adviser in the audience room of the ECtHR, December 2005). She took her case to the Court, claiming that federal troops killed her son and the authorities failed to adequately investigate the case. The Court upheld her arguments, ruling that Russia had violated the Convention. If the Court and Convention are undermined, people like Fatima will have nowhere to turn.

WE ALREADY HAVE A BRITISH BILL OF RIGHTS

At this stage it is impossible to know what rights would be included in a British Bill of Rights. The HRA already works very well as a package, so what would we lose? Particular rights, or particular protections for them, or mechanisms in the Act? Perhaps human rights would apply only in certain circumstances or only for certain groups of people? This kind of tampering contravenes international legal principles and fundamentally alters the key principle of universality of human rights.

Four sections of the HRA are particularly important in ensuring that Convention rights are effective in the UK:

- **Section 2** states that UK courts should 'take into account' ECtHR rulings. If UK courts are encouraged to routinely go against ECtHR rulings then standards will inevitably fall below the Convention's minimum protections more often. Changing this requirement would probably result in more cases going to Strasbourg and more rulings directly against the UK, which the UK would have to follow. That means more intervention, not less.

- **Section 3** ensures that UK courts interpret legislation in line with Convention rights, as far as possible. This ensures consistency and respect for rights in UK law. **Section 19** requires that when new laws are passed, the Minister responsible must explain how they are compatible with Convention rights (or why they are not) so that parliament can debate this. Together, these two sections encourage UK legislation to comply with human rights standards. If they were lost, legislation affecting millions in the UK could be passed without any assessment of the effect on people's basic rights and existing laws could violate rights.

- **Section 6** brings human rights into public authority decision making. It requires that public authorities respect human rights at all levels of government, including at a local level in relation to everyday services. It gives ordinary people a framework for challenge, dialogue and compromise with the authorities delivering public functions.

Amnesty sees no legitimate reason for repealing the HRA given the positive impact it has had for individuals and the UK in general.

THE BRITISH MILITARY AND HUMAN RIGHTS

In the military context, human rights principles have generally been applied to ensure that:

- soldiers continue to have basic rights, and must receive adequate protection and be provided with effective equipment
- even in wars and occupations there are red lines, such as that torture and inhuman treatment are always wrong.

Human rights are flexible and must always be applied appropriately in each context. They do not tie the hands of the military or dictate what equipment or action must be taken.

The British Military is perfectly capable of developing strategy and training that accounts for basic rights protections. It should be confident, in creating and defending its policies and practices, that they will withstand any ill-intentioned challenge and indeed be an international badge of honour.

Baha Mousa

Baha Mousa, an Iraqi civilian receptionist, was picked up by British soldiers and horrifically abused, later dying of his injuries. The HRA imposed an obligation on the UK to carry out an independent investigation of inhuman treatment, ensuring accountability, and that lessons were learned and procedures and policies improved. In this case, the military justice system had failed. This is one reason why the HRA and the ECtHR are so vital. They ensured a proper investigation, which should prevent the same things going wrong in the future.

Source: Report of the Baha Mousa Inquiry, 8 September 2011

Below: Baha Mousa with his wife and two children
© PA Images

SCOTLAND, WALES AND NORTHERN IRELAND

Repealing the Human Rights Act could have huge and complex implications for devolution and the Union. The Scottish Parliament says it will refuse legislative consent to repeal the HRA via the Sewel Convention, which states the UK government is expected not to legislate on devolved matters without the legislative consent of the Scottish Parliament. Since human rights are not 'reserved' for Westminster and because of the way the Scotland Act refers to the European Convention, the Sewel Convention is likely to be engaged.

The UK government could still repeal the HRA, but it would have to override the democratic will of the Scottish Parliament and ignore the Sewel Convention. This could create a constitutional crisis, just when the UK is trying to implement the Smith Commission proposals through the Scotland Bill, and the Sewel Convention is likely to become law.

The situation in Northern Ireland is even more complex, as the HRA is a critical part of the Good Friday Agreement, an international treaty lodged with the United Nations. Article 2 of the Agreement commits the UK to 'complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention'. The UK fulfils this obligation through the HRA. An international treaty would be violated if the HRA was not replaced with something just as effective in the British Bill of Rights.

The Agreement also commits the UK government to introduce 'policing structures and arrangements... which conform with human rights norms'. This obligation was fulfilled through the creation of the Police Service of Northern Ireland and its oversight body, the Northern Ireland Policing Board, a key function of which is to monitor compliance with the HRA. The Northern Ireland Assembly has also passed a motion rejecting attempts to repeal the HRA.

The HRA is also embedded in the devolution settlement for Wales, with its own complexities.

The government could perhaps repeal the HRA in England only, allowing it to continue to apply in other areas of the UK. This, however, would lead to a situation of fragmented rights across the UK, with people in England potentially left with a lower standard of protection than people in Scotland and Northern Ireland.

AN INVISIBLE SAFETY NET

The Human Rights Act provides an invisible safety net for us all, often only being seen by the most vulnerable people at the sharp edge when a public authority acts unlawfully. It protects people in the UK, and the freedoms that many of us take for granted.

Governments and public authorities are made up of human beings who are fallible, have opinions and make mistakes. People in the UK need to be able to access a system which allows them to exercise their rights. The Human Rights Act helps us all to do that.

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