LCHR

Labour Campaign for Human Rights

# Rebutting arguments for a British Bill of Rights

# Rebutting arguments for a British Bill of Rights

**Executive Summary**

In August 2016, Justice Secretary Liz Truss re-confirmed the government's plan to replace the Human Rights Act (HRA) with a British Bill of Rights. It was David Cameron, then Leader of the Opposition, who first proposed the Bill in 2006 and subsequently set up a panel of expert jurists to devise its contents. But after more than a decade of arguing for constitutional change, the Conservative Party still finds itself without any firm idea of what their British Bill of Rights will contain or how it would work.

This briefing addresses some of the arguments that have commonly been advanced by the government and by some elements of the media in favour of the change, and shows Labour MPs and activists how best to respond. The arguments include:

- *"The Human Rights Act undermines the role of UK courts in deciding on human rights issues in this country."*
- *"The Human Rights Act undermines the sovereignty of Parliament, and democratic accountability to the public."*
- *The European Court of Human Rights has developed 'mission creep'."*
- *"The HRA is a 'villains' charter' which protects the rights of the criminal more so than the victim."*
- *"The British Bill of Rights will enable the UK to keep the 'good' bits of the HRA and scrap the 'bad'."*

Our suggested rebuttals and counter-arguments include:

- UK courts have the power to contradict ECtHR judgments.
- The HRA is a British law that allows people to take human rights cases to British courts, rather than forcing them to go to the ECtHR.
- Both the HRA and ECHR are rooted in British values and traditions stretching all the way back to the Magna Carta through to the aftermath of the Second World War.
- The HRA allows human rights cases to be heard directly in British courts for the first time, rather than going to a European court.
- Parliament retains the power to make or repeal any law.
- Our understanding of human rights should reflect the changing views and values of our society. For example, LGBT rights have been integrated into our human rights framework as society has developed a more tolerant and inclusive outlook. This actually means human rights law and judges who interpret it are more in tune with the wider public.
- The HRA has been used to get justice for rape victims, to ensure elderly people get the care they need and aren't separated from their husbands and wives in care homes, and to stop modern-day slavery. It protects ordinary people from abuses of power.
- The right to a family life is qualified, which means the government can balance it against the interests of the wider public. Deportations are rarely held up by the HRA. Far more often, it's used to get justice for ordinary people.
- Restricting rights will just prompt more costly cases being sent to the ECtHR instead of being settled in British courts.
- Restricting rights will inevitably mean ordinary people lose out, as women fleeing domestic violence, elderly people trying to get proper care, victims of modern day slavery and others will be less protected.

**"The Human Rights Act undermines the role of UK courts in deciding on human rights issues in this country."**

*Argument and rebuttal*

The Conservatives' proposals for changing UK human rights law draw attention to Section 2 of the HRA which states that UK courts must 'take into account' rulings of the ECHR. The government claims 'this means problematic Strasbourg jurisprudence is often being applied in UK law'.[1] However, what they fail to note are the numerous and varying instances where British judges have deviated from ECHR rulings.

**Case study: Horncastle and Others v The UK**

In Horncastle and Others v The UK, an appeal was made to the ECHR after hearsay evidence was used, in part, to secure a conviction. In May 2005 Peter Rice was badly beaten by Michael Horncastle and David Blackmore. Sadly, Peter Rice died before the case came to trial, so the judge allowed his earlier statement given to police to be read in court. Along with other supporting evidence, the prosecution was able to secure a conviction and Horncastle and Blackmore were imprisoned in 2007.

In 2009 the men appealed the decision based on Article 6 of the Human Rights Convention - the right to a fair trial, which includes the right to examine prosecution witnesses. The men were relying on a judgement which the European Court of Human Rights (ECtHR) had given a few months prior, which stated that Article 6 would be breached if a conviction had been based solely or decisively on statements that a defendant had received no opportunity of challenging.

The Court of Appeal, whilst taking Strasbourg's rulings 'into account' found that there had been no breach of Article 6, and the conviction was upheld. Two months later, Horncastle and Blackmore took their case to the Supreme Court who also found in favour of the Court of Appeal and upheld the conviction.

As the Horncastle case underlines, there is a valuable dialogue that exists between the ECtHR and the UK courts which means the ECHR is far from an omnipotent statute that the UK courts must abide by at all times. As the HRA states, UK law must only 'take into account' rulings of the ECHR, which is exactly what it does.

*Best arguments to use*

When confronted with this argument, we recommend Labour MPs and activists argue the following:

- UK courts have the power to contradict ECtHR judgments.
- The HRA is a British law that allows people to take human rights cases to British courts, rather than forcing them to go to the ECtHR.
- Both the HRA and ECHR are rooted in British values and traditions stretching all the way back to the Magna Carta through to the aftermath of the Second World War.

**"The Human Rights Act undermines the sovereignty of Parliament, and democratic accountability to the public."**

*Argument and rebuttal*

Opponents of the HRA often claim it undermines British sovereignty. However, as argued above, it actually allows cases to be tried and resolved by British courts rather than a European court. This increases UK sovereignty and accountability.

[1] 'Protecting Human Rights in the UK' Conservative Party, 2015.

Moreover, Section 3 of the HRA requires courts to read and give effect to legislation that is compatible with the convention rights 'as far as is possible'.[2] Parliament can still make or unmake any law: all this section requires is that the court interpret a law consistently with the ECHR.

*Best arguments to use*

When confronted with this argument, we recommend Labour MPs and activists argue the following:

- The HRA allows human rights cases to be heard directly in British courts for the first time, rather than going to a European court.
- Parliament retains the power to make or repeal any law.
- The HRA is a British law that allows people to take human rights cases to British courts, rather than forcing them to go to the ECtHR.
- Both the HRA and ECHR are rooted in British values and traditions stretching all the way back to the Magna Carta through to the aftermath of the Second World War.

**"The European Court of Human Rights has developed 'mission creep'."**

*Argument and rebuttal*

This is an argument against the ECtHR rather than the HRA, but the two are often conflated in Conservative rhetoric. Critics give the impression of an ever growing ECtHR eerily taking the Convention rights way beyond their intended limit.

It is true that the court treats the convention as a 'living instrument' in order to ensure the rights reflect the ever changing and developing ideas of human rights within a modern society. This has actually proved valuable on a number of occasions. Article 14 of the ECHR, for example, protects people from discrimination on the grounds of 'sex, race, colour, language, religion, political or any other opinion, national or social origin, association with a national minority, property, birth or other status.'[3] But not sexual orientation.

In Dudgeon vs The United Kingdom, Jeff Dudgeon, a gay activist in Northern Ireland, was interrogated about his sexual activities by the local police. At the time, homosexuality in Northern Ireland was illegal. As a result, Dudgeon filed a complaint which was then passed on to the ECtHR. In 1981 The Court found that Northern Ireland's criminalisation of homosexual acts between consenting adults was a violation of Article 8 of the ECHR, which says: 'Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society …for the protection of health or morals....'.

The ECHR's online dossier now states:

"The Court has on several occasions modified its views on certain subjects because of scientific developments or changing moral standards. For example, it has initially refuted that relationships between same-sex couples fall within the scope of family life under Article 8 ECHR (Mata Estevez v Spain). In Schalk and Kopf v Austria, however, the Court has acknowledged that same-sex couples enjoy the protection afforded to family life by Art.8. in view of 'the rapid evolution of attitudes towards same sex-couples' which had taken place in many Council of Europe member states and the growing tendency to include same-sex couples in the notion of family in EU law."[4]

In its flexibility, the ECHR was able to find in favour of Dudgeon and, shortly afterwards, Northern Ireland decriminalised homosexuality.

[2] Human Rights Act 1998. (www.legislation.gov.uk)
[3] UK Human Rights Blog, 'Article 14: Anti-discrimination'. (https://ukhumanrightsblog.com/incorporated-rights/articles-index/article-14/)
[4] echr-online.info (http://echr-online.info/)

*Best arguments to use*

When confronted with this argument, we recommend Labour MPs and activists argue the following:

- Our understanding of human rights should reflect the changing views and values of our society. For example, LGBT rights have been integrated into our human rights framework as society has developed a more tolerant and inclusive outlook. This actually means human rights law and judges who interpret it are more in tune with the wider public.

**"The HRA is a 'villains' charter' which protects the right of the criminal more so than the victim."**

*Argument and rebuttal*

It is often reported in the press that the HRA prevents us from deporting foreign criminals. It is true that, to a limited extent, some criminals are given permission to remain based on human rights grounds. However, it is also true that a great number of cases are misreported in the media and that often the right to remain is given under other EU law such as the Refugee Convention, and not the HRA. There are no general prohibitions in our HRA that prevent criminals from being deported, aside from the prohibition of torture, which prevents a person from being deported to a country where they are likely to be tortured. However, this comes under international human rights law and was in fact already the case before the introduction of the HRA.

There have been other cases reported of criminals challenging deportation under Article 8 of the HRA – a person's right to a family life. However, Article 8 is a qualified right, which means the Home Office can overrule a judgement and make a decision based on the facts of a particular case. Overall, the number of deportations prevented is small. The LSE estimated in 2010 that as little as between 2 and 8% of appeals were granted under Article 8 of the HRA.[5]

The Human Rights Act contains rights that give elderly people protection in care homes, ensure cases of rape are properly investigated, protect people from discrimination at work and, crucially, also contains a number of rights that protect victims, such as the right to life, and the prohibitions of torture and forced labour. These rights are used all the time to help people challenge unfair decisions, neglect, or abuse by institutions that would otherwise lack real accountability for their actions. The passing of the HRA marked the first time that new obligations were placed on the state to protect civil liberties and investigate possible breaches of victims' rights. The HRA has been used widely to reduce the ordeal victims go through during trials, and provide compensation for families of victims of abuse by public bodies.

*Best arguments to use*

When confronted with this argument, we recommend Labour MPs and activists argue the following:

- The HRA has been used to get justice for rape victims, to ensure elderly people get the care they need and aren't separated from their husbands and wives in care homes, and to stop modern-day slavery. It protects ordinary people from abuses of power.
- The right to a family life is qualified, which means the government can balance it against the interests of the wider public. Deportations are rarely held up by the HRA. Far more often, it's used to get justice for ordinary people.

[5] LSE, 'Deportation and the right to respect for private and family life under Article 8 HRA', February 2013. (http://www.lse.ac.uk/humanRights/documents/2011/KlugDeportation.pdf)

**"The British Bill of Rights will enable the UK to keep the 'good' bits of the HRA and scrap the 'bad'."**

*Argument and rebuttal*

According to previous Tory proposals, a key part of the government's plans is likely to include '[limiting] the use of human rights laws to the most serious cases'.[6] To be clear, the government may propose a more limited range of rights, selected by them and enforced by British courts. We can only guess at which rights we will be afforded and which we will not.

Any dilution to human rights available in the UK will only increase the number of people being forced to go to the ECtHR for protection. The introduction of the HRA in the UK meant that the rights included in the ECHR were effectively 'brought home', enabling UK citizens to have their cases heard in British courts at considerably lower cost and much more quickly than they had previously. A British Bill of Rights offering fewer protections than the current HRA will force people to take cases to the ECtHR and, in so doing, invite the ECtHR to find against the UK.

*Best arguments to use*

When confronted with this argument, we recommend Labour MPs and activists argue the following:

- Restricting rights will just prompt more costly cases being sent to the ECtHR instead of being settled in British courts.
- It will inevitably mean ordinary people lose out, as women fleeing domestic violence, elderly people trying to get proper care, victims of modern day slavery and others will be less protected.

**Conclusion**

The government has attempted to make the case for scrapping the Human Rights Act through misdirection and misinformation. This demands rebuttal and myth-busting, but also smart political counter-arguments that emphasise how the HRA has brought human rights home, is rooted in British history and values, and primarily helps ordinary people.

[6] Protecting Human Rights in the UK' Conservative Party, 2015.