

Do human right
protections in the uk
go too far?



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Some argue that the current legal regime for protecting human rights in the UK goes too far. Others argue that it does not go far enough – Critically discuss these view points drawing on the relevant articles of the ECHR

Over the past century it is irrefutable that human rights have been developed into an imperative system that has allowed many people across the global be able to gain the justice they need. Baroness Hales ' Beanstalk or Living instrument' and the Conservatives' proposals for changing Britain's human rights laws give great insight into where us as a society are on the spectrum of human rights. Yet the question arises, are human rights going to far? Or are they not going far enough? First, I will discuss why Human rights are going to far and then I will move onto human rights not going far enough. Then finally a brief conclusion.

The Conservative article regards the embodiment of Human rights, which is the European court of Human rights (ECHR), by having developed a ' mission creep'. Adapting to the view of using the convention as a ' living instrument' is seen as a blunder in the eyes of the right winged party. One clear example is the current dispute between the Court and the United Kingdom over voting rights for prisoners and whether they should receive them or not. Many believing that once you commit a crime, you break the law and in doing so you are subject to losing some rights. In *Hirst V UK* (2006) previously the courts had ruled a blanket ban on British prisoners regarding the right to vote. The court did not state that all prisoners should be given voting rights. Instead, it held that if the franchise was to be removed, then the measure needed to be compatible with Article 3 of the First Protocol (Right to Free Elections). In the convention the issue of elections was excluded on purpose,

however the Strasbourg court has, however, now decided that it falls within the convention's extent showing that the Strasbourg judgment eliminates the UK court's ruling.

Moreover, the Labour's human rights act undermines the sovereignty of the parliament and democratic accountability to the public. As normally the parliament would pass a law, which would go into the UK legislation, which then once used in cases the judges interpret the cases and or law by using the 3 different rules, Golden, Mischief and Literal. However, now the ECHR now acts like a 'Novus Actus Interveniens' by now having the judges being forced to now consider what precedent the ECHR has set about previous cases in order to make them compatible. (GIVE CASE eg) Creating a threat to parliamentary sovereignty as it will not be interpreted in a way in which parliament would have wanted it to be. In addition to, it removes the UK courts in deciding on the important human rights cases and rulings within the country. For example, as the German Constitutional Court ruled that if there is a dissension between the German Basic Law and the ECHR, then the Basic Law overrules the Convention. The Human Rights Act provides no such domestic protection in the UK. So, section 2 of the Human Rights Act 1998; courts dealing with a convention right must consider of judgments made by the ECHR, would be removed or inadmissible.

However, there have been cases that have been in deeming the HRA as effective in as for protecting individuals' rights in the UK. As relevant to all 21 Declarations of Incompatibility Parliament has responded to 18 of them. For example, in *Bellinger v. Bellinger* (2003), the courts declared that not recognizing gender change of post-operative transsexuals in marriage law is

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incompatible with Articles 8 and 12 of ECHR. This compelled Parliament to pass the Gender Recognition Act 2004. Furthermore, prisoners' rights have been adapted. The position adopted by the Strasbourg court is that the blanket ban in UK law on the rights of convicted prisoners to vote in elections is incompatible with Article 3 of Protocol 1 of the ECHR, and it has ordered the UK to amend its law accordingly. This position has been expressed in a series of decisions since 2005, notably: *Hirst v UK (No 2)*¹¹ ; *Greens v UK*¹² , *Scoppola v Italy (No. 3)*¹³

However, ideas on the 'living instrument' is subjective, as Sir FITZGERALD alongside Lord Bingham argued forcibly that "judge-made law might be acceptable in domestic adjudication, but not in international adjudication which depends upon the agreement between states".

How some of the absolute rights apply to cases of deportation and other removal of persons from the United Kingdom by setting out clear playing grounds on how the ECtHR has ruled that if there is any 'real risk' (by no means even a likelihood) of a person being treated in a way contrary to these rights in the destination country, there is a bar on them being sent there, giving them in substance an absolute right to stay in the UK. Setting a much clearer and stricter present on the rules concerning deportation

Moving onto how human rights are not going far enough, Baroness Hales article uses the idea of the 'living instrument' in contrast with the 'living tree' in which the instrument is only given life by the one who plays it, whereas the tree is able to adapt and grow thus creating its own life. Linking this to the Human rights, meaning there is 2 routes in which law can

develop, one is the creative (the Violin) and one is natural (tree). Instrument takes effort and knowledge to gain the skills of playing the violin, but the tree once planted develops overtime on its own.

Compared to *Bellinger V Bellinger*, limitations may arise from the HRA that can undoubtedly be demonstrated through the case of *A and others v. Secretary of State for the Home Department* (2004). The final decision was only a declaration of incompatibility (s4) since it held that the detention of foreign prisoners without trial was incompatible with Article 5(1) of ECHR because it was “discriminatory on the grounds of nationality”. However, the potency of declarations of incompatibility is further instigated as the government replaced the Anti-Terrorism Crime and Security Act 2001 with the Prevention of Terrorism Act 2005, introducing restriction that apply to both Britons and non-nationals. Allowing the government to be able to pass such legislation restricting civil rights without the concern of the law being struck down, due to lack of judicial power. The case supports this attitude that rights will still be restricted, transfer into question of whether the HRA is committed to the concept of human rights as absolute.

In *Pretty V United Kingdom* (2002) A woman suffering from an incurable degenerative disease wanted to control when and how she died. To not prolong her suffering and the suffering of her loved ones she had requested that her husband would help her die. She had the impression that her husband would not be prosecuted for the death, unfortunately, the ECHR established that the right to life does not create a right to choose death rather than life. It meant there was no right to die at the hands of a third person or with the assistance of a public authority. So just like Article 2; right

to life, shouldn't someone be allowed to the right to death? Especially in cases like hers in which every day she is suffering.

During the Equality Act 2010's passage through Parliament, there have been amendments made to the Equality Bill which sought to increase protection against discrimination for humanists and others, and to minimize the exceptions from the law granted to religious organizations. Unfortunately, however, the Equality Act contains several exceptions to allow religious organizations and individuals to discriminate against others, in the provision of services and in other ways that we consider are unjust and unnecessary. Like in *Bull and Bull V Hall and Preddy* (2012) where they brought the case claiming discrimination under sexual orientation under equality act of 2007, after not being allowed a room due to them being homosexuals.

Looking at the Conservative' plan for change reforms, as stated, will mean that: I ' The European Court of Human Rights is no longer binding over the UK Supreme Court' The Strasbourg court can't bind the UK courts even now. The reason it looks as though it can be because the UK courts themselves choose to follow Strasbourg rulings. In *R (Ullah) v Special Adjudicator* (2004) UKHL 236, Lord Bingham held that no national court should ' without strong reason dilute or weaken the effect of Strasbourg case law'. Which is not keeping with HRA section 2, which only requires the domestic courts to ' take account of' Strasbourg decisions.

In conclusion, overall, the HRA has gone far as possible to safeguard the rights of individuals within the UK because it is evident that it has facilitated the use of human rights in the EU and is central to Britain's human rights

culture. It is used as a tool to help protect the rights both in the courts and in wider society. Terrorist suspects as discussed in this essay have created major challenges in which the HRA have had to tackle.

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