The Independent Human Rights Act Review: An attack on Judicial Scrutiny

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A Briefing by Muslim Engagement and Development (MEND)

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Abbreviations

Declaration of incompatibility **(DOI)**

The European Convention on Human Rights **(ECHR)**

The European Court of Human Rights **(ECtHR)**

The Human Rights Act 1998 **(HRA)**

The Independent Human Rights Act Review **(IHRAR)**

The Joint Committee on Human Rights **(JCHR)**

The Universal Declaration of Human Rights **(UDHR)**

Introduction

Democratic and free societies are built upon the ideals of equality, justice, and fairness. It is in line with these principles that we expect our governments and public bodies to act, and it is through these principles that we hold them to account when they do not meet this standard. Within this framework, the Human Rights Act 1998 (HRA) is a valuable check on power and an important mechanism for mitigating and correcting intentional or unintentional state actions that jeopardise the values, rights, and freedoms that we hold dear. In other words, even the best-intentioned legislation and policies can occasionally overlook potential human rights implications and can threaten the equality we expect as citizens; whether that be impacts to our privacy, our access to education, our freedom to hold political or religious beliefs, or our protection from abuse.

The HRA allows citizens to access justice in these situations. Specifically, it allows courts to determine if human rights have been breached. If this is found to be the case, the courts can call for any legislation that is incompatible with our human rights obligations be changed by the Government. This is a fundamental and objective protection against any government's abuse of power. However, recent times have seen the current Government's increasing hostility to the courts and indications that they wish to remove or restrict judicial scrutiny across a variety of areas. Indeed, the Independent Human Rights Act Review (IHRAR) emerges amid attacks [1] from government ministers and supporters regarding the powers of the judiciary to scrutinise decisions and make rulings which may undermine the wishes of the Government – conflicts which are exemplified by the prorogue of Parliament[2] on what was later ruled to be unlawful advice of the Prime Minister,[3] the unlawful handling of PPE contracts during the pandemic, [4] and discussions of "activist lawyers" representing the rights of vulnerable people to remain in the country. [5]

If this undermining of judicial powers were to happen in relation to the HRA, any potential human rights breaches and considerations to legislation would be increasingly subject solely to the decisions of Parliament – a body which cannot escape its politicised underpinnings and the subsequent infiltration of political agendas into any such decision; thereby rendering such a shift of power in conflict with ideals of a just society structured around objective and uncompromising fairness and equality.

Currently, the HRA is an efficient and carefully calibrated model that embeds human rights protections within our legal and political system. Attempts to politicise and dilute it will only harm those it seeks to protect. To accurately assess the efficacy of the HRA, a review must provide a holistic and comprehensive overview of the HRA's operations since its enactment. However, the questions posed by the IHRAR are very narrow in focus and provide only for a superficial analysis of issues surrounding the separation of powers between the judicial, legislative, and executive branches of government and its relationship with the European Court of Human Rights (ECtHR)

[1] Daniel Boffey, "Brexit: Lawyers Confront Liz Truss Over 'Dangerous' Abuse Of Judges", 2016, https://www.theguardian.com/politics/2016/nov/05/lawyers-war-liz-truss-over-abuse-judges-brexit-barristers.

[2] "Against The Law: Why Judges Are Under Attack, By The Secret Barrister", *Theguardian.Com*, 2020, https://www.theguardian.com/books/2020/aug/22/against-the-law-why-judges-are-under-attack-by-the-secret-barrister.

[3] Kate Lyons, "'Who Runs Britain?' Papers Divided Over Court's 'Damning Indictment' Of PM", 2019, https://www.theguardian.com/media/2019/sep/25/who-runs-britain-papers-divided-over-courts-damning-indictment-of-pm.

[4] "Covid: Matt Hancock Acted Unlawfully Over Pandemic Contracts", *Bbc.Co.Uk*, 2021, https://www.bbc.co.uk/news/uk-56125462.

[5] Lizzie Dearden, "Government Attacks On Lawyers 'Undermine Rule Of Law', Says Lord Chief Justice", *Independent.Co.Uk*, 2020, https://www.independent.co.uk/news/uk/politics/government-priti-patel-lawyers-activists-attacks-rule-law-b1720428.html.

– a focus that betrays the aforementioned political roots of the review itself. This fails to appreciate how the HRA has operated in practice and risks obscuring the important ways in which it has facilitated and protected victims of human rights breaches.

MEND recently submitted responses to both the IHRAR and the Joint Committee on Human Rights (JCHR) inquiry into IHRAR. However, the narrow focus and limited space available within both inquiries limits the depth of discussion that is possible and purposefully obscures important discussions surrounding the HRA that are essential in approaching a clear comprehension of its importance and functioning within the UK. As such, this accompanying briefing seeks to provide context and further nuance to the evidence supplied within the submissions, as well as constituting what we hope will be a useful resource for individuals, communities, and policy makers in understanding the realities of the HRA and overcoming the danger of misconceptions that may be perpetuated by skewed narratives and political agendas.

Executive Summary

Understanding the Human Rights Act

The HRA embeds the UK's human rights commitments under the ECHR into UK law and allows for human rights cases to be heard in domestic courts without the need to go to the ECtHR. Where human rights have been contravened or denied, the HRA maintains important checks on power and helps ensure accountability by:

- Ensuring that public authorities (e.g. police, local authorities, hospitals, schools) uphold and protect rights,
- Ensuring that new laws are compatible with the ECHR,
- Allowing individuals and organisations to seek justice in UK courts.

Contextualising the Independent Human Rights Act Review

A lack of public education about the HRA coupled with myths perpetuated by a hostile press and cynical factions within the Government has allowed misconceptions regarding the HRA to proliferate. Thus, despite the monumental advancement of human rights since it came into force, politicians have criticized the limiting effects of the HRA in policy areas such as migration control, the criminal justice system, and national security,[6] leading to the common notion that human rights rulings are disproportionately concerned with the rights of unpopular or problematic sections of society at the expense of public interest.[7] To many critics, the HRA also represents the 'foreign' imposition of the ECtHR encroaching upon the democratic sovereignty of the UK.[8] This led to the Conservative Party proposal to repeal and replace the HRA with a "British Bill of Rights and Responsibilities".[9] In recent times the IHRAR has emerged amid Government attacks against the powers of the judiciary to scrutinise governmental decisions, [10] with prominent examples including rulings on the prorogue of Parliament[11] on what was later ruled to be unlawful advice of the Prime Minister,[12] the unlawful handling of PPE contracts during the pandemic,[13] and discussions of "activist lawyers" representing the rights of vulnerable people to remain in the country. [14] These uncomfortable rulings have led to an assault on the legal mechanisms designed to limit executive power, including judicial reviews and the HRA.

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[6] "Theresa May under Fire over Deportation Cat Claim," BBC News (BBC News, October 4, 2011), https://www.bbc.co.uk/news/uk-politics-15160326.

[7] Alice Donald, Jane Gordon, and Philip Leach, "Equality and Human Rights Commission Research Report 83 the UK and the European Court of Human Rights," 2012, https://www.equalityhumanrights.com/sites/default/files/83._european_court_of_human_rights.pdf.

[8] "Speech by Lord Hoffmann: The Universality of Human Rights," Judiciary.uk, March 19, 2009, https://www.judiciary.uk/announcements/speech-by-lord-hoffmann-the-universality-of-human-rights/.

[9] Alexander Horne et al., *A British Bill Of Rights* (House of Commons Library, 2015).

[10] Daniel Boffey, "Brexit: Lawyers Confront Liz Truss Over 'Dangerous' Abuse Of Judges", 2016, https://www.theguardian.com/politics/2016/nov/05/lawyers-war-liz-truss-over-abuse-judges-brexit-barristers.

[11] "Against The Law: Why Judges Are Under Attack, By The Secret Barrister", *Theguardian.Com*, 2020, https://www.theguardian.com/books/2020/aug/22/against-the-law-why-judges-are-under-attack-by-the-secret-barrister.

[12] Kate Lyons, "'Who Runs Britain?' Papers Divided Over Court's 'Damning Indictment' Of PM", 2019, https://www.theguardian.com/media/2019/sep/25/who-runs-britain-papers-divided-over-courts-damning-indictment-of-pm.

[13] "Covid: Matt Hancock Acted Unlawfully Over Pandemic Contracts", *Bbc.Co.Uk*, 2021, https://www.bbc.co.uk/news/uk-56125462.

[14] Lizzie Dearden, "Government Attacks On Lawyers 'Undermine Rule Of Law', Says Lord Chief Justice", *Independent.Co.Uk*, 2020, https://www.independent.co.uk/news/uk/politics/government-priti-patel-lawyers-activists-attacks-rule-law-b1720428.html.

The IHRAR has been widely criticized as a political tool for undermining the UK human rights framework in line with the Conservative Government agenda. There are serious and concerning failings of the process, direction, and terms of reference of the IHRAR, including its limited scope and lack of sincere engagement with wider society, as well as the questionable independence of its panel members. Ultimately, the limited framing of the review and its failure to holistically examine the HRA's operation since its enactment betrays the preconceived agenda that drives the review.

Conclusions

The consequences of repealing or weakening the HRA would be devastating, particularly for vulnerable minorities who often rely on it the most. It would also damage the UK's international human rights reputation, as well as causing severe constitutional problems for the devolved powers in Northern Ireland and Scotland.

However, despite the valuable protections that the HRA provides, structural barriers to accessing justice exist across the UK justice system that prevent victims of human rights violations from pursuing their claims in court. Most notably are the extensive financial cuts to the justice system and the curtailment of legal aid in particular. These cuts often make the HRA unenforceable in reality. As such, the funding of the justice system must be prioritized to actualize the value of the HRA fully and to protect the vulnerable in society.

Recommendations

Preservation of the Human Rights Act in its current form.

The HRA is a crucial instrument that has markedly transformed human rights development in the UK. It has integrated a rights-based approach in both political and legal decision-making whilst granting victims of human right contraventions the means to seeking redress in UK courts. However, any portrayal of its successes within the media and public discourse has been eclipsed by misplaced concerns regarding its alleged bestowal of increased powers on the judiciary and subsequent encroachment on parliamentary sovereignty. Any erosion of the HRA would risk upsetting the carefully calibrated separation of powers that currently exists; would cause untold damage to those that currently rely on it for justice; and could cause a constitutional crisis regarding the UK's devolved powers.

Any review of the Human Rights Act to include a holistic examination of its operation since its enactment.

The HRA has yielded practical and material benefits for the most vulnerable of society. However, this dimension appears absent from the IHRAR, for which the narrow scope betrays its political underpinnings. Failure to consider and draw conclusions from the real-life experiences of human rights victims will only serve to produce unreliable and erroneous outcomes that do not reflect the realities of the HRA's operation.

Funding for the justice system to be prioritised to ensure access to justice.

The severe impact of the reforms enacted under the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, particularly upon vulnerable and marginalised groups, ethnic minorities, young children and those with mental health problems, cannot be overstated. MEND encourages immediate reviews into the consequences of legal aid cutbacks and the introduction of reforms such as widening the scope of legal aid eligibility in order to allow more people vital access to legal support.

Greater responsibility and accountability of political representatives.

The current attacks against the judiciary, judicial reviews, and the HRA are targeted deflections to avoid accountability and erode democracy across the UK. An independent judiciary is a vital pillar in a working democracy which risks being undermined when subject to misrepresentative attacks from political quarters. Those most impacted by attacks against the judiciary are usually the vulnerable and defenceless whose sole lifeline in obtaining justice often lies in the hands of the lawyers, legal practitioners, and frameworks that are routinely vilified by certain sections of our political representatives. MEND would like to remind politicians and policymakers of the vital nature of a functioning democracy and their moral duty to protect and serve the communities that they represent.

Prioritising public awareness of rights protections.

Currently, public awareness regarding the protections afforded by legislation such as the HRA and the Equality Act 2010 is markedly low. This is particularly concerning considering the level, extent, and impact of the political and media disinformation surrounding them. Ensuring better provision of public legal education is essential in creating honest and open discussions on the fundamentals of legal protections and how individuals can access their rights.

Understanding the Human Rights Act

The emergence of the Human Rights Act

Many of the principles contained in the HRA have been embedded within British political life for centuries. The Magna Carta was perhaps the earliest iteration that laid down a set of rules that attempted to protect citizens and act as a check executive power; in fact, *Magna Carta Libertatum* is Medieval Latin for "Great Charter of Freedoms". However, it was the aftermath of World War II that ultimately laid the groundwork for the creation of the human rights framework that we know today. The scale of human rights failings during World War II spotlighted the need for a standardized and codified set of rules that protected against such atrocities being committed again. These concerns gave rise to the adoption of The Universal Declaration of Human Rights (UDHR) by the UN General Assembly on 10 December 1948,[15] which included civil liberties and a set of social and economic rights. It represents the first global expression of what many people believe to be the rights to which all human beings are inherently entitled and was a pivotal point in the history of human rights and in shaping subsequent human rights legislation, including the HRA and European Convention on Human Rights (ECHR).

The Council of Europe used the UDHR to draft the ECHR as a treaty that would establish basic rights for the nations of its member states Any person who feels his or her rights have been violated under the ECHR by a state party can take a case to the European Court of Human Rights (ECtHR). Judgements which find violations of the ECHR are binding, and thus the states concerned are obliged to execute them. The ECHR was ratified by the UK in 1950 and came into force in 1953.[16]

However, the need to take cases to the ECtHR remained a lengthy and costly process that made it inaccessible for many claimants. According to the 1997 white paper, *Rights Brought Home*, "[i]t takes on average five years to get an action into the European Court of Human Rights once all domestic remedies have been exhausted; and it costs an average of £30,000. Bringing these rights home will mean that the British people will be able to argue for their rights in the British courts – without this inordinate delay and cost".[17] Consequently, the HRA was drafted by Parliamentarians in 1998 and came into force in 2000,[18] enshrining 16 provisions from the ECHR within domestic law, meaning people could claim these rights in UK courts without having to take their cases to the ECtHR in Strasbourg.

What does the Human Rights Act do?

Where human rights may have been contravened or denied, the HRA maintains important checks on power and helps ensure accountability. Specifically, the Act makes it unlawful for any public body to act in a way which is incompatible with the ECHR, unless there is explicit reason for doing so through the derogation of some rights in very limited and exceptional instances (such as war or a public emergency that threatens national security). It achieves this by requiring UK courts to take any

[15] "History Of The Declaration", *United Nations*, https://www.un.org/en/about-us/udhr/history-of-the-declaration.

[16] "A History Of Human Rights In Britain", *Equalityhumanrights.Com*, accessed 23 March 2021, https://www.equalityhumanrights.com/en/what-are-human-rights/history-human-rights-britain.

[17] Home Office, "The Human Rights Bill," GOV.UK, October 23, 1997, https://www.gov.uk/government/publications/the-human-rights-bill.

[18] "The Human Rights Act", *Equalityhumanrights.Com*, accessed 23 March 2021, https://www.equalityhumanrights.com/en/human-rights/human-rights-act.

decisions, judgments, or opinions of the ECtHR into account, and to interpret legislation, as far as possible, in a way which is compatible with ECHR rights.

In practice this means that if a public body has violated a fundamental right and has failed to rectify the transgression, an individual or organization can take them court whereby a judge can assess the situation and urge the public authority to take action either through a mandatory (requiring the authority to *do* something) or prohibiting (preventing the authority from doing something) order.

When it comes to human rights breaches emerging from UK legislation, if it is not possible to interpret an Act of Parliament so as to render it compatible with the ECHR, judges are not allowed to override Parliament and overturn the Act in question. They may only issue a declaration of incompatibility (DOI). However, it should be noted that a DOI does not affect the validity of an Act of Parliament. Rather, it permits the amendment of the legislation by a special fast-track procedure under section 10 of the HRA. Thus, whilst courts do not trigger immediate legislative change, they urge Parliament to consider amending or repealing legislation.

Ultimately, the HRA serves three primary functions:

- Ensuring that public authorities (e.g., police, local authorities, hospitals, schools) uphold and protect rights,
- Ensuring that new laws are compatible with the ECHR,
- Allowing individuals and organisations to seek justice in UK courts.

The HRA and ECHR are therefore important mechanisms that hold governments and public bodies accountable for abuses of power and allows a means to ensure human rights are protected and upheld. The HRA has proven instrumental in embedding a culture of human rights within political and legal decision-making and ensuring institutional practices and policies are informed by human rights considerations.

What rights does the Human Rights Act cover?

Article 2: The right to life

The right to life protects you from having your life ended or cut short by the state or through any means that could have been prevented by the state through appropriate measures (this may be through legislation that protect you or through taking action if your life is at risk). As such, public bodies must also be mindful of any policy or situation that could cause risk to your life or your life expectancy. As but one example, in situations of domestic abuse the right to life would demand that local police and local authorities protect victims through avenues including effective police involvement, social worker support, and the provision of accommodation.

The right to life also creates a requirement for the state to investigate a death if it occurs in circumstances related to the state (for example, a suspicious death in police custody). However, the right to life does not preclude the ability of the state to use "proportionate" force to prevent unlawful behaviour or protect the rights of others. As such, a death in police custody is not automatically a breach of the right to life if the measures that caused the death were proportionate. Similarly, the state is not

required to do everything in its power to prevent a death if to do so would not be proportional. For example, providing potentially life-saving treatment to a critically ill patient may not be proportional when considering the potential outcomes in comparison to the suffering it may cause the patient and resource requirements that the state may not possess.

Case Study: 19-year-old murdered by racist cell mate

Zahid Mubarek, a 19-year-old youth detainee and "model prisoner" was due to be released on 21 March 2000 after being sentenced to 90 days for theft. Just five hours prior to his release, his white cellmate, Robert Stewart, with a recorded history of racism and violence, beat him to death. Beyond a few internal and private investigations, no public inquiry or inquest was held, and the Secretary of State rejected the family's request for one. Under Article 2 of the HRA, the Mubarek family were able to petition the Home Secretary to open an independent investigation into Mubarek's death upon which a court found the detention centre liable for a series of institutional failures including Mubarek's death and disregarding racism within the facility.[19]

Article 3: Freedom from torture and inhuman or degrading treatment

Article 3 protects you from torture and inhuman or degrading treatment including cases of deportation and extradition where there is a risk you may be subject to such treatment in the country concerned. Torture is considered as the deliberate infliction of severe pain and suffering, either physical or mental, on an individual often with the aim of extracting information, or as punishment or intimidation. Inhuman treatment is considered less severe than torture but entails the intense physical or mental suffering such as physical assault, or severe psychological abuse. Degrading treatment is regarded as an act that is innately humiliating and violates human dignity. To be considered a breach of Article 3 the suffering must include an element of severity and is often circumstantial depending on the relative vulnerability of the victim.

Whereas other rights under the HRA and ECHR may be derogated from in strict situations, the prohibition on torture or inhuman or degrading treatment is absolute, unjustifiable, and can never be restricted under any circumstance. The state and public authorities have an obligation to prevent Article 3 violations. Regardless of how unpopular an individual may be or the crimes they are alleged to have committed (for example immigrants, terror suspects, or criminals) Article 3 prevents state officials from subjecting anyone to such treatment or allowing their extradition to states where there is a high risk of their being tortured or subject to inhuman or degrading treatment. UK courts are also unable to rely on evidence obtained under duress regardless of which state the torture took place. Likewise, public authorities have a positive duty to prevent torture and inhuman or degrading treatment, must investigate any such incidents, and must proactively protect vulnerable individuals who risk being subject to mistreatment.

Case Study: Black cab rapist[20]

[19] Liberty, A Parliamentarian's Guide To The Human Rights Act (London: The National Council for Civil Liberties, 2010).

[20] "Human Rights Act 'Absolutely Key' To Big Justice Fights Of Last 20 Years", 2018, https://www.amnesty.org.uk/press-releases/human-rights-act-absolutely-key-big-justice-fights-last-20-years.

John Worboys was a serial rapist who drugged and raped his victims. After police failed to investigate the initial claims brought by two of his earlier victims in both 2003 and 2007, the victims challenged the police over its systemic failure to investigate the case; injustices that not only failed them but led to the rape of several other women thereafter. The Supreme Court found the police to be in breach of rights under Article 3.

Article 4: Freedom from slavery and forced labour

Article 4 protects your right from being held in slavery or servitude or made to do forced labour. There are slight differences between slavery and servitude; slavery involves being owned and treated like a piece of property whilst servitude does not entail ownership but requires an individual to live on the person's premises and do their bidding with no recourse of leaving. Forced or compulsory labour is when an individual is made to work against their will usually under the threat of punishment and often under oppressive or difficult conditions. The UK is not free from modern day slavery, with individuals who are often vulnerable and migrant workers forced to work for little or no pay in situations which they cannot escape.

Like the right to freedom from torture and inhuman or degrading treatment, the right to be protected against slavery, servitude, and forced labour is absolute right and can never be restricted or limited. However, it is not applicable in certain instances such as work that forms part of normal civic obligations such as jury service, work whilst serving a prison sentence, military service, community service, or when in a state of public emergency such as a natural disaster.

The state has a duty to uphold this right by ensuring laws are in place to protect people from slavery, servitude, or forced labour, such as anti-trafficking legislation through investigating and penalising any incidents in breach of the right. Public authorities therefore have an obligation to ensure employees are sufficiently remunerated for their work, protect individuals from such mistreatment where there is a high or immediate risk, and intervene in any cases of which they are aware.

Case Study: Physical & mental abuse of a worker[21]

Patience Asuquo, a domestic worker and nanny, was subject to physical and psychological abuse for almost three years by her employer, who refused to pay her and confiscated her passport. Asuquo managed to escape and report her ordeal to the police who dismissed her complaints. However, through the protection granted by Article 4 the police were forced to investigate the case resulting in the prosecution of her employer and the introduction of a new slavery offence.

Article 5: The right to liberty and security

Article 5 guarantees your right to liberty and protects you from having your freedom arbitrarily and unreasonably deprived. This means you can only be stripped of this right where the detention has a legal basis, such as upon conviction of a crime; arrest or detention on remand (i.e. where there is a risk of the individual committing an offence or evading justice); detention of children for supervision or care; detention of an individual on mental health grounds, drug dependency or who otherwise may

[21] "Ibid

spread an infectious disease; and to prevent the unauthorised entry into the UK or when detained in lawful proceedings for deportation or extradition.

Article 5 also establishes a set of procedural safeguards and obligations that must be met in the detention or arrest of an individual. This grants the detainee the right to be informed of the reason for arrest and what charges they face in a language they understand; be taken to court promptly; challenge the lawfulness of detention before a court; be entitled to compensation in the case of unlawful detention; and to be tried for an offence within a reasonable time.

Case Study: Detention of foreign terror suspects[22]

Shortly after the 9/11 attacks in 2001, the Anti-Terrorism, Crime and Security Act was brought into effect, providing a power to indefinitely detain international terror suspects without trail at Belmarsh prison. The Government, aware that this measure breached Article 5(1) Right to Liberty and Security, issued a Derogation Order under Article 15 (which allows for some rights to be suspended at times of national emergency). This decision was challenged at court with regards to its incompatibility with the provisions of the ECHR and its unlawful and discriminatory targeting of non-UK citizens. In A v Sec of State for the Home Department [2004][23] the courts and House of Lords rendered the derogation as invalid and issued a declaration of incompatibility with Article 5(1) the HRA and quashed the order.[24] The case is particularly salient because it underlines the importance of the HRA in providing a mechanism for the judiciary to provide scrutiny and a counterbalance to the disproportionate use of powers by the Executive, particularly regarding matters relating to national security.

Article 6: The right to a fair trial

Article 6 is fundamental in upholding the rule of law through protecting the right to a fair and public trial or hearing which includes both criminal charges levied against you, or in cases impacting your civil rights and obligations. It means court cases must be heard in public before an independent and impartial court or tribunal and within a reasonable amount of time. Hearings can be conducted in private in exceptional cases, for instance in the interest of national security, safeguarding of children, or preserving the privacy of the individual. The right also informs the conduct of a criminal trial including the presumption of innocence until proven guilty, the effective access to courts, the right to representation, the opportunity to present a case, the right to an interpreter, and the right to a reasoned judgement. Article 6 may also require the provision of legal aid to ensure access to justice although it is considerably restricted in relation to civil cases, as will be explored in further detail later.

Although Article 6 itself is absolute, aspects of the right may be limited in areas such as immigration, extradition, tax, and voting rights, provided the essence of the right is not impaired. For instance, the right to a public hearing has been restricted in relation to closed material being used in cases involving counter-terrorism charges where national security concerns have been argued to override individual rights to the disclosure of evidence made against them.

[22] Liberty, A Parliamentarian's Guide To The Human Rights Act (London: The National Council for Civil Liberties, 2010).

[23] A and others v. Secretary of State for the Home Department, UKHL 56 (EWCA Civ 1502 2004).

[24] Lords Select Committee, Memorandum By JUSTICE (Parliament, 2009).

Case Study: Control order regime [25]

The control order regime of the Prevention of Terrorism Act 2005 allowed the Home Secretary to impose restrictions on the liberty of individual terror suspects, such as house arrest or 24-hour surveillance. However, as many control order cases were made based on closed material where the suspect is uninformed of the case against them, the Law Lords ruled that this breached the right to a fair trial under Article 6, particularly considering such a restrictive order. They observed that there could not be a fair trial if a person placed under such restrictions did not have sufficient information about the case against them. The control order regime has since been repealed.[26]

Article 7: No punishment without law

Protections under Article 7 means you cannot be charged or convicted of a retrospective criminal offence. In other words, you cannot be punished for an action that did not constitute a criminal offence at the time it was committed. This requires laws to be clearly defined to ensure public awareness regarding which acts are criminal. Article 7 requires that an individual cannot be given a heavier penalty than was applicable at the time of offence and equally ensures the application of any favourable changes to sentencing laws that have been made since the crime (for example, if the length of a sentence for an offence is reduced whilst an individual is serving it the new reduced sentence should also apply to that individual).

Whilst the right to no punishment without law is absolute, it includes the exception for acts that were against "the general principles of law recognised by civilised nations"[27] at the time they were committed. The purpose of this is to ensure the possibility for punishment of war crimes, genocide, and crimes against humanity. This exception allowed for the prosecution of war crimes following the Second World War.

Article 8: Respect for privacy and family life

Article 8 guarantees the right to privacy, family life, home life, and correspondence and protects against unnecessary surveillance or intrusion into your life. The right to privacy is often interpreted fairly broadly but in essence protects the right to autonomy and dignity including respect for sexuality, protection against unlawful state surveillance, and the right to protect private and confidential personal information including its storage and disclosure. The right to family life entails the right to enjoy family relationships without interference and is essential in the protection against state separation of family members in deportation cases or when children are taken into care. Respect for home life refers to protection against unlawful surveillance or entry or anything that prevents the enjoyment of home life. Article 8 also protects the right to respect for private communications such as texts, letters, or emails and becomes particularly important in instances such as phone tapping. Article 8 can be limited in certain circumstances and is a right that requires the balancing of rights between personal privacy and the interests of others or of society as a whole. The restriction of this right must meet the tests of lawfulness, necessity,

[25] Liberty. "A Parliamentarian's Guide to the Human Rights Act Published by the National Council for Civil Liberties." Accessed 06.05.21, September 2010. https://www.refworld.org/pdfid/4ed640552.pdf.

[26] David Anderson, "Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005," *Gov.uk* (2012), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228614/9780108511417.pdf.

[27] "Human Rights Act 1998," Legislation.gov.uk, 2011, https://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/I/chapter/6.

and proportionality that is dependent upon the need to protect public safety or national security, another individual's rights and freedoms, or prevent crime and disorder. For example, taking children into care may be a necessary and proportionate response to the need to protect them if their family is unable to care for them, thereby overriding the right to family life. The right to privacy is also often balanced with the freedom of expression. Public figures, for example, may not enjoy the same level of privacy when considering the rights of journalistic expression and public interest in publishing information about them.

Case Study: Police retention of DNA and fingerprints [28]

In R (GC) v Commissioner of Police of the Metropolis, the police had arrested a 12-year-old boy and a woman, however, the police refused their request to have their DNA and fingerprint records destroyed after charges against them were dropped. They were able to challenge this decision through the courts which found that their right to privacy had been breached and that the requirement for proportionality limiting the right was not met.[29] The court ruled that the indefinite retention of the claimants' data was an unjustified interference with their rights under Article 8 and granted a declaration that the Association of Chief Police Officers guidelines were unlawful.[30]

Case Study: Eviction of Travellers [31]

After being evicted from a Traveller site where a family had resided for 13 years on the grounds of disruption, the family challenged the eviction on the basis that it constituted an unjustifiable breach of Article 8. The court found that the procedural safeguards of rights were not considered with regards to their nomadic lifestyle and their precarious situation. As such, the court ruled the eviction to be in violation of Article 8 because the grounds for eviction on public interests were not proportionate to the consequences of the decision that would have rendered them effectively homeless. This case is particularly relevant with regards to the Police, Crime, Sentencing and Courts Bill and concerns that its provisions on trespassing laws unduly criminalises traveller lifestyles and infringes upon their right to a home.[32]

Article 9: Freedom of thought, religion, and belief

Article 9 protects the right to hold thoughts, belief, and practise a particular religion or have no religion, including the protection of religious organisations as a representative body. A breach of this right would constitute a scenario where a restriction limits an individual's ability to follow religious practise, for instance banning religious dress. The article therefore preserves important democratic values such as the promotion of religious pluralism and mutual respect of those that may hold different beliefs.

[28] "Human Rights Act 'Absolutely Key' To Big Justice Fights Of Last 20 Years", 2018, https://www.amnesty.org.uk/press-releases/human-rights-act-absolutely-key-big-justice-fights-last-20-years.

[29] "RMC & Anor, R (on the Application Of) v Commissioner of Police of the Metropolis & Ors [2012] EWHC 1681 (Admin) (22 June 2012)." Bailii.org, 2012. http://www.bailii.org/ew/cases/EWHC/Admin/2012/1681.html.

[30] Ibid.

[31] "A Private and Family Life - Liberty," Liberty, February 18, 2020, https://www.libertyhumanrights.org.uk/right/a-private-and-family-life/.

[32] Luke Smith, "How the Police Bill Threatens Britain's Gypsy and Traveller Communities," Tribunemag.co.uk, 2021, https://tribunemag.co.uk/2021/03/how-the-police-bill-threatens-britains-gypsy-and-traveller-communities.

The right can be limited in specific circumstances where lawful, proportionate, necessary and in the interests of public safety or order, health, morals or the rights and freedoms of others. For example, the closing of religious places of worship during the COVID-19 pandemic.

Case Study: Refusal to break voluntary fast for a drugs test [33]

A High Court ruled that disciplining a Muslim prisoner for failing to provide a urine sample for a drugs test during a voluntary fast was deemed a breach of Article 9 and his right to religious practice. When Imran Bashir refused to drink water to provide a urine sample, on account of his fasting, he was charged with failing to obey a lawful order. This resulted in a hearing before an Independent Adjudicator where he was convicted and given 14 days of additional detention as punishment. Although the Mandatory Drug Testing policy allows for leniency during Ramadan, the Adjudicator maintained that because Bashir's fast was not compulsory, he should suffer the consequences of disobeying the order. However, the court regarded this reason to be insufficient and stated that the Adjudicator should have considered whether his rights under article 9 engaged, whether these rights were interfered with and whether such interference was necessary, legitimate and proportionate to the ends pursued. Whilst the judge believed the aim to be legitimate, the tests of proportionality were not met owing to the fact that there was no explanation as to why the urine sample could not have been provided a few hours later once Bashir had broken his fast. The judge concluded: "The quality of the evidence made available to me leads me to think that the Prison Service has not attempted seriously to assess the impact of making adjustments for Muslims undertaking personal fasting. All this leads me to conclude that disproportionality based on costs and administrative inconvenience has not been demonstrated" and quashed the adjudication.[34]

Article 10: Freedom of expression

Article 10 protects the right to hold opinions and express your views as an individual or collective, even if they may be unpopular or disturbing, without interference from the state or public authority. It is often used to uphold journalistic freedoms and eradicating the obligation to disclose their sources.

However, Article 10 is subject to certain limitations. Any restriction must be lawful, necessary, and proportionate and must only be applied to protect national security, prevent disorder or crime, protect health or morals, protect the rights of others, prevent the disclosure of information received in confidence, and maintain the authority and impartiality of judges. For instance, offensive language may be restricted and considered unlawful if understood to be inciting racial or religious hatred.

Article 11: Freedom of assembly and association

Article 11 protects the right to association such as trade unions, political parties, or any other association or voluntary group, as well as the right to assembly, including peaceful protests. The right also provides protection from being forced to join or partake in any organisation. Article 11 may be restricted providing interference is

[33] "A Private and Family Life - Liberty," Liberty, February 18, 2020, https://www.libertyhumanrights.org.uk/right/a-private-and-family-life/.

[34] "Bashir, R (on the Application Of) v the Independent Adjudicator [2011] EWHC 1108 (Admin) (25 May 2011)," Bailii.org, 2011, https://www.bailii.org/ew/cases/EWHC/Admin/2011/1108.html.

lawful, necessary, proportionate, and in the pursuit of protecting national security, public safety, health or morals, the rights of others, or protecting against disorder or crime.

As such, any such limitation must be reasonable; a consideration which commentators have found to be absent in the recent Police, Crime, Sentencing and Courts Bill considering proposals to grant the police extensive powers to quell "disruptive" peaceful protests. The Bill is argued to be a draconian measure in breach of the fundamental and democratic rights to protest and hugely disproportionate due to provisions justifying crackdowns on protests because of "noise" and "unease".[35]

Case Study: Forestalling peaceful protest[36]

In 2003, around 120 protestors journeyed to Gloucestershire's Royal Air Base from London via coach to demonstrate against the Iraq war. After police were made aware of plans to protest, they stopped and searched the coaches and seized some of the protestor's belongings, including helmets, overalls, scarves, scissors, and a safety flame. Despite there being no reasonable grounds for arrest for breach of peace, the police sent the coaches back to London escorted by police vehicles. After one of the protestors sought a legal challenge against the police, the House of Lords found the police actions to have violated the protestors' rights to freedom of expression and protest under Articles 10 and 11. The Court regarded the police's actions to be disproportionate as there was no immediate threat and no reason to assume the protests would be disruptive. This case proves particularly pertinent in respect to recent attempts to restrict rights to protest including the powers under the Coronavirus Act[37] as well as those tabled under the aforementioned Police, Crime, Sentencing and Courts Bill.[38] Thus, it is the HRA that frequently offers the only reliable bulwark against attempts to curtail civil liberties.

Article 12: Right to marry and start a family

Article 12 protects the right to marry and enjoy family relationships providing you're of marriageable age, however, details relating to legal age, consent and what makes a legal marriage are clarified in other pieces of legislation. Whilst national law may inform the rules and conditions surrounding marriage, they must have a legitimate purpose and must not impose restrictions that would undermine the essence of the right itself.

Case Study: Discriminatory "sham marriage" laws[39]

In 2004, the introduction of laws to prevent "sham marriages" targeted anyone subject to immigration control and prevented them from getting married, even if there was no suggestion that the marriage was a 'sham'. These were blanket rules that applied to all non-UK and European nationals with the notable exception of people getting

[35] Haroon Siddique, "Anti-Protest Curbs in UK Policing Bill 'Violate International Rights Standards,'" the Guardian (The Guardian, April 28, 2021), https://www.theguardian.com/world/2021/apr/28/policing-bill-will-have-chilling-effect-on-right-to-protest-mps-told.

[36] Liberty, A Parliamentarian's Guide To The Human Rights Act (London: The National Council for Civil Liberties, 2010).

[37] Martha Spurrier, "The Coronavirus Act Is An Attack On Our Liberties. Mps Must Seize This Chance To Scrap It | Martha Spurrier", 2020, https://www.theguardian.com/commentisfree/2020/sep/29/coronavirus-act-liberties-powers-police-public-health-crisis.

[38] "Policing Bill Threatens Protest Rights", 2021, https://www.libertyhumanrights.org.uk/issue/policing-bill-threatens-protest-rights/.

[39] "Right to Marry - Liberty," Liberty, February 18, 2020, https://www.libertyhumanrights.org.uk/right/right-to-marry/.

married in the Anglican Church. The House of Lords deemed these laws discriminatory and a needless interference with the right to marry.

Article 14: Protection from discrimination

Protection from discrimination means everyone has equal entitlement to the rights embodied by the HRA without discrimination on the grounds of gender, race, religion, sexuality, disability, or age. Discrimination can either manifest as direct discrimination, which involves differential treatment on the basis of a particular characteristic or indirect discrimination whereby a seemingly neutral treatment may disproportionately impact certain individual or groups with a particular characteristic. In very exceptional cases, discrimination may be lawful but must be reasonably and objectively justified.

Case Study: Right to Rent[40]

In 2019, the High Court ruled that the Right to Rent scheme was incompatible with human rights laws and racially discriminatory as it required landlords to check the immigration status of possible tenants resulting in prejudicial targeting of ethnic minorities and foreign nationals who were legally entitled to rent. The scheme was considered in breach of Article 8 (the right to privacy) and Article 14 due to the engagement of Article 8 on a racially discriminatory basis. However, the Home Office recently overturned the ruling via appeal claiming that the scheme was justified and proportionate for controlling immigration, despite acknowledging that some landlords may be discriminating against ethnic minorities.[41]

Protocol 1, Article 1: Protection of property

The protection of property grants you the right to enjoy your property and possessions whilst preventing state interference with your property, confiscation of your possessions, or placing restrictions on its use without justification. Property includes material possessions such as land and money, but also includes contractual rights such as shares, leases, property rights, and claims for compensation. The right also applies to both companies and individuals.

The right can be restricted provided if it is lawful and a fair balance is struck between the property rights of the individual and public interest, for instance balancing public interest in building a road versus individual right to land. Where the interference is disproportionate or unlawful an individual can be entitled to compensation.

Protocol 1, Article 2: The right to an education

Protocol 1, Article 2 means that no child can be denied an education and has a right to an effective education, access to existing educational institutions, education in the national language, and official recognition upon leaving education. Education is interpreted as educational facilities that already exist and does not oblige the state to provide or subsidise a specific type of education.

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[40] Amelia Hill and Diane Taylor, "Right to Rent Scheme Ruled Incompatible with Human Rights Law," the Guardian (The Guardian, March 2019), https://www.theguardian.com/uk-news/2019/mar/01/right-to-rent-scheme-ruled-incompatible-with-human-rights-law.

[41] Amelia Gentleman, "Right to Rent Rule 'Justified' Finds UK Appeal Court," the Guardian (The Guardian, April 21, 2020), https://www.theguardian.com/politics/2020/apr/21/right-to-rent-rule-justified-finds-uk-appeal-court.

However, the right to education can be restricted; the government is free to pass laws relating to education and schools are also allowed to impose policies within reason. For instance, expulsion of a pupil would not be considered a violation providing they have access to an educational facility elsewhere.

The right also encompasses respect of religious or philosophical beliefs within education which aligns closely with Article 9. However, this right is not absolute and merely requires due consideration of such beliefs, for instance curriculum development must ensures different religious beliefs and worldviews are discussed in an objective and respectful manner. In this regard, the Government has made a special reservation stating that respect for religious and philosophical convictions apply "only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure".[42]

Protocol 1, Article 3: The right to participate in free elections

The right to free elections is critical in establishing a functioning and meaningful democracy through granting every individual the right to participate in free and fair elections at frequent intervals and by secret ballot.

Whilst this right is absolute, the Government can put limitations on how elections are held or what type of electoral system should be in place, but they must not disenfranchise an individual without reason or purpose. For instance, the Government can set restrictions to the right such as setting a minimum age but other decisions qualifying the right have been contentious: prisoners serving a custodial sentence in the UK do not have the right to vote, which the ECtHR found to breach Protocol Article 1, Article 3. However, whilst the European courts considered this blanket ban as disproportionate in depriving detainees of other Convention rights, the UK maintained that disenfranchisement was legitimate based on the conviction of serious crimes and the need to reinforce respect for the rule of law. As a result, the UK was able to depart from the ruling due to the wide discretion the UK enjoys under the margin of appreciation.

Protocol 13, Article 1: Abolition of the death penalty

This article abolished the death penalty in any circumstance including crimes committed during a war or when the threat of human rights is imminent.

Absolute and non-absolute rights

As previously mentioned, not all of the rights contained within the HRA are without limitation. Some of these rights are 'absolute rights', which means they cannot be lawfully limited in any circumstance. This includes articles such as the prohibition of torture and slavery and the right to a fair trial. However, most of them are non-absolute, meaning there are instances where they can be restricted. Some of these limitations may already be discussed above.

Under Article 15 of the ECHR (derogation in time of emergency), the UK is also permitted to derogate some rights in very limited and exceptional instances (such as war or a public emergency that threatens national security). Such derogation must be

[42] "Human Rights Act 1998," Legislation.gov.uk, accessed April 30, 2021, https://www.legislation.gov.uk/ukpga/1998/42/schedule/3/part/II?view=plain.

highly regulated in terms of its justification, its temporary nature, and with specificity regarding which exact rights under the Convention are included within the derogation. Derogation orders have been subject to legal challenges over their validity and correct application in both domestic courts and at the ECtHR, where they have been remedied by quashing orders or declarations.

Section 14 of the HRA grants both judicial and parliamentary scrutiny of derogation orders to mitigate against the possibility of arbitrary and disproportionate use. In particular, this section allows domestic courts to ensure that:

- The relevant conditions of Article 15 of the EHRC are met.
- The measures imposed are proportionate to the threat.
- The measures are otherwise compliant with the protections embodied within the HRA and ECHR.
- The measures are otherwise lawful in accordance with domestic legislation and public law principles.

As a case study, shortly after the 9/11 attacks in 2001, the Anti-Terrorism, Crime and Security Act was brought into effect, providing a power to indefinitely detain international terror suspects without trail at Belmarsh prison. The Government, aware that this measure breached Article 5(1) Right to Liberty and Security, issued a Derogation Order under Article 15. This decision was challenged at court with regards to its incompatibility with the provisions of the ECHR and its unlawful and discriminatory targeting of non-UK citizens. In A v Sec of State for the Home Department [2004] [43] the courts and House of Lords rendered the derogation as invalid and issued a declaration of incompatibility with Article 5(1) the HRA and quashed the order.[44]

The case is particularly salient because it underlines the importance of the HRA in providing a mechanism for the judiciary to provide scrutiny and a counterbalance to the disproportionate use of powers by the Executive, particularly regarding matters relating to national security. This check on power is essential in maintaining a functioning democracy.

Why is the Human Rights Act so important?

Even with the best-intended efforts and aspirations for an equal and fair society, the complexity of national legislation and the constant emergence of previously unconsidered issues and technologies means that human rights transgressions are inevitable, particularly against the most vulnerable in society as it is usually these groups that have the least representation amongst policymakers and whose lived realities have the least public visibility. The clauses contained in the HRA have thus had particular relevance for groups such as children, women, people with physical and mental disabilities, refugees and migrants, BAME communities, sexual minorities, religious minorities, and the homeless in offering meaningful protection and equal

[43] A and others v. Secretary of State for the Home Department, UKHL 56 (EWCA Civ 1502 2004).

[44] "Fast-Track Legislation: Constitutional Implications and Safeguards," Parliament.uk, 2009, https://publications.parliament.uk/pa/ld200809/ldselect/ldconst/116/9031102.htm.

treatment under the law. In turn, this has also granted disadvantaged groups greater recourse to hold public bodies accountable for human rights failures.

As recent examples, it secured justice for Hillsborough victims, and has aided the Grenfell and Windrush campaigns. After fans were blamed for the disaster and Hillsborough families denied an inquest, the HRA enabled the victims' families to demand a proper inquest that uncovered the reality behind the tragedy and finally held those responsible to account almost 30 years later.[45] Similarly, in response to the Grenfell Tower Inquiry the Equality and Human Rights Commission[46] found public authorities and local government failures to have breached Article 2: right to life.[47] The Windrush Lessons Learned review has also emphasised the Home Office's obligation to the HRA and the potential for racialised and discriminatory policies to give rise to human rights breaches.[48]

[45] "Human Rights Act 'Absolutely Key' to Big Justice Fights of Last 20 Years," amnesty.org.uk, 2018, https://www.amnesty.org.uk/press-releases/human-rights-act-absolutely-key-big-justice-fights-last-20-years.

[46] "Watchdog Confirms Grenfell Breached Human Rights Laws", *Equalityhumanrights.Com*, https://www.equalityhumanrights.com/en/our-work/news/watchdog-confirms-grenfell-breached-human-rightslaws#:~:text=Local%20authorities%20and%20public%20services,to%20the%20Grenfell%20Tower%20Inquiry.

[47] Human Rights Act 'Absolutely Key' To Big Justice Fights Of Last 20 Years", 2018, https://www.amnesty.org.uk/press-releases/human-rights-act-absolutely-key-big-justice-fights-last-20-years.

[48] Wendy Williams, "Windrush Lessons Learned Review" (2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874022/6.5577_HO_Windrush_Lessons_Learned_Review_WEB_v2.pdf.

Contextualising the Independent Human Rights Act Review

Criticisms of the Human Rights Act

Human rights are often subjective and abstract concepts – only a handful of the rights contained within the HRA are absolute. As such, their implementation in practice often become a source of contention and confusion. For instance, championing free speech in theory may differ to how upholding that right plays out in practice; an obvious example being the distinction between free speech and hate speech. As a result, human rights issues within policy are subject to a multitude of frequently conflicting considerations, including balancing public and private interests and national security concerns. Under the HRA, human rights interpretations and judgements are at the discretion of the UK courts which benefit from previous case studies and precedents set within Strasbourg jurisprudence. Unfortunately, media representation of cases involving conflicting interests coupled with wider miseducation about the HRA (which is overwhelmingly fuelled by myths perpetuated by a hostile press and cynical factions within the Government) has allowed misconceptions regarding the HRA to proliferate.

Thus, despite the monumental advancement of human rights since it came into force, the HRA has been a longstanding target of successive Conservative politicians and elements of the press. Politicians have criticized the limiting effects of the HRA in policy areas such as migration control, the criminal justice system, and national security, [49] leading to the common notion that human rights rulings are disproportionately concerned with the rights of unpopular or problematic sections of society at the expense of public interest.[50] To many critics, the HRA also represents the 'foreign' imposition of the ECtHR encroaching upon the democratic sovereignty of the UK.[51]

These concerns have formed the basis of proposals to reform or repeal the Act and replace it with a new 'home-grown' bill of rights that would loosen the obligation to consider Strasbourg case law. In both the 2010 and 2015 general elections, the Conservative Party proposed to repeal and replace the HRA with a "British Bill of Rights and Responsibilities".[52] According to the 2015 Conservative Party Manifesto, the new bill would "break the formal link between British courts and the European Court of Human Rights".[53] Arguments for a British Bill of Rights focus on concerns of judicial overreach undermining political decision-making; calls to re-assess the UK's relationship with the ECtHR in response to what was deemed to be an intrusive influence; and mitigate against the prospect of the HRA being "distorted by judicial legislation or abused by serious and serial criminals."[54]

As such, the following discussion seeks to situate the proposals to tamper with the HRA within the broader and longstanding criticisms against it, including concerns

[49] "Theresa May under Fire over Deportation Cat Claim," BBC News (BBC News, October 4, 2011), https://www.bbc.co.uk/news/uk-politics-15160326.

[50] Alice Donald, Jane Gordon, and Philip Leach, "Equality and Human Rights Commission Research Report 83 the UK and the European Court of Human Rights," 2012, https://www.equalityhumanrights.com/sites/default/files/83._european_court_of_human_rights.pdf.

[51] "Speech by Lord Hoffmann: The Universality of Human Rights," Judiciary.uk, March 19, 2009, https://www.judiciary.uk/announcements/speech-by-lord-hoffmann-the-universality-of-human-rights/.

[52] Alexander Horne et al., *A British Bill Of Rights* (House of Commons Library, 2015).

[53] Nicholas Watt and Rowena Mason, "Cameron 'Committed to Breaking Link with European Court of Human Rights,'" The Guardian (The Guardian, June 2015), https://www.theguardian.com/law/2015/jun/01/david-cameron-european-court-of-human-rights.

[54] "Oral Answers to Questions: Bill of Rights," hansard.parliament.uk, 2015, https://hansard.parliament.uk/Commons/2015-09-08/debates/15090844000011/BillOfRights.

regarding the perception of excessive rights, the relationship with the ECtHR, and perceived interference with security legislation. These examples also highlight the ways that popular myths have not only informed public perceptions of the HRA, but often lead to misunderstandings that then detrimentally influence the shaping of policy.

Accusations of excessive rights

A common criticism of the HRA is that is has generated a phenomenon of "rights inflation";[55] that it has needlessly given rise to a litigious culture of grievance and compensation that has only served to bankroll 'fat-cat' lawyers. During the 2005 parliamentary election campaign the Conservatives declared their intention to "overhaul or scrap" the HRA when Michael Howard stated that, "[t]he time has come to liberate the nation from the avalanche of political correctness, costly litigation, feeble justice, and culture of compensation running riot in Britain today" and warned that the "politically correct regime ushered in by Labour's enthusiastic adoption of human rights legislation has turned the age-old principle of fairness on its head."[56] In 2004, the Shadow Home Secretary, David Davis, proposed that the HRA has given rise to too many spurious rights, stating that, "It has fuelled a compensation culture out of all sense of proportion and it is our aim to rebalance the rights culture".[57] Similarly, in 2015, the then Justice Secretary Michael Gove accused the HRA of creating a "human rights culture… [that] supplants common sense and common law, and erodes individual dignity by encouraging citizens to see themselves as supplicants and victims to be pensioned by the state."[58]

Contrary to this myth, there has not been a barrage of lawsuits under the Act. Even prior to deep financial cuts to legal aid that have seriously undermined the ability of many to bring a case under the HRA, research showed that human rights legal actions only numbered 714 in 2002 – a figure that fell to 327 cases in 2013.[59] Furthermore, claims of a culture of a litigiously-driven politically correct culture due to the HRA is a distortion of the corrections afforded by the Act. Although damages can be granted under HRA claims, unlike in tort law,[60] compensation is not the primary purpose of the HRA.[61] The objective of a HRA claim is to address and resolve human rights breaches, relegating compensation to a secondary concern.[62] Where monetary compensation does occur, it is only granted to compensate for actual material loss suffered known as pecuniary damage. Furthermore, claimants have no inherent right to compensation under the HRA (unlike the law of tort) and the threshold to entitlement of damages is higher under the HRA and is dependent upon Strasbourg guidance and a broad assessment of circumstances, such as whether other relief or

[55] Francesca Klug, "The Rights of the Human Rights Act," The Guardian, 2009 https://www.theguardian.com/commentisfree/libertycentral/2009/mar/25/human-rights-act-civil-liberties.

[56] Nan Spowart, "Profile: The Human Rights Act," The National (The National, May 14, 2015), https://www.thenational.scot/news/14850422.profile-the-human-rights-act/.

[57] "Tories to Review Human Rights Act," bbc.co.uk, 2021, http://news.bbc.co.uk/1/hi/uk_politics/3590806.stm.

[58] "Human Rights Act", *Hansard.Parliament.Uk*, 2015, https://hansard.parliament.uk/commons/2015-06-30/debates/15063035000001/HumanRightsAct.

[59] Robert Verkaik, "Lawsuits on Human Rights Halve despite European Act," *The Independent*, October 29, 2013, https://www.independent.co.uk/news/world/europe/lawsuits-on-human-rights-halve-despite-european-act-1671332.html.

[60] Tort law concerns civil cases involving compensation for harm to people's health, safety, environment, property, economic interests, or reputations. Prominent examples include injury compensation following car accidents or accidents in workplaces or public places due to negligence. However, this also extends to areas such as product liability, medical negligence, environmental damage, defamation, and breach of confidence.

[61] Jenny Steele, "Damages in Tort and under the Human Rights Act: Remedial or Functional Separation?," *The Cambridge Law Journal* 67, no. 3 (2008): 606–34, https://www.jstor.org/stable/25166445?seq=1.

[62] Ibid.

remedy can be granted and whether compensation is necessary to ensure "just satisfaction."[63]

This is aptly exemplified in R (Greenfield) v Secretary of State for the Home department[64] where a petition for compensation under section 8 of the HRA (after the appellant had not been granted an independent and impartial tribunal and had wrongly been denied the right to be legally represented) was rejected by the House of Lords who maintained that that no such award was necessary to afford "just satisfaction". While compensation can only allay actual loss suffered and the case in question incurred only non-pecuniary loss, the court deemed a declaratory remedy to be sufficient.[65] As a High Court judge in a different case stated, "The award of non-pecuniary damages under section 8(3) is intended to reflect the Court's disapproval of infringement of the claimants' rights, in providing "just satisfaction" to the claimant; it is not intended to be, of itself, a costs award."[66]

Thus, in reality there are a minimal number of human rights cases that result in securing damages and the perpetuation of such myths serve only to distort the public understanding and present vulnerable and legitimate victims in need of protection as unworthy, undeserving, and 'greedy' compensation claimants. Hence, it is reasonable to argue that many of these assertions are politically driven to ignite public indignation and opposition to an Act that creates obstacles for political agendas that are in conflict with human rights considerations.

Limiting journalistic freedom

Many critics have also attacked the protections provided in balancing the right to privacy with freedom of speech within the HRA. In 2008, Paul Dacre (the editor of the Daily Mail) criticised the HRA following a judgement by a High Court judge, Mr Justice Eady, in which Dacre accused the Act of allowing an effective legislative right to privacy despite the fact that Parliament has not passed such legislation.[67] After News of the World published photographs of formula one boss Max Mosley taking part in a sado-masochistic orgy which was falsely portrayed as "Nazi-themed", Mr Justice Eady found the paper in breach of Mosley's privacy regarding consensual "sexual activities (albeit unconventional)."[68] In a speech to the Society of Editors response, Dacre lambasted Eady, including accusations of "introducing a privacy law by the back door"[69] using the "wretched" HRA to "inexorably and insidiously" impose privacy law on the press,[70] "amoral" judgements, and "adjudicating in matters that Parliament should be deciding".[71] In 2011, this was echoed by Prime Minister David Cameron arguing that "The judges are creating a sort of privacy law, whereas what ought to happen in a parliamentary democracy is Parliament – which you elect and put there – should decide how much protection do we want for individuals and

[63] "Human Rights Act 1998," Legislation.gov.uk, 2011, https://www.legislation.gov.uk/ukpga/1998/42/section/8.

[64] "Greenfield, R (on the Application Of) v. Secretary of State for the Home Department [2005] UKHL 14 (16 February 2005)," Bailii.org, 2021, https://www.bailii.org/uk/cases/UKHL/2005/14.html.

[65] Ibid

[66] "CZ (Human Rights Claim: Costs) [2017] EWFC 11 (16 February 2017)," Bailii.org, 2017, https://www.bailii.org/ew/cases/EWFC/HCJ/2017/11.html.

[67] Oliver Luft, "Daily Mail Chief Paul Dacre Criticises BBC Growth and Privacy Rulings," the Guardian (The Guardian, November 10, 2008), https://www.theguardian.com/media/2008/nov/10/pauldacre-dailymail.

[68] Helen Pidd, "Punishment That Was Not a Crime: Why Mosley Won in the High Court," the Guardian (The Guardian, July 24, 2008), https://www.theguardian.com/media/2008/jul/25/mosley.privacy.

[69] "Press Standards, Privacy and Libel," Parliament.uk, 2010, https://publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/36205.htm#note72.

[70] Paul Dacre, "Society of Editors: Paul Dacre's Speech in Full," Press Gazette, November 9, 2008, https://www.pressgazette.co.uk/society-of-editors-paul-dacres-speech-in-full/.

[71] "Press Standards, Privacy and Libel," Parliament.uk, 2010, https://publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/36205.htm#note72.

how much freedom of the press and the rest of it."[72] Such a representation obscures the fact that the HRA was drafted and passed by Parliament. As such, it was indeed Parliament that had direct control over its scope and powers. To therefore suggest that the HRA allows for rulings to be made that go against the will of Parliament is disingenuous. This active maligning of the HRA, particularly regarding the protections it affords to privacy, is arguably ascribable to the tabloids' commercial reliance on human-interest gossip for news stories.[73]

Consequently, Lord Lester, a senior Liberal Democrat peer and eminent human rights lawyer, said Dacre's criticism was "completely misconceived" and contended that "The Max Mosley judgment was a sensitive and sensible judgment. It is completely in line with the case law of the European court of human rights and it strikes a fair balance between free speech, personal privacy and reputation." [74]

Similarly, in its Annual Report 2007-2008, the Joint Committee on Human Rights commented that:

"Mr Dacre was wrong on a number of counts. The Human Rights Act - which was, of course, passed by Parliament - incorporated Articles 8 (right to a private life) and 10 (right to freedom of expression) of the European Convention on Human Rights into UK law. Parliament required the judiciary to balance these sometimes conflicting rights in making decisions in libel and privacy cases. Far from creating a privacy law to suit his own 'moral sense', Lord [sic] Justice Eady was implementing legislation passed by Parliament in deciding cases such as the recent action by Max Mosley against the News of the World. Indeed English courts have long protected confidential information, good reputation and aspects of personal privacy at common law and in equity, quite apart from Article 8 of the European Convention and the Human Rights Act."[75]

As aptly articulated by the Joint Committee on Human Rights, the HRA strikes the balance between the right to privacy and the right to free expression. Contrary to claims that the Act undermines journalistic rights, the HRA has protected and strengthened the press' right to free speech under Article 10. Article 10 protects press freedom by preserving journalistic rights to report on issues of public concern or interest on the one hand and exempting journalists from having to reveal the sources of their information (excepting in cases of public security) on the other. This is counterbalanced by the right to privacy, which protects against defamatory or invasive reports that breach the individual right to privacy, including media reports where courts deem it to be contrary to public interest to disclose private information.

To suggest otherwise falls into wider attacks on the judiciary, including allegations of judges putting their own personal judgements before legal considerations. In fact, in response to the Culture, Media and Sport Select Committee report into privacy and media intrusion in 2003, the Government observed that "the weighing of competing rights in individual cases is the quintessential task of the courts, not of Government,

[72] Owen Bowcott, "Privacy Law Should Be Made by MPs, Not Judges, Says David Cameron," the Guardian (The Guardian, April 21, 2011), https://www.theguardian.com/media/2011/apr/21/cameron-superinjunctions-parliament-should-decide-law.

[73] Derry Irvine, "Leave Human Rights Law to the Judges," the Guardian (The Guardian, October 11, 2011), https://www.theguardian.com/commentisfree/2011/oct/11/human-rights-act-theresamay.

[74] Esther Addley, "Lawyers' Riposte to Mail Editor: This Act Protects Everybody," the Guardian (The Guardian, November 11, 2008), https://www.theguardian.com/media/2008/nov/11/paul-dacre-privacy

[75] "Press Standards, Privacy and Libel," Parliament.uk, 2010, https://publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/36205.htm#note72.

or Parliament. Parliament should only intervene if there are signs that the courts are systematically striking the wrong balance; we believe there are no such signs."[76]

Interfering with security legislation

Senior politicians have criticised the HRA and the supposed willingness of the judiciary to invoke DOIs against terrorism legislation. For example, in 2007, the then Home Secretary, Baron John Reid, argued that the HRA was hampering the fight against global terrorism regarding the controversial control orders mentioned in a previous chapter of this briefing. He stated that he was prepared to declare a "state of emergency" to suspend key parts of the HRA if the law lords did not overturn a series of judgments that he maintained had weakened the anti-terrorist control order regime.[77] He also claimed that, "the threat to the life and liberties of the people of this country is higher than ever before, and is at the level of a national emergency" the basis of which was questioned by the JCHR, who pointed out that it is the Government's own position that a state of emergency entails an imminent terrorist threat that compromises public safety and thus questioned how such threat was able to be evidenced.[78]

Moreover, a year prior a report by the JCHR on the HRA found that decisions made under the Act had not significantly inhibited efforts to fight terrorism and protect the public against crime.[79] The Lord Chancellor concluded that "yes, there have been some changes that the Human Rights Act has caused - for example, the Belmarsh case - but it has not significantly inhibited the state's ability to fight terrorism because the Human Rights Act has allowed proportionate measures to be taken to fight terrorism". Similarly, Kofi Annan, former Secretary General of the United Nations said that "human rights law allows a pretty robust response to terrorism even in the most exceptional circumstances. Human rights law is not some rigid doctrine that can never be broken; it is something where a balance needs to be struck. If the state is threatened, it will allow the necessary steps to be taken to protect the democratic society which those values serve. I do not accept it has had a significant effect on inhibiting the fight against terrorism."

These conclusions highlight the fact that rather than the HRA impeding the counter-terror policies, it actually allows proportionate measures to be taken in restricting rights where necessary to protect against security threats. In fact, this very leniency has permitted the development of counter-terror laws that technically depart from the HRA. For example, the Counter-Terrorism and Security Act of 2015 stands in conflict with provisions under the HRA, due to powers to arbitrarily confiscate passports under Schedule 1 of the Act, which, in the absence of a fair and independent trial, limits freedom of movement, thereby breaching Article 5, the right to liberty.[80] Thus, where counter-terrorism powers are being expanded, the HRA and parliamentary and judicial scrutiny maintains essential checks that may prevent any disproportionate or

[76] "House of Commons - Press Standards, Privacy and Libel - Culture, Media and Sport Committee," Parliament.uk, https://publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/36205.htm

[77] Alan Travis and Vikram Dodd, "Reid Warning to Judges over Control Orders," the Guardian (The Guardian, May 24, 2007), https://www.theguardian.com/politics/2007/may/25/uk.topstories3.

[78] "Counter-Terrorism Policy and Human Rights: 28 Days, Intercept and Post- Charge Questioning Nineteenth Report of Session 2006-07 Report, Together with Formal Minutes and Appendices" (2007), https://publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/157.pdf.

[79] "The Human Rights Act: The DCA and Home Office Reviews," *Parliament.uk* (, 2006), https://publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/278.pdf.

[80] "Human Rights Watch Concerns and Recommendations on the United Kingdom," Human Rights Watch, June 22, 2015, https://www.hrw.org/news/2015/06/22/human-rights-watch-concerns-and-recommendations-united-kingdom.

arbitrary use of such powers, while still allowing for robust solutions and flexibility where required.

'Foreign' interference from Europe

Some of the disgruntlement with the HRA has centred on the idea that the ECHR and ECtHR are "tools of European meddling in British justice".[81] David Cameron's plans for a British Bill of Rights was underpinned by a supposed need to "show that we can have a commitment to proper rights, but they should be written down here in this country".[82] However, this framing is misguided for several reasons, not least of which is the fact that it overlooks the central role of the UK in formulating both the HRA and the ECHR. While the HRA passed by the UK Parliament in 1998, the UK Government, namely Conservative MP, David Maxwell Fyfe, also played a vital role in the negotiations and drafting of the ECHR, which the UK adopted voluntarily in 1951. Thus, far from the idea that the HRA has been imposed upon the UK by Europe, the UK voluntarily and proactively pursued the development and implementation of these rights.

However, David Cameron and other critics[83] have consistently argued that the "existence of a clear and codified British Bill of Rights will lead the ECtHR to apply the 'margin of appreciation'"[84] that would restore the UK's power to interpret and implement rights in a way that aligns with British culture and traditions. In reality, due to the careful balance struck by the HRA, the decisions made by the ECtHR are able to have a positive influence in the interpretation and enforcement of rights in the UK, whilst respecting British traditions and culture. Section 2 of the HRA requires UK courts to "take into account" any decision of the ECtHR regarding cases pertaining to rights contained within the ECHR.[85] However, UK courts are not bound by this case law. This is important as the ECtHR hears cases from 47 countries and cases concerning one country have resonance with issues found in the UK context. That is not to say that these cases set a precedent that UK courts are required to follow, rather, they must only consider it when deciding a similar case. Thus, UK courts have discretionary powers when considering the implementation of ECtHR rulings and, as such, decisions of the ECtHR do not automatically mandate the UK to amend domestic legislation. Indeed, there are numerous cases, such as R v Horncastle[86] which demonstrate that the Supreme Court readily diverges from Strasbourg rulings where appropriate.

The case of R v Horncastle mirrored previous cases heard by the ECtHR and concerned the right to cross-examine prosecution witnesses under Article 6 (the right to a fair trial). Previous cases at the ECtHR had ruled that the state was in breach of this right regarding convictions based upon the evidence of witnesses that were either deceased or unwilling to appear in court, thus the cases relied upon hearsay evidence and removed the ability for the accused and their legal representatives to cross examine witnesses against them. Under the Criminal Justice Act 2003, there is a general presumption that hearsay evidence is inadmissible except for limited circumstances,

[81] "There May Be Trouble Ahead," The Economist (The Economist, May 14, 2015), https://www.economist.com/britain/2015/05/14/there-may-be-trouble-ahead.

[82] David Cameron, *Oral Answers To Questions* (Hansard, 2010).

[83] Joanna Mason, "Guardian Live: Do We Still Need The Human Rights Act?", *Theguardian.Com*, 2015, https://www.theguardian.com/membership/2015/jul/03/guardian-live-do-we-still-need-the-human-rights-act.

[84] "Balancing Freedom And Security - A Modern British Bill Of Rights", *The Guardian*, 2006, https://www.theguardian.com/politics/2006/jun/26/conservatives.constitution.

[85] *Human Rights Act 1998*, vol. 2, 1998.

[86] R v Horncastle and others (Apellants), [2009] UKSC 14.

including the witness having died or being prevented from testifying due to fear. At the same time, the 2003 Act provides safeguards to ensure the credibility of hearsay evidence, including allowing judges to exclude unsafe evidence and providing additional opportunities for the opposing party to attack the reliability of the absent witness. In the case of R v Horncastle, the appeal against this use of hearsay evidence was therefore rejected by the court despite ECtHR precedent, with Lord Phillips ruling that the ECtHR had failed to take account of existing English law which possessed independent safeguards against untested hearsay evidence, thereby providing adequate protections to Article 6 rights.

From the perspective of victims of human rights breaches, the balanced relationship that the HRA creates between UK law and ECtHR jurisprudence is a fruitful one that creates space for constructive introspection whilst respecting the domestic context. Indeed, as demonstrated by R v Horncastle, the current system not only facilitates constructive dialogue between the UK courts and the ECtHR regarding the application of rights in the UK but does so in a way that allows for an implementation that is compatible with British traditions, cultures, and laws.

Moreover, amendments to Section 2 and changes in the relationship between UK courts and the ECtHR could result in legal uncertainty. With the Government's assertion that the UK will remain a member of the ECHR, it is the ECtHR that provides clarity in how the rights contained within the convention should be understood and what they mean in practice. Removing the obligation to consider the rulings of the ECtHR would, therefore, create confusion in the scope and application of these rights. At the same time, the ever-changing nature of our society results in the emergence of previously unexplored issues and questions (the fast-paced evolution of technology and its implications for privacy considerations as but one example). Having examples and guidance drawn from 47 nations can only benefit the UK in navigating such uncertainties.

Furthermore, the new bill of rights was put forward "so that all British citizens of different backgrounds feel ownership of it" [87] and as "a clear articulation of *citizen's* rights that *British* people can use in British courts".[88] The argument for a bill defined by its Britishness is tenuous. The idea that an exclusively 'British' bill would be preferred seems to overlook the fact that central to the HRA is its universality and its protection of the most vulnerable. Any bill that aims to restrict or qualify certain rights for non-citizens or unpopular minority groups undermines the core tenet of the HRA – that it applies to everyone. This is also a clear example of the divisive political rhetoric that has characterised the Bill of Rights debate as opposed to rational and sincere engagement with the specificities of legal rights. Thus, such arguments seem to serve only to promote a dichotomy of 'us' vs 'them', essentially fuelling moral panics in a mission of political point scoring and the furthering of political machinations to which the protection of human rights is a mere inconvenience.

"Villain's Charter"

[87] Dominic Grieve, 'Liberty and Community in Britain', Speech for Conservative Liberty Forum, October 2, 2006.

[88] "Balancing Freedom And Security - A Modern British Bill Of Rights", *The Guardian*, 2006, https://www.theguardian.com/politics/2006/jun/26/conservatives.constitution.

The vilification of the HRA as a "charter for villains"[89] has portrayed criminals, terrorists, prisoners, and immigrants as exploiting the HRA for their own ends. Narratives have consequently developed bemoaning European interference and portraying human rights judgements to be inordinately focused on minority rights and the protection of criminals whilst compromising national and public interests. The Hirst (No. 2) decision of the European Courts on voting rights for prisoners is one example that antagonised facets of the political spectrum[90] as have decisions by the EU and UK courts restricting powers to deport non-nationals. Indeed, amongst the most notable criticisms of the HRA is that it protects terrorists and hate preachers,[91] such as Abu Qatada, who was unable to be deported due to concerns that it would breach his rights to freedom from torture.[92] In 2014, David Cameron addressed this issue in a party conference speech that was imbued with nationalist and populist undertones; "Rulings to stop us deporting suspected terrorists. The suggestion that you've got to apply the human rights convention even on the battlefields of Helmand. And now, they want to give prisoners the vote. No, I'm sorry, I just don't agree. Our Parliament - the British Parliament - decided they shouldn't have that right."[93] In 2015, Cameron then claimed that a British Bill of Rights would "stop terrorists and other serious foreign criminals who pose a threat to our society from using spurious human rights arguments to prevent deportation."[94] The "spurious human rights arguments" in question was a ruling from the ECtHR that prevented Abu Qatada to be deported because of the likelihood of torture and being denied the right to a fair trial. The prohibition against torture is a universally absolute right, meaning it can never be justified. The fact that only a handful of rights are absolute while the majority can be qualified or restricted indicates the generous scope to cater for national security needs. Thus, where the HRA otherwise does not stop the deportation of terrorists that threaten national security, Cameron's claim itself seems ironically spurious. The right to a fair trial and prohibition against torture are embedded in British principles and universal human rights norms and are arguably values that any British Bill of Rights should champion. The prohibition against deporting people to face torture is therefore not singular to the HRA as Cameron's claim fails to appreciate.

Likewise, the ECtHR's ruling that held the UK's blanket ban on prisoners voting to be unlawful – a prospect which made David Cameron feel "physically ill"[95] – is another example underlying the decision to abolish the HRA. Crucially, the judgement centred upon the fact that a ban on *all* prisoners from voting was considered disproportionate. In other words, the judgement merely called for a more nuanced and sensitive re-visitation of policy, which granted Parliament the discretion to qualify the ban for certain groups of prisoners. Considering the complete ban on prisoner voting is still in place, this case epitomises how the margin of appreciation operates in favour of the UK, thereby enabling Parliament to decide how judgements are applied according to domestic circumstance.

[89] Andrew Sparrow, "Jack Straw Plans to 'Rebalance' Human Rights Act," The Guardian (The Guardian, December 8, 2008), https://www.theguardian.com/politics/2008/dec/08/human-rights-act-straw.

[90] "Theresa May Under Fire Over Deportation Cat Claim", *Bbc.Co.Uk*, 2011, https://www.bbc.co.uk/news/uk-politics-15160326.

[91] Allison Pearson, "We Must Get Rid Of The Dreadful Human Rights Act", *Telegraph.Co.Uk*, 2015, https://www.telegraph.co.uk/news/uknews/law-and-order/11602222/Allison-Pearson-We-must-get-rid-of-the-dreadful-Human-Rights-Act.html.

[92] Robert Mendick, "Judges Stop Theresa May Deporting Terror Suspects", *Telegraph.Co.Uk*, 2016, https://www.telegraph.co.uk/news/2016/05/07/judges-stop-theresa-may-deporting-terror-suspects/.

[93] Oliver Wright, "David Cameron To 'Scrap' Human Rights Act For New 'British Bill Of'", *Independent.Co.Uk*, 2014, https://www.independent.co.uk/news/uk/politics/conservative-party-conference-cameron-announces-plans-scrap-human-rights-act-9767435.html.

[94] "The UK, the EU and a British Bill of Rights," Parliament.uk, 2014, https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/139/13904.htm#footnote-219.

[95] Hélène Mulholland and Allegra Stratton, "UK May Be Forced to Give Prisoners the Vote in Time for May Elections," the Guardian (The Guardian, February 2011), https://www.theguardian.com/society/2011/feb/01/prisoners-vote-may-elections-compensation-claims.

Yet the media omitted this nuance, creating the false impression that the aim behind the ECtHR's ruling was to grant voting rights to *all* prisoners. This is a case in point of how media sensationalism serves to distort public understanding of the HRA and fuel populist sentiments of 'undeserved' criminals exploiting the leniency of 'our' justice system. Ultimately, human rights laws exist to protect everyone; even criminals and those traditionally unpopular because that is the core tenet of true justice.

Missing from these debates is also how the Act has positively changed the lives of thousands of ordinary and disadvantaged people – cases that fail to make the headlines. As evidenced by the prisoner voting and Abu Qatada case, it is only the most controversial stories that garner media and public attention, highlighting how political and emotionally charged rhetoric dominates debates surrounding the HRA with scant attention to the level of rights protection it provides.

Judicial over-reach

In recent years, the role of the judiciary in acting as a bulwark against executive overreach has increasingly frustrated the UK Government, leading to accusations of "judicial activism" [96] when courts have ruled political decision-making to be incompatible with UK law. The judiciary is an indispensable component of our democracy as an independent check on the Executive and maintaining the rule of law.

Section 3 of the HRA states: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." [97] What this means in practice is that UK courts must interpret legislation set out by Parliament in a way that is compatible with the ECHR. Essentially, Section 3 requires courts to rely on the assumption that the intent to comply with the UK's human rights obligations is inherent within all legislation passed by Parliament, unless Parliament has explicitly stated to the contrary. Indeed, in a democratic society the hope and assumption should always be that Parliament wishes its legislation to comply with our human rights obligations.

The careful drafting of the HRA specifically precludes any possibility of the courts interpreting legislation in opposition to the intent of Parliament. It is also important to note that if the courts are unable to interpret legislation compatibly with ECHR, they do not possess the power to change it or refuse to apply the law as legislated by Parliament. Instead, they may only make a DOI under Section 4. Parliament reserves the right to legislate incompatibly with the ECHR and also reserves the right to legislate to undo a Section 3 ruling and to override a DOI ruling. Therefore, there cannot be any question of any threat to parliamentary sovereignty.

Despite these safeguards, and perhaps due to the broad lack of knowledge amongst the general public regarding the realities of the justice system, the judiciary makes for an easy target within politicly driven culture wars. Attacks on judicial powers have arisen particularly in areas such as asylum, immigration, and counter-terrorism where judicial oversight appears to frustrate political agendas. [98] Whether regarding

[96] Charles Hymas, "Supreme Court Accused of 'Judicial Activism' in 'Radical' Judgment That Curbs PM's Constitutional Powers," The Telegraph, September 24, 2019, https://www.telegraph.co.uk/politics/2019/09/24/supreme-court-accused-judicial-activism-radical-judgement-curbs/.

[97] *Human Rights Act 1998*, vol. 2, 1998.

[98] Daniel Boffey, "Brexit: Lawyers Confront Liz Truss Over 'Dangerous' Abuse Of Judges", 2016, https://www.theguardian.com/politics/2016/nov/05/lawyers-war-liz-truss-over-abuse-judges-brexit-barristers.

the prorogue of Parliament[99] on what was later ruled to be unlawful advice of the Prime Minister;[100] the unlawful handling of PPE contracts during the pandemic;[101] or "activist lawyers"[102] representing the rights of vulnerable people to remain in the country, sensationalist media pronouncements and vehement protestations from Government ministers have exacerbated tensions between the Government and the judicial mechanisms intended to hold executive powers to account. It is these tensions and the public rhetoric surrounding them have shaped public narratives and understandings of the HRA.[103]

The frustration of the Government in the recent series of unfavourable court rulings has led to a worrying and concerted effort to curtail the powers of the judiciary to challenge the Government and hold public bodies to account. This has resulted in the Independent Review of Administrative Law that examined the "perverse consequences" of judicial reviews to ensure that they are "not abused to conduct politics by other means." [104] The Government initially proposed to set up a Constitution, Democracy and Rights Commission to examine "the relationship between the government, parliament and courts" but dropped such plans following sharp criticism of the move as a clear attempt to avoid accountability and scrutiny.[105]

Indeed, the judicial review reform proposal has been widely considered to be retribution for the Supreme Court's rulings that disrupted the Government's Brexit plans and their subsequent accusations that the Courts had strayed too far into political jurisdictions.[106] In 2016, three High Court judges challenged the invoking of Article 50 (a clause that would officially trigger the Brexit process), a decision that incited widespread criticism by politicians and media alike. Sajid Javid, the then Local Government Secretary, claimed the judges were attempting to "thwart the will of the people". [107] Meanwhile, the Daily Telegraph produced a headline "Judges v the people" [108] and the Daily Mail described the judges involved as "enemies of the people".[109] Likewise, in 2019, the Supreme Court's ruling of Johnson's attempt to prorogue Parliament at the height of the Brexit process was considered unlawful in undermining Parliament's constitution functions. [110] In response to what was considered a "constitutional coup",[111] the Government announced plans to reduce the size of the Supreme Court, rename it, and increase its own power to preside over

[99] "Against The Law: Why Judges Are Under Attack, By The Secret Barrister", *Theguardian.Com*, 2020, https://www.theguardian.com/books/2020/aug/22/against-the-law-why-judges-are-under-attack-by-the-secret-barrister.

[100] Kate Lyons, "'Who Runs Britain?' Papers Divided Over Court's 'Damning Indictment' Of PM", 2019, https://www.theguardian.com/media/2019/sep/25/who-runs-britain-papers-divided-over-courts-damning-indictment-of-pm.

[101] "Covid: Matt Hancock Acted Unlawfully Over Pandemic Contracts", *Bbc.Co.Uk*, 2021, https://www.bbc.co.uk/news/uk-56125462.

[102] Lizzie Dearden, "Government Attacks On Lawyers 'Undermine Rule Of Law', Says Lord Chief Justice", *Independent.Co.Uk*, 2020, https://www.independent.co.uk/news/uk/politics/government-priti-patel-lawyers-activists-attacks-rule-law-b1720428.html.

[103] Afua Hirsch, "Bad Press: Human Rights Myths Exposed", *Guardian.Co.Uk*, 2009, https://www.theguardian.com/humanrightsandwrongs/bad-press.

[104] Ashley Cowburn, "Boris Johnson Told to Keep 'Populist Hands' off Judiciary after Reports He Wants Overhaul of How Government Is Challenged in Court," *The Independent*, July 25, 2020, https://www.independent.co.uk/news/uk/politics/boris-johnson-judicial-reviews-supreme-court-uk-governemt-a9637601.html.

[105] Ibid.

[106] Tom Clark and Alex Dean, "Judges in the Dock: The inside Story of the Battle for Britain's Courts," Prospect Magazine (Prospect Magazine, January 24, 2020), https://www.prospectmagazine.co.uk/magazine/judges-in-the-dock-battle-britain-courts-boris-johnson-prorogation-supreme-court-hale-miller-constitution.

[107] "Brexit Case 'Attempt to Block Will of People' Says Sajid Javid," BBC News (BBC News, November 4, 2016), https://www.bbc.co.uk/news/uk-politics-37866411.

[108] "Judges vs the People: Government Ministers Resigned to Losing Appeal against High Court Ruling," The Telegraph, November 3, 2016, https://www.telegraph.co.uk/news/2016/11/03/the-plot-to-stop-brexit-the-judges-versus-the-people/.

[109] James Slack, "Enemies of the People: Fury over High Court Judges Who Defied Brexit Voters and Could Trigger Constitutional Crisis," Mail Online (Daily Mail, November 3, 2016), https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html.

[110] Owen Bowcott, Ben Quinn, and Severin Carrell, "Johnson's Suspension of Parliament Unlawful, Supreme Court Rules," the Guardian (The Guardian, September 24, 2019), https://www.theguardian.com/law/2019/sep/24/boris-johnsons-suspension-of-parliament-unlawful-supreme-court-rules-prorogue.

[111] Owen Bowcott, "Plan to Reform Supreme Court Is Attack on Independent Judiciary, Says Labour," the Guardian (The Guardian, November 15, 2020), https://www.theguardian.com/law/2020/nov/15/supreme-court-plans-an-attack-on-independent-judicary-says-labour.

appointments to it. The move was widely considered to be attack on the independence of the judiciary and a clear attempt to limit the powers of the courts.[112]

In a similar case of frustrating governmental agendas, Priti Patel came under stark criticism for her attacks on "activist lawyers" who she accused of frustrating the Home Office's deportation of migrants.[113] Priti Patel was supported in her assertions by the Prime Minister, Boris Johnson, who claimed that the criminal justice system was "being hamstrung by lefty human rights lawyers."[114] Such rhetoric is an example of the irresponsible manipulation of public understanding by public figures. In this case, the Home Secretary and Prime Minister used their positions to present legal practitioners as problematic and purposefully obscured the duty of such practitioners to represent vulnerable individuals who are entitled to representation under Article 6 of the HRA.

The danger of such public manipulation was highlighted in September 2020, when a man entered a law firm in London armed with a knife and committed a "violent, racist attack" that was reportedly inspired by Priti Patel's remarks.[115] As explained by Amanda Pinto QC, following the attack "irresponsible, misleading communications from the Government, around the job that lawyers do in the public interest, are extremely damaging to our society... Legal professionals who apply the law and follow Parliament's express intention, are not 'activists'. We strongly condemn the use of divisive and deceptive language that undermines the rule of law and those working to uphold it."[116]

In the face of governmental misconduct, the courts provide a vital checking mechanism that is essential to a functioning democracy, and without which the rule of law would be rendered but a hollow concept.[117] The current IHRAR should, therefore, be viewed within this context of Governmental attacks on the powers of the judiciary to act as a check on executive power.

[112] Jemma Slingo, "'Act of Spite': Lord Reed Decries Proposals to Change Supreme Court's Name," Law Gazette, 2021, https://www.lawgazette.co.uk/news/act-of-spite-lord-reed-decries-proposals-to-change-supreme-courts-name/5107840.article.

[113] Tom Batchelor, "Knife Attack on Law Firm 'Inspired by Priti Patel's Activist Lawyer Remarks,'" *The Independent*, October 12, 2020, https://www.independent.co.uk/news/uk/crime/priti-patel-activist-lawyer-refugees-knife-attack-law-society-b965947.html.

[114] Andrew Woodcocl, "Conservative Conference: Boris Johnson's Attack on 'Lefty Human Rights Lawyers' Branded Shocking by Bar Council," *The Independent*, October 6, 2020, https://www.independent.co.uk/news/uk/politics/boris-johnson-priti-patel-human-rights-lawyers-b838216.html.

[115] Tom Batchelor, "Knife Attack on Law Firm 'Inspired by Priti Patel's Activist Lawyer Remarks,'" *The Independent*, October 12, 2020, https://www.independent.co.uk/news/uk/crime/priti-patel-activist-lawyer-refugees-knife-attack-law-society-b965947.html.

[116] Ibid.

[117] Diane Taylor, "Priti Patel's Detention Policies Found to Breach Human Rights Rules," the Guardian (The Guardian, April 14, 2021), https://www.theguardian.com/uk-news/2021/apr/14/priti-patels-detention-policies-found-to-breach-human-rights-rules.

The Independent Human Rights Act Review (IHRAR)

Background

Although plans to repeal the HRA have thus far failed to come to fruition, attempts to undermine the HRA persist. In 2017, the Conservative Party Manifesto assured the public that the HRA would not be repealed or replaced whilst Brexit negotiations were taking place, but that they would instead evaluate the human rights legal framework once the UK had left the EU.[118] The 2019 Conservative Manifesto then contained a proposal to "update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government."[119] Although the Government withdrew plans to repeal the HRA, the same arguments underpinning the British Bill of Rights continue to fester.

The Government's IHRA review should thus be seen as an inevitable product of sustained attempts to chip away at the UK's human rights framework and a central underpinning of the wider constitutional reforms promised in the 2019 Conservative Manifesto.[120] The manifesto promised to establish a Constitution, Democracy and Human Rights Commission to examine wide-ranging constitutional considerations, including judicial reviews, the HRA, and the relationship between the Government, Parliament, and the courts.[121] In lieu of establishing this commission, the Prime Minister decided to address each issue independently, with a view to fast-tracking the process. As such, the Independent Review into Administrative Law (IRAL) was launched in July 2020[122] aiming to examine judicial reviews, followed by the IHRAR in December 2020 which claims to review 20 years of the HRA's operation.[123] The IHRAR is due to submit its findings in Summer 2021, including recommendations for reform.

Methodological flaws and terms of reference

MEND and other human rights organisations have found various problems with the IHRAR terms of reference and methodological framework, which are particularly evident in its narrow focus and failure to paint an authentic picture of the HRA's operation since its inception.

Narrow focus

As outlined in the terms of reference, the IHRAR aims to look at two main areas:

- **Theme One:** the relationship between domestic courts and the European Court of Human Rights (ECtHR).

- **Theme Two:** the impact of the HRA on the relationship between the judiciary,

[118] "What Do The Party Manifestos Say About Human Rights?", *Hrw.Org*, 2017, https://www.hrw.org/news/2017/06/01/what-do-party-manifestos-say-about-human-rights.

[119] *Get Brexit Done Unleash Britain'S Potential: The Conservative And Unionist Party Manifesto 2019* (Conservatives, 2019).

[120] "Conservative Manifesto 2019," Conservatives.com, 2019, https://www.conservatives.com/our-plan.

[121] Ibid

[122] "Independent Review of Administrative Law," GOV.UK, September 7, 2020, https://www.gov.uk/government/groups/independent-review-of-administrative-law.

[123] Ministry of Justice, "Independent Human Rights Act Review," GOV.UK (GOV.UK, December 7, 2020), https://www.gov.uk/guidance/independent-human-rights-act-review.

the executive, and the legislature.[124]

The review specifically considers the "approach" of domestic courts and the duty to "take into account" ECtHR jurisprudence, as well as whether "the HRA strikes the correct balance between the roles of the courts, the Government and Parliament", and whether domestic courts are "being drawn into questions of policy". In other words, it is concerned with the questions of:

1. Does the HRA vest too much power with the European Courts?

2. Has the HRA shifted power away from Parliament to the judiciary?

3. Has the HRA allowed the judiciary to act independently against the wishes of Parliament and to inappropriately give powers to politically motivated judges?

Interestingly, these questions echo the very harmful myths about the HRA that years of attacks against the judiciary have allowed to take root in the popular imagination. The IHRAR thus appears to emanate from pre-established politically driven machinations aimed at limiting the power of the courts and thereby removing accountability and limits to executive power.

To accurately assess the efficacy of the HRA, any review must provide a holistic and comprehensive overview of the HRA's operations since its enactment. However, the questions posed by the IHRAR are very narrow in focus and betray the seemingly political underpinnings of the review itself by echoing the aforementioned attacks on the HRA without any balancing focus on its everyday beneficial operation for those accessing it. Indeed, the terms of reference fail to appreciate how the HRA has operated in practice and risks obscuring the important ways in which it has facilitated and protected victims of human rights breaches.

Limiting opportunities for widespread engagement

Amongst the concerns raised by rights-based organisations was the limited time in which the public was given an opportunity to respond. The call for evidence was announced on the 13th January 2021 with the deadline for submissions on 3rd March 2021. The fact that an opportunity of only a month and a half was provided to gather evidence severely curtails the ability of many equalities organisations and community groups to adequately respond, particularly considering that such organisations overwhelmingly function with severely limited capacity and resources at their disposal.

Moreover, following the call for evidence, IHRAR panel members attended 'roadshows' at universities across the country "to engage and hear views from a wide range of interested parties".[125] However, there did not appear to be any significant advertising for these events, with even organisations and individuals specialising in the field of human rights being unaware of their existence until after they had

[124] Ministry of Justice, *Government Launches Independent Review Of The Human Rights Act*, 2020, https://www.gov.uk/government/news/government-launches-independent-review-of-the-human-rights-act#:~:text=The%20review%20is%20limited%20to,Robert%20Buckland%20QC%20MP%2C%20said%3A&text=After%2020%20years%20of%20operation,Act%20is%20still%20working%20effectively.

[125] Ministry of Justice, "Independent Human Rights Act Review," GOV.UK (GOV.UK, December 7, 2020), https://www.gov.uk/guidance/independent-human-rights-act-review.

occurred. Meanwhile, the fact that all of these events occurred between 5pm-7pm on university campuses limits the ability of many to logistically attend.

Partisan panel members

Whilst the review's panel of experts appears ostensibly balanced, the strong political opinions of certain individuals on the panel raise serious questions regarding the legitimacy, objectivity, and faithfulness of the review. Sir Stephen Laws, QC, of the right-wing Policy Exchange's Judicial Power Project, is a vocal champion of constitutional reform and curbing judicial powers.[126] Meanwhile Policy Exchange itself is known to have close ties to the Conservative Party,[127] thus raising questions about impartiality. His established arguments surrounding courts allegedly creating their own laws[128] are sentiments that are directly reflected in the review's questions as to whether "courts have been drawn unduly into matters of policy". Such partisanship can, therefore, be perceived as an attempt to influence a specific outcome.

Timing

The timing of the review has also been subject to criticism. Despite assertions that "after 20 years of operation, the time is right to consider whether the Human Rights Act is still working effectively"[129] it appears disingenuous to suggest that a review is inevitable when the HRA has been frequently subject to scrutiny in the past decade. Furthermore, attempts to interfere with the HRA when court backlogs, exacerbated by the pandemic, have had considerable impact on the criminal justice system and led to significant delays in cases being heard,[130] appears untimely and questionable. Amidst the precariousness of a pandemic and the pressure on our justice system, the prospect of having vital human rights protections diluted becomes increasingly concerning.

As such, Shadow Secretary David Lammy expressed concern over prioritising reviewing a functioning human rights system at a time when the country is mired in a global health crisis.[131] However, stoking longstanding culture wars resting on the scapegoating of the judiciary and the HRA seems a timely distraction from the Government's handling of the pandemic and a convenient deflection from political failings.

Dissecting the Review

The partiality from which the Government appears to approach this review prevents sincere and critical engagement with the HRA. As previously mentioned, the questions stated in the terms of reference stem from misplaced criticisms of the HRA regarding the power of "unelected" judges and European courts encroaching upon the authority of Parliament. Far from being neutral, the questions misrepresent the current

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[126] Stephen Laws, "How to Address the Breakdown of Trust between Government and Courts," *Policy Exchange* (,2021), https://policyexchange.org.uk/wp-content/uploads/How-to-Address-the-Breakdown-of-Trust-Between-Government-and-Courts.pdf.

[127] Andy Beckett, "What Can They Be Thinking?," the Guardian (The Guardian, September 25, 2008), https://www.theguardian.com/politics/2008/sep/26/thinktanks.conservatives.

[128] Stephen Laws, "Stephen Laws: The Supreme Court's Unjustified Lawmaking - Judicial Power Project," Judicial Power Project, October 4, 2019, https://judicialpowerproject.org.uk/stephen-laws-the-supreme-courts-unjustified-lawmaking/.

[129] Ministry of Justice, *Government Launches Independent Review Of The Human Rights Act*, 2020, https://www.gov.uk/government/news/government-launches-independent-review-of-the-human-rights-act#:~:text=The%20review%20is%20limited%20to,Robert%20Buckland%20QC%20MP%2C%20said%3A&text=After%2020%20years%20of%20operation,Act%20is%20still%20working%20effectively.

[130] Dominic Casciani, "Covid And The Courts: 'Grave Concerns' For Justice, Warn Watchdogs", *Bbc.Co.Uk*, 2021, https://www.bbc.co.uk/news/uk-55712106.

[131] David Lammy, "Tories Used To Understand The Importance Of Human Rights", *Telegraph.Co.Uk*, 2020, https://www.telegraph.co.uk/news/2020/12/08/tories-used-understand-importance-human-rights/.

process, centralising the popular problematization of the HRA and suggesting an oversized role and powers of the UK courts so far that it could even be possible for the judiciary to be "drawn unduly into matters of policy". Indeed, the HRA is carefully calibrated to protect Parliamentary sovereignty and to prevent courts from overreach into areas of policy.

Although aspects of the questions appear to be neutrally worded, the overall context and implications contained within the questions reinforce fears that the review is but a bureaucratic procedure intended to give a venire of credibility to a predetermined conclusion – that of the need for reform. As such, the below discussion seeks to examine the questions of the review and situate them within the wider context of the review itself in order to dispel misconceptions about how the HRA operates and the approach of the IHRAR in examining this operation.

Theme One: the relationship between domestic courts and the ECtHR

Ultimately, the questions in this section are founded upon criticisms of the HRA and the ECHR that emerge from Eurosceptic grievances relating to the UK's alleged 'subservience' to European power. As stated by the 2015 Conservative Manifesto, removing the HRA "will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK."[132] Meanwhile, in a speech in 2012, David Cameron asserted that the margin of appreciation applied by the ECtHR (the extent to which national governments can interpret the ECHR in line with their own national interests) has shrunk.[133] Similarly, Lord Hoffman argued in 2009 that the ECtHR is "unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States."[134] The implication is, therefore, that with UK courts having to take ECtHR cases into account, they can only apply an uneven perspective that is unfavourable to the UK context.

Section 2 of the HRA requires UK courts to "take into account" any decision of the ECtHR regarding cases pertaining to rights contained within the ECHR.[135] In other words, if a case is brought under the HRA, judges must examine previous ECtHR cases that have similar characteristics to the one in question, in order to take guidance from how the ECHR has been applied in similar circumstances. However, UK courts are not bound by this case law and these cases do not set a precedent that UK courts are required to follow, rather, they UK courts must only consider them when deciding a similar case. Thus, UK courts have discretionary powers when considering the implementation of ECtHR rulings and, as such, decisions of the ECtHR do not automatically mandate the UK to amend domestic legislation. Thus, the Supreme Court is unreservedly the ultimate authority on adjudicating human rights cases in the UK.

From the perspective of victims of human rights breaches, the relationship between UK courts and the ECtHR is a fruitful one that creates space for constructive introspection whilst respecting the domestic context. It is the ECtHR that provides clarity in how the rights contained within the convention should be understood and

[132] Clive Coleman, "Human Rights Law Is Gove's Big Challenge", *Bbc.Co.Uk*, 2015, https://www.bbc.co.uk/news/uk-32733609.

[133] "Speech On The European Court Of Human Rights", *Gov.Uk*, 2012, https://www.gov.uk/government/speeches/speech-on-the-european-court-of-human-rights.

[134] Adam Wagner, "Lord Chief Justice Says European Court Has Too Much Influence Over British Legal System - UK Human Rights Blog", *UK Human Rights Blog*, 2010, https://ukhumanrightsblog.com/2010/04/02/lord-chief-justice-says-european-court-has-too-much-influence-over-british-legal-system/.

[135] *Human Rights Act 1998*, vol. 2, 1998.

what they mean in practice. Removing the obligation to consider the rulings of the ECtHR would, therefore, create confusion in the scope and application of these rights. This is important as the ECtHR hears cases from 47 countries and cases concerning one country have resonance with issues found in the UK context. Certainly, the ever-changing nature of our society results in the emergence of previously unexplored issues and questions (the fast-paced evolution of technology and its implications for privacy considerations as but one example). Having examples and guidance drawn from 47 nations, therefore, can only benefit the UK in navigating such uncertainties. Consequently, the current system not only facilitates constructive dialogue between the UK courts and the ECtHR regarding the application of rights in the UK but does so in a way that allows for an implementation that is compatible with British traditions, cultures, and laws.

In fact, the drafting of Section 2 was precise and deliberate in facilitating a nuanced approach to Strasbourg case law – an aim that was made explicit in the original Government White Paper in 1997, *The Human Rights Bill*; "the rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom, and their interpretation will thus be far more subtly and powerfully woven into our law. And there will be another distinct benefit. British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe". [136] This underscores the primary intention of the HRA: to adopt the "living instrument" principle and tailor judgements to the British context whilst maintaining the beneficial link to the ECtHR. Suggestions that this approach straitjackets the UK ignores the careful and constructive balance that the HRA was purposefully designed to operate, and are overwhelmingly a mechanism for mobilising public emotion and strengthening political opposition to the HRA and the accountability that it enforces.

Moreover, criticisms surrounding the margin of appreciation applied by the ECtHR are similarly embedded within a rejection of governmental accountability and restraint. The margin of appreciation is the degree of scope and discretion the ECtHR gives to its 47 member states to accommodate their respective political and cultural customs. It is applied in cases where the Strasbourg courts deem national governments to be better suited to comment and assess on rights issues as appropriate and proportionate to their domestic context. The degree of manoeuvre within the margin of appreciation depends on the type of human rights case at hand (e.g. the principle would not apply to absolute rights such as prohibition of torture); the extent of the rights restriction; the reason behind it; and approaches to the issue amongst the other contracting states.

However, as outlined by Section 2, regardless of the margin of appreciation applied by the ECtHR, these cases do not set a precedent to be followed by UK courts. They have the ability to interpret cases in line with UK traditions and values – in essence creating the UK's own margin of appreciation regarding human rights cases.

Furthermore, as previously mentioned, even in cases that reach the ECtHR and result in a ruling that is unfavourable to the UK, the UK has the power to disregard the ruling. It is interesting that in making his argument that the margin of appreciation at the ECtHR was shrinking, David Cameron referred to decisions made by the ECtHR

[136] Home Office, "The Human Rights Bill," GOV.UK, October 23, 1997, https://www.gov.uk/government/publications/the-human-rights-bill.

that "are frankly wrong";[137] amongst which was the example of the ECtHR's ruling on the UK's position on prohibiting prisoners from voting – a ruling that the UK ultimately ignored. Therefore, it is arguable that the problem is not the margin of appreciation applied by the ECtHR nor the extent to which UK courts must consider Strasbourg jurisprudence, but rather the political embarrassment caused by the ECtHR or UK courts daring to rule against the UK Government.

Theme Two: The impact of the HRA on the relationship between the judiciary, the executive and the legislature.

This section addresses the relationship between the Government, Parliament and the courts, with the questions underpinned by longstanding grievances covered in the previous chapter of this briefing regarding allegations of judicial overreach and that the HRA gives too much power to "unelected judges".[138]

The HRA protects a delicate balance between the protection and enforcement of human rights by courts on the one hand and the preservation of parliamentary sovereignty on the other, with Sections 3 and 4 of the HRA being carefully calibrated to protect and maintain the separation of powers. The HRA is thus precise in its protection of parliamentary sovereignty and does not allow for UK courts to overturn any Act of Parliament. As such, MEND cannot find any evidence that the HRA poses a risk of domestic courts being unduly drawn into questions of policy, indeed the careful wording of the HRA precludes any possibility of such a thing occurring. Any amendments to these sections would only serve to damage this balance and undermine the ability to protect and enforce the fundamental rights upon which citizens rely.

As previously discussed, Section 3 puts a duty on courts to interpret laws under the assumption that Parliament intended its legislation to be compatible with human rights unless it has stated otherwise. Parliament reserves the right to legislate incompatibly with the ECHR and also reserves the right to legislate to undo a Section 3 ruling. If the courts cannot interpret legislation as compatible with the ECHR, they can issue a DOI under Section 4. Courts cannot strike down legislation nor are DOIs legally binding – Parliament can decide whether it wishes to ignore the DOI or to change the legislation in question.

Therefore, there cannot be any question of any threat to parliamentary sovereignty as it is Parliament that ultimately has control. Once again, the issue appears to be one of potential political embarrassment when courts interpret legislation in a manner that prevents the Government from pursuing policies without accountability, as the case study of forestalling peaceful protest[139] outlined in the earlier chapter demonstrates.

[137] Oliver Wright, "David Cameron To 'Scrap' Human Rights Act For New 'British Bill Of", *Independent.Co.Uk*, 2014, https://www.independent.co.uk/news/uk/politics/conservative-party-conference-cameron-announces-plans-scrap-human-rights-act-9767435.html.

[138] Clive Coleman, "Judicial Review Reform: An Attack On Our Legal Rights?", *Bbc.Co.Uk*, 2014, https://www.bbc.co.uk/news/uk-30226781.

[139] Liberty, A Parliamentarian's Guide To The Human Rights Act (London: The National Council for Civil Liberties, 2010).

Conclusions and Recommendations

Despite prevailing tabloid and political misinformation, the HRA is, by and large, popular amongst the public. A recent poll conducted by Amnesty International found that only one in five British people think that the Government should prioritise reviewing the HRA over the next few years and almost 70% of adults believe the HRA provides an important safety net to be able to hold the Government to account when things go wrong.[140] Similarly, a poll conducted by Liberty on the tenth anniversary of the HRA, revealed the public to be overwhelming in favour of the legislation.[141]

The HRA has been instrumental in protecting the human rights of victims of sexual abuse, domestic abuse, and defamation, as well as vulnerable groups, including disabled groups and those from minority backgrounds. Without the HRA, many victims would be forced to endure a lengthy and expensive process in taking their case to the ECtHR, which for many would render a route to justice inaccessible. However, low levels of public understanding and wider structural barriers frequently prevent victims from pursuing claims under the HRA, even when they would be entitled to do so.

Current challenges in accessing justice

Although in theory the HRA provides ample means to make justice reachable for all, there are areas that need significant improvement to make this a workable reality. Sweeping cuts to funding across the Criminal Justice System (reduction in spending overall between 2010 and 2019 has been around 25%[142] resulting in the closure of 295 court facilities across England and Wales)[143] but particularly to legal aid, has left victims of human rights abuses with little hope of recourse. Meanwhile, the recent loss of the EU Charter of fundamental rights has removed an additional layer of human rights protection, rendering the prospect of having our human rights further eroded under the HRA ever alarming.

Reforms to legal aid provisions have been largely construed as part of broader attacks against the judiciary in the pursuit for political popularity, with reducing funding to "fat-cat"[144] and "activist lawyers"[145] whilst enforcing "tougher sentences"[146] being a popular mantra of many a politician. However, the de-prioritisation of legal aid from public expenditure has been described as a "false economy"[147] that has proven more costly in the long run as litigants are forced to navigate the complexities of the legal system without support, impacting the efficiency of processes and thus adding immense strains to the Criminal Justice System. In 2010, Citizens Advice estimated that for every £1 spent on legal aid, the state saves £2.34 from housing advice; £2.98

[140] "Amnesty International – Human Rights Poll 2021", *Comresglobal.Com*, 2021, https://comresglobal.com/polls/amnesty-international-human-rights-poll-2021/.

[141] "Liberty Human Rights Act Poll", *Comresglobal.Com*, 2010, https://comresglobal.com/polls/liberty-human-rights-act-poll/.

[142] Dominic Grieve, "I've Seen How the Justice System Is Crumbling. Why Doesn't the Government Take Action?," the Guardian (The Guardian, April 5, 2021), https://www.theguardian.com/commentisfree/2021/apr/05/uk-justice-system-court-buildings-legal-aid-cuts#:~:text=In%20real%20terms%2C%20the%20reduction,to%20be%20hard%20to%20achieve.

[143] "Court Closures: Access to Justice," hansard.parliament.uk, June 20, 2019, https://hansard.parliament.uk/Commons/2019-06-20/debates/CAA83503-F9A5-430E-891E-434A242BFB1E/CourtClosuresAccessToJustice.

[144] David Wooding, "Fat Cat Lawyers Will Be Banned from Mounting Last-Ditch Appeals to Stop Foreign Criminals Being Booted Out...," The Sun (The Sun, March 13, 2021), https://www.thesun.co.uk/news/14332061/ban-appeals-to-stop-foreign-criminals-deportations/.

[145] Jamie Grierson and Diane Taylor, "Home Office Wrong to Refer to 'Activist Lawyers', Top Official Admits," the Guardian (The Guardian, August 27, 2020), https://www.theguardian.com/politics/2020/aug/27/home-office-wrong-to-refer-to-activist-lawyers-top-official-admits.

[146] Ministry of Justice, "Radical Sentencing Overhaul to Cut Crime," GOV.UK, September 16, 2020, https://www.gov.uk/government/news/radical-sentencing-overhaul-to-cut-crime.

[147] "Legal Aid Cuts Are a False Economy," Bindmans LLP, January 21, 2019, https://www.bindmans.com/insight/blog/legal-aid-cuts-are-a-false-economy.

from debt advice; £8.80 from benefits advice; and £7.13 from employment advice.[148] The National Audit Office corroborates this, revealing that legal aid reforms cost the Ministry of Justice an additional cost of approximately £3.4million in 2013-14.[149] Beyond economic ramifications, these cuts have obstructed access to justice for the most disadvantaged in society, including through limiting legal representation, support, and advice in addition to the general decline in quality of services and standards, thus severely undermining the prospect of redress and accountability for victims of human rights failings.

The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 introduced changes to the scope and eligibility for legal aid and the rates paid for legal aid work. Between 2010-11 and 2015-16, overall net spending on legal aid fell by 38% in real terms, from around £2.6 billion to £1.6 billion.[150] Ultimately, the legal aid support provided in 925,000 cases before LASPO came into force was reduced to just 497,000 cases the following year, a drop of 46 percent.[151] This resulted in a dramatic reduction in access to legal aid in various areas of law such as family, social welfare, housing, employment, and immigration. Shortly before her resignation as President of the UK Supreme Court, Baroness Hale deplored the cuts as causing "serious difficulty" for the justice system, particularly in the family courts.[152]

The limited access to legal advice and support caused by legal aid cuts resulted in the total number of legal help matters decreasing from 316,993 in 2012/13 to 76,416 in 2015/16 – a 76% drop in just 3 years.[153] This has meant that despite the ever-increasing need for legal assistance, the removal of funding has denied vast swathes of society their rights to access justice. Meanwhile, absent within these reforms is due concern for the wider socio-economic implications that can compound the precarious situations of vulnerable people seeking legal help. Without access to timely legal advice, the consequences for individuals and families are profound, including falling into debt, destitution, susceptibility to domestic abuse, and negative impacts on children's welfare.[154]

Another result of the reforms is a rise in self-representation due to the inaccessibility of legal representation. The National Audit Office report in 2014 found a 30% year-on-year increase in family court cases in which neither party had legal representation.[155] Similarly, an inquiry by the Equality and Human Rights Commission (EHRC) documented that, between 2013-14 and 2017-18, of 7768 discrimination cases, only 43 received funding that would grant them representation in court.[156] Where unrepresented parties are often unfamiliar with legal processes and

[148] Justice for all, "Saving Justice Where next for Legal Aid?," *Citizens Advice* (, 2010), https://www.citizensadvice.org.uk/global/migrated_documents/corporate/saving-justice-2.pdf.

[149] "Implementing Reforms to Civil Legal Aid," *National Audit Office*, 2014, https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf.

[150] Douglas Pyper et al., "Spending of the Ministry of Justice on Legal Aid," House of Commons Library, October 21, 2020, https://commonslibrary.parliament.uk/research-briefings/cdp-2020-0115/.

[151] "Cuts to Legal Aid Have 'Decimated Access to Justice' for Thousands of the Most Vulnerable," Amnesty International, October 10, 2016, https://www.amnesty.org.uk/press-releases/cuts-legal-aid-have-decimated-access-justice-thousands-most-vulnerable.

[152] "Lady Hale: Cuts Causing 'Serious Difficulty' to Justice System," The Guardian (The Guardian, December 27, 2019), https://www.theguardian.com/law/2019/dec/27/lady-hale-cuts-cause-serious-difficulty-to-justice-system.

[153] Lucy Logan Green and James Sandbach, *Justice In Freefall: A Report On The Decline Of Civil Legal Aid In England And Wales*, LAG Special Report (Legal Action, 2016).

[154] Lucy Logan Green and James Sandbach, "Justice in Free Fall: A Report on the Decline of Civil Legal Aid in England and Wales," Legal Action Group, 2016, https://www.lag.org.uk/article/201911/justice-in-free-fall--a-report-on-the-decline-of-civil-legal-aid-in-england-and-wales.

[155] Ministry of Justice and Legal Aid Agency, "Implementing Reforms to Civil Legal Aid," *National Audit Office*, 2014, https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf.

[156] Equality and Human Rights Commission, "Access to Legal Aid for Discrimination Cases," Equalityhumanrights.com, 2019, https://www.equalityhumanrights.com/en/publication-download/access-legal-aid-discrimination-cases.

struggle to represent themselves effectively, a "David vs Goliath"[157] scenario arises, creating an imbalance between an inexperienced and under-resourced party on one side and an experienced and often well-resourced opponent on the other. This has been noted to particularly impact the ability to adequately hold perpetrators to account, as they go essentially unchallenged due to being faced by unrepresented individuals without legal experience.[158]

Furthermore, evidence has shown that the groups most dependent on legal aid, such as women, disabled people, and those from BAME backgrounds, have been disproportionately affected by these reforms, which further compounds existing disparities in accessing justice.[159] For instance, the restriction of legal aid in immigration cases has substantially impacted migrants and refugees already facing acute hardships and inequalities, including issues surrounding language and literacy barriers, immigration status, mental health, poverty, isolation, financial issues, and homelessness.[160] Thus, being subject to further challenges, such as being compelled to make sense of the technicalities and complexities of legal processes or the ever-changing immigration laws, places justice well beyond conceivable reach for many.

Access to justice is a vital pillar in human rights protections and, in the past, UK legal aid has provided a route to redress and justice, particularly for the vulnerable. However, as legal aid reforms render legal recourse financially inaccessible for many, the HRA will remain unenforceable in practice. The removal of legal support has hampered the ability to challenge decisions and secure one's rights, without consideration of the profound consequences on human rights protections and in particular the disproportionate and discriminatory effects on those most in need of its provisions. Where obstacles to accessing justice should be proactively removed particularly for the most vulnerable, the reforms have served to compound discriminations even further.

The dangers of weakening the HRA

Beyond the challenges that already face everyday citizens in accessing their human rights through the HRA, a weakening of the Act would cause further upheaval the UK human rights framework, as well as to the UK's devolution settlements.

Reliance upon Common Law

Common law is an aspect of English law that is derived from custom and judicial precedent rather than statutes and has been hailed by politicians and judges alike in its promotion of human rights. For instance, in *Kennedy v Charity Commission*,[161] Lord Mance lauded the primacy of common law in upholding human rights vis-à-vis the ECHR, stating that Convention rights "may be expected, at least generally even if not always, to reflect and to find their homologue in the common or domestic statute law."[162]

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[157] Equality and Human Rights Commission, "Discrimination Going Unchallenged in Legal Aid System | Equality and Human Rights Commission," Equalityhumanrights.com, 2019, https://www.equalityhumanrights.com/en/our-work/news/discrimination-going-unchallenged-legal-aid-system.

[158] Ibid

[159] Amnesty International UK, *Cuts That Hurt: The Impact Of Legal Aid Cuts In England On Access To Justice* (London: Amnesty International UK, 2016).

[160] Ibid

[161] "Kennedy v the Charity Commission [2014] UKSC 20," Bailii.org, March 26, 2014, https://www.bailii.org/uk/cases/UKSC/2014/20.html.

[162] Mark Elliott, "Common-Law Constitutionalism and Proportionality in the Supreme Court: Kennedy v the Charity Commission," Public Law for Everyone (March 31, 2014), https://publiclawforeveryone.com/2014/03/31/common-law-constitutionalism-and-proportionality-in-the-supreme-court-kennedy-v-the-charity-commission/.

Although commentators frequently cite rights protections under common law as evidence for the redundancy of the HRA,[163] this is misleading as it obscures the weaknesses of common law and suggests that the HRA can be repealed without consequence. As common law is not codified, ambiguities exist with respect to the nuances of the rights protected by common law and to what extent. For instance, regarding the right to liberty and in cases of unlawful arrest or arbitrary detention, both common law and the HRA require evidence of lawful grounds for the detention. However, unlike the HRA, common law is unable to contest the lawfulness of detention when remanded in custody or police failures to investigate a crime.[164] As such, common law does not offer as extensive protection to review and dispute state and institutional failures. Consequently, recent cases of police brutality, [165] negligence,[166] or overreach[167] underscore the criticality of the HRA, particularly for those subject to structural and institutional inequalities.

Furthermore, whilst the HRA is enshrined in statute (requiring Parliamentary approval and oversight) common law rights are developed by judges and thus easier to be amended or overturned by Parliament. Therefore, the HRA exists as an infinitely more robust rights mechanism that defends against politically motivated erosions resulting in a reduction in the extent and strength of rights protection.

Moreover, whilst the HRA provides mechanisms for holding powers to account through Section 3 and 4 rulings, courts have limited powers to review let alone challenge primary legislation under common law, as evidenced by the number of cases taken to Strasbourg Court prior to the enactment of the HRA.[168]

Devolved powers

De-incorporating or restricting ECHR rights in UK law will inevitably generate significant legal complexities for devolved powers; a prospect that has been previously regarded as a "legal and political nightmare".[169] The Scotland Act 1998, the Belfast Agreement and Northern Ireland Act 1998, and the Government of Wales Act 1998 all embed ECHR rights within their respective devolution settlement.

In fact, ECHR rights are more deeply entrenched in devolution settlements than in England. In Scotland, not only does the HRA apply in the same way – in that devolved authorities must comply with ECHR rights under Section 6 and legislation is equally required to be interpreted compatibly under Section 3 – but the ECHR is also directly integrated within the constitutional framework. Under the Scotland Act, the Scottish Parliament are completely bound by ECHR rights in that they do not possess powers to legislate incompatibly, nor can any member of the Government make subordinate legislation or take any action incompatible with ECHR rights.[170] Thus, while English

[163] "When Rights Came Home," Law Gazette, 2020, https://www.lawgazette.co.uk/features/when-rights-came-home/5105937.article.

[164] "Common Law: A Poor Substitute for the Protections Afforded by the Human Rights Act," Hodge Jones & Allen (Hodge Jones & Allen, October 30, 2015), https://www.hja.net/expert-comments/opinion/civil-liberties-human-rights/common-law-a-poor-substitute-for-the-protections-afforded-by-the-human-rights-act/#_edn3.

[165] "Say Their Names: 12 Victims of Police and State Brutality in the UK," Vice.com, June 9, 2020, https://www.vice.com/en/article/qj4j8x/remembering-police-brutality-victims-uk.

[166] Vikram Dodd, "Stephen Lawrence Murder: CPS Asked to Consider New Charges against Police," The Guardian (The Guardian, November 3, 2020), https://www.theguardian.com/uk-news/2020/nov/03/stephen-lawrence-cps-asked-to-consider-new-charges-against-police.

[167] Alexandra Topping, "'A Missed Opportunity': Campaigners React to Everard Vigil Policing Report," the Guardian (The Guardian, March 30, 2021), https://www.theguardian.com/uk-news/2021/mar/30/report-into-policing-of-sarah-everard-vigil-a-missed-opportunity.

[168] Bella Sankey, Rachel Robinson and Sara Ogilvie, *European And External Relations Committee Human Rights Inquiry* (Liberty, 2015).

[169] *JUSTICE PRESS RELEASE: A Legal And Political Nightmare': Report On Devolution And Human Rights Warns Of Major Difficulties Ahead*, 2021, https://justice.org.uk/wp-content/uploads/2015/03/8feb10-Report-on-devolution-and-human-rights-warns-of-major-difficulties-ahead.pdf.

[170] "Scotland Act 1998," Legislation.gov.uk, 2011, https://www.legislation.gov.uk/ukpga/1998/46/contents.

courts only have the capacity to make DOI's, Scottish courts have powers to quash incompatible legislation. As such, where the provisions of human rights laws are stronger, the implications for an overhaul of the HRA are even more complex. In response to IHRAR, the Scottish Government have clearly stated that any attempts to weaken the HRA would be squarely rejected.[171] To disregard Scotland's position is contrary to the Sewell Convention which states that the UK Government cannot legislate without the consent of the Scottish legislature. Although the Sewell Convention is not legally binding and can override the Scottish Parliament's decision, it would most likely trigger significant backlash and a "constitutional crisis".[172]

The effects of amending the HRA would not be as pronounced in Wales, due to the fact that it does not enjoy primary legislative powers. However, the HRA is incorporated in the Government of Wales Act 1998,[173] preventing the National Assembly and authorities from acting incompatibly with ECHR rights. Meanwhile, the situation is even more contentious with regards to Northern Ireland as the HRA forms a fundamental part of the Good Friday or Belfast Agreement, an international treaty between the UK and Ireland. Article 2 of the Agreement obliges 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",[174] a commitment which is observed through the HRA. However, any revision of the HRA that serves to weaken its provisions would undermine the stipulations of this agreement and violate an international treaty. As expressed by academics from the Queen's University in Belfast in their submission to the IHRAR: "We consider the current review into the Human Rights Act to be neither welcome nor timely. We see no need to diminish in any way the protections that the Human Rights Act currently offers to the people of Northern Ireland. Any move that would be widely viewed as undermining the Belfast/Good Friday Agreement and its strong commitment to the advancement and protection of human rights would be highly regrettable… The HRA is seen in part as the mechanism that delivered on the agreement's promises in this respect. The HRA, therefore, has a constitutional function in Northern Ireland that is unique in the UK. Tinkering with it risks upsetting a delicate constitutional balance." [175]

Therefore, the legal and constitutional uncertainties brought by the prospective repeal or reform of the HRA would be met with considerable resistance from the UK's devolved powers. Any attempt to override the will of the devolved settlements would result in inconsistent and disparate standards of human rights protection across the UK which would create further confusion and undermine the unifying purpose of the ECHR. In light of this, the IHRAR must consider the impact of any amendment to the HRA on devolved powers and the arising constitutional complications.

International human rights reputation

Any erosion of the UK human rights framework will inevitably stain the UK's international reputation, particularly considering the existing criticism the UK has

[171] The Scottish Government, "UK Independent Human Rights Act Review: Our Response," Gov.scot (The Scottish Government, March 2, 2021), https://www.gov.scot/publications/scottish-government-response-uk-independent-human-rights-act-review/.

[172] Chris Curry, "HRA Year 5: The HRA and Northern Ireland," British Institute of Human Rights, June 24, 2019, https://www.bihr.org.uk/blog/15doa-october6a.

[173] "Government of Wales Act 1998," Legislation.gov.uk, 2011, https://www.legislation.gov.uk/ukpga/1998/38/contents.

[174] Northern Ireland Office, "The Belfast Agreement," GOV.UK, April 10, 1998, https://www.gov.uk/government/publications/the-belfast-agreement.

[175] Matt Mathers, "Review of Human Rights Act Could Undermine Northern Ireland Peace Process, Academics Warn," *The Independent*, March 1, 2021, https://www.independent.co.uk/news/uk/home-news/human-rights-act-review-northern-ireland-peace-process-b1809478.html.

received from human rights expert committees at the UN[176] and the Council of Europe[177] concerning immigration policies, national security and counter-terror, and the treatment of vulnerable groups. As the UK is still a signatory to the ECHR, amendments to the HRA could contravene the Brighton Declaration under paragraph 7 of the Declaration,[178] which states that all party states must guarantee that ECHR rights enjoy sufficient protection in national law through providing redress mechanisms for rights violations and ensuring national courts take into account Convention rights and Strasbourg case law. Where the aim of the Declaration is to reinforce consistency of approach and respect of human rights across member states, reforming the HRA would undermine this aim. Apparent disregard for international human rights norms and limiting the scope of ECHR rights would also limit the power and legitimacy of the UK in speaking out against rights violations on a global stage. Similarly, it would undermine the ability of the UK to credibly comment on Strasbourg case law (whilst shielding itself from its guidance) in the event of severing or weakening ties with the ECtHR.

Therefore, as long as the UK retains membership to the ECHR, it is desirable for Convention rights to remain embedded within domestic law. In the case of repeal, removing the ability to bring cases in UK courts would serve to re-introduce the costly and lengthy procedure of seeking a remedy in the ECtHR; the very situation the HRA was designed to prevent. Equally, in the case of weakening the HRA, diminishing the influence of the ECtHR would subject the UK to increased scrutiny regarding the application of ECHR rights and thereby inevitably increase the number of rulings declared against the UK. Thus, a redrafting of the HRA may simultaneously be viewed as disassociation from international human rights norms whilst creating layers of legal uncertainty, particularly in undoing decades of rights assimilation in the UK legal tradition.

Recommendations

The current challenges hampering pathways to justice means human rights must be strengthened not diluted. In light of Brexit and the loss of the EU Charter of Fundamental Rights that provided important protections for non-discrimination, migrant, and labour rights, the reliance upon the HRA is all the more critical for the preservation of human rights in the UK. Therefore, we propose that any changes to the human rights framework must only be in pursuit of fortifying the powers contained within the HRA.

The HRA has undoubtedly transformed the human rights landscape in securing and advancing the protection of human rights since it came into force. In particular, it has integrated human rights considerations within our legal and political frameworks and bestowed individuals, organisations, and groups with the means to seek justice through the domestic courts and hold public authorities and the Government to account.

Thus, it is important to remember that where human rights laws are susceptible to political attack it is the most vulnerable and unpopular groups, including migrants

[176] George Greenwood, "UN Says Prevent Extremism Policy Is 'Inherently Flawed'", *Bbc.Co.Uk*, 2017, https://www.bbc.co.uk/news/uk-politics-40286861.

[177] Owen Bowcott, "UK Has Multiple Social Rights Failings, Finds Council Of Europe", *Theguardian.Com*, 2020, https://www.theguardian.com/society/2020/mar/24/uk-has-multiple-social-rights-failings-finds-council-of-europe.

[178] "High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration," *ECHR.coe.int* 30, no. 3 (September 2012): 349–62, https://doi.org/10.1177/016934411203000307.

and minorities that overwhelmingly bear the brunt. Weaponising human rights rulings to arouse populist sentiment will only erode the vital protections that we benefit from every day. Any reformation of the HRA would therefore have severe implications for us all.

MEND thus proposes the following recommendations:

- **Preservation of the HRA in its current form.** The HRA is a crucial instrument that has markedly transformed human rights development in the UK. It has integrated a rights-based approach in both political and legal decision-making whilst granting victims of human right contraventions the means to seeking redress in UK courts. However, any portrayal of its successes within the media and public discourse has been eclipsed by misplaced concerns regarding its alleged bestowal of increased powers on the judiciary and subsequent encroachment on parliamentary sovereignty. Any erosion of the HRA would risk upsetting the carefully calibrated separation of powers that currently exists; would cause untold damage to those that currently rely on it for justice; and could cause a constitutional crisis regarding the UK's devolved powers.

- **Any review of the HRA to include a holistic examination of its operation since its enactment.** The HRA has yielded practical and material benefits for the most vulnerable of society. However, this dimension appears absent from the IHRAR, for which the narrow scope betrays its political underpinnings. Failure to consider and draw conclusions from the real-life experiences of human rights victims will only serve to produce unreliable and erroneous outcomes that do not reflect the realities of the HRA's operation.

- **Funding for the justice system to be prioritised to ensure access to justice.** The severe impact of the reforms enacted under the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, particularly upon vulnerable and marginalised groups, ethnic minorities, young children and those with mental health problems cannot be overstated. MEND encourages immediate reviews into the consequences of legal aid cutbacks and the introduction of reforms such as widening the scope of legal aid eligibility in order to allow more people vital access to legal support.

- **Greater responsibility and accountability of political representatives**. The current attacks against the judiciary, judicial reviews, and the HRA are targeted deflections to avoid accountability and erode democracy across the UK. An independent judiciary is a vital pillar in a working democracy which risks being undermined when subject to misrepresentative attacks from political quarters. Those most impacted by attacks against the judiciary are usually the vulnerable and defenceless whose sole lifeline in obtaining justice often lies in the hands of the lawyers, legal practitioners, and frameworks that are routinely vilified by certain sections of our political representatives. MEND would like to remind politicians and policymakers of the vital nature of a functioning democracy and their moral duty to protect and serve the communities that they represent.

- **Prioritising public awareness of rights protections.** Currently, public awareness regarding the protections afforded by legislation such as the HRA

and the Equality Act 2010 is markedly low. This is particularly concerning considering the level, extent, and impact of the political and media disinformation surrounding them. Ensuring better provision of public legal education is essential in creating honest and open discussions on the fundamentals of legal protections and how individuals can access their rights.

Appendix I: Submission to the Independent Human Rights Act Review

Muslim Engagement
& Development

mend

The Independent Human Rights Act Review (IHRAR)

A Submission from Muslim Engagement and Development (MEND)

March 2021

MEND's contribution to the review

This submission from Muslim Engagement and Development (MEND) to the Independent Human Rights Act Review (IHRAR) seeks to explore the questions posed by the Independent Human Rights Act Review Panel regarding the current functioning of the Human Rights Act 1998 (HRA), the relationship between domestic courts and the European Court of Human Rights (ECtHR), and the operation of the HRA within the relationship between the judiciary, the executive, and the legislative branches of government.

MEND is a community-funded organisation that seeks to encourage political, civic, and social engagement within British Muslim communities through empowering British Muslims to interact with political and media institutions effectively. Our approach to achieving this involves a combination of community engagement (through education, community events, local campaigns to encourage voting etc.) and advocacy work (involving victim support, submissions to parliamentary inquiries, media analysis, election resources, briefings etc.).

Considering MEND's expertise in the protection of minority rights and those of Muslim communities in particular, we feel that we can provide constructive insights into the HRA and its operational value in society. As such, MEND hopes that this contribution may provide guidance to the IHRAR in approaching the HRA in a manner that recognises the experiences of minority communities that rely upon its protections.

Abbreviations

The European Court of Human Rights **(ECtHR)**

The European Convention on Human Rights **(ECHR)**

The Human Rights Act 1998 **(HRA)**

The Independent Human Rights Act Review **(IHRAR)**

Declaration of incompatibility **(DOI)**

Approaching the review

Democratic and free societies are built upon the ideals of equality, justice, and fairness. It is in line with these principles that we expect our governments and public bodies to act, and it is through these principles that we hold them to account when they do not meet this standard. Within this framework, the HRA is a valuable check on power and an important mechanism for mitigating and correcting intentional or unintentional state actions that jeopardise the values, rights, and freedoms that we hold dear. In other words, even the best-intentioned legislation and policies can occasionally overlook potential human rights implications and can threaten the equality we expect as citizens; whether that be impacts to our privacy, our access to education, our freedom to hold political or religious beliefs, or our protection from abuse.

The HRA allows citizens to access justice in these situations. Specifically, it allows courts to determine if human rights have been breached. If this is found to be the case, the courts can demand that any legislation that is incompatible with our human rights obligations be changed by the Government. This is a fundamental and objective protection against any government's abuse of power. However, recent times have seen the current Government's increasing hostility to the courts and indications that they wish to remove or restrict judicial scrutiny. If this were to happen, any potential human rights breaches and considerations to legislation would be subject solely to the decisions of Parliament – a body which cannot escape its politicised underpinnings and the subsequent infiltration of political agendas into any such decision.

Consequently, the importance of the courts cannot be overstated. It is only through the courts that all citizens can be assured access to justice and the legal protection of their rights, regardless of the political machinations of those in political power.

Key conclusions

1. It is unnecessary to amend the duty inscribed within Section 2 of the HRA for UK courts to "take into account" any decision of the ECtHR. MEND believes that this section is operating as intended.

2. Parliamentary sovereignty is appropriately protected under Sections 3 and 4 of the HRA. Any amendments to these sections would only serve to damage this balance and undermine the ability to protect and enforce the fundamental rights upon which citizens rely.

3. To amend or repeal Section 3 of the HRA can only cause lengthy delays in victims accessing redress for potential rights violations.

4. Due to the protection to parliamentary sovereignty inherent within Section 4 of the HRA, MEND can see no benefit nor need for Parliament to be involved earlier in the process regarding DOIs.

5. MEND can see no evidence of Section 14(1) operating in a problematic manner to date and considers the remedies available under this section to be measured, appropriate, and a necessary check on power.

6. MEND deems the provisions contained within the HRA to address secondary legislation that contravenes HRA rights to be measured and essential. Indeed,

as secondary legislation is subject to reduced levels of parliamentary scrutiny in comparison to primary legislation, MEND believes that the HRA plays an important role creating oversight to guard against human rights implications that may have been overlooked in the legislative process.

7. Remedial orders embodied by Section 10 of the HRA provides an adequate balance between securing timely remedies and allowing for effective parliamentary scrutiny. MEND is not aware of any evidence demonstrating that Parliament is placed at a disadvantage by these provisions, thus consider it unnecessary to expand its role at the expense of victims' swift access to justice.

Theme One: the relationship between domestic courts and the European Court of Human Rights

> *"The first theme deals with the relationship between domestic courts and the European Court of Human Rights (ECtHR). As noted in the ToR, under the HRA, domestic courts and tribunals are not bound by case law of the ECtHR, but are required by section 2 HRA to "take into account" that case law (in so far as it is relevant) when determining a question that has arisen in connection with a Convention right. We would welcome any general views on how the relationship is currently working, including any strengths and weakness of the current approach and any recommendations for change…*
>
> *How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?"*

As observed by the terms of reference for the IHRAR, Section 2 of the HRA requires UK courts to "take into account" any decision of the ECtHR for cases pertaining to rights contained within the ECHR.[179] However, UK courts are not bound by this case law. This is important as the ECtHR hears cases from 47 countries and cases concerning one country have resonance with issues found in the UK context. That is not to say that these cases set a precedent that UK courts are required to follow, rather, they must only consider it when deciding a similar case. Thus, UK courts have discretionary powers when considering the implementation of ECtHR rulings and, as such, decisions of the ECtHR do not automatically mandate the UK to amend domestic legislation.

From the perspective of victims of human rights breaches, this relationship is a fruitful one that creates space for constructive introspection whilst respecting the domestic context. Indeed, the current system not only facilitates constructive dialogue between the UK courts and the ECtHR regarding the application of rights in the UK but does so in a way that allows for an implementation that is compatible with British traditions, cultures, and laws.

Moreover, amendments to this section could result in legal uncertainty. With the Government's assertion that the UK will remain a member of the ECHR, it is the ECtHR that provides clarity in how the rights contained within the convention should be understood and what they mean in practice. Removing the obligation to consider the rulings of the ECtHR would, therefore, create confusion in the scope and

[179] *Human Rights Act 1998*, vol. 2, 1998.

application of these rights. At the same time, the ever-changing nature of our society results in the emergence of previously unexplored issues and questions (the fast-paced evolution of technology and its implications for privacy considerations as but one example). Having examples and guidance drawn from 47 nations can only benefit the UK in navigating such uncertainties.

Consequently, MEND argues that it is unnecessary to amend the duty inscribed within Section 2 of the HRA for UK courts to "take into account" any decision of the ECtHR. We believe that this section is operating as intended.

Theme Two: the relationship between the branches of government

The ToR note that the judiciary, the executive and the legislature each have important roles in protecting human rights in the UK. The Review will consider the way the HRA balances those roles, including whether the current approach risks "over-judicialising" public administration and draws domestic courts unduly into questions of policy. We would welcome any general views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether courts have been drawn unduly into matters of policy. We would particularly welcome views on any strengths and weakness of the current approach and any recommendations for change…

Should any change be made to the framework established by sections 3 and 4 of the HRA?

The HRA protects a delicate balance between the protection and enforcement of human rights by courts on the one hand and the preservation of parliamentary sovereignty on the other. Indeed, the HRA is limited in its power and does not allow for UK courts to overturn any Act of Parliament. As such, Sections 3 and 4 of the HRA fully protect and maintain the separation of powers whilst upholding the sovereignty of Parliament. MEND cannot find any evidence that the HRA poses a risk of domestic courts being unduly drawn into questions of policy. Any amendments to these sections would only serve to damage this balance and undermine the ability to protect and enforce the fundamental rights upon which citizens rely.

Parliamentary sovereignty is appropriately protected under Sections 3 and 4 of the HRA. Any amendments to these sections would only serve to damage this balance and undermine the ability to protect and enforce the fundamental rights upon which citizens rely.

Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?

Section 3 of the HRA states: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible

with the Convention rights." [180] What this means in practice is that UK courts must interpret legislation set out by Parliament in a way that is compatible with the ECHR. Essentially, Section 3 requires courts to rely on the assumption that the intent to comply with the UK's human rights obligations is inherent within all legislation passed by Parliament, unless Parliament has explicitly stated to the contrary. Indeed, in a democratic society the hope and assumption should always be that Parliament wishes its legislation to comply with our human rights obligations. Consequently, MEND can find no case brought under this section of the HRA for which the outcome could be seen to have resulted in a reading that was incompatible with the intention of Parliament.

In reality, the careful drafting of the Act specifically precludes any possibility of the courts interpreting legislation in opposition to the intent of Parliament. Parliament reserves the right to legislate incompatibly with the ECHR and also reserves the right to legislate to undo a Section 3 ruling. Therefore, there cannot be any question of any threat to parliamentary sovereignty and MEND can see no evidence for any benefit to amending or repealing Section 3 of the HRA.

It is also important to note that if the courts are unable to interpret legislation compatibly with ECHR, they do not possess the power to change or refuse to apply the law as legislated by Parliament. Instead, they may only make a DOI under Section 4, as will be discussed further below.

At the same time, Section 3 facilitates courts to provide an immediate remedy for individuals and groups subject to human rights breaches. If it were to be amended or repealed the only result would be to delay access to redress as those affected would potentially have no option but to wait possibly for several years for legislation to be redrafted and passed by Parliament.

To amend or repeal Section 3 of the HRA can only cause lengthy delays in victims accessing redress for potential rights violations.

> *Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?*

Section 4 of the HRA grants the courts the ability to declare a piece of legislation to contravene the ECHR if they are unable to interpret legislation as compatible under Section 3. Section 4(6) also states that "a declaration of incompatibility a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and b) is not binding on the parties to the proceedings in which it is made." [181] This reinforces the fact that the HRA has limited influence on the application or operation of law; it cannot strike down legislation nor are DOIs submitted under Section 4 legally binding – Parliament can decide whether it wishes to ignore the DOI or to change the legislation in question.

[180] *Human Rights Act 1998*, vol. 2, 1998.

[181] *Human Rights Act 1998*, vol. 2, 1998.

Evidence has shown that the declarations of incompatibility are an important collaborative process between the judiciary, the executive and the legislature. While the courts adjudicate and assess cases to provide useful conclusions, it is the Government and Parliament which draws upon these conclusions if they wish to reshape policy. Ultimately, the authority remains with Parliament to decide if and how legislation should be amended. Given that the provisions under Section 4 preserve parliamentary sovereignty, there appears be to no need to enhance Parliament's powers earlier in the process.

Due to the protection to parliamentary sovereignty inherent within Section 4 of the HRA, MEND can see no benefit nor need for Parliament to be involved earlier in the process regarding DOIs.

What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

Under Article 15 of the ECHR (derogation in time of emergency), the UK is permitted to derogate some rights under the ECHR in very limited and exceptional instances (such as war or a public emergency that threatens national security). Such derogation must be highly regulated in terms of its justification, its temporary nature, and with specificity regarding which exact rights under the convention are included within the derogation. Derogation orders have been subject to legal challenges over their validity and correct application in both domestic courts and at the ECtHR, where they have been remedied by quashing orders or declarations.

Section 14 of the HRA grants both judicial and parliamentary scrutiny of derogation orders to mitigate against the possibility of arbitrary and disproportionate use. In particular, this section allows domestic courts to ensure that:

- The relevant conditions of Article 15 of the EHRC are met.
- The measures imposed are proportionate to the threat.
- The measures are otherwise compliant with the protections embodied within the HRA and ECHR.
- The measures are otherwise lawful in accordance with domestic legislation and public law principles.

As a case study, shortly after the 9/11 attacks in 2001, the Anti-Terrorism, Crime and Security Act was brought into effect, providing a power to indefinitely detain international terror suspects without trail at Belmarsh prison. The Government, aware that this measure breached Article 5(1) Right to Liberty and Security, issued a Derogation Order under Article 15. This decision was challenged at court with regards to its incompatibility with the provisions of the ECHR and its unlawful and discriminatory targeting of non-UK citizens. In *A v Sec of State for the Home Department*

[2004][182] the courts and House of Lords rendered the derogation as invalid and issued a declaration of incompatibility with Article 5(1) the HRA and quashed the order.[183]

The case is particularly salient because it underlines the importance of the HRA in providing a mechanism for the judiciary to provide scrutiny and a counterbalance to the disproportionate use of powers by the Executive, particularly regarding matters relating to national security. This check on power is essential in maintaining a functioning democracy.

Moreover, Section 14 remains a remedy of last resort. As such, the use of such remedies remains a rarity. Indeed, there are protections in place to ensure against any inappropriate use of remedies. Hence, considering the limited use of derogation orders and challenges to them, MEND regards the remedies available remain both essential and entirely appropriate.

Consequently, MEND can see no evidence of Section 14(1) operating in a problematic manner to date and considers the remedies available under this section to be measured, appropriate, and a necessary check on power.

Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?

As previously discussed, laws that are deemed incompatible with HRA rights can be addressed through Section 3 and 4 of the HRA. However:

- Section 3 cannot be applied to provisions of secondary legislation wherein these provisions are mandated within a primary piece of legislation.

- DOIs have been issued under Section 4, however, this is a rarity and where DOIs have occurred it is overwhelmingly in relation to primary legislation.

There is also an ability to quash or strike down secondary legislation that contravenes the rights protected by the HRA. This is in line with the manner in which any secondary legislation may be quashed if found to be incompatible with a provision of primary legislation as a principle of basic constitutional law. Ultimately, all secondary legislation is subordinate to the provisions of an Act of Parliament – which includes the HRA as it itself is an Act of Parliament. It therefore follows that the quashing of secondary legislation that contravenes the HRA is an integral part of the UK's legislative framework.

Furthermore, Section 10 of the HRA underpins accelerated remedial order procedures in cases of DOIs or when secondary legislation has been quashed, thereby providing an avenue for the Government to quickly rectify any breaches of HRA rights if it is deemed inappropriate to follow the normal processes to address a DOI. Once more, this careful construction serves to support parliamentary sovereignty.

[182] A and others v. Secretary of State for the Home Department, UKHL 56 (EWCA Civ 1502 2004).

[183] Lords Select Committee, *Memorandum By JUSTICE* (Parliament, 2009).

Meanwhile, in the last seven years there appears to have only been 14 successful cases that have challenged secondary legislation on grounds of the HRA.[184] In only four of those cases was the legislation struck down. Considering the fact that thousands of pieces of subordinate legislation are made each year, the comparatively insignificant number of successful cases in challenging secondary legislation highlights both the courts' measured approach when considering secondary legislation and the extreme caution applied when implementing quashing orders, thereby demonstrating the judicial deference to parliamentary sovereignty with courts offering the Executive substantial scope to consider rulings.

Because secondary legislation is subject to reduced levels of parliamentary scrutiny in comparison to primary legislation, MEND believes that the HRA plays an important role in scrutinizing legislation for human rights implications that may have been overlooked in the legislative process. Indeed, where the level of parliamentary involvement is minimal, judicial oversight becomes paramount.

As such, MEND deems the provisions contained within the HRA to address secondary legislation that contravenes HRA rights to be measured and essential mechanisms for ensuring that the UK legislative framework is compatible with our human rights obligations.

Should the remedial order process, as set out in section 10 of Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

The remedial order procedure under Section 10 of the HRA offers a means to revise legislation if a DOI is made by the courts and if a government minister considers it prudent to do so.[185] In such a case, the minister must present a draft order, which is scrutinised by the Joint Committee on Human Rights supported by legal advisors, and which must then be approved by both Houses in order for it to become law. This process takes 120 days, however, urgent orders can also be made provisionally without prior scrutiny but will become void if they are not approved within 120 parliamentary days.

This remedial process is essential for ensuring that human rights breaches can be dealt with swiftly for the sake of victims. Were these provisions not in place, the delay in waiting for new legislation to be passed through Parliament would be significant.

As such, MEND is of the view that remedial orders embodied by Section 10 provides an adequate balance between securing timely remedies and allowing for effective parliamentary scrutiny that acknowledges the legal realities and ramifications. To disrupt this balance would only serve to detrimentally impact those seeking justice. We are not aware of any evidence demonstrating that Parliament is placed at a disadvantage by these provisions, thus consider it unnecessary to expand its role at the expense of victims' swift access to justice.

[184] Joe Tomlinson, Lewis Graham and Alexandra Sinclair, "Does Judicial Review Of Delegated Legislation Under The Human Rights Act 1998 Unduly Interfere With Executive Law-Making?", *UK Constitutional Law Association*, 2021, https://ukconstitutionallaw.org/2021/02/22/joe-tomlinson-lewis-graham-and-alexandra-sinclair-does-judicial-review-of-delegated-legislation-under-the-human-rights-act-1998-unduly-interfere-with-executive-law-making/.

[185] Liberty, *A Parliamentarian's Guide To The Human Rights Act* (London: The National Council for Civil Liberties, 2010).

Appendix II: Submission to the Joint Committee on Human Rights inquiry into the Government's Independent Human Rights Act Review

Muslim Engagement
& Development

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The Joint Committee on Human Rights inquiry into the Government's Independent Human Rights Act Review

A Submission from Muslim Engagement and Development (MEND)

March 2021

MEND's contribution to the inquiry

This submission from Muslim Engagement and Development (MEND) to the Joint Committee on Human Rights (JCHR) inquiry into the Government's Independent Human Rights Act Review seeks to explore how the Human Rights Act (HRA) has advanced human rights in the UK, the relationship between domestic courts and the European Court of Human Rights (ECtHR), and the operation of the HRA with regards to the relationship between the judiciary, the executive, and the legislative branches of government.

MEND is a community-funded organisation that seeks to encourage political, civic, and social engagement within British Muslim communities through empowering British Muslims to interact with political and media institutions effectively. Our approach to achieving this involves a combination of community engagement (through education, community events, local campaigns to encourage voting etc.) and advocacy work (involving victim support, submissions to parliamentary inquiries, media analysis, election resources, briefings etc.).

Considering MEND's expertise in the protection of minority rights and those of Muslim communities in particular, we feel that we can provide constructive insights into the HRA and its operational value in society. As such, MEND hopes that this contribution may provide guidance to the JCHR in approaching the HRA in a manner that recognises the experiences of minority communities that rely upon its protections.

The JCHR is inviting evidence on a range of issues, with key questions to which MEND believes our expertise can make a valuable contribution:

1. Has the HRA led to individuals being more able to enforce their human rights in the UK? How easy or difficult is it for different people to enforce their human rights?

2. What has been the impact of the HRA on the relationship between the courts, Government, and Parliament?

3. Has the correct balance been struck in the HRA in the relationship between the domestic courts and the ECtHR? Are there any advantages or disadvantages in altering that relationship?

Abbreviations

The European Court of Human Rights **(ECtHR)**

The European Convention on Human Rights **(ECHR)**

The Human Rights Act 1998 **(HRA)**

The Independent Human Rights Act Review **(IHRAR)**

Declaration of incompatibility **(DOI)**

Approaching the review

Democratic and free societies are built upon the ideals of equality, justice, and fairness. It is in line with these principles that we expect our governments and public bodies to act, and it is through these principles that we hold them to account when they do not meet this standard. Within this framework, the HRA is a valuable check on power and an important mechanism for mitigating and correcting intentional or unintentional state actions that jeopardise the values, rights, and freedoms that we hold dear. In other words, even the best-intentioned legislation and policies can occasionally overlook potential human rights implications and can threaten the equality we expect as citizens; whether that be impacts to our privacy, our access to education, our freedom to hold political or religious beliefs, or our protection from abuse.

The HRA allows citizens to access justice in these situations. Specifically, it allows courts to determine if human rights have been breached. If this is found to be the case, the courts can demand that any legislation that is incompatible with our human rights obligations be changed by the Government. This is a fundamental and objective protection against any government's abuse of power. However, recent times have seen the current Government's increasing hostility to the courts and indications that they wish to remove or restrict judicial scrutiny. If this were to happen, any potential human rights breaches and considerations to legislation would be subject solely to the decisions of Parliament – a body which cannot escape its politicised underpinnings and the subsequent infiltration of political agendas into any such decision.

Indeed, the HRA is an efficient and carefully calibrated model that embeds human rights protections within our legal and political system. Attempts to politicise and dilute it will only harm those it seeks to protect. To accurately assess the efficacy of the HRA, a review must provide a holistic and comprehensive overview of the HRA's operations since its enactment. However, the questions posed by the IHRAR are very narrow in focus and provide only for a superficial analysis of issues surrounding the separation of powers between the judicial, legislative, and executive branches of government and its relationship with the ECtHR – a focus that betrays the seemingly political underpinnings of the review itself. This fails to appreciate how the HRA has operated in practice and risks obscuring the important ways in which it has facilitated and protected victims of human rights breaches.

It is important to bear in mind that the HRA was meticulously drafted and ratified by Parliament to ensure the centrality of upholding the principles of parliamentary sovereignty. Thus, it has consistently proved to be a fundamental mechanism in negotiating the delicate balance between providing a check on power whilst simultaneously respecting the powers of the legislature. At the same time, it has played a valuable role in instilling a greater awareness of human rights obligations amongst the Government and public authorities and has been instrumental in enabling victims of human rights violations to seek redress.

Key conclusions

1. While the HRA is operating as intended, wider challenges endemic throughout the criminal justice system, including funding cuts to legal aid, create barriers for victims seeking justice.

2. Provisions within the HRA appropriately maintain a delicate balance between respecting parliamentary sovereignty whilst ensuring courts have a means to redress human rights breaches.

3. The duty inscribed within Section 2 of the HRA for UK courts to "take into account" any decision of the ECtHR is operating as intended and provides space for constructive introspection whilst respecting the domestic context.

"Has the Human Rights Act led to individuals being more able to enforce their human rights in the UK? How easy or difficult is it for different people to enforce their Human Rights?"

The HRA has undoubtedly transformed the human rights landscape in securing and advancing the protection of human rights since it came into force. In particular, it has integrated human rights considerations within our legal and political frameworks and bestowed individuals, organisations, and groups with the means to seek justice through the domestic courts and hold public authorities and the Government to account.

The HRA has been instrumental in protecting the human rights of victims of rape, domestic abuse, and defamation, as well as vulnerable groups, including disabled groups and those from minority backgrounds. Without the HRA, many victims would be forced to endure a lengthy and expensive process in taking their case to the ECtHR, which for many would render a route to justice inaccessible. A recent poll conducted by Amnesty International found that almost 70% of adults believe the HRA provides an important safety net to be able to hold the Government to account when things go wrong.[186] This underscores the criticality of the HRA as a fundamental tool in the protection and enforcement of human rights.

However, whilst the HRA has been indispensable in making rights directly enforceable, there are wider barriers to accessing justice, including funding cuts under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. With regards to social welfare law, the total number of legal help matters started decreased from 316,993 in 2012/13 to a 76,416 in 2015/16 – a 76% drop in just 3 years.[187] This has meant

[186] "Amnesty International – Human Rights Poll 2021", *Comresglobal.Com*, 2021, https://comresglobal.com/polls/amnesty-international-human-rights-poll-2021/ .

[187] Lucy Logan Green and James Sandbach, *Justice In Freefall: A Report On The Decline Of Civil Legal Aid In England And Wales*, LAG Special Report (Legal Action, 2016).

that despite the ever-increasing need for legal assistance, removal of funding has denied vast swathes of society their rights to access justice. Furthermore, evidence has shown that the groups most dependent on legal aid, such as women, disabled people, and those from BAME backgrounds, have been disproportionately affected by these reforms, which further compounds existing disparities in accessing justice.[188] With legal recourse being financially inaccessible for many, the HRA thus often remains unenforceable in practice.

The current challenges hampering pathways to justice means human rights must be strengthened not diluted. In light of Brexit and the loss of the EU Charter of Fundamental Rights that provided important protections for non-discrimination, migrant, and labour rights, the reliance upon the HRA is all the more critical for the preservation of human rights in the UK. Therefore, we propose that any changes to the human rights framework must only be in pursuit of fortifying the powers contained within the HRA.

While the HRA is operating as intended, wider challenges endemic throughout the criminal justice system, including funding cuts to legal aid, create barriers for victims seeking justice.

"What has been the impact of the Human Rights Act on the relationship between the Courts, Government and Parliament?"

The HRA maintains a delicate balance between respecting parliamentary sovereignty whilst ensuring courts have a means to redress significant human rights breaches. Concern amongst certain politicians and conservative think tanks[189] regarding the role of the HRA and ECtHR in expanding judicial powers at the expense of parliamentary decision-making are at best misguided. In reality, Sections 3 and 4 of the HRA fully protect and maintain the separation of powers whilst upholding the sovereignty of Parliament. Under Section 3, courts are required to interpret legislation as compatible with ECHR rights and, if they are unable to do so, issue a DOI under Section 4. Such powers are not legally binding. Indeed, under Section 3 interpretations can be overridden, whilst under Section 4, Parliament retains the freedom and powers to ignore the declaration, overturn it, or take steps to amend legislation as they see fit. The relationship can therefore be best exemplified as an important collaborative process between the judiciary, the executive, and the legislature. While the courts adjudicate and assess cases to provide useful conclusions, it is the Government and Parliament which draws upon these conclusions if they wish to reshape policy. Ultimately, the authority remains with Parliament to decide if and how legislation should be amended. In reality, the courts display significant deference to Parliament, exemplified by the fact that only 43 declarations of incompatibility have been issued over the past 20 years.[190]

Provisions within the HRA appropriately maintain a delicate balance between respecting parliamentary sovereignty whilst ensuring courts have a means to redress human rights breaches.

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[188] Amnesty International UK, *Cuts That Hurt: The Impact Of Legal Aid Cuts In England On Access To Justice* (London: Amnesty International UK, 2016).

[189] Michael Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights Compatible With Parliamentary Democracy In The UK* (Policy Exchange, 2016).

[190] Ministry of Justice, *Report To The Joint Committee On Human Rights On The Government'S Response To Human Rights Judgments 2019–2020,* Responding To Human Rights Judgments (APS Group, 2020).

Has the correct balance been struck in the Human Rights Act in the relationship between the domestic Courts and the European Court of Human Rights? Are there any advantages or disadvantages in altering that relationship?

Arguments for the severance of formal links with the ECtHR often cite the ECtHR's undue influence on domestic courts. However the Supreme Court is already the ultimate authority on adjudicating on the UK's human rights cases. Meanwhile, Section 2 of the HRA requires UK courts merely to "take into account" any decision of the ECtHR for cases pertaining to rights contained within the ECHR.[191] However, UK courts are not bound by this case law. Such cases do not set a precedent that UK courts are required to follow, rather, they must only consider them when deciding a similar case.

From the perspective of victims of human rights breaches, this relationship is a fruitful one that creates space for constructive introspection whilst respecting the domestic context. The ECtHR hears cases from 47 countries and cases concerning one country have resonance with issues found in the UK context. Consequently, the current system not only facilitates constructive dialogue between the UK courts and the ECtHR regarding the application of rights in the UK but does so in a way that allows for an implementation that is compatible with British traditions, cultures, and laws.

In R v Horncastle[192] the appellants called upon the decisions of the ECtHR (made previously in a similar case Al-Khawaja and Tahery v United Kingdom)[193] which upheld that that hearsay evidence would breach Article 6 of the ECHR: the right to a fair trial. However, the UK's Supreme Court dismissed the appeal, on the basis that under English law, hearsay evidence may be used as long as the relevant conditions under s.116 Criminal Justice Act 2003 are met; safeguards of the legal process, which the ECtHR failed to consider. The case confirms that Section 2 of the HRA strikes an important balance that allows domestic courts to depart from and disagree with the decisions of the ECtHR whilst facilitating beneficial insights, in this instance, which alerted the Grand Chamber to the specificities of legal procedures in the UK.

Thus, the HRA affords an interdependent and mutually beneficial system whereby just as domestic courts can take into account ECtHR jurisprudence, UK courts can equally exert influence on the ECtHR. As such, altering the current relationship may risk limiting the UK courts' ability to influence Strasbourg decision-making and counterproductively, may result in more cases against the UK reaching the ECtHR because this dialogue has been obstructed.

In its current state, the reduction in the number of UK cases being heard by the ECtHR is a testament to the importance and success of the HRA in remedying human rights cases. In 2020, only 0.7% of applications allocated to a judicial formation at the Strasbourg court were UK cases,[194] whilst in 2000 6% of all applications allocated to a decision body were UK cases. Even amongst those that do reach the ECtHR, it is rare that they result in a violation. In 2020 0.2% (2) out of all the 871 judgements given by the Strasbourg Court found a violation by the UK[195] a clear decrease since 2002 where

[191] *Human Rights Act 1998*, vol. 2, 1998.

[192] R v Horncastle and others (Apellants), [2009] UKSC 14.

[193] Al-Khawaja and Tahery v UK [2011] ECHR 2127

[194] European Court of Human Rights, *Analysis Of Statistics 2020*, 2021, https://www.echr.coe.int/Documents/Stats_analysis_2020_ENG.pdf.

[195] Ibid

the figure was 3.6%.[196] This suggests that the HRA has drastically reduced the frequency with which the ECtHR declares UK cases in violation of the ECHR as a result of the conclusions provided by the domestic courts.

Moreover, amendments to this section could result in legal uncertainty. With the Government's assertion that the UK will remain a member of the ECHR, it is the ECtHR that provides clarity in how the rights contained within the ECHR should be understood and what they mean in practice. Removing the obligation to consider the rulings of the ECtHR would, therefore, create confusion in the scope and application of these rights.

As such, there are few perceivable advantages to altering the current relationship. The critical role of the ECtHR in interpreting and protection rights in the UK should not be underestimated.

The duty inscribed within Section 2 of the HRA for UK courts to "take into account" any decision of the ECtHR is operating as intended and provides space for constructive introspection whilst respecting the domestic context.

[196] European Court of Human Rights, *Annual Report 2002*, 2003, https://www.echr.coe.int/Documents/Annual_report_2002_ENG.pdf.

How MEND can assist parliamentarians, policymakers, and community stakeholders

- Providing briefings, information, analysis, and expertise on issues impacting Muslim communities.
- Arranging opportunities for parliamentarians, policymakers, and community stakeholders to engage with their local Muslim communities.
- Conducting research within Muslim communities.
- Connecting parliamentarians, policymakers, and community stakeholders to other local stakeholders.

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