

# HUMAN RIGHTS AND THE UK CONSTITUTION

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EXECUTIVE SUMMARY

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## Executive summary

1. Human rights law has been the subject of considerable controversy over the last few years. This paper aims to clarify some of the key issues at stake. In particular, it evaluates the current state of UK human rights law, and explores how proposals for a new Bill of Rights may affect how human rights are protected within the framework of the UK's unwritten constitution.
2. The UK is a parliamentary democracy: the British people can be said to govern themselves through their elected representatives in Parliament. However, it is widely accepted that healthy democracies are based on more than majority rule. Parliament, the executive and other organs of the state are expected to respect individual freedom and the human rights of every person subject to their jurisdiction.
3. From the Magna Carta through to the current day, there has been lively debate about what constitutes a human right. Deep disagreement also often exists as to what constitutes a *breach* of an individual's human rights. This is particularly true when it comes to 'qualified rights' such as freedom of speech and the right to privacy, which can come into conflict with other rights. As a result, elected politicians are usually given the authority to decide how individual rights should be balanced against the public interest.
4. However, in a majoritarian political system, minorities and other disadvantaged groups are at risk of being subject to discrimination or unfair treatment. Furthermore, most of the day-to-day functioning of the state is controlled by the executive, which through the government of the day usually exercises a dominant influence over Parliament. This limits the extent to which Parliament can protect individual rights and makes it difficult for public bodies to be held fully to account for how they use their wide-ranging powers.

5. As a result, courts have come to play a more active role in protecting individual rights over the last half century or so. This trend is not just confined to the UK: it has been a feature of elected democracies across the world. Some have expressed concern that judges lack the democratic legitimacy to perform this task. However, the opposing argument can also be made: judicial protection of human rights may enhance the functioning of democratic states. It ensures greater protection for the rights of vulnerable individuals and groups who lack political influence, helps to create a 'culture of justification' which benefits all citizens and provides a counterbalance to the dominance of the executive over Parliament.
6. In many states, such as the USA, Germany and South Africa, written constitutions give the courts the power to overturn legislation which is deemed to violate basic rights. However, the UK has not followed this approach. Instead, over the last few decades, it has developed its own distinctive system, which gives courts a role in protecting individual rights while respecting the sovereign law-making authority of Parliament.
7. Several different layers of rights protection currently exist in British law. The common law requires that public authorities must have a clear legal basis for their actions, respect the requirements of fair procedure, and act in a 'rational' manner. However, the protection it offers against abuses of state power is mainly limited to these largely procedural requirements. In contrast, the Human Rights Act 1998 (HRA), which 'incorporated' most of the rights and freedoms contained in the European Convention on Human Rights (ECHR) into UK law, gives more substantive legal protection to individual rights.
8. Moving to the level of international law, the European Court of Human Rights (the 'Strasbourg Court') acts as a court 'of last resort' to protect human rights across the whole of Europe. Individuals can bring a petition to the European Court of Human Rights alleging a breach of their Convention rights once they have exhausted all domestic remedies. All European states (except Belarus) have agreed to respect and give effect to judgments of the Court.
9. The evidence suggests that the ECHR and HRA have enhanced protection for individual rights in the UK. Furthermore, the current design of British human rights law has received favourable reviews

from legal academics and the judiciary. However, it has also been subject to strong criticism from certain quarters. Some have called for a fundamental reform of the European Court of Human Rights, and for the HRA to be replaced by a new 'Bill of Rights'. This has prompted the government to establish the Commission on a Bill of Rights, which has been charged with investigating whether there is a need for a UK Bill of Rights to replace the HRA to 'protect and extend' existing liberties.

10. In particular, critics have alleged that the European Court of Human Rights has been too 'activist' in developing its jurisprudence on human rights. However, on a close legal analysis, the 'living instrument' approach adopted by the Strasbourg Court to interpreting the ECHR appears to be fully in line with the practice of other international courts. It also ensures that the case-law of the Court is able to reflect modern moral and social standards: for example, it has allowed the Court to play a leading role in protecting the rights of LGBT persons across Europe.
11. The structural relationship between the UK and the Court also seems to be fully compatible with democratic principles. The UK has voluntarily accepted the jurisdiction of the Strasbourg Court. While its judgments are binding in international law, Parliament and the UK government can choose under national law not to give effect to judgments of the Court. However, whether it is wise or justified for them to do so is another question. Good reasons exist as to why the UK should be slow to refuse to comply with a judgment of the Strasbourg Court, not least because of the potential damage it could cause to the UK's international reputation and to human rights and democracy across Europe at large.
12. Critics have also attacked the HRA for establishing too close a link between UK law and the Strasbourg jurisprudence, instead of encouraging the development of a 'home-grown' and distinctively 'British' approach to human rights adjudication. The HRA has also been attacked for failing to strike the right balance between individual rights and the 'common good', and for being out of synch with British traditions of governance. Once again, these criticisms appear to be open to question.
13. The HRA was designed to give the courts a greater role in protecting individual rights while ensuring that the sovereign power

of Parliament to make law remained intact. The machinery of the Act appears to have functioned well over the twelve years in which it has been in effect: for example, Parliament responded positively to 18 out of the 19 definitive 'declarations of incompatibility' issued by the UK courts up to August 2011.

14. A new Bill of Rights could make some far-reaching adjustments to UK human rights law. However, any attempt to 'de-incorporate' Convention rights in UK law and break the link with Strasbourg will give rise to serious legal complications, and may be incompatible with the UK's international commitments. In any case, it is also difficult to identify how a 'home-grown' human rights jurisprudence would differ in substance from what has emerged from the ECHR and HRA case-law, unless it were to drastically restrict current rights protection or the categories of people who have access to them.
15. There are strong arguments for drawing up a new Bill of Rights to expand human rights protection beyond that offered by the ECHR. However, this would be likely to extend the role of the judiciary in protecting rights rather than reining it in, as many critics of the HRA would like. Furthermore, any such expanded Bill of Rights should ideally be the product of an extended consultative process that permits disadvantaged groups to participate fully in the process. The consequences for the devolved regions should also be taken into account, especially given that a separate Bill of Rights process has been underway in Northern Ireland for over a decade.
16. In conclusion, it should be acknowledged that getting the balance right between respecting the decisions of elected politicians and protecting individual rights is difficult. Regardless, the current state of human rights law in the UK appears to be compatible with constitutional principles. It also appears to strike a defensible balance between respect for democracy and the need to protect individual rights. Attempting to recalibrate that balance may prove to be a difficult and thankless task. It may also be unnecessary, given that the current state of UK human rights law is both principled and workable as long as Parliament, the executive and the courts continue to engage constructively with one another.

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Human rights law has been the subject of considerable controversy in the UK over the last few years. In *Human rights and the UK constitution* Colm O’Cinneide clarifies some of the key issues at stake. In particular he evaluates the workings of UK human rights law, and the nature of the relationship between the European Court of Human Rights and the UK courts and Parliament. Finally, the report explores how proposals for a new Bill of Rights may affect the protection of human rights within the framework of the UK’s unwritten constitution.

*Human rights and the UK constitution* finds that the current state of human rights law in the UK strikes a good balance between respect for democracy and the need to protect human rights. Attempting to recalibrate that balance may prove to be a difficult and thankless task.

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