

Q&A: Explaining the UK Government's proposals to replace the Human Rights Act 1998 and the implications for Europe

Katie Lines,¹ 28 April 2022

Questions discussed in this document (click to read):

1. What is happening in the UK and why should other countries in Europe be concerned?
2. How likely is the UK Government to follow through on its reform plans?
3. What is the motivation behind these current reform proposals?
4. What is the current status of the ECHR in UK law?
5. What are the key proposals for change?
6. What impact could the UK's reform proposals have on the legitimacy of the Convention system as a whole?
7. How might the UK's reform proposals be utilised by countries with a poor record of compliance with the ECHR?
8. Would the reform proposals limit the ability of individuals in the UK to enforce their rights under the ECHR in UK courts and would they limit the remedies available?
9. What impact would the reform proposals have on applications to the ECtHR?
10. Are the Government's proposals for change supported by the findings of the Independent Review about the operation of the Human Rights Act in practice?
11. What are the views of the UK's parliamentary Joint Committee on Human Rights?
12. What about Brexit and the loss of the EU Charter of Fundamental Rights in this context?

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1. What is happening in the UK and why should other countries in Europe be concerned?

The UK's Conservative Government has proposed significant changes to the country's framework for implementing the European Convention on Human Rights ("ECHR") and for executing judgments of the European Court of Human Rights ("ECtHR"). The UK Government intends to replace the domestic legislation that gives effect to Convention rights – the [Human Rights Act 1998](#) – with a Bill of Rights. It also wishes to reduce the influence of the Strasbourg Court on UK law. If enacted, the proposed reforms would place the UK in breach of its obligations under the Convention and would transform the UK's national system for protecting Convention rights from an innovative and effective system to one of the most problematic in the Council of Europe.

The UK Government has recently concluded a public consultation in which views were sought on a number of different options for reform. The consultation document containing all proposed options can be found [here](#). This Q&A focuses on the proposals which are likely to have the most significant implications for other European countries.

2. How likely is the UK Government to follow through on its reform plans?

This is not the first time that the Conservative party, which is currently governing with a comfortable majority, has proposed to reform the Human Rights Act. However, the failure of previous attempts does not mean the Government's current plans should be taken lightly, as they have reached a fairly advanced stage and the relevant ministers seem committed to change. On 10 May 2022, the Queen will be presenting to Parliament the programme of legislation that the Government intends to take forward in the following session of Parliament, and it is expected that a draft of the proposed Bill of Rights will be announced then. Human rights legislation cannot be entrenched in UK law, so the Human Rights Act can be repealed or amended by ordinary legislation passed by a simple majority in each House of Parliament.

3. What is the motivation behind these current reform proposals?

The politician spearheading the Government's proposals, Dominic Raab MP, has been a firm critic of the Human Rights Act for many years and [some](#) see the current plans as a fulfilment of his long standing political and ideological goals. Raab has previously [stated](#) that he does not support the Human Rights Act, nor believe in economic and social rights. In 2010, Raab published a book on these themes entitled "The Assault on Liberty", which was [billed](#) as a "polemic on... the proliferation of Human Rights".

The Government's current reform proposals are not in line with recommendations made by an Independent Review, which the Government established in December 2020 to examine how the Human Rights Act is operating in practice and whether any change is needed. The Review Panel published its [final report](#) in December 2021, and concluded that there was little wrong with the current human rights regime in the UK. The Panel mainly proposed maintaining the status quo and did not recommend any major reforms to the Human Rights Act (see Q10 below for further detail on the conclusions of the Independent Review).

The Government's current plans go well beyond the Independent Review's recommendations, and include proposals that are contrary to the Review's conclusions. In addition, [around half](#) of the Government's current proposals for change relate to issues the Independent Review was not asked to consider, mostly because they were outside its Terms of Reference.

The UK Government has not explained these discrepancies, but they make sense if the current plans for reform are a reflection of Dominic Raab's political priorities. Raab was appointed as Justice Secretary in September 2021, nine months after the Review had been established. Raab therefore did not determine the Review's Terms of Reference, but now has primary responsibility for deciding the proposals for reform, and whether the Ministry of Justice follows the Review's recommendations.

More broadly, the proposed reforms align with [a number](#) of recent Government policies that have sought to strengthen executive power and reduce accountability, such as the Government's [attempt](#) in 2019 to prorogue Parliament for the longest period in modern times, which [many saw](#) as an effort to avoid parliamentary scrutiny of the Government's Brexit plans. Ultimately, the decision to prorogue Parliament was [ruled unlawful](#) by the UK Supreme Court.

4. What is the current status of the ECHR in UK law?

International treaties like the ECHR are not automatically incorporated into UK domestic law. Instead, the UK gave effect to the ECHR by enacting the Human Rights Act 1998, which created domestic rights that mirror those in the Convention. The Human Rights Act enables people in the UK to rely on the Convention rights, as set out in the Act, before national courts. It also requires domestic courts to take into account relevant jurisprudence of the ECtHR, and to interpret and give effect to UK legislation in a way that is compatible with the Convention rights, so far as this is possible.

A fundamental element of the UK's unwritten constitution is the principle of Parliamentary Sovereignty. The Human Rights Act respects Parliament's sovereignty and does not empower a court to strike down an Act of Parliament. In addition, a court cannot strike down secondary legislation where this is precluded by an Act of Parliament. Although the court cannot make a quashing order in these situations, it can make a declaration that the legislation in question is incompatible with the ECHR, and it is then for the Government and Parliament to remedy the conflict.

5. What are the key proposals for change?

The following three proposals from the Government's [consultation document](#) would constitute some of the most significant departures from the current human rights framework in the UK.

(A) The Government wishes to affirm the UK Parliament's sovereignty in the context of adverse Strasbourg rulings.

The Government intends to create a "[democratic shield](#)" in order to protect the UK Parliament's sovereignty "in the context of adverse Strasbourg rulings" and to make clear that Parliament "has the last word" on how to respond to judgments from the ECtHR. To achieve this aim, the consultation document proposes inserting a clause in the Bill of Rights which affirms that "the judgments and decisions of the European Court of Human Rights—(a) are not part of the law of any part of the United Kingdom, and (b) cannot affect the right of Parliament to legislate or otherwise affect the constitutional principle of Parliamentary sovereignty." The Government's proposals also include an option for allowing ministers to hold a vote in Parliament on specific ECtHR judgments and how the UK should respond to them.

Non-compliance with judgments of the Strasbourg Court would be a breach of the obligation in Article 46 ECHR to abide by judgments of the Court and, if maintained over time, would become incompatible with the UK's continued membership of the ECHR system.

The Government's plans for change are consistent with Europe-wide trends identified by the Commissioner for Human Rights, Dunja Mijatović. In 2018, Mijatović [expressed concern](#) around instances of selective or non-implementation of ECtHR judgments, which were often "accompanied by a political rhetoric which delegitimises the Court, and as a consequence the Council of Europe and the values and principles it stands for".

(B) The UK Government wishes to reduce the influence of the Strasbourg Court on UK law.

The Government believes that the UK [should](#) “develop a constitutional jurisprudence on rights and liberties that is centred, first and foremost, around [its] own unique history, legal traditions and constitution”. It therefore wishes to strengthen domestic common law traditions and reinforce the supremacy of the UK Supreme Court. To this end, the UK Government is seeking to reduce the influence of Strasbourg jurisprudence on UK case law. Currently, domestic courts are required to “take into account” relevant jurisprudence of the ECtHR. The consultation document proposes removing this requirement, and instead inserting a clause in the new Bill of Rights that permits (but does not require) a domestic court to consider relevant case law from the Strasbourg Court, while also stating that domestic courts are “not required to follow or apply any judgment or other decision of the European Court of Human Rights”.

The consultation document is [particularly critical](#) of the Strasbourg Court for its “living instrument” or expansive interpretation of Convention rights, which is described as a “concerted attempt” to expand human rights law beyond the rights set out in the Convention. Instead, one of the options consulted upon is a form of originalism which would direct a domestic court to consider the original meaning of a Convention right (rather than the ECtHR’s interpretation of that right). The consultation document [asks](#) whether the Bill of Rights should explicitly permit a court to “have regard to the preparatory work of the European Convention on Human Rights”.

The consultation document also seeks views on whether a new Bill of Rights should decouple human rights protections in the UK from the Convention rights. The consultation document [asks](#) whether the Bill of Rights should state that “it is not necessary to construe a right or freedom in this Bill of Rights as having the same meaning as a corresponding right or freedom in the European Convention on Human Rights”. If enacted, this clause would almost inevitably lead to a divergence between the human rights framework in the UK and the rights protected by the ECHR.

(C) The UK Government has a proposed a number of changes that if enacted would alter the substance of the rights protected under UK law and would contravene the principle that human rights are universal (as affirmed in Article 1 ECHR).

The UK Government is [critical](#) of human rights claims being brought by people who have “themselves showed a flagrant disregard for the rights of others”. The Government wants domestic courts to review the extent to which a person has fulfilled their responsibilities to society when considering the proportionality of an interference with that person’s rights, and to consider the claimant’s conduct when determining whether to award damages. The consultation document seeks views on whether the conduct to be considered should be confined to the circumstances of the case, or whether a court should be allowed to consider the claimant’s “wider conduct”, including their past behaviour.

The Government also [believes](#) the ECHR has given rise to impediments to tackling “the challenges posed by illegal and irregular migration”, and it wishes to prevent human rights claims from “frustrating” deportations that are in the public interest. The consultation document suggests a number of options, one of which is for the Bill of Rights to provide that certain rights “cannot prevent the deportation of a certain category of individual”, such as individuals who have been imprisoned for a certain length of time. The Government’s proposals would therefore grant different levels of human rights protection to UK nationals and non-nationals.

In addition, the Government [believes](#) that the courts have strayed too far into the realm of public policy, and have expanded the State’s positive obligations under the ECHR to impose “overly prescriptive” requirements on public authorities. The Government is particularly critical of public authorities being required to spend time and effort protecting the rights of “serious criminals”, as the Government believes this “displaces police resources allocated to protecting wider society”. To

combat this perceived problem, the Government wishes to “restrain the imposition and expansion of positive obligations” on public bodies.

6. What impact could the UK’s reform proposals have on the legitimacy of the Convention system as a whole?

The Council of Europe [considers](#) its legitimacy to come from member states protecting Convention rights domestically; implementing adverse judgments of the Strasbourg Court; and avoiding new violations.

The UK currently has a strong record in all three of these areas. The country has one of the strongest national systems for protecting Convention rights; one of the [best](#) compliance records for addressing human rights violations; and, since 2017, the [lowest number](#) of cases per 100,000 inhabitants brought against it in the Strasbourg Court. The number of cases in which the ECtHR rules against the UK is also low. In [2020](#), 284 cases were lodged against the UK, and the Court found a violation in only two.

If the Bill of Rights is enacted in line with the Government’s most strident proposals for change, then the UK’s national system for protecting Convention rights would be transformed to one of the weakest in the Council of Europe, and the country would be unable to meet its obligations under the Convention. The Bill of Rights would give Parliament tacit approval to choose not to implement ECtHR judgments, and there would almost inevitably be a widening divergence between the rights protected under UK law and the Convention rights. The Bill of Rights would therefore jeopardise all three of the domestic conditions which the Council of Europe believes are necessary to confer legitimacy upon the Convention system.

7. How might the UK’s reform proposals be utilised by countries with a poor record of compliance with the ECHR?

If the UK, one of the countries with the best compliance records, were to substantially weaken its domestic human rights framework, other members of the Council of Europe which have resisted the full application of European human rights standards to their own legal systems would have a useful example that they can draw upon to justify their own divergence from the ECHR. The UK is likely to find itself in uncomfortable company. Legal commentators are already [discussing](#) the UK Government’s proposals for reform as an example of the challenges facing the Convention system, alongside Russia [withdrawing and then being expelled](#) from the Council of Europe over its invasion of Ukraine, and the Polish Constitutional Tribunal [finding](#) that the right to a fair trial in Article 6(1) ECHR is incompatible with the Polish Constitution in so far as it applies to the election of constitutional judges.

8. Would the reform proposals limit the ability of individuals in the UK to enforce their rights under the ECHR in UK courts and would they limit the remedies available?

Yes, in a number of ways.

As discussed above, a higher level of human rights protection would be available to UK nationals over non-nationals; and claimants could receive a lower level of human rights protection and/or damages if they have not fulfilled their “responsibilities to society”.

In addition, the Bill of Rights would introduce a permission stage for domestic human rights claims. The consultation document [proposes](#) that claimants should be required to demonstrate that they have suffered a “significant disadvantage” before their claim can be heard, or that the “overriding public importance” of their case otherwise merits it being considered by a court. The document also

[proposes](#) restricting the circumstances in which a human rights claim can be brought, and suggests that the Bill of Rights should require applicants to pursue all other possible claims first before a rights-based claim will be considered by a court. The Government expects this “to reduce the number of human rights-based claims being made overall”.

Finally and perhaps most significantly, as discussed above, the Government has proposed weakening the requirement for domestic courts to take into account Strasbourg jurisprudence, and has suggested that the rights protected under UK law need not be interpreted in line with the Convention rights. If these changes are enacted, domestic human rights protections in the UK will almost inevitably diverge over time from the ECtHR’s interpretation of the Convention rights, meaning that individuals may find themselves unable to enforce their Convention rights before UK courts.

9. What impact would the reform proposals have on applications to the ECtHR?

Over the last two decades, the Human Rights Act 1998 has [led to](#) a closer alignment between the ECtHR and UK domestic courts in the application of the Convention, which has resulted in a reduction in the number of cases brought against the UK before the Strasbourg Court. This trend is likely to be reversed if the proposed Bill of Rights is enacted, as individuals will have no option but to turn to the Strasbourg Court to assert Convention rights that are no longer adequately protected in UK law. Therefore, the UK Government’s plans for reform will almost inevitably result in more applications being made to the ECtHR. This would further burden the Strasbourg Court which is already [struggling with its caseload](#).

10. Are the Government’s proposals for change supported by the findings of the Independent Review about the operation of the Human Rights Act in practice?

As discussed above, in December 2020, the Government established an [Independent Human Rights Act Review](#) to examine how the Human Rights Act is operating in practice and whether any change is required. The Review was asked to answer [questions under two themes](#): (1) The relationship between domestic courts and the European Court of Human Rights, and (2) The impact of the Human Rights Act on the relationship between the judiciary, the executive and the legislature.

The Independent Review conducted a thorough evidence gathering process – involving a call for evidence, roundtable meetings and public roadshows – before it [published](#) its findings on 14 December 2021. The Review panel found that there was little wrong with the current human rights regime in the UK and did not recommend any substantial reform of the Human Rights Act. Its principal recommendations for change involved:

- i. The development of an educational programme on the Human Rights Act 1998 and human rights in general, to promote greater public ownership of the human rights regime in the UK;
- ii. Amending the Human Rights Act to clarify the priority of rights protections and interpretation (i.e. that a UK court should apply domestic statute and case law first before considering Convention rights and Strasbourg case law). This effectively amounted to the Review Panel embracing the familiar concept of subsidiarity; and
- iii. Clarifying the extra-territorial and temporal scope of the Convention.

Legal commentators have [noted](#) that the Government’s current proposals “bear little resemblance” to the recommendations made by the Independent Review panel, and “more of the government’s proposals are ideas that were rejected by the Review than were recommended by it”.

11. What are the views of the UK's parliamentary Joint Committee on Human Rights?

On 30 March 2022, the UK's parliamentary Joint Committee on Human Rights published a [report](#) on the proposed reforms. The report was largely critical of the Government's proposals. It found that no case had been made for changing the Human Rights Act 1998, which had, in the Committee's view, "had a positive impact on the enforcement and accessibility of rights in the UK, both in and out of court". Instead, the Committee recommended "more political leadership in championing respect for human rights" as a core part of the UK's unwritten constitution and values.

12. What about Brexit and the loss of the EU Charter of Fundamental Rights in this context?

The UK chose not to incorporate the EU Charter of Fundamental Rights into its domestic law following Brexit. One of the [principal arguments](#) that the Government made against incorporation was that the inclusion of the Charter would create unnecessary duplication, since the rights it safeguarded were protected elsewhere, including by the Human Rights Act 1998. In fact, the Charter goes further, and [in some ways](#) provides a stronger level of protection, than the Convention as incorporated by the Human Rights Act.

When the EU (Withdrawal) Bill was passing through Parliament, the Government gave [assurances](#) that the loss of the EU Charter would not result in a reduction in rights, and [produced](#) a right-by-right analysis that identified other sources of the rights in the Charter. The Human Rights Act was identified as an alternative source for around half of the rights conferred by the Charter. The Government's current plans to replace the Human Rights Act and reduce the influence of the Convention rights in domestic law undermine these previous assurances.

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