

# The Human Rights Act: a Magna Carta for the twenty-first century?

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Magna Carta was sealed at Runnymede in June 1215 by King John; the Human Rights Act owes its origins to the European Convention on Human Rights, signed in Rome in November 1950 by ministers from fifteen countries, including Britain. This article compares the two documents and considers whether the European Convention on Human Rights (ECHR) and the Human Rights Act (HRA) can be seen as a modern equivalent to Magna Carta.

The circumstances under which each was agreed, separated by seven and a half centuries, were of course very different. The signing of Magna Carta followed years of dispute between King John and a group of influential barons, and it was inspired by the coronation oath sworn by Henry 1 more than a century earlier. The European Convention on Human Rights was an international agreement which aimed to establish common standards of human rights in the aftermath of the Second World War and the Holocaust. Yet the fact that British lawyers, notably David Maxwell Fyfe, Conservative MP, later Home Secretary and Lord Chancellor, took a leading role in the drafting of the Convention meant that it was heavily influenced by British legal traditions, including the Magna Carta. There were other historic sources of inspiration, notably the French revolutionary Declaration of the Rights of Man, dating from 1789, the US Bill of Rights, ratified in 1791, and the Universal Declaration of Human Rights, adopted by the United Nations in 1948. The fact, however, that in March 1951 Britain was the first country to ratify the ECHR suggests that it sits

comfortably within British legal traditions. The ECHR came into force in 1953 and was eventually incorporated into British domestic law as the Human Rights Act in 1998.

Yet from the start, the HRA attracted criticism, because of fears that by empowering the judiciary to defend individuals against the state, it would undermine parliamentary sovereignty, draw the courts into the political arena to an unprecedented degree and, in the words of Conservative Leader William Hague, replace *“the rule of law with the rule of lawyers”*. The Act tried to allay these fears by stating specifically that, unlike the US Supreme Court, no British court would have the power to strike down an Act of Parliament. Courts were instructed to interpret laws in a manner compatible with the ECHR and the HRA *“so far as it is possible to do so”*. Where the court decided that a law conflicted with the Convention, it could not declare the law null and void, but merely issue a *“declaration of incompatibility”*. It would then be for parliament and the executive to decide how to respond.

Although it was Tony Blair’s government which introduced the Human Rights Act, it quickly found itself at odds with the courts over anti-terror legislation. Following the 9/11 terrorist attacks on New York and Washington, Blair acted rapidly to tighten anti-terror laws in Britain. One of these, the Anti-Terrorism, Crime and Security Act 2001, allowed indefinite internment without trial of foreign nationals suspected of involvement in terrorism. Some were detained in Belmarsh Prison, but in 2004 the House of Lords declared *“section 23 of the 2001 Act incompatible with the right to liberty in article 5(1) of the European Convention”*. The response of the Home Secretary, Charles Clarke, was to announce that internees would be released, but might instead be subject to Control Orders, a form of house arrest, but still without trial. Unchastened, the Blair government continued to use the ‘war on terror’ as a justification for violating the rights in the Convention, for example by trying to extend the length of time for which suspects could be held without charge to 90 days – though in this case it was parliament rather than a court which blocked it.

Since the HRA came into force, tensions between courts and government have also developed over other issues such as the deportation of illegal immigrants and sentencing policy for criminals. Another Labour Home Secretary, David Blunkett, was particularly critical of the judiciary over immigration matters: *“I just want judges*

*that live in the same real world as the rest of us,” he said in 2003, “I just like judges who help us and help you to do the job.”*

Nor is it only Labour ministers who have railed against the HRA. The Conservatives pledged in their 2010 manifesto to repeal the act and replace it with “*a British Bill of Rights*”, though they did not specify what rights safeguarded by the HRA would be removed. Their coalition partners, the Liberal Democrats, however, have always been supporters of the HRA and although a Commission on a Bill of Rights reported in December 2012, it was deeply split and the HRA remains, though David Cameron is likely to enter the 2015 election pledged again to repeal it.

Magna Carta too was quickly renounced by the king who had sealed it. Almost as soon as the barons had dispersed after the signing, King John withdrew his consent from clause 61, which created a committee of twenty-five barons to overrule the will of the King if he transgressed any of the provisions of the charter. Governments, whether feudal monarchies or modern democracies, do not like the law being used against them, but both Magna Carta and the Human Rights Act were created for the protection of citizens, not for the convenience of governments. If government actions violate one or more of the list of civil liberties enshrined in the ECHR and the HRA, then judges are there to defend them.

If King John and twenty-first century politicians show a depressingly similar attitude towards renouncing their pledges on the rights of the governed, what similarities are there between the content of the two documents? Much of the Magna Carta has little apparent relevance today and is preoccupied with the complexities of relations between monarch and their subjects in a feudal society, including the rights of wards and widows, the regulation of those in debt to moneylenders, and the standardisation of weights and measures. Yet there are several sections which have close parallels with parts of the ECHR and hence with the Human Rights Act:

- Article 4 of the ECHR declares that, “*No one shall be required to perform forced or compulsory labour*”, while Article 23 of Magna Carta (all article numbers refer to the original 1215 version of Magna Carta) pledged that, “*No village or individual shall be compelled to make bridges at river banks.*” Although this clause from Magna Carta is narrower and much

more specific in its scope, it shares the ECHR's concern to prevent the arbitrary imposition of forced labour by an autocratic government.

- Article 6 of the ECHR requires that any citizen accused of criminal charges, *"is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."* This fundamental human right clearly owes much to Article 39 of Magna Carta, which stated that, *"No freemen shall be taken or imprisoned ..., except by the lawful judgment of his peers or by the law of the land."*
- Article 21 of the ECHR is concerned with the quality of judges, requiring them to *"be of high moral character"* and to *"possess the qualifications required for appointment to high judicial office"*. King John in Article 45 of Magna Carta promised to, *"appoint as justices, constables, sheriffs, or bailiffs only such as know the law of the realm and mean to observe it well."*

One substantial difference between Magna Carta and the HRA is that the former was a purely English invention, while the latter is based on an international agreement. As we have seen, the ECHR came into force in 1953, but for more than forty years its position in Britain was anomalous. It formed part of Britain's international treaty obligations, but, unlike most signatories, Britain did not incorporate it into domestic law. It was argued that incorporation was unnecessary as the rights and freedoms guaranteed by the Convention were adequately protected in Britain's case by long-standing legal practices and traditions - of which Magna Carta was a significant foundation. The effect of this was that a British citizen could not bring a case of alleged violation of the Convention against the government in British courts, but only through the European Court of Human Rights in Strasbourg, a lengthy and very expensive process.

By the 1990s, a growing cross-party campaign to incorporate the ECHR into domestic law was building momentum and the proposal was in Labour's manifesto in 1997, part of a package of constitutional reforms which also had the backing of the Liberal Democrats. After his landslide election victory, Tony Blair's government, using the catchy slogan *'Rights Brought Home'*, published a Bill to incorporate the

ECHR into domestic law: the Human Rights Act was passed by parliament the following year and came into force in October 2000. This means that any citizen can bring a case of alleged violation of the Convention against the government in British courts.

Both Magna Carta and the Human Rights Act were created for the protection of citizens, not for the convenience of governments. Rulers, whether in a mediaeval monarchy or a modern democracy, do not like the law being used against them, but rather than seeking to bypass or get rid of the Human Rights Act, governments would do well to ensure that their policies respect the internationally recognised rights of citizens.

## **About the Author**

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