

“A Bad Name in the Public Square”: Does it Matter What People Think about Human Rights?*

Adam Wagner**

1 Crown Office Row

1. The Government will soon announce its much-delayed plans to reform our human rights laws. One of the most common justifications given by ministers for reform is public dissatisfaction with the Human Rights Act and the European Court of Human Rights. But is that claim supported by evidence? And does it matter what people think about human rights?

Mr Gove in the public square

2. On 2 February 2016, Justice Secretary Michael Gove gave evidence to the EU Justice Subcommittee. He was asked about the proposals to repeal the Human Rights Act 1998 and replace it with a Bill of Rights. Mr Gove was at pains to stress that the reforms would be “minimal”. This may surprise those who read Chris Grayling’s 2014 proposal, entitled, apparently without irony, *Protecting Human Rights in the UK*. At the time I described those proposals as “apocalypse soon”.¹ This was only a slight exaggeration. The center-piece of the Grayling plan was to leave the European Convention on Human Rights, if the Council of Europe (CoE) refused to agree that its judgments would become “advisory” rather than binding on states, as is the current treaty commitment.² In other words, make the CoE an offer it could only refuse. The CoE quickly responded that the proposal was “not consistent” with the ECHR.³ Britain leaving the Convention system, which it helped invent could, in human rights terms, be apocalyptic.
3. But if the reforms were to be minor, the committee asked Mr Gove, why was he bothering? Was it worth the likely political and constitutional fall-out? And here is the curious part. The clearest justification Mr Gove gave to the committee was that “human rights have a bad name in the public square” and “have become associated with unmeritorious individuals pursuing claims through the courts that don’t command public sympathy”. In other words, the changes were necessary to give the public the *perception that something was being done*. Indeed, it appears that the perception is more important than the “something” itself. “Some of the purpose” of the Bill of Rights, said Mr Gove, would be “to affirm” that the Convention rights are “fundamental British rights”. This seems a lot of effort simply for affirmation.

* This article is based on a talk given at the Ninth Annual Hart Judicial Review Conference, held on 11 December 2015.

** Adam Wagner is the founder of RightsInfo (www.rightsinfo.org).

¹ Adam Wagner, “Apocalypse soon: The Conservatives reveal their real plans for human rights”, UK Human Rights Blog, 3 October 2014 (<http://ukhumanrightsblog.com/2014/10/03/apocalypse-soon-the-conservatives-reveal-their-real-plans-for-human-rights/>, accessed 10 February 2016).

² ECHR, Art. 46: “The High Contracting Parties [i.e. states] undertake to abide by the final judgment of the Court in any case where they are parties”.

³ Nicholas Watt and Owen Bowcott, “Kenneth Clarke lambasts Conservatives’ human rights plan”, *Guardian*, 3 October 2014.

4. This attitude to human rights reform is not new. In 2014, Chris Grayling justified his own proposal in part to "command public support".⁴ In July of last year, not long after being given the brief, Mr Gove told the Justice Committee that "rights in the Convention are admirable but must apply in a context where people believe the culture of human rights isn't being abused".⁵ Back in 2012, the majority of the Commission on a Bill of Rights concluded that "lack of 'ownership' by the public" was "the most powerful argument for a new constitutional instrument". They argued that "[s]ome of the voices both for and against the current structures are now so strident, and public debate so polarised, that there is a strong argument for a fresh beginning".⁶
5. It is now taken as read, in some quarters at least, that public support for human rights is low. And it is assumed that the only way to increase that support is by a change to the existing laws, which is either radical or is *seen* to be radical. Yet the underlying assumptions are seldom challenged, despite the fact that there is now a significant amount of publicly available evidence on what people think about human rights.

What people really think about human rights

6. Let us consider some of the evidence.⁷ A good place to start is the 2012 Commission on a Bill of Rights. The Commission decided not to poll the public, as polling was "notoriously unreliable"⁸ as it depends "heavily on the way in which questions are phrased". The Commission did carry out two separate consultations, both of which led to similar results.⁹ Around 930 people and groups responded, and a few thousand more through pro-forma postcards organised by the British Institute of Human Rights. The vast majority (98 per cent) favoured continuing incorporation of the European Convention on Human Rights into domestic law, and only a slightly smaller majority (88 per cent) favoured retaining the Human Rights Act (96 per cent if you include the postcard responses). This was a self-selecting group of what appears to be human rights enthusiasts, so is of limited value vis-à-vis the population at large.
7. More nuanced results can be found in YouGov and ComRes polling carried out on behalf of various organisations. Also in 2012, YouGov surveyed the public on behalf of Equally Ours. It found that 26 per cent of the public were "opposed" to human rights, 22 per cent "supportive", 41 per cent "conflicted" and 11 per cent "uninterested".¹⁰
8. In November 2013, ComRes polled various questions for the human rights advocacy organisation, Liberty. Answering the question "How important or unimportant do

⁴ *Protecting Human Rights in the UK*, October 2014, p. 2.

⁵ Michael Gove's evidence to the Justice Committee, 15 July 2015.

⁶ "A UK Bill of Rights? The Choice Before Us", December 2012, para. 80.

⁷ What follows is by no means an exhaustive study, but rather a collection based on my own research and involvement in RightsInfo (www.rightsinfo.org), a human rights communications project I set up in 2015.

⁸ "A UK Bill of Rights?", n 6 above, para. 80: "polling on these issues is notoriously unreliable – with the answers given by the public depending heavily on the way in which questions are phrased (which is why the Commission did not commission any such polling itself)".

⁹ Baroness Helena Kennedy QC and Philippe Sands QC, in the minority on the Bill of Rights Commission, later revealed that the second consultation was carried out as the first was too positive: "Concerned that the results might be misleading, the commission ordered a second consultation. To our amazement, satisfaction or horror (depending on perspective), it produced virtually the same result as the first": London Review of Books, *In Defence of Rights*, 3 January 2013.

¹⁰ Equally Ours, "Telling the story of everyone's rights every day", November 2013 (<http://www.disabilityrightsuk.org/sites/default/files/pdf/TelltheStory.pdf>, accessed 10 February 2016).

you think it is that there is a law that protects rights and freedoms in Britain?", 98 per cent of respondents said "important". Only 8 per cent of respondents remembered "receiving or seeing any information from the Government explaining the Human Rights Act". It might be said that asking people whether a law protecting rights and freedoms is important is a bit like asking them whether they like sunny days. As the Commission on a Bill of Rights correctly stated, and every politician knows, the choice of question is crucial.

9. On 8 October 2014, shortly after the Grayling proposal was released, YouGov asked about people's attitudes towards reform.¹¹ When asked whether they supported a plan to repeal and replace the Human Rights Act with a British Bill of Rights, which would include the same rights as the European Convention but with some limitations, 43 per cent supported the proposition, 23 per cent opposed, 29 per cent did not know enough to say and 5 per cent answered "neither".
10. More interestingly, when asked whether "incorporation of the ECHR into UK law had been a good or bad thing", 38 per cent answered "a bad thing", 31 per cent "a good thing", 22 per cent that they did not know enough to say and 8 per cent "neither". It would be interesting to know to what extent those asked truly understood what "incorporation of the ECHR into UK law" meant, given how hard it is to understand our dualist system, even for lawyers. Forty-eight per cent of respondents thought that British courts should "not have to take into account European Court of Human Rights rulings", compared to 32 per cent who thought that they should. Forty-one per cent thought that human rights should be "limited for lawbreakers", whereas 39 per cent thought that they should be available to everyone.
11. In June 2015, following the Conservative Party's surprise General Election victory, ComRes carried out a survey for the *Daily Mail*.¹² People were asked whether they supported or opposed replacing the Human Rights Act with a British Bill of Rights. Slightly more supported the proposal (46 per cent) than in the YouGov poll a year earlier (43 per cent) but significantly more opposed (36 per cent versus 23 per cent), perhaps suggesting that opinion had been polarised during the election campaign or in the short period afterwards when repeal of the Human Rights Act became a front-page issue.
12. The most recent high-profile polling was by ComRes on behalf of Amnesty UK in November 2015.¹³ The public were not asked for their general views on the Human Rights Act or Bill of Rights. The key point arising was that few people think that human rights reform should be a priority for the Government. Indeed, only 3 per cent thought that it should be the top priority, and 11 per cent that it should be in the top three.¹⁴

¹¹ YouGov, "Support for Tory human rights plans falls along party lines", 8 October 2014 (<https://yougov.co.uk/news/2014/10/08/support-tory-human-rights-plans-falls-along-party-/>, accessed 10 February 2016).

¹² See <http://www.comres.co.uk/polls/daily-mail-eu-poll-june-8th-2015/>.

¹³ See <http://www.comres.co.uk/polls/amnesty-international-human-rights-poll/>.

¹⁴ This accords with the oft-repeated rumour that Lynton Crosby, the Conservative's election guru, conducted polling with similar results which is why human rights reform only made it to p. 93 of the 2015 Conservative Election manifesto.

What does it all mean?

13. We now have access to a reasonable amount of public opinion research on attitudes to human rights. It must, however, be treated cautiously when generalising about the conclusions. The Bill of Rights Commission were rightly wary (probably too much so) of polling, as the nature of the questions asked could skew the results. And whilst human rights themselves are simple to understand at first blush – the right to life, the right not to be tortured, the right to free expression and so on - the laws which incorporate them into our lives are notoriously complex. So a non-lawyer is likely to find it difficult to answer a question about whether "incorporation" of human rights into UK law is a good or bad thing. But notwithstanding those provisos, I think we can reach some provisional conclusions based on the research.
14. First, people are generally supportive of rights in principle. I imagine they would respond positively to Lord Bingham's famous question: "Which of these rights would we wish to discard? Are any of them trivial, superfluous, unnecessary? Are any them un-British?".¹⁵ Secondly, some have a *sense* that the current system, represented by the Human Rights Act and the European Convention on Human Rights, is not working properly and perhaps is benefiting the wrong people. There appears to be an appetite for some kind of change, though not a majority in favour. Thirdly, and importantly, human rights is not an issue which is high on most people's agendas, as schools or the NHS might be; perhaps it can be said that human rights is more of a Westminster and Fleet Street obsession than a burning issue of public concern.

Does it matter?

15. There are three reasons why public opinion on human rights, such as we can ascertain it, needs to be treated very cautiously before being used to justify reforms.
16. First, people's opinions about human rights may not be based on an accurate understanding of our laws and how people use them. I have written elsewhere about the "monstering" of human rights in the United Kingdom.¹⁶ Recent research by Counter-Point and Equally Ours found that 70 per cent of press coverage of human rights in the United Kingdom presented a negative message.¹⁷ The figure climbs to an astonishing 80 per cent in England. And this is nothing new. Back in 2002, Professor Francesca Klug asked "[w]hy ... every time the ECtHR finds against the UK government is it so easy for the press to present this as a deranged judgment by a power-mad European court of ignorant judges ranged against a blameless regime which has exported the idea of liberty and justice to most of the rest of the world and needs no lessons from anyone?"¹⁸ The relentless negativity of the press towards human rights, over a long period is likely to have had a corrosive effect on public opinion. And if the public

¹⁵ Lord Bingham, Keynote Speech to Liberty's 75th Anniversary Conference, 6 June 2009.

¹⁶ Adam Wagner, "The Monstering of Human Rights", 19 September 2014 (<https://adam1cor.files.wordpress.com/2014/09/the-monstering-of-human-rights-adam-wagner-2014.pdf>, accessed 10 February 2016).

¹⁷ Rachel Krysz, "Research-based messaging changes public support for human rights", Open Democracy, 3 July 2015.

¹⁸ Francesca Klug, Issues in Communicating Human Rights, (conference paper published in F Klug *A Magna Carta for all humanity* (Oxon: Routledge, 2015) at 271).

have been shown a skewed picture of human rights cases and claimants, justifying reform based on public opinion alone could be dangerous.

17. Secondly, universality has always been a central element of human rights laws. Human rights protect everyone, including unpopular minorities such as immigrants and criminals. Indeed, human rights instruments were developed *in order* to protect unpopular groups against the populist mob. Even notwithstanding the skewed press coverage, it is perhaps inevitable that human rights laws will give rise to cases involving individuals whose claims will attract the ire of the masses. And, again, that is not a good reason for taking away those rights.
18. Finally, there has been almost no public education about human rights in the United Kingdom to counter negative press coverage. It is surprising that as many as 8 per cent of people told ComRes that they remembered government education on the Human Rights Act. The only successful public education campaign about human rights has been by the tabloid newspapers, which have mounted a campaign of public *misinformation*.

Another option

19. Public opinion on human rights is important, but we should be cautious about reforming our human rights laws if the reason for doing so is to appease the "public square". There is another option, which is the attempt to move opinion through public education rather than a legislative change. The majority of the Bill of Rights Commission rejected that possibility on the basis that opinion was already so polarised that it was unlikely to work. But had the Commission carried out polling they would have found that that public opinion may be split on human rights but it does not appear to be strongly polarised. Fundamental constitutional change must be based on more than just a hunch about what the public square wants.