

# Replacing the Human Rights Act would be a risk that could backfire on the Conservatives

By Democratic Audit

*In opposition, David Cameron committed the Conservative Party to investigating the viability of replacing the Human Rights Act with a 'British Bill of Rights'. But while this approach found favour in his party, there is every chance that his proposed replacement would fail to live up to Conservative expectations and traditions, and may not even work on its own terms, according to **Peter Munce**.*

From the outset in 1997 when the UK Parliament began debating the draft bill that would become the Human Rights Act (HRA), significant voices within the Conservative Party have expressed unease with Britain's 'rights revolution'. After almost 10 years of unease with the HRA its newly elected leader David Cameron committed a future Conservative government, in a speech to the Centre for Policy Studies in June 2006, to consider [repealing](#) the HRA and replacing it with a British Bill of Rights (BBoR).

Cameron's BBoR proposal has been subject to criticism both from within the Conservative Party and outside it. Former Justice Secretary and Home Secretary Ken Clarke [dismissed](#) it as 'xenophobic and legal nonsense' whilst Francesca Klug [expressed](#) concern that the BBoR debate was becoming an 'unedifying race to the bottom'. This article takes a different direction by scrutinising Cameron's BBoR proposal within the wider context of conservative thinking about constitutional reform. It does this by revisiting an essay published in 1980 by the late and distinguished political scientist, Nevil Johnson, where he explored some of the core dilemmas for Conservatives that arise when they find themselves in the position of protagonists for constitutional reform in Britain.

The central argument of the article is that Cameron's approach to addressing Conservative concerns about human rights law in Britain by advocating the repeal of the HRA and replacing it with a BBoR is inconsistent with many of the key themes of a generally orthodox conservative approach to constitutional reform. Ultimately, it argues that Cameron's Bill of Rights proposal is profoundly unconservative and offers no guarantee that it can solve the problems Conservatives have identified with the HRA.

## Conservatives and Constitutional Reform

As early as 1998, the Conservatives began to recognise that, in practical terms, it would be extremely difficult to reverse many of New Labour's constitutional reforms and that to, in [the words](#) of then leader William Hague 'return the constitution to its status quo ante would be a futile task'. The Conservative Party have, to a large extent, adopted an essentially conservative approach to the bulk of New Labour's constitutional reforms, accepting the changes and seeking to improve them through incremental reforms within the broad framework of the way the constitution is after Labour's reforms. However, one significant area where the Conservatives eschewed this conservative approach in favour of pursuing a more radical agenda was on Human Rights through Cameron's proposal to repeal the HRA and replace it with a BBoR.

When conservatives find themselves in the position of proposing reform to an aspect of the constitution two questions must be asked. Firstly, to what extent does the radicalism of a proposal for constitutional reform bring itself into tension with traditional conservative approaches to constitutional reform? Secondly, to what extent are proposals for constitutional reform constructed on abstract principles rather than on the concrete circumstances of social, cultural and political life in the world as it is?

The orthodox approach of the Conservative Party to constitutional reform can be described as evolutionary. It is heavily influenced by Burkean philosophy – preferring evolutionary development to radical departures from what has gone before. The Conservatives, generally, have not been hostile to constitutional change; it is just that they have preferred this to be evolutionary rather than revolutionary.

The dilemma for the Conservative tradition, when it comes to constitutional reform, is what Philip Norton has described as the 'inherent conflict between continuity and change'. In other words once a problem with an aspect of the constitution has been identified, what should Conservatives do about it? To what extent should Conservatives embrace radicalism and change if that change is necessary to construct a better constitutional settlement?

### **David Cameron's British Bill of Rights**

David Cameron's BBoR proposal causes a profound dilemma for Conservatives because it goes to the very heart of this tension between continuity and change within conservative political thought on constitutional reform. From Johnson's writing on the topic it is possible to discern two elements of his work that directly pertain to the Bill of Rights issue and which illustrate neatly the dilemmas for Conservatives when it comes to constitutional reform. Firstly, there is a dilemma for conservatives when proposed constitutional reforms are based upon a set of abstract principles or ideas, as will be argued is the case with Cameron's BBoR proposal, particularly when there exists an aversion within conservatism towards the construction of social and political institutions on the basis of abstract principles and ideas. Secondly, there is a dilemma for conservatives when they become intentional advocates of constitutional change, as has happened in proposing to replace the HRA with a BBoR, particularly when the tradition of conservative thought about constitutional reform stresses the importance of an evolutionary, incremental and organic approach to change.

The Burkean approach to change, as has been mentioned, is evolutionary acknowledging and embracing change when it is necessary to conserve but what happens when the conservative is faced with an institution or constitutional practice that, as they see it, is beyond repair and whose continued existence, for conservatives, threatens the entire edifice of the constitutional architecture? In many ways this is the scenario the Conservatives have presented with their proposal to repeal the HRA and replace it with a BBoR.

In other words, part of the Conservative's narrative on repealing the HRA is that tinkering round the edges is not enough, the HRA has done too much damage to be reformed or modified but rather instead, radical surgery is required to deal with its negative effect on the constitution. Whilst Cameron in proposing to repeal the HRA and begin again with a new BBoR has the stated aim of seeking to restore and reinvigorate Britain's constitution it is, nevertheless, a far-reaching proposal to redesign what has become an important aspect of Britain's constitution.

It is just over thirteen years since the HRA took effect. In that time it has become 'part of the United Kingdom's constitutional order' and as Vernon Bogdanor describes it the cornerstone of the new British constitution. As such, the HRA is putting down roots in the both the UK's constitutional order and in the legal and political culture of the nation. Philip Norton argues that, for Conservatives, 'once an institution is in place, helping shape behaviour and forming part of a network of stable relationships, then there becomes, for the Conservative, a problem in justifying abolition or radical surgery'. When applied to the HRA the problem for Cameron is that the HRA represents such an institution that is becoming part of a 'network of stable relationships' within Britain's constitutional framework

A new Bill of Rights is a brave new world that Cameron has set off towards, but one where there is insufficient knowledge to provide any reassurance that the proposed changes to human rights legislation will work and address the perceived problems that the Conservatives have highlighted. Rather than accept that the HRA now has a place as part of the UK's body politic and constitutional order David Cameron has committed the Conservative Party to uprooting the HRA and to planting a new mechanism for the protection of rights in the form of a BBoR with no guarantee that any of his or the Conservative Party's criticisms about it can be addressed.

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