**Whether Gove or May wins on human rights, psychiatric patients will lose**

We learned recently that whereas [Theresa May](http://www.independent.co.uk/news/uk/politics/european-convention-human-rights-eu-referendum-brexit-theresa-may-a6999701.html) wants to stay in the EU, scrap the Human Rights Act and *leave* the European Convention on Human Rights, [Michael Gove](http://www.telegraph.co.uk/news/2016/04/26/michael-gove-and-dominic-raab-turn-on-theresa-may-over-human-rig/) wants to *keep* the European Convention, scrap the Human Rights Act and leave the EU. Neither is really a surprise, as the 2015 [Conservative Party manifesto](https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf) did ominously commit to *‘scrap the Human Rights Act, and introduce a British Bill of Rights… break[ing] the formal link between British courts and the European Court of Human Rights’.*

Either proposal should be of serious concern to anyone providing or receiving mental healthcare, as both threaten to remove legal frameworks which have quietly been safeguarding and bolstering the rights of psychiatric service users for decades, and which have directly led to significant legislative and policy changes. The ‘best-case’ scenario whereby despite losing the Human Rights Act the European Convention is retained as the ‘ultimate’ arbiter would still be hugely regrettable, as the considerable delays involved in the absence of a domestic remedy (which led to the Human Rights Act [being introduced](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf)) could well disincentivise people from bringing important cases.

During the 1980s the mental health charity MIND used the European Convention on Human Rights to successfully argue a [series](http://www.sciencedirect.com/science/article/pii/S0160252799000394) of human rights-based cases with the broader intention of changing the law. This led to legal aid being made available for service users applying to mental health tribunals, regular reviews of the necessity for detention being required, and the power to discharge patients being vested in independent tribunals rather than with the Home Secretary.

The [Mental Health Act 2007](http://www.legislation.gov.uk/ukpga/2007/12/pdfs/ukpga_20070012_en.pdf) subsequently reflected the outcome of key human rights cases, for example the seminal ruling in [HL v  United Kingdom](http://www.bailii.org/eu/cases/ECHR/2004/471.html) that people who do not have mental capacity but are compliant in receiving treatment  (and who are therefore not subject to mental health legislation) should be offered legal protections in the same way as those who are non-compliant (who are formally detained and thus subject to legislative safeguards whereby detention is reviewed).

One case in particular demonstrates how human rights frameworks have changed the law to correct a fundamental and longstanding injustice. In [ex parte H](http://www.bailii.org/ew/cases/EWCA/Civ/2001/415.html) the Court of Appeal ruled that the Mental Health Act was in conflict with the Human Rights Act as the former placed the onus on applicants to mental health tribunals to demonstrate why they should be released, instead of the onus being placed on the hospital to demonstrate that the applicant’s detention should be continued. A remedial order was accordingly made rewording these sections to alter the burden of proof. This case is also particularly significant as it prompted the first ‘declaration of incompatibility’ between existing English law and the Human Rights Act to be issued by a court.

Returning to theConservative manifesto, the reassurance is given that any reforms *‘will remain faithful to the basic principles of human rights’*. A [horrendous case](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2003/1094.html) where a woman who was detained under the Mental Health Act and found that she could not challenge the appointment of her adoptive father as her ‘nearest relative’ (even though he had sexually abused her when she was a child) belies this. A court found that the woman’s inability to contest this appointment was a breach of her human rights, and following the judgement the Mental Health Act 2007 provided that challenges could be made. The right she invoked to challenge this legal loophole was the right to a private and family life - one of the particular rights that the Conservative manifesto had in its sights (on the spurious ground that it gives foreign criminals some kind of blanket right to stay in the UK – although in fact [it does no such thing](https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/human-rights-act-mythbuster)). Without this right being available, the woman in question would have had no legal recourse, and there would have been no lever to change the faulty legislation.

There is still more to be done, and human rights laws continue to act as levers for positive change. These include the case of [R (B) v DPP](http://www.mentalhealthlaw.co.uk/R_%28B%29_v_DPP_%282009%29_EWHC_106_%28Admin%29) which changed CPS guidelines to safeguard against people with mental illness automatically being treated as unreliable witnesses, and the case of [MS v UK](http://hudoc.echr.coe.int/eng#{"dmdocnumber":["907418"],"itemid":["001-110717"]}) which established that holding someone experiencing a mental health crisis in a police cell can amount to inhuman treatment in certain circumstances. [Legislation](http://services.parliament.uk/bills/2015-16/policingandcrime.html) is currently being passed to significantly reduce the amount of time that someone who is mentally ill can be lawfully detained in a police cell, and the citation of MS v UK in the accompanying evidence[review](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389254/Literature_Review_S135_and_S136_of_the_Mental_Health_Act_1983.pdf) suggests this case was a key influence.

Mental health is still a long way away from achieving [‘parity of esteem’](http://www.rcpsych.ac.uk/pdf/OP88.pdf) with physical health. Although we acknowledge that this is a complicated topic and [not always straightforward](http://www.theguardian.com/law/2012/may/03/strasbourg-wrong-ms-uk), repealing the Human Rights Act and/or withdrawing from the European Convention on Human Rights will remove mechanisms that have made huge strides in closing the current gulf, and which have the potential to continue to make a positive difference. If the government is serious about parity of esteem – which it certainly [professes](http://www.theyworkforyou.com/debates/?id=2016-03-22a.1366.2&s=%27parity+of+esteem%27) to be - then neither May nor Gove's proposal should be on, or anywhere near, the table.

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