

COMMON SENSE: REFLECTIONS ON THE HUMAN RIGHTS ACT

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Preface

The Human Rights Act (HRA) will soon have been in force for a decade. No modern Bill of Rights can have had such a testing infancy.

Passed in 1998 in the first flush of optimism and reforming zeal of the New Labour Government, the Act drew on the Convention for the Protection of Human Rights and Fundamental Freedoms championed by Britain in post-war Europe. We had long been able to invoke the protections of no torture, free speech, fair trials, personal privacy and equal treatment etc., but often only after the long road to the Court of Human Rights in Strasbourg. In allowing these rights to pass directly into UK law, the HRA was “Bringing Rights Home”.

Few people outside Government can claim to have played such an important role in the birth of the HRA as leading LSE academic Francesca Klug who edits this collection of reflections originally published by the Guardian.

The HRA’s political parents soon appeared impatient with its checks on executive power. After the Twin Towers’ atrocity only eleven months later, the Act was sometimes the sole practical protection against internment, evidence gathered through torture and breathtakingly broad police powers passed in freedom’s name.

However, the HRA’s relative success in mitigating the worst excesses of Britain’s War on Terror, allowed hawkish critics to present it as a charter for the undeserving. These political and media pundits stubbornly ignored the cases in which journalists, gay people, victims of crime, children and homeless people were all protected by the Act.

Despite binding disparate elements together with the language of rights and freedoms, the new Coalition Government faces a conundrum in relation to the HRA. Whilst the Liberal Democrats have been its greatest champions, parts of the Conservative party



have run it down, either because of its protections or in spite of them. As the pieces in this collection demonstrate, political attacks on the HRA have rarely come with “progressive” intent but just as every corporal bears a field-marshal’s baton in his knapsack, each vainglorious lawyer stows a constitutional draftsman’s pen.

As the Coalition agreements fail to make the HRA non-negotiable, other voices must now do so. Whilst the Labour Party begins a new conversation about its future, it is to be hoped that it might learn to love one of the prouder legacies of its time in Government, a little more.

Shami Chakrabarti
Director of Liberty
June 2010

“Many circumstances hath, and will arise, which are not local, but universal, and through which the principles of all Lovers of Mankind are affected”

Thomas Paine, Common Sense, 1776.

Introduction

At the beginning of this year the Guardian asked me if I would like to start my own series on Comment is Free, titled Blogging the Bill of Rights. The context was the competing British bills of rights and responsibilities that the then Labour Government, and Conservative Opposition, were proposing. Labour was said to support a Bill of Rights and Responsibilities to build on the Human Rights Act (HRA); the Conservatives to replace it. The Liberal Democrats meanwhile, the party with the longest and most consistent support for the HRA, expressed caution about proposals for a specifically British Bill of Rights if it were aimed at sidestepping international human rights standards or restricting civil rights to British citizens, rather than all the human beings who live here.

I was asked to explain the context and background to these events based on my academic research and experience as an independent advisor to the Government on both the HRA and a British Bill of Rights. What were the origins and intentions behind the HRA? What were the historical developments which led up to its introduction? Was there single or multi-party support for this legislation? Is the HRA a bill of rights by any other name or is it merely the technical incorporation of the European Convention on Human Rights into UK law? Is the HRA solely aimed at enhancing the liberty of the individual against the state or does it also require the state to provide protection and support for vulnerable individuals and groups in order to realize rights in practice? What would be the implications of repealing the HRA and introducing a specifically British bill of rights? How would this affect the well-entrenched devolution settlements in Scotland and Northern Ireland? Where do responsibilities fit in?

This pamphlet reproduces the first ten articles in the series, each of which attempt to address one or more of these questions. In some cases we have changed the title from the original to more



clearly signal the content of the piece. They are reproduced in the order in which they were published. Four of the articles are written by 'guest columnists': the Director of Liberty, Shami Chakrabarti, the Chairs of the Scottish and Northern Ireland Human Rights Commissions, Alan Miller and Monica McWilliams and the QC Helena Kennedy. Each external contributor provides a unique insight into the current debate from their particular perspective. We have also included an appendix summarising some of the impact of the case-law under the HRA, produced by Helen Wildbore, research officer for Human Rights Futures at the LSE.

With the new Coalition Government, the question of a so-called 'British Bill of Rights' has now been transferred to a Commission but the issue is still current and pressing. Whilst the Guardian's Blogging the Bill of Rights series will continue, this pamphlet is offered as an aide to deciphering the background and intricacies of the current debate.

Professor Francesca Klug
Director, Human Rights Futures
LSE
June 2010



What's in a name?

Is the Human Rights Act a bill of rights by any other name?

Francesca Klug

guardian.co.uk, Tuesday 19 January 2010

David Cameron's well-aired pledge¹ to introduce a British Bill of Rights is not as novel as it seems. He is only the latest in a line of Opposition leaders to wave this flag. First in the queue was his mentor, Margaret Thatcher, whose 1979 Manifesto promised all-party talks on "a possible Bill of Rights."² Once in power, this commitment evaporated. When lobbyists like myself, from pressure groups such as Liberty and Charter 88, attempted to engage the Thatcher or Major Governments on this commitment, the customary response was similar to this 1989 letter from Thatcher to Baroness Ewart-Biggs: "the government considers that our present constitutional arrangements continue to serve us well and that the citizen in this country enjoys the greatest degree of liberty that is compatible with the rights of others and the vital interests of the state."

At the 1992 election, it was the turn of the leader of the Labour party. Neil Kinnock's Manifesto snuck in a commitment to bolster the widely promoted proposal for a non-enforceable charter of rights with "a complementary and democratically enforced Bill of Rights" to "establish in law the specific rights of every citizen".³ His successor, John Smith, likewise declared his ambition to "create a climate of opinion in which a Bill of Rights" had widespread "backing" in a major speech in 1993. After Smith's untimely death,



Tony Blair pledged in his leadership election literature that “Labour will win by being the party of democratic renewal” including “providing a Bill of Rights”.⁴

The 1998 Human Rights Act (HRA) was the manifestation of this pledge. The impetus was not so much the incorporation of the European Convention on Human Rights (ECHR) into UK law to save British citizens the long and expensive journey to the Human Rights Court in Strasbourg, as is commonly assumed, but the growing clamour for a domestic bill of rights. This campaign was led by the all-party constitutional reform group Charter 88, Liberty, the Liberal Democrats and a widening circle of eminent lawyers, most notably Lord Lester. It gained momentum from a developing frustration with the lack of opportunities to hold the government to account outside elections. Prior to 1979, the democratic system was seen to deliver regular changes to the political complexion of the government of the day, but after 18 years of one party in power, the lack of checks and balances in the UK’s ‘unwritten constitution’ became more transparent. Unpopular legislation like the poll tax, new requirements to give advanced notice of demonstrations and the abolition of ‘the right to silence’ for defendants, could not be reviewed by the courts. Once a statute was passed, there were virtually no means for individuals to successfully challenge it within the domestic political or legal system, short of demonstrations or riots. Lobbyists for constitutional change looked with envy at other countries with bills of rights or incorporated human rights treaties, where the courts were able to review legislation that impacted on fundamental rights.

When Smith declared in his 1993 speech ‘A Citizen’s Democracy’ that “Britain is alone amongst major western European nations in not laying down in law the basic rights of its people, and in not giving its people a direct means of asserting those rights through the country’s courts”, he was responding to calls for a Bill of Rights. He proposed that “parliament should pass a Human



Rights Act”, to incorporate the ECHR, not as a technicality or at the behest of the Council of Europe, but because it was self-evidently “the quickest and simplest way of achieving democratic and legal recognition of a substantial package of human rights”. The State was already bound by the ECHR but the courts were unable to enforce it. This was dramatically displayed when UK judges were constitutionally barred from ruling against the ban on gay and lesbian people serving in the armed forces.⁵ Declaring this policy a breach of Article 8, the right to privacy, the European Court of Human Rights came close to damning the entire British legal system for “effectively excluding any consideration by the domestic courts” of such a fundamental right.⁶

Campaigners like myself at Liberty had lobbied for a Bill of Rights that incorporated the ECHR but went beyond it. We produced a consultation document, A People’s Charter, Liberty’s Bill of Rights, in 1991, which proposed protections for jury trials and children’s rights, provisions that would be familiar to bills of rights campaigners now.⁷ Like the Committee on the Administration of Justice in Northern Ireland and the Scottish Council for Civil Liberties, we urged widespread public involvement (of relevant constituencies) in this debate. There was no consensus about which additional rights to the ECHR should be supported amongst civil liberty campaigners and constitutional reformers, let alone the population as a whole.

Labour’s solution in 1993, proposed in the National Policy Forum document A New Agenda for Democracy, was to incorporate the ECHR into UK law as a “mature statement of rights” which the UK was already signed up to “that has been interpreted and applied over many years”. The ‘second stage’ would be to consult on a “UK Bill of Rights” to supplement the ECHR, “which could not be done on a purely partisan basis”. By 1996, when, like now, it looked like a change of government was in sight, Jack Straw announced in a



lecture to Charter 88 that this “second phase” had morphed into “a British Bill which will contain clear declarations of both rights and responsibilities”.⁸

This latter pledge did not appear in the 1997 Manifesto and did not re-emerge in any detail until the Government’s Green Paper last year⁹ – something I will return to, among other things, later in this series. Meanwhile, the HRA was purposefully designed to be more than an incorporated treaty. Like all bills of rights, it was deliberately crafted as a ‘higher law’, to which all other law and policy must conform ‘where possible’.¹⁰ There is no judicial strike down power, in keeping with Britain’s constitutional traditions to date, but the HRA empowered the judges to hold the executive to account and review Acts of Parliament to a degree that was almost unprecedented in Britain’s constitutional history. Virtually all informed legal and political commentators at the time, and since, have recognised that the HRA is a Bill of Rights by any other name.¹¹ Straw, the then Home Secretary, described it in a speech to the Institute for Public Policy Research in January 2000 as “the first Bill of Rights this country has seen for three centuries”. He was supported in this view by Conservative MPs, who opposed the Act for this very reason.

There is a developing parallel to this story in Australia. Despite the country’s written constitution, the Government is now poised to introduce a Federal Bill of Rights. It is likely to be called a Human Rights Act, directly modelled on the UK’s approach, after the Government-appointed National Human Rights Consultation Committee reported last year that there is no settled definition of the terms ‘bill of rights’, ‘charter of rights’ or ‘Human Rights Act’, “which are often used interchangeably”.¹²

By the time the UK’s HRA came into force in October 2000, the Government had already developed cold feet about its potentially wide-ranging effects and capacity to clip ministers’ wings. Aware that the promotion of the HRA had been paltry, I urged the Home Office

to describe the Act as a Bill of Rights. "It would be as if devolution were referred to as the Scotland Act," I wrote. But by then the Government was choosing to play down the HRA's constitutional significance and play up its role as a conduit for the technical incorporation of the ECHR.

If the HRA had been called a Bill of Rights, would Cameron still be arguing that it should be repealed only 10 years after its implementation, so that he can pass another one? There is no precedence for this twin policy anywhere in the world. When the HRA was introduced there was no thought to disturb the 1689 Bill of Rights or Magna Carta, both of which remain on the statute book. When Canada passed the Charter of Rights in 1982 to improve on its 1960 Bill of Rights there was no decision to repeal the latter. No country anywhere has proposed de-incorporating a human rights treaty from its law so that it can introduce a Bill of Rights. The truly original, and most disturbing, aspect of Cameron's Bill of Rights pledge is that rather than manifestly building on the HRA, it is predicated on its repeal.

¹ 'Cameron pledges bill to restore British freedoms', Alan Travis, *The Guardian*, 28 February 2009.

² 'The Conservative Manifesto', April 1979.

³ 'It's time to get Britain working again', *Labour Party Manifesto*, 1992.

⁴ *Labour Party Leadership Elections*, 1994.

⁵ *R (Smith and Grady) v Secretary of State for Defence [1995] EWCA Civ 22*.

⁶ *Smith and Grady v UK (1999) 29 EHRR 493*.

⁷ See also *A British Bill of Rights*, A. Lester, J. Cornford, R. Dworkin, W. Goodhart, P. Hewitt, J. Jowell, N. Lacey, K. Patchett, S. Spencer, foreword by F. Klug, IPPR, 1990.

⁸ *Charter 88 lecture on rights and responsibilities*, Jack Straw, 26 June 1996.

⁹ *'Rights and Responsibilities: Developing our Constitutional Framework'*, Ministry of Justice, March 2009.

¹⁰ Section 3(1) of the HRA states: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

¹¹ For example, *Promoting Human Rights Through Bills of Rights*, Philip Alston, Oxford University Press, 2000, p 11.

¹² *National Human Rights Consultation Report*, September 2009, section 12.



Party pieces

Claims that the Human Rights Act is a creature of the left ignore long term support from the Liberal Democrats and Conservatives

Francesca Klug

guardian.co.uk, Tuesday 2 February 2010

Last week, on Holocaust Memorial Day, full page adverts featuring the desolate tracks to Auschwitz appeared in the national press. They were placed by the human rights group Liberty to remind us of our “common values”,¹³ including freedom from torture, fair trials, privacy and free speech. These are enshrined in the European Convention on Human Rights and Fundamental Freedoms (ECHR), drafted as a lasting legacy of the struggle against fascism and totalitarianism. The advert encouraged us to find out more about the Human Rights Act (HRA), which incorporates the rights in the ECHR into UK law.

Despite this heritage, the HRA is sometimes painted as a party political measure. Henry Porter implied last week that the HRA was a creature of the left, used by Labour as a “figleaf” behind which to attack our freedoms.¹⁴ Conservative MPs also sometimes refer to “Labour’s Human Rights Act”.¹⁵ Anyone acquainted with the sequencing that led to the Act will be struck by the awkwardness of this phrase.

It was the Society of Conservative Lawyers which recommended in its 1976 report, *Another Bill of Rights?*, that “the ECHR should be given statutory force as overriding domestic law”. This was two years after Lord Scarman’s famous Hamlyn lecture which galvanised the modern debate for a Bill of Rights.¹⁶

When the House of Lords set up a Select Committee in 1978 to inquire whether to introduce a bill of rights, it was the three Conservative members, and only one Labour, who supported its introduction. The Committee unanimously agreed that “if there were to be a Bill of Rights it should be a Bill based on the European Convention”.¹⁷ Former Conservative Home Secretary Leon Brittan proposed the introduction of a Bill of Rights for Scotland, based on the ECHR, in the same year.¹⁸

When some years later, Conservative MP Edward Gardner introduced a “Human Rights Bill to incorporate in British law the ECHR”, he had the support of several colleagues including Brittan, Geoffrey Rippon, Terence Higgins and Norman St John-Stevas.¹⁹ Other prominent Tories who have argued that the ECHR should be part of UK law, in the context of debates on introducing a bill of rights, include Richard Shepherd, Ivan Lawrence, Sir Michael Havers and Quintin Hogg. It was Hogg, in his later incarnation as Lord Hailsham, just before his second stint as Tory Lord Chancellor, who famously declared that “in this armoury of weapons against elective dictatorship, a Bill of Rights, embodying and entrenching the European Convention, might well have a valuable, even if subordinate, part to play”.²⁰

There were, of course, some notable Labour supporters of incorporation but this was dwarfed by widespread scepticism within the party that, interpreted by judges from a narrow social base, a Bill of Rights would stymie the programme of a Labour government. Although the post-war Labour administration signed and ratified the ECHR this was not without significant qualms.²¹ The first formal Labour party document to propose incorporation of the ECHR into UK law was a 1976 discussion paper, A Charter of Human Rights. This emerged from a committee chaired by Shirley Williams MP but the party’s National Executive Committee would not allow it to be discussed. Most supporters of a bill of rights in the Labour party, like Williams and former home secretary Roy Jenkins, left to join the



Social Democratic Party (SDP). The Home Office, meanwhile, published its own discussion document on incorporation in 1976 but came to no conclusions.

Generally speaking, support for a Bill of Rights within both the Labour and Tory parties evaporated when their government was in power. There were some exceptions. In a letter to *The Times* in March 1981, former Tory Cabinet Minister Geoffrey Rippon urged the Thatcher government to act on its manifesto commitment “to discuss a possible Bill of Rights with all parties”. Like most other protagonists, he urged support for a “Bill of Rights Bill which is intended to render the provisions of the ECHR enforceable” in UK law. Rippon noted that it was Winston Churchill who promoted and proclaimed the ECHR in the first place, a theme developed by *Daily Mail* journalist Peter Osborne and Conservative Parliamentary Candidate Jesse Norman in their *Liberty* pamphlet, launched at the last Tory party conference.²²

If there was one political party which was consistent in its support for a Bill of Rights it was the Liberal Democrats (and its predecessors the SDP and Liberals). The Liberal peer Lord Wade was tireless in introducing Bills to incorporate the ECHR into UK law. He was followed by Robert Maclennan MP and Lord Lester, who probably did more than any other single figure to garner support for this policy.

When Labour finally adopted incorporation of the ECHR as party policy in the early 1990s, in the context of a debate about the “quickest and simplest way” to introduce a Bill of Rights,²³ this was a significant departure from its previous stance. Just a few years earlier, in 1989, Alistair Darling, speaking for the Labour shadow cabinet, opposed a parliamentary motion by the Lib Dems supporting a Bill of Rights based on the ECHR.²⁴

Once in power, with the exception of the Cabinet ministers who introduced the Act, and successive human rights and health ministers who have since championed it, the Government has been



noted for its lamentable lack of promotion of the HRA, rather than its wholesale support. More than once after 9/11 and 7/7 the Blair Government seemed close to amending, if not repealing, the HRA. Former Home Secretary John Reid appeared to echo David Cameron when he declared in September 2007 that “we need a review of the workings of our human rights laws at a British and European level”.²⁵ It was, of course, Ken Clarke, now Shadow Business Minister, who described Cameron’s 2006 commitment to replace the HRA with a “British Bill of Rights” that “spells out the fundamental duties and responsibilities” of the people²⁶ as “xenophobic and legal nonsense”.²⁷ Cameron repeated these sentiments only two weeks ago.²⁸

Far from a clear-cut ideological divide between the two main political parties, they have at times seemed perilously close in their discomfort with the HRA. This is the surest sign of its effectiveness. Whilst the HRA has clearly not prevented serious incursions into our freedoms, it has put brakes on the executive that were completely absent before (more on this later in the series). Bills of rights are not panaceas. Most only allow the courts to review primary legislation after it has been passed or overturn unfair policies or decisions by officials. A Bill of Rights that could act like Simon Cowell, and stop Acts of Parliament in their tracks, would no doubt be accused of totally usurping Britain’s parliamentary traditions.

The US Bill of Rights, which has a strike-down power, has also failed to stop liberty defying legislation from being introduced like the USA Patriot Act 2001, the Homeland Security Act 2002, the Real ID Act 2005, the Detainee Treatment Act 2005 or the Military Commissions Act 2006. Former DPP Sir Ken Macdonald estimated at Liberty’s June 2009 conference that “the HRA stood up to the pressures created by global terrorism more effectively than the US Bill of Rights”.²⁹ Amongst a growing list, it has banned evidence procured by torture from being admitted in our courts, required independent and public investigations of all deaths in custody,



declared that control orders and indefinite detention breach fundamental rights, reduced the destitution of asylum seekers and safeguarded due process for mental health detainees. None of this is remotely enough, or a substitute for political action which no Bill of Rights can, or should, make redundant.

It would, of course, be possible to introduce a Bill of Rights that is wider in scope and stronger in enforcement powers than the HRA, although neither the Tories nor Labour propose the latter. If it is to garner the support the HRA has lacked, it must be preceded by widespread, and lengthy, popular engagement and debate. When I worked at Liberty in the early 1990s we tried to persuade the Labour party to support incorporation of the ECHR as the 'first step', with a 'follow up' Bill of Rights based on a wider set of internationally recognised human rights and traditional British liberties. For a while this was Labour policy. Virtually all of the debates referred to above likewise proposed "a Bill of Rights" based on "entrenching the European Convention", as Lord Haisham put it in his evidence to the 1978 Select Committee. In some cases this was presented as the first stage towards a "constitutional Bill of Rights", in others as the last, but in no case was it ever suggested that incorporation would need to be reversed to introduce a subsequent Bill of Rights.

The political divide which has now emerged is not between those who support and oppose bills of rights. It is between those, like the Liberal Democrats and Labour party, who are adamant that any new Bill of Rights must build on the HRA,³⁰ and the Tory front bench that is flying in the face of its heritage (and the rest of Europe) in arguing that it must be predicated on the HRA's denigration and repeal. Human rights are hard to win and easy to lose. They belong to no political parties. As Porter rightly argues, it is "plainly in all our interests" to stop this "struggle over ownership of rights". Human rights are not objects to barter away. They come from struggles that were begun long ago by past generations who gave their lives for these rights to be enshrined in our laws.



- ¹³ See www.commonvalues.org.uk
- ¹⁴ 'Stop playing politics with our rights and freedoms. They're too valuable', *The Observer*, 24 January 2010.
- ¹⁵ 'Army of 1,000 lawyers formed in first decade of Human Rights Act', *Telegraph*, 7 November 2008.
- ¹⁶ 'English Law – the new dimension', Lord Scarman, 1974.
- ¹⁷ *Bill of Rights: Select Committee Report*, HL Deb 29 November 1978 vol 396 cc1301-97.
- ¹⁸ *Bill of Rights for Scotland*, HC Deb 01 February 1978 vol 943 c491.
- ¹⁹ *Human Rights Bill*, HC Deb 06 February 1987 vol 109 cc1223-89.
- ²⁰ *The Dilemma of Democracy*, 1978.
- ²¹ See 'The United Kingdom' Part in the *Preparation of the European Convention on Human Rights, 1950*, Geoffrey Marston, (1993) 42 *International & Comparative Law Quarterly*, 796-826.
- ²² *Churchill's Legacy: The Conservative Case for the Human Rights Act*, Jesse Norman and Peter Osborne, Liberty, 2009.
- ²³ See Chapter 1 'What's in a name?'
- ²⁴ *Civil Liberties and Bill of Rights debate*, HC Deb, 19 June 1989, vol 155, cc76-117.
- ²⁵ 'John Reid calls for human rights law reform', *Telegraph*, 17 September 2007.
- ²⁶ 'Balancing freedom and security – a modern British Bill of Rights', David Cameron, Centre for Policy Studies, 26 June 2006.
- ²⁷ Quoted in the *Daily Telegraph*, 'Has Cameron thought it through or is he just thinking aloud?', 27 June 2006.
- ²⁸ 'David Cameron answers your questions', *This Is Gloucestershire*, 20 January 2010.
- ²⁹ *Speaking at Liberty 75th anniversary conference*, London, 6 June 2009.
- ³⁰ 'Rights and Responsibilities: Developing our Constitutional Framework', Ministry of Justice, March 2009.
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Human rights ... for some

Collusion in torture? The HRA, the courts and parliamentary sovereignty

Francesca Klug

guardian.co.uk, Tuesday 16 February 2010

In one of the less well-aired features of Binyam Mohamed's landmark case against the Foreign Office last week, Lord Neuberger commented that, "The Human Rights Act has enlarged the court's role for present purposes ... they now have to comply with the Convention [on Human Rights]." ³¹ He continued, "Article 10 carries with it a right to know, which means that the courts, like any public body, have a concomitant obligation to make information available ... where the publication at issue concerns the contents of a judgment of the court, it seems to me that Article 10 is plainly engaged; the public's right to know is a very important feature."

As is now well established, this judgment marks a watershed in our right to know the approach the security services take to combating terrorism in our name. It also casts a spotlight on the impact of the European Convention on Human Rights (ECHR) on our law as incorporated by the Human Rights Act (HRA). Some shameful truths have been laid bare, including the eminent judge's apparent opinion that "the security service does not in fact operate a culture that respects human rights". ³²

If this is his view, the security services would hardly be the only public authority about which this could be said. ³³ Not that everyone will necessarily think this is a bad thing. In an interview with the Daily Express published the same day as the judgment, David Cameron complained that, "The problem we have with the HRA is the rights

culture it's created." Two days earlier, to "rebuild trust in politics", Cameron again promised to "abolish the HRA and introduce a new Bill of Rights".³⁴ How will this enhance trust, you might ask? By ensuring "that Britain's laws can no longer be decided by unaccountable judges".

So Cameron's aim is not to hold the executive to greater account – which is the usual justification for bills of rights – but to clip the wings of judges such as Sir Igor Judge, the Lord Chief Justice, who argued in the *Binyam Mohamed* case that "the principle of open justice encompasses the entitlement of the media to impart, and the public to receive, information in accordance with Article 10" of the ECHR. What is particularly novel about the reasoning of the Leader of the Conservative Party is that concern about unaccountable judges is usually the reason protagonists give for opposing bills of rights, not for introducing one. As the HRA does not overturn parliamentary sovereignty anyway, it is unclear how the Tories' proposal to weaken the role of the courts further is likely to strengthen fundamental rights.

The Shadow Lord Chancellor, Dominic Grieve, paints a characteristically more nuanced picture. The problem with the HRA, he maintained in a lecture to the Northern Ireland bar on 4 February, is that it has not tied the hands of Parliament enough. In fact, he said, "It has taken decisions by the European Court of Human Rights, and not our own courts, to force the UK Government to change its policy on the blanket retention of DNA and stop and search powers under s 44 of the Counter Terrorism Act."³⁵

This is absolutely true. But what is Grieve's solution to this? He wants to "reconsider" the duty in section 2 of the HRA "for our courts to 'take into account' Strasbourg jurisprudence". This seems to turn logic on its head. While the Government drags its feet, or fails to properly address these recent Strasbourg judgments,³⁶ at least our courts now have to give due weight to them. Consequently, in any future cases on DNA retention or the use of



blanket stop and search powers under anti-terrorism laws, the courts should take a different stance to their earlier one.

But Grieve appears to want to take us back to the days before the HRA when our judges were under no such obligation and rarely even considered the ECHR. In research I carried out for Essex University in 1993³⁷ (five years before the HRA was passed), I established that the ECHR was cited in only 173 domestic cases in the higher courts in 21 years. This was despite the fact that Winston Churchill was one of the main drivers of the Convention, it was largely drafted by UK lawyers and the UK was one of the first countries to ratify it in 1951. Unlike virtually the whole of the rest of Europe, the UK relied on judge-made common law and statutes to determine the scope of our freedoms. There was no 'higher law' to which other laws had to correspond to protect our fundamental rights.

The consequences of this, both good and bad, were many. It may be hard to believe, but until 1989 MI5 was completely unregulated. It was only as a result of a European Court of Human Rights ruling that the UK was forced to put the security services on a statutory footing for the first time.³⁸

Ten years earlier, in a case brought by James Malone, the domestic courts expressed deep concern at the absence of legal safeguards to control telephone tapping, but regretted that they had no powers to intervene.³⁹ "This is not a subject on which it is possible to feel any pride in English law", the high court declared.

But on the principle that operated before the HRA, that everything was permitted in law except that which was expressly forbidden, telephone tapping could not be declared unlawful. It was only after Strasbourg determined that the absence of regulation of state interception in the UK was a breach of the right to privacy under the ECHR that the Government passed the Interception of Communications Act in 1985.⁴⁰ Plus ça change! But what has changed is that when a new relevant case comes before them, the courts don't have to wait for the Government to legislate to provide



remedies under the HRA for individuals who have had their rights violated or to declare government policies inadequate.

Grieve is therefore absolutely right to say that the HRA “afforded an opportunity for our own courts to develop their own jurisprudence in relation to the ECHR”, and “in an environment where the intrusive power of the State is increasing it provided extra protection for rights and liberties, just as Magna Carta did to reinforce the common law”.⁴¹ He is also right when he complains that the domestic courts have sometimes engaged in “interpretative deference” in deciding to “follow” Strasbourg case law rather than rely on it as a floor, but not a ceiling, or strike out on their own when appropriate, using common law principles.⁴²

Love or hate the Strasbourg Court, the HRA was never intended to mandate our judges simply to ape it. On the contrary, in 1997 the Government rejected an opposition amendment to clause 2 of the Human Rights Bill which would have bound UK judges to follow the jurisprudence of the Strasbourg courts. Derry Irvine, then lord chancellor, explained, “We believe that clause 2 gets it right in requiring domestic courts to take into account judgments of the European Court but not making them binding”.⁴³

As a result, Tory MP Edward Leigh commented that, “We are in danger of not simply incorporating the Convention in our law, but going much further. What we are creating is an entirely new Bill of Rights”.⁴⁴ Leigh was spot on. Now there is every sign that our courts are starting to return to the ‘original intention’ of the HRA,⁴⁵ as Grieve acknowledged in his Belfast speech, the HRA can reasonably be described as a Bill of Rights that is mandated only to ‘take account’ of Strasbourg case law alongside established common law principles.

As with all bills of rights, this will not always result in judgments that civil rights campaigners will applaud. Nor does it preclude a subsequent Bill of Rights that is more strongly enforced and broader in scope if there is popular support for it, as I have previously argued in this series. But it is very difficult to understand what is to be gained



from Grieve’s proposal to decouple any proposed successor to the HRA from Strasbourg jurisprudence when our courts are not bound by it anyway. Or to put it another way, why should any subsequent Bill of Rights require the repeal of the HRA when the Northern Ireland Human Rights Commission,⁴⁶ the Joint Committee on Human Rights,⁴⁷ and even the Government’s Green Paper on Rights and Responsibilities⁴⁸ have demonstrated that this is neither necessary nor desirable?

Repeal or significant amendment of the HRA would also prove a “legal and political nightmare”⁴⁹ for the current devolution frameworks governing Scotland, Wales and Northern Ireland, as the all-party law reform group JUSTICE explained in a well-argued report last week.⁵⁰ Throughout Europe the ECHR is incorporated into domestic law, often alongside national bills of rights. Some constitutions, such as Spain’s, specifically require the courts to “construe” their provisions “in conformity” with the ECHR. There is no precedent for de-incorporation of the Convention in order to add new rights.

Perhaps the key to the motive for repealing the HRA is to be found in other contradictory comments Grieve made in his Belfast speech. Having complained that our courts have been too craven, he also bemoaned that they have “been willing at times to go much further than the Strasbourg Court has ever gone”, contributing to “rights inflation”. Grieve’s “own inclination” would be to favour a Bill of Rights which uses ECHR rights as currently drafted, but “where rights are qualified and not absolute” he would “consider the possibility of interpretation clauses to give a more detailed guide consonant with our own legal and political traditions”.

But what does that mean exactly? We may need to turn to Cameron’s plain speaking to find out. Some might argue that the Tory leader was in step with our ‘political tradition’ that ‘a man’s home is his castle’ when he recently declared that “the moment a burglar steps over your threshold and invades your property ... I

think they leave their human rights outside”.⁵¹

The HRA would probably need to be repealed or amended to accommodate that philosophy. Or perhaps the new interpretation clauses Grieve proposes would be necessary to fulfil Cameron’s repeated ambition for a “modern British Bill of Rights” that “sets out people’s rights and responsibilities” and would “strengthen our hand in the fight against terrorism and crime”.⁵² After this week’s shocking exposures, is this what we really want to repeal the HRA and introduce a Bill of Rights for?

³¹ *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65.

³² See ‘Binyam Mohamed: text of letter which reveals Court’s criticism of ‘deliberately misleading’ security service’, *Guardian online*, 10 February 2010.

³³ See ‘Human Rights Inquiry’, report of the Equality and Human Rights Commission, June 2009.

³⁴ ‘Rebuilding trust in politics’, 8 February 2010.

³⁵ ‘What Price Justice?’, Lecture to Northern Ireland Bar, 4 February 2010.

³⁶ See for example, the statement on DNA and Biometric Data (Lords Hansard, 11 November 2009) following the decision of the European Court of Human Rights in *S and Marper v UK*, decided 4 December 2008.

³⁷ *Three Pillars of Liberty*, F. Klug, K. Starmer and S. Weir, Routledge, 1996.

³⁸ *Harman and Hewitt v UK* (1989) 14 EHRR 657.

³⁹ *Malone v Metropolitan Police Commissioner* [1979] 344 Ch.

⁴⁰ *Malone v UK* (1984) 7 EHRR 14.

⁴¹ ‘What Price Justice?’.

⁴² See for example, *R (Ullah) v Special Adjudicator* [2004] UKHL 26.

⁴³ *Human Rights Bill*, Lords Hansard, 18 Nov 1997, col. 514.

⁴⁴ *Human Rights Bill*, Lords Hansard, 3 Jun 1998, col. 398.

⁴⁵ See for example, *R v Horncastle* [2009] UKSC 14.

⁴⁶ ‘A Bill of Rights for Northern Ireland’, Northern Ireland Human Rights Commission, 10 December 2008.

⁴⁷ ‘A Bill of Rights for the UK?’, Joint Committee on Human Rights, 29th report of session 2007-08.

⁴⁸ ‘Rights and Responsibilities: Developing our Constitutional Framework’, Ministry of Justice, March 2009.

⁴⁹ Roger Smith, Director of JUSTICE, quoted in press release, 8 February 2010.

⁵⁰ ‘Devolution and Human Rights’, JUSTICE, February 2010.

⁵¹ ‘David Cameron: burglars leave human rights at the door’, *Telegraph*, 1 February 2010.

⁵² ‘David Cameron answers your questions’, *This Is Gloucestershire*, 20 January 2010.



The Human Rights Act does protect us

Officials are using the HRA as a scapegoat and those who hastily call for its replacement should pause to reconsider

Shami Chakrabarti

guardian.co.uk, Tuesday 2 March 2010

Bills of rights serve many purposes. In young nations they can help heal wounds and bring formerly warring factions together. In older democracies, a clear articulation of hard-won freedoms should ward off complacency and remind a society of its foundations. In either event, no Bill, Charter, Declaration or Rights Act is worth its salt unless it goes some way towards protecting the vulnerable from neglect of duty and abuse of power.

This is the second week of an inquest that officialdom would prefer not to happen. Naomi Bryant was brutally murdered by a man released on licence 16 years into a life sentence for rape and threats to kill. At the time of his release from prison, Anthony Rice's career of violent sex offending already stretched back 30 years, including a serious indecent assault against a five-year-old girl. But the parole board was never shown his complete record and post-release supervision in a probation hostel proved fatally inadequate.

In one of the most shameless exercises of bureaucratic buck-passing in recent years, the chief inspector of probation pointed to the 'human rights' of offenders as somehow responsible for the failures of his colleagues. The response of Naomi's grieving mother, Verna, was simple yet devastating: "What about my daughter's

human rights?" While opponents of the Human Rights Act (HRA) cite this tragedy with unseemly relish, they couldn't be further from the truth.

Article 2 of the HRA imposes a positive obligation on the State to protect life. When death occurs in custody or as a result of the authorities' dereliction, it imposes obligations to hold an independent inquiry into what went wrong. Acting on Verna Bryant's behalf my Liberty colleagues have invoked this vital protection to secure the full jury inquest that the criminal justice agencies wanted to avoid. But for the exacting standards of the Act, Rice's admission to killing Naomi would have been an end of it and there would be little opportunity to learn the lessons that Verna craves in her daughter's name instead of financial compensation or any yearning for revenge.

The inquest process of disclosure is already proving far more revealing than the internal investigation that came before. Every other mother in the country can have real hope that the authorities may be forced to take a long hard look at the reality rather than the rhetoric of our correctional system as a result.

Community supervision may be woefully inadequate at protecting us from the most dangerous proven offenders, but it is enough to ruin an innocent's life and extend the unfair punishment to his partner and children. Also this week, the Government is asking Parliament to renew its shameful system of 'control orders' for the fifth year running. Passed as 'emergency legislation' after the House of Lords used the HRA to impugn the infamous Belmarsh internment policy,⁵³ the Prevention of Terrorism Act 2005 replaced imprisonment without charge for terror suspects with house arrest on the same basis.

Liberty's campaign slogan 'Unsafe-Unfair' best sums up this cruel nonsense. Sixteen-hour curfews, orders to leave your family and move to a completely different part of the county, police station reporting requirements and exposure to raids on your home at all



hours of the day or night are enough to drive you mad when based on secret intelligence that you and your lawyers will never see. Equally, these anti-terror ASBOs are essentially self-policing and would hardly prevent a determined suicide bomber from walking out of an unguarded bedsit and doing his worst. Unsurprisingly seven out of 45 'controlees' have completely disappeared and one former wretched subject of this regime attended public gatherings of hundreds and thousands of people without the intervention of the authorities.

Meanwhile government fails to allow intercepted telephone calls and emails to be admitted into evidence so that more terror suspects might be prosecuted within fair criminal trials. The Home Office officials responsible for this perverse policy have seen the departure of three home secretaries since it was passed as a temporary measure. The same personnel formulated the legislation, handled the case files and defended the inevitable litigation in an astonishing breach of the separated roles normally associated with the rule of law.

Armed with HRA fair trial protections, the higher courts have quashed many individual control orders and attempted to impose some basic requirements of fairness upon the Home Secretary. Of course I would have liked the entire scheme declared incompatible, but ultimately the abomination of control orders marks a failure of politics not law. To those who scapegoat the HRA, craving new bills of rights before our existing one has survived adolescence, I say rub the sleep from your eyes. Do you really believe politicians who permit internment year on year are more likely to build on existing rights and freedoms or to destroy them?

⁵³ *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

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Who deserves human rights?

Do our human rights apply in every situation – and should the HRA be replaced by a British Bill of Rights?

Francesca Klug

guardian.co.uk, Thursday 25 March 2010

Listening to shadow justice secretary Dominic Grieve, as I did yesterday morning, maintain that the Tory party wants to repeal the Human Rights Act (HRA) in order to make human rights more popular, I was reminded of an old Jewish joke. A boy who kills his parents goes to court and pleads for mercy on the grounds that he's an orphan. This, the joke concludes, is the definition of 'chutzpah'. That was the precise word that came to mind at yesterday's Human Rights Lawyers Association breakfast meeting.

After years of an unedifying race to the bottom between leading politicians from both the main political parties – remember David Cameron's Conference speech lamenting the "Human Rights Act culture that has infected every part of our life"⁵⁴ – it is more than a little 'rich' to cry 'nothing to do with me gov – all I ever wanted was for the nation to love human rights but unfortunately they just wouldn't get it'. When Grieve himself claimed⁵⁵ at last year's Party Conference that Derbyshire police had failed to issue pictures of two fugitive murderers because of their privacy rights under the HRA, the Derbyshire constabulary was forced to issue an official statement that it had never refused to release photographs on human rights grounds.⁵⁶

Contrary to what we are told, opinion surveys consistently show how popular human rights are. A Liberty poll in December 2009

found overwhelming support for the rights in the HRA and that 96% of people believe it is important that there is a law that protects rights and freedoms in Britain.⁵⁷ The goal of making human rights better understood and more widely valued is, of course, crucial. There is no denying that the HRA was inadequately consulted upon and even more weakly promoted (when ministers weren't directly undermining it). But it is not the rights themselves that are in contention, rather who has access to them and when.

This is a question the Supreme Court faced last week in considering whether British soldiers should forfeit all their human rights when they are sent into battle. The Court of Appeal said they shouldn't in a case concerning Private Jason Smith who died of heatstroke in Basra in 2003 after repeatedly telling medical staff he was feeling unwell.⁵⁸ Appeal Court judges said that soldiers should have the benefit of the rights guaranteed in the HRA wherever they are. Jason's mother, Catherine Smith, strongly agreed, but the Ministry of Defence argued before the Supreme Court last week that human rights laws should not apply once soldiers leave their army base.⁵⁹

There is similar disagreement over whether the military themselves should be held accountable for violations of the human rights of those they detain when they are sent to fight abroad. Lieutenant Colonel Nicholas Mercer thought they should and made his views known in a "massive row" with the commander of the Queen's Dragoon Guards about the army's legal obligations in Iraq under the Geneva conventions and the European Convention on Human Rights (ECHR), an official inquiry learned last week.⁶⁰ These standards, the inquiry reportedly heard, were deemed by a military official to be "appropriate for individuals locked up on a Saturday night in Brixton", but not "for detainees arrested by the Black Watch etc following a bit of looting in Basra".⁶¹

We were reminded that it is not so much the rights themselves, but who has access to them, that is the source of so much disquiet,

earlier this month when Jon Venables, one of the murderers of the toddler James Bulger in 1993, was detained after apparently breaching the terms of his licence. The vexed ‘debate’ that followed about whether our ‘right’ to know his identity should over-ride his right to life and safety was not surprising, as such moments, fraught with emotional impact, raise fundamental questions that test the best of us. They boil down to this: should there be an eligibility test for protection under our human rights legislation – related to responsible behaviour, citizenship or the nature of your job – or should it apply to everyone who lives under the jurisdiction of the UK State? And if the answer to this question is that the whole point of human rights is that they belong to all human beings, as many of us believe, in what circumstances should rights be limited and to what degree? One of the points of a Bill of Rights is to provide a transparent and consistent framework to address this difficult question. It is this framework that is in play in the current debate on whether the HRA should be scrapped and replaced by a Bill of Rights and Responsibilities.⁶²

I remember the first time that I was challenged as to whether the proposed HRA would give unfettered rights to the ‘irredeemable’ and ‘irresponsible’. It was at a public meeting prior to the Act coming into force where a speaker suggested we needed a Bill of Duties rather than a Bill of Rights. The tabloids were already warning that the new Act would usher in an era of unparalleled license with head teachers unable to ban sex in schools, polygamy legalised and speeding and parking laws overturned. In response I quoted the famous English radical Thomas Paine, whose bestseller Rights of Man, written in 1791, reminds us that this debate is hardly new.

He argued that calls for a ‘Declaration of Duties’ to accompany a ‘Declaration of Rights’ suggested “a mind that reflected” but “erred by not reflecting far enough.” In Paine’s words “A Declaration of Rights, is, by reciprocity, a Declaration of Duties also. Whatever is my right as a man, is also the right of another; and it becomes my



duty to guarantee, as well as possess.” Paine was foreshadowing the philosopher Joseph Raz who later theorised that “rights are grounds of duties in others.”⁶³ In other words, a society that respects fundamental human rights can only be secured if we respect each other’s rights and freedoms. Without this insight the whole enterprise is doomed.

He did not live to see it, but Paine’s broad approach to rights and duties is embedded in all post-Second World War human rights treaties that form the backbone of most modern bills of rights around the world.⁶⁴ While the criminal and civil law is packed with legal duties, the HRA is one of a very few measures which sets out our basic rights.⁶⁵ This does not mean, of course, that rights are absolute. The test for limiting our freedoms under the HRA, as in all modern bills of rights, lies in the necessity to take proportionate measures to prevent us doing harm to others or to protect the common good, not whether an individual belongs to a particular category of people, whether convicted prisoners or battlefield soldiers. Under this framework, rights are not contingent upon ‘good behaviour’, but the State has a responsibility to ensure that our liberties are not abused at others’ expense.⁶⁶

This is the route to victims of crime claiming protection under the HRA as well as defendants, as the Director of Liberty, Shami Chakrabarti, amplified in the last piece in this series. A rape victim⁶⁷ and an assault victim⁶⁸ have used the HRA to receive compensation for inadequate investigation or prosecution of the alleged crimes committed against them and the families of murder victims have used the Act to obtain a more thorough public inquiry into their deaths.⁶⁹ So it was unsurprising that the European Court of Human Rights ruled, in the case of Thompson and Venables in 1999, that “states have a duty under the convention to take measures for the protection of the public from violent crime” and that the ECHR does not “prohibit States from subjecting a child or young person convicted of a serious crime to an indeterminate sentence... where

necessary for the protection of the public".⁷⁰ The Court concluded that their right to a fair trial was violated, not because the sentence was too long, but because the Home Secretary, who was clearly not independent from the executive, had fixed their tariff or minimum time in detention.

This kind of sober judgment is lost in the cacophony that surrounds such difficult cases. Both the Government and the Opposition have sought to give the impression that they will introduce a Bill of Rights to remedy a 'responsibilities deficit' in our society to ensure we deal with "the wrongs against society – not just the rights of their perpetrators".⁷¹ 'Rights and responsibilities' was of course Tony Blair's mantra and for his swan song in May 2007 he reiterated that "the civil liberties of the suspect" were being put "first" by the courts.⁷² David Cameron's main charge against the HRA has been that it "has helped to create a culture of rights without responsibilities."⁷³ The Brown Government, while pledging to maintain the HRA, made the case for a non-justiciable Bill of Rights and Responsibilities (a more woolly concept than duties) in its Green Paper last year to "remind people of the importance of individual responsibility and to give this greater prominence".⁷⁴

In January Cameron maintained that "what we need is a modern British Bill of Rights which clearly sets out people's rights and responsibilities, and strengthens our hand in the fight against terrorism and crime."⁷⁵ Both parties have acknowledged that in practice they are unlikely to go beyond the symbolic and use the vehicle of a Bill of Rights to introduce a legally enforceable catalogue of responsibilities or duties that would impact on us all. The real target in this debate is those deemed unworthy or ineligible to claim legal entitlements under the HRA. However, and here is the rub, this still "leaves scope for interpretation clauses", Grieve has said, "to provide for the better balancing of rights where the assertion of a right undermines the rights of others."⁷⁶ Given that the HRA already allows – indeed requires – rights to be limited to protect



others and deter crime we are left wondering what Grieve means when he said, in the same speech, that such “interpretation clauses” should “give a more detailed guide consonant with our own legal and political traditions than does the ECHR text itself as to the weight to be given” to each of the articles.

Some of us asked Grieve to clarify the effects of these proposed interpretation clauses at yesterday’s meeting. I am not sure we were any the wiser. The purpose appears to be to free our judges from the approach of the Strasbourg Court (they are already free from slavishly following the case law) where rights are not absolute. The text of the ECHR could still be used, Grieve says (although he suggests this is only his personal preference, not necessarily his party’s). But it is not at all clear that the human rights framework for balancing or limiting rights – based on preventing harm rather than creating eligibility criteria – will survive these suggested ‘interpretation clauses’.

We are not told who will lose out from such changes but here are some clues. In a recent planning policy Green Paper the Conservatives committed to repealing the HRA so that Travellers can be more easily evicted.⁷⁷ Cameron has promised that “a modern British Bill of Rights” will “guide the judiciary and the Government in applying human rights law when the lack of responsibility of some individuals threatens the rights of others.”⁷⁸ Grieve has pointed to a woman and her son whose deportation to Lebanon was prevented by our courts⁷⁹ on the grounds that she would lose custody of her young child to a formerly violent father he had never met, as the kind of decision that could be affected by a Bill of Rights with “interpretation clauses” that are more “consonant with our own legal and political traditions”.⁸⁰

Some readers of this piece might welcome a new approach to deciding such issues. But those who are seeking a Bill of Rights which builds on the human rights framework will be very wary. This goes to the heart of the question: why do the Conservatives

(alongside UKIP and the BNP) feel it necessary to repeal the HRA when there is no shortage of models for a UK Bill of Rights that leaves the HRA intact or incorporates it wholesale?⁸⁷ Grieve's Liberal Democrat counterpart, David Howarth, speaking to the same audience last week, reaffirmed his party's support for the HRA, alongside any additional bill of rights. He also commented on the need to make rights popular. But he distinguished between "reconciling human rights with the front page agendas of the Sun and Daily Mail" and making human rights better understood and appreciated as the bedrock values of our democracy that can benefit us all.

⁵⁴ *Speech to Conservative Party Conference, 1 October 2008.*

⁵⁵ *'Protecting the public, not criminals' privacy, 7 October 2009.*

⁵⁶ *'Tories slammed over attack on Derbyshire police during party conference, This Is Derbyshire, 8 October 2009.*

⁵⁷ See <http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2009/10-12-09-the-truth-about-britain-s-values.shtml>

⁵⁸ *Secretary of State for Defence v Smith [2009] EWCA Civ 441.*

⁵⁹ *'Supreme Court considers UK soldiers' right to sue over military missions, Guardian, 15 March 2010.*

⁶⁰ *'Baha Mousa inquiry: Eight or more civilians died in British custody, Guardian, 16 March 2010.*

⁶¹ *'Baha Mousa inquiry: Attorney general 'blocked' system to stop prisoner abuse, Guardian, 16 March 2010.*

⁶² *'Multiculturalism – A Conservative vision of a free society, Dominic Grieve, 4 March 2009.*

⁶³ *The Morality of Freedom, Oxford University Press, 1986.*

⁶⁴ See *'The relationship between rights and responsibilities', L. Lazarus, B. Goold, R. Desai and Q. Rasheed, Ministry of Justice, 2009.*

⁶⁵ See *'Rights and Responsibilities', Eric Metcalf, (2007) Justice Journal 4(2).*

⁶⁶ *F. Klug, 'Human Rights and Victims', in Reconcilable Rights? Analysing the tension between victims and defendants, Edited by Ed Cape, LAG, 2004.*

⁶⁷ *'Rape complaint woman reaches settlement with police, BBC News, 1 December 2009.*

⁶⁸ *R (B) v Director of Public Prosecutions [2009] EWHC 106 (Admin).*

⁶⁹ *R (Amin) v Secretary of State for the Home Department [2003] UKHL 51.*

⁷⁰ *T v UK; V v UK (2000) 30 EHRR 121.*



Who deserves human rights?

⁷¹ Chris Grayling speech, 23 February 2009.

⁷² 'Blair accuses courts of putting rights of terrorist suspects first', *Independent*, 28 May 2007.

⁷³ 'Balancing freedom and security – a modern British Bill of Rights', speech at the Centre for Policy Studies, 26 June 2006.

⁷⁴ 'Rights and Responsibilities: developing our constitutional framework', Ministry of Justice, March 2009.

⁷⁵ 'David Cameron answers your questions', *This Is Gloucestershire*, 20 January 2010.

⁷⁶ 'Can the Bill of Rights do better than the Human Rights Act?', 30 November 2009.

⁷⁷ *Open Source Planning Green Paper*, Conservative Party.

⁷⁸ 'Balancing freedom and security – a modern British Bill of Rights', speech at the Centre for Policy Studies, 26 June 2006.

⁷⁹ *EM (Lebanon) v Secretary of State for Home Department* [2008] UKHL 64.

⁸⁰ 'Can the Bill of Rights do better than the Human Rights Act?', 30 November 2009.

⁸¹ See Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change*, Hart, 2010.

Human rights an election issue

Liberal Democrats are keen to set themselves apart from the Tories' confused plan for replacing the Human Rights Act

Francesca Klug

guardian.co.uk, Wednesday 14 April 2010

The pundits who predicted that the three main political parties were broadly agreed on reforming the Human Rights Act through a British Bill of Rights have been confounded.⁸² It is not the case that they all propose to amend it.⁸³ Only the Conservatives pledge to scrap the HRA and replace it with a UK Bill of Rights.⁸⁴ When the Liberal Democrats publish their Manifesto this morning they will line up with Labour in standing by the Human Rights Act.⁸⁵ More intriguingly, given their consistent commitment to constitutional reform and individual rights, they will not express support for a UK Bill of Rights.

There are three interlinked reasons for this. First, in contrast to earlier eras, there is something to lose as well as gain. According to a senior Liberal Democrat source "it would not be difficult to use the Orwellian language of a UK Bill of Rights to water down the HRA" as much as build on it. While Labour declares it is proud to have introduced the HRA, and many prominent Tories were once strongly in support,⁸⁶ it was the Lib Dems and Liberals who spearheaded the campaign for its introduction over many years.

They promised to "enact a Bill of Rights by immediately incorporating the European Convention on Human Rights"⁸⁷ into

UK law in every manifesto from 1979 onwards until Labour passed the HRA in 1998. They have never pretended that the HRA is some alien European imposition. Especially now that the UK courts are asserting their independence in interpreting the rights in the HRA,⁸⁸ they recognise that the HRA is a Bill of Rights in all but name. This is the view of most of the rest of the world. The Australian Federal Government is currently consulting on introducing a Bill of Rights – called a Human Rights Act – mainly based on the UK model.

Second, instead of proposing an additional Bill of Rights which could cause confusion, the Lib Dems will express strong support for a written constitution in their manifesto as, among other reasons, the vehicle for consulting upon additional rights to the HRA and the mechanisms for enforcing them. They will commit to a citizens' convention to determine its contents, subject to a national referendum.

Labour's much more tentative and elite all-party commission to "chart a course to a written constitution" – a new departure for New Labour – is one of 50 policies they highlight at the back of their Manifesto. The proposed Bill of Rights and Responsibilities that was the subject of the Government's Green Paper in March 2009 has vanished.⁸⁹

As a member of the small Ministry of Justice Bill of Rights reference group, I am not surprised at this decision. The difficulties of reconciling conflicting demands across government and Whitehall effectively torpedoed the project. Many of the issues that surfaced – such as the relationship between the executive, legislature and judiciary, and the mechanism for enforcing any social and economic rights – are more appropriately the subject of a written constitution. The only way to introduce a credible Bill of Rights which builds on the HRA is to open up the process to genuine national participation and consultation Australia-style. This means a government must be prepared to lose at least some measure of control over the result.

The Tories give no indication that this is what they intend in their

Manifesto. When asked, Shadow Justice Secretary Dominic Grieve talks of white papers and draft Bills – an entirely Whitehall-led process. The Conservative Manifesto makes no mention of a written constitution other than to reaffirm that we do not have one and that “ultimate authority” rests with Parliament.

The triangulated rationale in the Tory manifesto for scrapping the HRA is “to protect our freedoms from state encroachment” on the one hand and “encourage greater social responsibility” on the other. There are some positive commitments in the Conservative manifesto which will be welcomed by civil liberties campaigners, like scrapping Labour’s ID cards. No rationale whatsoever is given as to why it is necessary to overturn the HRA in order to enhance such freedoms, rather than introduce a Bill of Rights which builds on it, as virtually every credible human right advocate has proposed.⁹⁰

When Shadow Business Secretary Kenneth Clarke was asked at the Tory party conference whether abolishing the HRA would improve human rights he answered with characteristic honesty: “I don’t think it does.”⁹¹

We would be the first democracy in the world to introduce a Bill of Rights on the back of scrapping one already on the statute book.⁹² The UK would sit alongside Belarus as virtually the only country in Europe not to have incorporated the ECHR into domestic law. Using the vehicle of a Bill of Rights to “encourage social responsibility” beyond the values already strongly embedded in the HRA, is either unachievable or suggests the importation of an alternative framework where rights are contingent on ‘responsible behaviour’.⁹³ Lawyers who say this would make little difference because we would still be signed up to the ECHR forget this was the situation prior to the HRA coming into force, or ignore David Cameron’s repeated insistence that one of the purposes of his Bill of Rights would be to reduce the power of the courts.⁹⁴

This leads to the third reason why the Lib Dems will not support



a UK Bill of Rights in their Manifesto. The necessity of signalling an alternative policy to the Conservatives. “The Tories have hijacked the language of a Bill of Rights in order to weaken them,” the senior Lib Dem source told me. “We are in favour of the Human Rights Act as it stands. We want to see its scope extended and, eventually, its entrenchment in a written constitution. We are not prepared to give a single inch to those who want to undermine it”.

⁸² See ‘Labour 1997-2010: a Verdict’, Joshua Rozenberg, *Standpoint Blogs*, 9 April 2010.

⁸³ ‘Repealing the Human Rights Act may not be as alarming as it seems’, Vernon Bogdanor, *The Times*, 18 February 2010.

⁸⁴ ‘Invitation to Join the Government of Britain’, *The Conservative Manifesto 2010*.

⁸⁵ ‘A Future Fair for All’, *The Labour Party Manifesto 2010*.

⁸⁶ See Chapter 2, ‘Party Pieces’.

⁸⁷ ‘Changing Britain for good’, *Liberal Democrat General Election Manifesto 1992*.

⁸⁸ *R v Horncastle* [2009] UKSC 14.

⁸⁹ ‘Rights and Responsibilities: developing our constitutional framework’, Ministry of Justice, March 2009.

⁹⁰ See Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change*, Hart, 2010 and ‘A Bill of Rights for the UK?’, Joint Committee on Human Rights, 29th report of session 2007-08.

⁹¹ ‘Andrew Rawnsley interviews Kenneth Clarke – as it happened’, *Guardian online*, 6 October 2009.

⁹² ‘Developing a bill of rights for the UK’, A. Donald with the assistance of P. Leech and A. Puddephatt, *Equality and Human Rights Commission*, 2010.

⁹³ See Chapter 5, ‘Who deserves human rights’.

⁹⁴ ‘Rebuilding trust in politics’, 8 February 2010.

The Human Rights Act from a Scottish perspective

Repealing the HRA would have negative consequences at global, UK and Scottish levels

Alan Miller

guardian.co.uk, Tuesday 20 April 2010

As Chair of the Scottish Human Rights Commission (SHRC), human rights matter to me at three interconnected levels – global, UK and Scottish. I am concerned at the plight of the persecuted in Zimbabwe, the detention in Scotland by UK authorities of children of asylum seekers or the neglect of older persons in Scotland.

What happens after the general election to the UK Human Rights Act (HRA) has a significant impact at all three levels. Any UK Government committed to building upon the HRA would have a positive impact. Any UK Government committed to a “consultation” process that has as its starting point the repeal of the Act would have a harmful impact. This is of course the Manifesto position of the Conservative Party.⁹⁵

First, at a global level – no developed country has repealed fundamental human rights legislation. No ‘consultation’ process claiming to be leading to a Bill of Rights has started out on the basis of repeal of fundamental human rights legislation. Repealing the HRA and replacing it with something less effective would give a green light to regimes around the world to continue, or to escalate, human rights abuses, and in part justify this by pointing to the UK’s rolling back of human rights protection. This has been the experience of the past few years with the so-called ‘war on terror’ and rehabilitation of torture.

Second, at a UK level, such a ‘consultation’ process over the next few years would seriously undermine the many efforts of everyone engaged in practical ways of using the HRA as a means of raising standards of public services, e.g. care of older people and other vulnerable members of the community. All public authorities in the UK currently have a duty to comply with the HRA and where best practice has been developed to assist public authorities in so doing the quality of public services has been significantly improved, as the SHRC has found in an independent evaluation of the State Hospital for Scotland and Northern Ireland.⁹⁶

At a UK level, the repeal of the HRA could also create a two-tier system of the level of human rights protection within the UK. The Act currently provides a ‘safety net’ or common standard of human rights protection for individuals throughout the UK. It is unlikely that the Scottish Parliament would seek to lower the level of protection of human rights through supporting the repeal of the HRA as it applied in Scotland in relation to such devolved areas as health, housing, criminal justice, education and social work. Consequently, residents in Scotland would enjoy a higher degree of human rights protection, more in line with the UK’s international legal obligations and international best practice, than residents in England and Wales. The question will inevitably be asked: why should residents of Gateshead not enjoy the same protection as those in Glasgow?

Third, at a Scottish level, the HRA has been an important pillar of the constitutional framework of devolution. Under the Scotland Act 1998 (which established the Scottish Parliament and the Scottish Government) there is a duty of both to comply with the Human Rights Act and through it the European Convention on Human Rights (ECHR).

This has had tangible benefits for the public. For example, it has ensured that all of the legislation passed by the Scottish Parliament has been compatible with the rights of individuals under the ECHR. That of course has not been the case with certain Westminster

legislation which has had to be successfully challenged in the courts. The HRA has also been influential in contributing to progressive and popular Scottish legislation relating to, for example, mental health and homelessness.

The Scottish Human Rights Commission is committed⁹⁷ to defending the HRA and in fact progressively building on it.⁹⁸ As part of our four-year strategic plan the Commission is embarking on a 'mapping' of the realisation of human rights throughout Scotland – identifying the 'gaps', and good practices, of human rights protection. The purpose of this is to determine what needs to be done to bring the living experience of all, particularly the most vulnerable, up to the standards consistent with the UK's international legal human rights obligations.

This evidence will then inform a genuine public consultation on how to build upon the HRA and develop a national action plan for human rights in Scotland. This would be able to be progressively implemented by the Scottish Parliament and Scottish Government and all public authorities through a variety of means – legislative, administrative, policy and practice development and resource allocation

Rather than seeking to reduce the domestic influence of international human rights obligations through repealing the HRA this approach would aim to progressively bring the living experience of all, without discrimination, up to those international standards.

⁹⁵ 'Invitation to Join the Government of Britain', *The Conservative Manifesto 2010*.

⁹⁶ 'Human Rights in a Health Care Setting: Making it Work', *Scottish Human Rights Commission, 2009*.

⁹⁷ *Statement on a proposed British Bill of Rights*, see <http://www.scottishhumanrights.com/news/latestnews/article/billofrights>

⁹⁸ *Joint Statement on the Bill of Rights with Northern Ireland Human Rights Commission*, see <http://www.scottishhumanrights.com/news/latestnews/article/jointstatement>



Human Rights Act underpins devolution

The Act formed a crucial part of the Northern Ireland peace deal. To tamper with it would be wrong and invite unnecessary discord

Monica McWilliams

guardian.co.uk, Tuesday 27 April 2010

When political parties talk about the future of the Human Rights Act and a proposed United Kingdom Bill of Rights coupled with responsibilities,⁹⁹ bemusement is perhaps the kindest way to describe the initial reaction of many people in the wake of the debate in Northern Ireland.

The decision to give domestic effect to the European Convention on Human Rights took place over a decade ago. In Northern Ireland, the negotiators to the Good Friday agreement made sure that this was included. They even went to the trouble of having the Government of the UK agree to incorporate the Convention through an international treaty with the Government of the Republic of Ireland on the basis of a quid pro quo. When some people claim in 2010 that the decision to give the Convention domestic effect was the product of a so-called 'chattering class', they need to be reminded that the Convention – and subsequently the Human Rights Act – were crucial parts of a peace accord.

The Good Friday Agreement was subject to widespread public deliberation in Northern Ireland, with copies of the document sent to every household. This treaty, which included the proposed incorporation of the Convention, was also widely debated and

subsequently endorsed in the Republic of Ireland. Finally, the agreement was overwhelmingly agreed in Northern Ireland through a referendum under the watchful gaze of the international community: the same community that now lauds Northern Ireland as an exemplar of how violent conflict can be successfully resolved.

A decade after the discussion ended, with stable government restored in Northern Ireland, we are being invited to reconsider what the foundational document for protecting human rights in the United Kingdom ought to be and what it might include. Proposals to amend the Human Rights Act have created a sense of particular unease among those concerned to preserve and maintain the fragile constitutional balances that have been painstakingly put in place.

In Northern Ireland, the Human Rights Act has been accepted as a foundational document, and since 1998 the Northern Ireland Human Rights Commission has been busy, not trying to get rid of it or replace it, but attempting to build upon it.¹⁰⁰ The judiciary have been using the legislation effectively, developing a cohesive domestic jurisprudence. A large amount of public money has been spent on training both the legal profession in the application of the Act, and the public authorities in compliance with the Act.

The suggestion that, post-general election, an overhaul of the Act¹⁰¹ is desirable defies logic, and the idea that we should throw in a vague and ill-defined discourse on responsibilities for good measure is puzzling. Add to this the notion that reopening a debate will somehow help us in defining British values,¹⁰² and what we are left with are more bitter and divisive clashes, not less. Let me explain why.

Before the recent arrival of the UK debate, if you had mentioned human rights at the Northern Ireland Assembly you would probably have received an opinion, but not on the proposed repeal of the Act. What you would have got instead was an opinion on our own homegrown proposals – a Bill of Rights for Northern Ireland, reflecting our particular circumstances, and supplementing the Convention.



I realise this statement could, admittedly, appear to be parochialism run rampant or an example of the worst excesses of devolution. But it would be wrong to draw this conclusion. Northern Ireland has not suddenly become cut off from the rest of the United Kingdom. It is just that devolution, as is the case in Scotland and Wales, enables us to consider our own context. The context is one of both British and Irish nationalities, not the agenda of those advocating a reform of the Act.

The Human Rights Act is central to the constitutional DNA of the UK. It underpins the devolution settlements while simultaneously elucidating the common values of the constituent nations. It also provides a necessary platform from which the sense of autonomy that devolution brings can be further built upon. The importance of this dual understanding cannot be overstated in a part of the UK where identity politics have often gone hand in hand with sectarian conflict.

For anyone who wishes to consider tampering with the Act, a strong message must be sent out. Nowhere in the world has the repeal of existing human rights protections been a starting point for discussing a proposed Bill of Rights.¹⁰³ The UK, particularly given its constitutional complexities, should not attempt to set such an unedifying precedent. The Human Rights Act 1998 must be defended and built upon as part of further progress in the promotion and protection of human rights within and across all jurisdictions. To do otherwise, from a Northern Ireland perspective, is to invite an unnecessary and unwelcome discord.

⁹⁹ See 'Invitation to Join the Government of Britain', *The Conservative Manifesto 2010*; 'A Future Fair for All', *The Labour Party Manifesto 2010*; 'Change that works for you', *Liberal Democrat Manifesto 2010*.

¹⁰⁰ 'Commissions defend the Human Rights Act', joint statement with Scottish Human Rights Commission, see http://www.nihrc.org/index.php?page=press_news_details&category_id=2&press_id=415&Itemid=65

¹⁰¹ 'Invitation to Join the Government of Britain', *The Conservative Manifesto 2010*.

¹⁰² 'Rights and Responsibilities: developing our constitutional framework', Ministry of Justice, March 2009.

¹⁰³ 'Developing a bill of rights for the UK', A. Donald with the assistance of P. Leech and A. Puddephatt, *Equality and Human Rights Commission*, 2010.



Hung parliament shows need for a written constitution

It is not another bill of rights we need but a written constitution

Francesca Klug

guardian.co.uk, Tuesday 11 May 2010

“We need a constitution. You cannot run a country without having a constitution, without basic laws. It’s a must.” So said Saif al-Islam al-Gaddafi, the Libyan leader’s LSE-educated son, speaking to the Jordan Times last week.¹⁰⁴

Despite the reams of coverage that last week’s election has evoked, it is surprising how few commentators echoed the sentiments of Gaddafi Jr. For if the election demonstrated the case for electoral reform, as its supporters maintain, it surely also highlighted the vagaries of the UK’s famed ‘unwritten constitution’.

William Gladstone, probably the most successful Liberal statesman (until now), described the British constitution as “the most subtle organism which has proceeded from the womb”. So subtle that we appear to regularly require the three wise men – constitutional experts Vernon Bogdanor, Peter Hennessey and Robert Hazel – to divine its meaning for the rest of us. As respected as they are, they have clearly not been able to satisfy all commentators as to what precisely the constitutional convention is in the case of a hung parliament. For some of the media Gordon Brown is a squatter in No 10 who needs to get out. For others, “the constitution is working well”.¹⁰⁵ David Cameron was quoted as

saying just prior to the election “there is convention and there is practice and they are not always quite the same thing”.¹⁰⁶

In the midst of the election campaign Cameron insisted that Prime Ministers who take office in the middle of a parliamentary term should be required to face a general election within six months.¹⁰⁷ Had Labour and the Liberal Democrats clinched a deal we would undoubtedly have heard much more about this new-found constitutional principle. Supporters of a Lib-Lab coalition keep telling us, as if we were all inattentive politics students, that ours is a parliamentary system, not a presidential one, in which there is no impediment to changing PMs mid-term as past practice has demonstrated.¹⁰⁸ Given the absence of a written constitution, I doubt whether most people have the slightest idea what this means.

It is often remarked that our constitution is not, in fact, unwritten – it is just not all written down in one place. Bogdanor and his Oxford University colleagues attempted to rectify this when they worked with students to codify the rules, regulations and conventions which currently apply, produced as the UK constitution.¹⁰⁹ As admirably comprehensive as this exercise was, it tells us almost nothing about what should happen in the event of a hung parliament, beyond stating that “the sovereign appoints as Prime Minister the person who appears best able to form a government enjoying the confidence of the House of Commons”. It does not even say that in such circumstances it will be the responsibility of the Cabinet Secretary to, in the words of the *Sunday Express*, “glide Britain smoothly over its time of turbulence”.¹¹⁰ In the event, it has been Sir Gus O’Donnell’s Cabinet Office manual which has stood in lieu of a written constitution.

Although it is exceedingly unlikely to have even surfaced as an issue in the ‘coalition negotiations’, the Liberal Democrats’ Manifesto promises a referendum to introduce a written constitution drawn up by a citizens’ convention.¹¹¹ This is the fifth Manifesto since 1979 in which the Liberals have made a similar commitment. Labour’s



much more tentative Manifesto pledge to “chart a course to a written constitution” is a first.¹¹² The Tories make no such promise,¹¹³ unsurprisingly, other than to reaffirm that we do not have a written constitution and that they will introduce a “UK sovereignty Bill” to establish that “ultimate authority” rests with Parliament.¹¹⁴

A written constitution is the only logical, long-lasting and reliable forum through which to advance additional rights to those in the Human Rights Act. A constitution is the means by which the respective powers of the courts, the government and Parliament can be determined. It is the appropriate vehicle for settling the relationship between domestic and international law. The Bogdanor codification of our constitution, circa 2007, incorporates the HRA lock, stock and barrel as does the model produced by Richard Gordon QC earlier this year, which includes additional social and economic rights.¹¹⁵

The Liberal Democrats have an unambiguous Manifesto commitment to “protecting the Human Rights Act”. This is in stark contrast to the Tories pledge to “replace the HRA”, rather than introduce a Bill of Rights which builds on it. Whatever other outcome, the parliamentary arithmetic of the 2010 election should put an end to this unseemly haggling over whose is better – my Bill of Rights or yours – which has besmirched the debate about fundamental human rights over the last decade.

Although it was included in Labour’s 1997 manifesto, and is based on the European Convention on Human Rights to which the UK was already committed, a fair critique of the HRA is that it was not adequately consulted on. The problem was that 1997 was not a ‘constitutional moment’. Besides devolution, for which there was significant and sustained support, there was little interest in bills of rights or written constitutions beyond a narrow elite. One of the consequences of the current impasse is that the 2010 election might just usher in such a moment – and not only in Libya but here in the UK.

¹⁰⁴ 'Qadhafi's reformist son urges Libyan constitution', *Jordan Times*, 7 May 2010.

¹⁰⁵ 'The Constitution Is Working Well', Alastair Bruce, *Sky News blog*, 10 May 2010.

¹⁰⁶ 'Tories: 'Give us the keys to No 10, Liz'', *Guardian*, 4 May 2010.

¹⁰⁷ 'Another unelected Prime Minister 'would be unacceptable'', *telegraph.co.uk*, 11 May 2010.

¹⁰⁸ Gordon Brown statement, 'Gordon Brown 'stepping down as Labour leader'', *BBC News*, 10 May 2010.

¹⁰⁹ 'The constitution of the UK as of 1 January 2007', in *Towards a new constitutional settlement*, Chris Bryant (ed), *Smith Institute*, 2007.

¹¹⁰ 'Sir Gus's legacy is key to No 10', *Sunday Express*, 9 May 2010.

¹¹¹ 'Change that works for you', *Liberal Democrat Manifesto 2010*.

¹¹² 'A Future Fair for All', *The Labour Party Manifesto 2010*.

¹¹³ 'Invitation to Join the Government of Britain', *The Conservative Manifesto 2010*.

¹¹⁴ See Chapter 6 'Human Rights an Election Issue'.

¹¹⁵ Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change*, *Hart*, 2010.



Human rights must not be the subject of coalition deals

The Lib Dems should not be tempted to concede ground on rights in order to carve out victories on other areas of reform

Helena Kennedy

guardian.co.uk, Wednesday 19 May 2010

I frequently argued to Labour in government that whatever challenges we face in the modern world, the sacrifice of civil liberties and human rights is a folly. The erosion of liberty taken collectively was one of the reasons why the electorate lost trust in New Labour.

Law translates standards of human rights into reality and the Human Rights Act will ultimately be recognised as one of the greatest legacies of Labour in government. You would have been forgiven for thinking it was a bastard child, not produced by Labour at all, as a number of New Labour Home Secretaries like John Reid railed against it.¹⁷⁶ They hated it when it was invoked by the courts to rein in government excesses, like the locking up of non-citizens indefinitely without trial. Of course, that is precisely what good human rights legislation will do – empower people against the might of the State, in particular those who are unprotected by any other legislation.

Even the former Prime Minister, Tony Blair, sometime lawyer, was deeply ambivalent about the HRA, frequently echoing the Daily Mail in claiming it allowed the judges to get too big for their own

breeches.¹¹⁷ Belatedly, just before the election, he publicly recognised that the HRA was part of Labour’s “progressive” agenda, even if it sometimes proved “difficult” for the Government.¹¹⁸

The Conservatives are also leery about the legislation. They grudgingly came round to the idea in 1997 and did not attempt to block the final reading of the Human Rights Bill because they were persuaded it was sensible to repatriate rights; “bring rights home” was the mantra, so that English judges got to make the decisions about our fundamental human rights rather than the mostly foreign judges in the European Court of Human Rights.

However, like Blair, many have been unhappy about aspects of the Act in practice, claiming it protects criminals’ rights over those of victims (despite the Director of Public Prosecutions, Keir Starmer, maintaining that it has provided a useful framework for furthering victims’ rights¹¹⁹). David Cameron has called for limits to be placed on the power of the courts to prevent the deportation of non-British nationals whom the Home Secretary alleges might pose a threat to national security¹²⁰ even though he must know this would be contrary to the European Convention on Human Rights’ (ECHR) prohibition on deporting people to places where they face torture or the death penalty; an obligation which applied even before we had the HRA.

The Conservative Manifesto has promised to replace the HRA with a Bill of Rights for the UK to “protect our freedoms from state encroachment” on the one hand and “encourage greater social responsibility” on the other. No explanation is given as to how to achieve these triangulated aims without weakening the protections we now have in the HRA.

On occasion, Conservative Shadow Ministers have said they would add jury trial and habeas corpus to the current framework. Sounds great. However, other statements suggest this so-called Bill of Rights is aimed at preventing the British courts from drawing upon European Human Rights jurisprudence to which they take



exception¹²¹ in order “to strengthen our hands in the fight against terrorism and crime”.¹²² This strange and novel argument for introducing a Bill of Rights has bewildered our most eminent jurists, who do not see how such a change is possible while remaining signed up to the ECHR.

What the Conservatives have also failed to consider in any depth is how their proposed British Bill of Rights would fare in Scotland, which has a different legal system and a devolved administration, which would certainly block such Conservative changes, or in Northern Ireland, where they have already embarked on the creation of their own tailored Bill of Rights. The answer is that neither place is very happy about this proposed set of Conservative alterations.

The key question is what will happen in the new political environment of a Coalition Government between the Conservatives and the Liberal Democrats? The Lib Dems have always been committed champions of the Human Rights Act; their Manifesto promised to protect it and resist any moves to repeal. This was restated with force at the post-coalition Lib Dem party meeting on 16 May in Birmingham, where both the Climate Change Secretary Chris Huhne and Justice Minister Lord McNally threatened to resign from the coalition if the HRA were repealed.

There was also some comfort in the appointment of the new Lord Chancellor, Kenneth Clarke, who was a practicing criminal lawyer and committed civil libertarian and has publicly refuted any idea of opting out of the European Convention or repealing the HRA, which he famously dismissed as “xenophobic and legal nonsense”.¹²³ When interviewed recently on BBC radio, he made it clear that “a fundamental belief in human rights is shared by Conservatives and Liberals so there is not going to be any problem there”. I hope he is right.

However, the rights agenda is going to be a source of real tension.

The control order regime, which bares a very scant resemblance to due process under Article 6 of the ECHR, the right to fair trial, is constantly being redrawn by the higher courts using the Human Rights Act. Yet, it is already being endorsed by the new Conservative Home Secretary. It will be interesting to see how the Liberal Democrats respond and whether they were consulted. Then there will be the issue of torture and whether our security services are condoning practices which offend Article 3.¹²⁴ The Liberal Democrats are going to be sorely tested on these issues and many more affecting fundamental human rights.

On other constitutional fronts the horizon is hazier. Part of the coalition deal has been the promise of a referendum on voting reform – the alternative vote, which is not proportional representation. However, in the view of many it would be an advance, simply because it would dispatch the first past the post voting system and start us on a journey towards something more radical. Such a referendum raises the spectre of the two coalition parties campaigning against each other to achieve different outcomes. It is hard to imagine their political marriage withstanding this voting-system war, so the referendum may be pushed back in the timetable.

On the House of Lords, again there is the promise of reform but it will be a tough battle to get a Bill passed without terrible acrimony, as the Conservatives in the upper chamber are almost uniformly against a fully elected chamber, as are most Labour peers. The cynics among you will see this as shocking self-interest but even promises that such a reform will be executed at a snail's pace with appropriate compensation have not diluted the opposition to reform. For many, it really is about finding a solution to the old conundrum: how do you create a chamber of people who will be independent-minded and bring together the diverse expertise that makes a second chamber effective in revising legislation and



offering something distinctive from the Commons? The prospect of a chamber elected from political party lists is pretty unattractive.

I mention these other items on the possible legislative agenda because it may be very tempting for the Liberal Democrats to carve out victories on some areas of reform by making concessions elsewhere. This is why we have to make it clear that the terrain of human rights must not be the ground on which any further deals are done. Human rights have to be non-negotiables in this new political landscape.

¹¹⁶ 'John Reid calls for human rights law reform', *Daily Telegraph*, 17 September 2007.

¹¹⁷ 'Blair 'to amend human rights law'', *BBC News*, 14 May 2006.

¹¹⁸ 'General election 2010: Tony Blair says don't vote tactically', *Guardian*, 4 May 2010.

¹¹⁹ 'The role of the prosecutor in a modern democracy', *public prosecution service annual lecture*, 21 October 2009.

¹²⁰ 'We need a minister for terror', *Sunday Times*, 12 November 2006.

¹²¹ 'It's the interpretation of the Human Rights Act that's the problem – not the ECHR itself', *Dominic Grieve, Conservative Home Platform*, 14 April 2009.

¹²² 'David Cameron answers your questions', *This Is Gloucestershire*, 20 January 2010.

¹²³ 'Has Cameron thought it through or is he just thinking aloud?', *Daily Telegraph*, 27 June 2006.

¹²⁴ See Chapter 3, 'Human Rights ... for some'.

Appendix

The protection of freedom under the Human Rights Act: some illustrations¹²⁵

Helen Wildbore

Research Officer, Human Rights Futures Project, LSE

Protest

- **Preventing demonstrators reaching a protest is unjustified intrusion into right to freedom of assembly**

The decision by police to stop coaches of demonstrators reaching a demonstration was a breach of the rights of freedom of speech (Article 10) and freedom of peaceful assembly (Article 11). The court said that the police must take no more intrusive action than appeared necessary to prevent a breach of the peace. The House of Lords referred to the fact that post-HRA, it is no longer necessary to debate whether we have a right to freedom of assembly.¹²⁶

Privacy

- **Retention of DNA and fingerprint evidence of innocent people is a breach of right to private life**

The blanket and indiscriminate retention of fingerprints, cellular samples and DNA profiles of people suspected but not convicted of offences failed to strike a fair balance between the competing public and private interests. It was a disproportionate interference with the right to respect for private life (Article 8) and could not be regarded as necessary in a democratic society.¹²⁷



- **Damages awarded for unjustified intrusion into private life**

Where an invasion of private life is a matter of legitimate public interest because a public figure had previously lied about the matter, there will be a strong argument in favour of freedom of expression (Article 10) that will often defeat a claim of privacy (Article 8). But publication of additional information, beyond setting the record straight, was an unjustified intrusion into private life and damages were awarded for the breach.¹²⁸

Freedom of expression

- **Responsibly written articles on matters of public interest are protected**

The common law defence of qualified privilege in libel cases can protect media articles which are of public importance.¹²⁹ Post-HRA the defence has been strengthened¹³⁰ and as a result, the media have much more freedom when reporting matters of public interest, where it may not be possible to subsequently prove the truth of the allegations, provided that they act responsibly and in the public interest.

- **Freedom of expression includes the right to receive information**

The right to freedom of expression (Article 10) includes not only the freedom to impart information and ideas but also to receive. The media have been granted access to a hearing in the Court of Protection, when such hearings had previously been closed.¹³¹



No slavery

- **HRA protects against modern-day slavery**

The Metropolitan police accepted that their failure to investigate a victim's report of threats and violence by her employer, who withheld her passport and wages, had breached the prohibition of slavery and forced labour (Article 4) after the human rights organisation Liberty took judicial review proceedings under the HRA. The police agreed to reopen the investigation and the employer was found guilty of assault.¹³²

Protecting right to life

- **Right to life can include positive obligation to protect life**

The right to life under Article 2 not only prevents the State from intentionally taking life, it also requires States to take appropriate steps to safeguard life.¹³³ As a result, the majority of the 43 police forces in England and Wales now have specific policies on handling immediate and foreseeable risks or threats to life.¹³⁴

- **Soldiers in Iraq fall under the jurisdiction of the HRA**

The court said that the protection of the right to life was capable of extending to a member of the armed forces wherever they were. If there is a known risk to life which the State can take steps to avoid or minimise, such steps should be taken. The circumstances of the death of a soldier serving in Iraq, who died from hyperthermia after complaining that he couldn't cope with the heat, gave rise to concerns that there might have been a failure by the army to provide an adequate system to protect his life. An inquest was necessary.¹³⁵



- **Public authorities in ‘effective control’ of areas outside the UK are subject to the HRA**

A man who had died as a result of injuries sustained in a detention unit in a British military base in Iraq was “within the jurisdiction” of the UK and covered by the HRA.¹³⁶

Right to Liberty

- **Detention of suspected international terrorists without trial is breach of HRA**

The detention without charge or trial of a group of foreign nationals suspected of terrorism was declared incompatible with the right to liberty (Article 5) and the prohibition of discrimination (Article 14).¹³⁷ The provisions were repealed by the Prevention of Terrorism Act 2005, which put in place a new regime of control orders.

- **Control order restrictions violate right to liberty**

The non-derogating control orders imposed on a group of Iraqi and Iranian asylum seekers under the Prevention of Terrorism Act 2005, which, among other things, imposed an 18-hour curfew and prohibited social contact with anybody who was not authorised by the Home Office, amounted to a deprivation of liberty contrary to Article 5.¹³⁸ The Government responded by issuing new orders, subjecting the men to less restrictive conditions.

Right to fair trial

- **Secret evidence in control order hearings violates right to fair trial**

The right to fair hearing (Article 6) means that a defendant must be given sufficient information about the allegations against him to enable him to give effective instructions to the special advocate representing him.¹³⁹

No torture

- **Evidence procured by torture must not be admitted in court**

The Special Immigration Appeals Commission (Procedure) Rules 2003 determined that the Commission could receive evidence that would not be admissible in a court of law. The court ruled that this did not extend to statements procured by torture, giving effect to the absolute prohibition of torture in Article 3.¹⁴⁰

- **Deportation where there is a real risk of torture would violate the absolute prohibition on torture**

There is an absolute prohibition on deporting individuals where substantial grounds have been shown for believing that there is a real risk of them being subjected to torture or to inhuman or degrading treatment or punishment. Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.¹⁴¹

Investigations into deaths

- **Duty to investigate death in custody**

Where a death has occurred in custody the State is under a duty to publicly investigate before an independent judicial tribunal, with an opportunity for relatives of the deceased to participate.¹⁴²

- **Article 2 secures inquest into murder**

The human rights organisation Liberty used Article 2 (right to life) arguments to secure the re-opening of the inquest into the death of Naomi Bryant, who was killed in 2005 by convicted sex offender Anthony Rice. In light of new information, the inquest will be reconvened with a fresh jury in January 2011.¹⁴³



Destitution of asylum seekers

- **Duty under HRA to avoid asylum seekers living in conditions amounting to inhuman or degrading treatment**

Where asylum seekers were excluded from support for accommodation and essential living needs under asylum legislation,¹⁴⁴ the court ruled that as soon as an asylum seeker makes it clear that there is an imminent prospect of his treatment reaching inhuman and degrading levels, the Secretary of State has a power under asylum legislation and a duty under the HRA to avoid it.¹⁴⁵ Following the court's decision, the Immigration and Nationality Directorate adopted a new approach to comply with the judgment.¹⁴⁶

Disability

- **Duty to take positive action to secure dignity of disabled tenant in local authority housing**

Where a local authority knew that a disabled tenant's housing was inappropriate but did not move her to suitably adapted accommodation, they failed in their duty to take positive steps to enable her and her family to lead as normal a family life as possible and secure her physical integrity and dignity. Damages were due for this failure.¹⁴⁷

- **Policies on lifting must consider competing rights**

A lifting policy should balance the competing rights of the disabled person's right to dignity and participation in community life and the care workers' right to physical and psychological integrity and dignity. Following a challenge under the HRA, East Sussex local authority amended its Safety Code of Practice on Manual Handling to include consideration of the

dignity and rights of those being lifted. This was circulated to other local authorities, NHS trusts and care providers to encourage them to review their policies.¹⁴⁸

Mental health

- **Onus of proof in mental health cases reversed to protect patients**

The Mental Health Act 1983 was successfully challenged under the HRA, leading to an amendment to put the burden of proving that continued detention for treatment for mental illness is justified under Article 5 (the right to liberty) on the detaining authority, and not the patient.¹⁴⁹

Children

- **Unnecessary physical restraint of young people in custody is a breach of HRA**

The Secure Training Centre (Amendment) Rules 2007 which allowed officers working in institutions for young offenders to physically restrain and seclude a young person were quashed. The Secretary of State could not establish that the system was necessary for ensuring 'good order and discipline' and the Rules breached the prohibition on inhuman and degrading treatment (Article 3).¹⁵⁰

Sexual orientation

- **Same-sex partner given 'nearest relative' status**

The same-sex partner of a detained mental health patient, whom the local council had refused to afford the status of 'nearest relative', challenged this decision under Article 8 (respect for private life) arguing that private life includes issues of sexuality, personal choice and identity. The court accepted



that same-sex partners should be covered by the co-habiting rule applied to heterosexual couples who qualify as 'nearest relative' after six months co-habitation.¹⁵¹

- **HRA provides protection against discrimination on grounds of sexual orientation**

The courts have used their powers under the HRA to eliminate the discriminatory effect of para 2, Schedule 1 of the Rent Act 1977 which meant that the survivor of a homosexual couple could not become a statutory tenant by succession whilst the survivor of a heterosexual couple could.¹⁵²

Race

- **Changes made to cell-sharing policies following racist murder of prisoner**

Following the murder of a prisoner by his racist cell-mate and a successful challenge under the HRA for a public inquiry, the Prison Service introduced changes to its policy and procedures relating to cell-sharing risks, allowing information-sharing to identify high risk factors.¹⁵³

Gender

- **Gender re-assignment requires legal recognition**

A successful challenge was made against the different treatment for post-operative transsexuals in obtaining marriage certificates and a declaration was made that the Matrimonial Causes Act 1973 was incompatible with the right to private and family life (Article 8) and the right to marry (Article 12). The Government altered the law and the Gender Recognition Act 2004 now entitles a transsexual person to be treated in their acquired gender for all purposes, including marriage.¹⁵⁴

- **Separation of mother and baby in prison requires flexibility**

Following a challenge to the blanket Prison Services rule, requiring compulsory removal of all babies from imprisoned mothers at 18 months, the Prison Service amended the requirements for the operation of Mother and Baby Units. The removal of the child had to be a proportionate interference with her right to family life. It was necessary to consider the individual circumstances and whether it was in the child's best interest to be removed.¹⁵⁵

¹²⁵ Some European Court of Human Rights decisions have also been included as illustrations of the development of human rights law which, as a result of the HRA (s. 2), the domestic courts are bound to "take into account". Prior to the HRA, European Court of Human Rights decisions were not part of the domestic legal framework.

¹²⁶ *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55.

¹²⁷ *S and Marper v UK*, ECtHR Grand Chamber, 4 December 2008.

¹²⁸ *Campbell v Mirror Group Newspapers* [2004] UKHL 22. See also *Douglas v Hello! Ltd* (2005) EWCA Civ 595; *HRH Prince of Wales v Associated Newspapers* [2006] EWCA Civ 1776; *Mosley v News Group Newspapers* [2008] EWHC 1777.

¹²⁹ *Reynolds v Times Newspaper* [1999] UKHL 45. The court referred to the need for the common law to be developed and applied in a manner consistent with Article 10 (freedom of expression).



- ¹³⁰ *Jameel v Wall Street Journal Europe* [2006] UKHL 44.
- ¹³¹ *A v Independent News and Media and others* [2010] EWCA Civ 343.
- ¹³² See <http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2010/28-05-10-justice-for-victim-of-modern-day-slavery.shtml>
- ¹³³ *Osman v UK ECtHR*, 28 October 1998.
- ¹³⁴ See 'Human Rights Inquiry: Report of the Equality and Human Rights Commission', June 2009.
- ¹³⁵ *R (Smith) v Oxfordshire Assistant Deputy Coroner and Secretary of State for Defence* [2008] EWHC 694 (Admin).
- ¹³⁶ *R (Al-Skeini) v Secretary of State for the Defence* [2007] UKHL 26.
- ¹³⁷ *A and others v Secretary of State for the Home Department* [2004] UKHL 56. The claimants received (modest) damages for the violation of their right to liberty at the European Court of Human Rights (*A and others v UK, ECtHR Grand Chamber*, 19 February 2009).
- ¹³⁸ *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45.
- ¹³⁹ *Secretary of State for the Home Department v AF and others* [2009] UKHL 28.
- ¹⁴⁰ *A and others v Secretary of State for the Home Department* [2005] UKHL 71.
- ¹⁴¹ *Saadi v Italy ECtHR Grand Chamber*, 28 February 2008; *Chahal v UK ECtHR*, 15 November 1996.
- ¹⁴² *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51. See also *R (Middleton) v HM Coroner for Western Somerset* [2004] UKHL 10; *R (Takoushis) v HM Coroner for Inner North London et al* [2005] EWCA Civ 1440 and *D v Secretary of State for the Home Department* [2006] EWCA Civ 143.
- ¹⁴³ See <http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2010/bryantinquest-abandoned.shtml>
- ¹⁴⁴ They were excluded from support for accommodation and essential living needs granted under the Immigration and Asylum Act 1999 Part VI by the Nationality, Immigration and Asylum Act 2002 s. 55(1), because the Secretary of State had decided that they had not made their claims for asylum as soon as reasonably practicable after their arrival in the UK.
- ¹⁴⁵ *R (Limbuela and others) v Secretary of State for the Home Department* [2005] UKHL 66.
- ¹⁴⁶ "No claimant who does not have alternative sources of support, including adequate food and basic amenities, such as washing facilities and night shelter, is refused support", Home Office, 'Asylum Statistics: 4th quarter 2005 UK', 2005.
- ¹⁴⁷ *R (Bernard) v Enfield* [2002] EWHC 2282 Admin.
- ¹⁴⁸ *R (A and B) v East Sussex County Council* [2003] EWHC 167 (Admin).
- ¹⁴⁹ *R (H) v Mental Health Review Tribunal (North and East London Region)* [2002] QBD 1.
- ¹⁵⁰ *R (C) v Secretary of State for Justice* [2008] EWCA 882.
- ¹⁵¹ *R (SG) v Liverpool City Council* October 2002.
- ¹⁵² *Ahmad Raja Ghaidan v Antonio Mendoza* [2004] UKHL 30.
- ¹⁵³ *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51.
- ¹⁵⁴ *Bellinger v Bellinger* [2003] UKHL 21.
- ¹⁵⁵ *R (P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151.

About the author

Francesca Klug is a Professorial Research Fellow at the LSE and Director of the Human Rights Futures Project at LSE Global Governance. Francesca was previously a Senior Research Fellow at the Human Rights Incorporation Project at King's College Law School where she assisted the government in devising the model for incorporating the European Convention on Human Rights into UK law reflected in the Human Rights Act.

From 2006-09 Francesca was a Commissioner on the statutory Equality and Human Rights Commission. She is a frequent broadcaster and has written widely on human rights, including *Values for a Godless Age: the story of the UK Bill of Rights* (Penguin, 2000). She is currently writing a sequel to this book, *Human Rights in an Age of Failed Utopias* to be published by Routledge. Francesca was awarded the Bernard Crick prize for the best article published by *Political Quarterly* in 2009 at the annual Orwell Prize event in May 2010.

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This short book brings together the first 10 articles in a series of blog posts about the Human Rights Act written or edited by Professor Francesca Klug between January and May 2010. The series examines the origins and intentions of the HRA, how the Act works in practice and the context behind political debates about its future. The series was first published on the Guardian website and includes guest contributions by Shami Chakrabarti, Alan Miller, Monica McWilliams and Helena Kennedy QC.

