Rights, liberties and values – Always read the label.
The Third Annual University of Huddersfield Social Justice Lecture
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Introduction

I am delighted to be invited to deliver this year's Annual Social Justice Lecture. I grew up in a community where 'knowledge of the law' usually meant that a neighbour, a friend or a family member had been evicted or arrested. Living in an environment where the law was viewed as something done "by them" and "to you", I learnt early the potential for the legal system to shape lives for good or for bad. That those who most likely to be in need of its protection are the least able to understand or access the justice system hasn't changed.

The work of organisations like the Huddersfield Legal Advice Clinic remains ever more crucial. The work of committed individuals like Phil Drake and his team should be celebrated (and better rewarded).

JUSTICE continues to work hard towards its vision – of fair, accessible and efficient legal processes, in which the individual's rights are protected, and which reflect the country's international reputation for upholding and promoting the rule of law.

However, our justice system is at a moment of crisis. Challenges to budgets and changes in ideology have led to new and significant barriers to justice for individuals without deep pockets – heavy fees, reduced scope and funding for legal aid, a 30 % cut in the budget for HMCTS, new restrictions on access to judicial review – and a new residence test for legal aid looming on the horizon. Many of these changes may work to shield public bodies from challenge; unlawful conduct from censure and poor public administration from accountability.

It is against this background that we consider the proposal to repeal the Human Rights Act 1998.

The Human Rights Act – What's not to love?

For human rights to matter, they must be made real, accessible and relevant to our lives and to the life of our community. This is what the world understood when – in the first of the post-war settlements which would create the international human rights framework – States came together to adopt the Universal Declaration of Human Rights (1948) and the European Convention on Human Rights very shortly thereafter (1950). As Eleanor Roosevelt explained:

> *"Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world.… Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world."*[1]

After over four decades of debate, it was in this vein that the Westminster Parliament voted to "*Bring Rights Home*" in the Human Rights Act 1998 ("HRA").

The Act itself is very straightforward in its operation. Put simply, it allows individuals within the UK to enforce their human rights in our courts.

The rights protected by the HRA are those that we agreed when we signed the European Convention on Human Rights in 1953. Those rights weren't any more alien to our traditions

[1] *Eleanor Roosevelt, "In Our Hands" (1958 speech delivered on the tenth anniversary of the Universal Declaration of Human Rights).*

then as they are now. It is well known that the text itself was prepared by British lawyers, including David Maxwell-Fyfe, who would go on to become a Conservative Home Secretary, Attorney General, and Lord Chancellor.

The rights protected include:

- the rights to life, to liberty and to a fair trial;
- protection from torture, inhuman and degrading treatment;
- the rights to freedom of expression, thought and belief, religion, and assembly;
- the right to be free from slavery;
- the right to marry; and
- the right to enjoy those protections without discrimination.

They are rights we are committed to not only in the European Convention, but in the International Covenant on Civil and Political Rights and multiple other UN instruments which follow it, including the UN Convention against Torture and the UN Convention on the Rights of the Child.

As Lord Bingham asked once "*Which of these rights … would we wish to discard? Are they trivial, superfluous, unnecessary? Are any of them un-British*"?[2]

Like constitutional guarantees the world over – including those modelled on the European Convention on Human Rights and exported to former British colonies – the Human Rights Act requires all public bodies to respect our rights in everything they do. It should be a tool which puts people at the heart of public decision making.

Our colleagues at Liberty have begun their campaign to save the Human Rights Act, perhaps unsurprisingly, with a simple question:

"*What's not to love?*"[3]

Vaunting values, downgrading rights?

Unfortunately, the operation of the HRA has attracted the criticism of every serving Government since its inception; from Jack Straw's description of the HRA as a "charter for villains"[4] to Boris Johnson's most recent suggestion we should not be "bothered" about civil liberties "stuff" for terrorist suspects.[5]

That a Government may not like decisions which hold them to account may not come as a surprise.

However, on the day we celebrated the 800th birthday of *Magna Carta*, last June, the Prime Minister and his newly minted Cabinet began their campaign for repeal with a degree of constitutional nostalgia. The Prime Minister told us with pride:

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[2] Liberty, 75th Anniversary Lecture, 6 June 2009. See https://www.liberty-human-rights.org.uk/sites/default/files/lord-bingham-speech-final.pdf

[3] See Liberty's Campaign, 'Save the HRA' here: https://www.liberty-human-rights.org.uk/campaigning/save-our-human-rights-act-0. They explain the public perception of the Act is in fact supportive of many of the legal rights it protects, here: https://www.liberty-human-rights.org.uk/news/press-releases/britain-agrees-what%E2%80%99s-not-love-about-human-rights-act

[4] Daily Mail, *Cameron 'will scrap Human Rights Act' in campaign for UK Bill of Rights*, 8 December 2008 http://www.dailymail.co.uk/news/article-1092716/Cameron-calls-UK-Bill-Rights-Straw-reveals-plans-overhaul-Human-Rights-Act.html

[5] Daily Telegraph, *Boris Johnson: I am not bothered with civil liberties stuff for terror suspects*, 11 January 2015, http://www.telegraph.co.uk/news/worldnews/europe/france/11338602/Boris-Johnson-I-am-not-bothered-with-civil-liberties-stuff-for-terror-suspects.html

> *"Liberty, justice, democracy, the rule of law – we hold these things dear, and we should hold them even dearer for the fact that they took shape right here, on the banks of the Thames. So on this historic day, let's pledge to keep those principles alight".*[6]

Less than a month later, the new Lord Chancellor, the Right Hon Michael Gove MP added for good measure:

> *"The rule of law is the most precious asset of any civilised society. It is the rule of law which protects the weak from the assault of the strong…and which guarantees the essential liberty that allows us all as individuals to flourish."*[7]

This commitment to precisely those values and liberties underpinning the fundamental rights protected by the common law and reflected in the rights guaranteed by the European Convention on Human Rights might suggest a solid foundation for constitutional reform.

Yet, while the Prime Minister's proposals have met with enthusiasm in the pages of The Daily Mail[8] and The Sun;[9] other commentators, including organisations like JUSTICE, continue to express concern, caution and horror in varying degrees.

Constitutional values and principles can play a crucial role in defining a nation, but they are difficult to define in isolation, particularly in a country without a written constitution. Values ill-defined may mean one thing to one scholar and something else entirely to another.

It is often said in this country that the principle of equality before the law before the law finds its roots in *Magna Carta*. Unfortunately, our historical commitment to *egalité* proved little comfort for a group of soldiers famously dismissed in the 90s from our Armed Forces on the grounds of sexuality alone. A lifetime of commitment, a career's value in training and nothing in our common law or statute could prevent the lawful dismissal of Mr Grady and Ms Smith. Before the introduction of the Human Rights Act, our sympathetic House of Lords could do nothing within the existing law. Instead it took a lengthy trip to the European Court of Human Rights in Strasbourg to find a remedy for an action we would now readily recognise as wholly improper discrimination.[10]

Blueprint values and principles – however inspirational they may be - are uncertain and far from immutable without the bricks and mortar of enforceable legal standards.

This was perhaps brought into sharp relief by the Prime Minister's recent call for us to adapt to meet the ever-changing risks of the modern world by rejecting "*passive tolerance*" and instead working to be "*more assertive about our liberal values*" by being "*more clear about*

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[6] https://www.gov.uk/government/speeches/magna-carta-800th-anniversary-pms-speech

[7] UK Government, *Magna Carta 800th anniversary: PM's speech*, 15 June 2015, https://www.gov.uk/government/speeches/what-does-a-one-nation-justice-policy-look-like

[8] Daily Mail, *Cameron vows to 'safeguard' Magna Carta by pushing ahead with plans to scrap the 'devalued' human rights act*, 15 June 2015, http://www.dailymail.co.uk/news/article-3124959/Cameron-vows-safeguard-Magna-Carta-pushing-ahead-plans-scrap-devalued-human-rights-act.html

[9] The Sun, *DAVID CAMERON: "WHY I'M DETERMINED TO SCRAP THE HUMAN RIGHTS ACT"*, June 14 2015, http://www.sunnation.co.uk/david-cameron-why-im-determined-to-scrap-the-human-rights-act/

[10] *Smith and Grady v UK* (1999) 29 EHRR 493. *Magna Carta* itself provides a fine example of the limits of principle and symbolism. As the late, Lord Bingham explained, the Great Charter was ever more important as a symbol than a guarantee: *"a travesty of history to regard the Barons who confronted King John at Runnymede as altruistic liberals seeking to make the world a better place. But, for all that, the sealing of Magna Carta was an event that changed the constitutional landscape in this country and, over time, the world."* The Rule of Law, (2009), page 11.

the expectations we place on those who come to live here and build our country together."[11] Many, more eloquent than I, have commented on the difficult juxtaposition of the values of liberalism and tolerance with a call for greater limits on immigration and new restrictions on the activities of migrants to this country.[12]

Ownership and understanding of the language of rights is important.

As long ago as 1765 with *Entick v Carrington* – that constitutional lawyer's 101 – we learned the importance of common law civil liberties. Without a foundation in law, the agents of the state – in this case breaking and entering into someone's home to look for evidence of sedition – could not trespass against our inherent liberty to do as we will.[13] Freedom *from* unjustifiable State action is, of course, crucial to any modern constitutional democracy. It is, perhaps understandably, an aspect of human rights law which is particularly attractive for those with a conservative philosophy of government. However, over the years, the notion of liberty in the common law was of limited help to many, not least Ms Smith and Mr Grady.[14]

For the first time, in 1998, the Human Rights Act created a domestic statement of clear claim rights to bind public bodies and to guide public action. While these rights continue to bind the State to refrain from intruding on our lives, they may also require central Government and public agencies to take positive steps to protect our rights from harm. These "positive obligations" are at the core of many of the success stories for the Human Rights Act and little evidenced in the earlier common law. Unfortunately, those stories don't always make the headlines.

As ever, the devil is in the detail and it is here where reformers must make their case on a new rights settlement.

The case for change

The case for reform - however expressed - falls broadly into three strands.

Firstly, that *"Human rights are good for "them" and bad for "us"".*

In the same week the Prime Minister declared his commitment to *Magna Carta*, he told us:

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[11] UK Government, *'Passive tolerance' of separate communities must end*, says PM, 18 January 2016, https://www.gov.uk/government/news/passive-tolerance-of-separate-communities-must-end-says-pm

[12] See for example, Frank Furedi, for Spiked, 19 May 2015 http://www.spiked-online.com/newsite/article/no-cameron-you-can-never-have-too-much-tolerance/16987#.VsSvt7SLQdU

[13] *Entick v Carrington* [1765] EWHC KB J98

[14] There are, of course, cases based on common law rights which precede the Human Rights Act 1998. Consider, for example, *Raymond v Honey*, [1982] AC 1, [1981] UKHL 8. However these cases were relatively sparing and the most stark of the pre-HRA cases - *R v Secretary of State for the Home Department, ex parte Simms* [2000] AC 115 – was handed down while the HRA was pending commencement. The limits of the common law are perhaps best illustrated in the significant litigation on the role of the European Convention on Human Rights in the interpretation of the common law and statute, see for example, *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696. See Conor Gearty, *On Fantasy Island: British politics, English judges and the European Convention on Human Rights,* UK Const. L. Blog (13th November 2014) (available at http://ukconstitutionallaw.org). By way of contrast, many have commented widely, for example, on the contribution which the European Convention on Human Rights has made, including for the protection of LGBT rights within the UK and across Europe. Most recently, see Rachel Logan, *Why we should all love human rights this Valentine's day,* Amnesty International Blog, 14 February 2016, https://www.amnesty.org.uk/blogs/yes-minister-it-human-rights-issue/why-love-human-rights-valentines-day-echr-lgbti.

> *"When we have these foreign criminals committing offence after offence, and we cannot send them home because of their "right to a family life", that needs to change. I rule out absolutely nothing in getting that done".* [15]

This reflects the commitment in the Conservative strategy paper published in October 2015 which proposed to add new qualifiers which would limit the substance of Convention rights recognised in domestic law.[16]

In practice, this could mean rewriting – or undercutting – the Convention rights for domestic application: compiling an "ECHR-minus" set of UK guarantees. Little detail has been provided, but that paper suggested that criminals, those subject to immigration control, and perhaps more surprisingly, individuals who disrespected planning law, might be afforded lesser protection than the rest of us. Some – mostly unpopular groups – would be deemed undeserving.

It went on to explain *"Some terms used in the Convention rights would benefit from a more precise definition, such as 'degrading treatment or punishment'."*[17] It mooted that only "serious" cases should benefit from protection, with "trivial" human rights violations locked out of the domestic courts.[18] JUSTICE asked - and continues to ask – just what violations we might consider "trivial".[19]

Secondly, the critics are concerned that human rights decisions should be taken by Parliament, not judges.

So, the Conservative party strategy paper promised, *"At the heart of our plan is a new British Bill of Rights and Responsibilities. It will ensure that Parliament is the ultimate source of legal authority".*[20]

The painting of judges as anti-democratic has become a popular past-time for some politicians, but it creates a flawed constitutional picture. As the late, great Lord Bingham explained, in the *Belmarsh* case:

> *"It is of course true that the judges in this country are not elected and are not answerable to Parliament. …. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself."*[21]

Last but not least, human rights decisions definitely shouldn't be taken by *European* judges.

It is this aspect of the debate that is perhaps most timely as we head full-tilt into the Brexit debate. The European Convention is, of course, a creature of the Council of Europe, and not the European Union. However, for some the two debates have become inseparable.

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[15] The Guardian, *Cameron refuses to rule out leaving European convention on human rights*, 3 June 2015, http://www.theguardian.com/law/2015/jun/03/cameron-refuses-to-rule-out-leaving-european-convention-on-human-rights

[16] Protecting Human Rights in the UK, The Conservative Proposals for changing Britain's Human Rights Laws, 3 October 2014, Conservative Party. https://www.conservatives.com/~/media/files/downloadable%20Files/human_rights.pdf

[17] Ibid, page 6.

[18] Ibid, page 7.

[19] You can read JUSTICE's response to the Conservative Party strategy paper, here: http://justice.org.uk/justice-british-bill-rights/

[20] Conservative Party Strategy, page 5.

[21] [2014] UKHL 38, para [101]

Conservative party strategy proposed to treat the European Court on Human Rights in Strasbourg as no more than 'advisory'. In a faintly familiar commitment, it promised to renegotiation of our obligations under the Convention, or an exit if unsatisfied.[22] (Strexit?)

We are now promised a new "sovereignty bill" which will enable the Supreme Court (or Parliament – it is unclear) to act as the ultimate arbiter of our law, seemingly free from not only the European Convention and the court in Strasbourg, but the strictures of European Union law and the determinations of Luxembourg.[23]

Legal commentators have questioned how a domestic statement of law – perhaps unnecessarily legislating to reflect existing common law practice – could possibly affect the binding international obligations of the UK.[24] If it is the obligation to comply with ECHR or EU obligations which politicians find distasteful, they might question the substantive obligations and not their enforcement?

Looking behind the headlines

It's a habit that dies hard, but I'd like to suggest that a quick look at a few cases – a bit of legal precedent – might give short shrift to some of the sound-bite descriptions of the work of the Act – and the European Convention on Human Rights – found in the press and in the critics' case for change.

Let's take the case of the *Michaels* family.[25] Ms Michaels called 999 to report that she feared for her life. Her historically abusive partner had been at her property and had threatened to return and kill her. He did return, and a claim was brought by her family to challenge the failure of local police authorities to respond, in negligence and under the right to life protected by Article 2 ECHR. The Supreme Court held that the common law of negligence could give no remedy; but that the police had a case to answer under the Human Rights Act 1998. Whatever we might think about the Supreme Court's conclusion on negligence – and there is a strong dissent – this case has a lot to say about the debate on the role of the HRA and the Convention in the UK.

While the common law protects many of the same rights guaranteed by the Convention; its protection isn't guaranteed and hasn't always been up to scratch. Thus, without the HRA, the Michaels family would be denied a remedy in this case.

Most famously, before the Act came into force, we had no clear means to protect our right to privacy in the common law. In a famous case – Gordon Kaye – the star of 80s sitcom and '*Dave'* favourite – "*Allo Allo*" – and son of Huddersfield - was left without a remedy to prevent The Sunday Sport publishing unauthorised pictures of him near death in a hospital bed.[26]

Yet, the press have been quick to focus on the impact of Article 8 ECHR – which now protects the right to private and family life – only on immigration; just yesterday we saw provocative headlines decrying a (likely-futile) attempt by one of the Rochdale groomers to resist deportation ("Perversion of justice").[27]

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[22] Conservative Party strategy, page 8.

[23] Financial Times, *Tories look to tame European Courts*, 15 February 2016, http://www.ft.com/cms/s/0/30724834-d0ba-11e5-92a1-c5e23ef99c77.html#axzz40RvZWmKo

[24] See for example, Carl Gardner, *Cameron's Sovereignty Plan: What to hope for?*, Head of Legal Blog, 20 February 2015 http://www.headoflegal.com/2016/02/21/camerons-sovereignty-plan-what-to-hope-for-and-what-to-fear/

[25] *Michael & Ors v The Chief Constable of South Wales Police & Anor* [2015] UKSC 2.

[26] *Kaye v Robertson* [1991] FSR 62

[27] Daily Mail, *Perversion of justice: Rochdale child sex grooming gang ringleader who was convicted of 30 rapes fights to avoid being kicked out of UK - and he's using European human rights law to do it*, 16 February 2016,

However, editors have been slow to report that the well-publicised challenges arising from the Snowden revelations – challenging the scope of Government powers to conduct surveillance of our internet traffic and hack into our computer devices - have the same Article 8 at their heart.

More critically, perhaps, stories of Article 8 being used by older people and by people with disabilities to secure respect in their treatment at home or in care receive very little publicity:

- Mrs Bernard, for example, used the Act to challenge a local authority housing decision which left her family managing her double incontinence in a home ill-suited to her needs.[28]
- Two sisters from East Sussex challenged an absolute ban on their being lifted or moved by NHS staff, which left them with bed sores after being confined to their wheelchairs for months.[29]
- Jan Sutton – a wheelchair user whose life and dignity was endangered by a restriction in community care - speaks most eloquently about her experience:

  "The Human Rights Act told me "yes, you are worth as much as any human being". […] It confirmed to me that the rights that I regarded as so fundamental to people in other countries that I wanted to protect also applied to me."[30]

It's the application of the law – in cases like this - that works to make rights relevant.

Critical voices call for a more literalist approach to the text of the Convention, decrying the "living instrument" approach adopted by the European Court of Human Rights.

However, the Convention was designed to be a statement of common principles, defined in practice by their application. There is nothing, for example, in Article 2 ECHR which deals expressly with the obligation of the State to take steps to protect life. These duties have been *necessarily* implied and have provided a crucial framework within which public authorities – in policing, in healthcare and beyond – have been tasked to consider how to work best to protect us all. Without those important positive obligations – found in the detail necessary to make the rights real – the Michaels family and many like them – the Hillsborough families, the families of Cheryl James and Stephen Lawrence and the victims of John Worboys – would be without redress.

The value in these cases is not measured in compensation, but in the opportunity to learn lessons, to do better and to protect others from harm.

While human rights guarantees must be about the rights of those most vulnerable to state power – minorities, prisoners and immigrants – their protections exist for us all. It is precisely this universal nature that gives human rights law its value.

Before we take any political decision to diminish the protection offered by the HRA; the electorate should be fully aware of what it has to offer. Unfortunately, it doesn't appear in the best interests of either the Government or the press to sell that message.

Moving to Europe, even the 'headline cases' help undermine the tabloid image of the Strasbourg judge as an overfussy, judicial dictator, tying the hands of our Parliamentarians and dealing with cases well beyond their human rights remit.

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http://www.dailymail.co.uk/news/article-3449760/Rochdale-child-sex-grooming-gang-ringleader-convicted-30-rapes-uses-European-human-rights-law-fight-avoid-kicked-UK.html

[28] *R v Enfield London Borough Council, ex parte Bernard* [2002] EWHC 2282 (Admin), [2003]

[29] *R (A, B, X and Y) v East Sussex County Council (No 2)* [2003) EWHC 167 (Admin), (2003) 6 CCLR 194

[30] Save the Human Rights Act, *Jan's story: 'I began to feel like a human being again'*, 30 April 2015, http://savetheact.uk/jans-story-i-began-to-feel-like-a-human-being-again/

First, consider *Hutchinson.*[31] This case is the latest in a series of cases about the compatibility of "whole-life" sentences with the Convention. *Vinter* – a case grossly misrepresented– held that domestic law was in violation of Article 3 of the Convention (which protects against inhuman and degrading punishment) as it provided for a life sentence with absolutely no prospect of review; a life in prison with all the associated costs to the state without prospect of rehabilitation or redemption.

Subsequently, in *Newell* and *McLoughlin,* back in the UK, the Court of Appeal clarified that, *because* of their duty under the Human Rights Act, Ministers would be required to exercise their duties to consider whether release might be justified, thus providing a limited review compatible with the Convention. This confirmed that, although in this handful exceptionally serious cases, the possibility of release would be remote, it *could* be considered. In this important example of judicial dialogue, the Strasbourg court accepted the new interpretation adopted by the Court of Appeal. It explained:

> *"The Court recalls that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation… the national court has specifically addressed those doubts and set out an unequivocal statement of the legal position, the Court must accept the national court's interpretation.*"

If we repeal the HRA and distance ourselves from the Convention, the UK will be less able to engage in this kind of judicial dialogue and less able to help shape the application of the Convention. The importance of the HRA and the duties it imposed are clear in this case. Strasbourg judges have repeatedly said that the reasoned judgments of our higher courts are important in helping shape their consideration of Convention rights in UK cases and, in turn, in helping shape the future application of the Convention more broadly. This not only makes it harder for people in the UK to secure a remedy but harder for UK lawyers to help inform the development of the international standards which apply across the Council of Europe.

In a final story from Strasbourg, *McHugh* takes us to the controversial issue of prisoners' votes, but with little actual controversy. In that case, the European Court reopened over 1000 joined cases, found a violation on the same terms as the earlier case law and refused to pay either compensation or costs.[32]

I am not going to use this issue to make the case for the European Convention – reasonable people do disagree about its scope - but I suggest that it teaches us more about the limits of that system than its critics would have us believe.

Contrary to some reporting, there is nothing in the judgment which will require the UK to give "murderers and rapists" a vote. Judicial dialogue, in part driven by the UK, has helped to clarify the law, but has maintained that a blanket ban on all prisoners voting is in violation of the Convention.[33] Close parliamentary consideration has suggested that 12 months incarceration would be a proportionate starting point for a ban, but no legislation has been introduced, nor is it expected any time soon.[34]

This saga shows that there is <u>nothing</u> in either the Human Rights Act or European Convention which can force Parliament to change the law, nor which challenges parliamentary sovereignty.

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[31] *Hutchinson v. the United Kingdom*, App No, 57592/08, 3 Feb 2015.
[32] *McHugh and Others v. the United Kingdom*. App No. 51987/08, 10 Feb 2015
[33] See for example, *Scoppola v Italy,* [GC], App No. 126/05, 22 May 2012.
[34] Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, Report, 12 June 2014
http://www.publications.parliament.uk/pa/jt201314/jtselect/jtdraftvoting/103/10302.htm

The judgment in *Hirst* – the first case on prisoner's votes - has been in place since 2005.[35] While Article 46 of the treaty binds the UK to implement the judgment of the Court, the judgment has no direct effect in domestic law. Its enforcement is governed by the Committee of Ministers – a body made up of European foreign Ministers – in a political and diplomatic process which can accommodate States' particular interpretation of the effective implementation of a judgment subject to the scrutiny of the other partners to the treaty.

Critics of the Act who favour of a new Bill of Rights might consider that the settlement in the Human Rights Act is rare in the lengths to which it endeavours to *preserve* parliamentary sovereignty. In many, if not most, constitutional democracies, constitutional judges are imbued with the power to strike-down acts of Parliament which neglect to respect individual rights. In the UK, neither the Supreme Court nor the European Court of Human Rights can have such an effect, nor does that option appear to be on offer in any proposal for reform.

There will always be hard cases. Any human rights instrument which didn't create tension for Government wouldn't be doing its job.

However, if we can pick and choose which judgments we respect, so can Russia, Turkey or Ukraine. While we take a stand on prisoner votes; others might yet "opt-out" on prisoner treatment issues of a far more serious nature. Cases against the UK number few – 912 UK cases sent to a judge in 2010-13, with 8 losses in 2013; contrasting around 12,000 claims against Russia and 119 violations. In 2015, there were 4 judgments against the UK and 109 against Russia.[36] We might ask whether our concerns justify tainting the Convention's value for the 800 million people subject to its application.

Glossing over our rights?

The latest word on the Government's proposals comes from the Lord Chancellor. On 2 February, in evidence to the House of Lords EU Sub-Committee on Justice, he explained that:

> *"Human rights have become associated with unmeritorious individuals pursuing through the courts claims that do not command public support or sympathy. More troublingly, human rights are seen as something that are done to British courts and the British people as a result of foreign intervention, rather than something that we originally championed and created and seek to uphold."*[37]

Broadly, he said, the Government plans to consult on some exceptions to the Act and changes to the rights protected, including to remove protection for military personnel operating overseas. These reforms will include "*glosses that could be put on the rights that are capable of being balanced*" – 'tweaks' to the qualified rights in the Convention - including for example, the right to private life or the right to freedom of expression.

The real question is: What particularly British kind of dualist Dulux would the Lord Chancellor like to apply?

Does he envisage a white-as-white shade; very much akin to the Human Rights Act, albeit with a subtle tint of red, white and blue?

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[35] *Hirst v United Kingdom (No. 2)* (2005), ECHR 681

[36] See European Court of Human Rights Annual Report 2014 (http://www.echr.coe.int/Documents/Annual_report_2014_ENG.pdf) and Annual Report 2015 (http://www.echr.coe.int/Documents/Annual_Report_2015_ENG.pdf).

[37] Evidence, 2 February 2016, QQ 79. http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/potential-impact-of-repealing-the-human-rights-act-on-eu-law/oral/28347.html

Or instead, will changes take on an entirely darker hue; committing our domestic courts to apply a legal standard out of step with the case law of the European Court of Human Rights, inconsistent with not only our obligations in the European Convention, but with our commitments in the wider UN Human Rights settlement?

If this truly is an exercise driven by public opprobrium, we must ask whether the principle of universality can be preserved if we choose to meet apparent majoritarian hostility by altering the substance of seemingly immutable rights rather than making efforts to shift popular opinion.

The new deal

Until we see the proposals the Government have to offer, we know little of the mechanics of the new deal. The commitment to remove the requirement in Section 2 of the Human Rights Act for judges to 'take into account' case law from Strasbourg is well-rehearsed. However, some of the most important features of the HRA have nothing to do with judges, domestic or international.

The responsibilities in the Act are tripartite, with clear roles for Government, Parliament and the judiciary:

- Section 6 places an important duty on all public authorities to respect our rights in discharging their functions. The Government has been so far silent on this key responsibility.

- Section 19 of the HRA requires Ministers to certify that legislation presented to Parliament is compatible with the rights protected by the Human Rights Act. This provides the foundation for enhanced legislative scrutiny performed by the Parliamentary Joint Committee on Human Rights. Thus, the Act creates a framework which puts individual rights – and people – at the heart of public decision making, on the frontline and in Parliament alike.

  While the strategy paper published in October promised that "*Parliament will consider the Convention rights set out in the law in all the legislation it passes*", the proposals are again light on detail.

  Yet, the Ministerial Code has very recently rewritten to "*remove any ambiguity*" about the duty of Ministers to act in accordance with the will of Parliament, as promised in the Conservative party strategy.[38] Traditionally, that Code made clear that Ministers must discharge all of their duties in a manner consistent with the international obligations of the United Kingdom. Now, those obligations are excised. Despite the pre-election commitment to revision to send a strong message about sovereignty, the Foreign Office has been quick to stress that the new text does not absolve Ministers of any binding treaty responsibilities.[39] Yet, this hasty rewrite appears to give lie to the current attitude in Whitehall. Not to enhance the role of Parliament, but to ease the limits on executive action.

[38] JUSTICE, together with a group of other civil society organisations, has written to the Prime Minister to express our concerns about this change. You can read the correspondence, here: http://justice.org.uk/8544-2/

[39] See, for example, here: http://www.theguardian.com/law/2015/oct/26/ministerial-code-no-10-showing-contempt-for-international-law

The bigger picture

There is clearly a growing sensitivity within Government about the particular problems the implementation of the party's high-water-mark pre-manifesto promises would create. It is welcome.

Ignoring the bigger picture – at home or abroad - isn't easy or sensible.

This debate takes place in an environment already fraught with considerable constitutional uncertainty. The Human Rights Act is written into the current devolution settlement and lies at the heart of the obligations in the Belfast/Good Friday Agreement. As the Coalition Government's exploratory Commission on a Bill of Rights for the UK made clear – there is no appetite for any reform in Scotland, Wales or Northern Ireland, let alone for reform which would diminish the standards of protection offered to individual rights.[40] The Scottish Government has indicated that it would not consent to any repeal of the Human Rights Act and that it considers that such consent is necessary.[41] After the independence referendum in Scotland, the state of the Union remains precarious. Whether any Bill - of rights, values or liberties – could ever truly be labelled "British" is a political question of perhaps insurmountable constitutional significance; and one which remains to be answered.

Yet, one of our oldest political parties and our current Government is sending a global message that national parliaments – and by extension, the popular majority – should have the first and last say on human rights standards.

If this selective – pick and mix - approach to international human rights standards works for us, it also works for Moscow, Tehran and Beijing. If there is to be a British gloss on seemingly universal standards, there must also be a Russian, an Iranian and a Chinese brand too.

Our Government might seek to carve out special exceptions for criminals, alleged terrorists or violators of planning legislation; another might direct their courts to refuse protection to dissidents or journalists. It is difficult to see how the UK might then credibly object.

The debate in this country has already inspired new legislation designed to give the Russian Duma an 'opt-out' similar to that explored in the Conservative Party strategy paper.[42] Our Prime Minister's case for sovereignty from international human rights standards has been cited by President Kenyatta of Kenya in his derision of the role of the International Criminal Court.[43] Our retrenchment is not only damaging to the reputation of the UK, but to the long-term viability of international human rights law in Europe and beyond.

A patchwork of national rules could mean no standard at all; with every human once again subject only to the whims of national interest. This vision would reset the clock to 1945, before Eleanor Roosevelt and David Maxwell-Fyfe ever put pen to paper. It would scupper

[40] A Commission on a Bill of Rights, *The Choice before Us?,* December 2012

[41] The Independent, *Scotland will block Human Rights Act repeal,* 23 September 2015 http://www.theguardian.com/law/2015/oct/26/ministerial-code-no-10-showing-contempt-for-international-law

[42] BBC Online, *Russia passes law to overrule European Human Rights Court,* 4 December 2015 http://www.bbc.co.uk/news/world-europe-35007059

[43] Addressing the Kenyan Parliament in October 2014, President Kenyatta said ""The push to defend sovereignty is not unique to Kenya or Africa. Very recently, the prime minister of the United Kingdom committed to reasserting the sovereign primacy of his parliament over the decision of the European Human Rights Court. He has even threatened to quit that court." Two days later, he became the first head of state to face charges in the Hague. http://www.politics.co.uk/blogs/2014/10/22/kenyan-leader-cites-cameron-s-human-rights-attack-as-he-figh

our diplomats working right now to bring light to dark places and shame those who have gone before, holding out the UK as a beacon for the rule of law.

So, the debate to come is not only about headlines, but about *both* the substantive rights we respect at home *and* promote abroad; *and* how we chose to protect them in our own constitutional arrangements. It is perhaps unsurprising that organisations like JUSTICE are concerned.

If the changes proposed are truly minor, it begs the question why the UK would undermine its exceptional international reputation and further risk the Union for such a minimal gain. To use a commercial analogy, if this is a rebranding exercise and not a new product, wouldn't public energy be better spent in public education?

We await the imminent publication of the Government's long-promised consultation. As the debate begins in earnest, let us remember that not only is the label important; but the quality and performance of the product on offer. In a classic case of *caveat emptor* – "buyer-beware" – we must all be sceptical consumers.

The Human Rights Act does what it says on the tin. The debate so far suggests that the new package is unlikely to be an upgrade to the "finest" range, but instead a bargain bin offer; loud and flashy, a good sell for the seller if we buy it, but worse value in the long run for you and for me.

A "cry-freedom" narrative grounded in national and parliamentary sovereignty might seem attractive politically, particularly to those deeply sceptical of all law "from Europe". However, a Bill of Rights which actually offers *fewer* rights for *fewer* people would be a rough deal.

Not bringing rights close to 'small places', but closer to Government. Not bringing rights home, but bringing rights to heel.

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JUSTICE