



Human Rights or Citizens' Privileges?

**Liberty's Response to the Commission
on a Bill of Rights Discussion Paper: *Do
we need a UK Bill of Rights?***

November 2011

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

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Contact

Isabella Sankey

Director of Policy

Direct Line 020 7378 5254

Email: bellas@liberty-human-rights.org.uk

Rachel Robinson

Policy Officer

Direct Line: 020 7378 3659

Email: rachelr@liberty-human-rights.org.uk

Sophie Farthing

Policy Officer

Direct Line 020 7378 3654

Email: sophief@liberty-human-rights.org.uk

"Since we started our uprising against dictatorship in Egypt last January, many British officials visited Cairo and asked how they could help our struggle. The most important thing that the British can do to support human rights in Egypt is to support human rights in the United Kingdom. We have all heard of your Government's attempt to repeal the UK's Human Rights Act. Diluting current human rights protections, or restricting fundamental rights to citizens rather than humans, would set us all back. It is significantly more difficult for us to fight for universal human rights in our country if your country publicly walks away from the same universal rights."

**Hossam Bahgat, the Executive Director of the Egyptian Initiative for Personal Rights and veteran of the Tahrir Square Uprising
9th November 2011**

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QUESTION 1 - DO YOU THINK WE NEED A UK BILL OF RIGHTS?

1. As newly freed societies take their historic first steps, both our own Government and the fledgling democracies of North Africa have recognised this is an important moment for human rights. Indeed, Bills of Rights are invaluable to any liberal democracy. Legally, they ensure that fundamental rights are protected when governments try to oust the jurisdiction of the courts or exclude them from debates of fundamental importance. In these instances, as we discovered in the UK in 2004, the common law is not enough. It took Articles 5 and 14 of the European Convention on Human Rights (ECHR) as incorporated into British law by the *Human Rights Act 1998* (HRA) to allow our House of Lords to rule that the indefinite internment of foreign nationals without charge or trial breached fundamental human rights.¹ As this case, and many other HRA cases have ably demonstrated since the Act came into force, a healthy democracy needs some sort of “higher status law” that protects fundamental rights and freedoms and which, at the very least, allows for a dialogue between Parliament and the Judiciary.

2. Bills of Rights are also incredibly important to ensure a proper functioning democracy. They protect minority interests by acting as a check on actions of the majority, and they protect the values that are essential for democracy to thrive – free speech, free and fair elections, free conscience, equal treatment before the law etc. This is why throughout history new democracies have enshrined protection for human rights in their founding documents, recognising that democracy cannot flourish for more than a brief moment without the protection of fundamental rights and freedoms.

3. The importance of a Bill of Rights for any society cannot be separated from the importance of respect for the Rule of Law. An independent judiciary, free from political interference, tasked with interpreting and applying the will of Parliament, is a prerequisite for a society that upholds fundamental rights and freedoms. Indeed respect for the Rule of Law and the protection of fundamental freedoms are so closely linked that each concept is inherently contained in the other.

4. Whether or not the UK, the world's oldest unbroken democracy, needs a Bill of Rights is surely then beyond question. But what is curious about the Bill of Rights

¹ *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

Commission's terms of reference is that they do not mention the HRA, understood by most to be the UK's modern Bill of Rights.² Acknowledging the existence of the HRA, the question then becomes, do we need an additional or a replacement Bill of Rights? As to the former question, there are of course all sorts of additional protections that could be included in any supplementary Bill of Rights. But, injecting a little reality into this response, we are not aware that a purely supplementary Bill of Rights is seriously under political consideration. Instead, the focus of the debate to date has been on whether the HRA should be scrapped in favour of a new and somehow more "British" Bill of Rights. Therefore our response takes as its premise, that proposals for a new "UK Bill of Rights" would include the repeal of the HRA.

5. If this is the proposition the issue to consider is, how would a UK Bill of Rights differ to the HRA? As the key components of any Bill of Rights are content, entrenchment and enforcement, it would have to be in at least one of these areas that a new Bill of Rights would differ. As we discuss in response to Question 2, Liberty believes that all the Convention rights incorporated by the HRA deserve protection and we cannot imagine voluntarily parting with any of these vital safeguards against state oppression. In addition, we believe that the accessible and unique enforcement mechanisms provided by the HRA represent a bare minimum for rights enforcement in any UK Bill of Rights. Enforceability is just as important as substantive content. In the following pages we explore the necessary minimum components of any new Bill of Rights.

² Alston (1999) has identified three characteristics of a 'bill of rights', including "a formal commitment to the protection of these human rights which are considered, at that moment in history to be of particular importance" which is "binding upon the government and can be overridden...only with significant difficulty", and in which "some form of redress is provided" if the provisions are violated. See Alston, P (1999) *Promoting Human Rights through Bills of Rights* (Oxford: Oxford University Press), at page 10. The HRA clearly lays claim to all three indicators.

QUESTION 2 - IF SO, WHAT DO YOU THINK A UK BILL OF RIGHTS SHOULD CONTAIN?

The substantive rights

6. Liberty understands the desire to strive for more and stronger human rights protections in this country. The range of rights protected by the 1998 Act (15 well-established fundamental rights and freedoms) is far more limited than those contained in rights instruments in other liberal democracies and in many regional and international human rights treaties. The potential renegotiation of our human rights framework is therefore understandably seen as an opportunity by some – a chance to increase protection for certain vulnerable groups in our society by, for example, enshrining rights specifically protecting children, or demonstrating our commitment to equal treatment by developing a free-standing right to equality. A more expansive Bill of Rights could also, for example, recognise the ways in which the British legal system has historically protected rights like the right to a fair trial, by safeguarding the right to trial by jury for more serious offences, inserting protections against summary extradition and providing a right to legal aid. However the political context in which the contemporary “Bill of Rights” discussion is unfolding – examined at greater length in paragraphs 113 - 124 - gives us cause for serious concern. The political mood makes us deeply skeptical that any net increase in the nature or strength of rights protections is on the horizon. We are also acutely aware that we have much to lose by opening up negotiations on the protection of fundamental human rights in this country in the current climate.

7. Before embarking on a discussion of the value of the rights already protected in UK law by the HRA, it is important to establish some general facts about the level and nature of protection the Act provides.

Balancing rights protections

8. Of the substantive rights protected by the HRA, some are absolute rights that can never be compromised – but most can be limited in certain circumstances. All the rights are to be read together with Article 17 of the ECHR, which provides that none of these protections gives anyone a right to engage in any activity that aims to destroy other

people's rights and freedoms or limit them in ways not set out in the Convention. In addition, section 11 of the HRA provides that nothing in the Act limits any pre-existing rights a person may have. This means that the rights contained in the HRA represent a 'floor' of fundamental protection alongside which pre-existing rights can continue to exist and on which other rights can be built. The rights in the HRA are in no way a ceiling for rights protection.

9. For those rights and freedoms which can be limited, the types of limitations allowed are generally set out in the description of the right itself. For example, the prohibition on forced labour does not apply to prisoners forced to perform work within the prison, and the right to life is not breached by a police officer acting in self-defence. There are a few absolute rights that can never be limited in any circumstance, namely the prohibition on torture and inhuman and degrading treatment; the prohibition on slavery; the right to a fair trial and the right not to be charged or convicted of a retrospective criminal offence (i.e. charged for conduct which was not criminal at the time it occurred).

10. Rights such as the right to life, the right to liberty, the right to marry, the right to protection of property, the right to education and the right to free elections can be limited in narrowly defined circumstances. Other, qualified, rights such as the right to respect for private and family life, freedom of religion, freedom of expression and freedom of association and assembly provide more widely permissible limitations in the circumstances set out in the text of the right. Qualified rights generally require that any limitation be set out in law, seek to achieve a legitimate aim, and be necessary in a democratic society and proportionate. In this way the rights of the individual are not only balanced against the rights of others, they are weighted against wider social and national interests such as the prevention of crime and disorder, immigration control and the protection of national security. The courts in this country put down an early marker that, "*inherent in the whole of the Convention,*" is "*a search for balance between the rights of the individual and the wider rights of the society...neither enjoying an absolute right to prevail over the other*".³ The claim, therefore, that the HRA somehow provides unfettered and limitless rights without any corresponding responsibilities is very far from

³ Lord Bingham, *Leeds City Council v Price and others and others (FC); Kay and others and another (FC) v London Borough of Lambeth and others* [2006] UKHL 10, paragraph 32.

the truth. Liberty believes that any Bill of Rights must, like the HRA, find a fair balance between the public interest as a whole and the protection of an individual's human rights.

Article 2: The Right to Life

11. Critics of the Human Rights Act often attempt to set up the rights of victims in conflict with the rights of criminals and to present the HRA as a charter for the 'undeserving' in our society. Stories about the protections offered by the Act to victims of crime or vulnerable people neglected by those trusted with their care rarely make the front pages and understandably this imbalance has led some people to question whether the HRA serves the needs of victims. Since the Act came into force, however, the most significant impact of Article 2 has been to secure bereaved relatives the right to an independent public investigation into the circumstances surrounding the death of their loved ones, and the right to be involved in the investigation. Article 2 was pivotal in ensuring an inquest was conducted into the death of Naomi Bryant at the hands of a recently released serial sex offender, Anthony Rice in 2005. In March this year a jury found that a shocking catalogue of failings, by every agency involved, had directly contributed to Naomi's death.⁴ Naomi's mother finally received the answers she so desperately needed and with the errors of the authorities laid bare, Article 2 will also play a role in ensuring that such avoidable tragedies are not repeated.

12. At the most basic level, Article 2 imposes strong obligations on the state to refrain from taking life, except where this is absolutely necessary - such as to prevent violence to others, or to effect a lawful arrest.⁵ The protection enshrined in the Article, however, also extends to positive duties to put in place rules and guidance to reduce the risk of deaths whether at the hands of the state or due to an act or omission of a private body or individual. The Government has a positive obligation to ensure that those authorized to use lethal force on behalf of the state are appropriately trained, instructed and regulated by strict guidance surrounding the use of arms. Thanks to the HRA the majority of the 43 police forces in England and Wales now have specific policies on

⁴ <http://www.liberty-human-rights.org.uk/media/press/2011/inquest-secured-by-human-rights-act-finds-institutional-.php>.

⁵ Article 2(2)(a) and (b).

handling immediate and foreseeable risks or threats to life.⁶ Article 2 further incorporates a requirement to have effective criminal law, to ensure that it is properly enforced and a requirement to take appropriate steps to prevent accidental deaths. In this way, Article 2 has been used to compel investigations into an avoidable death in custody caused by a failure to provide proper medical treatment⁷ and a failure to protect a prisoner from a violent, racist attack by a cellmate.⁸ Mental health institutions have been held to account when their failures have allowed vulnerable patients to take their own lives⁹ and Article 2 has been used to secure an inquest into the death of a British soldier from a treatable illness while on active service.¹⁰

13. Article 2 recognises the fundamental value of human life, not just to the individual but to their loved ones. It requires the state to take steps to protect it and ensures that when it fails in this duty, it will be held to account.

Article 3: Prohibition on Torture

14. After the horrors of the Second World War and with images of Holocaust survivors and Prisoners of War fresh in mind, the international community made certain an absolute prohibition on torture was central to the Universal Declaration of Human Rights. This absolute prohibition is mirrored in Article 3 of the Convention. Sadly, over a decade of the “War on Terror” has taught us that we cannot take for granted even this country’s commitment to the prohibition of torture. Over this period, great democracies orchestrated and were complicit in the extraordinary rendition and barbaric torture of hundreds of people. For its part the UK Government has subsequently admitted to misleading Parliament over the practice;¹¹ it has argued in court that evidence obtained through torture should be made admissible;¹² argued that the absolute ban on torture

⁶ See *Human Rights Inquiry: Report of the Equality and Human Rights Commission*, (June 2009), available at http://www.equalityhumanrights.com/uploaded_files/hri_report.pdf.

⁷ <http://www.liberty-human-rights.org.uk/media/press/2001/paul-wright-death-in-custody-judge-orders-investigation.php>.

⁸ *R v Secretary of State for the Home Department, ex p Amin (FC)* [2003] UKHL 51.

⁹ *Savage v South Essex Partnership NHS Trust* [2008] UKHL 74.

¹⁰ *R (on the application of Smith) (FC) (Respondent) v Secretary of State for Defence (Appellant) and another* [2010] UKSC 29.

¹¹ House of Commons *Hansard*: 26 Feb 2009: Column 365.

¹² *A and others v Secretary of State for the Home Department* [2005] UKHL 71.

should be weighed against other considerations and narrowed;¹³ and is yet to properly investigate the level of its own complicity in the torture of British citizens, residents and foreign nationals. Additionally, the 2011 Inquiry into the death of innocent Iraqi civilian Baha Mousa revealed that Mr Mousa had been subjected to “*appalling*” and “*gratuitous*” violence at the hands of UK soldiers.¹⁴ The Inquiry confirmed that the events which led to Mr Mousa’s death were not a one-off and there were other examples of “*abuse and mistreatment of Iraqi civilians*” by British soldiers. It concluded that serious corporate failures in the Ministry of Defence had allowed brutal techniques such as those used on Baha Mousa to continue unaddressed. The protection against torture, inhuman and degrading treatment, then, is as vital now as it was in 1945. Most obviously Article 3 prevents State officials from torturing anyone. This applies anywhere within the UK’s jurisdiction including places outside this country. Article 3 also makes clear that our courts must not admit evidence obtained through torture¹⁵ and provides an absolute prohibition on deporting individuals to places where they face a real risk of torture or inhuman and degrading treatment or punishment.¹⁶

15. Like Article 2, Article 3 also demands an official investigation if there are credible allegations of serious ill-treatment by public officials, allowing victims to uncover the truth and ensuring that those complicit in their torture are held to account. Finally, authorities are required to take steps to prevent torture – including protecting vulnerable groups from ill-treatment.

16. Attacks on the HRA frequently focus on protections provided to those within the criminal justice system, whilst paying scant regard to protections afforded to victims of serious crime. It is thanks to Article 3, for example, that victims of rape are not cross-examined by their alleged attackers.¹⁷ The Article has also been used to challenge the decision to terminate a prosecution for a violent attack on the eve of the trial, on the grounds that the victim could not be considered a credible witness as he suffered from

¹³ *Saadi v Italy ECtHR Grand Chamber*, 28 February 2008; *Chahal v UK ECtHR*, 15 November 1996.

¹⁴ <http://www.liberty-human-rights.org.uk/media/press/2011/baha-mousa-inquiry-delivers-damning-verdict-on-mod-s-cor.php>. The Report of the Baha Mousa Inquiry chaired by Rt Hon Sir William Gage at: <http://www.bahamousainquiry.org/report/index.htm>.

¹⁵ *A and others v Secretary of State for the Home Department* [2005] UKHL 71.

¹⁶ *Saadi v Italy ECtHR Grand Chamber*, 28 February 2008; *Chahal v UK ECtHR*, 15 November 1996.

¹⁷ *J.M. v United Kingdom Application no. 41518/98*.

mental health problems. In considering the requirements of Article 3, the High Court found that the decision not to prosecute added insult to injury, causing humiliation to the victim and representing a grave dereliction of the state's obligations to provide protection against serious assaults through the criminal justice system.¹⁸

17. A huge variety of groups have claimed the protection of Article 3, from prisoners in Northern Ireland subjected to degrading interrogation techniques including stress positions, hooding and sleep and food deprivation,¹⁹ to children seriously neglected by their parents after the refusal of social services to intervene.²⁰ Elderly care home residents and people with serious disabilities denied the most basic care consistent with human dignity have also called Article 3 in aid.²¹

Article 4: Prohibition of Slavery and Forced Labour

18. Centuries after the slave trade was abolished, modern day slavery persists with many workers, often migrants, forced into performing compulsory work for little or no wages in conditions where they are effectively prevented from escaping. Article 4 provides protection against slavery and forced labour. This is another of the few absolute rights enshrined in the Convention providing an uncompromising level of protection. The prohibition on requiring a person to perform forced or compulsory labour does not include lawful work required of prisoners or military service; work required during an emergency or other work or service that forms part of normal civil obligations such as jury service.

19. The state is under a positive duty to protect the victims of modern day slavery, servitude and forced labour, including by having anti-trafficking legislation and making it an offence to subject someone to such practices. State authorities are also obliged to protect victims or potential victims of Article 4 ill-treatment from real and immediate risks which are known, or ought to be known, by the authorities. Article 4 also requires the police to investigate and prosecute the perpetrators. The case of *Patience Asuquo* aptly

¹⁸ *R (B) v DPP [2009] EWHC 106* (Admin); paragraph 70.

¹⁹ *Ireland v United Kingdom* (1978) 2EHRR 25.

²⁰ *Z v UK* European Court of Human Rights, 10/5/2001.

²¹ *R (A and B) v East Sussex County Council* (Disability Rights Commission interested party) [2003] EWHC 167 (Admin), 10 February 2003.

demonstrates the need for strong legal protections against modern day slavery.²² Patience escaped an abusive employer after being held in servitude, only to be confronted by disinterested police refusing to consider her allegations. Using Article 4, Liberty forced officers to investigate and Patience's employer was eventually prosecuted for theft of her passport and assault occasioning actual bodily harm.

20. After significant lobbying from Liberty and others, calling in aid Article 4, last year it became a criminal offence in this country to hold another person in slavery or servitude or require them to perform forced or compulsory labour.²³ In August of this year, we saw one of the first convictions under this new legislation.²⁴ In September came another reminder of the need for a law protecting victims of forced labour, as a number of arrests were made of those suspected of keeping 24 people in appalling and squalid conditions in Bedfordshire who had been forced to work for years with no pay.²⁵ True to the legacy of William Wilberforce, the reforming British politician who lobbied for the abolition of the slave trade 200 years ago, the Human Rights Act is helping to make the end of slavery and forced labour a reality in the UK today.

Article 5: Right to Liberty and Security

21. The right to liberty and security protects the right of a person not to be arbitrarily deprived of their liberty. Article 5 is a limited right providing that an individual can be lawfully deprived of their liberty in an array of circumstances. Obviously this includes those sentenced to custody after a criminal conviction, but it also extends to, amongst other things, detention for failing to observe a lawful court order or to fulfil a legal obligation; proportionate detention where an individual is awaiting trial and arrest or detention to prevent unauthorised entry into the country or proportionate detention to facilitate deportation or extradition.

²² <http://www.liberty-human-rights.org.uk/media/press/2010/justice-for-victim-of-modern-day-slavery.php>.

²³ Section 71 of the *Coroners and Justice Act 2009*.

²⁴ <http://www.liberty-human-rights.org.uk/news/2011/slavery-law-liberty-lobbied-for-in-action.php>. Read Liberty and Anti-Slavery International's Briefing here: <http://www.liberty-human-rights.org.uk/pdfs/policy09/joint-liberty-asi-report-stage-briefing-on-forced-labour-lords.pdf>.

²⁵ <http://www.liberty-human-rights.org.uk/news/2011/repeal-the-human-rights-act-slavery-arrests-another-reas.php>.

22. Article 5 includes a series of safeguards to help make sure that people deprived of their liberty are able to challenge their detention before an independent court or tribunal. Whether an individual is detained on mental health grounds, immigration grounds, or on suspicion of criminality, he or she must be informed of the reason for incarceration. This means that erroneous decisions can be effectively challenged. Article 5 further provides the right to be brought promptly brought before a judge who can assess whether detention is warranted. There is also an entitlement to trial within a reasonable time and for bail to be granted unless there are relevant and serious reasons why an individual should remain in detention.

23. Article 5 has been used to challenge the worst excesses of our counter-terrorism legislation which has threatened to undermine fundamental British liberties. Using Article 5, the Courts in this country found that the indefinite detention of foreign nationals who had not been convicted, or even charged with an offence, was incompatible with this country's commitment to civil liberties.²⁶ This meant we were able to dispense with a practice which allowed the Zimbabwe Ambassador to say to a Member of our Parliament: *"We have the Rule of Law in Zimbabwe. We don't lock up people for years without trial as you do in Belmarsh."*²⁷

24. Article 5 has also proved an invaluable source of protection for vulnerable people suffering from physical and mental disabilities. Using Article 5, a challenge was brought, in the UK courts, against the actions of Manchester Council in removing a man who suffered from severe learning difficulties from the care of his long term guardian and placing him in local authority care without proper consultation and consideration. Thanks to the HRA this young man, who had not been in any way ill-treated by his foster parent, was able to return to his home and the Local Authority were forced to face up to and remedy a catalogue of failures.²⁸

²⁶ *A and others v UK* (2009) 49 EHRR 29 European Court of Human Rights (Grand Chamber).

²⁷ Norman, J and Osborne, P (2009) *Churchill's Legacy: The Conservative Case for the Human Rights Act* (Published by Liberty (National Council for Civil Liberties), at page 51.

²⁸ *G v E & Ors* [2010] EWCA Civ 822 (16 July 2010).

Article 6: Right to a Fair Trial

25. The right to a fair trial in the determination of civil rights and obligations and in any criminal proceedings is fundamental to the Rule of Law and democracy itself. It is an absolute right, protecting victims, claimants and defendants alike. In criminal proceedings, it requires that a fair hearing take place within a reasonable time before an independent tribunal and ensures that all the procedural requirements which are pre-conditions of fair and open justice are in place. In addition to having his or her day in court, an accused person must be allowed to present his case, and the decision maker must give reasons for a decision. Similarly, there must be equality as between the parties to proceedings. Accused persons are entitled to be present at their hearings, with a few limited exceptions. As a rule, hearings and judgments must be public, and a defendant must be informed of the case against him. The basic requirements of fairness demand that defendants be allowed to prepare a defence and access representation. It is these very protections which help us to avoid the miscarriages of justice which ruin innocent lives.

26. Notwithstanding the existence of Magna Carta, without Articles 5 and 6 of the HRA the attacks on our fundamental rights seen in recent years would have been unstoppable. After the Belmarsh internment policy was declared unlawful by the House of Lords in 2004 the Government responded by introducing control orders enacted by the *Prevention of Terrorism Act 2005* (soon to be replaced and rebranded by “TPIMs” under the Terrorism Prevention and Investigation Measures Bill). The effect of both regimes is to impose severe restrictions on anyone suspected of being involved in terrorism-related activity, completely outside of the criminal justice system.²⁹ In nearly all cases control orders are made on the basis of secret evidence heard in Closed Material Procedures (CMPs) with the use of “Special Advocates”. As a result of these mechanisms the person made subject to the control order is prevented from hearing or challenging the evidence against them. In a landmark case, the House of Lords held in June 2009 that this breached the right to a fair trial under Article 6.³⁰ The Law Lords decided that a person subject to such a restrictive order had to be given sufficient

²⁹ Read Liberty’s most recent briefing at: <http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-hol-committee-stage-briefing-on-the-tpim-bill-oct-2011-.pdf>.

³⁰ *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

information to understand the essence of the case against him. It was held that there could never be a fair trial (to satisfy the standard for civil proceedings) if the case against a person was based solely or to a decisive degree on closed material. The Court held that in conducting control order hearings judges must consider whether material needs to be disclosed to ensure the fairness of the trial.

27. The importance of Article 6 in ensuring that we are not punished by the state without access to a fair trial is thrown into sharp focus by cases like that of Cerie Bullivant, a British man from East London, placed under a control order in 2006. He has spoken openly (since the order was revoked after two years) about the irrevocable impact the order had on his life.³¹ During the imposition of the order:

*Friends turned against me and people were afraid...the control order grew more and more restrictive – it began with forced residence, no travelling and daily signing in at a police station and ended up with tagging, curfews, no studying and forced unemployment. It became impossible to live an ordinary life.*³²

28. All this despite never having committed a crime and never being informed of the substance of the case against him. In April of this year, another control order was ruled unlawful and quashed by the Court of Appeal, on the basis that the evidence relied upon to impose it was “too vague and speculative”.³³

29. The importance of the protections afforded in Article 6 are going to become even more self evident in the coming years. Having settled a number of civil claims regarding complicity in torture brought by former Guantanamo detainees, the Government has recently launched a consultation which proposes incorporating CMPs and Special Advocates lock, stock and barrel into ordinary civil proceedings.³⁴ The implications of this proposal cannot be overstated. Instead of coming to court as a normal litigant in civil

³¹ “A control order ruined my life and my respect for Britain” *The Independent* available at <http://www.independent.co.uk/news/uk/home-news/a-control-order-ruined-my-life-ndash-and-my-respect-for-britain-2178069.html>.

³² Read Cerie’s statement in full at: <http://www.liberty-human-rights.org.uk/materials/control-orders-case-study-cerie-bullivant.pdf>.

³³ *BM v Secretary of State for the Home Department* [2011] EWCA Civ 366 (05 April 2011).

³⁴ See the Ministry of Justice Green Paper *Justice and Security* (October 2011), available at <http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2011/green-paper.pdf>.

cases, the Government is proposing that it should be able to submit “secret evidence” that an applicant cannot see or challenge. If implemented this reform would destroy the most basic tenets of the civil law. The only effective challenge to civil cases conducted according to these reforms will be under Article 6 of the HRA.

Article 7: No Punishment without Law

30. Common sense and justice demand that individuals should only face criminal penalties for their actions if they were criminal at the time they were undertaken. The law should act as a guide for our behaviour and it follows that it would be unjust to declare an act criminal if an individual had no way of knowing that what they were doing could attract adverse consequences. For the same reasons the law must be clear enough to enable people to understand what it means and be guided by its strictures.³⁵ In domestic law, Article 7 also provides that those found guilty of a criminal offence do not face a heavier penalty than that which was applicable at the time the offence was committed. Article 7 helps to ensure that the law is an objective tool applying to us all equally and is not used as a vindictive way of targeting the behaviour of an unpopular individual or group.

Article 8: Right to Respect for Private and Family Life

31. Myths and misunderstandings abound about the effect of Article 8. Of all the negative HRA stories published in the press and cited by senior politicians, most have focused on the protection of the right to respect for private and family life. The debate on Article 8 is so clouded by half-truths and misrepresentations that it is important to look, in some detail, at the kind of protection it provides.

32. First and foremost, Article 8 does not provide a guarantee of protection for family life, even for a British national – it simply provides that the organs of state must show *respect* for family life when making decisions which affect individuals. Secondly, Article 8 explicitly sets out wider social factors which are to be weighed against the right to

³⁵This prohibition does not apply, however, to criminal offences that were offences recognised by international law at the time they were committed. This is intended to capture war crimes, genocide and crimes against humanity etc., which remain punishable in UK courts even if committed before these were specific offences in UK law.

respect for family life. These factors include the prevention of crime and disorder, protection of the UK's economic well-being and the protection of the rights and freedoms of others.³⁶ The courts in this country have consistently stressed that the family life of the individual can be compromised in order to further the legitimate aim of controlling immigration.³⁷ All that Article 8 demands is that decisions which will separate families are lawful and proportionate. The former requirement is no more than a requirement that the Government make decisions which have a basis in law; the latter, put simply, means that arms of the state cannot use a sledge hammer to crack a nut: they must bear in mind the importance of family life to an individual and only interfere with it where there are other, more pressing, concerns.

33. The speech given by the Home Secretary, the Rt Hon Theresa May MP, at this year's Conservative Party conference is a sad reminder of the level of myth and misinformation surrounding the HRA and particularly Article 8. Outlining what she described as "*conservative values to cut crime and cut immigration*", the Home Secretary cited examples of cases where Article 8 had,, in her view, been used and abused.³⁸ In doing so she gave the now infamous example of a man she described as an "illegal immigrant" who she said was permitted to stay in the UK because of his pet cat. Like so many of the stories which circulate about the effect of the Article 8, this one is entirely inaccurate. The Bolivian – who was neither a criminal nor an illegal entrant – had been with his partner for four years. He argued he should have benefited from a Home Office policy giving credit to couples who had been together for more than two years. Both the initial Judge and the Senior Immigration Judge who decided his case made clear that he should benefit from that policy and be granted the right to remain. The Home Office representative at the appeal hearing conceded that the policy did apply. Joint ownership of a cat was one small detail amongst many commonly given by couples seeking to prove a genuine relationship. Misleading stories like this apparently form part of the

³⁶ Article 8(2) of the ECHR.

³⁷ See for example the decision of the House of Lords in *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39 where it was noted that the Immigration Judge had correctly directed himself to "*consider whether the interference with the appellant's family rights, which would obviously interfere with the family as a whole, is justified in the interest of controlling immigration*" (paragraph 12).

³⁸ Speech of the Home Secretary Rt Hon Theresa May MP:

http://www.conservatives.com/News/Speeches/2011/10/May_Conservative_values_to_fight_crime_and_cut_immigration.aspx.

evidential basis for the Home Secretary's view that *"the Human Rights Act needs to go"*.³⁹

34. Against this background it is important to take the opportunity to dispel some of the other inaccuracies surrounding the operation of Article 8 under the Act. It has been widely reported, and even suggested by the Prime Minister, the Rt Hon David Cameron MP, that Learco Chindamo, the Italian national who fatally stabbed headmaster Philip Lawrence in 1995, could not be deported solely because of the protections afforded by the HRA.⁴⁰ In fact Chindamo's case was decided primarily on the basis of the EU Directive on Freedom of Movement, which is in no way related to the protections afforded by the HRA.⁴¹ In another very high profile case, the HRA has been blamed for putting the British public at risk when an Iraqi man, Aso Mohammed Ibrahim, who killed a young girl, Amy Houston, in a hit-and-run incident, was permitted to remain in the UK. Ibrahim was prosecuted for failing to stop following an accident, driving whilst disqualified and driving without insurance. Not murder, manslaughter or dangerous driving. He was jailed for just four months. Understandably Amy's family were outraged at the sentence. Had he been convicted of a more serious offence and received a longer sentence, the Home Office may well have tried to remove him upon release. But it was not until five years later that deportation proceedings were commenced. During those five years he married and fathered two children in this country – he became a stepfather to two more. In finding that deportation would violate Article 8, the Immigration Judge was heavily influenced by the best interests of the appellant's innocent children. He pointed out that if the Home Office had not delayed and deportation proceedings had been brought right away, there would have been very little to stand in the way of Mr Ibrahim's removal from the UK.⁴² But what about Amy and her family's rights? That's a

³⁹ Ibid.

⁴⁰ See, for example, "Free: The Headmaster's killer we cannot deport in case we breach his right to a 'family life' *The Daily Mail* (6th October 2008), available at <http://www.dailymail.co.uk/news/article-1068130/Free-The-headmasters-killer-deport-case-breach-right-family-life.html>. Speaking on BBC Radio WM David Cameron said: "He [Chindamo] is someone who has been found guilty of murder and should be deported back to his country... what about the rights of Mrs Lawrence or the victim?" "The fact that the Human Rights Act means he cannot be deported flies in the face of common sense."

⁴¹ Directive 2004/38/EC *Directive on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States*.

⁴² See in particular paragraph 70 of the judgment which is available at: <http://www.bailii.org/uk/cases/UKUT/IAC/2010/B1.html>: "the reason he has become entitled is the Secretary of State for the Home Department's delay in making a lawful decision in relation to his

perfectly natural response in a case so heartbreaking. But deportation was *not* the punishment for his crime. Ibrahim's penalty was his jail sentence – however lenient – which he served. Our legal system may have failed Amy's family, but those shortcomings aren't the fault of Article 8 or the HRA.

35. Misleading allegations about the impact of Article 8 have long prevented an open and honest debate about its operation. Whilst myths are peddled about the protections offered to 'foreign criminals' by the Article, neither this Government nor the last has devoted any time or effort to explaining the wider protections the Article offers to ordinary people. Article 8 is important in many different contexts, not just in relation to the expulsion of foreign nationals. Article 8 protects both private and family life. The concept of private life includes things like respect for individual sexuality (so, for example, investigations into the sexuality of members of the armed forces engages the right to respect for a private life); the right to personal autonomy and physical and psychological integrity i.e. the right not to be physically interfered with and the right to respect for private and confidential information. Article 8 has been used to safeguard the dignity of disabled people living in care homes⁴³ and to help an adopted woman access personal information about held about her.⁴⁴ In the case of Jenny Paton, Article 8 was used against a local Council which had subjected a family to the kind of targeted surveillance we might associate with attempts to foil a major terrorist plot, simply to discover whether the family lived within the catchment area where the children went to school.⁴⁵

36. Article 8 has also been used to challenge the indefinite retention of innocent people's DNA on the UK's National DNA Database.⁴⁶ Whilst the value of DNA evidence in solving crime is beyond question, the Court found that a blanket and indiscriminate policy, which meant that highly personal information was retained, regardless as to whether an individual was subsequently charged or convicted, was a disproportionate

removal." At paragraph 80 the Court reports: "*the outcome might well have been different if the process of removing the Respondent had begun before his family life had become so firmly established.*"

⁴³ *R (A and B) v East Sussex County Council* (Disability Rights Commission interested party) [2003] EWHC 167 (Admin), 10 February 2003.

⁴⁴ <http://www.liberty-human-rights.org.uk/media/press/2001/victory-in-adoption-file-access-case.php>.

⁴⁵ *Jenny Paton and others v Poole Borough Council* (2010) IPT/09/01/, available at www.ipt-uk.com/docs/Paton_v_Poole_Borough_Council.pdf.

⁴⁶ *S & Marper v United Kingdom* 30562/04 [2008] ECHR 1581 (4 December 2008).

infringement of the right to respect for private life. Article 8 was also used to successfully challenge broad stop and search without suspicion powers previously contained in section 44 of the *Terrorism Act 2000*. This came about when, in 2003, a journalist and a peace protester were subjected to a lengthy stop and search by police officers and prevented from attending a demonstration at the Docklands in London. Liberty helped them to successfully challenge the ill-defined stop and search powers which allowed officers to conduct routine stops and searches on a rolling basis, in large parts of the country, without any suspicion of criminality.⁴⁷

37. Article 8 is also responsible for enactment of the *Regulation of Investigatory Powers Act 2000* and the phone hacking offences it contains. The legislation was enacted in anticipation of the passage of the HRA and in direct response to a successful challenge in the European Court of Human Rights (ECtHR)⁴⁸ where the UK was found to be in breach of Article 8 for not criminalising the unjustified hacking of internal phone systems. It is quite possible that without the domestic protections that have been triggered by Article 8 there would have been no recent convictions for phone hacking and no redress for the victims of an intrusive and callous practice.

38. Where Article 8 protects the right to respect for family life, it is most frequently engaged when measures are taken by the State to separate family members, for example by removing a child into care, or refusing a parent entry clearance to join a young child in the country. Every time a court makes a decision under Article 8 it strikes a balance between the rights of the individual and the rights of society at large.

Article 9: Freedom of Thought, Conscience and Religion

39. Article 9 protects the fundamentally British liberty of freedom of thought, conscience and religion. This Article is such an essential tenet of the British tradition of liberty that it is given additional emphasis at section 13 of the HRA. Section 13 provides that courts must have particular regard to Article 9 when considering any issue which might affect the exercise by a religious organisation or its members of the right to freedom of thought, conscience and religion. People of all faiths must be free to express

⁴⁷ *Gillan and Quinton v. United Kingdom* 4158/05 [2010] ECHR 28 (12 January 2010).

⁴⁸ Also referred to as the Strasbourg court.

their beliefs provided they do not infringe the rights of others in the process. Article 9 protects the right to change your religion or belief as you wish and protects the freedom to exercise it publicly or privately; alone or with others. The worship, teaching and practice of your belief is also protected. Article 9 further guards the right to practice no religion or hold other non-religious beliefs. The role of the state under this right is simply to encourage religious tolerance. If religions are to be regulated, they must be regulated with complete neutrality. Whilst the right to hold certain beliefs can never be interfered with, the right to express those views can be limited under some circumstances. But any limitation must be set by law and be necessary and fair. It must also pursue a legitimate aim such as public safety, public order or the protection of others' rights.

40. The case of Sarika Singh demonstrates the ongoing importance of Article 9 in modern Britain. She was the Aberdare Girls' School pupil who was excluded from classes for wearing her kara – a plain single bangle widely accepted as a central tenet of the Sikh race and religion. Liberty represented the 14-year-old and, using Article 9 together with Article 14 (no discrimination) of the HRA, we defended Sarika's right to wear her kara in the wider pursuit of freedom of thought, conscience and religion for everyone in Britain. The High Court awarded victory to Sarika.⁴⁹ In another case due to come before the ECtHR, a devout Christian forced to take unpaid leave from her employment at British Airways because the company would not allow her to wear a small cross on a chain around her neck, will challenge the decision using Article 9.⁵⁰ Nadia Eweida argues that her cross is an important symbol of her Christianity and she should have been permitted to wear this simple and inoffensive sign of her faith at work. Ms Eweida's case will be heard by the ECtHR shortly before a case concerning the controversial Burka ban introduced by the French Government which is also being challenged under Article 9.

Article 10: Freedom of Expression

41. Article 10 protects freedom of expression and is a central tenet of an open democratic society. Democracy can not thrive if people are unable to share ideas which

⁴⁹ *Watkins-Singh, R (on the application of) v Aberdare Girls' High School & Anor* [2008] EWHC 1865 (Admin) (29 July 2008).

⁵⁰ Application nos. 48420/10 and 59842/10 *Eweida and Chaplin v the United Kingdom*.

inform debate and ensure accountability in government. Article 10 covers communication using any medium – words, pictures and actions (such as protests) – and protects various types of expression: political, artistic and commercial. Unsurprisingly both political and artistic expression are particularly strongly guarded. Article 10 is a qualified right meaning that freedom of expression can be limited to the extent necessary. It may be restricted as long as the limitation is set by law, necessary and proportionate and pursues a legitimate aim – such as national security or public safety. The potential for a “chilling effect” on expression, the value of the particular form of expression and the medium used will all be taken into account when considering any limits on freedom of expression. Article 10 forms such a central plank of democratic freedom that section 12 of the HRA makes special provision to guide the decision making of judges in individual cases. When considering whether to grant any remedy which would infringe the free expression of another, the courts must have particular regard to the importance of free expression, especially where the material to be communicated is journalistic, literary or artistic in nature – attention must be paid to whether publication is in the public interest.

42. Article 10 protects the concept of press freedom - it is a bitter irony that, in attacking the HRA, certain sections of the media undermine the very document that protects, for the first time in British law, the right to journalistic freedom. Amongst other important functions, a free press ensures that those in positions of power are made accountable to the public they serve. Without Article 10 investigative newspaper campaigns, undercover documentaries and exposure of matters of public interest would be vulnerable to attempts at censorship and suppression. In 2007 a Milton Keynes Citizen journalist, was charged with illegally obtaining police information after receiving informal briefings from a Thames Valley Police Detective Sergeant. The force had bugged the officer's car to record their conversations. But the case collapsed after journalists argued that the evidence had been obtained in breach of Article 10 – and that the free press must be protected from such state interference.⁵¹

43. The protection provided by Article 10 also covers sensitive journalistic sources – one of the ethical cornerstones of reporting. In 2001 a journalist at the Financial Times received and subsequently published a copy of a leaked document about a possible company takeover by Interbrew. Interbrew brought proceedings against the newspaper

⁵¹ <http://www.liberty-human-rights.org.uk/news/2011/article-10-freedom-of-expression.php>.

to force it to reveal the name of its source, but ultimately the FT were able to use Article 10 to resist Interbrew's demands. The ECtHR held that the forced disclosure of journalistic sources would have a serious chilling effect on press freedom and constituted a disproportionate interference with the right to freedom of expression.⁵² In a similar very recent example, we saw the threat of Article 10 litigation prevail as the Metropolitan Police rightly backed down in its attempt to force Guardian reporters to reveal confidential phone-hacking sources.⁵³

44. The right to freedom of expression often considered together with Article 11 below, also provides vital protection for protesters. The brutal oppression of protesters across the Arab world in recent months throws the importance of this aspect of democratic freedom into sharp focus. The HRA has reinforced fundamental political freedoms in this country by preventing the stifling of peaceful dissent. In March 2010 Liberty represented five protesters who held a peaceful protest during the Queen's visit to Wakefield. Silently, they held up posters demanding fair pensions for all. They were arrested and held at the police station for 5 hours. The protesters were granted damages for wrongful arrest and false imprisonment because the arrests were a disproportionate interference with their right to peacefully protest.

Article 11: Freedom of Assembly and Association

45. Like freedom of expression freedom of association sits at the heart of our democracy but had no specific protection in domestic law before the enactment of the HRA. It provides a means for public expression and covers a wide range of activities including protest marches and demonstrations, press conferences, public and private meetings, counter-demonstrations, 'sit-ins', motionless protests and the right to form and to join trade unions and to join with others to pursue or advance common causes and interests. The right only applies to peaceful gatherings and does not protect intentionally violent protest. Although the right to peaceful assembly is a qualified right, crucially it can not be interfered with merely because there is disagreement with the views of the protesters or because it is likely to be inconvenient and cause a nuisance or there might

⁵² *Financial Times Ltd and Others v United Kingdom* (Application no. 821/03).

⁵³ <http://www.liberty-human-rights.org.uk/news/2011/metropolitan-police-v-the-guardian-why-application-was-d.php>.

be tension and heated exchange between opposing groups. There is a positive obligation on the State to take reasonable steps to facilitate the right to freedom of assembly, and to protect participants in peaceful demonstrations from disruption by others.

46. As a qualified right Article 11 may only be interfered with insofar as interference is prescribed by law and is a necessary and proportionate means of pursuing a legitimate aim such as preventing disorder or crime or protecting national security. Protesters have used Article 11 to uphold their rights to freedom of expression and association in this country on many occasions. In early 2003, for example, around 120 protestors travelled by three coaches from London in order to demonstrate against the Iraq war at a Royal Air Base in Gloucestershire. Five kilometres from the Air Base, police, who were aware the group was travelling to the protest, stopped the coaches. The coaches were searched and a number of items seized including helmets, overalls, scarves, scissors and a safety flame belonging to a small number of protestors. The police then took the decision that while there was no proper basis to arrest anyone for breach of the peace, they would turn the coaches back and prevent the group from attending the protest. All three coaches were forced to return to London for the 2½ hour journey. The coaches had a police escort the entire way and were prevented from stopping anywhere, even for people to relieve themselves. The highest Court in this country held that the police's actions breached the protestors' rights to free expression and protest under Article 11 of the HRA.⁵⁴

Article 12: Right to Marry

47. Article 12 guarantees the right to marry to men and women of marriageable age and the right to found a family, according to UK laws. The rules concerning the appropriate marriageable age; issues of capacity and consent; the prohibition on bigamy and incest etc. are left to specific legislation. However, laws and rules on marriage must not be arbitrary and must not interfere with the essence of the right – they must not deprive a person or category of person of full legal capacity of the right to marry or substantially interfere with their exercise of the right. So, for example, laws that impose unnecessary delays or restrictions that serve no legitimate purpose may breach this

⁵⁴ *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55.

right. Article 12 together with Article 14 (below) has been used to ensure that minority groups are not unfairly prevented from marrying their life partners⁵⁵ - it is thanks to Article 12 that transsexual people are able to marry in the UK.⁵⁶ When considering Article 12, the House of Lords has found marriage still has deep significance for many people, and denying to members of minority groups “*the right to establish formal, legal relationships with the partners of their choice is one way of setting them apart from society, denying that they are free and equal in dignity and rights*”.⁵⁷

Article 14: Prohibition on Discrimination

48. The right not to be discriminated against, whether on the grounds of race, sex, religion, language, sexual orientation, political opinion is unquestionably one of the fundamentals of a civilized society. Although the UK has made great strides in reducing discrimination over the last fifty years, there is still a long way to go. Article 14 prohibits discrimination in the application of human rights. While this Article doesn't give a free-standing right to non-discrimination, it does require that all the other rights protected by the HRA can be secured without discrimination. In this way, freedom from discrimination is the key to the effective protection of human rights for all, meaning, for example that protection against torture does not apply only to people of certain faiths; the right to liberty is not dependant on nationality and the right to protest is not dependant on an individual's political views. Protection from discrimination is one of the most fundamental human rights without which many other rights would be meaningless.

49. Discrimination can be both direct and indirect. Direct discrimination occurs when a person is treated less favourably than others on the basis of their race, ethnicity, nationality, disability, age, gender, sexual orientation, marital status etc. Less familiar, but just as important, is indirect discrimination - this can occur when a person applies policies and criteria that, while not discriminatory on their face, have a discriminatory effect. The case of Sarika Singh⁵⁸ again provides a good example of how this right works in practice. Her school's no jewellery policy which applied to everyone, indirectly

⁵⁵ *R (On The Application of Baiai and Others) V Secretary of State For The Home Department* [2008] UKHL 53.

⁵⁶ *Bellinger v Bellinger* [2003] UKHL 21.

⁵⁷ Baroness Hale: *Baiai*, paragraph 44.

⁵⁸ See paragraph 40.

discriminated against her and meant that she was ultimately excluded from school for expressing her religious faith by wearing the kara (a plain single bangle widely accepted as a central tenet of the Sikh race and religion).

50. It is not the case that all discrimination breaches Article 14 – but there must be an objective and reasonable justification for the discriminatory law or treatment to be lawful. It must be to pursue a legitimate aim and the measure taken must be a proportionate way to achieve that aim. However there would need to be particularly weighty reasons to justify discrimination on certain grounds such as race or gender.

51. Article 14 considered together with the right to respect for private and family life has been used to challenge a blanket rule that unmarried couples can never adopt,⁵⁹ the courts in this country have also used their powers under the HRA to eliminate the discriminatory effect of the Rent Act 1977 which meant that the survivor of a heterosexual couple could become a statutory tenant by succession but the survivor of a homosexual couple could not.⁶⁰ Article 14 has also been used to ensure that the people are not denied the right to marry on discriminatory grounds.⁶¹

Article 1 of the First Protocol: Protection of Property

52. The riots in England this summer rightly elicited condemnation from our political leaders. Bizarrely though, in his response to the lawlessness the Prime Minister hinted that the HRA may be in some way to blame and he lamented “*a culture*” that “*says everything about rights but nothing about responsibilities*”.⁶² Attempts to link the motivation of rioters to the existence of the HRA is particularly surprising because, in addition to protecting personal safety, the Act also safeguards the right to peaceful enjoyment of possessions.

⁵⁹ *In re P and others (AP) (Appellants) (Northern Ireland)* [2008] UKHL 38.

⁶⁰ *Ahmad Raja Ghaidan v Antonio Mendoza* [2004] UKHL 30. Para 2, Schedule 1 of the Rent Act.

⁶¹ *R (On The Application of Baiai and Others) V Secretary of State For The Home Department* [2008] UKHL 53.

⁶² See House of Commons *Hansard*, Column 1054, 11th August 2011, available at: <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110811/debtext/110811-0001.htm#1108117000784>.

53. The concept of property and possessions includes tangible things like land and money but also includes contractual and intellectual property rights. In addition to the state's duty not to interfere with the peaceful enjoyment of possessions, Article 1 of the First Protocol also requires the state to take positive steps to protect property. This is particularly the case where there is a direct link between the measures a property owner may legitimately expect from the authorities and the effective enjoyment of his or her possessions. So, for example, where the negligence of a public authority leads to property destruction, this may well be a breach of the right to protection of property. This right also imposes an obligation on the Government to take necessary and reasonable steps to protect property, for example in the event of natural disasters, but only to the extent that is reasonable in the circumstances. Any interference with this right must be subject to conditions provided for by law and must achieve a fair balance between the general public interest and the protection of an individual's property rights. What is considered to be in the public interest is often left to the Government to decide, but any interference must strike a fair balance between the demands of the general interests of the community and the requirements of the individual's fundamental rights.

Article 2 of the First Protocol: Right to Education

54. Article 2 of the First Protocol enshrines protection for access to education in recognition of the critical importance of education to personal development. The Article encompasses a right to an adequate and appropriate education, to access existing educational institutions, to be educated in the national language and to obtain recognition when an individual has properly completed his or her studies. The right to education extends to primary, secondary as well as higher education and includes a freedom to set up private schools, but this freedom is subject to regulation by the State to ensure there is a proper educational system, and does not include a right to subsidies for providing that education.

55. Article 2 of the First Protocol also provides that the State must respect the right of parents' religious and philosophical convictions in respect of education and teaching. This aspect of the right is closely aligned to the right to freedom of religion in Article 9. This right belongs to the parent rather than the student. This right does not prevent the State from setting and planning the school curriculum, but it does require the matters in

the curriculum to be conveyed in an objective, critical and pluralistic manner so that parents' different religious and philosophical convictions are respected. When it first agreed to be bound by this Article the UK entered a reservation to it to say that it accepts the need to respect parents' religious and philosophical convictions but that it would do so only so far as it is compatible with providing efficient instruction and training and unreasonable public expenditure was avoided.

Article 3 of the First Protocol: Right to Free Elections

56. The right to free elections is crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the Rule of Law. By agreeing to Article 3 of the First Protocol, the UK has undertaken to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. The right to vote is closely linked to the rights of free speech assembly, guaranteeing, as it does, respect for pluralism of opinion in a democratic society. The right to vote is not absolute – the state can interfere with the right of an individual to vote as long as an interference pursues a legitimate aim, is proportionate and does not thwart the free expression of the people in choosing their democratic representatives.

57. It follows then that a blanket, automatic restriction that applies regardless of individual circumstances will be in breach of the right to vote. Accordingly, this was the decision reached by the Grand Chamber of the ECtHR in *Hirst v UK (No. 2)*⁶³ when it found the UK to be in breach of its international obligations by placing a blanket ban on prisoners voting, whether they are sentenced to one day in prison or life and even where they are in prison on remand awaiting trial and have not been convicted of any offence. The UK's response to this judgment – discussed in more detail in paragraph 117 – reveals much about the general antipathy for independent rights adjudication felt by many elected representatives. In an embarrassingly ill-informed parliamentary debate on the judgment in February 2011 parliamentarians demonstrated a shocking level of ignorance of the Council of Europe system and a staggering disregard for the Rule of Law. Some tied themselves in knots arguing judicial overreach and trying to explain away the issue of prisoner voting as a 'social' issue that shouldn't fall within the

⁶³ *Hirst v The United Kingdom*, ECtHR, application no. 74025/01, 6 October 2005.

jurisdiction of the Strasbourg Court. This creative argument does not sit well with Article 3 of the First Protocol to which the UK is a signatory and which lays down specific protection for the right to vote. Six years after the Court's decision there remains a blanket ban on prisoners voting.

Article 1 of the Thirteenth Protocol

58. By incorporating this Article into UK law, the UK has confirmed its commitment to the abolition of the death penalty, ensuring that, in this country, nobody will be condemned to the death penalty or executed. We are often told that the majority of people in this country would support a return to the death penalty and the recent launch of the Government's e-petitions website saw a concerted campaign for a parliamentary debate on its re-introduction. There was intense media focus on those petitions calling for death penalty to be re-instated. However, soon after this initial flurry, an even more popular (but largely unreported) petition emerged, opposing any such return to the death penalty and suggesting that the British people are not as keen to see the return of capital punishment as we are sometimes led to believe.⁶⁴

59. Liberty believes that all the fundamental rights protections provided for in the HRA are vital to protect human dignity and preserve democratic freedoms. Any replacement Bill of Rights which eroded these fundamental values would seriously diminish rights protections in this country.

Entrenchment

60. The HRA was voted through our Parliament by a majority of MPs and Peers in the same way as any other piece of legislation and the fact that our democratically elected representatives are free to repeal the HRA using the normal legislative procedures or to refuse to give effect to its provisions, actually marks our human rights framework out from the systems provided for in many other modern democracies. For the rights protected by the US Constitution to be amended, for example, a special legislative procedure must be followed requiring significantly greater majority support in both Congress and the Senate than is required for ordinary legislation to be passed.

⁶⁴ <http://www.liberty-human-rights.org.uk/news/2011/no-place-for-the-death-penalty.php>.

Notwithstanding short-term restrictions placed on the freedom of the State Legislature impose by the American Constitution, the US Bill of Rights is generally viewed as a source of pride for ordinary Americans, enshrining, as it does, the freedoms for which the colonists had rebelled. In the same way, the substantive rights protected by the HRA were drafted in the aftermath of the horrors of the Second World War, with the reality of crimes against humanity fresh in everybody's minds and with a great deal of influence from British politicians and lawyers, most notably former British Prime Minister Winston Churchill. The United Kingdom was among the first countries to sign the Convention, on the first day it was possible to do so - we were also the first to ratify it, in March 1951.

61. The German constitution is even stronger than its US counterpart. It declares, in its very first sentence, the inviolability of human dignity, but by contrast with our constitutional arrangements, a commitment to fundamental rights in German law is protected by an 'eternity clause' which means those commitments are binding on future governments. The reality is that our framework of human rights protection boasts a lighter touch than those in comparable democracies, representing a uniquely British compromise. A replacement Bill of Rights could be strengthened by entrenchment in an enduring constitutional document, but with that additional protection would come an erosion of British democratic traditions.

Enforcement

62. The focus for much of the criticism of the HRA has been the claim that it places too much power in the hands of "unelected" judges, thus removing decision-making from our democratically elected representatives. Unfortunately little attention is paid to the careful and cautious drafting of the HRA which, instead of removing powers from our legislature, in fact ensures that the final decision on issues of human rights and fundamental liberties always rests with Parliament. First and foremost, the HRA, established a dialogue between Parliament and the British courts. Section 3 of the Act records that, where our laws are open to more than one interpretation, it is Parliament's intention that the courts adopt an interpretation which is consistent with the rights protected by the HRA.⁶⁵ In this way the HRA created a new type of statutory

⁶⁵ Section 3: '*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.*'

interpretation but one that fits within usual common law powers of the courts to apply and interpret laws – something the courts have been doing for hundreds of years. One of the cornerstones of our democratic system is an independent judiciary that interprets and applies the law. Judicial decision-making is fundamental to the Rule of Law, and the powers given by the HRA to the courts fall squarely within this historic function.

63. Where an Act of Parliament cannot be read compatibly with this country's commitments to fundamental rights, however, section 4 of the HRA provides that a court may do nothing more than make "*a declaration of incompatibility*" alerting Parliament to the inconsistency. Section 6 makes clear that whilst other public authorities, including the courts are bound by the protections enshrined in the HRA primary legislation passed by Parliament can only be overridden by Parliamentary consent.

64. Section 10 and Schedule 2 of the HRA provide a mechanism whereby amendments to legislation can be made by a Remedial Order. If a Minister considers there are compelling reasons to do so, he or she can make an order to amend legislation in order to remove an incompatibility recognised by the courts. A draft of the Order must, however, be laid before Parliament for 60 days and then approved by resolution of both Houses before it can be made. The only exception is in respect of urgent orders which allow for an interim order to be made which will have no effect if not approved by both Houses within 120 parliamentary days. This is intended to ensure that clear breaches of human rights can be dealt with swiftly, rather than waiting for a legislative slot which can often take months. Ultimately any proposal to change the law can be overridden by Parliament.

65. Rather than imposing an absolute limit on the legislative competence of Parliament, the HRA helps to integrate rights into the decision making process so Parliamentarians in general and those in government in particular, are alive to the human rights implications of their policies and proposals. To this end, section 19 of the HRA requires any Minister who is in charge of a Bill in both Houses of Parliament to lay, before the Second Reading of the Bill, a statement which says that in the Minister's view the Bill is either compatible with our human rights protections, or that it is incompatible but that the Government nevertheless wishes to proceed with the Bill. This is an

executive statement known as a 'statement of compatibility', giving the personal opinion of the Minister introducing the Bill – it is not binding on Parliament or the courts. It is intended to encourage Ministers and the civil service to consider the human rights implications of proposed legislation before it is introduced. The statement of compatibility has the additional benefit of acting as a trigger, prompting debate on human rights issues within Parliament. Explanatory Notes (which accompany Bills) also now include detailed information as to why the legislation is considered to be compatible with human rights protections. This means that detailed policy justification for proposed measures is provided which in turn helps to inform parliamentary debate.

66. The HRA's deference to the role of Parliament sets the UK framework for the protection of rights and freedoms apart from those adopted by other democracies. Perhaps the most famous modern Bill of Rights is set out in a series of Amendments to the US Constitution. Like the HRA, the US Bill of Rights includes, amongst other provisions, protections for freedom of expression, personal privacy, property rights and fair trials.⁶⁶ Unlike the HRA, the US Bill of Rights provides a direct limit on the activities of the elected representatives of the American people. This means that when a decision concerns prescribed fundamental rights of the individual, the US Supreme Court has the final say.

67. The power of the US Courts to strike down the laws enacted by the representatives of the American people may seem surprising for a country as committed to democracy as the United States – it has not been uncontroversial. Judicial interference in democratic debate is a charge that has been laid at the door of those judges responsible for upholding the American Constitution. *Roe v Wade*, the seminal decision of the US Supreme Court, is a case in point.⁶⁷ In this case the Court discerned a right to abortion in Amendment 14 of the Constitution which prohibits the state and local governments from depriving persons of life, liberty or property without certain steps being taken to ensure fairness. As the Supreme Court is the final arbitrator of the American Constitution, federal laws which failed appropriately to tie the regulation of abortion to a woman's trimester of pregnancy and to recognise a limited rights to

⁶⁶ See Amendments 4, 5 and 6.

⁶⁷ 410 U.S. 113 (1973):

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=410&invol=113>.

abortion, were held to be unconstitutional and unviable. The case has been widely criticised for judicial activism and an overriding of democratic processes. If the same decision were made in the UK, our laws would continue to be viable until such time as Parliament determined that they must change: this simple comparison reveals the deference to democratic legitimacy which lies at the heart of our human rights framework. The best way of demonstrating the point is to investigate further how the HRA is used by the courts in this country.

68. In the case of *Bellinger v Bellinger*,⁶⁸ the House of Lords was called upon to consider whether a provision of the *Matrimonial Causes Act 1973*, which failed to recognise gender reassignment for the purposes of marriage, was compatible with the rights protected by the HRA. This was an extremely serious issue for the transgender community as UK law effectively placed a bar on the right of transgender people to fully acquire their chosen sex. Whilst the Court found that UK law was incompatible with the rights of transgender people in this respect, it made clear that the decision to change the situation was an important matter of policy which must be left to Parliament. The following year, after a period of full Parliamentary debate, our elected representatives enacted the *Gender Recognition Act 2004* which allows transgender people to marry consistently with their adopted gender role.

69. In the same year that the Court considered the issue of transgender marriage, a mother challenged the provisions of the *Human Fertilisation and Embryology Act 1990* which prevented her from registering the name of her deceased husband on the birth certificates of her two children conceived by IVF.⁶⁹ The Courts found that the law governing registration violated the right to respect for family life protected by Article 8, it further infringed Article 14, the right not to be discriminated against in the exercise of fundamental rights. The Court highlighted this problem by issuing a declaration of incompatibility under section 4 of the HRA. It was then for Parliament to decide what course to take. Ultimately our elected representatives voted to pass a new Act, the *Human Fertilisation and Embryology (Deceased Fathers) Act 2003*, to ensure that, in the future, a father's name could be registered on a birth certificate in these circumstances.

⁶⁸ [2003] UKHL 21.

⁶⁹ *Blood and Tarbuck v Secretary of State for Health* (unreported; 28 February 2003).

70. In another case a patient liable to detention on mental health grounds used the HRA to challenge the effect of section 26 of the *Mental Health Act 1983* which designated her adoptive father as her "nearest relative" even though he had abused her as a child.⁷⁰ The High Court in this country found the law in question was incompatible with right to respect for private and family life protected by the HRA and alerted Parliament to the problem by issuing a section 4 declaration. When the issue came to be considered initially by Parliament in 2004, a Government Bill was drafted which was widely opposed by MPs. The Government was then forced to think again and eventually withdrew its Bill, introducing new legislation which commanded better support from across Parliament in what became the *Mental Health Act 2007*. The new law remedied the incompatibilities identified by the Court in its 2003 decision.

71. These cases help to demonstrate the flexibility given to our elected representatives by the HRA. Whilst in other modern democracies, it is the courts which have the final say, in Britain the judiciary serve a crucial, but subservient role. This was a quite deliberate element of the drafting of the Act. When introducing the Human Rights Bill, as it then was, in the House of Commons, former Home Secretary Rt Hon Jack Straw MP made the following statement:

*The sovereignty of Parliament must be paramount. By that, I mean that Parliament must be competent to make any law on any matter of its choosing... The authority to make those decisions derives from a democratic mandate... To allow the courts to set aside Acts of Parliament would confer on the judiciary a power that it does not possess...the courts and the senior judiciary do not want such a power, and we believe that the people do not wish the judiciary to have it.*⁷¹

72. The value of the HRA for ordinary people in this country is far greater than the sum of the individual rights it protects. Before the HRA came into force, individuals had no direct way of holding local authorities to account for disregarding or undermining their fundamental rights. Quite apart from the threat of legal proceedings, a unique strength of

⁷⁰ *R (on the application of M) v Secretary of State for Health* Administrative Court; [2003] EWHC 1094 (Admin); 16 April 2003.

⁷¹ House of Commons *Hansard*, 16 February 1998 Column 770.

the Act is that it requires those in positions of power in our society to bear in mind our individual rights when they make decisions which affect our lives. This means that in the UK, human rights are not just about courts, judges and Acts of Parliament, they are about creating a culture of rights protection within public authorities, including schools, hospitals, government departments and the police. Without this vital protection, many important changes in the approach of public authorities to individual rights in this country simply would not have happened.

73. Section 6 of the HRA performs a hugely important role in protecting vulnerable individuals against large and sometimes bureaucratic bodies which wield a significant amount of power. Care homes, for example, are obliged by the HRA to treat those within their care with dignity and respect. Similarly, when devising a school uniform policy, schools must show respect for pupil's religious beliefs. When the police conduct stops and searches they must ensure they do not discriminate on the grounds of race. To those who say the HRA places too much power in the hands of judges, they should remember that section 6 places binding obligations on our courts and tribunals to respect our human rights in every decision they make. Whilst the HRA cannot ensure that mistakes are never made and rights never ignored, it imposes strong obligations on key institutions of the state and makes them accountable to the individuals they serve – as a last resort, local authorities which disregard can be brought before the courts.

74. Perhaps unsurprisingly this unique strength of the HRA has been a source of criticism amongst some organisations performing public functions who must now meet certain standards in everything they do. Sadly it is not only companies and local authorities trying to escape blame that scapegoat the HRA. In a now infamous speech on 15th August this year, the Prime Minister compared human rights protections to health and safety law, alleging both have '*a chilling effect*' on the public sector, imposing burdens which '*fly in the face of common sense, offend our sense of right and wrong, and undermine responsibility*'.⁷² In this vein, much of the political discussion around the HRA has focused on the idea that it runs counter to common sense. Frequently, the examples given to justify these claims involve public authorities, or sometimes even

⁷² "We are all in this together" Speech by Prime Minister, Rt Hon David Cameron available at: http://www.conservatives.com/News/Speeches/2011/08/David_Cameron_We_are_all_in_this_together.aspx

private companies misunderstanding what the HRA requires, or blaming it for problems or mistakes to avoid owning up to administrative failures. One example of this is the recent case of a private company contracted to transport prisoners from the prison grounds to their court hearing. A number of newspapers carried the headline that huge expense had been incurred in transporting a prisoner 60 yards from prison to court.⁷³ Reportedly the cost incurred was over £1000 – with a prison van sent 100 miles and across three counties to transport the individual in question. Rather than explaining why there was not a locally available van or car available that could have been used, at very little expense, to make the journey, the company in question chose to pin the blame on human rights. This was surely an organisational failure on the part of the company whose responsibility it is to make appropriate arrangements.

75. One of the most shameless exercises of bureaucratic buck-passing in recent years came after the tragic murder of Naomi Bryant by a man erroneously released on licence by the probation service 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. After he murdered Naomi following his release, the chief inspector of probation pointed to the "human rights" of offenders, suggesting they were somehow responsible for the failures of his colleagues. The truth of the matter is that the HRA imposes an obligation on the probation service 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. Those obligations were fatally neglected by a public authority in the case of Anthony Rice, but thanks to this direct obligation, imposed by the HRA and enforceable by ordinary people like Naomi's mother, Verna Bryant, an inquiry was carried out providing much needed answers for Naomi's family. At the inquest it emerged that the HRA had nothing to do with Rice's release which resulted instead from a series of catastrophic administrative blunders. As a result, we can have real hope that lessons have been learned and that

⁷³ "Van travels 100 miles to take a suspect in cuffs 60 yards to court... and, you've guessed, the farce is all to protect his human rights", *The Daily Mail*, (27.09.11), available at: <http://www.dailymail.co.uk/news/article-2041977/Prison-van-travels-100-miles-suspect-cuffs-60-yards-court.html>.

the authorities will improve the system to provide adequate levels of protection for the public.

76. Section 6 provides a vital means by which individual can ensure public authorities take notice of their rights. It is an indispensable counterweight in the unequal relationship between the individual and the state. The HRA, quite the opposite of an affront to democracy, is an instrument which gives power to the people. Not only is this invaluable for those trying to vindicate their rights in individual cases, it creates an awareness amongst those bodies performing functions of the need to be respectful of individual rights – they ignore those duties at their peril.

77. Any attempt to replace the HRA with something substantially different would mean altering the protections afforded in at least one of the three component areas of content, entrenchment or enforcement. Liberty believes that the unique blend of fundamental values, accessible enforcement mechanisms and ultimate deference to democracy offered by the HRA are what mark it out as a uniquely British instrument.

Relationship with the European Court of Human Rights

78. Any discussion about what should be contained in a “UK” or “British Bill of Rights” is not complete without considering the mechanism currently provided for in Section 2 of the HRA that governs the relationship between domestic rights jurisprudence and Strasbourg case law. If we are to remain a signatory to the ECHR and within Strasbourg’s supervisory jurisdiction any new Bill will need to have regard to this relationship. One of the repeated rallying cries for repealing the HRA and replacing it with a ‘British Bill of Rights’ is based on the perception that the HRA has allowed the ECtHR to dictate to British courts. The argument is entirely misconceived. Just as the HRA strikes a balance between protecting parliamentary sovereignty and the judicial protection of rights and freedoms, so too has it allowed for the development of human rights jurisprudence by our domestic courts while still ensuring that the UK complies with its international obligations. The incorporation mechanism adopted by the HRA requires domestic courts to take account of – and not be bound by – ECtHR case law. Accordingly the Act has not only allowed for greater appreciation in Strasbourg of British judgments, it has encouraged dialogue, disagreement and the development of *British*

human rights principles. Liberty believes that any UK Bill of Rights would need to replicate this carefully constructed mechanism. But in any event, and as we discuss in detail below, those who seek HRA repeal in order to lessen “European” interference are badly ill-advised. Repeal or replacement of the HRA would cause Strasbourg judges to exercise more, not less, scrutiny over the actions of the UK Government.

Taking account of ECtHR jurisprudence: section 2 of the HRA

79. Before the HRA was brought into force it was the ECtHR which was solely tasked with ensuring “*the observance of the engagements undertaken*” in the Convention by the UK Government.⁷⁴ While the ECtHR is required under the Convention to determine “*all matters concerning the interpretation and application of the Convention*”,⁷⁵ it is now able to make those determinations lead by British court judgments.⁷⁶ The relationship between the ECtHR and domestic courts is established by section 2 of the HRA, which provides that in determining a question raised in connection with a Convention right the court or tribunal must “*take into account*” any judgment, decision or advisory opinion of the ECtHR “*so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen*”. The unambiguous wording of section 2 clearly contradicts the popular misconception that the HRA has transported Strasbourg case law straight into British courts. The recent assertion, for example, by Conservative MP Dominic Raab that “*We should not be importing the Strasbourg case law wholesale*”, and that this was a “*serious flaw in the Human Rights Act*”, is plainly, and simply, wrong.⁷⁷ To the contrary, the HRA has constructed a careful mechanism giving primacy

⁷⁴ Article 19 ECHR.

⁷⁵ Article 32 ECHR.

⁷⁶ See, for example, three recent cases of the ECtHR, *A v United Kingdom* (3455/05) (2009) 49 EHRR 29, *N v United Kingdom* (26565/05) (2008) 47 EHRR 39 (27th May 2008) *Mustafa (Abu Hamza) v United Kingdom (No. 1)* (31411/07) 52 EHRR SE11 (18th January 2011), *Pretty v United Kingdom* (2002) 35 EHRR 1 and *Donaldson v United Kingdom* (56975/09) (2011) 53 EHRR 14 (25th January 2011), in which the ECtHR adopts and/or includes substantial parts of the reasoning of UK domestic courts in its judgments. In the recent case *Kennedy v United Kingdom* (App no. 26839/05) [2010] ECHR 26839/05 (18 May 2010) the ECtHR stated: “*it is in principle appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention in order that the Court can have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries (see Burden v UK [2008] ECHR 13378/05, para 42; and A. v UK [2009] ECHR 3455/05, para 154.*”: at para 109.

⁷⁷ As quoted in “Britain can ignore Europe on human rights: top judge” *The Times*, 20 October 2011.

to British adjudication of human right principles which balances the need of the UK Government to fulfill its obligations under the Convention as determined by the ECtHR.

80. Section 2 of the HRA is the manifestation of the principle of subsidiarity, a Convention doctrine which protects the ability of each democratic State to make decisions about how it will govern its society, balanced with the underlying aim of the Convention to secure universal recognition of the rights it contains.⁷⁸ The ECtHR has always allowed contracting States a 'margin of appreciation' in determining whether there has been a breach of a Convention right. This principle gives a contracting State a degree of latitude in how it interprets and implements the Convention rights in accordance with its own laws, customs and traditions. The margin is both an "*interpretive obligation*" to recognise the ECtHR's review powers ought not to be as extensive as a national court's, and a "*standard of judicial review*", recognising that contracting States will generally be in a better position to balance competing rights claims in the context of their own society.⁷⁹ The extent of the margin afforded to a contracting State is decided on a case by case basis, depending on the right interfered with, the extent of that interference, social, political and cultural domestic factors and the standard of protection across all contracting states. The Court has tended to defer more liberally to contracting states where it comes to matters of national security,⁸⁰ or the application of social policy.⁸¹ Less leeway has been given where the right being considered is absolute, such

⁷⁸ The Preamble to the ECHR states the aim of the Convention is to secure "*the universal and effective recognition and observance of the rights therein declared*".

⁷⁹ See Clayton and Tomlinson *The Law of Human Rights* (2nd Ed, Vol. 1) (Oxford: Oxford University Press), at 6.45.

⁸⁰ See, for example, *Ireland v United Kingdom* (App No 5310/71) [1978] ECHR 5310/71, in which the ECtHR was required to determine whether special powers adopted by the UK Government to provide for extrajudicial deprivation of liberty as part of its approach to the threat of terrorism from Northern Ireland was a breach of Articles 5 and 6, where the UK had derogated from the Convention under Article 15(1) on the grounds the situation constituted a "*public emergency threatening the life of the nation*". The ECtHR considered "*It falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15(1) leaves those authorities a wide margin of appreciation.*"

⁸¹ See, for example, *Stec v United Kingdom* (65731/01) (2006) 43 EHRR 47. In *Dickson v United Kingdom* (App No 44362/04) (2008) 24 BHRC 19 (4th December 2007), the ECtHR rejected the claim that denying a prisoner and his wife access to artificial insemination facilities to enable them to have a child was a breach of their Article 8 (right to respect for private and family life) and Article 12 (right to marry and found a family) rights. In rejecting the claim the Court held that

as the right to be free from torture,⁸² or is of fundamental democratic importance, such as the protection of free speech.⁸³

Influencing the ECtHR

81. Before the HRA was brought into force the ECtHR was informed in its assessment of whether a Convention right had been impermissibly breached only by the submissions made to it by the parties before the Court. Former Master of the Rolls and Lord Chief Justice Lord Bingham considered the “grave weakness” of the pre-HRA position was that questions from the UK “were being argued in Strasbourg without any judgment from the United Kingdom Court for the judges there to look at and say, ‘That makes moderately good sense, considering’”.⁸⁴ The current President-elect of the ECtHR, Sir Nicolas Bratza, also considers that the HRA has had a positive impact on the relationship between his Court and those in the UK:

*the Strasbourg Court has...been particularly respectful of decisions emanating from courts in the United Kingdom since the coming into effect of the Human Rights Act and this is because of the very high quality of the judgments of these courts, which have greatly facilitated our task of adjudication.*⁸⁵

82. The HRA has then greatly contributed to ECtHR decision-making, and fundamentally strengthened the ‘margin of appreciation’ afforded to the UK by the Court.

where there is a lack of consensus about an issue amongst the contracting States “the margin will be wider. This is particularly so where the case raises complex issues and choices of social strategy: the authorities’ direct knowledge of their society and its needs means that they are in principle better placed than the international judge to appreciate what is in the public interest. In such a case, the Court would generally respect the legislature’s policy choice unless it is ‘manifestly without reasonable foundation’. There will also usually be a wide margin accorded if the State is required to strike a balance between competing private and public interests or convention rights.”: at para 78.

⁸² See, for example, *Chahal v United Kingdom* [1996] 22414/93 (15 November 1996) in which the ECtHR held that there was a real risk that the applicant would be tortured should he be deported and therefore the deportation order if implemented may give rise to a breach of Article 3.

⁸³ See, for example, *Handyside v United Kingdom* (1976) 1 EHRR 737.

⁸⁴ Oral evidence given by Lord Bingham of Cornhill, then the Senior Law Lord, to the Joint Committee of Human Rights inquiry into the *Implementation of the Human Rights Act 1998*, Minutes of Evidence, Monday 26th March 2001 (Published 4 April 2001) (HL Paper 66-iii; HC 332-iii). At 130.

⁸⁵ Sir Nicolas Bratza, President-Elect of the European Court of Human Rights “Opinion: The relationship between the UK courts and Strasbourg” [2011] *EHRR Issue 5*, page 505, at page 507.

As discussed below, a simple review of jurisprudence from both domestic courts and the ECtHR shows how the HRA incorporation mechanisms have greatly strengthened British sovereignty and lead to the protection, not denigration, of parliamentary decision-making. It is difficult to see how any new “British Bill of Rights” could provide any advances on the HRA in this respect. The Prime Minister, while Leader of HM Opposition, stated in 2006 that the ECtHR “*has nothing to go on except its own previous rulings*”, therefore, he reasoned

*The existence of a clear and codified British Bill of Rights will tend to lead the European Court of Human Rights to apply the ‘margin of appreciation’. This means that the court in Strasbourg will tend to respect and uphold the principles laid down in the Bill of Rights whenever they can.*⁸⁶

On the contrary, the ECtHR has always sought to apply the margin of appreciation, and increasingly since the HRA has come into force that has become easier to do. Domestic incorporation of the makes Strasbourg’s role easier and arguably strengthens the margin of appreciation that it will afford. It is legal nonsense to suggest that a British Bill of Rights which looks either to rewrite, reduce or tweak the wording of the Convention will encourage the ECtHR to apply a broader margin of appreciation. It is likely to do the exact reverse. Strasbourg will once again effectively become a court of first instance when applicants try to argue that a British Bill of Rights does not give sufficient protection to their rights under the Convention. Becoming the first contracting State to repeal legislation incorporating the Convention will not engender confidence in the acts of UK Government in relation to human rights. Such a move will also damage the constructive dialogue between the Strasbourg and the Supreme Court which has developed since the HRA came into force.

Disagreement, dialogue and development of UK human rights principles

83. The mechanism adopted by the HRA to make reference to ECtHR jurisprudence under section 2 has enabled a dialogue to develop between British courts and the

⁸⁶ Speech by Prime Minister Rt Hon David Cameron MP when Opposition Leader, “Balancing Freedom and Security – A modern British Bill of Rights” (London, 2006) available at <http://www.britishpoliticalspeech.org/speech-archive.htm?speech=293>.

ECtHR. It is clear that section 2 of the HRA, in requiring British courts to “take into account” ECtHR case law, does not *bind* British courts to follow ECtHR jurisprudence, nor was it ever intended to do so.⁸⁷ An amendment to clause 2 was in fact proposed by the late Conservative Peer Rt Hon Lord Kingsland QC during the passage of the Human Rights Bill in the House of Lords, which suggested that clause 2 expressly state that courts “*shall be bound*” by decisions of the ECtHR.⁸⁸ The proposal was soundly rejected by the Lord Chancellor of the day, Rt Hon Lord Irvine of Lairg, as moving “*in an undesirable direction*”.⁸⁹ Liberty agrees. The strength behind the section 2 implementation mechanism is that it ensures the development of human rights jurisprudence by British courts and parliament. This was always the intention behind the Act. The White Paper preceding the Human Rights Bill stated

*The Convention is often described as a “living instrument” because it is interpreted by the European Court in the light of present day conditions and therefore reflects changing social attitudes and the changes in the circumstances of society. In future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention.*⁹⁰

Similarly, in responding to Lord Kingsland’s proposal that British courts be bound by Strasbourg jurisprudence, Lord Irvine stated

*it is important that our courts have the scope to apply [their] discretion so as to aid in the development of human rights law. There may also be occasions when it would be right for the United Kingdom courts to depart from Strasbourg decisions. ...We feel that to accept this amendment removes from the judges the flexibility and discretion that they require in developing human rights law.*⁹¹

⁸⁷ See the Home Office White Paper *Rights Brought Home: The Human Rights Bill* (CM 3782) (October 1997), which states at para 2.4 “*In considering Convention points, our courts will be required to take account of relevant decisions of the European Commission and Court of Human Rights (although these will not be binding).*”.

⁸⁸ As moved by former Lord Chancellor, the late Conservative Peer Rt Hon Lord Kingsland QC. See House of Lords *Hansard*, Report stage proceedings on the Human Rights Bill, 19th January 1998 at column 1269.

⁸⁹ *Ibid*, at column 1270.

⁹⁰ *Rights Brought Home*, *ibid*, at para 2.5.

⁹¹ *Ibid*, at column 1271.

84. As a consequence of the wording of section 2 and its effect as intended by Parliament, British judges have asserted the right to disagree with ECtHR jurisprudence where it does not accord with British law or values. In the 2009 *Horncastle* decision,⁹² the Supreme Court did so in robust terms. The Court was considering the extent of the right to a fair trial and declined to follow a decision of the ECtHR⁹³ in circumstances where to do so would, in its view, have undermined the entire domestic approach regarding the admission of hearsay evidence in criminal trials.⁹⁴ The Court concluded that the development of ECtHR case law in this case had not been informed by consideration of the protections available in English common law which safeguard the fairness of a trial, nor changes made to rules of admissibility to ensure they are human rights compliant.⁹⁵ The President of the Supreme Court, Lord Phillips, stated

*The requirement to “take into account” the Strasbourg jurisprudence will normally result in this court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course.*⁹⁶

The Attorney General, Rt Hon Dominic Grieve QC MP, in a recent speech contemplating the relationship between Strasbourg and the domestic courts, stated that if the current system under the HRA “*is not working we could positively provide for a right of rebuttal*”.⁹⁷ As is clear from the *Horncastle* decision, this right already exists.

⁹² [2009] UKSC 14.

⁹³ *Al Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1.

⁹⁴ The case concerned the claim by two defendants that their criminal trial had been unfair contrary to Art 6 of the ECHR as in each case there was placed before the jury the statement of a witness (in each case the victim of the alleged offence) who was not called to give evidence.

⁹⁵ Per Lord Phillips at para 107.

⁹⁶ At para 11. Lord Brown distinguished the case before the court from that in *SSH D v AF (No 3)* [2009] UKHL 28 where the Supreme Court felt bound by a Grand Chamber decision which gave a clear and decisive judgment on the very point at issue before the court which the judges felt compelled to follow: *Horncastle* at para 118.

⁹⁷ The Attorney General Rt Hon Dominic Grieve QC MP speaking at Lincoln's Inn on 24th October 2011, *European Convention on Human Rights – Current Challenges*, available at <http://www.attorneygeneral.gov.uk/NewsCentre/Speeches/Pages/AttorneyGeneralEuropeanConventiononHumanRights%E2%80%93CurrentChallenges.aspx>.

85. That said, the courts have been more reluctant to go beyond the rare disagreement with Strasbourg case law. It is perhaps unsurprising that there has been some judicial reticence. A predominant view espoused by the judges is that while section 2 does not bind the courts to follow ECtHR jurisprudence, it does not permit the courts to develop rights beyond what has already been confirmed by Strasbourg. The oft-cited principle of Lord Bingham in *Ullah*⁹⁸ states that the “*duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less*”.⁹⁹ Lord Bingham based this principle on his view that the Convention is most authoritatively expounded by the Strasbourg Court and therefore expansion of the Convention rights by national courts should not be by reason of its own interpretation.¹⁰⁰ Lord Hope more recently stated in *Ambrose*¹⁰¹ that Lord Bingham’s point in *Ullah* was that it was not Parliament’s intention for the courts to go beyond the Strasbourg jurisprudence, given “*To do so would have the effect of changing them from Convention rights, based on the treaty obligation, into free-standing rights of the court’s own creation*”.¹⁰²

86. Liberty believes section 2 can be more liberally construed. This view accords with both the wording of the provision and the intention of parliament in enacting the HRA. The purpose of the carefully constructed HRA incorporation mechanisms is to allow for the development of human rights jurisprudence by British courts. Ultimately the ECtHR under the Convention is able to define the extent and content of the right should a complainant seek redress in Strasbourg after domestic avenues have been exhausted. However the HRA first allows a British court to make a determination with the advantage of their detailed knowledge of UK law and practice and within a constitutional framework which appreciates the necessary separation between judicial and Executive decision-making.

⁹⁸ *Ullah v Special Adjudicator* [2004] UKHL 26.

⁹⁹ Following the dicta of Lord Slynn in *R (Alconbury Developments Ltd) v Environment Secretary* [2003] 2 AC 295: “*Although the Human Rights Act 1998 does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights*” at para 26: cited by Lord Bingham in *Ullah*, *ibid*, at para 24.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ambrose v Harris (Prosecutor Fiscal, Oban) (Scotland); Her Majesty’s Advocate v G (Scotland); Her Majesty’s Advocate v M (Scotland)* [2011] UKSC 43.

¹⁰² As per Lord Hope in *Ambrose v Harris (Prosecutor Fiscal Oban) (Scotland) and other appeals* [2011] UKSC 43, at para 19.

87. This more expansive approach to section 2, moving away from “*Ullah-type reticence*”,¹⁰³ is beginning to emerge. The Lord Chief Justice of England and Wales, Lord Judge, recently gave evidence to the parliamentary Constitutional Committee suggesting British courts can and should go further when considering and/or applying ECtHR jurisprudence. Lord Judge indicated that section 2 allows for a wider principle of interpretation than the ‘rare occasion’ approach, as articulated by Lord Phillips above. He pointed out that whereas the *European Communities Act 1972* unequivocally states that European Court of Justice decisions are binding on the UK, the HRA has allowed for the development of the meaning of “*taking into account*” in section 2 by the courts, a meaning which is continuing to evolve. Lord Judge left the door open for the courts to give greater scrutiny – and object more frequently – to ECtHR case law, stating that while our courts ought to give Strasbourg decisions “*due weight*”, it is not necessary to follow them in every case.¹⁰⁴

88. In the recent Supreme Court decision in *Ambrose*¹⁰⁵ Lord Kerr¹⁰⁶ went further still. He considered the courts to be bound by section 6 of the HRA to act in a compatible way with a Convention right which creates a duty to make a determination of any complaint brought before it regardless of whether Strasbourg has spoken.¹⁰⁷ Liberty agrees with Lord Kerr that this is what was intended by the HRA:

It is to be expected, indeed it is to be hoped, that not all debates about the extent of Convention rights will be resolved by Strasbourg. As a matter of practical reality, it is inevitable that many claims to Convention rights will have to be determined by courts at every level in the United Kingdom without the benefit of unequivocal jurisprudence from ECtHR. Moreover, as a matter of elementary principle, it is the court's duty to address those issues when they arise, whether or not authoritative guidance from Strasbourg is available. The great advantage of the Human Rights Act is that it gives citizens of this country direct access to

¹⁰³ As described by Lord Kerr in *Ambrose*, *ibid*, at para 130.

¹⁰⁴ Oral evidence given by Lord Judge, Lord Chief Justice of England and Wales, to the Select Committee on the Constitution, *Unrevised transcript*, Wednesday 19th October 2011, at Q164.

¹⁰⁵ *Ambrose v Harris (Prosecutor Fiscal, Oban) (Scotland)*; *Her Majesty's Advocate v G (Scotland)*; *Her Majesty's Advocate v M (Scotland)* [2011] UKSC 43.

¹⁰⁶ Lord Kerr gave a dissenting opinion.

¹⁰⁷ *Ibid*, at para 129.

*the rights which the Convention enshrines through their enforcement by the courts of this country. It is therefore the duty of this and every court not only to ascertain “where the jurisprudence of the Strasbourg court clearly shows that it currently stands” but to resolve the question of whether a claim to a Convention right is viable or not, even where the jurisprudence of the Strasbourg court does not disclose a clear current view.*¹⁰⁸

89. Liberty believes the approach articulated by Lord Kerr as to what is permitted under section 2 fits far better within the overall framework of the Convention and the purpose of the HRA. Robust scrutiny of Strasbourg case law, occasional disagreement or moving beyond what has been espoused by the ECtHR, should not be seen as two courts on a collision course, but rather evidence of constructive development of human rights protection and the proper safeguarding of the UK’s sovereignty. Although the UK Supreme Court may disagree with Strasbourg as it did in *Horncastle* this will only allow the ECtHR an “opportunity to reconsider the particular aspect of the decision that is in issue” thereby establishing “a valuable dialogue” between the two courts.¹⁰⁹ Consciously leaping ahead of Strasbourg, seeking clarification where ECtHR principle is unclear and directly disagreeing with a ECtHR decision which has failed to appreciate or accommodate an aspect of the domestic law or practice are all elements of a process which the President-elect of the ECtHR considers to be “right and positive for the protection of human rights”.¹¹⁰

90. The Home Secretary has offered a confused critique of the section 2 relationship. On the one hand she “would like to see the Human Rights Act go” because she believes that ECtHR decisions have “bound” British courts analysis of deportations which will breach Article 3.¹¹¹ On the other hand, she has complained that British judges have gone too far, beyond ECtHR jurisprudence, in their Article 8 analysis in the context of immigration cases.¹¹² Castigating British judges for both following and not following

¹⁰⁸ *Ibid*, at para 129.

¹⁰⁹ Per Lord Phillips in *Horncastle*, *ibid*, at para 11.

¹¹⁰ Sir Nicolas Bratza, *ibid*, at page 512.

¹¹¹ “Home Secretary: Scrap the Human Rights Act” *The Telegraph* (1st October 2011), available at <http://www.telegraph.co.uk/news/politics/8801651/Home-Secretary-scrap-the-Human-Rights-Act.html>

¹¹² See, for example, letter of the Home Secretary to the Joint Committee on Human Rights (October 2011), available at <http://www.parliament.uk/documents/joint-committees/human->

ECtHR judgments suggests a general antipathy towards the judicial protection of human rights rather than a coherent and reasoned basis upon which to embark radical change. It certainly reveals a lack of understanding about how section 2 operates. Further, such confusion bodes ill for the type of replacement the Government envisages for the HRA. Repealing the HRA, or repealing and replacing it with something which fetters judicial discretion or limits the Article rights, would only secure the HRA critics' supposed worst fears: heightened influence from the ECtHR and the end of British influence on it. Any change which could be interpreted as diminishing the Convention protections will doubtless lead claimants to argue, and the ECtHR to find, that the UK Government is not giving proper domestic effect to its Convention obligations. Even a rewording of the Convention rights would likely lead to much greater scrutiny by the ECtHR, as it would need to determine whether the alteration has changed the content of the rights and diminished the level protection which the Convention requires.

Legal consequences of replacing the HRA

91. Finally, any move to alter the relationship between Strasbourg and national courts and the way that the Convention is incorporated into domestic law would also lead to great legal and constitutional uncertainty. Lord Woolf has stated that the UK faces “a stark choice” between accepting the ECtHR rulings or leaving the system altogether, as creating a Bill of Rights which is separate to the Convention would cause complication as there will be “two conventions to which the courts are going to have regard”.¹¹³ The Deputy President of the Supreme Court, Lord Hope, has stated that regardless of any repeal of the HRA the human rights jurisprudence which now exists in relation to Convention rights will remain, as will the overriding Convention obligations of government and the right of individual petition.¹¹⁴ Lord Phillips has indicated that the HRA may have reached constitutional status, which would cause serious difficulty for the

[rights/HRJ%20\(10-12\)%20029%20-%20Letter%20from%20Home%20Secretary%20on%20ECHR%20Article%208.pdf](#).

¹¹³ BBC Interview 21st February 2011, as reported: <http://www.bbc.co.uk/news/uk-politics-12522239>.

¹¹⁴ As reported by Joshua Rozenberg, “European Court of Human Rights reform may be supported” (10th November 2011) *Law Society Gazette*, available at <http://www.lawgazette.co.uk/opinion/joshua-rozenberg/are-supreme-court-justices-more-assertive-they-were-law-lords>

relationship between parliament and courts interpreting any new Bill of Rights.¹¹⁵ Some of these issues may well be resolved if the UK was to withdraw from the Convention, which doesn't presently appear to be being contemplated. Senior Government Ministers have thankfully repeatedly committed to the Convention and have stated that withdrawing from it is not an option.¹¹⁶ Indeed, withdrawing from the Convention would not just impact on the UK but would “do untold damage to the system itself”, causing “immeasurable harm to the standing of the United Kingdom within the wider community of Europe in which it plays such an important part”.¹¹⁷ Closer to home, making changes to the HRA raises significant complications in the devolved states.

¹¹⁵ See Lord Phillips First Alexander of Weedon Lecture, given in London on 19th April 2010, available at <http://www.supremecourt.gov.uk/news/speeches-archive.html>.

¹¹⁶ See the Liberal Democrat party conference speech of Deputy Prime Minister Rt Hon Nick Clegg MP of 21 September 2011, in which he stated the HRA “is here to stay”, available at http://www.libdems.org.uk/speeches_detail.aspx?title=Nick_Clegg's_speech_to_Liberal_Democrat_Conference&pPK=00e086ba-d994-4146-bb14-60ce615d05eb. The Lord Chancellor stated in February 2011 that Britain will not pull out of the ECHR, see http://www.libdems.org.uk/speeches_detail.aspx?title=Nick_Clegg's_speech_to_Liberal_Democrat_Conference&pPK=00e086ba-d994-4146-bb14-60ce615d05eb. See also the speech of the Attorney General Rt Hon Dominic Grieve QC MP on 24th October 2011, *ibid*, in which he stated “There is no question of the United Kingdom withdrawing from the Convention”.

¹¹⁷ Sir Nicolas Bratza, *ibid*, at page 506.

QUESTION 3 - HOW DO YOU THINK IT SHOULD APPLY TO THE UK AS A WHOLE, INCLUDING ITS FOUR COMPONENT COUNTRIES OF ENGLAND, NORTHERN IRELAND, SCOTLAND AND WALES?

A “British Bill” of Rights and the devolved regions of the United Kingdom

92. While there has been much debate amongst Westminster MPs about the repeal of the HRA and the adoption of a “British Bill of Rights”, there has been little consideration of the impact that repealing the HRA would have on the devolved territories of Scotland, Northern Ireland and Wales. Any changes to the HRA would have serious legal and constitutional implications for each. The proposal for a “British” Bill of Rights would also present significant complications of a political, social and cultural nature. The HRA has been defined as “*central to the constitutional DNA of the UK*”, underpinning “*the devolution settlements while simultaneously elucidating the common values of the constituent nations*”.¹¹⁸ The HRA forms a pillar of the devolution statutes and is an integral part of the Northern Ireland peace agreement. The Government should be extremely wary of the complications which would follow any proposal to make changes to the HRA and the precedent it would set.

93. The HRA applies throughout the UK. Each of the devolution statutes has incorporated the HRA by requiring the devolved institutions to act compatibly with the Convention rights, as defined in section 1 of the HRA.¹¹⁹ Each of the devolved institutions and authorities, and the devolved Scottish Parliament and Assemblies of Northern Ireland and Wales, must also act compatibly with the ECHR under section 6 of the HRA.¹²⁰ In both the Scottish and Northern Irish devolution statutes the devolved Parliament and Assembly respectively are expressly prevented from modifying the HRA.¹²¹ The consequence of this measure is to afford two-fold protection from potential violations of Convention rights: under the devolution statutes on a claim that the relevant

¹¹⁸ Professor Monica McWilliams former Chief Commission of the Northern Ireland Human Rights Commission, “Human Rights Act underpins devolution” in *Common Sense: Reflections on the Human Rights Act* (June 2010) (Published by Liberty (National Council for Civil Liberties)), at page 46. Available at <http://www.liberty-human-rights.org.uk/policy/reports/common-sense-reflections-on-the-hra-book-june-2010.pdf>.

¹¹⁹ Section 126 *Scotland Act*; s 98 *Northern Ireland Act*; s 158 *Government of Wales Act 1998*.

¹²⁰ See also s 21 HRA; ss 29 and 54 *Scotland Act*; ss 6 and 24 *Northern Ireland Act*; ss 81 and 94 *Government of Wales Act 1998*.

¹²¹ Section 29, Schedule 4 *Scotland Act*; ss 6(2f) and 7(1) *Northern Ireland Act*.

act was outside the public body's competence; and under the HRA on the ground of unlawfulness.¹²²

94. Whereas in Scotland and Wales the overriding purpose of these human rights provisions in the devolution statutes was to incorporate the ECHR at pace with England, the incorporation of human rights principles in Northern Ireland takes on additional significance because of the peace process which underlies their constitutional arrangements. The incorporation of the ECHR was an important part of the Belfast (Good Friday) Agreement (GFA).¹²³ Against a backdrop of the “*history of communal conflict*”¹²⁴ the parties agreed that the British Government would

*complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.*¹²⁵

The Agreement also confirmed that the British Government committed

*as a particular priority, to create a statutory obligation on public authorities in Northern Ireland to carry out all their functions with due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation.*¹²⁶

The GFA was passed by referendum in Northern Ireland and the Republic of Ireland before it was signed; it has consequently been characterised as both a peace agreement and a bilateral treaty between the UK and the Republic of Ireland.¹²⁷

¹²² See Justice, *Devolution and Human Rights* (February 2010), at p 14. Available at <http://www.justice.org.uk/data/files/resources/30/Devolution-and-Human-Rights-8-February-2010.pdf>.

¹²³ Para 2 *Rights, safeguards and equality of opportunity*, GFA. Available at <http://www.nio.gov.uk/agreement.pdf>.

¹²⁴ Para 1, *ibid.*

¹²⁵ Para 2, *ibid.*

¹²⁶ Para 3, *ibid.*

¹²⁷ Beatson, J, Grosz, S, Hickman, T and Singh, R *Human Rights: Judicial Protection in the UK* (2008) (United Kingdom: Sweet & Maxwell); at page 772.

95. Given the extent to which the ECHR and the HRA are intertwined in the devolution statutes, any repeal of the HRA would require considerable amendment to those statutes. Legally and constitutionally this is obviously significant. Although in theory Westminster has retained the authority – under the various devolution mechanisms – to legislate on all matters, it has become a constitutional convention that it will not do so without the consent of the devolved bodies.¹²⁸ The responsibilities of the ruling bodies in Scotland and Northern Ireland under the respective devolution acts in relation to the ECHR means that should the UK wish to take legislative action in relation to the observation and implementation of the ECHR this would be touching upon a devolved matter. Consent of the Scottish Parliament and the Northern Ireland Assembly would accordingly be required for it to do so.¹²⁹ One view in Northern Ireland is that if the UK Government attempts to unilaterally amend the devolution statutes, this may precipitate a constitutional crisis and a risk that a UK Bill “*would be vetoed by the Northern Ireland Assembly, due to its operating procedures, thus forcing the Westminster government to take the unpalatable decision of trying to force legislation through in accordance with the doctrine of parliamentary sovereignty*”.¹³⁰ Gaining consent in Scotland is equally likely to be difficult if not impossible. The Scottish National Party has already committed in its 2010 Election Manifesto to oppose any repeal of the HRA, opting instead to “*stand up for what is right*”.¹³¹ Consequently there is a distinct possibility that Scotland will maintain their level of human rights protection even if it is amended and potentially downgraded in the rest of the UK. Professor Alan Miller, Chair of the Scottish Human Rights Commission, considers repeal of the HRA in the UK would create a “*two-tier system of the level of human rights protection within the UK*” as 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

¹²⁸ Ministry of Justice *Rights and Responsibilities: developing our constitutional framework*, (March 2009) available at <http://www.justice.gov.uk/publications/docs/rights-responsibilities.pdf>

¹²⁹ Justice, *Devolution and Human Rights*, *ibid*, at para 75.

¹³⁰ David Russell, NIHRC, seminar (1 December 2009) quoted in *Developing a Bill of Rights for the UK*, Equality and Human Rights Commission, 2010, available at http://www.equalityhumanrights.com/uploaded_files/research/developing_a_bill_of_rights_for_the_uk_report_51.pdf

¹³¹ See the *Westminster Manifesto of the Scottish National Party* (2010), at page 16. Available at <http://www2.snp.org/manifestos/westminster/2010>.

*Scotland... The question will inevitably be asked: why should residents of Gateshead not enjoy the same protection as those in Glasgow?*¹³²

96. The tone of the Westminster debate about HRA repeal and a replacement “British Bill of Rights,” is already creating political unease. Professor Monica McWilliams, former Chief Commissioner of the NIHRC, has noted from the Northern Ireland perspective that anything other than defending and building upon the HRA “*is to invite unnecessary and unwelcome discord*”.¹³³ Further, proposals to amend the HRA have created in Northern Ireland “*a sense of particular unease among those concerned to preserve and maintain the fragile constitutional balances that have been painstakingly put in place*”.¹³⁴ Former Northern Ireland Human Rights Commissioner¹³⁵ Professor Colin Harvey, has also recently expressed his serious concern about the lack of involvement of Northern Irish voices in the ‘British Bill of Rights’ discussion given the implications for the devolved nations:

*Proposing a UK bill of rights in such a context raises profound constitutional questions. Have they been thought through? Even the initial stages require skilful management. An appreciation of constitutional and national pluralism is vital. What of the potential outcome? No credible human rights activist or organisation will endorse anything that resembles a backward step. How could they? The Human Rights Act is legislation to be proud of. Subtle and crass attempts to undermine it should not prevail. That message may well emerge clearly from the consultation.*¹³⁶

In 2010 both the Scottish and Northern Irish Human Rights Commissions released a joint statement in which they declared their unequivocal support for the HRA, stating that the Act must be “*ringfenced and built upon as part of further progress in the promotion and protection of human rights within and across all jurisdictions including devolved,*

¹³² Professor Alan Miller, “The Human Rights Act from a Scottish Perspective” *Common Sense: Reflections on the Human Rights Act*, *ibid*, at page 42.

¹³³ *Common Sense: Reflections on the Human Rights Act*, *ibid*, at page 46.

¹³⁴ *Ibid*, at page 45.

¹³⁵ 2005-2011.

¹³⁶ “Listen to Northern Ireland’s advice on a UK Bill of Rights” *Comment is Free, The Guardian* (9 November 2011), available at <http://www.guardian.co.uk/commentisfree/libertycentral/2011/nov/09/northern-ireland-uk-bill-of-rights>

excepted and reserved areas”.¹³⁷ The Scottish Human Rights Commission has also explicitly rejected a British Bill of Rights, considering

*such a proposal to be the path of regression. It is a backward and inward-looking approach to the protection and promotion of human rights. It is against the public interest throughout the UK. It would be the first time that a developed country has repealed fundamental human rights legislation and will have a detrimental influence on the cause of human rights elsewhere in the world and on the UK’s international reputation.*¹³⁸

97. Achieving political consensus in Northern Ireland is additionally complicated by the fact the GFA also expressly acknowledged the possibility of a ‘Charter of Rights for the island of Ireland’. A report published jointly by the Northern Irish and Irish Human Rights Commissions in June 2011 recommended that a charter along the lines envisaged in the GFA should, as a minimum, “reaffirm the political parties’ commitment to the rights set out in the ECHR”, and could also include the rights set out in the ECHR protocols, the rights articulated in the GFA and those rights which can be derived from the text of the GFA.¹³⁹

98. To date, it appears that the sensitivities involved in legislating for a “UK” or “British Bill of Rights” to cover the Union have been lost on the Coalition Government.¹⁴⁰ With regard to Northern Ireland, the Secretary of State for Northern Ireland, the Rt Hon Owen Paterson MP, stated in May 2010 following the coalition’s victory *that “if we are to have a UK-wide Bill of Rights, the people of Northern Ireland are best represented within that, rather than by any stand-alone sideshow”,*¹⁴¹ and in January 2011 stated that “a

¹³⁷ Joint Statement on the Bill of Rights of the Northern Ireland Human Rights Commission and the Scottish Human Rights Commission (30 March 2010), available at <http://www.scottishhumanrights.com/news/latestnews/article/jointstatement>

¹³⁸ Statement on a proposed British Bill of Rights, Scottish Human Rights Commission (15 March 2010) available at <http://www.scottishhumanrights.com/news/latestnews/article/billofrights>.

¹³⁹ *The Advice of the Joint Committee on a Charter of Rights for the island of Ireland*, Northern Ireland Human Rights Commission and the Irish Human Rights Commission (June 2011), at page 38. Available at [http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/67/Charter_of_Rights_Advice_\(June_2011\)_Final.pdf](http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/67/Charter_of_Rights_Advice_(June_2011)_Final.pdf) At pages 38 to 40.

¹⁴⁰ Donald, A (201) “A Bill of Rights for the UK? Why the process matters” *European Human Rights Law Review* 5 459-464 page 2.

¹⁴¹ House of Commons *Hansard*, 30 June 2010, at column 850.

future UK Bill of Rights is an appropriate legislative vehicle for the implementation of additional rights for Northern Ireland".¹⁴² On the detail of how such reforms could be attempted in Northern Ireland, Scotland and Wales, the Government has so far been silent.

HRA: Devolved, British, European and International

99. That the HRA is already a quintessentially British Bill of Rights is often forgotten. Its enactment responded to calls, over many years, for a modern day Bill of Rights to supplement the 1689 Bill of Rights which makes no mention of several of the fundamental freedoms subsequently recognised by our courts through the development of common law and later explicitly contained in the post-war human rights consensus. It followed numerous attempts by senior politicians and lawyers from across the political spectrum to incorporate the ECHR into domestic law.¹⁴³ Despite the fact that the HRA was incorporated into domestic law by Parliament, recent calls for HRA repeal in favour of a "British" Bill of Rights appear to stem in part from a common misperception that the HRA was imposed on us by Europe and it is in some way tied-up with the European

¹⁴² Northern Ireland Human Rights Commission Annual Review (Autumn 2011) at page 9, available at http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/71/NIHRC_Review_Issue_10_September11.pdf

¹⁴³ For the history of the steps taken towards incorporation of the ECHR and/or enactment of a Bill of Rights, see Clayton and Tomlinson *The Law of Human Rights*, *ibid*, at para's 1.47 to 1.70; see also House of Commons Research Paper 98/24 *The Human Rights Bill* (13th February 1998). Calls for the incorporation into domestic law of the ECHR began as early as 1968 with the publication of a pamphlet entitled *Democracy and Individual Rights* by Anthony Lester, now Liberal Democrat Peer Lord Lester of Herne Hill QC. Lord Lester continued to be instrumental in pushing for human rights legislation, introducing incorporation Bills in both the 1994-95 and 1996-97 parliamentary sessions. Similar arguments and calls for incorporation were made throughout the following decades until the Human Rights Bill made its successful passage through Parliament in 1997 and 1998. A number of Labour MPs and Peers called for bills of rights in various forms to be implemented in the late 1960s, for example Lord Annan and Emylyn Hooson QC MP. In the 1970s the Labour Party moved toward incorporation, the Human Rights Subcommittee of Labour's National Executive Committee publishing a document calling for a Charter of Human Rights based on the ECHR. The Conservative Party had long called for domestic incorporation of the ECHR. Conservative Peer Lord Lambton introduced a 10 minute rule bill proposing to preserve individual rights in 1969. In 1977 Conservative MP Leon Brittain, shadow devolution spokesperson, proposed that the ECHR be incorporated by amendment into the Scotland Bill. Also in the late 1970s Conservative Peer Lord Wade was instrumental in firstly establishing the Select Committee on a Bill of Rights and bringing forward an ECHR incorporation bill in 1979 and again in 1981. In 1985 Conservative Peer Lord Broxbourne introduced the Human Rights and Fundamental Freedoms Bill, which was passed by the Lords but fell on second reading in the House Of Commons after being introduced by Sir Edward Gardiner QC MP.

Union and Brussels. The Act is, of course, nothing to do with Brussels or the EU. It was debated and passed by the UK Parliament following its inclusion in the 1997 Labour Manifesto and the party's landslide 1997 General Election victory. It is based on the ECHR, drawn up by the Council of Europe following the horrors of the Holocaust¹⁴⁴ and British politicians and lawyers played a major role in the Convention's drafting. It further contains many – but not all - of the rights and freedoms enjoyed for centuries in this country. Contrary to popular myth, the Act therefore enjoys both democratic legitimacy and a proud and national heritage.

100. However calls for a “British” Bill of Rights come not only from those who misunderstand the Act's very British roots but also from those who resent the way in which it protects the basic rights of foreign as well as British citizens. Conservative calls for the Act to be scrapped which preceded the Party's 2010 Manifesto commitment were fuelled, in particular, by consternation over the way that Articles 3 and 8 can prevent deportation of foreign nationals if a court determines that they will face a real risk of torture if returned or that deportation would breach their right to respect for family and private life.¹⁴⁵ To this end, in 2008 the previous Government argued before the Grand Chamber of the ECtHR that it should be able to ‘balance’ the risk of torture with national security concerns in deciding whether to deport a person to a country where they risk being tortured; in other words that the protection of an absolute right should be contingent on citizenship.¹⁴⁶ While Leader of the Opposition, the now Prime Minister made a similar argument. He said:

And the Human Rights Act has made the problem worse. So our approach has got to change. If our security services believe that a foreign national is a dedicated terrorist and a danger to national security, then the Home Secretary

¹⁴⁴ An institution, whose founding father was Winston Churchill, set up after the Second World War in response to the twin horrors of Nazism and Stalinism.

¹⁴⁵ See early articulation of the policy in the speech of Prime Minister the Rt Hon David Cameron MP, then as Opposition Leader, to the Centre for Policy Studies “Balancing freedom and security – a modern British Bill of Rights” (26 June 2006), available at <http://www.guardian.co.uk/politics/2006/jun/26/conservatives.constitution>.

¹⁴⁶ See the UK Government's intervention in the case of *Saadi v Italy*, ECtHR, Grand Chamber, 28 February 2008. Note that the Grand Chamber unanimously rejected this argument and reiterated its previous decision in *Chahal*: that the prohibition against torture is absolute and that no other interests can be balanced against the risk of torture.

*should be able to balance the rights of the suspect with the rights of society as a whole, and go ahead with deportation.*¹⁴⁷

While the Bill of Rights Commission's terms of reference are clear that it should look at how a new Bill of Rights could *build* on Convention obligations, this doesn't sit easily with past claims from the Prime Minister and others about how a new Bill could scale back Article 3 protections. As to the substance of Article 3 case law, it continues to provide vital protection to those within our jurisdiction who face a real risk of torture. Recent revelations about our Agencies' links with Gaddafi's Libya should serve as a stark reminder that politically negotiated "diplomatic assurances" are no substitute for a legal backstop which prevents deportation to torturing regimes. As to the Prime Minister's "security" argument for curtailing Article 3: in an interconnected and shrinking world, it is surely safer to prosecute or monitor terror suspects in the UK than send them off to corrupt and unstable regimes where there is no guarantee that they will be contained.

101. While there will rightly always be certain privileges that attach to citizenship a Bill of Rights which reserves any of the HRA's basic rights and freedoms to British citizens would fly in the face of the whole concept of human rights. After the horrors of WWII the international community recognised "*the inherent dignity ... and inalienable rights of all members of the human family*".¹⁴⁸ People have basic rights by virtue of being human. They are not earned by paying taxes to a particular government and do not come with possession of a particular passport. As the ill-fated Belmarsh internment policy aptly demonstrated, it is all too often non-citizens that are most in need of vital human rights protection.

102. The strength of the HRA is that it is a simultaneously British, European and universal document that is also woven into the sensitive devolution settlements of the UK. Following the sacrifice of an earlier generation, it was a former British Prime Minister and British lawyers who played an instrumental role in drafting the Convention, exporting hard won British freedoms as part of a project that helped to re-build democracy across the region in post-War Europe. The Convention in turn reflects one

¹⁴⁷ See *Cameron on Cameron: Conversations with Dylan Jones* (2010) (London: 4th Estate), at page 178.

¹⁴⁸ Preamble to the Universal Declaration of Human Rights.

half of the universal values that were encapsulated in the Universal Declaration of Human Rights at a unique moment in human history. It is also an international document which reflects the rights found in Constitutions and Bills of Rights throughout the Commonwealth and in younger democracies all over the globe. It is simultaneously outward and inward looking. *Human* rights as opposed to “British” rights allow for people in all parts of the Union to identify with the precious values contained in the HRA. And it is our adherence to *human* rights under the HRA which makes the UK a beacon for those striving for rights and freedoms in the world’s darkest corners. Hossam Bahgat, the Executive Director of the Egyptian Initiative for Personal Rights¹⁴⁹ and a recent veteran of the Tahrir Square uprising, has said

Since we started our uprising against dictatorship in Egypt last January, many British officials visited Cairo and asked how they could help our struggle. The most important thing that the British can do to support human rights in Egypt is to support human rights in the United Kingdom. We have all heard of your Government’s attempt to repeal the UK’s Human Rights Act. Diluting current human rights protections or restricting fundamental rights to citizens rather than humans, would set us all back. It is significantly more difficult for us to fight for universal human rights in our country if your country publicly walks away from the same universal rights.

Similar sentiment has been expressed by Balázs Dénes, Executive Director of the Hungarian Civil Liberties Union¹⁵⁰:

To understand how important is the UK’s Human Rights Act one doesn’t have to do a lot: it’s enough to examine a country or a jurisdiction which doesn’t have such an Act. I am working and living in a post-Communist country, which belongs to this later category. From here, it is very clear: to repeal the HRA would be immoral, ineffective and unfair - it would be a bad thing to do.

The hypocrisy of promoting human rights abroad, while repealing the HRA at home, is clearly not lost on those striving for their own freedoms.

¹⁴⁹ <http://eipr.org/en>

¹⁵⁰ <http://tasz.hu/en>

103. Repealing the HRA is not only unedifying as the UK attempts to influence newly freed societies and cement our role as the moral yardstick for rights and freedoms, it is also without precedent. Recent comparative research of Bill of Rights processes across the democratic world concluded that none of these “has involved the possibility of repealing or weakening existing human rights protections or reversing the incorporation of international human rights law into domestic law”.¹⁵¹ Anthony D. Romero, Executive Director of the American Civil Liberties Union,¹⁵² has reflected on the potential global consequences of repealing the HRA

Much has been said about the “special relationship” between the US and the UK. There is no doubt that two old friends with so much by way of history and values in common can be a great force for good in the wider world. Equally, recent years have shown how they might lead each other astray. The UK Human Rights Act is a Bill of Universal Rights and Freedoms to be proud of. When a great democracy waters down its concern for human rights in favor of “patriot’s rights”, that is surely a decision a proud and honorable people will come to regret. America did just that after 9/11 and such “recalibration” of principle in favor of political expediency is the road to Guantanamo Bay. The ACLU can only warn its British friends away from such a dangerous path.

Similarly Mark Kelly, Director of the Irish Council for Civil Liberties,¹⁵³ has argued that it would be “inconceivable” to repeal Ireland’s ECHR Act, modelled on the HRA, simply

because it locates the job of legally protecting rights where it belongs – in the hands of the Irish authorities and national judges applying national laws. ... The suggestion that the UK’s Human Rights Act might be repealed is deeply misguided. ... Repeal would cede the UK’s human rights sovereignty back to Strasbourg, where it lay before the 1998 Act came into force. ... (It) would be a

¹⁵¹ Donald, A (Human Rights & Social Justice Research Institute, London Metropolitan University) (2010) *Developing a Bill of Rights for the UK* (Published by the Equality Human Rights Commission), at page 68. Available at http://www.equalityhumanrights.com/uploaded_files/research/bill_of_rights_report.doc.

¹⁵² <http://www.aclu.org/>

¹⁵³ <http://www.iccl.ie/>

deeply regressive step, which would fly in the face of the UK's international obligations and be ineffective in practice.

To be the first democratic Government to introduce a Bill of Rights on the ashes of its predecessor will not be without consequence.

QUESTION 4 - HAVING REGARD TO OUR TERMS OF REFERENCE, ARE THERE ANY OTHER VIEWS WHICH YOU WOULD LIKE TO PUT FORWARD AT THIS STAGE?

Politics

104. No response to the earlier questions posed in this consultation can be complete without some mention of the politics of the contemporary “British Bill of Rights” debate. Indeed the creation of the present Bill of Rights Commission (foretold in the Coalition’s *Programme for Government*) was a political compromise agreed during the Coalition negotiations in response to the awkward fact that the 2010 Manifesto commitments of the respective political parties were diametrically opposed on the HRA.¹⁵⁴ It is no secret that contemporary discussion about a new Bill of Rights is driven, in the main, by human rights detractors who wish to see the substantive rights in the HRA narrowed, or the relatively limited judicial powers provided in the HRA curtailed. Critics of the HRA typically contend that the HRA is insufficiently “British”; compromises public protection; is both too strong and too weak; promotes rights over responsibilities and prevents Parliament from controlling immigration. This year, further accusations have been added to the charge sheet including claims that the HRA has allowed judges to create a privacy law that protects the private lives of public figures at the expense of a free press; that it somehow cedes greater power to foreign judges than would any replacement Bill; and that it played some part in the August riots. We deal with each of these unsubstantiated criticisms below.

105. But before dealing with dishonest and confused narratives about the HRA it is also worth pausing to consider the terms of reference of this Commission. If the

¹⁵⁴ The Liberal Democrat 2010 General Election Manifesto committed to “*Ensure that everyone has the same protections under the law by protecting the Human Rights Act*”, at page 94. The Conservative 2010 General Election Manifesto committed to “*replace the Human Rights Act with a UK Bill of Rights*”, at page 79. The Coalition Programme for Government stated “*We will establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties. We will seek to promote a better understanding of the true scope of these obligations and liberties*”, at page 11. On the other hand, the Labour 2010 General Election Manifesto stated “*We are proud to have brought in the Human Rights Act, enabling British citizens to take action in British courts rather than having to wait years to seek redress in Strasbourg. We will not repeal or resile from it*” at page 9:3.

wider debate is driven by inconsistency, spin, and partisan politics, what can be the real purpose of the Commission's investigations? As we examine in greater detail below, announcements about the establishment or work of the Bill of Rights Commission by Conservative Ministers, in particular the Prime Minister and the Home Secretary, have consistently been premised by expressions of their intent to repeal the HRA. Their main criticisms of the HRA relate to the power it has ceded to 'unelected judges' and the perceived generosity of some of its substantive protections. The implication is that they either expect or hope that the Commission will recommend that enforcement powers are stripped from the independent judiciary and/or the substantive provisions in the HRA are re-drafted or "re-balanced" to become more palatable to Government. This is of course in sharp contrast to the public pronouncements of the Deputy Prime Minister, Rt Hon Nick Clegg MP, who was categorical in his party conference speech that "*the Human Rights Act is here to stay*".¹⁵⁵ It also jars with the spirit of the Commission's terms of reference which (although bizarrely) don't make explicit reference to the HRA, do require it to "*investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the ECHR...and protects and extends our liberties*".¹⁵⁶

106. Any human rights lawyer or campaigner could provide potentially endless examples of other rights that could be included in a new Bill of Rights but the troubling dilemma at the heart of the Commission's mandate is whether it is truly investigating how the HRA/ECHR could be built on or whether this politically designed process is tasked with delivering the undeliverable: to make recommendations for progressive reform while simultaneously soothing the tempers of those who wish to diminish human rights protections and undermine the Rule of Law. Those who would like see terror suspects deported to torturing regimes and judges stripped of the relatively limited powers they have under the HRA will not be satisfied with a rebranding exercise which essentially re-enacts the HRA by a different name but retains the protections already in place. While some may be fooled for a while, it would not take much new litigation for the sheen to

¹⁵⁵ Liberal Democrat party conference speech of Deputy Prime Minister Rt Hon Nick Clegg MP, 21 September 2011, available at http://www.libdems.org.uk/speeches_detail.aspx?title=Nick_Clegg's_speech_to_Liberal_Democrat_Conference&pPK=00e086ba-d994-4146-bb14-60ce615d05eb.

¹⁵⁶ See the Written Ministerial Statement of Mr Mark Harper MP (Parliamentary Secretary, Cabinet Office), House of Commons *Hansard* 18 March 2011, at column 32WS, also printed in the Commission on a Bill of Rights Discussion Paper, *Do we need a UK Bill of Rights* (August 2011), at page 3.

come off a “Botox Bill of Rights”. Further, what prospect do we have of creating an enduring document of unique constitutional importance which sits above the conflicts and fluctuations of party politics if we reopen and reassess it with each successive government?

HRA: too strong *and* too weak?

107. The arguments made by the Act’s detractors invariably contain glaring inconsistencies and contradictions. The HRA has, for example, at the same time been accused of being both too strong and too weak. Too strong, allegedly, for sucking power away from Parliament and giving too much power to “unelected judges”. Indeed for the Prime Minister, one of the central reasons for the creation of the Bill of Rights Commission is so that it can address problems caused by a supposedly over-mighty judiciary. At Prime Minister’s Questions in February he said:

*A Commission will be established imminently to look at a British Bill of Rights, because it is about time we ensured that decisions are made in this Parliament rather than in the courts.*¹⁵⁷

As for the supposed shifting of power from Parliament to the judiciary, it is difficult to imagine a mechanism that more neatly squares a difficult circle between upholding parliamentary sovereignty and safeguarding against abuses by the State than that already provided for by the HRA. As we discuss earlier at paragraphs 62 - 71 the HRA does not contain a power for judges to strike down legislation (as is the case under the US Bill of Rights and many other rights instruments). Instead, the HRA achieves a rather British compromise. The section 4 declaration of incompatibility both preserves parliamentary sovereignty, while being capable of shaming the Executive into more enlightened remedial action.

108. Described as too strong by some, the Act is also described as too weak – sometimes by the very same detractors. They point to ID cards, the growth of the ‘database state’, excessive snooping powers, stop and search without suspicion and

¹⁵⁷ House of Commons *Hansard*, 16th February 2011, at column 955.

other excesses as evidence that the HRA is either useless or out-dated.¹⁵⁸ Such criticisms are most likely connected to the relative youth (and therefore perceived vulnerability) of the HRA – the same criticisms have not been levied at the US Bill of Rights for allowing the passage of the PATRIOT Act or many of the other repressive measures carried out across the Atlantic during the ‘War on Terror’. Almost by definition, Bills of Rights act as a check on Executive and legislative power after its exercise. And we must not forget that the HRA and the Convention have clocked up some significant and symbolic victories against the growth of the surveillance society. Convention case law was responsible for the enactment of the *Regulation of Investigatory Powers Act 2000* which put state surveillance on a much more comprehensive statutory footing and *S and Marper v UK*¹⁵⁹ and *Paton v Poole Borough Council* are two of many hugely significant legal victories for the protection of personal privacy under Article 8.¹⁶⁰

Responsibilities

109. A frequent and rather woolly criticism of the HRA is that it has helped to create a culture of rights without responsibilities. The Prime Minister has argued that we need “a modern British Bill of Rights that ... balances rights with responsibilities” and which “spell[s] out the fundamental duties and responsibilities of people living in this country”.¹⁶¹ Liberty does not dispute that individuals owe moral and legal obligations to the society they live in. We are not, however, convinced that the HRA is responsible for undermining the public’s sense of social responsibility or that a British Bill of Rights is needed to make individual responsibilities explicit. The HRA already enunciates the balance of rights and responsibilities that are now common to most of the democratic world. With few exceptions the rights in the HRA are not absolute.¹⁶² Further a mass of criminal and civil laws have existed for centuries to ensure that people act in accordance with their responsibilities to the state and other individuals. These laws already operate to punish those who breach the criminal law and to provide redress where a person violates his or her civil law responsibilities to others. Given that the HRA is one the very

¹⁵⁸ See Raab, Dominic (2009) *The Assault on Liberty* (London: Fourth Estate).

¹⁵⁹ *S and Marper v United Kingdom* Application Nos 30562/04 and 30566/04, Grand Chamber judgment 4 December 2008.

¹⁶⁰ *Jenny Paton and others v Poole Borough Council* (2010) IPT/09/01/C.

¹⁶¹ David Cameron, “Balancing freedom and security – A modern British Bill of Rights”, Speech to the Centre for Policy Studies, June 26, 2006

¹⁶² See above at para’s 8 to 10.

few pieces of legislation which provides some protection for the individual against the State, amending it to impose further obligations on individuals would certainly undermine its values as a bulwark against Executive overreach.

110. As a constitutional instrument one would expect any Bill of Rights to express rights in relatively broad terms, to enable the Bill to stand the test of time and to be applied in a wide variety of contexts. Framing legal duties in such broad terms would present myriad problems. It is a central feature of the Rule of Law that legal obligations placed on individuals are expressed with sufficient clarity to enable people to predict the likely consequences of their actions. It is also difficult to see how the myriad of moral, ethical and legal responsibilities that we all owe could be compiled with sufficient succinctness and clarity for codification. If any responsibilities were left out, hierarchies of responsibility would be created, inadvertently devaluing the importance of certain duties and elevating others. If people are confused by the responsibilities they owe this is a matter for public education.

111. Another way of giving greater weight to responsibilities would be to make rights protection contingent upon compliance with one's responsibilities. However, this would clearly undermine the principle of universality – the cornerstone of the human rights framework. Self-evidently a person could not, for example, be denied a right to a fair trial because they are suspected of having committed a crime. A failure to afford rights protection to everyone within a state's jurisdiction would violate the UK's obligations under international law and would also undermine the UK's moral standing in the international community and with its own citizens.

112. Indeed, research carried out on behalf of the Ministry of Justice in relation to the relationship between rights and responsibilities,¹⁶³ warned that the focus on responsibilities may actually represent "*an opportunity to introduce new restrictions on human rights*".¹⁶⁴ After reviewing the concept of rights and responsibilities in treaties and Bills of Rights around the world the report concluded that "[j]urisdictions with liberal

¹⁶³ Liora Lazarus, Benjamin Goold, Rajendra Desai and Qudsi Rasheed, University of Oxford, *The relationship between rights and responsibilities*, Ministry of Justice Research Series 18/09, December 2009, available at:

<http://www.justice.gov.uk/publications/docs/research-rights-responsibilities.pdf>

¹⁶⁴ *Ibid*, page 10.

democratic traditions tend, on the whole, towards implicit or rhetorical recognition of duties".¹⁶⁵ Examples given include the limitations already implicit in the ECHR. In contrast it found that "*it is more common to find extensive lists of directly enforceable individual duties in constitutions with a strong authoritarian or socialist element (for example, the People's Republic of China)*".¹⁶⁶ It also warned that even rhetorical or aspirational statements about duties could "*risk undermining rights by implying that the fulfillment of duties is an essential prerequisite to the enjoyment of certain rights*"¹⁶⁷ and that "*there is always the possibility that a court or public body may mistake the statement of a duty as a call for it to be made a precondition for the exercise of a right*".¹⁶⁸ In addition to the possible limitation on rights, the focus on responsibilities is totally unnecessary. The HRA already requires rights to be read together with Article 17 which provides that the Convention does not give anyone a right to do anything that would destroy or unduly limit other people's human rights.¹⁶⁹

Anti-HRA narratives in 2011

113. 2011 has seen the development of further the anti-HRA narratives. Much of the discussion has been based on factual and legal inaccuracy, contradiction, or misrepresentation. Even where it hasn't, the tone of the criticism is such that rather than disagreeing with the application of the Act in individual cases, the very values contained in the Convention and the Rule of Law itself is brought into question. Of course, not everyone is going to agree, at all times, about the application of the HRA to different factual circumstances but as a framework for bare minimum rights protection it is surely quite difficult to fault.

"Super injunctions"

114. One accusation that is now leveled at the HRA is that it has allowed for the creation of privacy law via the backdoor. Since 2000 domestic judges, in adjudicating on common law breach of confidence and misuse of private information claims and injunctions have done so in accordance with their duties under Articles 8 and 10 and

¹⁶⁵ Ibid, page 24.

¹⁶⁶ Ibid, page 24.

¹⁶⁷ Ibid, page 30.

¹⁶⁸ Ibid, page 31.

¹⁶⁹ See section 1(1) of the HRA and Article 17 of the European Convention on Human Rights.

section 12 of the HRA.¹⁷⁰ The approach of the courts in these cases is to first examine whether the applicant has a reasonable expectation of privacy so as to engage Article 8¹⁷¹ and if so, to undertake “the ultimate balancing test”¹⁷². Examination of case law in this area reveals a non-exhaustive list of factors to which the courts have regard in determining whether article 8 rights should outweigh article 10. These include but are not limited to: whether there is any legitimate public interest in the disclosure of the information; the right of the public generally to receive information; whether the claimant has sought to mislead the public on the matter in question; the claimants motivation in bringing the claim (whether the claimant is in fact seeking to protect their reputation and commercial interests, rather than any other aspect of their private life); the personal attributes of the claimant; the interests of the family members of the person seeking the injunction and their Article 8 rights; whether the applicant is being blackmailed etc. As with all areas of common law development, Parliament is free to legislate to provide greater guidance to the judiciary in balancing Articles 8 and 10 as it has chosen to do this in other privacy contexts, for example the *Data Protection Act 1998* and the *Regulation of Investigatory Powers Act 2000*. It is, however, difficult to see how this would amount to anything more than a codification exercise regarding what appear on their face to be a set of common sense principles in determining the difficult balance between Articles 8 and 10. This is not to say that the judges have always reached the right determination in every case. The successful temporary super-injunction granted in the *Trafigura* case was an alarming example where the public interest in swifter disclosure was arguably not given sufficient weight. But even with specific legislation,

¹⁷⁰ Section 12 is of particular relevance to claims under Article 8 which seek to restrain publication of material. Section 12 applies whenever the court is considering whether to grant relief that may interfere with freedom of expression. It requires the court to consider the merits of an application before granting an injunction. The court must be satisfied that that an applicant is likely to establish at trial that publication should be restrained.

¹⁷¹ The question of whether or not there is a reasonable expectation of privacy in relation to the information “...is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.” *Murray v Express Newspapers* [2009] Ch. 481.

¹⁷² Per Lord Steyn in *Re S (A Child)* [2005] 1 AC 59 at [17] In undertaking this balancing test the courts will have regard to the fact that (i) neither article has as such precedence over another (ii) where conflict arises between rights under Article 8 and Article 10, an “intense focus” is required in the particular circumstances of the case upon the comparative importance of the specific rights being claimed (iii) the court must take into account the justification put forward for interfering with or restricting each right (iv) the proportionality test must be applied to each.

disagreements on the application of the principles will likely still arise. That is the nature of statutory interpretation and judicial function of refereeing clashes of rights.

115. It is easily forgotten that before the introduction of the HRA, British law was left wanting for privacy protections. A high profile example of this came in 1991 when the actor Gordon Kaye, star of the TV series *Allo Allo* was involved in a car accident and suffered serious head injuries. Having been on a life support machine for 3 days he was moved to a private room, whereupon two journalists from the Sunday Sport entered his room without permission, photographed and interviewed him. Refusing to leave when asked by nursing staff, the journalists were eventually removed by security staff. Because of his injuries Kaye had no recollection of the interview and medical evidence later showed that he was in no fit state to be interviewed or give informed consent to an interview. Kaye tried but failed to get an injunction to stop publication. In his judgment, Lord Justice Bingham reflected that the case demonstrated “*yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens*”.¹⁷³

116. Now that the common law has developed under the HRA, it is deeply unfortunate that to date, rather than considering the merits of specific legislation, senior politicians have instead responded to individual judgments by attacking the HRA and the role of the judges in interpreting its values. While a Parliamentary Committee on Privacy and Super injunctions has now been established it remains to be seen whether the Government will choose to legislate. It might after all be more politically convenient to maintain the status quo, whereby the HRA remains a sitting target and politicians can avoid legislating to put press restrictions in the privacy sphere on a statutory footing. Whether or not Parliament decides to legislate on this issue, it must accept that it *retains the ability to legislate* if it wishes to influence how the Article 8/10 balance is drawn and that it hasn't been 'overridden' by the HRA.

Prisoner Voting

117. The super-injunctions row quickly gave way to a parliamentary row over prisoner voting. A motion against giving prisoners the vote was debated and passed by

¹⁷³ *Kaye v Robertson* (1991) FSR 62.

the House of Commons on 10th February 2011 following an embarrassingly ill-informed and toxic parliamentary debate. While this issue does not relate directly to the HRA (but rather the ECtHR following their judgment in *Hirst v UK(No.2)*)¹⁷⁴ the requirements of the decision and the response of the UK Government and Parliament is worth noting. In its 2005 judgment, the ECtHR ruled that the current blanket ban on prisoner enfranchisement was in breach of the right to vote under Article 3 of Protocol 1. The disenfranchisement of prisoners in the UK is rooted historically in the notion of 'civic death', dating back to the days of Edward III. It was first formalised in the *Forfeiture Act* of 1870 and is now contained in the *Representation of the People Act* 1983.¹⁷⁵ When Strasbourg considered the ban it had therefore not been considered by Parliament for a significant amount of time and was based on a highly outdated concept. Further in its thoughtful judgment the Strasbourg Court did not require full enfranchisement nor even prescribe any hard and fast rules for compliance with the Protocol. Instead, the Court ruled that a blanket ban, which applies to every prisoner regardless of the offence for which they have been convicted and the length of their sentence, was disproportionate and unlawful. Hardly the most radical of human rights judgments, yet ahead of the parliamentary debate earlier this year the Prime Minister described physical sickness at the idea of any prisoner voting: not disappointment or disagreement but actual nausea. In a recent article on the relationship between the UK courts and Strasbourg, the President-Elect of the ECtHR said of Westminster's response to the judgment:

The vitriolic – and I am afraid to say, xenophobic – fury directed against the judges of my Court is unprecedented in my experience, as someone who has been involved with the Convention system for over 40 years.

It is of course inevitable that Governments and Parliaments will sometimes be unhappy with court judgments which uphold individual rights and declare Government policy unlawful. But in earlier times, UK Governments and Parliaments have distinguished themselves from despots and dictators by respecting the Rule of Law. As the Lord

¹⁷⁴ *Hirst v UK (No 2)* (App No 74025/01) (6 October 2005) (2005) 42 EHRR 849.

¹⁷⁵ As amended by the *Representation of the People Acts* 1985 and 2000.

Chancellor recently commented “*the Rule of Law is one of our greatest exports*”.¹⁷⁶ Parliament’s response to the *Hirst* judgment threatens to undermine this proud legacy.

Sex Offender Register

118. Also in February the Government made an announcement about proposed reforms to the sex offenders’ register, responding to a Supreme Court judgment from June 2010 when it determined that the *lack of a review mechanism* for indefinite placement on the sex offender register was in breach of the applicant ex-offenders’ human rights.¹⁷⁷ The conclusion of the Court focused on a narrow point. In its judgment the Court recognised that ex-offenders must be able to at least review their inclusion on the register given that not all ex-offenders will continue to pose a life-long risk that must be monitored. What of a young twenty-something teacher who has a consensual affair with a sixth former; a lengthy sentence of over 30 months may well be handed down, but is it so outrageous that once released the person be able to seek a review of the notification arrangement, to at least present the view to the authorities that he no longer poses a risk? What if he or she married the sixth former and never offended again? Should police be required to collect his notification details annually for the rest of his life? Such examples show that there will be cases where registration is no longer necessary or desirable, and the system of notification must reflect those possibilities. As with prisoner voting, the decision was modest and not overly prescriptive; it didn’t demand the removal of any single person that is already listed on the register; just a requirement of review. Despite this, the case was presented in certain sections of the media as requiring the removal of serious sex offenders under colourful headlines such as “*End this human rights insanity*”¹⁷⁸. Yet in announcing the draft Remedial Order, the Home Secretary said that the ruling “*places the rights of sex offenders above the right of the public to be protected from the risk of their reoffending*”; and further pledged “*It is*

¹⁷⁶ Speech by the Lord Chancellor and Secretary of State for Justice Rt Hon Kenneth Clarke QC MP, CityUK Future Litigation event, Clifford Chance, 14 September 2011, available at <http://www.justice.gov.uk/downloads/about/moj/our-ministers-board/speeches/clarke-speech-future-litigation-140911.doc>.

¹⁷⁷ *R (on the application of F (by his litigation friend F)) and Thompson (FC) v Secretary of State for the Home Department* [2010] UKSC 17.

¹⁷⁸ See “End this Human Rights Insanity: PM’s fury as judges rule paedophiles and rapists should have chance to get off sex offenders’ register” *The Daily Mail* (17th February 2011), available at: <http://www.dailymail.co.uk/news/article-1357472/Sex-offenders-register-Paedophiles-rapists-apply-remove-name.html>

time...that we have a legal framework that brings sanity to cases such as these”. In making the announcement the Home Secretary referred to the imminent creation of the present Bill of Rights Commission – hinting once again that in her view the Commission’s real task is to reduce not build on our existing Convention obligations.

August Riots

119. Of all the Government’s responses to the lawlessness of the summer, the most disappointing was the Prime Minister’s attempt to implicate the HRA as being either a cause of rioting, or a barrier to the police response. This tired theme featured in his first public statements on the riots on 9th August where he pledged that ‘phony human rights concerns’ would not get in the way of police efforts to publish CCTV images of suspected riots. This widespread myth – that Article 8 of the HRA can prevent the publication of photos of wanted suspects – dates back to January 2007 when the *Daily Mail* reported that a Chief Constable was ‘refusing to release pictures of two escaped murderers amid fears it might breach their human rights’.¹⁷⁹ The paper claimed that the Derbyshire police force had refused to release pictures of two convicted murderers who had escaped from prison because the police force had to have regard to the HRA. *The Sun* also ran the story with the inflammatory headline: “What about OUR rights”.¹⁸⁰ The following month, *The Sun* ran the story again quoting a North East Conservative MP claiming that “this is yet another instance of the rights of suspected criminals being put before those of the law-abiding population”.¹⁸¹ And so the myth gathers pace. The truth is that the HRA does not prevent pictures from being published in order to help find a fugitive. This has been tested in a case which concerned a decision by the London Borough of Brent and the Metropolitan police to distribute leaflets and to publicise other material carrying the claimants’ images, names and ages, and details of ASBOs issued against them. In the case, Kennedy LJ held that the publicity did not infringe the claimants’ Article 8 rights.¹⁸²

¹⁷⁹ “Wanted: for crimes against common sense” *The Daily Mail* (5th January 2007), available at <http://www.dailymail.co.uk/news/article-426650/Wanted-crimes-common-sense.html>.

¹⁸⁰ “What about OUR rights?” *The Sun* (6th January 2007), available at <http://www.thesun.co.uk/sol/homepage/news/7022/What-about-OUR-rights.html>.

¹⁸¹ “Fury over ‘rights’ of suspects” *The Sun* (10th February 2007), available at <http://www.thesun.co.uk/sol/homepage/news/17506/Fury-over-rights-of-suspects.html>

¹⁸² *R (on the application of Stanley, Marshall and Kelly) v Metropolitan Police Commissioner & Anor* [2004] EWHC 2229 (Admin), at para 40.

120. Contrary then to what the Prime Minister appeared to imply, it is perfectly permissible under the HRA to publish pictures of wanted suspects. Nevertheless, a few days later in his statement to Parliament on the 11th August the Prime Minister lamented “a culture” that “says everything about rights but nothing about responsibilities”.¹⁸³ This message was reinforced in his speech in Witney on 15th August where he attacked the “twisting and misrepresentation of human rights”, linking the attitude of rioters to the existence of legal human rights protections. The post-riots attack on the HRA culminated in an opinion piece by the Prime Minister in the *Daily Express* on 21st August entitled “Human Rights in my sights” in which he vowed a “fight back” which:

*also means rebuilding the sense of personal responsibility that has been eroded over the years by many things, from the welfare system where work doesn't pay to the twisting and misrepresenting of human rights. The British people have fought and died for people's rights to freedom and dignity but they did not fight so that people did not have to take full responsibility for their actions. So though it won't be easy, though it will mean taking on parts of the establishment, I am determined we get a grip on the misrepresentation of human rights. We are looking at creating our own British Bill of Rights. We are going to fight in Europe for changes to the way the European Court works and we will fight to ensure people understand the real scope of these rights and do not use them as cover for rules or excuses that fly in the face of common sense.*¹⁸⁴

121. Needless to say, at no point in any of his various complaints about the HRA did the PM point to a concrete example of how the HRA had been responsible for undermining personal responsibility or the outbreak of violence in our cities. This is unsurprising as the HRA expressly protects private property as well as personal safety. Nevertheless, his high profile attacks on the HRA sparked yet another round of media speculation about the possibility of repealing the Act. Interestingly, the Prime Minister's

¹⁸³ See House of Commons *Hansard*, Column 1054, 11th August 2011, available at: <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110811/debtext/110811-0001.htm#1108117000784>

¹⁸⁴ See “David Cameron: Human Rights in my sights” *Daily Express* (21st August 2011), available at <http://www.express.co.uk/posts/view/266219/David-Cameron-Human-rights-in-my-sightsDavid-Cameron-Human-rights-in-my-sightsDavid-Cameron-Human-rights-in-my-sightsDavid-Cameron-Human-rights-in-my-sightsDavid-Cameron-Human-rights-in-my-sights>

comments were in stark contrast to those of Sir Hugh Orde, President of the Association of Chief Police Officers, who robustly defended the role of human rights in public order policing, writing in the days that followed the rioting that “*Equally, to suggest human rights get in the way of effective policing is simply wrong.*”¹⁸⁵

122. Opportunistic broadsides against the HRA by senior politicians are nothing new. Towards the end of its time in office, the New Labour Government published a Green Paper *Rights and Responsibilities*¹⁸⁶ that attempted to link the need for a new Bill of Rights to the 2008 financial crisis. The Green Paper suggested that the faltering economy, recent technological developments, globalisation, medical advancements, climate change and an ageing population have led to “*a new age of anxiety and uncertainty*” and that a Bill of Rights “*could act as an anchor for people in the UK*” as we enter this new age.¹⁸⁷ It conceded that a new Bill of Rights would not be “*an alternative to decisive action on the economic front*” but nevertheless suggested it was “*an essential complement to it*”.¹⁸⁸ Unsurprisingly, the Green Paper was unable to explain how a new Bill of Rights could possibly alleviate concerns over the financial crisis or globalisation, nor explain how it would complement the taking of action on the economic front.

123. Sadly, partisan opportunism has been a hallmark of the contemporary Bill of Rights debate and there has been little genuine attempt to reach beyond party political lines. New Labour’s Green Paper, for example, placed strong emphasis on exploring socio-economic rights, with a focus on the welfare state and the NHS. It also explicitly excluded the possibility of including greater protection for trial by jury within the remit of a new rights settlement. By the same token, the Conservative Party has, so far, explicitly ruled out the possibility of socio-economic rights being included in a Bill of Rights, focusing instead on the potential for greater protection of the right to jury trial, and ‘re-balancing’ the rights of foreign nationals.

¹⁸⁵ See “Sir Hugh Orde: Water Cannon can make for good headlines – and bad policing”, *The Independent* (11th August 2011) available at <http://www.independent.co.uk/opinion/commentators/sir-hugh-orde-water-cannon-make-for-good-headlines-ndash-and-bad-policing-2335676.html>

¹⁸⁶ Ministry of Justice Green Paper *Rights and Responsibilities: developing our constitutional framework* CM 7577 (March 2009), available at <http://www.justice.gov.uk/publications/docs/rights-responsibilities.pdf>.

¹⁸⁷ See paras 1.13-1.16 of the Green Paper, *ibid.*

¹⁸⁸ See page 3 of the Green Paper, *ibid.*

124. Until there is at least some attempt to cross traditional party dividing lines, it is difficult to see how a future government will ensure cross-party support for any new rights settlement. This will inevitably mean that any new Bill will be open to the same populist and political attacks that have befallen the HRA in recent years. If the cause of fundamental rights and freedoms is to be truly advanced there must, at the very least, be a cross-party commitment to consensus-building and genuine engagement. Political point-scoring in this area can only do more harm to the currency of rights and freedoms in the UK.

Article 8 and immigration

125. The most recent HRA furore involved the role or otherwise of Article 8 in preventing deportations of foreign nationals. Of all the fundamental freedoms protected by the HRA, none attracts controversy quite like Article 8. Barely a day passes without it hitting the headlines for apparently all the wrong reasons. Flicking through certain newspapers you would be forgiven for concluding that it exists only to shield foreign murderers and rapists from deportation. The Home Office's chief grumble is that people it wants to remove are using Article 8 to block deportation and so earlier this year it launched a consultation¹⁸⁹ on reforms to the immigration rules, which also asked whether requirements should be put in place, in the context of family migration to '*reflect a balance between Article 8 rights and the wider public interest in controlling immigration*'.¹⁹⁰ This was an odd question to pose. As immigration control is a legitimate purpose for which the right to respect for family life can be limited, every time a court makes a decision under Article 8 it strikes a balance between the rights of the individual and the rights of society at large - this balance is therefore already an integral part of the HRA framework. It is also not the case that successful Article 8 applications have undermined immigration control; in 2010 only 12 per cent of appeals to the Immigration and Asylum Tribunal on Article 8 grounds were actually successful.

¹⁸⁹ ¹⁸⁹ Home Office UK Border Agency *Family Migration: A consultation* (July 2011), available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/family-migration/consultation.pdf?view=Binary>

¹⁹⁰ *Family Migration* consultation paper, *ibid*, at Question 34, page 60.

126. In fact, our courts have been very clear that Article 8 does not grant foreign nationals the right to reside with even close family members in the UK.¹⁹¹ People with close family members in this country whether a civil partner, husband, wife or young children are frequently denied permission to remain in the UK; the balance is a careful one and all relevant factors must be taken into consideration. The courts have regard to whether a person asserting Article 8 rights has been upfront with the authorities or tried to evade them; an adverse immigration history will count against an applicant.¹⁹² It further counts against an applicant if, at the time he formed family bonds in the UK, his immigration status was precarious.¹⁹³ The courts also routinely consider whether family life can be carried out elsewhere. When Article 8 is claimed by foreign national offenders that the Home Office seeks to deport, the strength of Article 8 is that all relevant factors will be weighed in the balance: the threat they pose, the seriousness of their offence; how long they have been in the UK; whether they have genuine and longstanding family ties etc. Is it not right that the courts consider the rights of children who have no control over whether their parents have committed offences? Or that someone who has been in the UK almost since birth has their family connections taken into account? It is also historical nonsense to claim foreign nationals couldn't assert family life to avoid removal before the Act. Article 8 principles were incorporated into Home Office deportation guidance by the last Conservative Government in the early 1990s. It's all too easy for politicians to blame human rights for failings at the Borders Agency. Quicker administration would allow more people to be deported after conviction and before starting families but once they have, over many years, sometimes it's more desirable that a criminal stays, accepts his family responsibilities and supports his children. In any event, you don't need to tamper with the protection of fundamental rights and freedoms to ensure that those who pose a risk and have no right to be here should not be allowed to stay. While Article 8 provides an eminently sensible and carefully fashioned framework within which this complex balancing exercise takes place, as with the courts

¹⁹¹ See, for example, *Nkurunziza and Others v ECO, Immigration and Asylum Chamber of the First-tier Tribunal* (2010): “*Article 8 does not entail a general obligation for a state to respect a family’s choice of the country in which to conduct family life or to authorize family reunion in its territory.*”

¹⁹² See, for example *R (on the application of Mark Wray) v Secretary of State for the Home Department* [2010] EWHC 3301 (Admin).

¹⁹³ *R (on the application of Mark Wray) v Secretary of State for the Home Department* [2010] EWHC 3301 (Admin).

powers to grant anonymity and super injunctions, the final word on our immigration rules rests with Parliament.

Public Perceptions

127. It is undeniable that there is a lack of public understanding and ‘ownership’ of the HRA. An almost complete absence of public education about the Act by the Government that introduced it has meant that for many years the human rights narrative has been one of real and imagined litigation as reported by a mainly hostile media. It is disappointing that more was not done before, during or after the Act’s enactment to explain its effect to the British public. This might well have encouraged greater understanding and cultural attachment to the legislation. As Professor Klug has observed:

“Very little was done to prepare for the introduction of the HRA beyond the publication of Bringing Rights Home, the discussion document Labour issued before it came to power, and a large-scale training programme for the judiciary prior to the Act coming into force.”¹⁹⁴

128. The HRA has been and remains the target of concerted media campaigns which intentionally portray it as an affront to common sense, sovereignty and a charter for criminals and terrorists. The Daily Telegraph, for example, is currently running a branded campaign entitled **“End this human rights farce”** which features regular stories that contain alarmingly confused human rights reporting. The Sun has been campaigning for years for HRA repeal under the banner **“Give us Back OUR Human Rights”**. Farcical claims that are unlikely to reach the court-room door are often reported as if already adjudicated and numerous inaccurate HRA articles are left uncorrected skewing the impression of the HRA in the public imagination. Some Editors have been open about the reasons for their hostility to the HRA. In particular, their suspicion of and contempt for Article 8 which demands justifications for intrusions in the privacy sphere and has interfered with the tabloid trade in “kiss and tell”. In a speech in 2008, the *Daily Mail* Editor-in-Chief, Paul Dacre said:

¹⁹⁴ Professor Francesca Klug, Irvine Human Rights Lecture 2007, University of Durham, Human Rights Centre, 2 March 2007, “A Bill of Rights: Do we need one or do we already have one?”

"The British press is having a privacy law imposed on it, which apart from allowing the corrupt and the crooked to sleep easily in their beds is, I would argue, undermining the ability of mass-circulation newspapers to sell newspapers in an ever more difficult market... This law is not coming from parliament. No, that would smack of democracy, but from the arrogant and amoral judgments, words I use very deliberately, of one man. I am referring, of course, to Justice David Eady who has, again and again, under the privacy clause of the Human Rights Act, found against newspapers and their age-old freedom to expose the moral shortcomings of those in high places. If mass-circulation newspapers, which, of course, also devote considerable space to reporting and analysis of public affairs, don't have the freedom to write about scandal, I doubt whether they will retain their mass circulations with the obvious worrying implications for the democratic process".¹⁹⁵

129. As we note in detail at paragraphs 41 and 42, it is bitterly ironic that instead of seeking parliamentary clarification of the Article 8/10 balance, some newspapers have resorted to trashing an Act which provides the first legally enforceable right to free speech in British law.

130. Given this background, it is unsurprising that the HRA has not yet been fully understood by the public. However, lack of understanding and unpopularity does not mean, as some have argued, that the Act is not working nor that a replacement is required or would fare any better. If one of the principal shortcomings of the HRA is that it exists in a fog of misunderstanding it is far from clear that tearing it up and starting afresh with a new Bill of Rights, would solve the problem. Bad PR is not commonly motivation enough for constitutional style reform. As long ago as 1976, a Committee of the Society of Conservative Lawyers acknowledged that any Bill of Rights must be given a chance to 'bed down' if it is to stand a chance of being understood, appreciated and owned by the public:

"A Bill of Rights can only operate as an effective safeguard if it commands the respect and confidence of those whom it seeks to protect. This it cannot do

¹⁹⁵ "Daily Mail Chief, Paul Dacre, criticises BBC growth and privacy rulings" *The Guardian* (10 November 2008) available at: <http://www.guardian.co.uk/media/2008/nov/10/pauldacre-dailymail>

*unless the public can reasonably expect it to be a permanent feature of our constitution, at least for the foreseeable future”.*¹⁹⁶

131. Surely the real challenge is to encourage better understanding and appreciation of the HRA and the rights it contains? Our experience certainly indicates that the British public is not as hostile to the currency of human rights as some editors and politicians would have you believe. Since 2008, Liberty has carried out, at regular intervals, public opinion polling on attitudes towards human rights. Conducted by ComRes¹⁹⁷ on behalf of Liberty, this research involves interviewing over 1,000 GB adults by telephone. Data is weighted to be demographically representative of all GB adults. The opinion poll asks the following questions:

Q.1 Generally speaking, how important or unimportant do you think it is that there is a law that protects rights and freedoms in Britain?

Q.2 In modern Britain, would you say each of the following rights are vital, important, useful, or unnecessary?

The right not to be tortured or degraded/The right not to be detained without reason/The right to a fair trial/ Freedom of thought, conscience and religion/Respect for privacy, family life and the home/Freedom of speech, protest and association/Protection of property

Q.3 Do you remember ever receiving or seeing any information from the Government explaining the Human Rights Act?

In response to question 1, results have consistently shown mass support (between 93% and 97%) for a law that protects rights and freedoms in Britain. In response to question 2, results have consistently shown mass support for each right, with high numbers of people polled viewing each of these rights as being vital/important (results for each range between 76% and 96%). In response to question 3, in our most recent survey conducted in September 2011, less than a tenth of respondents (9%) remember ever having received or seen information from the Government explaining the Act. Shockingly, this result has never been higher than 13%. If the

¹⁹⁶ *Another Bill of Rights for Britain?*, A Report by a Committee of the Society of Conservative Lawyers, 1976, page 10.

¹⁹⁷ ComRes is a member of the British polling council and abides by its rules.

'twisting and misrepresentation of human rights' that the Prime Minister often speaks of amounts to a genuine concern that the public misunderstand their rights or that those working for public bodies are confused as to their obligations under the HRA, this should be addressed through public education and sector-specific training. Far from requiring a new Bill of Rights it requires quite the reverse. How would replacement legislation lead to less rather than more confusion?

CONCLUSION

132. Previous generations fought and died to secure the freedoms contained in the Human Rights Act for future generations. The rights enshrined in the Act mirror those protected throughout the free world. Free speech, fair trials, respect for private and family life and the prohibition on torture are values which distinguish democrats from dictators and terrorists. In the words of the late and great Lord Bingham:

The rights protected by the Convention and the Act deserve to be protected because they are, as I would suggest, the basic and fundamental rights which everyone in this country ought to enjoy simply by virtue of their existence as a human being....Which of these rights, I ask, would we wish to discard? Are any of them trivial, superfluous, unnecessary? Are any them un-British? There may be those who would like to live in a country where these rights are not protected, but I am not of their number. Human rights are not, however, protected for the likes of people like me – or most of you. They are protected for the benefit above all of society’s outcasts, those who need legal protection because they have no other voice – the prisoners, the mentally ill, the gypsies, the homosexuals, the immigrants, the asylum-seekers, those who are at any time the subject of public obloquy.¹⁹⁸

133. Whilst the remit of the Bill of Rights Commission is ostensibly to address a legal and constitutional question of how to build on the UK’s obligations under the Convention, its creation was triggered in order to paper over a fundamental fault line in the Coalition consensus. Diametrically opposed and raised expectations on either side now mean that you face an almost impossible challenge. But if the two central complaints about the Act relate to the increased power it supposedly gives to judges and the universality of its protections then this is no basis for reform. To return to the words of Lord Bingham “*The Act does not, as is sometimes suggested, effect a massive transfer of power from politicians and administrators to judges. No decision is now made by a judge under the Act which could not have been made by a judge before.*” The

¹⁹⁸ Lord Bingham’s speech at the Liberty 75th Anniversary Conference, Methodist Central Hall, 6th June 2009, available at <http://www.liberty-human-rights.org.uk/media/articles/pdfs/lord-bingham-speech-final.pdf>.

difference is of course that decisions are now made by British judges and not just in Strasbourg. As for the universality of human rights, we hope that you will reflect on the statements we have enclosed from those elsewhere in the world striving for the rights and freedoms we take for granted. Walking away from the Human Rights Act will not only damage our moral standing in the world, it will undermine their struggle as well.

**Sophie Farthing
Rachel Robinson
Isabella Sankey**

Armistice Day 2011