

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's briefing on the Human Rights Act and the Government's proposal for its repeal

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Introduction

1. The Queen's Speech 2016 contained an announcement that the Government will bring forward 'proposals' to abolish the Human Rights Act (HRA) and replace it with a 'British Bill of Rights'. The statement mirrored – almost to the letter – the Queen's Speech 2015 which also promised that the Government would bring forward 'proposals' concerning a 'British Bill of Rights'. It is testament both to the huge opposition to this policy which exists across the nations of the UK and the incoherence of the Government's position that a Bill has twice been omitted from the legislative agenda. Despite repeated promises, in the intervening period Government has also failed to publish or disclose any further information about what it proposes to do. However, despite the absence of recent detail from Government, in October 2014, the former Justice Secretary and current Leader of the House of Commons, Chris Grayling, published a set of substantive proposals on the desired contents of a "British Bill of Rights and Responsibilities." This briefing is a response to those proposals as the most recently articulated Cabinet policy in this area.

2. Over the past year confusion over this policy within Government has reigned. In December, in evidence to Parliament the Justice Secretary, Michael Gove, suggested broad constitutional reform was on the table, including the possibility of a German-style constitutional court with the power to strike down Acts of Parliament.¹ This was believed to be the genesis of a mysterious Sovereignty Bill which was briefed to the press before being quietly shelved. While Human Rights Minister, Dominic Raab, has attempted to reassure that the Government does not currently intend to withdraw from the Convention on Human Rights, the Home Secretary has recently asserted that such a move would be her policy of preference.² Meanwhile, Boris Johnson MP, rightly points out the confusion of the Government position, saying that:

"it is peculiar that the government is now straining at the gnat of the Convention and the Strasbourg court, whose rulings are not actually binding on UK courts, while swallowing the camel of the 55-article charter of Fundamental rights, which is fully justiciable by the

¹ Oral evidence taken before the Constitution Committee, 2 December 2015 (Session 2015–16), Q 9 (Michael Gove MP).

² The Guardian 'Cabinet rift widens over European convention on human' 26 April 2016, available at: <http://www.theguardian.com/politics/2016/apr/26/theresa-may-criticised-over-call-to-leave-european-convention-on-human-rights>.

*European Court in Luxembourg, when you consider that it is the rulings of this court that are binding and that must be applied by every court in this country”.*³

3. Over the same period, two parliamentary inquiries have examined the Government’s proposal. After hearing evidence from a range of constitutional experts and Government figures, including the Justice Secretary, the EU Justice Sub-Committee noted, that they were left “*unsure why a British Bill of Rights was really necessary*”.⁴ The confusion surrounding the proposals soon turned to anxiety. The Committee relates, “*[d]oubts about the wisdom of introducing a British Bill of Rights grew with each evidence session we held*”.⁵ Their concerns included lack of clarity around the Government’s position on the ECHR, the potential damage to this country’s international reputation and the lack of support amongst the devolved nations.⁶ Meanwhile the Scottish Parliament’s Human Rights Act Inquiry found strong opposition in Scotland to any repeal of the Human Rights Act.⁷ There was considerable consensus that the Human Rights Act had become a “*key component of [Scottish] society and an effective tool for the protection of our rights*”, as well as “*an effective means for individuals to challenge the actions of the State and seek redress in a more accessible, timely and affordable way than was possible before incorporation of the ECHR rights*”.⁸

Chris Grayling’s 2014 proposals

4. It was always hard to see how an incoherent smear campaign spanning a decade could evolve into a policy for major constitutional reform and indeed the former Justice Secretary’s policy paper astonished many from the Government’s own benches with its legal inaccuracies and constitutional illiteracy. The proposals were met with consternation, including from former Conservative Attorney General Dominic Grieve QC MP, who pointed out that the paper contained “*a number of howlers which are simply factually inaccurate*”. Former Lord Chancellor Ken Clarke QC MP described his bewilderment at plans designed to allow the Government to pick and choose which judgments of the Court of Human Rights it

³ Boris Johnson’s speech on the EU referendum: full text. 9 May 2016. Available at: <http://www.conservativehome.com/parliament/2016/05/boris-johnsons-speech-on-the-eu-referendum-full-text.html>.

⁴ European Union Committee, Report number 12 of Session 2015/16, *The UK, the EU and a British Bill of Rights*, p. 3.

⁵ *Ibid.*, p.3.

⁶ *Ibid.*

⁷ European and External Relations Committee letter to the Justice Secretary, 17th March 2016. Available at:

http://www.parliament.scot/S4_EuropeanandExternalRelationsCommittee/2016_03_17_Convener_UK_Govt_HR.pdf.

⁸ *Ibid.*

wished to implement, warning of arbitrary, executive decision-making. The proposals suggest carving out exceptions to the reach of human rights law for certain groups, making rights contingent on the fulfilment of responsibilities and allowing the Government to decide which of our liberties are worthy of protection. The vexed issue of the devolution settlements and the devolved administrations' opposition to HRA repeal was brushed aside in one sentence. It further proposed that the UK demand preferential status within the Council of Europe allowing it to treat the decisions of the Court of Human Rights as merely advisory. In its response, the Council of Europe made clear that the proposals were inconsistent with the UK's ongoing membership of the Convention system and the Council itself. Mr Grayling then promised a draft Bill before Christmas 2014, and then before the General Election 2015, but none materialised.

Proposal: Repeal Labour's Human Rights Act

5. Over the past fifteen years the impact of the HRA has been felt across society, making life better and fairer not only for individuals who successfully bring cases to court but also for the millions of other people who benefit from the changes to legislation, policy and practice that have emerged from living in a country where human rights are directly enforceable and public bodies have a positive obligation to protect and uphold them. At different times, many of us will fall within one or more groups, either as a direct result of who we are, what we believe or think, or as a result of circumstances outside our control. Victims of crime, people with physical disabilities, people experiencing mental health problems, minority groups including BAME communities and LGBT groups have all received help from the HRA. Journalists, members of the armed forces and those who have lost loved ones as a result of State failings have used the HRA to hold the authorities to account and ensure that mistakes and abuses aren't repeated.

6. Anyone can become a victim of crime. Liberty client, Patience Asuquo was forced to work, without any time off, for almost three years. Her employer took her passport, refused to pay her, and abused her. Thanks to Article 4, prohibiting slavery or forced labour, police who initially ignored her complaints were forced to investigate. Patience's employer was eventually prosecuted, and a new slavery offence was introduced as a result. Living in an open and diverse society, the protection offered to minorities by the HRA is essential and wide-reaching.

7. Darren Fuller has no convictions. However, like many Black Londoners, he has been continually stopped and searched – without explanation – by police. On one occasion, he was pushed into a fence, kicked and bundled off to a police station, where his fingerprints and DNA were taken. Thanks to Article 5, the right to liberty, Darren received compensation for being unlawfully stopped.

8. As a society, we are becoming increasingly aware of the prevalence of mental health problems and are still working out how best to support people who are experiencing such problems. Peter was admitted to a mental health hospital as an informal patient. He should have been free to leave as he wished, but was prevented from visiting his sister and friends on three occasions. Using Article 5, the right to liberty, nurses reconsidered and Peter was permitted to leave when he wanted. His health improved and he was soon discharged.

9. Article 9 of the Human Rights Act couldn't be more British – it protects the fundamentally British liberty of freedom of thought, conscience and religion. Sarika Singh was a fourteen year old 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. Using Article 9 and Article 14 (no discrimination) of the Act, we defended Sarika's right to wear her kara in the wider pursuit of freedom of thought, conscience and religion for everyone in the country.

10. The HRA has brought repeated legal victories to journalists. At the local level, a reporter for the Milton Keynes Citizen, Sally Murrer, successfully relied on Article 10 to resist charges that she encouraged a police officer to leak information, stopping evidence of her sources being used against her at trial. The judge reiterated the paramount need for Article 10, stating, "A large chunk of the reporting we read in the newspapers and see on television originates from reports from confidential sources in public authorities. That is a form of journalism that needs protection from the law." The HRA provided just such protection.

11. And the HRA protects journalists in other ways. Recently, a finding that the UK had breached Article 10 by its reporting restrictions applicable to criminal trials in Scotland led to legislative change enabling court orders prohibiting such reporting to be challenged. It was further as a result of the impact of Article 10 – built upon by law reform campaigners – that led to substantive changes in defamation law, such as the introduction of a threshold of 'serious harm' in the Defamation Act 2013.

12. The HRA can't undo some of the worst mistakes or intentional harms caused by others or by the State, but it can offer information and justice to individuals or their bereaved friends and families, and crucially, can help to identify systemic problems that need to be remedied. After Joanna Michael was brutally murdered by her ex-partner – despite calling police twice on the night she was killed – the Supreme Court ruled that her family can bring a case against local police. Though not able to sue in negligence, her family can use Article 2, the right to life, to challenge the police's failure to protect her. Understanding how and why things went wrong will help to ensure that similar mistakes don't happen in the future. Indeed the staggering impact that the HRA has had on the rights of victims of serious crime has led the former Director of Public Prosecutions, Keir Starmer QC, to comment *"the HRA has heralded a new approach to the protection of the most vulnerable in our society, including child victims of trafficking, women subject to domestic and sexual violence, those with disabilities and victims of crime. After many years of struggling to be heard, these individuals now have not only a voice, but a right to be protected."*⁹

13. FGP was rushed to hospital with severe abdominal pains while being held in immigration detention. The private security firm responsible for him insisted on restraining him at all times, 24 hours a day – for example, by handcuffing him to a guard using a 2.5-metre chain. The High Court ruled that FGP's right not to be subjected to inhuman and degrading treatment, under Article 3, was breached.

14. It is sometimes asserted that the common law and British courts can provide adequate protection against rights abuses in the UK. But despite the often-cited protections of the common law, prior to the HRA, British courts were left with no recourse when statutes sought to oust judicial oversight or directly usurped common law rights. The important nature of the cases against the UK taken to the Strasbourg Court between 1966 and 1998 – concerning matters such as the criminalisation of homosexuality¹⁰, the prohibition on openly homosexual individuals serving in the British Armed Forces¹¹, the failure of local authorities to protect children from severe neglect and abuse¹², corporal punishment against children¹³,

⁹ Keir Starmer QC MP, *The arguments against the Human Rights Act are coming. They will be false*, the Guardian, 13th May 2015.

¹⁰ *Dudgeon v the United Kingdom* (1981) held that laws prohibiting certain homosexual acts between consenting adult males constituted an unjustified interference with Dudgeon's right to respect for his private life (Art. 8 ECHR).

¹¹ *Lustig-Prean and Beckett v United Kingdom* (2000) 29 ECHR 548 found that investigations into the sexual orientation and their subsequent discharges of members of the armed forces violated their right to respect for their private lives, protected by Article 8 of the Convention, and that they had been discriminated against contrary to Article 14.

¹² *Z v UK* (2001) found that failure of social services to protect children subject to abuse and neglect by their parents despite the fact that the relevant authorities had been informed of concerns about the

and the lack of legal framework governing the actions of law enforcement agencies and security services¹⁴ show that common law powers were wholly inadequate to hold the State to account.

15. The recent rebranding of the HRA as “Labour’s” Human Rights Act misrepresents the mixed political heritage of the HRA and the role played by democratic politicians from across the UK’s main political parties in its creation. It also ignores the vital role that Conservative politicians and lawyers played in drafting the Convention, creating momentum behind its incorporation into UK law and then in helping to shape the HRA as it passed through Parliament. Incorporation of the ECHR had previously been attempted by key Conservative figures. In 1976 the Society of Conservative Lawyers recommended that *“the ECHR should be given statutory force as overriding domestic law.”*¹⁵ In 1987, Conservative MP Edward Gardner introduced a *“Human Rights Bill to incorporate in British law the ECHR.”* In 1998, by the time the legislation had reached its concluding stages a number of areas of disagreement between the Labour Government and Conservative Opposition had been resolved; in some instances, the Conservatives had wanted the Government to grant the UK courts more powers to protect human rights rather than less. By the end of the closing stages of debate, the Conservative representative in the House of Commons, Sir Nicholas Lyell, commented: *“Although we have opposed aspects of the Bill, we now wish it well and hope that it will be implemented effectively, to the benefit of the citizenry as a whole.”*¹⁶

Proposal: Put the text of the original Human Rights Convention into primary legislation but limit application of the Convention to “serious cases”, “clarify” the Convention rights to reflect “a proper balance between rights and responsibilities” and give instructions to the judiciary on how to interpret rights.

16. While the text of the Convention is principled and remains a vital statement of rights, the force and practical value of human rights comes from their universal nature and the capacity for all individuals to have them enforced. A great number of Governments both now and over the course of history have promised in rhetoric and even in legal documents that

mistreatment of the children was a violation of Article 3. The case led to a number of changes in social services procedures and registering of at risk children.

¹³ *A. v. UK* (1998) found that beating with garden cane applied with considerable force on more than one occasion reaches level of severity prohibited by Article 3 and that “reasonable chastisement” offered no defence.

¹⁴ *Malone v UK* found that interception of telecommunications constituted a violation of the right to privacy and in the absence of a legal power authoring the state to take this action such a violation was not in accordance with law.

¹⁵ Society of Conservative Lawyers, *Another Bill of Rights?* 1976.

¹⁶ Sir Nicholas Lyell, Hansard, 21 October 1998, per column 1363.

they respect human rights, but evidence and practice reveals the contrary. There will be no moral or practical benefit in the UK Government re-incorporating the text of the Convention while also taking steps to make it harder for individuals to enforce rights in the UK.

Re-draft the meaning of substantive rights

17. The 2014 policy paper is explicit about re-interpreting rights protection to impose new tests and definitions for rights breaches. This would remove large areas of rights protection from the British population. It claims that the meaning of “*degrading treatment or punishment*” needs to be curtailed and that the legal test for the risk of torture needs to be significantly weakened, effectively scrapping the absolute prohibition on the practice that the UK has accepted for decades. It is not clear how far the proposed redefinition of Article 3 would go. Inhuman and degrading treatment currently provides the basis for the ban on rape victims being cross-examined by an alleged abuser, for elderly care home residents being able to require basic care, and for protections against neglect otherwise suffered by children following a refusal of social services to intervene.

18. The Article 8 protection for private and family life is specifically explored in the section of the paper dealing with exceptions to the application of rights protection. It is proposed, that foreign nationals convicted of an offence in the UK would not be able to rely on Article 8 to challenge deportation. In 2013 the Coalition brought forward legislation substantially limiting the scope of Article 8 in deportation matters. Under the *Immigration Act 2014*, Article 8 protection is already unavailable for those convicted of serious offences, in the absence of compelling circumstances which must be over and above an unduly harsh impact on a British child. We can only conclude that the intention now is to remove this tiny area of residual discretion for the most compelling cases impacting innocent British children.

Serious vs Trivial

19. The intention to remove human rights protection from cases which the Government deems trivial is another proposed reduction in the scope of human rights protection. Perhaps more than any other aspect of the paper, this objective is impossible to reconcile with the essential purpose of human rights legislation: to protect the individual against arbitrary Executive decision-making. This proposal offends fundamentally the separation of powers, in the words of former Attorney General Dominic Grieve QC MP:

“The stated aim that “trivial” violations of rights will not be settled by a court of law, and that Parliament will determine a threshold, below which Convention rights will not be applied, begs the question as to how and where this line is drawn. By usurping the role of our own courts in interpreting the law, Parliament will be more to blame than the Strasbourg court for micromanaging the Convention.”¹⁷

20. A Bill of Rights allowing Government to stipulate, apparently in some level of detail, the kinds of human rights claims the Courts may adjudicate would be conspicuously authoritarian. We are left to guess at basis on which rights claims will be deemed trivial or serious, but it is instructive to look at some claims which the Executive appeared, at least initially, to consider too minor or subjective to invoke rights protection:

The right of a Christian employee to wear a cross. In the case of former Liberty client, and BA employee, Nadia Eweida, the Government sought to argue that her decision to wear a small cross on a chain was not an act of practice of a religion in a generally recognised form, and therefore was not a human rights issue under Article 9 of the Convention. The European Court of Human Rights upheld Ms Eweida’s claim found a violation of the right to freedom of thought, conscience and religion.¹⁸

The right of an individual detained under the Mental Health Act 1983 to change the identity of her “nearest relative”. In the late nineties a woman detained under the Mental Health Act 1983 argued that her inability to change the identity of her “nearest relative”, despite long-standing allegations of familial abuse, was incompatible with her right to respect for her family life. The Government’s primary contention was that the claim was manifestly unfounded. Only when faced with a positive admissibility decision was a settlement reached and legislation amended.¹⁹

Legal recognition of a new gender. In a case brought in 1995 by a woman who had changed her gender and sought legal recognition of her female status, the Government argued that the lack of recognition in the United Kingdom of the applicant’s new gender identity for legal purposes did not entail a violation of Article 8, partly because the Government did not consider the applicant to have faced any particular *“practical*

¹⁷ Prospect, *‘Human Rights Act: Why the Conservatives are wrong’*, Rt Hon Dominic Grieve QC MP, 10th October 2014.

¹⁸ *Eweida and Others v the United Kingdom* (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).

¹⁹ *JT v. United Kingdom* (application number 26494/95, 26 February 1997).

disadvantages".²⁰ Although the law was ultimately changed, the Government's original approach was effectively to argue that the inability to legally change gender was a trivial or practically insignificant matter.

Use of close surveillance powers by a local council to establish whether a family lived in the correct school catchment area. When Jenny Paton took Poole Council to the Investigatory Powers Tribunal, the Council argued that the directed surveillance of the complainants was proportionate for determining the genuineness of information supplied by Ms Paton to the Council, as the local education authority for the relevant area. It was only after a rare adverse HRA decision in the IPT and the passage of a number of years that a Bill introducing limited positive changes to the law was brought forward.²¹

21. Which if any of these cases would remain justiciable under the Government's proposals? Certainly none are cases involving "*criminal law and the liberty of an individual*" or "*the right to property*", the examples given in the paper of the kind of case which would be considered worthy of the courts' time. The notion of "serious" and "trivial" human rights is dangerously confused and unorthodox. As argued by Cambridge Public Law expert Dr Mark Elliot:

*"the very fact that a right is considered to be a human right to immunise it against any suggestion that it is insufficiently important to warrant judicial protection if unlawfully infringed."*²²

22. The Government cannot claim to preserve the rights enshrined in the Convention whilst committing to place certain rights violations beyond the purview of the courts. If the Government believes that certain of the rights protected by the Convention are not true articulations of basic civil and political rights it should straightforwardly make this argument. But as the late former Lord Chief Justice, Lord Bingham of Cornhill, said in his keynote address at Liberty's 75th Anniversary Conference –

"The right to life. The right not to be tortured or subjected to inhuman or degrading treatment or punishment. The right not to be enslaved. The right to liberty and security of the person. The right to a fair trial. The right not to be retrospectively penalised. The right to respect for private and family life. Freedom of thought, conscience and religion.

²⁰ Christine Goodwin v the United Kingdom (Application no. 28957/95), paragraph 65.

²¹ Jenny Paton v Poole Borough Council (IPT/09/01/C, IPT/09/02/C, IPT/09/03/C, IPT/09/04/C, IPT/09/05/C).

²² Dr Mark Elliot, 'My Analysis of the Conservative Part's Proposals for a British Bill of Rights', 3rd October 2014.

*Freedom of expression. Freedom of assembly and association. The right to marry. The right not to be discriminated against in the enjoyment of those rights. The right not to have our property taken away except in the public interest and with compensation. The right of fair access to the country's educational system. The right to free elections. 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...*²³

“Responsibilities”

23. Mr Grayling's paper suggests clarifying the Convention to “reflect a proper balance between rights and responsibilities”. Bills of Rights in most of the common law world make no reference to the duties or responsibilities of the individual, including Bills of Rights in Canada, New Zealand, the US and South Africa.²⁴ Research carried out in 2009 on behalf of the Ministry of Justice,²⁵ warned that the focus on responsibilities may represent “an opportunity to introduce new restrictions on human rights”.²⁶ 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 democratic traditions tend, on the whole, towards implicit or rhetorical recognition of duties”.²⁷ 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”.²⁸ 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”.²⁹

24. Obvious examples of this approach include Chapter II of the Constitution of the People's Republic of China which governs the “*Fundamental Rights and Duties of Citizens*”. Article 59 of the 1977 Constitution (Fundamental Law) of the Union of Soviet Socialist Republics made clear that “*citizens' exercise of their rights was inseparable from*

²³ Lord Bingham, 6 June 2009, available at <https://www.liberty-human-rights.org.uk/sites/default/files/lord-bingham-speech-final.pdf>

²⁴ Eric Metcalfe, *Rights and Responsibilities*, [2007] 2 Justice Journal.

²⁵ 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>.

²⁶ Ibid, page 10.

²⁷ Ibid, page 24.

²⁸ Ibid, page 24.

²⁹ Ibid, page 30.

performance of their duties". For example citizens were obliged to *"comply with the standards of socialist conduct, and uphold the honour and dignity of Soviet citizenship"*.³⁰

The Constitution of the People's Republic of North Korea deals with the *"Fundamental Rights and Duties of Citizens"* at Chapter 5, for example *"Citizens must constantly increase their revolutionary vigilance and devotedly fight for the security of the State"*.³¹

25. To say that people living in Britain owe moral and legal obligations is a truism borne out by the predominance of criminal and civil responsibilities on the statute book. These laws very clearly define the responsibilities of individuals towards the state and each other. A Bill of Rights is the rare breed of law which protects the individual against the State. Faithful to this essential purpose, the HRA sets out 15 basic freedoms to act as a bulwark against Executive overreach. That is not to say that the rights of others and considerations of the national interest are irrelevant to the application of the HRA. Most of the rights set out in the Convention are either limited or qualified to take account of the national interest or the rights of others. But balancing rights to take account of the rights of others is not the same as making rights contingent on good behaviour or the acquisition of British citizenship.

Proposal: Limit the reach of human rights cases to the UK so that British Armed forces overseas are not subject to persistent human rights claims that undermine their ability to do their job and keep us safe.

26. The Government proposes that a new Bill of Rights should not apply to the British Armed forces overseas. But the HRA currently performs a vital dual function: protecting our service men and women from abuse and injustice as well as requiring them to uphold basic human rights standards.

27. Military police officer Anne-Marie Ellement took her own life in 2011 – she had been subjected to a campaign of bullying after reporting that she had been raped in Germany by two colleagues – and an extremely brief inquest failed to look in depth at the issues around her death. Using the HRA, Liberty and Anne-Marie's sisters were able to secure a fresh inquest under Article 2. In 2014 the Coroner ruled that the mental effects of the alleged rape, workplace bullying and her 'work-related despair' were all contributing factors in her suicide and identified systemic failings in the treatment of service personnel. In the wake of the verdict, the Ministry of Defence announced that it would establish a Service Complaints

³⁰ Constitution (Fundamental Law) of the Union of Soviet Socialist Republics, Article 59: <http://www.departments.bucknell.edu/russian/const/77cons02.html#chap07>.

³¹ Constitution of the People's Republic of North Korea, Article 85.

Ombudsman to deal with complaints made by service men and women, a position created by the Armed Forces (Financial Assistance and Service Complaints) Act 2015. Thanks to Article 3, a rape prosecution was also finally brought. Whilst those accused were ultimately acquitted, the trial judge identified serious and ingrained problems with attitudes towards sexual behaviour in the Royal Military Police and criticised the failure to conduct a proper investigation years ago. Annie-Marie's allegations related to her time working on a UK base in Germany as a military police officer. Without the protection of human rights abroad, Anne-Marie and her family would have been deprived of any semblance of justice.

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28. Between 1995 and 2001 four young British Army recruits were undergoing initial training at Deepcut, Surrey. They all died of gunshot wounds. Questions about their deaths remain unanswered. Liberty represents the families of Sean Benton, Cheryl James and James Collinson. Almost twenty years later, there remain concerns regarding the circumstances surrounding their deaths and how they were investigated. In July 2014 the High Court ordered a fresh inquest into Cheryl's death, but only after our lawyers used the HRA to secure access to documents held by the authorities about Cheryl's death. The Inquest began in February 2016 and a verdict is expected in the coming months. We are now calling for fresh inquests into the deaths of Sean and James also. There is no principled reason why, had these tragic deaths taken place not in the UK but at barracks abroad, the families should have been blocked from using the HRA to help them finally get answers – yet under Mr Grayling's proposals they would.

29. The HRA was used by family members of service men and women who were killed in Iraq when the vehicles they were in exploded. Their families sought to establish that the Ministry of Defence breached the right to life of their loved ones, not because those individuals were sent to war but because the equipment they were sent with was wholly inadequate to the task of protecting them. The Supreme Court found that the Ministry of Defence had Article 2 obligations to these soldiers in relation to operational decisions made prior to deployment and away from battle.³² It is difficult to see why the important process of establishing the facts and investigating allegations that our troops were sent into danger with inadequate equipment is one which the Government wants to see cast aside.

30. It is also the case that there are currently a number of human rights claims lodged against the British Government relating to the actions of the armed forces in Iraq and

³² *Smith and others v The Ministry of Defence* [2013] UKSC 41.

Afghanistan. When allegations of the most serious and damaging nature are made about the actions of British troops, the appropriate response should be to conduct independent investigations into the claims, so that wrong-doers can be identified and the innocent can be acquitted and allowed to continue their lives with their reputation intact. A significant proportion of the claims currently before the courts concern the duty of the UK Government to conduct this type of independent investigation and it is unclear why this is a matter of controversy. Similarly, it is an insult to our forces to imply they are incapable of carrying out their duties in a manner that honours the UK's Government's human rights commitments. And while the courts have been clear that human rights law must be interpreted to ensure overseas troops aren't put under an unduly onerous a burden, cases like Baha Mousa – where Mr Mousa was detained by British troops and then died following mistreatment including lack of food and water, extreme heat, exhaustion, hooding and stress positions as well as a final struggle with his guards - show why it's vital no one is automatically exempted from the standards in the HRA.

Proposal: The European Court of Human Rights has developed “mission creep” and expanded Convention rights into new areas, and certainly beyond what the framers of the Convention had in mind when they signed up to it. We will prevent our laws being effectively re-written through “interpretation”.

31. Mr Grayling's paper gives some examples of supposed 'mission creep' and criticises the “living instrument” approach taken to interpretation of the Convention. One of the examples given is the prisoner voting decision and the paper complains that “*the issue of the franchise in elections was deliberately excluded from the text of the Convention*” yet “*the Strasbourg Court has, however, now decided that it falls within the Convention's ambit*”. Bizarrely, it appears the authors don't realise that the UK has agreed to Article 3 of the First Protocol to the Convention, the right to free elections, on which the prisoner voting decision was based. Other allegations of “mission creep” involve artificial insemination and a misreading of a decision about sentencing.

32. The Convention was drafted in 1950, at a time when across much of Europe, homosexuality was illegal, marital rape, corporal punishment and discrimination against illegitimate children was legal and developments such as the internet, IVF treatment and the prevalence of trafficking could never have been envisaged. If the Convention was applied today exactly as it would have been applied in 1950, the protection of human rights would stagnate to a time when social attitudes and day to day life were very different. Instead, the

intention of drafters of the Convention was to protect whatever human rights people have, rather than the human rights they believed existed in 1950.

33. If the interpretation of the Convention did not evolve, individuals would effectively have no legal protection against new threats to their human rights. As the US former Supreme Court Chief Justice, William Rehnquist, asserted in relation to the US Constitution,

“Merely because a particular activity may not have existed when the Constitution was adopted, or because the framers could not have conceived of a particular method of transacting affairs, cannot mean that general language in the Constitution may not be applied to such a course of conduct. Where the framers of the Constitution have used general language, they have given latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen”³³.

34. In *Rantsev v Cyprus and Russia*³⁴, the ECtHR held that trafficking fell within the prohibition on slavery in Article 4 of the Convention, commenting that *“the absence of an express reference to trafficking in the Convention is unsurprising”* since it was a relatively new phenomenon. The case concerned the death of a 20 year old Russian woman who had been trafficked from Russia to Cyprus for the purpose of sexual exploitation, leading to her ultimate death. There was no adequate investigation into the victim’s death, she had been offered no protection by Cypriot police while alive, and there had been a complete failure to punish those responsible. A strictly literal approach of the Convention would have denied protection to the victim and future victims of trafficking offences.

35. In *S and Marper v United Kingdom* the ECtHR held that retaining DNA samples of individuals who had been arrested but later acquitted violated the Article 8 right to respect for private life. The case concerned the continued retention by the police of the fingerprints and DNA samples taken from a boy of 11 who was arrested but later acquitted. Clearly the collection of DNA samples could not have been anticipated by the drafters of the Convention. However, the ECtHR was struck by the state’s blanket power of retention of information of the most private nature, namely knowledge of the applicant’s genetic make-up, which it determined clearly fell within the language of Article 8.

³³ William Rehnquist, *The Notion of a Living Constitution*, 54 *Tex. L. Rev.* 693 (1976), quoted by Kanstantsin Dzehtsiarou, *“Evolutionary Interpretation of Rights Provisions: A Comparison of The European Court of Human Rights And The U.S. Supreme Court”*, *Columbia Human Rights Law Review* 2013

³⁴ *Rantsev v Cyprus and Russia* (App no, 25965/04) Judgment of 7 January 2010

36. No Bill of Rights can exist without judicial interpretation. The ECtHR approach to the Convention as a living instrument is often contrasted to the more “originalist” approach of the US Supreme Court in relation to the US constitution and Bill of Rights. Yet, even in the US, the courts have held that the rights must be interpreted to accommodate modern attitudes. Wiretapping and electronic surveillance were clearly not envisaged by the drafters of the U.S. Constitution in 1789. However, the U.S. Supreme Court has decided that such practices fall within the scope of the prohibition on unreasonable searches and seizures under the Fourth Amendment.³⁵ Similarly, as early as 1930 in Canada, in the case of *Edwards v Attorney General*, the court used an interpretive approach to the Canadian Constitution to hold that women were “persons” who could become members of the upper house of the Canadian Parliament. In his judgment, Lord Sankey commented that the Constitution of Canada should be seen:

“as a living tree capable of growth and expansion within its natural limits” and that the court *“did not think it right to apply rigidly to Canada of today the decisions and the reasons therefore which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries in different stages of development . . .”*³⁶.

The approach of the US and Canadian courts demonstrate that Bills of Rights can have no real effect unless they are treated as living instruments. Accordingly, an argument against the living instrument approach of the ECtHR is in fact an argument against a Bill of Rights of any kind.

37. Even in the UK, the concept of interpretation to reflect modern times is not new and existed before the enactment of the HRA. As Supreme Court Justice, Lady Hale articulates:

“...it is in a comparatively rare case that an Act of Parliament has to be construed and applied exactly as it would have been applied when it was first passed. Statutes are said to be ‘always speaking’ and so must be made to apply to situations which would never have been contemplated when they were first passed. Thus in 2001, a ‘member of the family’, first used in 1920, could be held to include a same-sex partner. In 1998, ‘bodily harm’ in a statute of 1861 could be held to include psychiatric harm. And in 2011,

³⁵ Kanstantsin Dzehtsiarou, *supra* note 29.

³⁶ *Edwards v Attorney General* [1930] AC 124, at p 136.

'violence' could be held to extend beyond physical violence into other sorts of violent behaviour.

In all of these examples, the court is seeking to further the purpose of the legislation in the social world as it now is rather than as it was when the statute was passed, but to do so in a principled and predictable way which will not offend against either the intention of Parliament or the principle of legal certainty.”³⁷

Proposal: Break the formal link between the British Courts and the Court of Human Rights. In future Britain’s Courts will no longer be required to take into account rulings from the Court in Strasbourg. This will make the Supreme Court the ultimate arbiter of human rights matters in the UK.

38. This proposal appears to be based on a fundamental misunderstanding of how the current system operates and proposes a course of action that would conversely make the Supreme Court *less* rather than *more* influential. For the reasons we set out below, the Supreme Court is already the ultimate arbiter of human rights matters in the UK.

Section 2 HRA requires British courts to “take account” not “follow” Strasbourg

39. Mr Grayling’s paper asserts that the HRA creates a rule of “*legal precedent*” which requires UK courts to follow decisions of the Strasbourg Court. This is incorrect. Section 2 of the HRA requires courts only to “take account” of relevant decisions of the ECtHR, not to follow them. It was not Parliament’s intention for domestic courts to be bound by the ECtHR. During the passage of the Human Rights Act, the Conservative Peer Lord Kingsland tabled an amendment to make ECtHR case law binding on British courts. In response, Lord Irvine, the Lord Chancellor, expressed the Government’s intention that British courts should be able to disagree with the ECtHR:

“We believe that Clause 2 gets it right in requiring domestic courts to take into account judgments of the European Court, but not making them binding.”³⁸

³⁷ “Beanstalk or Living Instrument? How tall can the European Convention on Human Rights Grow?”, Gray’s Inn Reading 2011, The Rt Hon the Baroness Hale DBE, available at:

<http://www.gresham.ac.uk/print/2666>

³⁸ Lord Irvine, 18 November 1997, column 514, per Hansard.

British court decisions not to follow Strasbourg jurisprudence

40. In practice, domestic courts can and do depart from decisions made by the Strasbourg Court. For example, in *Al Khawaja v United Kingdom* in 2003, a Chamber of the ECtHR held that criminal convictions based solely or decisively on hearsay evidence breached the Article 6 right to a fair trial. The later domestic case of *R v Horncastle* was based on a similar issue to that in *Al Khawaja*, whether criminal convictions based mainly on hearsay evidence should be upheld. The Supreme Court did not follow the ECtHR decision in *Al Khawaja* and upheld the criminal convictions. In the judgment, the Supreme Court explained that the ECtHR had not considered the substantial safeguards in UK criminal procedure in relation to hearsay evidence which could not be tested through cross examination. In commenting on section 2 of the HRA in the Supreme Court, Lord Phillips stated that there will be:

*“...rare occasions where the domestic 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 the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course.”*³⁹

41. Similarly in *Morris v United Kingdom*⁴⁰, the ECtHR held that the courts martial system in the UK violate the right to a fair trial enshrined in Article 6(1) of the Convention, on the basis that officers serving as courts-martial lacked independence. However in *R v Spear*⁴¹, the House of Lords decided not to follow the ECtHR decision in *Morris*, and held that the courts martial system was fair. The House of Lords decided that the ECtHR had not been made aware of all the relevant facts at the time of delivering its decision in *Morris*, including key procedural safeguards in the courts martial system.

Judicial dialogue allows the UK to influence the Convention system

42. The HRA not only allows the British Courts to make decisions that reflect particular traditions, cultures and laws in the UK, but also establishes a dialogue between the UK Courts and the ECtHR, allowing the UK to influence the application of the Convention in

³⁹ *R v Horncastle, Marquis, Graham and Carter* [2009] EWCA Crim 964.

⁴⁰ *Morris v United Kingdom* (App no. 38784/97).

⁴¹ *R v Spear* [2002] UKHL 31.

Strasbourg and for UK court decisions to be followed. For example, as a direct result of the Supreme Court explaining in detail its disagreement with the ECtHR in *R v Horncastle* and providing information about the safeguards in UK procedure, the ECtHR reversed its approach in *Al Khawaja* when the Grand Chamber considered the case in 2011, holding the UK was not in breach of Article 6. Similarly, in *Cooper v United Kingdom*⁴² which concerned the courts martial system, the ECtHR had the benefit of the information on safeguards set out in *R v Spear*. As a result, the ECtHR accepted the House of Lords had been correct in *Spear* and held that the court martial system was in fact fair.

43. Another example of this dialogue and influence concerns the issue of whole life sentences. Mr Grayling's paper states that *"In 2013 the Strasbourg Court ruled that murderers cannot be sentenced to prison for life."* This is not true. The Court ruled that while imposition of a whole life sentence was permissible, failure to provide any opportunity to review this sentence would be unlawful. The Strasbourg court expressed the view that UK law on whether review was possible was unclear. The Court of Appeal then considered the issue again in *R v Newell; R v McLoughlin*⁴³ and concluded that UK law does provide for the possibility for review. In its judgment it set out, in detail, domestic law around the possible exceptional release of whole life prisoners and confirmed that judges should continue to apply the statutory scheme set out in domestic law. When the matter then came back before the ECtHR in *Hutchinson v United Kingdom* in 2015⁴⁴ the Strasbourg Court made clear that the Court of Appeal had addressed the concerns of the Grand Chamber about the clarity of UK law. It found in conclusion that there was no violation of Article 3, stressing –

*"In the circumstances of this case where, following the Grand Chamber's judgment in which it expressed doubts about the clarity of domestic law, the national court has specifically addressed those doubts and set out an unequivocal statement of the legal position, the court must accept the national court's interpretation of domestic law."*⁴⁵

44. The vast majority of human rights cases in the UK do not reach Strasbourg and are resolved by British courts applying the HRA. However for the handful of cases that do reach the ECtHR, the Court frequently follows the conclusions reached by the domestic courts, due to the high quality of judgments in the UK. Accordingly, the introduction of the HRA has made it more likely that the ECtHR will find that the UK has not violated the Convention,

⁴² *Cooper v United Kingdom* (App no. 48843/99).

⁴³ *R v Newell; Rv McLoughlin* [2014] EWCA Crim 188

⁴⁴ *Hutchinson v United Kingdom* (App no. 57592/08), Judgment of the Chamber, 3 February 2015.

⁴⁵ *Hutchinson v United Kingdom* (App no. 57592/08), Judgment of the Chamber, 3 February 2015, paragraph 25.

relying on the conclusions of the domestic courts. As the former president of the ECtHR, Nicholas Bratza, comments:

“In many cases the compelling reasoning and analysis of relevant case-law by the national courts has formed the basis of the Strasbourg Court’s own judgment”⁴⁶.

45. For as long as the UK remains a member of the Convention, any reduction in the type or number of cases in which UK courts are able to consider human rights claims – as is proposed elsewhere in Mr Grayling’s paper – will automatically reduce the influence that British courts can have over the Strasbourg analysis. This outcome is surely the opposite of that which the Government claims it seeks to achieve, and the practical consequence can only be for more judgments against the UK.

Positive influence of Strasbourg Decisions

46. In assessing the impact of the dialogue between British courts and the ECtHR, the role of the latter in interpreting and applying the Convention in a manner which improves human rights in the UK should not be overlooked. The protection of rights and freedoms in the UK has improved as a direct result of the ECtHR. Even over the years that the HRA has been in force, in many cases it has been the ECtHR and not the UK courts which have protected key fundamental rights of including religious freedoms and freedom of speech. In a number of important cases, rulings of the Strasbourg Court have been warmly welcomed in the UK.

47. For example, in *S and Marper v United Kingdom* the ECtHR held that retaining DNA samples, profiles and fingerprints of individuals who had been arrested but not convicted violated the Article 8 right to respect for private life. In this case, the virtues of a supra national court were clear. The ECtHR was able to examine the legal position in other Member States and conclude that England & Wales was the only European jurisdiction which allowed the systematic and indefinite retention of DNA profiles and fingerprints of innocent people. Six months later, the Home Office issued a consultation on how to comply with the ruling and when the Coalition Government came to power in 2010 reform of the DNA database one of the flagship policies taken through by its *Protection of Freedoms Act 2012*.

⁴⁶ Sir Nicolas Bratza, “The Relationship between the UK Courts and Strasbourg”, 2011 EHRLR 505, page 507

48. Similarly, it was the ECtHR, not the British courts, which found that British Airways' policy of banning employees from wearing crucifixes to be unlawful,⁴⁷ ruled that blanket and discriminatory stop and search practiced against young Black and Asian men was unlawful⁴⁸ and it was the ECtHR which protected the rights of Financial Times journalists who had been required by the British courts to reveal their sources.⁴⁹ While we now live in a country proud to allow equal marriage, as recently as the 1980s homosexuality was a criminal offence in Northern Ireland and it was prohibited to be an openly homosexual member of the armed forces. In both these instances, the European Court on Human Rights found that the right to respect for private and family life was breached, paving the way for further progress in equal rights.

Proposal: End ability of the European Court to require the UK to change British laws. Every judgment against the UK will be treated as advisory and will have to be approved by Parliament if it is to lead to a change in our laws.

49. Like many other proposals in Mr Grayling's paper, this policy rests of a fundamental misunderstanding or misrepresentation of the current position. The ECtHR is not able to require or enforce a change in the law in the UK and Parliament remains sovereign – British law can only be changed after reform is approved by Parliament.

50. The requirement that the UK must implement judgments of the Court is a duty under international law and stems wholly from the fact that the UK has signed up to an international treaty which includes binding dispute resolution in its terms – it has nothing to do with the HRA. Article 46 of the European Convention on Human Rights requires member states “to abide by the final judgment of the Court in any case to which they are parties.” This type of agreement is far from unique, as noted by former Attorney General Dominic Grieve QC:

“When I was Attorney General, I enquired of the Foreign Office as to how many Treaty commitments we were adherent. They were unwilling to go back before 1834, but indicated that since then they had some 13,200 records of treaties and agreements that the UK had signed and ratified. Many thousands are still applicable and range in importance from the UN Charter to local treaties over fishing rights or maritime access.

⁴⁷ Eweida And Others v United Kingdom (App nos. 48420/10, 59842/10, 51671/10 and 36516/10).

⁴⁸ Gillan and Quinton v United Kingdom 4158/05 [2010] ECHR 28.

⁴⁹ Financial Times Ltd & Ors v United Kingdom (App no. 821/03).

*Over 700 contain references to the possibility of binding dispute settlement in the event of disagreements over interpretation-as does of course the ECHR.*⁵⁰

51. A requirement to implement treaty obligations does not challenge the notion of parliamentary sovereignty, a fact recognised by the Joint Parliamentary Committee on the Draft Voting Eligibility (Prisoners) Bill. The Committee found that:

*“the principle of parliamentary sovereignty is not an argument against giving effect to the judgment of the European Court of Human Rights. Parliament remains sovereign, but that sovereignty resides in Parliament’s power to withdraw from the Convention system; while we are part of that system we incur obligations that cannot be the subject of cherry picking.”*⁵¹

52. Decisions of the Strasbourg court do not have automatic effect in UK law. Similarly, Strasbourg has no ability to require the UK to amend British laws, nor to mandate the exact terms of any legislation. Making legislation remains entirely and uniquely within the competence of the UK Parliament and the devolved legislatures. It is wholly at the discretion of those institutions to find a way to change legislation so that judgments of the Court are implemented in a manner which reflects the British way of life. This means that under the Convention system and with the HRA in place, parliamentary sovereignty remains wholly intact.

53. The non-implementation of the prisoner voting judgement is a clear example of how parliamentary sovereignty is preserved under the present system. Successive Executives have chosen not to present Parliament with a Bill to implement the judgment and so the law remains unchanged. In *Hirst v United Kingdom*, the ECtHR held that an indiscriminate blanket ban on prisoner voting is in breach of the electoral right under Article 1 of Protocol 3 of the Convention. In its judgement the ECtHR made clear that it is up to the UK to decide how to rectify the violation, since states have a very wide margin of appreciation in this area. While the judgment requires the UK to reconsider the blanket ban and adopt a more proportionate approach, it does no more than that. This was made clear in the subsequent case of *Scoppola v Italy (No 3)*, in which the ECtHR ruled that a life-long ban on *certain*

⁵⁰ Rt Hon Dominic Grieve QC MP, Why Human Rights should matter to Conservatives, 3rd December 2014 at University College London, page 7.

⁵¹ Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, Report, Session 2013–14, paragraph 111.

prisoners voting was not in breach of the Convention, as the ban was not indiscriminate. The Court emphasised the:

“...importance of the principle that each State is free to adopt legislation in the matter in accordance with “historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into their own democratic vision” (see Hirst (no. 2) [GC], cited above, § 61)”⁵².

It is accordingly open to Parliament to take a very minimalist approach in deciding which prisoners receive the vote.

54. In 2013 a cross party committee of Conservative, Labour, Liberal Democrat and Crossbench MPs and Peers, examined the issue in detail and strongly recommended enacting legislation so that prisoners serving sentences of 12 months or less should be entitled to vote. The same committee noted that our Government had failed to advance any plausible case for the blanket ban, noting that it was ineffective as a punishment.⁵³ The Joint Committee on Human Rights has endorsed this recommendation. Notwithstanding this finding, inaction on the part of successive Governments means that the Court has had no choice but to find continuing violations in subsequent cases. The Court has been unequivocal, however, that the finding of a violation is satisfaction enough for claimants and has consistently refused to order damages or even costs.⁵⁴

55. While the role of making and changing legislation properly belongs to Parliament, requiring Parliament to “approve” individual decisions of a court would set a dangerous constitutional precedent. In a democratic society it is for judges, not Parliament, to decide how the law is applied in individual cases. If Parliament is to be required to “approve” Strasbourg judgments why not make Supreme Court judgments conditional on parliamentary approval? This type of proposal is worthy of a totalitarian regime not a mature democracy that purports to take the rule of law seriously.

56. Legislating to require Parliament to “approve” Strasbourg judgments would also set the UK on a collision course with the Strasbourg Court which would likely result in the UK’s departure from the Convention system. For the UK to seek unilaterally to change the terms

⁵² Scoppola v Italy (No. 3)(App no. 126/05) at 102

⁵³ Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, Draft Voting Eligibility (Prisoners) Bill Report Session 2013–14, page 3.

⁵⁴ See most recently *McHugh and Others v United Kingdom* (Application no. 51987/08 and 1,014 others), Judgment of the Chamber, 10th February 2015.

of a multilateral international agreement on the basis that in any given year perhaps four cases will be decided against it is disproportionate and unsightly, ill-befitting in particular a country that purports to be a leader in internationalism and standard setting. Implementing this proposal would send a very serious and damaging message to the rest of the world. It would suggest that the United Kingdom does not honour its agreements, even when bound to do so by an international treaty, doing terrible damage to the country's reputation and influence, including but not limited to the Convention sphere.

57. How can our diplomats and politicians travel the globe and seek to improve the treatment of individuals in other countries – for example calling on Qatar to improve the working conditions and living standards for immigrants building the World Cup stadium⁵⁵ or discussing with Sri Lanka its obligation to investigate war crimes in accordance with a timetable set by the United Nations⁵⁶ - when it treats its own human rights obligations as advisory? Just as worryingly, it would act as a green light for countries across the world to disregard the decisions of their human rights courts. Niels Muižnieks, the Council of Europe's Human Rights Commissioner, warned that cherry-picking which cases to implement would lead the convention system to “unravel”.

58. Venezuela has already cited the UK's ambivalence on human rights as justification for ignoring obligations under the American Human Rights Convention. In a speech to the Kenyan Parliament in 2014 concerning the his charges for war crimes, Kenyan President Uhuru Kenyatta prayed in aid the Prime Minister's trash talking about the ECHR saying “*The push to defend sovereignty is not unique to Kenya or Africa. Very recently, the Prime Minister of the UK committed to reasserting the sovereign primacy of his Parliament over the decision of the European Human Rights Court. He has even threatened to quit that court*”.⁵⁷ At their hearing in Strasbourg in October 2014, the bereaved families of the Beslan massacre spoke of the importance of the Strasbourg Court in their struggle for justice and argued that a future UK withdrawal would be a catastrophe for the rule of law in Russia. They said -

“The European Court of Human Rights exists as a deterrent to totalitarian regimes like Russia. It works to deter Putin's imperialistic behaviour. [If the UK was to withdraw], it

⁵⁵ See, for example, <http://www.theguardian.com/football/2015/may/18/fifa-tory-mp-damian-collins-world-cup-qatar>

⁵⁶ <https://www.gov.uk/government/publications/sri-lanka-country-of-concern/sri-lanka-country-of-concern>

⁵⁷ “*Kenyan President uses Tory human rights plans to defend war crimes charges*”, Adam Wagner, UK Human Rights Blog.

would be an excuse for our Government to say “We don’t want it either!” Putin would point at the UK straight away. It would be a catastrophe. [The UK] has to understand; we all live in the same world and we all have an impact on each other...It is hard to overestimate the significance of the European Court of Human Rights for the Russian people. It is the only deterrence from this lawlessness. It is our only hope.”⁵⁸

59. The UK very rarely loses cases in Strasbourg. The vast majority of cases brought in the ECtHR against the UK are either found to be inadmissible or contain no evidence of a violation of human rights. In 2012, only 0.6% of cases brought in the ECtHR resulted in a finding against the UK.⁵⁹ In 2013, the court had decided on 1,652 cases concerning the UK. Of these, 1,633 – 98.85% of cases - were declared inadmissible or struck out. In that same year the Court gave 13 judgments concerning the UK, with eight judgements finding at least one violation of the convention.⁶⁰ In 2014 there were only 4 new judgments finding a violation by the UK. The statistics show that in 2014 of all the 47 Member States of the Council of Europe the UK was the State with the highest number of judgments finding no violation of the Convention.⁶¹ This means that there are very few instances where the UK is required to implement decisions of the ECtHR. Unsurprisingly, there has been a significant downward trend in the number of findings against the UK since the HRA was enacted, although that figure is certain to increase if the Government repeals the HRA and introduces a luke-warm incorporation of the ECHR.

Proposal: We will work with the devolved administrations and legislatures as necessary to make sure there is an effective new settlement across the UK.

60. Mr Grayling’s paper shows total disregard for the implications for the Northern Irish, Scottish and Welsh devolution settlements. The issue is dealt with in one short sentence in the part of the paper which deals with the removal of protection for “trivial” human rights. It is perhaps particularly shocking that the Good Friday Agreement, an international treaty painstakingly constructed after decades of civil unrest, and voted on in a referendum across the Republic of Ireland and Northern Ireland receives no mention, less still any serious consideration. Yet the Good Friday Agreement required the British Government to complete

⁵⁸ *“UK must not think only of itself”*: Massacre families urge UK not to leave ECHR, Alice Donald, UK Human Rights Blog.

⁵⁹ The Huffington Post blog, article entitled “Why is Everyone Talking Rubbish About ‘Europe?’” by Sam Fowles, dated 17 January 2014, available at: http://www.huffingtonpost.co.uk/sam-fowles/europe-immigration_b_4609313.html

⁶⁰ <http://www.theguardian.com/law/2014/oct/03/what-is-european-convention-on-human-rights-echr>

⁶¹ Joint Committee on Human Rights, Human Rights Judgments, Seventh Report of Session 2014-15, paragraph 2.6.

incorporation of the Convention in Northern Ireland law and grant direct access to the courts. The proposed repeal of the HRA and its replacement with a heavily caveated version of the Convention would breach the Good Friday Agreement. It is of little surprise therefore that as a guarantor of the Good Friday Agreement, the Government of the Republic of Ireland, has made clear that it sees the UK's proposals for a Bill of Rights "as a *threat to the international agreement that underpins Northern Ireland's fragile but enduring peace process*".⁶² As it has further stated:

*"On the broad question of human rights and the Good Friday Agreement, the views of the Government are clear and unchanged. The protection of human rights in Northern Ireland law, predicated on the European Convention of Human Rights, is one of the key principles underpinning the Agreement. As a guarantor of the Good Friday Agreement, the Government takes very seriously its responsibility to safeguard its institutions and principles".*⁶³

61. Similarly, the Sewell Convention, written into a Memorandum of Understanding between the UK Government and the devolved administrations, receives no consideration in the October 2014 proposals. The terms of the MOU specify that:

*"The UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government."*⁶⁴

62. Where Westminster seeks to legislate "*with regard to devolved matters*" it should seek consent from the devolved administrations. In the case of Scotland, Social Justice Secretary, Alex Neil spoke to the Holyrood Parliament in no uncertain terms:

⁶² *The Financial Times*, 'Ireland dismayed by UK plan to repeal Human Rights Act', 17 May 2015, accessible here: <http://www.ft.com/cms/s/0/e1ad7d2e-fa48-11e4-b432-00144feab7de.html#axzz3wU8UWpYz>

⁶³ Minister for Foreign Affairs and Trade, Charles Flanagan, 'Seanad address on the effect of the repeal of the UK Human Rights Act on the Good Friday Agreement', 14 May 2015, accessible here: <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2015/may/minister-flanagan-addresses-the-seanad-uk-hr-act/>.

⁶⁴ *Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee*, Part 1. The Government has purported to place the Convention on a legislative footing by section 2 of the Scotland Act 2016, which amended the 1998 Scotland Act to include section 28(8). It reads, 'it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.'

“The Scottish government’s position is that implementation of the Conservative government’s proposals would require legislative consent and that this parliament should make clear that such consent will not be given.”⁶⁵

63. On 11 November 2014, the Scottish Parliament voted by 100 -10 in favour of a motion expressing its confidence in and support for the HRA. In June 2015, Northern Ireland’s Assembly similarly passed a motion to reject “any attempts” to repeal the HRA and to recognise its “vital importance”, not simply to those in the UK but to the devolution settlements and the Good Friday Agreement.⁶⁶ In November 2015, the Welsh Assembly passed a motion with overwhelming support stating that the Assembly “oppose[s] any attempt to repeal the Human Rights Act 1998”.⁶⁷ The Welsh Government had previously pledged to do “everything it can” to block repeal of the HRA.⁶⁸ In Scotland the First Minister has stated clearly: *“I oppose the repeal of the Human Rights Act, I think it’s an appalling thing to be doing.”⁶⁹* In Wales, Plaid Cymru Leader, Leanne Wood, has made clear that her party is standing up *“... to retain the Human Rights Act. It’s integral to the Welsh constitution. A majority of votes at the Westminster election here in Wales went to parties that do not want to scrap the Human Rights Act.”⁷⁰* Welsh First Minister Carwyn Jones has further argued that scrapping the Human Rights Act would *“make us look like a banana republic”⁷¹*

64. Due to the considerable opposition in all three devolved administrations, Government is left with a choice between attempting to force an unwanted and deeply divisive “British Bill of Rights” on unwilling nations of the United Kingdom, or opting for the “patchwork” approach whereby the HRA could remain in place in Scotland, Northern Ireland and Wales, providing stronger rights protections for people living in the devolved administrations, while repealing it and replacing it in England, granting less rights protection for English people. Even if this approach were adopted, while stronger human rights protections would remain against the

⁶⁵ The Guardian, ‘Scotland ‘will not consent’ to Tory plans to scrap Human Rights Act’, 12th May 2015.

⁶⁶ See the text of the motion of 15 May 2015, available here: <http://aims.niassembly.gov.uk/plenary/details.aspx?tbv=0&ptv=0&mcv=0&mtv=0&sp=0&spv=-1&per=1&it=0&pid=2&sid=p&pn=0&ba=1&doc=234772%20&fd=01/06/2015&td=01/06/2015>.

⁶⁷ See the text of the motion, NDM5856, available here: <http://www.senedd.assembly.wales/ieListDocuments.aspx?MId=3473>.

⁶⁸ *Wales Online*, ‘Welsh Government will do “everything it can” to block repeal of the Human Rights Act’, 18 May 2015, available here: <http://www.walesonline.co.uk/news/wales-news/welsh-government-everything-can-block-9279496>.

⁶⁹ The Independent, ‘The Scottish Government will try to stop the Tories repealing the Human Rights Act in Scotland’, 12th May 2015.

⁷⁰ <https://www.facebook.com/leanne.wood.714/posts/850506715024013>.

⁷¹ BBC News, Election 2015: *Human Rights Act ‘banana republic’ warning*, 12th May 2015.

Welsh, Scottish and Northern Irish institutions, the people of the devolved administrations would still have diminished protections in relation to actions of the Westminster Government. It is small wonder that the present proposals have been described by the former Special Advisor to the Justice Secretary as a “*political and constitutional minefield*”.⁷² We are yet to hear how the Government plans to approach this fraught constitutional battleground, but it is clear it will face fierce opposition at every turn.

Conclusion

65. Liberty is pleased that the Government has once again seen fit to pause for thought on its policy to scrap the Human Rights Act and replace it with a “British Bill of Rights”. The HRA is a modern Bill of Rights and over the past fifteen years it has been used in countless ways to protect and further the human rights of everyone in the United Kingdom, from victims of rape, modern slavery and domestic abuse to journalists, minority ethnic groups, members of our armed forces and those with disabilities and mental health problems. Liberty’s polling suggests that when the public are given even a small amount of information about how the HRA works they are overwhelmingly in favour of the legislation. This is unsurprising since the HRA exists to give the voiceless the power to hold the State to account for abuse, negligence and mistreatment. There is no doubt that current proposals for reform would radically reduce rights protection in this country. Our human rights are too important to be denigrated in a phoney war waged with aggressive misinformation. Now is the time to be honest about the indispensable protection the HRA offers before it is too late.

Bella Sankey

Rachel Robinson

Sara Ogilvie

⁷² Prospect, ‘*Human Rights Act: Why the Conservatives are wrong*’, Rt Hon Dominic Grieve QC MP, 10th October 2014; The Independent, ‘*Michael Gove must navigate a political minefield before Tories can scrap the Human Rights Act*’, 13th May 2015.