Human Rights or Citizen’s Privileges: The Great Bill of Rights Swindle

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Introduction

It is a daunting privilege to give this year’s Political Quarterly Lecture at such an important and challenging time for human rights and progressive discourse, not just in the United Kingdom but around the world.* Nonetheless, I find myself dwelling on a number of the contradictions of this moment:

• The contradiction of those who support human rights ideals and struggles abroad whilst denigrating them at home.
• The further contradiction of seeking international cooperation in every societal enterprise from fighting crime to combating climate change, whilst simultaneously undermining international human rights values and structures.
• The contradiction of those who seek to assert national sovereignty over human rights adjudication by scrapping the means of allowing British judges so to adjudicate (the Human Rights Act).
• The contradiction of those, from across the political spectrum, who preach ‘law and order’ as a means of holding ordinary people to account but attack the Rule of Law when it acts as a check on the most powerful.
• The grand contradiction—even swindle as I call it—of promoting the idea of a new ‘Bill of Rights’, not as a means of enhancing, extending or entrenching rights and freedoms in the UK, but to dilute or even dismantle their protection.

So the underlying context is of a post-war universal framework of fundamental rights and freedoms that has been under threat for some time—not just from tyrants and terrorists, who understandably never supported it, but from too many so-called western democrats who seek to abandon it in freedom’s name.

First principles

At Liberty (NCCL) and over 78 years of campaigning for rights and freedoms, we have never taken complete consensus over these values for granted. We never flinch from making the underlying argument for human rights and build it upon two foundations:

1. The inherently precious nature of each individual human life and the need to cherish, respect and protect it. This ideal of ‘human dignity’ necessitates some modicum of respect even for those who fail to respect others and who have perhaps lost even their own self-respect. In a modern media discourse which so often pits the forces of faith and reason as polar opposites—notably on issues of the human rights value of equality—I am constantly struck by the ease with which so many people from all the great world faith communities feel able to embrace this basis for human rights.

2. The notion that democracy is the least

* This is the edited text of the 2012 Political Quarterly Annual Lecture delivered at the LSE on 20 March 2012.
worst way to run a civilised society
and that it cannot sustain without a
small bundle of non-negotiable rights
and freedoms underpinning and
underpinned by the Rule of Law. Of
course, common understanding of
democracy is invariably that of peri-
odic elections and of power and au-
thority to govern and legislate passing
to those who win them (or who are
able to negotiate coalitions). But con-
sider the impossibility of democracy
without rights and freedoms pro-
tected by law; the ease with which
popular leadership might attack
minorities (including political minori-
ties), censor the press, disrupt and
arrest opponents, undermine the just-
icy system—even delay further elec-
tions or interfere with their free and
fair administration. This has hap-
pened in my lifetime and yours—all
over the world.

Whilst it has become a common refrain
to set up democracy in tension with
human rights, in truth, it cannot survive
and thrive without them. At best it can be
something approaching democracy
today, mob rule tomorrow and tyranny
for some time after that.

But here I am not primarily present this
foundational argument; instead I attempt
to discuss the havers and eaters of the
human rights cake who think we can
slice, dice and sugar-coat it to suit our
convenience and suit our convenience open to irrita-
tion, inconvenience, challenge or account.

The Great British Bill of Rights Swindle
is an attempted self-deception—a decep-
tion both of those who are for and against
the notion of human rights. It is an
attempt to pick and choose which and
crucially whose freedoms are convenient
for protection at any given time. This is
populism masquerading as policy and
aspiring to be law. And so it is potentially
destructive to law, politics and the values
that underpin democracy itself.

Traditional British fare

Notwithstanding the necessary interde-
pendence between the Rule of Law and
democratic politics, there have of course
been perennial debates as to the
strengths, weaknesses and limits of
each. This has been especially so in a
constitution built upon a fairytale of par-
liamentary sovereignty.

To be clear: I don’t call it a fairytale for
lack of fondness for it and certainly not
out of any disrespect for Parliament
(where many important human rights’
struggles have been won, even in recent
years). My concern is that this sometimes
sentimental fiction has ignored the awe-
some power—not of lawyers and judges
in our system—but of the Executive
(which often wears the cloak of Parlia-
mentary sovereignty) not just to put itself
above the law, but to dominate Parlia-
ment itself.

There have been two other constant
features of our traditional British debate
over human rights protection.

Firstly the idea that judges are some-
how democratically ‘illegitimate’ and
inherently suspect—a road block to
reform. This is closely connected with a
failure to see rights, freedoms and the
rule of law as foundational to all civilised
societies, especially democratic ones. In
my youth, here at the LSE, it was often
prevalent on the left of politics and
coupled with a class-based analysis of
both the judiciary and wider world. Its
famous and most credible exponent was
probably the late great John Griffith1 and
to be fair, one could certainly see some
justification for it in the context of a
previous generation of judges clashing
with municipal government over eco-

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irony of right of centre (and some considerably right of centre politicians) belittling independent judges (whether domestic or international) for being part of an ‘unelected elite’ and insufficiently tough on foreigners, criminals and especially foreign criminals. Such jibes may smack of the ‘toff’ calling the kettle black, but they should serve as a chilling reminder of the importance of promoting both greater demographic diversity in our judiciary and constitutional literacy in our politics and wider society.

Secondly and in strange counterpoint to the first complaint, we were told that Bills of Rights are not necessary in this country because freedom fills the air and flows in the water and if in doubt, the Common Law will provide. So if the traditional left-wing knee-jerk was to distrust the referees with constitutional documents to interpret, right-of-centre complacency thought that they could manage and perhaps even better manage without them. Both of these attitudes would require fundamental review in the dramatic early years of the twenty-first century.

‘Things can only get better . . .’

New Labour in formation in opposition became interested in constitutional reform. Others are better qualified to reflect or remember and comment on why this was the case. Perhaps a genuine belief in radicalism with responsibility? Perhaps an understandable courting of long-term liberal concerns? Perhaps John Smith’s legacy or Professor Klug’s tenacity?

In any event, and though it is often forgotten now, the Human Rights Act passed in 1998 with cross-party support and notwithstanding the anxieties of a press worried about the first explicit right to personal privacy and a Church worried about equality protection. Those concerns may seem particularly poignant in the light of more recent events and debates. Nonetheless each secured a special mention in the Act—reminding the courts of the particular importance of free speech and freedom of thought, conscience and religion respectively. For my own part, I believe such special pleadings to be far less important to the legal operation of the Act than the fact that expression and conscience are themselves fundamental rights enumerated and protected in the Act and the Convention it encapsulates.

Yes—inevitably personal privacy and free expression sometime sit in tension but they also often march hand in hand. Ask any journalist why he will never give up his anonymous sources or so many writers (centuries before even the advent of the internet) why it is sometimes important to be able to publish under an assumed name. And look, not just at the difficult balancing judgements on the fault-line between privacy and speech, but the many occasions when the Convention has in practice protected journalistic freedom.

In turn, it is not surprising that traditional theology and faith communities should sometimes rub up against equal treatment protection. However such communities might reflect on the broad enduring value of freedom of thought, conscience and religion. The right to subscribe to a recognised religion, of course. Equally, the right not to subscribe at all, but surely just as or even more importantly, the right to be a heretic in any faith or political community, and sometimes by so being to keep relevant debate in that community alive.

Postwar fundamental rights and freedoms had of course been settled by a generation well-versed in existential threats to people and democracy—including those that come from both radical movements and national governments with (at least initial) popular support. The social and economic rights of the Universal Declaration were given effect in Britain via progressive politics and a
National Health Service, welfare state and public education system that improved the life chances of vast swathes of the population. But it was a later Labour government that enhanced civil and political rights by granting the right of individual petition to the European Court of Human Rights in 1966.

Extremely fittingly and not before time, therefore, the Human Rights Act of 1998 finally allowed domestic debate and decision-making around the rights and freedoms in the Convention on Human Rights (ECHR). Notwithstanding the learned nature of the present audience, it is perhaps just as well to list this small bundle of protections as the wonderful and much-missed Tom Bingham did at Liberty’s 75th Anniversary Conference in 2009:7

- The right to life and absolute prohibitions on torture, degrading treatment and slavery.
- The right against arbitrary detention and to a fair trial (including the rule against retrospective punishment). (Due process rights with a long domestic tradition.)
- Respect for personal privacy and family life, freedom of thought, conscience and religion. Free expression and association. The right to education, peaceful enjoyment of property and to participate in elections. (Rights that must be inevitably qualified— not least by the need to protect the rights of others but nonetheless vital to human beings as social creatures, rubbing along together in democratic society.)

And then, in my view, the key to the human rights’ kingdom—not least because of the ease with which majorities will trade away and compromise the rights of disenfranchised minorities (whether children or asylum seekers) when there is no immediate loss to themselves—the principle of non-discrimination in the application of human rights. In legal speak: equal treatment. In human speak: empathy or mutuality of respect.

It is in essence the opposite of the hypocrisy and double-standards that can so undermine any value-system or civilisation. As Rabinder Singh QC (as he then was— now Singh J) pointed out in his excellent 2003 LSE Lecture ‘Equality, a neglected virtue’,8 this is the means by which legal discipline and democratic politics perhaps most potently work in combination to protect the human rights of the vulnerable.

But to return to Lord Bingham:

Which of these rights, I ask, would we wish to discard? Are any of them trivial, superfluous, unnecessary? Are any of 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.

So the Human Rights Act brought home the wisdom of generations around the world, but its original genius lies in its exquisite balancing of the rule of law with parliamentary sovereignty and of a framework that can simultaneously link the United Kingdom to Europe, common law jurisdictions and the wider democratic world. These amazing balancing feats are achieved by way of four crucial conversations that are built into this modern progressive Bill of Rights.

Firstly the link between domestic and international human rights discourse is achieved by way of section 2, which provides that domestic courts and tribunals ‘must take into account’ Strasbourg jurisprudence when adjudicating over the Convention rights.

This may seem obvious common sense given that disappointed claimants have, in any event, the right to petition the European Court once domestic remedies are exhausted. However, it is important that the language creates a duty to consider but not be bound by the international court. The court has its authority in a treaty and thus binds governments rather than local courts.
(those governments often enjoy considerable latitude as to how to implement its judgements). Thus the traffic is not all one way and an internationally respected UK judiciary can actively participate in the development of Strasbourg jurisprudence (including by way of disagreement), and can provide a vital link between the common law and civil law worlds.

The second vital democratic dialogue in the Human Rights Act is between the judiciary and parliament and facilitated by way of sections 3 and 4 which require (on the one hand) that all legislation be read compatibly with the Convention rights ‘so far as it is possible to do so’ but further provide that when a compatible reading of primary legislation is not possible (parliamentary intention to the contrary being crystal clear), the judicial remedy of a ‘declaration of incompatibility’ shall have only moral and persuasive effect and will not strike down the law.

This might be viewed by many as a rather weak Bill of Rights model but it does spare the senior judiciary some (if not all) of the personal political scrutiny at play elsewhere in the world and requires Parliament to take ultimate responsibility for having the final word in tense human rights debates.

The third relationship is between the judiciary and executive and managed by way of section 6 of the HRA which (in keeping with traditional judicial review principle) does allow strike-down of Executive action (including secondary legislation) which violates Convention rights, save of course, where such incompatible action was required by incompatible primary legislation. This is of course the provision that has provided consistent irritation to so many successive Home Secretaries whose lazy retort often refers to parliamentary sovereignty—as if the Executive and Parliament were one and the same or as if the Human Rights Act (like other primary legislation to be interpreted by the courts) were not itself, the product of Parliament.

So importantly, the fourth, final and often forgotten vital conversation in the Human Rights Act is between Parliament and the government of the day. Section 19 requires a minister in charge of a Bill to make a statement as to his belief in the compatibility (or otherwise) of the draft legislation with Convention rights, so as to trigger a more informed and rigorous parliamentary debate over the wisdom of its passage.

Some vocal critics of the Human Rights Act (often those who plead their libertarian credentials as if to be a libertarian is synonymous with respect for human rights), impugn the document by pointing to every authoritarian Act of Parliament that ever began with a minister’s stated belief in compatibility under section 19. They should be reminded that such a document is a statement of belief, not a certificate of truth or final judgement. Its purpose is to start a debate between the elected limbs of the constitution, not end it. The need for such analysis and justification, particularly when combined with the attentions of the Joint Parliamentary Committee on Human Rights and Home Affairs Select Committee, can add substantially to the quality of parliamentary scrutiny and empowerment over the most contentious legislation impacting upon Convention rights.

Nonetheless, this so-called ‘libertarian’ griping cannot be completely separated from the rather mixed record on fundamental rights and freedoms of its political parents. The New Labour years brought other important legislation in the Equality sphere, race equality and disability amendment legislation culminating in the Equality Act. The infamous and discriminatory section 28 was repealed;9 the age of consent equalised10 and civil partnerships for same-sex couples introduced.11 In other respects however, human rights values were often dishonoured in thought and word and deed.
War on Terror

It would be airbrushing history in surreal primary colours to suggest that the tensions began with 9/11. Many in the Labour movement had seen civil liberties as the preoccupation of the ‘metropolitan liberal elite’ and long believed in a necessary choice of equality over liberty. Sure enough, unfettered freedom for the wolf gives little comfort to the lamb. However as continued freedom struggles around the world best demonstrate, oppression rarely works with an even hand. Those who favour either liberty or equality over the other should consider how this false dilemma squares with the right not to be a slave.

Further, New Labour’s authoritarian instincts were visible early on, not least in opposition when Messrs Blair and Howard began an arms race that led Britain to overfull prisons at home and secret prisons abroad. Nonetheless, it is a tragic twist of fate that the twin towers atrocity occurred just eleven months after the infant Human Rights Act had been brought into force in October 2000.

The two year preparation period (during which judges and lawyers were trained but the public not educated or informed about Convention rights) seemed to suggest cooling feet on the part of the government. This delayed and almost private implementation conspired with the War on Terror and attacks on legal aid (for all but the poorest and most desperate) to distort the emerging public human rights narrative as mediated by popular press. You seemed to have to be super-rich (protecting your privacy) or suspect (and seeking to avoid deportation or prison) to gain access to justice and actively invoke protection.

In truth, the Act did as much as any bill of rights to temper some of the worst excesses of the War on Terror. Notwithstanding the stubborn resilience of the executive instinct for so-called ‘secret justice’, the HRA dialogue between our highest court and Parliament ended internment in Belmarsh over seven years ago. By contrast, Guantanamo still stands as an icon of injustice even and perhaps especially in the run-up to President Obama’s re-election campaign.

The Strasbourg Court too acted as crucial check on the last government’s claims that ‘the innocent had nothing to hide’ from mass DNA retention and overbroad stop and search powers unhindered even by the generous test of ‘reasonable suspicion’. It seemed that a continental court of judges including those from younger democracies had something real to say about the ‘lives of others’ in the UK and the dangers of complacency about personal privacy. Whilst these positions were often championed by various media outlets, some heard a different drummer when Big Business not Big Brother sat behind the camera.

The Convention also served to facilitate important debates and protections. It should be remembered that Strasbourg litigation preceded and nudged almost every important development in domestic gay equality legislation. Similarly whilst criminal defendants have rightly long held precious protections in domestic common law, the rights of victims of crime, deaths in custody or by state negligence and their bereaved families gained far more from positive obligations on state agents under the Convention and Human Rights Act.

Nonetheless and despite having created and extended such important human rights architecture, the last government set out on a legislative path that tested every part of its design almost to destruction. After internment came control orders and then proposals for 90 and 42 day pre-charge detention. In a poignant fusion of Wars on Terror literal and foreign and metaphysical and domestic, people were convicted for reading aloud the names of dead British soldiers and Iraqi civilians at the cenotaph.
We gained the dubious honour of being CCTV capital of the world and its unregulated use left one Muslim community in Birmingham feeling betrayed and alienated when a counter-terror ring of steel was erected around their homes without their knowledge.\textsuperscript{17} The victims of stop and search without suspicion and DNA retention without conviction were disproportionately young, black and male—equality laws notwithstanding.

Outflanking Conservatives on the authoritarian right became a new orthodoxy that many in the Labour party remain reluctant to question. Much actual and political capital was wasted on the grand folly of ID cards, opposition to which would eventually make it just that little bit easier for liberals and conservatives, Europhiles and sceptics, libertarians and passionate believers in equality protection to coalesce.

**Civil liberties coalition?**

The present Coalition parties were of course flung together in 2010 by a combination of electoral gravity, parliamentary arithmetical and precarious financial markets. But the noble glue on hand was the language not of human rights but ‘civil liberties’. What else could unite such a broad range of views on almost every other aspect of domestic and international politics? Liberal Democrats and Conservatives had walked through the lobbies together before and what’s more they had stayed up night after night doing so and with a song in their hearts. Just as martial artists trust that in a crisis, they will be able to repeat moves that they have rehearsed again and again in the past, common cause around past civil liberties struggles must have made mutual trust in the nervous early days of the Coalition easier.

Just as ID cards policy remains one of the few policies from which the new generation of Labour leadership explicitly resiles, the repeal of the legislation (by now even less popular in times of recession), was the perfect iconic choice for the first Act of the Coalition Parliament.\textsuperscript{18}

And with little encouragement (to say the least), from Her Majesty’s new opposition, there were other signs of early promise from the Coalition on these issues. A review of anti-terror legislation brought 28 day pre-charge detention down to 14 days though a cynic would point to the rebranding of the odious control order regime as Terrorism Prevention and Investigation Measures (‘TPIMs’).\textsuperscript{19} Stop and search powers and DNA retention would be more tightly regulated in line with Strasbourg judgments against the UK and there was even talk (if sadly no early action on) putting a little discretion back into the Extradition system.\textsuperscript{20}

However, the most obvious Justice and Home Affairs fault line in the Coalition relates to ‘human rights’ at home—if not abroad. Whilst many commentators rather assumed that retention of the Human Rights Act would be a non-negotiable condition of Coalition, the relevant agreement deliberately fudged the issue by establishing a Commission to explore a UK Bill of Rights that might build upon the European Convention.\textsuperscript{21} Such an exploration might seem harmless enough until you remember that it is the mechanisms of the Human Rights Act, not the Convention itself, that make its precious freedoms directly enforceable in the UK without a ten-year trudge off to Strasbourg. Combine this with hyperbolic statements from cabinet ministers about cats, criminals and feeling physically sick at the decisions of unelected judges. Further add the silence or occasional goading of the Labour opposition and, it seems to me, there are reasons to be concerned for our human rights future.
Fresh British beef

But rather than merely bemoan what I contend to be misplaced current criticisms of the Human Rights Act, let me attempt to address them in some of their contradictory glory.

Firstly, the Human Rights Act like the Convention it contains is just too European—like the Euro or Silvio Berlusconi or a Bratwurst. Some of the Conservatives who take this position rather resent Churchill’s well-evidenced belief in both universal human rights and promotion of the European Convention after the Second World War.22 Perhaps citing a Great British politician who was at times a Liberal and a Conservative is just too galling to some of those less comfortable with coalition. However, I might ask them to consider the mixed messages that anti-Convention noises send not just to younger and more fragile democracies within the Council of Europe but to potential and embryonic ones around the world.

Nonetheless if Churchill’s legacy is not British enough and harmony in domestic and international rhetoric too consistent, the following pragmatism ought to have some force. The immediate direct effect of repealing or radically diluting the Human Rights Act tomorrow would be to convert the Strasbourg Court back into our country’s first instance Court of Human Rights without no opportunity for adjudication at home or a meaningful British contribution to international jurisprudence.

It would perhaps be remiss to leave this particular criticism without touching on the UK’s current chairmanship of the Council of Europe and discussions over reform of the Strasbourg system. The current debate is as much about spin as substance and all friends of rights and freedoms lament the Court’s backlog and sometime political appointments to it. Aspects of the government’s draft declaration encouraging higher quality judicial appointments and better democratic governmental implementation of human rights are therefore to be welcomed.23

But attempts to alter the Court’s admissibility criteria are more troubling. It is important to remember the huge percentage of cases that go to the court from less entrenched and stable democracies. The backlog is largely attributable to some of those member states and their repeated failure to maintain human rights standards. Government should be wary of doing real or symbolic damage to protections across the Council of Europe for the swift applause that may come with easier deportation or the automatic deprivation of every short-term prisoner’s vote.24

If the first beef is with Strasbourg, the second applies equally to the Strand and Supreme Court. It is the chorus of disapproval at ‘unelected’ judges adjudicating on human rights issues at all. My response is as follows. Under the Human Rights Act, Parliament has the final word so don’t bad-mouth the referees when you lack the courage of your convictions and grudgingly implement decisions with which you disagree rather than introducing or maintaining incompatible legislation that you wholeheartedly defend.

Under the Convention, the United Kingdom enjoys a considerable margin of appreciation in its application of qualified rights and further latitude in choosing how to implement findings of breach. In the case of prisoner voting, some of us might prefer allowing all prisoners the vote but there is an extremely wide range of choices open to Parliament other than the present automatic and universal ban. In the case of Abu Qatada (another cause célèbre that serves to toxify our debate), I would have preferred this suspect to have been charged and tried with a criminal offence many years ago. However, the Court having upheld ‘diplomatic assurances’ in principle, the Home Secretary is pursuing further and better assurances from the Kingdom of Jordan.25
In the end, however, and despite the present chilling proposals for yet more one-sided secret courts in the Justice and Security Green Paper,26 one cannot accept the jurisdiction of any court (domestic or international) with a promise of always winning there. Why should any ordinary person in Britain accept a magistrate’s ASBO if her government will not respect the highest courts in the land and beyond?

The third beef is with rights for the unworthy. This often comes from belief in a simple contract whereby rights are earned and subject to deprivation on poor performance of obligations or bad behaviour. It fails to see the ease with which any of us (however innocent) may at times seem suspicious through suspicious eyes. It furthers fails to recognise the way in which the same person may be a victim as well as a perpetrator and the human and social cost in throwing so many people away. Finally, it forgets the way in which the same person may be a victim as well as a perpetrator and the human and social cost in throwing so many people away. Finally, it forgets the endless legal obligations (many of them exacted under pain of criminal sanction) to which we are all bound. It forgets that most of our human rights are capable of limitation in order to protect others but that there must remain some minimum standards for our protection nonetheless.

The next beef is with ‘rights inflation’ or the so-called ‘trivialisation’ of rights and freedoms. Prisoner voting is once more given as an example of this phenomenon and described by some Human Rights critics as a matter of social policy rather than civil liberties. Once more, I find this a rather disingenuous method of expressing simple disagreement with a particular judicial application of human rights principle. You might argue that the court gave insufficient regard to some possible rational purpose to the disenfranchisement of offenders in custody. But it seems a contortion too far to suggest that voting could be regarded as a trivial social matter rather than a fundamental civil and political right central to democracy.

So many other examples of so-called ‘rights inflation’ (again often in the context of prisoners) relate to claims asserted but not upheld by the courts.

The final beef is perhaps the most real and dangerous one. Not primarily based upon myth or misunderstanding it marks the greatest fault line in so many coalitions across politics. Do you believe in the rights of free-born Englishmen; the privileges that come with the citizenship of any country or in universal human rights for all human beings; every new-born baby and newly arrived asylum seeker anywhere in the world?

It is this fault line which causes so many human rights controversies to centre on deportation. The Convention system and Human Rights Act of course recognise nation states. It is Convention States after all who created them and are ultimately responsible for them. Unauthorised entry to a country is an explicit ground for lawful detention and the economic well-being of the country and national security are explicit grounds for limiting respect for family life though not protection from torture.

But that generation who had witnessed the Holocaust gleaned the importance of building rights on humanity rather than citizenship or any other privileged status of which people might be stripped.

And if we needed the lesson in our own times, we find it in the worst mistakes of recent years. When great democracies abandoned their values in freedom’s name during the War on Terror, the harshest treatment whether by internment or kidnap and even torture was reserved for foreign nationals. Some would say—and have said—‘so what’? In times of crisis it must be nationals first; it is for them rather than all people in a territory (let alone people beyond it) that governments must be responsible. Whilst instinctively attractive to many, this argument forgets the shrinking and interconnected nature of our world, not just of actual travel, migration and multiple ties
that bind but of virtual movement and communities via the internet.

Popular concern about instant extradition is a case in point. We are all foreigners in most parts of the world. So it might be in our better interests to seek to be treated as human beings everywhere. By contrast, the attempted differentiation between British rights, American rights and so on, marks the all-too-well trodden road to Guantanamo Bay.

Now of course it would be possible to draft a UK Bill of Rights that added to rather than subtracted from the rights protected by way of the ECHR and HRA. But that would hardly live up to the expectations of most of those calling for reform.

It would be equally possible to add to the Human Rights Act by entrenching it as a first step to a written constitution, requiring super-majorities of Parliament or public consultation or referendums before any future amendment or repeal. Such innovations also seem quite removed from realistic political promises from any current quarter.

It would even be possible to add to judicial power (perhaps with good cause if independent peers are to lose their role in legislative scrutiny). But do we hear a single senior politician calling for strike-down powers for unconstitutional legislation under a UK Bill of Rights? Hardly. Instead, judge-bashing, human-rights bashing appetites are offered a world where their own liberties will always be protected but never those of the undeserving. Politicians rather than interfering unelected judges will always know the difference and the sun will always shine.

The best possible offering to those of us bemused and concerned by all this is a Bill of Rights that faithfully cuts and pastes the Human Rights Act but without offending references to the European Convention and possibly wrapped in the union flag for more patriotic effect (unless you live in one of the parts of these islands where the flag provokes an uncertain reaction).

Once more, such a drafting exercise is perfectly possible. But does anyone think that this Botox Bill of Rights is going to fool the critics? Instead it would feed the idea that fundamental rights are creatures of fad and fashion to be thrown out or ‘made over’ with each passing government—a kind of permanent constitutional revolution rather than a statement of basic law and values for all democrats and generations to unite round. Further, inevitably disappointed expectations the next time a terror suspect cannot be send abroad to torture might not exactly reignite faith or engagement in democratic politics.

So you will see from my concerns about the government’s Bill of Rights Commission that I see a group of eminent lawyers who have been placed in the Big Brother house when the real beef with the Human Rights Act cannot be negotiated or drafted away even by eminent lawyers. It will rest in the end, dare I say it, on political leadership.

**Conclusion**

Yet out of adversity opportunity may come and perhaps the opportunity not for eminent lawyers but for all of us (across the democratic spectrum) finally to debate, and attempt to resolve, some of the questions and contradictions with which I began.

Why human rights at all? How abroad if not at home? What does it mean to believe in dignity, equality and fairness in difficult times when ‘we’re all in it together’ but some of us seemingly so much deeper in it than others?

Might this not finally be a moment to rediscover or perhaps really discover for the first time a framework of liberty and security, respect and protection, individual, community and democratic society as a lens for policy-analysis and debate?
Might it not be time to realise that internationalism need not just be for government and multinational corporate action but for ethical values, legal protection and people’s struggles and aspirations too? I say all this knowing how lucky I am to be a human rights campaigner in an old unbroken democracy where the biggest danger is complacency and where I have worked for many years without personal risk or sacrifice. Do not treasure your rights and freedoms on my account. Listen instead to someone younger, braver and wiser:

Since we started our uprising against dictatorship in Egypt . . . 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, Director of the Egyptian Initiative for Personal Rights, and veteran of the Tahir Square Uprising of 2011)

Notes

3 R v Secretary of State ex parte Joint Council for the Welfare of Immigrants [1996] 4 All ER 385, [1997] 1 WLR 275; Simon Brown LJ [1996] 4 All ER 385 at 401. . . . After all, the 1993 Act confers on asylum seekers fuller rights than they had ever previously enjoyed, the right of appeal in particular. And yet these regulations for some genuine asylum seekers at least, must now be regarded as rendering these rights nugatory. Either that, or the 1996 regulations necessarily contemplate for some a life so destitute that, to my mind, no civilised nation can tolerate it. So basic are the human rights here at issue, that it cannot be necessary to resort to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) to take note of their violation.’
6 E.g. Financial Times Ltd and Others v United Kingdom (Application no. 821/03).
9 Section 28 of the Local Government Act 1988 which had prevented local authorities from ‘promoting’ homosexuality and preventing schools from teaching the acceptability of homosexuality, was repealed in 2003.
10 The Sexual Offences (Amendment) Act 2000 equalised the age of consent (16 years) for both homosexual and heterosexual acts.
12 A and Others v Secretary of State for the Home Department [2004] UKHL 56.


Article 2 ensured that an inquest was conducted into the death of Naomi Bryant at the hands of a recently released sex offender, Anthony Rice, in 2005 which revealed a shocking catalogue of failings by every department involved.

Article 2 has also, for example, been used to compel investigations into a failure to protect a prisoner from a violent racist attack by a cellmate: R v Secretary of State for the Home Department, ex p Amin (FC) [2003] UKHL 51.

Article 2 has also been used to secure an inquest into the death of a British soldier from a treatable illness while on active service: R (on the application of Smith) (FC) (Respondent) v Secretary of State for Defence (Appellant) and another [2010] UKSC 29.

Mental Health institutions have been held to account when their failures have allowed vulnerable patients to take their own lives: Savage v South Essex Partnership NHS Foundation Trust [2010] All ER (D) 196 (Apr).

Article 3, for example, prevents victims of rape from being cross-examined by their alleged attackers: JM v United Kingdom Application no. 41518/98.


• Reduction 28 to 14 days: clauses 57 and 58 Prot of Fr Bill
• Section 44: clauses 59 to 63 Bill
• DNA: Chapter 1 of the Bill


