TALK TO BACFI

THE BRITISH BILL OF RIGHTS- SUBSTANCE OR POLTERGEIST?

INTRODUCTION

It is a great pleasure to be with you this evening and a particular privilege to be asked to give this year's Denning Lecture. Rather worryingly I realise that I belong to the youngest generation at the Bar to have had the possibility of seeing him in action, sitting as Master of the Rolls and listening to his quiet and trenchant judgments and marvelling at how his wig, which seemed by the early 1980s to have reached a state of existence semi detached from his own, was only kept from walking off by being occasionally patted down.

I do wonder at what he would have made of the current revolution in our country's affairs, with a government about to embark on a legal and political upheaval of a dimension unprecedented in our modern history, in unraveling our relationship with the European Union. But this is only the most dramatic twist in a debate about our country's governance and future which has developed so markedly since those distant days when he sat on the bench and identified clearly the significance of the incoming tide of change from EU law. As we look around the legal and political scene we can also see the unresolved issues relating to Devolution which continue to threaten the break up of the United Kingdom. And we have the continuing tensions between the idea of a British state adherent to

and compliant with norms of behaviour enshrined in international treaties and principles of parliamentary sovereignty and concerns that traditional structures of governance are being eroded by judicial activism.

All these topics are linked. But I could not hope to do justice to them all, so I have chosen this evening to concentrate on the last of these which centres at present on whether or not we should replace ("scrap" was the word favoured by the last Prime Minister) the Human Rights Act and replace it with a British Bill of Rights. This is a subject on which I can't make claim to complete objectivity because, as I was once informed by a helpful press statement, put out by the number 10 Downing Street press office, that was the reason for the ending of my Ministerial career as Attorney General. But I think that the most interesting facet of the issue is that it has now been under discussion in political circles for over ten years and nothing has happened. The new Prime Minister is of course on record as saying during the EU referendum that pulling out of the ECHR was more important than leaving the EU; but she has since indicated that the Government will not pursue this. Yet the new Lord Chancellor, Liz Truss, has stated repeatedly that getting rid of the HRA remains a top priority for the new government. What is now completely unclear is what purpose might be served in doing this if the compatibility of our laws with the ECHR is to be retained.

So at the risk of becoming a single issue politician, (which I am now trying to escape by attempting instead to engage with Brexit) I thought I would return to this topic one more time, not for some academic legal discourse but as a political matter. I would like to examine why this issue jangles around my Party so noisily and sustainedly and whether there is any prospect of a constructive outcome.

BACKGROUND

But first I think we need to look at how we have got to where we are.

The ECHR and our country's adherence to it has long been the subject of political polemic. It is curious that it should be so, because its origins undoubtedly reflect British constitutional traditions of freedom and the Rule of Law that are generally accepted in our country as the foundations on which good government should be conducted. It is suffused with principles that can be traced back to Magna Carta, Habeas Corpus and the Bill of Rights of 1689. The ten key rights originally protected by the Convention were, with the exception of Article 8 on privacy and family life, a classic exposition of the liberties which successive generations of British politicians and the public routinely claim as our shared inheritance. It fits with a national narrative that can be seen as early as Chief Justice Fortescue's celebration of English medieval exceptionalism in "de Laudibus Legum Angliae" of 1453. There the use of torture is deprecated and trial by jury and due process

praised and its uniqueness to England. He said that "he would rather twenty evil doers to escape death through pitie, than have one man unjustly condemned". There is even an excellent section in it on government by decree which might be relevant to the current debate on Article 50 "the King of England" he said "cannot alter nor change the laws of his realm at his pleasure".

And of course to this we can add the Case of Proclamations of 1610, the Petition of Right of 1628; Lord Mansfield's ruling on slavery in Somerset's case and the commentaries of William Blackstone.

But for all that, when the Convention was being promoted by a Conservative lawyer politician, Sir David Maxwell Fyfe, in the late 1940s, adherence to it was controversial. The Convention was seeking to give concrete expression to the UN Charter, itself promoted by Eleanor Roosevelt as the Magna Carta of the 20th century. But there was anxiety about the UK being fettered by an international legal obligation that was in the last resort to be interpreted by an international tribunal. There was also tension between the UK preference for a detailed list of clearly defined rights and that of the French and some other nations for a general list of principles derived from the more abstract ideas set out in the Declaration des Droits de l'Homme et du Citoyen. Contemporary FCO advice to Ministers showed characteristic caution about all this. It said: "To allow governments to

become the object of such potentially vague charges by individuals is to invite Communists, crooks and cranks of every type to bring actions."

It is doubtless true that most Britons in 1950 considered that our Common Law and unwritten constitution upheld by a democratic Parliament offered a better level of protection for freedom than any continental model. So, in signing up to the Convention, we were doing something new. We were intent, through the creation of rights which we ourselves believed we already enjoyed as liberties, not so much on protecting ourselves, but on setting a standard of behaviour for other states towards their citizens that could be universally applied. We were the first country to ratify the Convention in 1951 and Lord McNair, a British legal scholar of renown, became the first President of the Court of Human Rights in 1959. Most importantly we then came through another debate on the Convention in the mid 1960s when we recognised the right of individual petition. Interestingly the principle advocate for this in Parliament was Terence Higgins, a right of centre Conservative MP, who wanted it as a check on curbs on freedom that a Labour government might be minded to introduce. This more than anything else provided the the conditions which transformed the Strasbourg Court from an international tribunal intended to deal with a limited number of cases into the institution it is today. It also made apparent the need to incorporate the ECHR, in some way, into our own domestic law to allow the rights to be claimed here.

As you will know, in the run up to the enactment of the Human Rights Act there was much discussion as to whether or not a home grown Bill of Rights might be better than mere direct incorporation of the Convention into our law. That idea foundered because there was no agreed view as to what the scope of such a Bill of Rights should be. Some wanted socio-economic rights so they could be enforced through the courts. Others, including the few Conservative lawyers who got involved, wanted to protect core liberties over and above those covered by the Convention, such as for example the right to trial by jury in England and Wales.

But the principal problem was that any discussion rapidly hit the barrier touching on the fundamental doctrine of Parliamentary sovereignty. For a Bill of Rights to have a powerful effect domestically it would have to include some form of judicial override of subsequent legislation that was incompatible with it. The then Conservative government of John Major found these issues far too divisive to get involved. When Labour won in 1997 they proceeded on a deliberately minimalist approach with very little consultation at all. Parliamentary sovereignty was respected by Section 2 of the HRA. No attempt was made to add other rights. The only glosses in respect of freedom of expression and freedom to manifest one's beliefs have proved to be essentially declaratory. And after enactment of the HRA, it is noteworthy that the then Labour government did very little to promote the concept of Human Rights with any distinct national narrative. Indeed, within

a few years it was advocating restrictions on traditional rights, such as derogation from the Convention for the imposition of detention without trial and, subsequently, 90 and 42 day pre-charge detention which ran entirely counter to them.

So I don't think we should be surprised that, the main promoters of the HRA having become so ambivalent as to its principles, those who worried about its impact in empowering individuals considered "underserving" by the tabloid Press, to bring claims, should have been left unchallenged in their belief that the HRA was unacceptable. Although at the Third Reading of the Human Rights Bill in 1998 my friend and colleague the late Nicholas Lyell QC, who was then Shadow Attorney General, had been able to persuade William Hague that its principles and intention were sound and it should not be opposed, by 2006, when David Cameron became Leader of the Opposition, the Conservative position was entirely changed. Michael Howard, seared by his experiences with the Strasbourg Court when he was Home Secretary, in deportation and extradition cases such as Chahal, was hostile to the HRA, which he considered an excessive fetter on executive discretion. The new leader had been Howard's Special Adviser and had witnessed these problems. Furthermore, News International, with which he wished to build a relationship in order to win an election, was implacably opposed to the progressive development of privacy law which was one of the

consequences of the Human Rights Act and was leading a campaign against the HRA and the ECHR.

This was the genesis of Cameron's speech to the Centre for Policy Studies in 2007 which committed the Conservative Party to repealing the Act. In it he stated that there would be a British Bill of Rights to replace the HRA and that its wording and consequential interpretation by our own national courts would be sufficiently different for it to enable the United Kingdom to exploit to the maximum the "margin of appreciation" allowed for by the Strasbourg Court in the interpretation of the Convention by member states. This approach was based on the principle of "subsidiarity" in the Convention that recognises the right of signatory states to interpret and apply the Convention with differences reflective of national traditions. This David Cameron believed would help the UK to prevent the Convention being used to create rights here unintended by its creators. As I was Shadow Attorney General and then Shadow Home Secretary and Shadow Justice Secretary in the period up to the 2010 election, I was tasked with producing a paper on how this could be done and set up a small commission of Conservative and other lawyers to help me. My one insistence was that the end product must be compatible with our continued adherence to the Convention. When we produced a position paper in late 2009 for David Cameron highlighting the difficulties involved with the proposal and the very limited changes that could

be achieved, it was put in a bottom drawer and the work was not pursued. But this did not prevent the Conservative Manifesto of 2010 repeating the promise.

Under the Coalition Government, no changes could be made without the agreement of the Liberal Democrats. So the Government set up another commission under Sir Leigh Lewis to inquire fully into the matter. Its report is excellent reading for academics but came to no conclusion. It did set out the complete rejection of change by all the devolved administrations in response to its consultation and the variance of views between the Commission's members on what a Bill of Rights might contain. It may have been frustration at this lack of progress which prompted David Cameron to consider a far more radical solution of crafting a Bill of Rights free of the need for compatibility with the ECHR and it was this idea that resulted in the Conservative Party paper of October 2014 which formed the basis of the Conservative Party manifesto statement last year to which the Lord chancellor still adheres.

THE 2014 PAPER

In the paper, the intention behind the Convention was lauded. But while it was described as "an entirely sensible statement of the principles which should underpin any democratic nation" and it was acknowledged that the UK had a key role in its drafting but it then went on to assert that "Both the recent practise of

the Court and the domestic legislation passed by Labour (that is to say the HRA) has damaged the credibility of human rights at home.". It accused the Strasbourg Court of mission creep and outlined a programme of fundamental change, advocating the repeal of the HRA and its replacement by a new Bill of Rights which would clarify rights, particularly those under Articles 3 and 8, to prevent their alleged abuse in respect of deportation, by changing the tests to be applied. There was a desire to confine the right to invoke a breach of the Convention to "cases that involve criminal law and the liberty of the individual and other serious matters", with Parliament setting a threshold below which no Convention rights would be enforceable. It wanted to limit the the reach of human rights cases to the territory of the UK, removing all activities of the armed forces overseas from its scope. It also advocated breaking the link between British courts and the Strasbourg Court so that no account need be taken of that court's rulings and further demanded a special status for the UK, where Strasbourg judgments would be merely advisory and threatened leaving the Convention entirely if this could not be achieved. This would then leave us with a domestic Bill of Rights which would have the Convention text glossed to remove the areas of irritation identified and which would be interpreted solely by our own courts subject, as is the HRA itself, to Parliamentary supremacy in respect of primary legislation.

The authority of the paper was not helped by a series of assertions which are manifestly erroneous. Thus, complaint is made in it that the Strasbourg Court has

ruled in the case of Dickson v UK 44362/04 2007 that the UK government should allow more prisoners to go through artificial insemination with their partners in order to uphold their rights under Article 8. But this sidesteps the fact that this was already allowed on grounds of maintaining family relationships before the ruling and that the ruling does not confer an absolute right to this service at all with the Justice Secretary considering each case on its merits. As of 2013 it had led to only one application being allowed.

Another example is the allegation that the Strasbourg Court has made the imposition of Whole Life Tariffs for murder impossible because in its judgment in Vinter v UK 66069/09 it has insisted that there has to be some possibility of review of such sentences to ensure compliance with Article 3 of the Convention on inhuman treatment. Yet, as had been made clear by the case of R v McLoughlin [2014] EWCA Crim18, such a review mechanism has always existed and has to be operated compatibly with Convention rights, thus making the Vinter case hypothetical and of no practical effect.

The paper was also short on detail. It indicated, for example, that a foreign national who “takes the life of another person” would be excluded from invoking Article 8 altogether so as to be able to remain in this country. But what “taking a life” meant was not specified. It was unclear if it covered just murder or included manslaughter and causing death by dangerous or even careless driving which

might properly not even attract a custodial sentence. It was also unclear if it was intended to include minors. The possibilities of this leading to grave injustice were ignored.

When published, it was announced that the paper would be followed by a draft bill. But this has never happened. The paper's poor reception was consistent, I subsequently discovered, with private opinion polling for the Conservatives, which showed that the desire for a Bill of Rights and repealing the HRA was not in the top ten priorities of the electorate and was only supported by 16% of those polled. So it was relegated to deep inside the Manifesto. It re-emerged as a continuing commitment on the Conservative victory in May 2015 but with the new Lord Chancellor, Michael Gove, hinting that leaving the Convention was not desired and might not be necessary, although without explaining at all how this could be reconciled with the thrust of the pre-election paper. A draft bill for consultation was then promised for the autumn of last year, but the date kept on slipping. The next news was that the matter had been transferred from the Ministry of Justice to the Cabinet Office and it was hinted that the Bill of Rights was now being looked at in the context of not only dealing with the HRA but also as a way to assert parliamentary sovereignty against decisions of the European Court of Justice in Luxembourg and enable adverse judgments of that Court to be ignored, notwithstanding the EU treaty requirements of giving 'Direct Effect" to ECJ decisions. This development culminated just before the Referendum

campaign started in stories of an imminent announcement of proposals that were designed to keep Boris Johnson in the Remain camp. When he went for Leave, the whole thing was dropped. Today neither of the two ministers most connected with the Bill of Rights project remain in office following Theresa May becoming the new Prime Minister. We are thus none the wiser as to what the Government now wants.

WHY THE GOVERNMENT IS WRONG IN ITS APPROACH

In my view the reason why the Government finds it so difficult to carry forward any such project is that its desire for a measure to appease a small section of the public and the media and rid itself of an occasional administrative irritant keeps on coming up against the reality of the benefits given to UK citizens by both the ECHR and its incorporation into our law through the HRA.

If we leave the Convention we would be spurning the reasons why we signed up in the first place. Notwithstanding our pride in our sovereignty, it has been the intention and policy of successive UK governments over the last two centuries to seek to make the World a better and more predictable place by encouraging the creation of international agreements governing the behaviour of States. We have records of over 13,000 treaties that the UK has signed and ratified since 1834, ranging in scale from the UN Charter to bilateral fishing agreements. Over 700

contain references to binding dispute settlement arrangements in the event of disagreement over interpretation as does the Convention. And, increasingly, these treaties such as the UN Convention on the Prohibition of Torture or the creation of the International Criminal Court deal with a state's conduct towards those subject to its power. This has become so important that the Ministerial Code, until deliberately changed last year, made express and specific reference to the duty of UK ministers to respect our international treaty obligations. This was then deleted in a fit of pique by David Cameron at being too frequently reminded of this point. But the deletion does not remove the obligation, as the Cabinet Office has conceded. It is part of Lord Bingham's eighth principle of the Rule of Law. The original decision to sign the Convention and keep adhering to it thereafter is because it was and remains in our national self interest to promote the Convention's values to our co-signatories and others. This is something the UK is recognised as doing rather well.

A moment's examination shows that the impact of the Convention has been favourable for the development of the Rule of Law and principles of justice in our country. Over the years it has produced a number of landmark decisions which have challenged and halted practises which were once considered acceptable in Western democracies but which would now be seen as unacceptable by the vast majority of the public. In Marckx v Belgium in 1979 6383/74 it ended state discrimination against children on the grounds of illegitimacy. In Dudgeon

v UK 7525/76, the criminalisation of homosexual acts in private in Northern Ireland was held in breach of the Convention, a decision with a beneficial impact far more important elsewhere than in our own country. In Rantsev v Russia 25965/04 people trafficking was held to fall within the definition of slavery in Article 4 and a positive obligation placed on states to halt it.

One of the grounds advanced for our uncoupling ourselves from the Convention is the complaint that the Strasbourg Court has interpreted the Convention as a "living instrument" in a manner that undermines the intention of its signatories. Taken to its logical conclusion, this argument would mean that the court remained fixed in the moral and ethical standards of 1950. On that basis none of the cases I have just cited would ever have been decided in the way they were. There is in any case nothing unusual in judicial interpretation based on current values. It is rooted in our own Common Law tradition as Baroness Hale has pointed out when she said "….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 applied to a same sex partner.

It would of course be possible, whether or not we left the Convention, to legislate to prevent our substitute Bill of Rights, unlike the HRA, being subject to such interpretation. But this would be an extreme form of parliamentary and political micro management. And if we were still wishing to be adherent to the Convention, it would raise the risk of there being more instances where decisions of our own courts conflicted with those of the Strasbourg Court. One suggestion made by the Government is that the read down provisions of section 3 of the HRA should be removed. Such a move will lead to more declarations of incompatibility, clogging up the legislative timetable of Parliament, unless it is just the cue for the Government to ignore such judgements.

That suggestion also fails to take into account the value of the cross fertilisation between our courts and the Strasbourg Court. Strasbourg jurisprudence has been influenced by our own. We have recent examples. In Al Khawaja v UK26766/05 in 2009, the Court moved from a condemnation by a chamber of the Court of our rules on hearsay, to the acceptance of the decision of our Supreme Court, when the Grand Chamber revisited the case, following the rejection of its previous judgment by the Supreme Court in Horncastle. We have also been the beneficiaries of the Strasbourg Court's ruling in S and Marper 30562/04 in 2009, that the blanket retention of DNA, practised in England and Wales (the only jurisdiction in Europe to do this) was in breach of the right to a private life. Our own House of Lords had earlier held this policy compatible with Convention

rights. Yet I have never heard a complaint since about the Strasbourg Court decision which led to a change in our law.

This isn't to say that all is perfect. The confrontation that has developed between the Strasbourg Court and Parliament over the case of Hirst 2005 740/01 on prisoner voting is a good illustration. In itself the issue is largely symbolic and of little practical consequence. But symbols can matter in a parliamentary democracy and the judgement was in my opinion an unnecessary interference with a reasonable policy supported by Parliament and public. Senior members of our judiciary have expressed concern that the Court has been failing at times to respect national differences of interpretation which should be allowed under the Convention and has been failing to appreciate the practical limits of its authority in giving judgments which contradict settled democratic will.

But Hirst is now eleven years ago. The past excessive micro manipulation of the Convention by the Court, faced by an understandable desire to protect human rights in countries with poor records has in recent years shown signs of modification. The Brighton Declaration of 2012, negotiated by Ken Clarke when Justice Secretary and myself, has helped the efficiency of the Court and reduced its backlog of cases. It has also started the constructive judicial dialogue between national courts and the Strasbourg Court. Horncastle was an illustration of this. Another example is the Animal Defenders case, where the Court deferred to our

courts and legislature in accepting our ban on political advertising. At present 99% of cases brought against the UK in Strasbourg are struck out as inadmissible.

Constitutionally, leaving the Convention or placing ourselves in deliberate incompatibility with it, calls into question the Devolution settlements to Scotland, Wales and Northern Ireland which are underpinned by Convention rights accessible through the HRA which the devolved administrations must observe, The Westminster Parliament could legislate to change that, but we know this would be against the wishes of all devolved governments and they will argue that the UK Government will be breaching both the Sewel Convention and latest devolution statutes if it does so. In the case of Northern Ireland it would also breach the terms of the Belfast Agreement which is an international treaty with the Irish Government. To get round this it has been suggested that the Bill of Rights should contain the text of the Convention, which would meet the requirement of the Belfast Agreement, but then have the controversial Articles such as 3 and 8 glossed by means of sub clauses so that they will be interpreted thereafter in the way the Government thinks they should be. A moment's thought must cast doubt both on the feasibility and effectiveness of such a measure.

Nor can we, at least yet, ignore that adherence to the Convention is implicit in our EU membership. That of course may change but in the meantime there is risk that if the UK denies rights under the Convention to its citizens they may try to

claim them under the EU Charter of Fundamental Rights which unlike the ECHR has direct effect in our law.

Finally in this critique the Government underestimates the positive impact that the Convention has had on improving the Rule of Law in places where it has never previously existed and also appears oblivious of the destructive impact which our non adherence to its principles will have on its wider effectiveness.

Just to take one example of a country with a difficult human rights record illustrates this. Turkey generated between 1959 and 2011 over 2400 adverse judgements. It was responsible for 43% of all cases that came before the Court alleging violations of Article 10 on freedom of expression. The judgements cover cases ranging from the action of the security forces against the PKK, demands for wearing headscarves at universities, the right to criticise prison conditions, the expropriation of Greek Cypriot property in northern Cyprus, conscientious objection to military service and the banning of a political party. In all these the Strasbourg Court, has in the words of a leading Turkish legal academic, Basak Cali, provided "a reasoned and authoritative statement about the boundaries between rights and space for politics in turkish domestic political discourse".

And, despite the challenges, we can see the same thing in other countries with difficult records, such as Russia, where the Convention is routinely invoked to

challenge rights violations by public authorities including beatings up and torture by the police and, similarly, in Romania and the Ukraine. Even countries with better records have benefitted. I have not heard the UK government criticise the Strasbourg Court for its decisions in Vallianatos v Greece 201429381/09 and Oliari v Italy 201518766/11, where both governments were held in breach of Articles 8 and 14 in not including same sex couples in their new civil union laws.

It is suggested at times that the ECHR lacks value because so many of its judgments are not being implemented. The backlog does indeed stand at about (CHECK FIGURE) and some countries with long histories of rights violations, such as Turkey, Russia, Ukraine and Romania are principal offenders. Despite long delays, compliance is usually in the end achieved, but this is of course entirely due to peer group pressure exercised through the Council of Europe. Our threats to withdraw or to ignore the Convention are not helpful in this respect and this has an impact beyond Convention state members in their attitude to human rights obligations. Russia has invoked our attitude to the ECHR to justify non implementation. But so has the President of Kenya in obstructing the work of the ICC in Kenya, at a time when we were doing all we could to support the authority of that court. In contrast our willingness to follow the ECHR judgements scrupulously in the case of the deportation of Abu Qatada to Jordan, helped ensure reforms to the Jordanian criminal justice system which were both needed and welcomed.

All this highlights for me the irrationality of the Government's present stance. Obviously, if the Government chose to take us out of the Convention entirely, then it would be open to it to put together a Bill of Rights which could give us rights substantially different and probably inferior to those that the Convention currently gives us. Such a change would further come at a great price to our international standing and our ability to pursue our aim of improving human rights on our planet, quite apart from its effect domestically. If, alternatively, we are intent on fiddling with the HRA to try to reduce the impact of Strasbourg Court jurisprudence, whilst maintaining our adherence to the Convention, the likely outcome is going to be minimal. We have already addressed some issues with no change to the HRA at all, as we can see with the tests on balancing the right to a private life with public safety in section of the Immigration Act 2015 and the possibility of future permissible derogation from the Convention to cover battlefield detention overseas by British Forces. Trying to go further and manipulate the Convention through a British Bill of Rights will not work. The benefits are illusory and I suspect this is why this project never gets anywhere.

AN ALTERNATIVE APPROACH

It may seem strange therefore that I should try and suggest any way in which a British Bill of Rights might serve a purpose. I think it could, but this needs us to

get away from the current impasse of trying to use such a step to dilute the Convention.

It seems to me that its real relevance could be to help address the current political trends whereby the traditional structures of authority and governance in our country are being subjected to profound change of which that proposed for the Convention and the HRA are only a small part. In this process principles such as that of Parliamentary Sovereignty look increasingly called into question.

The first and greatest of these is undoubtedly devolution. Politically the Scottish referendum showed that the Scots have the power, subject to referendum, to overturn the act of Union of 1707 at such time as they might choose. Meanwhile there is continuing friction between London and Edinburgh on the details of present devolution and this is before we get to the issues of the Sewel Convention, devolved powers and Brexit. Other parts of the UK have complained at the way devolution affects their interests. There are complaints that devolution to Wales was very poorly crafted in terms of giving primary legislative powers to the Welsh Assembly. Indeed, there is some evidence that the Brexit vote itself was in part an English revolt against the constitutional change going on around them. It is also noteworthy that, in 2015, the UK Parliament carried out a major constitutional transformation in giving a blocking vote at Westminster to English and in some cases Welsh MPs, by changing the standing orders of the House of

Commons. This profound change in the corporate identity of the sovereign Parliament was accomplished with no statutory underpinning whatsoever. It has no permanence and could be reversed by simple motion of the Commons. We are also witnessing a dispute between the Government and sections of Parliament about the constitutional framework in which Brexit should be triggered and progressed, which will now involve our Supreme Court in what may be one of the most important constitutional cases in our modern history.

The Article 50 case also illustrates the growing but unexamined involvement of our judiciary in matters that might once have been seen as purely political and this extends well beyond human rights and the EU into other areas.

The case of Evans v Attorney General shows the Supreme Court putting a shot across Parliament's bows. It was my duty, as the matter related to a previous Labour administration, to decide whether or not to exercise the executive veto provided for in clear terms in the Freedom of Information Act, to overrule a decision of the Upper Tier Tribunal that the correspondence of the Prince of Wales should be disclosed. I exercised that veto as my analysis of the public interest differed markedly from that of the Tribunal.

The Supreme Court struck my decision down, not on the basis that my decision was unreasonable, but because it considered that Parliament could not have

intended to give a minister power to override a superior court of record in this way. It was apparent that the majority of the court were deeply concerned by their perception that such a direct statutory power would undermine the Rule of Law. But to reach their conclusion, the majority engaged in some highly creative statutory interpretation to find a way of negating a clear legislative provision whilst trying to avoid a constitutional collision.

And I would just add as a further example, the minority dissenting judgment of Lord Kerr in R(JS) v Work and Pensions Secretary [2015] 1WLR, concerning the lawfulness of the benefit cap and its compatibility with Article 3.1 of the UN Convention on the Rights of the Child. Lord Kerr suggested that such a treaty obligation should be directly enforceable in domestic law on the basis that, as the UK had chosen to subscribe to its standards, our Government should be held to account as to its actual compliance. If such a view were ever to prevail it would entirely transform our dualist system separating international and domestic law to startling effect.

All these trends make me believe that the time has come to consider a written constitution. It isn't a panacea but it would provide an opportunity for greater clarity and certainty as to how power is distributed and exercised. It would also allow constitutional change to take place by a single process and not in the ad hoc

way that it is happening at present. A preliminary Constitutional Convention could help shape its contents.

As part of that I do see a place for a Bill of Rights, which would define and protect rights constitutionally rather than in the terms of the Convention, although it would have to be compatible with it. It would enable us to protect rights and liberties on which the Convention is silent, as first suggested in the 1990s, and to articulate a balance between privacy law and freedom of expression. It could provide the place to set out the key rights for areas of devolved governance and as and when we leave, to consider what rights if any currently coming from the EU we might wish to retain. If we want to avoid a detailed written constitution, the Bill of Rights could be the framework and we could include in it, updated, those clauses of the Bill of Rights of 1689 and the Parliament Acts that underpin our parliamentary democracy. It could also lead to the setting of clearer boundaries between the role of the judiciary and that of the UK Parliament. Those boundaries are likely to offer better protection from supra national courts such as the Strasbourg Court and for as long as we remain, the European Court of Justice than we have at the moment. These courts have shown high levels of deference to well formulated, democratically approved constitutions and basic laws.

CONCLUSION

The continuing desire by the Government to replace the HRA with a British Bill of Rights, stems in large part from the uncertain boundary between parliamentary sovereignty, executive discretion and judicial intervention. All these reflect rapid change in our traditional constitutional order that politicians find uncomfortable to acknowledge. So, instead, I experience many colleagues trying to turn back the clock and reassert a rose tinted and mythologised version of Parliamentary supremacy. But this will fail as the complexity of current power structures and indeed our society makes it impossible to achieve. It might be better to accept these changes and move forward. A Bill of Rights, based on our traditions of democracy, the Rule of Law and a shared allegiance to constitutional monarchy, offers an opportunity of bringing and keeping us all together through periods of great change, if we keep in mind the principles that have served us so well so far in our common history.

But that means ditching a political proposal for a Bill of Rights that is no more than a prolonged psychic crashing and banging against international legal obligations which do us no harm and are one of our own best contributions to the improvement of the human lot. Like all poltergeists its noise and nuisance is, in the end, just sad.

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