

CHURCHILL'S LEGACY:

THE CONSERVATIVE CASE FOR THE HUMAN RIGHTS ACT



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Contents

| | |
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| <i>Preface by Shami Chakrabarti, Director of Liberty</i> | 5 |
| 1: Why the Human Rights Act Matters | 6 |
| 2: The Conservatism of the HRA | 17 |
| 3: Addressing the Critics | 28 |
| 4: Dispelling the Myths | 36 |
| 5: A British Bill of Rights? The New European Charter? | 51 |
| Appendix: The Human Rights Act (abridged) | 58 |
| Acknowledgements | 69 |
| Endnotes | 70 |
| About the Authors | 75 |

*At Canterbury did they meet
Upon a certain day,
With sword and spear, with bill and bow
And stopt the conqueror's way.*

*"Let us not yield, like bond-men poor
To Frenchmen in their pride
But keep our ancient liberty
What chance so e'er betide:*

*"And rather die in bloody field
With manly courage prest
Than to endure the servile yoke
Which we so much detest."*

From *The Valiant Courage And Policy Of The Kentishmen
Which Overcame William The Conqueror, Who Sought To Take
From Them Their Ancient Laws And Customs, Which They Retain
To This Day.*

Preface

Liberty (the National Council for Civil Liberties) is a cross-party, non-party membership organisation that, for the past 75 years, has been at the heart of the struggle for rights and freedoms in modern Britain. In our work, promoting and protecting fundamental rights and freedoms, we constantly draw from all the great democratic traditions of this country, not least the Conservative one. We are therefore enormously grateful for this contribution to the current debate by Jesse Norman and Peter Osborne, two leading modern conservative thinkers.

Jesse Norman, a Conservative parliamentary candidate, has had a diverse and varied career as a businessman, academic and political adviser. Peter Osborne is a well-known and respected conservative journalist, author and commentator. Together they are extremely well placed to offer a critical conservative analysis of British history and the very important role that centre-right thinking has played in the development of fundamental rights and freedoms. As they have so ably demonstrated, the European Convention on Human Rights, which the *Human Rights Act 1998* (HRA) incorporates, largely originated from British common law traditions and it was largely drafted by British conservative lawyers.

Liberty's current campaign, Common Values, seeks to dispel the myths that have sprung up about the HRA, broaden understanding and promote the importance of human rights in the UK today. I believe that democrats of all persuasions must better cherish the civil and political rights that are essential to democracy itself. Those rights have a long tradition in Britain and were agreed the world over in the wake of World War II.

We hope that Norman and Osborne's outstanding Tory case for the Human Rights Act will help modern Conservatives rediscover their real roots in rights and liberties.

Equally, a new generation of liberal left-thinkers should be provoked into asserting the role of their forebears in the struggle for civil liberties and human rights. Isn't it time that party politics delivered a race to the top and not the bottom when it comes to defending the individual dignity of everyone in our country?

Shami Chakrabarti, Director of Liberty – September 2009

1: Why the Human Rights Act Matters

We must never cease to proclaim in fearless tones the great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world and which through Magna Carta, the Bill of Rights, the Habeas Corpus, trial by jury, and the English common law find their most famous expression in the American Declaration of Independence.

Sir Winston Churchill, “Iron Curtain” speech,
Fulton, Missouri 1946

The purpose of this book is to make the Conservative case for the Human Rights Act.

We will show that the European Convention of Human Rights (ECHR), which the Human Rights Act (HRA) incorporates into British law, is an impeccably Conservative document. It was inspired by Sir Winston Churchill, drafted in large measure by the Tory politician David Maxwell Fyfe (later Lord Chancellor Kilmuir), and ratified by Britain in March 1951, the first nation to do so. And we will argue that all of the great ideas embodied by the European Convention – including those of freedom under law, restraint on the power of the state and a deep understanding of the link between individual liberty and private property – are based on ancient conservative beliefs.

We will also show that the repeated claim that the HRA is a charter for socialism and state interference is quite false. In fact the HRA is a charter *against* socialism and state interference. This is why the post-war Labour Prime Minister Clement Attlee was suspicious of the European Convention and only supported it with reluctance. It also explains why Tony Blair and Jack Straw, who were swift to introduce the HRA after the 1997 election, in due course became such angry critics of it. Prime

Minister Blair believed in a strong, powerful and centralised state and was in general indifferent or even hostile to the rights of minorities; the HRA hindered his government from carrying out some of its most populist and authoritarian policies.

It is at first sight puzzling that, officially at least, the Conservative Party should be opposed to the HRA. Indeed a pledge has been made to repeal the HRA if the Conservatives win the next election. A number of factors account for this paradox, which arise from a misreading of the origins, motivation and language of the European Convention.

The Conservative Party has always been properly sceptical about abstract rights and entitlements. This scepticism was set out most famously by Edmund Burke, whose *Reflections on the Revolution in France*, published in 1790, is a core text for the Conservative party in its current incarnation. Burke challenged the enlightenment proposition that human beings could or should lay claim to the possession of abstract rights such as those of Liberty, Equality and Fraternity. He did so not because he denied the existence of rights as such, but because he saw them as embedded in and grounded by tradition, experience and human institutions.

Burke warned of the dangers that would follow if these institutions were overturned and a system of natural rights set up in their place. These warnings were shown to be hideously accurate with the bloodshed and terror that followed the French revolution, and later the Bolshevik revolution of 1917. So it is only to be expected that thoughtful Conservatives should be chary of a new system that at first sight appears so hostile to the English system of common law, which has set the framework for justice in this country for some nine hundred years.

However, as we show in the pages that follow, Conservative scepticism about the HRA is based on an erroneous interpretation both of the European Convention, and also of the teaching of thinkers such as Burke. The truth is that the Convention was framed by British jurists, working within a common law legal tradition stretching back past the US Bill of Rights 1791 to encompass our own Bill of Rights 1689, and the Petition of Right 1628. So it is not surprising that its essential principles – including the right to a fair trial, the right not to be held

without charge, and the right not to be subject to cruel and unusual punishment – are manifestations of the English common law as it took shape during a centuries-long jostling for power between the different estates of the realm.

In the 20th century the great British war leader Sir Winston Churchill was determined that these freedoms, for him the essence of civilisation as such, should be publicly set forth in the European Convention. He saw this as a response both to the barbarity of fascism, then a recent and appalling memory, and to the sinister threat to human freedom posed by the Soviet Union in the post-war period. The ECHR thus marks a vital codification of the common law, not its repudiation.

A second objection to the HRA is that it is not really about justice at all as properly understood, and that its real purpose is to insinuate into the British legal system a left-wing social and political agenda.

The criticism goes right to the heart of the political debate as to the nature and purpose of the law itself. The conservative vision of law is, broadly, a procedural one. Conservatives insist that the rules should be observed, wherever they may lead. They attend to history. They are fastidious in distinguishing between different institutions. They demand impartiality of administration, equality of access to justice and a ban on special treatment. For them the proper means to address public issues of social inequality is simply through politics. Individual freedom is preserved through the rule of law, backed by the state as final enforcer. Human society becomes what the philosopher Michael Oakeshott called a “civil association”: a group of people who agree to subject themselves to a set of common rules of conduct, so that they can better pursue their own various lives and interests with as little interference as possible.

For the left, by contrast, the focus is less on means than on ends. Legal procedure is subsumed in the quest for social justice. At its most utopian, this view holds that any institution – national or local, public or private – is potentially available to be used to pursue social goals. Thus even the integrity of the judicial system itself is of interest only insofar as it serves to secure equality of outcomes and to enforce social justice.

In Oakeshott’s phrase, human society becomes an “enterprise association”: made subject to some overriding purpose which takes

priority over private interests and which stands ready to sacrifice individual freedom for the greater good. It is in this sense “rationalist”, in seeing politics as simply a series of problems to be solved, if only a suitably detailed and comprehensive abstract plan existed to do so. An enterprise society is moralizing and ambitious. It is, so to speak, always on a war footing. In such a society the rule of law is always at risk.

In these terms the European Convention on Human Rights and the Human Rights Act are exquisitely conservative documents. The European Convention nowhere asserts that human beings have a right to equality of economic status, possessions or material comfort – it is silent on these questions. Its rights largely amount to a set of limitations as to how the state is permitted to behave towards those within its jurisdiction. For instance, it insists the state cannot arrest someone without good cause, determine what kind of books they read or unlawfully sequester their property. These are without exception rights which give ordinary citizens the ability to carry on with their private and family lives as best they can without interference from the state, or anyone else.

By contrast the left has historically demanded a much more activist kind of rights culture. It demands so-called socio-economic rights, such as the right to work. Furthermore, it has a fundamentally collectivist view of rights, placing the state or the “common good” above all else. When the Soviet Union guaranteed certain human rights in its 1977 Constitution, it warned that “citizens’ exercise of their human rights must not harm the interests of society, the state, or other individuals.”

By contrast the European Convention, scrupulously drafted and rigorously defined, provides no comfort for socialist conceptions of social or economic justice. It is implicitly sceptical about the power of the state. It falls on the side of civil, and not enterprise association; on the side, to use Churchill’s words in his Hague Congress Speech, in which the people own the government, and not the government the people.

The same is not true, however, of the European Union’s *Charter of Fundamental Rights*, to which Britain was signed up in 2008 as part of the Lisbon Treaty. As we argue below, this document does indeed enfranchise as “rights” a host of secondary social and economic

entitlements. Almost as alarming is the Government's intellectually catastrophic *Rights and Responsibilities* Green Paper, published earlier this year. Contrary to its name, this legislation would introduce no new legal rights or obligations into British law whatever. But it would cloud the area with unenforceable and rhetorical statements of right, opening the way up to exactly the kind of "rights inflation" so feared by critics of the HRA. It is documents like these, and not the astringent and rigorous European Convention or the HRA, that pose the real legislative threat to liberty in the years to come.

A third Conservative criticism of the Human Rights Act is that it is part of an anti-democratic conspiracy because it supposedly devolves to a foreign court the task of interpreting British liberties: a task which should much better be carried out at home and which undermines the sovereignty of parliament.

This broad anti-federalist instinct is well-motivated and widely shared across the British political spectrum. Yet the specific criticism, when examined forensically in relation to the HRA, makes no logical sense at all. The first point to make is obvious enough, but frequently forgotten. The European Convention on Human Rights has virtually nothing to do with the European Union. It was ratified six years before the formation of the common market. And it contains no federalist agenda beyond a common commitment to human decency and liberty in the light of the great fight against totalitarianism of both right and left.

Indeed the overwhelming purpose of incorporating the European Convention into British law through the Human Rights Act is *precisely* so that decisions can be reached by British judges in British courts within the British legal framework, thus building up a body of British case law in this area. This is already happening, and there is already plentiful evidence that the European Court of Human Rights in Strasbourg is respecting the integrity of British judicial decisions.

The Conservative pledge to repeal the HRA, if carried out, would thus have the perverse consequence of moving the judicial process overseas. Unless the Conservative Party actually proposes to withdraw from the European Convention on Human Rights – and it does not – there is no avoiding this.

A fourth criticism of the Human Rights Act concerns national security. The most emotive argument against the HRA is the one used by Tony Blair and successive Labour Home Secretaries: namely, that the HRA impedes the ability of the security forces of the British state to fight the threat of terrorism. Indeed the period since 9/11 has been marked by a running argument between British politicians and British judges over counter-terrorism legislation.

The argument came to a head at the end of 2004, when the Law Lords ruled that Part 4 of the *Anti-Terrorism, Crime and Security Act 2001* – which allowed the British Government to imprison foreign terrorist suspects without charge, thus undermining the ancient principle of habeas corpus – was incompatible with the HRA (the Belmarsh judgment). As a result the Government decided to find an alternative mechanism; and the situation was resolved, temporarily at least, with the introduction of so-called control orders in the *Prevention of Terrorism Act 2005* which restricted the movements of suspects.

Claims that the HRA makes Britain less safe are untrue. The Human Rights Act requires the courts to balance human rights against safety and accepts that important rights may be restricted to protect national security. In the vast majority of cases it does not prevent those who pose a threat to our national security from being deported. What it does do is to prevent the government from sending terror suspects back to countries where they may be tortured. As evidence grows of possible British Government involvement in the “extraordinary rendition” of suspects, and amid allegations of complicity in torture, it is clear that these protections are desperately needed.

Furthermore, it is important to understand that the common law by itself proved insufficient to protect British liberties in the aftermath of 2001, including as venerable and sacred a liberty as habeas corpus. As the historian Ben Wilson has written of the Belmarsh judgment: “Incompatibility with the Human Rights Act made this possible, not incompatibility with the British tradition of liberty.” This episode showed that it is now the HRA, and not simply the common law, which has become the fundamental guardian of freedom against oppressive and arbitrary government.

The opposition of many Conservatives to the HRA is not only, however, the result of a misreading of its rights and function. The empirical basis for a great deal of public debate on the Act is also badly flawed and incomplete. Indeed a great deal of the popular hostility towards the HRA is based on sheer ignorance, made worse by misunderstanding. Myths abound about the HRA. These start out as newspaper reports. Soon they enter popular discourse. It is not long before they are used in the speeches of politicians. And yet almost invariably they are fabrications, or sometimes outright lies.

One example is the very widespread belief that the Human Rights Act has been successfully used to allow prisoners access to hardcore pornography in prison. In 2001 the *Daily Mail* correctly reported that the serial killer Dennis Nilsen was “using the controversial new human rights law to demand porn magazines in prison”. The key point, however, is that he was not using it *successfully*. When he went before the High Court to argue that denial of access to these materials was “inhuman or degrading treatment” the case was thrown out at the first instance.

A later Prison Service Order on prisoner property, unconnected with the HRA, gave prison governors some discretion as to what inmates should read. Yet the *Telegraph* reported, falsely, that “prisoners win their claim that hardcore porn is a human right”. Since then the Nilsen case has been reported again and again as fact by newspapers on left and right, and it has been highlighted by politicians trying to show that the HRA promotes a “compensation culture”. In Chapter Four we show in detail how these myths emerge, and how they shape public opinion and create a false public discourse about the HRA and the European Convention.

We also draw attention to a coincidence. These myths, distortions and fabrications appear most in newspapers and broadcasting media which believe they have a powerful vested interest in the failure of the HRA. Specifically, they believe that they could be adversely affected by the right to a family and private life contained in Article 8 of the Act.

A large element of the selling power of some British newspapers depends on their ability to break stories about the private lives of celebrities and other public figures. Furthermore, many editors and proprietors passionately believe that there is a strong public interest that

such stories should be published. Celebrities and others have successfully used this right to prevent newspapers from publishing some stories about their private and family lives, and it seems likely that this has fuelled hostility towards the HRA by some parts of the press.

In general the same newspaper groups and media organisations which have campaigned most powerfully against the Human Rights Act are also those most powerfully affected by the privacy provisions of the HRA. Perhaps for that reason those pledging to abolish the HRA are guaranteed a generous media reception. Indeed it is unlikely that reform of the HRA would be on any political agenda, were it not for the potent advocacy of the most powerful media groups in the country.

In fact, however, it is far from clear that the HRA is contrary to the interests of the media. While there may be understandable and legitimate concerns about the impact of the right to privacy on press freedom, those in the press who have pilloried the HRA seem to forget that it is only because of the HRA that their freedom of speech is properly protected at all. The simple fact is that before the introduction of the HRA there was no enforceable right to free speech in this country – a position we would return to if the HRA were repealed.

Take the case of Sally Murrer, for example. She was the journalist on the *Milton Keynes Citizen* who had a conversation with a police officer which was secretly recorded by the Thames Valley Police, as a result of which she was prosecuted. She successfully argued that she had a right to freedom of expression under Article 10 of the HRA to do her journalistic job and to protect her sources. The prosecution case against her was thrown out as a result.

Moreover, if criminal proceedings had been brought against the *Telegraph* for its extraordinary revelations about MPs' expenses earlier this year, it would be to the HRA that the newspaper would best have turned for a legal defence. And it should not be forgotten that even the much maligned right to privacy is championed by the same press that otherwise rail against it – when it is the State, and not the paparazzo, that wields the camera.

Abolition of the HRA would sweep away these protections for the press. And it is debatable whether abolition would in fact choke off the

emerging law of privacy. The common law on breach of confidence might itself be a sufficient legal basis for the development of a *de facto* privacy law even without the HRA.

No: if newspaper editors and proprietors are unhappy with the way in which the common law is developing in conjunction with the HRA, the remedy is clear: they should lobby Parliament in the usual way for the introduction of new legislation to balance personal privacy with the media's right to free speech. It is short-sighted in the extreme to call for the repeal of constitutional protections of fundamental rights, including those that offer direct protection to journalists, simply because of individual fact-specific judgments that displease – especially when the reporting of those judgments is often so distorted.

What, then, of the Conservative party? The strength of the party as a political movement has often derived from a tension between different principles which is intrinsic to conservatism itself. Nowhere is this clearer than in its attitude to freedom. On the one hand the mainstream party has consistently adhered to the ancient and liberal tradition of British scepticism about the role and extent of the state. This can be traced back through dissenter and patrician alike, through philosopher, campaigner and common law judge, through Cobbett and Dicey, through Burke and Blackstone back to Harrington and Bolingbroke, and well beyond. It emphasizes exactly the kind of individual liberties enshrined in the HRA.

On the other hand there is also a tradition of Conservative respect for authority, which can sometimes elevate the state above the rights and liberties of individuals. This strand of thinking lay at the heart of nineteenth century nationalism and is in general more commonly associated with continental movements of right and left, and with the Fabian tradition in this country, than with conservatism. But this more authoritarian strand of Conservatism still has its adherents, and it has received fresh impetus since 9/11. The logic can seem compelling: the first duty of the state is to protect its citizens; global terrorism poses a potentially existential threat to British citizens; so any measures by the state are legitimate to combat this threat. The argument receives further potency from the language of warfare, with its implicit suggestion that normal constitutional arrangements are to be set aside.

There is no need to rehearse the arguments on this issue. We would just make three obvious remarks. The first is that very serious terrorist threats are not new. Lest we forget, the Gunpowder Plot of 1605 was designed to kill both the monarch and his successor and the entire political and ecclesiastical leadership of this country. The second is that this country is not in a state of emergency. In an emergency, the supreme necessity of survival creates an imperative for action. Rightly or wrongly, various leaders including Pitt and Lincoln have even thought it necessary to suspend habeas corpus in order to protect the life of the nation and the government itself in the most difficult possible circumstances. The third is that the curtailment of individual liberties should be not the first but the last resort for government. Of course, as Mark Twain said, when all you have is a hammer everything looks like a nail. But the evidence is that this government in particular has been far too ready to reach for legislation to fight terror, in this area as in every other, rather than do the job well.

But the real point is this: that in its modern form this authoritarian strand is hardly a form of conservatism at all. Rather, it is rationalist, in seeking to suborn human society to a single moralizing project. Ultimately, this line of thought would put at risk both the freedom of our institutions and the rule of law itself.

Under the leadership of David Cameron, however, the Conservative Party has re-embraced the first and more dominant philosophical tradition. It has fought important battles for personal freedom: opposing 42 day detention of suspects without charge, opposing ID cards, and opposing unjust extradition and the poorly designed and safeguarded European Arrest Warrant. And it has taken these positions in a thoughtful and well-calibrated way, without naivety as to the gravity of the issues involved.

As a General Election approaches, it is important for the Conservative Party to drive home the message that it stands for freedom, decency and British liberty. It should drop its opposition to the Human Rights Act. As we show the existence of the HRA's rights and freedoms derives from British common law. Their codification was specifically inspired by Winston Churchill and the Act is thoroughly conservative in its content and operation.

It is time, then, for the Conservative Party to make the Conservative case for the Human Rights Act. It is our own Bill of Rights, and Churchill's legacy.

2: The Conservatism of the Human Rights Act

The idea and practice of this political or civil liberty flourish in their highest vigour in these kingdoms, where it falls little short of perfection ... And this spirit of liberty is so deeply implanted in our constitution, and rooted in our very soil, that a slave the moment he lands in England, falls under the protection of the laws, and with regard to all natural rights becomes instantly a freeman.

Sir William Blackstone, *Commentaries on the Laws of England*

The Human Rights Act, passed by a Labour government in 1998 and brought into force in 2000, is a fundamentally conservative piece of legislation. It is not just conservative with a small “c”, however. To the extent that it has any basis in party politics, it should be regarded as a creation, not of New Labour, but of the Conservative party. Because the Act is both conservative and Conservative, it should be welcomed by Conservatives today and not reviled by them.

What the Human Rights Act says

Given the degree of public misunderstanding that has arisen about the Act, one might think that it was a long and indigestible piece of legislation. In fact, however, it is brief, essentially consisting of two elements.

The first is a list of rights and freedoms applicable to all people subject to UK law. These are all taken verbatim from the European Convention on Human Rights, which was ratified by the UK in 1951. They include a right to life; a prohibition against torture, slavery and forced labour; various rights to liberty and security of person; rights to a

fair trial and not to be punished without law; a right to respect for private and family life; rights to freedom of expression and to thought, conscience and religion; rights to freedom of association, assembly and marriage; and a prohibition on discrimination. Two further protocols contain rights to property, education and free elections, and a formal abolition of the death penalty.

The second element of the Act consists of a set of legal mechanisms by which these Convention rights are to be interpreted, followed and enforced by UK public authorities. Existing legislation is to be read and given effect to in a way which is compatible with the Convention rights, so far as it is possible to do so. Judges are required “to take account of” relevant decisions of the European Court. Ministers are required to state on the introduction of new legislation whether or not it is compatible with the Convention rights, and public authorities are required to act in ways compatible with them.

Where a relevant UK court considers that the terms of a statute cannot be interpreted compatibly with the Convention rights, it can issue a “declaration of incompatibility”. As the Act makes clear, a declaration of incompatibility has no formal effect whatever on the statute: the government may choose to amend the law so as to make it compatible with the Convention rights, or not. In practice, so far at least, it has always taken the former option.

History

This is a bare factual summary of the content of the Human Rights Act. For interested readers we have included an abridgement of the Act, containing the full text of all the Convention rights, in an Appendix.

But even this short description should already make one crucial point clear. This is that the rights and freedoms enumerated in the Act are all directly drawn, indeed restated in terms, from the European Convention on Human Rights. And it is a matter of historical fact that the European Convention was in large measure the creation of two British Conservative politicians: David Maxwell Fyfe, later Lord Kilmuir, and Sir Winston Churchill.

The European Convention was opened for signature on 4 November 1950 in Rome. Britain signed it on this date and was the first state to ratify the Convention in March 1951, without reservations. It formally entered into force in September 1953, and was extended later in 1953 to include 42 British dependencies. At present the Convention covers the 47 members of the Council of Europe, including approximately 800 million people.

As we shall see, the Convention itself, and so the Human Rights Act, has its intellectual roots in the English common law, going back to the 13th century. But the need for such an instrument, and for its accompanying institutions assumed special urgency during the Second World War. As early as 1942 Winston Churchill as Prime Minister had looked ahead to consider the political landscape of continental Europe. With Germany defeated, he believed the only realistic way to hold a dominant USSR at bay would be through what he termed a “Council of Europe”, led by Britain. This, he believed, would be a bulwark against any new totalitarianism.

After his landslide defeat in the 1945 General Election, Churchill remained true to this idea, leading the public argument for European solidarity. He became Chairman of the new United Europe Movement. He commissioned his son-in-law Duncan Sandys to organise a major international congress in May 1948 in The Hague, in the face of opposition from Attlee’s Labour government. And in a rousing opening speech at the Hague conference he specifically advocated a Charter of Human Rights, “guarded by freedom and sustained by law”.

Churchill believed that British victory in the recent war was above all the victory of certain basic values – values that were the cornerstone not merely of Western civilisation, but of civilisation as such. The purpose of the Charter, or Convention as it became, would be the fundamentally conservative one of protecting and extending those values. This approach was later made absolutely explicit in the formal motion proposing the new Convention, which stated that the convention “would maintain intact the human rights and fundamental freedoms actually existing in the respective countries at the date of signature”.

Churchill's bold proposal was adopted. The British lawyer and politician David Maxwell Fyfe then became the chairman of the new Council's legal and administrative council in August 1949, as well as serving as rapporteur on the committee drafting the European Convention on Human Rights. A former minister in Churchill's government and then deputy Chief Prosecutor at Nuremburg, Maxwell Fyfe was well qualified for the arduous task of negotiating the language of the Convention rights, and then shepherding them through the various national governments, including that of the UK.

Burke and Human Rights

There is thus a clear Conservative party provenance to the rights enumerated in the Human Rights Act. But too much should not be read into this, of course. Part of the Labour government's opposition was motivated by jealousy at Churchill's pre-eminent role in the new Convention. Moreover, Churchill's own position on European unity was never absolutely clear, especially as regarded the UK's own involvement. And there were also genuine concerns on all sides as to whether the new Convention might unhappily fetter the sovereignty of the UK government itself.

So the fact that the Human Rights Act has a Conservative pedigree hardly means it is a conservative piece of legislation. Indeed the argument is often made the other way: that statutory legal rights as such are fundamentally unconservative because they are innovations contrary to the traditions and spirit of the common law, and because they infringe the principle of parliamentary sovereignty. After all, was it not Burke himself who denounced the "rights of man" as harbingers of revolution in his *Reflections on the Revolution in France* (1790), saying "Against these ... rights of men let no government look for security in the length of its continuance, or in the justice and lenity of its administration"?

This is a complex issue, in which absolute clarity is not available. But on a fair reading of the evidence, this objection is in fact the opposite of the truth. In the first place, Burke was not opposed to rights as such, only to "abstract" or "metaphysical" rights. These are rights which have been divorced from a context of legal custom and tradition, rights which

mankind is somehow deemed to have enjoyed in an original state of nature. They are uncertain in their full meaning, and potentially revolutionary in their effects.

In sharp contrast to these abstract rights, however, Burke praises “recorded” rights; that is, rights which have been elaborated through the common law. In a crucial but often neglected passage from the Reflections, he says:

Far am I from denying in theory; full as far is my heart from withholding in practice... the real rights of men... If civil society be made for the advantage of man, all the advantages for which it is made become his right... Whatever each man can separately do, without trespassing upon others, he has a right to do for himself; and he has a right to a fair portion of all which society, with all its combinations of skill and force, can do in his favour.

The last two sentences are a masterly statement of Burke’s Old Whig or “compassionate” conservatism.

So, then: what distinguishes recorded from abstract rights? Simply this: recorded rights are, in effect, summaries of human experience. They are established, they are well-understood, and they have been filtered, elaborated, nuanced and defined in a huge range of different contexts through countless legal judgments. It is in their status as the product of the common law, of the judge-made law of the land, that Burke sees their legitimacy; and in their protection against the tyranny of the majority that he sees their value. From time to time these rights or freedoms may be codified or recorded in statute, and for Burke this is to be welcomed when such a statute operates, in his words, on the principles of the common law.

Thus it is crucial to note that Burke is not opposed to change as such. Far from it: for him acceptance of change is the indispensable corollary of commitment to the established order. As he famously put it “A state without some means of change is without the means of its conservation.” Thus, far from reviling the Glorious Revolution of 1688, Burke celebrated it as the necessary and limited change required to preserve the constitution. For him, then, the continuing substance in the body

politic – the framework within which any change must occur – is the British constitution, and specifically the common law.

Blackstone, Dicey and the Legal Tradition

Burke would not have considered this line of thought as in any sense innovative, and indeed he would have been appalled at the idea. On the contrary, he regarded himself as writing from within the very heart of British legal, constitutional and specifically parliamentary traditions.

He was correct. For the greatest British legal authorities have always recognised that basic rights are an essential part of the rule of law. Article 39 of Magna Carta 1215, for example, contains the prohibition “No freemen shall be taken or imprisoned or disseised [expropriated] or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgement of his peers or by the law of the land” – the basis of Articles 5 and 6 of the Human Rights Act today.

Burke’s readers would not have needed to look as far back as the 13th century for confirmation of this point, however. For the wider argument had in fact been made very forcefully three decades before the *Reflections*, with the publication of the magisterial *Commentaries on the Laws of England* (1765-9) of Sir William Blackstone.

Blackstone’s was the first full-scale presentation of English law, and specifically the common law, for over 200 years. It had three huge merits: it was systematic, presenting the law in a coherent way from first principles; it was written in English, not Latin; and it was aimed not merely at lawyers but at squires, merchants and other educated laymen. It went through eight editions in 11 years, and was vigorously circulated not merely in Britain but in the American colonies. It has had an inestimable influence on the development and spread of the rule of law in the English-speaking world.

For Blackstone, rights are not merely an accretion to the rule of law: they are intrinsic to it. In his words “the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were invested in them by the immutable laws of nature ... Hence it follows, that the primary end of human laws is to maintain and regulate these *absolute* rights of individuals.” At the end of the *Commentaries*

Blackstone gives a rather Whiggish account of the origins of these rights and liberties, encompassing Magna Carta, the Petition of Right, the Habeas Corpus Acts, the Bill of Rights, and the Act of Settlement. He thus links both Parliament's constitutional function and its own history to the growth of individual freedoms and restraint on the Crown.

In Blackstone's analysis, there are three "absolute" rights: the right to personal security, the right to personal liberty, and the right to private property. These are rights of individuals, not groups, and they are specifically chosen in opposition to different forms of tyranny and oppression. Moreover, they are to be read widely. Thus the right to personal security includes "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation", while the right to personal liberty includes "the power of removing one's person to whatsoever place one's inclination may direct without imprisonment or restraint, except by due process of law". And Blackstone notably argued that these primary rights were in turn supported and protected by a range of subordinate rights, such as the right of subjects to access to the courts and the right of petition. These protections are the forerunner of the modern idea of that the law should provide effective remedies, as in sections 7 and 8 of the Human Rights Act.

This broad line of thought was taken up, developed and given a characteristic twist by the great constitutional theorist A.V. Dicey towards the end of the 19th century. As with Blackstone, Dicey's *Introduction to the Study of the Law of the Constitution* (1885) has been massively influential ever since first publication.

For Dicey the British constitution rested on two foundations: parliamentary sovereignty and the rule of law. Parliament had unfettered power as the supreme law-making institution. But it was itself held to certain unchanging principles that constituted the rule of law, and these guaranteed the rights and liberties of the individual. These principles were that no-one could be punished except by court order with due process and for a distinct breach of the law; that everyone was subject to law and to the jurisdiction of the courts; and that the general principles of the constitution were derived from judicial decisions in court, that is from judge-made law.

Dicey also picks out three particular rights: the rights to personal freedom, to freedom of discussion and to public meeting or freedom of association. The latter two are not those of Blackstone, but Blackstone's other rights, to personal security and private property, are clearly assumed elsewhere in Dicey. Where the two theorists differ is that for Dicey these rights, indeed rights as such, have no special status. There are no "absolute" or foundational rights. Rights may be well-established, but ultimately they remain the products of judge-made law, of the normal processes of courtroom adjudication. As such they can change: slowly as legal practice evolves, or rapidly through Act of Parliament. For this reason, perhaps, Dicey is generally rather dismissive of formal statements, charters or guarantees of rights: his thought seems to be that if the rights in question are not sufficiently embedded in the law, customs and manners of a nation, then formal guarantees are likely to be of little value.

But Dicey's position is slightly less clear than it might be, for two reasons. The first is the obvious point that formal guarantees may themselves be a way to strengthen the customs and manners of a nation, by recording a public and social commitment to certain basic values.

The second point is more subtle: it is that regardless of Dicey's official position there clearly are some rights that he takes to be, if not entrenched, then very well-established indeed – these are the rights assumed in his conception of the rule of law itself, such as the right to due process. A more fully-fledged conception of the rule of law might identify other such rights, and point to them as being wholly or partly constitutive of the rule of law. Parliament would preserve its own unfettered sovereignty, but there would be something self-defeating about the exercise of that sovereignty in the abolition of those basic rights. We will return to this issue later.

What Rights are Not

Unsurprisingly, then, Burke, Blackstone and Dicey share a broadly consistent view of English law and the importance of certain established rights and liberties within it. Not only that, they see it as a primary purpose of government and of the rule of law to protect the liberties of

the individual. Good government is maintained by constitutional arrangements that are deliberately slow-moving and yet flexible.

This line of thought is a profoundly conservative one. To see why, consider what these rights are not. They are not natural, pre-ordained, or the products of God's law. They inhere in individuals, not in groups or classes. They are not, by and large, economic or social in character. They are not divorced from, but are the products of, legal tradition and social custom. They are not conceived of in the abstract or grounded in *a priori* reflection, but based on experience. They are not independent of specific legal remedies, but backed by them. They are not entrenched against Parliament as superior law, but explicitly acknowledge the sovereignty of Parliament.

By contrast, there is a liberal or radical conception on which human rights are all or many of these things. The French revolution was founded on such a conception, and Burke's genius was to predict in advance that, and how, such a revolution would end in disaster. But the American revolution is arguably a more interesting case, because it allied radical rhetoric in the style of Paine with radical innovation in its entrenched and written constitution, and specifically the Bill of Rights, and then grafted the whole onto English legal traditions directly and recently inspired by Blackstone himself. From this heady mixture came, in the course of a century, not merely the extraordinary energy of American statecraft, but a powerful and distinct conception of national identity, of what it was to be American at all.

And this contrast in turn brings out two final points. The first is that the Human Rights Act, and indeed the European Convention and the Universal Declaration of Human Rights 1948, clearly arise from the same English or Anglophone legal tradition discussed here. This is a great British contribution to the worldwide rule of law.

But secondly, there is an important contrast with the USA. There the status of the constitution as entrenched and superior law means that judges in State or Federal Supreme Courts can strike down legislation which they deem to be in conflict with the Constitution. This power has been used many times over the past two centuries to remove laws

from the statute book, including laws that would now be deemed both reactionary and progressive. Its effects have on occasion been extremely controversial, as in the abortion debate with *Roe v. Wade* or in the notorious *Dred Scott* case which ruled that slaves were not US citizens, but property. Because the judges can strike down laws, the bench has become heavily politicised.

The same is not true in this country. Under the Human Rights Act the principle of the sovereignty of Parliament is preserved. Parliament passed this legislation, and could repeal it within days if it so desired. This would leave the UK as a signatory to the European Convention and various other legal instruments protecting legal rights, but again Parliament could in principle quickly drop those commitments. Under the terms of the Act the most the courts can do is to issue a declaration of incompatibility, and Parliament is under no obligation to change the law to make it compatible. There is in fact virtually no recorded case in British legal history in which the courts, without the authority of Parliament, have invalidated or struck down a statute.

The courts thus remain independent and at some distance from the political fray. It is sometimes said that section 3 of the Act gives judges the power to exceed Parliament's intention by re-interpreting legislation according to the Convention rights. But section 3, which requires legislation to be interpreted in a way that is compatible with the Convention rights, is specifically limited by the phrase "so far as it is possible to do so". And in fact the courts have deployed this power cautiously, with great respect to procedural fairness and the rule of law, and often specifically with some consideration of what Parliament intended for the given legislation.

The Human Rights Act thus operates in a peculiarly conservative way. It confers no new right which has not already been long recognised in common law, or to which the UK has not already long been committed. Its rights are not inviolable but can be set aside. Where there is an incompatibility with rights, it leaves it to Parliament to decide how to resolve that incompatibility, and only if it chooses. A more conservative approach could hardly be conceived.

The Conservatism of the Human Rights Act

Let us sum up. The argument of this chapter has been that the Human Rights Act is a conservative, and indeed Conservative, piece of legislation on three grounds: those of history, of philosophy and of law. Its rights are basic, established and generally well understood. It is not alien to but profoundly in keeping with our legal and constitutional traditions. It is not entrenched. It is used in British courts with British judges. For these reasons it should be widely supported by all segments of British political opinion, and especially by the Conservatives.

Thus in later chapters we will look at the various criticisms that have been made of the Act; at different myths that have arisen, which have undermined public feeling towards the Act and its implications; and at alternative approaches that could be taken to the preservation of personal rights and freedoms. Our contention is not that all is well with the public understanding of human rights. On the contrary, there are some serious problems to be addressed, and we will look at these. But the Act itself is not the problem.

For the present, however, we close this chapter with a series of questions to those who would prune back or repeal the Human Rights Act:

1. Which rights would you propose to cut? The right to life? The right to liberty and security of person? To freedom of expression and association? The prohibition on torture?
2. If the Human Rights Act is repealed, then the same cases will fall under the European Convention on Human Rights. Would you propose to leave the European Convention too? Virtually no reputable commentator has suggested this step.
3. And if you would adhere to the Convention, then is it really preferable that these cases should be decided by the distant European court in Strasbourg at far greater expense than now, rather than in this country by British judges? Why?

These questions are hard for anyone to answer persuasively and, we would say, impossible for conservatives to do so.

3: Addressing the Critics

We will make sure that our human rights legislation does not get in the way of common sense legislation to protect our country.

Tony Blair, Prime Minister's Questions,
17 May 2006

The previous chapter made the positive case for supporting the Human Rights Act. We turn now to address the many criticisms that have been levelled against it.

It may be helpful to be clear from the outset about three things. First, we do not claim that the Act is a perfect document, or a panacea for injustice in the UK, only that it is a good piece of legislation. Secondly, even where a criticism of the Act is misplaced, it often springs from important wider public concern about issues such as rights inflation. Here our argument will be that the Human Rights Act is the wrong target, however, and that these issues should be tackled in other ways.

Thirdly, we will assume in what follows that there is no case for the UK to leave the European Convention on Human Rights. This move has never been seriously advocated by any mainstream political party. Not only was the UK the legal and historical inspiration for the Convention and its first signatory, as noted, but departure would send a message to the world that individual freedoms, personal rights and indeed the rule of law itself can be set aside when they are inconvenient.

1. “Bad people should not have rights”

The first criticism is the most basic: that bad people should not have rights. It may be that someone has committed a serious criminal offence, or a repeated series of minor offences, that they are a known criminal from another country, or perhaps even just that they are strongly suspected of criminal intent: in such cases the person concerned should not enjoy the protections afforded by the Human Rights Act.

This criticism should be rejected out of hand. The rights in question are all or almost all the basic prerequisites of our law. In the words of Horace Rumpole, it is the golden thread of British law that people are innocent until proven guilty in a court of law. Of course the Act is most invoked on behalf of those at the margins of society – this is only to be expected. But these basic rights protect us all. Abolishing them would give the state free rein to trample on the citizenry.

2. “The Human Rights Act hampers the fight against terror”

A more persuasive variant of the first criticism goes like this: of course there can be no question of abolishing such basic rights and freedoms as such. But the Human Rights Act itself is clearly hampering the fight against terror.

Thus the Belmarsh decision prevented the state from detaining terrorist suspects without trial; the Home Secretary has been prevented from deporting known terrorists because of concerns that they would be tortured; and some control orders have been rejected by the courts where suspects have not been given any information about the nature of the case against them. So the Human Rights Act needs to be pruned back in order to allow effective prosecution of the war on terror.

There are several difficulties with this line of thought, however. The first point is that it rests on a factual claim which cannot be tested – that the fight on terror has been materially hampered by the courts. Of course the Home Secretary’s life may have been made a bit more difficult. But this is not at all the same thing as saying that the fight on terror has been hampered. It may actually have been assisted by the worldwide legitimacy and reputation for fair play of British justice, as it has often been in the past, for example with the centuries-old British prohibition on torture. And it is noticeable that the US seems to get by fairly well in combating terror, despite the Bill of Rights and its own extremely vigorous culture of civil liberties – notwithstanding recent attempts to circumvent the Bill of Rights by outsourcing interrogation at Guantanamo Bay or via “extraordinary rendition”.

But say the factual claim is true. Would this give sufficient grounds to prune back these basic rights and freedoms? Certainly not. There are

many laws that inhibit the state's ability to catch criminals, but we accept them because they are valuable for other reasons. Moreover, the key rights in question already contain explicit limitations and the idea of proportionality, in recognition of the balance that needs to be struck between the interests of the state and those of the citizen. Thus Article 8 prohibits public authorities from infringing the right to respect for family and private life – except on the grounds of “national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” Those are very significant carve-outs.

Even if these points were mistaken, however, to warrant this extreme step it would still need to be shown to a reasonable standard that the British state was already using all the effective legal means at its disposal in the fight against terror. But we know this is very far from the case – on the contrary, there has been a huge amount of incompetence in this area, notably in conceiving and managing immigration policy.

3. “The Human Rights Act undermines Parliament”

The third criticism has been much voiced by politicians on all sides of the debate. This is that the Human Rights Act undermines the sovereignty of parliament, by fettering it with rights that constrain its actions, and by encouraging the judges to create new law.

There can be little doubt that as a practical matter Parliament is less autonomous now than it was in, say, the time of Gladstone and Disraeli. It has voluntarily restricted its own freedom of action over many years, notably by joining the European Economic Community in 1973. But the principle of parliamentary sovereignty, as a principle, remains as inviolate now as it was in Dicey's heyday. As a result, the Human Rights Act could be repealed tomorrow if Parliament so wished.

Moreover, it bears restating that the Human Rights Act confers no new right which has not already long been recognised in common law, or to which the UK has not already long been committed. It enables no new concepts or issues to be considered by judges which they were not previously able to consider. So if any undermining of the principle of

parliamentary sovereignty has occurred, it has not been done by the Act. Not only that: the Act demonstrates its commitment to parliamentary sovereignty on the face of the legislation. Indeed it preserves that sovereignty, by way of the supremely British compromise of a declaration of incompatibility. The contrast is, again, with countries in which rights are set forth as superior law and judges have the ability to strike down or annul primary legislation.

And the implication that British judges are an alternative source of legislation is in general untrue. There is of course a broad sense in which the common law is “judge-made” law, as it has been for centuries. This is because any court judgment itself becomes part of the record, and so part of legal precedent. It was Lord Reid who in an essay on “The Judge as Lawmaker” in 1972 famously stated that the old idea that judges did not make law but simply declared it was “a fairy tale ... But we do not believe in fairytales any more.” Indeed in legal cases where the question at issue has not been previously raised, or where there is a lack of clarity in the law, any decision of the court will have the effect of “making law”.

But this is very far from the judges being “legislators” in any genuine sense. In fact there is remarkably little evidence that judges have creatively elaborated new law, or been subject to any political influence in their decisions. To take one example, it might have been expected that the Law Lords would reject the use of the *Parliament Act 1949* to push through the hunting ban, given that the Parliament Act was hardly designed for this kind of legislation and the issue was extremely politically controversial. Yet they found unanimously for the government on this issue.

4. “The Human Rights Act fuels rights inflation”

A fourth criticism is that the Human Rights Act has fuelled “rights inflation”. That is, it has created a whole host of new legal rights, which have encouraged people to file bad or frivolous claims, stimulated a public culture of grievance and litigation, and lined the pockets of gold-digging lawyers.

Perhaps more than any other, this issue is the subject of huge misrepresentation and misunderstanding. There is clearly huge public

concern about the growth of a litigious, timid, safety-first culture of political correctness in Great Britain today. But very little of this has anything to do with the Human Rights Act.

Contrary to public expectation, there has not been a flood of litigation under the Act. Recent figures show that human rights legal actions peaked in 2002 with 714, and fell to a low of 327 cases in 2008. And, again contrary to public expectation, there have been remarkably few declarations of incompatibility under the Act: just 26 in its first eight years, of which eight have been overturned on appeal. Instead, there has been an explosion of stories in the popular press about vexatious claims, very few of which in fact make it as far as the courtroom, still less secure a favourable judgment. These are the Myths of the Human Rights Act, and we analyse them in more detail in Chapter Four.

At a conceptual level, it is useful to distinguish between rights elaboration and rights inflation. Elaboration is a normal process whereby new areas of law are filled out over time by court judgments, which clarify how the law applies in different contexts. Sometimes the effect is to extend the reach of law, sometimes to hold it back. In the area of personal rights and freedoms, a recent example is the Law Lords' judgment that the Human Rights Act applies in principle to British soldiers on the battlefield. The battlefield has been understood to be subject to law for over a hundred years. What this judgment does is to make clear that soldiers have certain basic legal rights under the Act, such as to adequate kit and training.

Rights inflation is something else. It has little to do with the Human Rights Act, as we have seen. But we would argue that it is a serious problem, created by bad legislation and by the present government's penchant for turning even trivial entitlements into "rights". This spills over into public discussion of the basic rights and freedoms of the individual, and trivialises and debases it. If there is a culture of grievance at present, then this is its source.

5. "Rulings from the European Court should not be part of British law"

The fifth criticism is that the Human Rights Act in some way imports

European judgments into British law; or makes the UK subject, or more subject, to the European Court of Human Rights in Strasbourg. It plays on concern among the general public that the UK is dominated by the European Union, and among some commentators that European court judgments are of lower quality than those rendered by British judges.

Again, however, we need to be clear about the facts. Almost all of these rights are not of European origin, but were developed through the English common law, as we have noted, in some cases hundreds of years before their European counterparts. The Article 3 prohibition on torture, for example, arises from the common law, which even in the 15th century seems to have regarded torture both as morally degrading to all involved and as a source of unreliable evidence. The Court of Star Chamber continued to receive evidence from torture in the early 17th century by exercise of the royal prerogative, but the lawful sanction of torture was ended in 1640 in England, when the Star Chamber was abolished by the Long Parliament. This step was then reinforced in the Bill of Rights 1689 with its prohibition on “cruel and unusual punishment”, a phrase which in turn made its way into the US Bill of Rights. But the legal use of torture persisted in many European countries until the 18th century, and in some until the 19th.

The second fact to note is that the European Convention is not a treaty of the European Union. The Human Rights Act does not import European judgments into British law: it does the opposite. It allows British courts to decide cases concerning basic rights and freedoms themselves, instead of their being referred to the European Court as was required before 2000. It thus brings justice closer to the ordinary person, and makes it more accessible and less expensive.

Furthermore, British judges are only obliged by the Act to “take account of” rulings by the European Court – a minimum condition, given that these are Convention rights – not to follow them. It is in the nature of courts that they will occasionally disagree, and this is part of the value of the appeal system. Thus the European Court has occasionally made a different decision to the Law Lords on appeal; one important recent example is the *S and Marper* decision, where the Court decided, in effect, that the Lords were wrong to uphold the Government’s blanket policy of

taking and keeping DNA samples from innocent people. However, far more often the Court has backed the Lords. And of course many more cases decided by British courts do not make it to the European Court in the first place because it is understood that they would have no chance of success. In many others, of course, an applicant will have been successful in the local courts and have no need to go to Strasbourg.

All this would change if the Human Rights Act were abolished. Abolition would do away with the ability of British claimants to seek justice in British courts with British judges. All such cases would need to be taken to the European Court, with huge consequent cost and delay. There would be none of the current scope for British judges to respect British traditions, concerns and values in their judgments: the European Court would simply apply the law as they saw it. Far from maintaining the relative autonomy of British law, abolition of the Human Rights Act would reduce it.

There is a wider point to be made here. Many people, and certainly many Conservatives, are concerned about what they see as growing European federalism. But this has little or nothing to do with the Human Rights Act. It is a political problem, which requires political solutions. The Act has the effect, not of exposing, but of protecting both the broader British legal tradition of respect for individual rights and freedoms, and more current local concerns from decision in foreign courts.

6. “The Human Rights Act imposes huge costs on business”

The sixth line of criticism is that the Act imposes unacceptable costs on business, because of the extra expense involved in respecting the rights of employees, and in litigation.

It is true that the Act imposes some cost on the public sector, because it requires our public authorities to comply with the Convention rights. But these costs are not new costs: they would have been faced anyway as local government, the NHS, schools and other public bodies became aware of the UK’s obligations under the Convention.

The Act itself imposes little if any cost on the private sector. Almost all the spiralling costs which now beset British businesses, especially small and medium-sized businesses, have arisen from other Government

legislation, and from EU legislation. The spreading of myths about human rights by the press has added to these costs, by encouraging frivolous complaints against companies, thus creating a situation in which companies feel compelled to take legal advice rather than deal with such concerns in a common-sense way. Indeed most of these claims have less to do with human rights than with the desire to escape onerous regulatory controls.

7. “The Human Rights Act is ineffective”

We can briefly address a seventh and final criticism of the Act: that it is ineffective in operation. This has been said both by those on the authoritarian right or left who wish to ignore or undermine the Act, and by those of more libertarian stamp who wish to make it stronger.

The claim of ineffectiveness is a slightly paradoxical one given that so much other criticism focuses on the supposedly malign effects of the Act; and in fact it is not true. As noted, the Act has caused the Government to revise its position on indefinite detention without trial and on control orders. It has enhanced personal privacy. It has significantly increased the accessibility of justice to the British people on issues affecting fundamental rights and freedoms. These are not small achievements, and they underline that in its modest, conservative way the Act has proven to be rather effective. Of course, this is not to say it could not be improved – or be more vigorously supported by politicians.

These, then, are seven lines of criticism that have been advanced against the Human Rights Act. None of them succeeds. In several cases they articulate real and pressing political concerns, which have been stoked by the press, by government actions or by legislation, especially over the past decade, and which require political solutions. In several cases abolition of the Act would in fact worsen the original problem, rather than address it.

It is, finally, notable that none of these criticisms is a reason to adopt a British Bill of Rights. We will turn to this issue in Chapter Five. In the next chapter, however, we look at the different myths that have stoked up public concerns about human rights, and attempt to put the record straight.

4: Dispelling the Myths

The Human Rights Act has tipped the balance of justice away from the victim in favour of the troublemaker.

Michael Howard, Conservative Party
Conference Speech 2004

It is now time to turn to turn our attention to the many myths which have grown up around the Human Rights Act. We will show that these falsehoods – which include fabrications and outright lies – have become so widespread as to make it hard to sustain a reasoned public debate on the Act.

Our research suggests that any public statement concerning the HRA to be found in the British press and broadcasting media should be regarded with extreme caution, unless proven otherwise. There is in fact a neglect of the truth here amounting almost to a culture of deception, which stretches far wider than just the so-called “red top” newspapers. Even organisations such as the BBC and the *Guardian*, which proclaim the sacredness of factual reportage, are today capable of disseminating lazy untruths on the subject of the Human Rights Act.

Nor are these media falsehoods random. They are often tailored to fit an agenda: in the great majority of cases the truth has been twisted to place the HRA in an unfavourable light. Their effect is to influence popular attitudes. Ordinary voters generally believe what they read or hear is true, and it is entirely predictable that they should feel frustrated and angry. Worse still, the same falsehoods soon start to fill the speeches of politicians, whose constitutional duty is to listen to and represent voter discontent.

Our case studies below show how even normally scrupulous Opposition politicians have often accepted as accurate some of the myths about the HRA that fill our public discourse. Nor have government ministers shown much appetite to correct the cycle of

deception. On the contrary, successive Home Secretaries, from Jack Straw and David Blunkett to John Reid, have proved as keen as their Conservative opponents to undermine the HRA. Indeed no mainstream politician, with the partial exception of Charles Falconer when he was Lord Chancellor, has made it her or his business to come out fighting for the HRA, and to challenge the misinformed public debate that now surrounds the subject.

The explanation is a simple one. Any politician who denounces the HRA, however incorrectly, is generally guaranteed a round of applause from the press. A politician who challenges the conventional wisdom by insisting that it is an important piece of legislation tends to get pilloried.

It is not hard to speculate why this should be so. As we noted in Chapter One a large part of the British press and broadcasting media believe, wrongly, that they have an interest in the destruction of the Human Rights Act, because of the possible impact of Article 8 on their freedom to publish stories. These very same papers publish many (though by no means all) of the myths concerning the HRA.

They also exert considerable political influence. It is thus tempting, indeed virtually costless, for those seeking public office to earn easy praise through pledges to repeal the Human Rights Act, regardless of the merits. The same is true for those who already hold high office: as witness the persistent attacks launched on the HRA by Labour ministers such as Jack Straw, who as Home Secretary actually piloted the legislation through the House of Commons.

The evidence thus suggests that mainstream comment concerning the HRA is distorted by neglect of the truth, and indeed by intentional misrepresentation. But the purpose of this chapter is more prosaic: to examine, to profile and to expose some of the myths of the Human Rights Act themselves.

To illustrate the scale of the problem, we examine three case studies. The first concerns Learco Chindamo, the 15 year old Italian born schoolboy who stabbed to death head teacher Philip Lawrence outside the gates of his North London school in 1995. Two years ago the government, in preparation for Chindamo's release from prison, sought to deport him back to Italy. Chindamo successfully challenged

his deportation, principally using a European Union Directive on freedom of movement to do so. He won his appeal. The result was a massive public storm in which the Human Rights Act was widely blamed.

The Chindamo case is illuminating in a number of ways. It demonstrates the continuing confusion in the public mind between the Human Rights Act and the European Union. It was largely British membership of the EU that prevented Chindamo's deportation, not the HRA. But it also shows in the starkest possible fashion how the HRA is automatically blamed for unpopular policies or judicial decisions. Within days the supposed role of the HRA in the Chindamo case had achieved the status of established fact in the public mind – when it had little to do with it.

Finally, the episode illustrates the way in which politicians on all sides can become swept up in the public hysteria about the HRA. For their part, it was reported that Labour ministers had given private assurances to the family of Philip Lawrence that Chindamo would be deported after his release from jail. In truth any such assurances would have been without merit even at the time they were made, and it was extremely embarrassing for Ministers when their promises were broken. Rather than admit that they had acted in bad faith, however, they allowed the HRA to be blamed. In other words, they were happy to use public outrage against the HRA as a kind of air raid shelter, because it protected them from the consequences of their own dishonesty and incompetence. On the other side, instead of taking time to establish the facts, opposition figures took advantage of the public anger surrounding the Chindamo case to attack the HRA.

Our second case study deals with the widespread but quite mistaken popular belief that prisoners are able to obtain access to hardcore pornography through the Human Rights Act. We show how quickly an unsuccessful attempt by the serial killer Dennis Nilsen to use the HRA in order to obtain hardcore pornography mutated into widely held public belief that prisoners could have access to it. This case study underlines how readily the HRA is often blamed, not merely when it is not at fault, but even when the legal system has functioned impeccably.

The third case study is similar. It deals with the widespread, though wholly again false, belief that the Human Rights Act prevents the police from issuing “wanted” photographs of suspects and fugitives. Once again popular feeling was whipped up by the press and exploited by politicians, in this case especially on the political right.

Dominic Raab, the Conservative Party and the Human Rights Act

There are dozens of other instances of similarly incorrect or biased reporting about the HRA, which need not detain us here. But before turning to the case studies, it is important to explore further the intellectual outlook that seeks to diminish and challenge the Human Rights Act, through a brief analysis of *The Assault on Liberty*, a recent book by the lawyer and Conservative adviser Dominic Raab.

Raab’s book is a passionate and valuable attack on the erosion of British liberty. Reading the book helps the readers understand why, under David Cameron, the Tories have been mainly on the right side in the great debates on personal freedom. But Raab’s argument falters when he attempts to deal with the Human Rights Act. Here truth yields to falsehood and clarity to obfuscation.

Most importantly, the book contains, and further propagates, a series of fundamental conceptual mistakes about the HRA. For example, it states that the Act introduces a “socialist conception of human rights” which elevates social services, NHS treatment, welfare payments and even police protection to the status of fundamental human rights. But it does not, as the reader can check by consulting the Appendix. The HRA focuses on basic civil and political rights, and economic, social and cultural rights are generally excluded. There is no general right to social services, NHS treatment or welfare payments under the HRA.

The book also states that “a successful claim of human rights has trump card status”. But this too is incorrect, as we have seen. Many of the HRA rights are specifically limited in certain respects, and judges have no power to strike down legislation. The creation and revision of legislation remains the job, and the responsibility, of Parliament.

Finally, Raab suggests that the UK courts give too much deference to Strasbourg jurisprudence in their own decisions. But this ignores both the “margin of appreciation” by which national courts are able to respect local customs and laws, and the many remarks by UK judges that show that they are not over-bound by Strasbourg. Thus in a recent case about political advertising, notwithstanding decisions by the Strasbourg court in cases with extremely similar facts, the House of Lords came to a different conclusion to Strasbourg. In so doing it gave specific consideration to the fact that the UK Parliament had recently passed legislation to this effect. Speaking for the court, Lord Bingham said that “the judgment of Parliament on such an issue should not be lightly overridden”. “In the absence of special circumstances” UK courts should follow any clear and constant jurisprudence of the Strasbourg courts. But as the case showed, UK courts can at times differ from Strasbourg jurisprudence on factual grounds, even when the difference in facts is slight.

The Assault on Liberty also fails to give the Convention rights in the HRA the credit they deserve for protecting British rights in the 21st century. For example, on the one hand it rightly celebrates the legal protection of personal data:

Rooted in our history, this basic idea of placing checks on the power of the state, thereby preserving the freedoms of the citizen from interference, are [sic] at the heart of the current debates on the limits of state surveillance, the reach of the database state, the right of the police to take and retain DNA on innocent people and safeguards on the use of the ever-present coverage provided by CCTV cameras.

Yet on the other hand, the right to privacy that Raab is referring to here only exists because of the European Convention on Human Rights, and the HRA. It is not found as such in British common law. And it is noteworthy that the book nowhere credits the HRA as the basis of the Belmarsh judgment by the House of Lords, as a result of which indefinite detention without charge was repealed on the grounds of incompatibility with the Act.

As this brings out, despite its other virtues, in regard to the HRA *The Assault on Liberty* is unfair, narrow and tendentious. It celebrates British liberty and personal freedoms, yet somehow contrives to attack the legal instrument through which those freedoms are maintained. Its significance lies in the fact that Raab's case against the Human Rights Act is the best case so far made against the HRA from a centre-right perspective, and is made by a lawyer who trained at Linklaters and Liberty, and worked at the Foreign Office. This brings out how criticism of the Act can be quite unfair, even when it comes from experienced and knowledgeable sources.

With this in mind, we turn to our case studies.

Case Study 1: The Human Rights Act and the Deportation of Learco Chindamo

On 21 August 2007 readers of *The Sun* awoke to read the following furious leader:

The Human Rights Act has been making a mockery of justice for years. Yesterday it delivered another blow when the killer of head teacher Philip Lawrence won his battle to avoid deportation back to Italy. Learco Chindamo's lawyers took his case to the Asylum and Immigration Tribunal and played the trump card of their client's human rights.

In a disgraceful decision, they won. Now vile Chindamo's human rights must take priority over those of Mr Lawrence's widow and children. What madness. It's not as though he was being returned to a lawless country. The Home Office is rightly appealing. But the Human Rights Act is a folly of the Government's own making. This lunacy will only end when the wretched Act is scrapped.

Readers could be forgiven for thinking that the Human Rights Act was the principal barrier to Chindamo's deportation. Indeed nearly everyone who picked up a newspaper of any kind that day would have likely concluded that it was the HRA alone which barred the deportation of Chindamo.

Writing in the *Daily Mirror* on 22 August 2007, columnist Sue Carroll told us:

Philip Lawrence was the first notable victim of knife crime in Britain, and in the current climate, his name strikes an emotional chord. If any family deserves a safe, happy life it's his. But since when did we ever have a say in human rights? Tragically for Frances, the ruling by the Asylum and Immigration Tribunal was entirely predictable. Chindamo, they insisted this week, would have his human rights denied were he to be expelled to Italy.

Apparently, he'd be deprived of a "family life"... And if Human Rights legislation was introduced for the greater good, why has it left Frances Lawrence more broken, defeated and demoralised than she was on the horrendous day she lost her husband to a killer's blade?

On the same day the *Daily Mail* ran an article entitled "Has the law deprived Francis Lawrence of justice?" saying:

But though Mrs Lawrence did not want revenge, she did want justice. And she feels now – like all too many people in our society – that the law has lost sight of natural justice and has become so detached from reality that, legalistically, it protects the human rights of perpetrators at the expense of their victims...

What makes her – in her own words – "devastated and demoralised", is that immigration judges have ruled that he may not be deported because, under the Human Rights Act introduced by New Labour, he would be denied the right to a "family life" because his language is English and his ties are with Britain, whose hospitality he has abused shamefully.

Even broadsheet attempts to unpack the legal ruling suggested that the HRA was the principal bar to Chindamo's deportation. In an article entitled "*Learco Chindamo: the Deportation Debate*" the *Daily Telegraph* reported:

Why can't Learco Chindamo be deported to Italy? Article 8 of the Human Rights Act says that Chindamo has the right to a family life.

Chindamo's family live in London, and he left Italy aged five, so the Asylum and Immigration Tribunal ruled that he should stay.

Politicians were swift to take up the emerging thread. In an article entitled "David Cameron: Scrap the Human Rights Act" the *Telegraph* reported the Tory leader's comments: "The problem for this Government is that the Human Rights Act is their legislation and they appear to be blind to its failings. It is a glaring example of what is going wrong in our country. What about the rights of Mrs Lawrence? We ought to abolish the Human Rights Act and replace it with a British Bill of Rights that we can write ourselves that sets out clearly our rights and responsibilities."

The then Shadow Home Secretary David Davis said: "It is a stark demonstration of the clumsy incompetence of this Government's human rights legislation that we are unable to send a proven killer back to his own country, especially when that country is in the EU." The Police Federation's Alan Gordon was reported to have called the ruling 'ludicrous' saying: "What about the human rights of Philip Lawrence, his wife and children?"

Following an unsuccessful Government appeal against the decision not to deport, media focus remained on the perceived role of the HRA. Indeed confusion even spread to whether or not the HRA was an EU Directive itself: on 31 October 2007, the *Guardian* reported: "The Chindamo case has triggered much debate about victims' rights and reignited criticism of the Human Rights Act, a European directive." BBC Online similarly reported Chindamo's legal challenge to his transfer from an open to a closed prison as a done deal in article entitled: "Head killer wins human rights bid".

But the facts told a different story. Learco Chindamo, an Italian national, had lived in the UK since he was a young child. In 1996, then aged 15, he was convicted of the murder of head teacher Phillip Lawrence, whom he stabbed to death in December 1995. Chindamo was given a life sentence and a tariff of twelve years was subsequently imposed. In 2007 the Government began deportation proceedings against Chindamo in preparation for his planned release from prison.

It was reported that Mr Lawrence's widow was repeatedly assured by the Government over many years that Chindamo would be deported following his release from prison.

Chindamo challenged his deportation and on 17 August 2007 his appeal against deportation was upheld by the Asylum and Immigration Tribunal. The Tribunal judgment on the deportation appeal stretches to 32 pages. Twenty-nine of those pages concern an EU Directive – the Citizens' Directive – and it is the Tribunal's decision under this Directive that forms the basis of their judgment to block deportation.

The Citizens Directive and UK Regulations implementing it state that residence decisions and freedom of movement can only be restricted on grounds of public policy, public security or public health, specifically "the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the most fundamental interests of society". In this case the Tribunal decision revolved principally around the legal effect of EU law. On page 29 the judgment stated:

We have concluded that there do not exist grounds of public policy in this case which justify exclusion. The provisions of EU law, in particular Article 27 paragraph 2 and the relevant decisions of the European Court are compelling taken with Article 28 paragraph 1 considerations and the various reports on the appellant especially that of Mr Hughes. We conclude that the Secretary of State has not shown that the decision to remove is proportionate, nor that the decision complies with the other requirements of Regulation 21(5).

The judgment then briefly considers Article 8 of the HRA, finding that deportation would also breach Article 8. The judgment notes however that Article 8 is only engaged by the relationship between an adult appellant and their parent/adult siblings in exceptional circumstances.

The Government appealed against the Tribunal's decision not to allow deportation and their appeal was rejected in October 2007.

The Tribunal decision of 2007 and subsequent reporting is not the first time that the impact of the HRA on Chindamo's circumstances had

been misreported. On 26th July 2006 the following leader appeared in *The Sun*:

LOWEST OF THE LOW: KNIFE killer Learco Chindamo shocked the nation when he slaughtered headmaster Philip Lawrence outside his school gate in 1995. The sadistic gang leader, then 15, was locked away indefinitely. Yet six months ago he was out again, strolling unsupervised on a weekend break from an open prison....Why? You guessed it. A locked cell apparently breaches Chindamo's human rights. Forget about the rights of Philip Lawrence and his shattered family. Courts now lean over backwards to give criminals an easy ride.

BBC Online similarly suggested that Chindamo's legal challenge to his transfer from an open to a closed prison had been successful in an article entitled: "Head killer wins human rights bid". In fact all that had been "won" was the ability to formally challenge the transfer decision.

These claims, that the HRA prevented Chindamo from being transferred from an open to a closed prison, were wholly false. In August 2005 Chindamo was transferred from the closed prison where he had previously been to Ford Open Prison. On 8 May 2006 he was returned to closed conditions at Blakenhurst Prison. Chindamo challenged the legality of the decision to return him to closed conditions and judgment was given on 24 November 2006 where his application was dismissed. In giving judgment Justice Underhill questioned whether the Article 8 right to private life would even be engaged by the difference between an open and a closed prison. He concluded that even if it was engaged the impact of the transfer on the claimant's rights would be justified.

In sum: the Chindamo case barely concerned the HRA at all, and the press coverage was thoroughly inept and misleading.

Case Study 2: The Human Rights Act and Prisoners' Pornography

The *Daily Mail* on 26 October 2001 led with the story "Serial killer's legal aid porn bid", which opened with the line "Serial killer Dennis Nilsen is using the controversial new human rights law to demand porn magazines in prison."

The article contained a quote from Norman Brennan, director of the Victims of Crime Trust, saying “It’s hardly surprising that the Human Rights Act is seen as a friend to the criminal and an enemy to their victims. The public have to ask themselves whether we have got our priorities right.” The *Telegraph* also reported his claim that his human rights had been breached by not being able to receive pornography of his choice.

On 10 November 2002 the *Telegraph* ran with the headline “Prisoners win their claim that hardcore porn is a human right” saying “Prisoners are to be allowed hardcore pornography inside British jails for the first time after mounting a successful challenge based on the Human Rights Act”. The article said this was based on a new Prison Service Order on prisoner property. On 24 August 2004 *The Independent* reported that the then Shadow Home Secretary, David Davis had suggested that the HRA should be scrapped as it had fuelled a compensation culture, citing the case of Dennis Nilsen as “It had enabled the serial killer Dennis Nilsen to receive pornography in jail under his ‘right to information’.”

On 13 May 2006 *The Sun* published a story stating that 35,000 readers had called for the HRA to be scrapped. As part of the story it stated that the HRA had led to “crazy rulings that have seen murderers and sex offenders being treated better than their victims” and listed the case of Dennis Nilsen:

Serial killer Dennis Nilsen, 60, received hardcore gay porn in jail thanks to human rights laws. He argued it was his “right to information and freedom of expression” in 2002. The Prison Service agreed to allow that right to Nilsen, convicted of killing six young men in 1983.

On 15 May 2006 the *Mirror*, in listing cases which it claimed to show the “Rights and Wrongs” of the HRA, stated “Gay serial killer Dennis Nilsen ... won the right to hardcore porn in his cell in November 2002. He was going to sue under the Human Rights Act.”

Again, the facts were quite different. In 1983 the serial killer Dennis Nilsen was sentenced to life imprisonment for his multiple murders. In 2001 he sought to challenge by judicial review the prison Governor’s

decision to refuse him access to hard-core gay pornography. He argued that denying him access was “inhuman or degrading treatment” or was discriminatory towards gay men, in breach of the Human Rights Act. This was widely reported.

On 25 October 2001 Nilsen went before the High Court seeking to make two challenges by judicial review. The first of these was to grant him access to hardcore pornography. He was not given legal aid and the judge at first instance refused him permission at the outset to bring the claim, on the grounds that he had not established that there was any arguable case that a breach of his human rights had occurred, or that the prison’s rules were discriminatory. Because permission was refused he was unable to appeal this decision.

Nilsen’s second claim was for judicial review of the prison authorities’ decision to refuse to return to him his unfinished autobiography, so that he could continue working on it. He argued that this confiscation was a breach of his right to freedom of expression. This claim was considered by the courts but was also unsuccessful. The courts held that there was no breach of the HRA, saying that freedom of expression could be limited for a number of reasons. Leave to appeal to the House of Lords was refused.

The suggestion that the HRA had been instrumental in allowing Nilsen access to pornography was thus quite false. The *Telegraph*’s claim that the prison rules had been amended as a result of this claim was also incorrect. To repeat: Nilsen was never successful in even bringing the claim, and even if he had done so the rules required the Governor to “impose restrictions on the display of material which he or she considers is likely to cause offence by reason of its indecent or violent or racist content, or because it is racially or sexually discriminatory, taking account of local circumstances.” That is, far from permitting Nilsen access to pornography, they required the Governor to restrict it.

Case Study 3: The Human Rights Act and Police “Wanted” posters

In an article entitled “Wanted: for crimes against common sense”, the *Daily Mail* reported in January 2007 in that a Chief Constable was

“refusing to release pictures of two escaped murderers amid fears it might breach their human rights”.

The paper claimed that the Derbyshire police force had refused to release pictures of two convicted murderers who had escaped from prison because the force had to have regard to the Human Rights Act. The article contained a quote from one of the murder victims’ father: “And to suggest they had to consider Nixon’s human rights is unbelievable. He is a convicted murderer. What about my human rights and my son’s human rights?”

The Sun also ran the story with the following inflammatory headline: “What about OUR rights”, and reported that the Derbyshire police force had said that “police forces must take into account numerous factors including the public interest test, whether there is a strong local policing purpose and, of course, the Human Rights and Data Protection Acts”.

The articles in January were followed by more in February. The headline “Fury over Rights of Suspects” appeared in *The Sun* claiming that the police were keeping details of suspected criminals who are on the run secret “to protect their human rights”. It said that Northumbria police had released the names and pictures of five suspects that they wanted to trace but that senior officers had refused to reveal details of the alleged offences. The article included a quote from the North East Conservative Euro MP claiming that “this is yet another instance of the rights of suspected criminals being put before those of the law-abiding population”.

By this time the idea that the HRA prevented, and prevents, the police from releasing pictures of fugitive suspects had become part of the received wisdom on the HRA. Writing in the *Evening Standard* in 2007, the then Shadow Home Secretary David Davis highlighted “the perversities caused by the Brown-Blair Human Rights Act: The confusion generated by Labour’s warped approach to human rights has seen ... the names of fugitive killers withheld to protect their ‘privacy’”.

Misrepresentation of how the HRA applies to photographs of suspects and convicted criminals came to the fore once again in 2009. On 17th June 2009 the *Manchester Evening News* ran with the front-page story “Gangsters’ relatives seek compensation.” A legally privileged

letter sent to Greater Manchester Police had been leaked to the newspaper and in the days that followed the pending action was reported widely inaccurately in the press. The case revolved around a billboard campaign launched by the GMP, which used pictures of gang members convicted of murder alongside a digital image of what they might look like in 40 years when released from prison.

The relatives of the gang members (who were completely unrelated to the crimes or police investigation) argued that the GMP had breached their human rights, because they were experiencing abuse and intimidation from members of the public who recognised them as being related to the convicted gang members. Typical headlines ran as “Gangster images ‘breached rights’”, and appeared to leave the question of whose rights were being breached intentionally vague. At worst, the headlines seemed to be implying that it was the gangsters’ right to private life that was being infringed.

Yet again, however, the facts were quite otherwise. The case was not about protecting already-convicted criminals, but about safeguarding family members who had done nothing wrong. Yet this confusion was not so much dispelled as exploited by those involved. Thus Chief Constable Peter Fahy was widely quoted as saying “In this case we were concerned with the ultimate human right – the right to life – and this far outweighed any privacy rights.” This remark was doubly unfortunate: the case was not about a conflict of rights, and the right to life was not at issue.

The truth is that the Human Rights Act does not prevent pictures from being published in order to help find a fugitive. This has been tested in another case which concerned a decision by the London Borough of Brent and the Metropolitan police to distribute leaflets and to publicise other material carrying the claimants’ images, names and ages, and details of anti-social behaviour orders issued against them.

The claimants argued that the publicity was unlawful and in breach of their rights under Article 8 of the European Convention. However Kennedy LJ held that the publicity did not infringe the claimants’ human rights, saying that:

It is clear to me that whether publicity is intended to inform, to reassure, to assist in enforcing the existing orders by policing, to inhibit the behaviour of those against whom the orders have been made, or to deter others, it is unlikely to be effective unless it includes photographs, names and at least partial addresses. Not only do the readers need to know against whom orders have been made, but those responsible for publicity must leave no room for mis-identification. As to the remainder of the content of any publicity, that must depend upon the facts of the case.

As regards the publication of pictures of convicted criminals and the rights of their relatives the courts have held that publication of photographs will not breach the right to private life of those associated with the criminals, as long as full consideration is given to the impact of publication before images are published.

These three case studies bring out how neglectful of the truth the press and even the broadcast media have been with the Human Rights Act, how willing they have been to traduce it through false and misleading stories, and how tempting it can be for politicians to follow them. It is hard to resist the inference that many sections of the media have pursued a deliberate policy of undermining the Act, perhaps from concern at the protection it offers under Article 8 for people's private lives. Yet as we have discussed, the press also have a huge interest in preserving the HRA. It is time for that interest to be recognised.

The HRA is thus quite wrongly held in the very lowest public esteem. But are there any worthwhile alternatives to it? We turn to this question in the final chapter.

5: A British Bill of Rights? The New European Charter?

We have the rule of law in Zimbabwe. We don't lock up people for years without trial, as you do in Belmarsh.

Zimbabwean Ambassador to Chris Mullin MP,
February 2005

The many myths that have been promulgated about the Human Rights Act have grossly undermined its public reputation, as we have seen. Partly for this reason, all the major British political parties have floated possible alternatives or supplements to the Act.

Thus the Government published a Green Paper in early 2009 proposing a new Bill of Rights and Responsibilities. The Conservatives have long declared themselves in favour of a new British Bill of Rights. And the Liberal Democrats have also promoted the idea of a Bill of Rights. In addition various other groups, including two parliamentary committees, have published other reports calling for a new Bill of Rights of some description.

Finally, if the Lisbon Treaty is ratified it will bring into effect a new Charter of Fundamental Rights of the European Union, not as an alternative to the European Convention, but as a supplement to it.

This chapter argues that adoption by the UK of any of these instruments would be a serious mistake.

The 2009 Green Paper on Rights and Responsibilities

The Government's Green Paper of March 2009 *Rights and Responsibilities: Developing our Constitutional Framework* sets out for consultation a variety of ideas as to a proposed Bill of Rights and

Responsibilities. Politically, it is an attempt by the Government to present its credentials and to shape public debate in this area. Unfortunately it is vague to the point of obscurity, and the little that is clear in it is inadvisable or incoherent. Since one of its earliest paragraphs wrongly traces basic legal rights in America to the US Constitution of 1787, rather than to the Bill of Rights of 1791, perhaps this is not surprising.

The new Bill is intended to supplement the Human Rights Act, not to replace it. In the words of Jack Straw MP, the Secretary of State, it “will in no way detract from or undermine the rights and freedoms in the HRA.” It will not be entrenched, and it will not be superior law and so confer no right to annul legislation. The Green Paper suggests that any new Bill is likely to be largely declaratory, rather than to have legal force. It may confer new rights, but will not vary or amend any existing ones. What new rights does it have in mind? The answer appears to be none. However, it adds “A new Bill of Rights and Responsibilities could present the opportunity to bring together in one place a range of welfare entitlements currently scattered across the UK’s legal and political landscape.”

One innovation here is the stress which the Green Paper lays on “responsibilities”, specifically the responsibilities we owe to each other and to society as a whole. So what new legal responsibilities will it impose? Again, the answer appears to be none; indeed it is not clear that the Green Paper thinks there are any available at all. But it suggests it would be valuable to present “succinctly, and in one place”, non-enforceable responsibilities such as “treating NHS and other public-sector staff with respect ... voting and jury service; reporting crimes and co-operating with the prosecution agencies; as well as more general duties such as paying taxes and obeying the law.”

To sum up, then, the Government’s proposed Bill of Rights and Responsibilities will add no new legal rights and no legal responsibilities. It will have a very grand name, but little or no legal force. Its content is likely to include a list of welfare entitlements, and a formal declaration of the importance of being nice to NHS staff and snitching on your neighbours. Its effect will be to promote rights inflation still further,

and to add confusion and delay to legal proceedings. It is, in short, an embarrassing, muddled farce of a bill.

But it is more than that – the Green Paper is actively dangerous. Its whole thrust is to confuse and push the argument in a very unwise direction. First, it runs together basic rights with the secondary economic and social entitlements which Labour have tried to dignify as rights in other legislation. Secondly, although it rightly disavows the idea that basic rights should be conditional on the fulfilment of responsibilities, by tying them together and seeking to use legislation for moralistic effect, it further strengthens the corrupting picture of society as a collective enterprise. And because of this, thirdly, it blurs the one clear responsibility that all citizens bear: to obey the law. For all three reasons, the Green Paper actually serves to undermine the rule of law.

A British Bill of Rights

The call for a British Bill of Rights has also been recently made by the Liberal Democrats, without venturing into any substance, and more boldly by the Conservatives. In a Conference speech in 2006, David Cameron said “We will abolish the Human Rights Act and put a British Bill of Rights in its place.” And in a more detailed speech last year, Nick Herbert, then Shadow Secretary of State for Justice, called for a British Bill of Rights and Responsibilities, while making clear that he did not propose to leave the European Convention.

Apart from a repeal of the Human Rights Act, however, it is far from clear exactly what is being proposed here. Would the new Bill be entrenched in some way, so that it could not be simply repealed by Parliament? Presumably not: since the same speech insisted that Parliament was being undermined by the Act, it would hardly advocate entrenching an alternative which would inevitably contain many of the same rights. Would the Bill be superior law, so that judges could strike down primary legislation? Evidently not: for the same reason.

Moreover, the Herbert speech did not list which, if any, rights from the Human Rights Act would be dropped or amended in a new Bill of Rights, though it did hint that the Bill would strengthen, not weaken, such rights as that governing the protection of personal data, and the

right to trial by jury. Nor did it state which responsibilities it would introduce, or what legal status those responsibilities would possess.

Even without these details, however, there are three clear problems with this line of thought. The first lies in the underlying diagnosis that the Human Rights Act is not in line with British traditions of liberty, because it simply imports the European Convention rights into British law. As we have argued in Chapter Two, this underplays British, and specifically Conservative, influence over the genesis of the European Convention itself.

The second problem, highlighted by media commentators, is that any rights omitted by a British Bill of Rights would still be available under the Convention on appeal to the European Court. So an unwieldy and expensive twin-track system would likely arise, in which claims under the Bill could be pursued in the British courts, while those under the Convention would be referred to Strasbourg.

And finally, this approach would not be more effective than the present system. For example, either the current right not to be tortured would exist in the Bill of Rights, or merely in the Convention. But neither would permit the Government to deport even known terrorists to the threat of torture overseas. And nor would the other anti-torture conventions and treaties to which the UK is a signatory.

The Charter of Fundamental Rights of the European Union

To return: one important reason why the Government's Green Paper is likely to be a dead letter is that it has already signed the UK up to the Lisbon treaty, which contains a legal instrument called *The Charter of Fundamental Rights of the European Union*. This new charter should be a source of genuine public concern in this country.

The EU Charter is a quite different document to the European Convention. The Convention is not an instrument of the European Union, whereas the Charter was originally part of the failed EU Constitution and is now part of the Lisbon treaty. The Convention is restricted to what are almost all incontestably basic human rights and freedoms, whereas the Charter enfranchises as "rights" a host of secondary social and economic entitlements.

These include a supposed right to engage in work, a “workers’ right to information and consultation within the undertaking” [sic], a right of collective bargaining and action, a right of access to a free placement service, a right to protection against unfair dismissal, and a “right of access to services of general economic interest”.

All rights documents are at some level the product of political negotiation. But as their mangled names suggest, these so-called rights lack a clear and established provenance from across the different countries of the EU. They are not settled summaries of human experience. They are not, as Burke would put it, recorded rights, but simply still-unresolved negotiating claims.

The Lisbon treaty contains a partial opt-out for the UK from the Charter in this area. But the Charter is clearly an important aspect of the EU’s current drive to consolidate and federalise the individual nation states. So the ultimate effect of the treaty is likely to be to increase the influence of these social and economic rights in the UK.

This is a very unwelcome development. These social and economic entitlements are still highly politically contested matters. What the Charter does is to try to remove them from the political realm and to elevate them to the same status as the Convention Rights: a clear case of rights inflation. But such a move is ludicrous. It equates the right to a fair trial, which has its roots in Magna Carta, with a right of access to a free placement service! Headhunters often do excellent work. But this is not Runnymede.

More seriously, people may have different views about, say, the economic and political importance of collective bargaining. What no-one can dispute is that the argument has varied wildly over the past 40 years, from beer and sandwiches at No. 10 to the labour laws of the Thatcher government. And many would argue that this variation gives valuable flexibility to the British economy. Whatever one’s politics, then, there are strong pragmatic as well as legal and constitutional reasons to oppose the Charter.

The Real Problem

These rights documents have similar names. It is very easy to confuse the European Convention and the EU Charter, and Labour’s proposed

Bill of Rights of Responsibilities and the Conservatives' proposed British Bill of Rights.

In reality, as we have noted, the Convention and the Charter are quite different. The same is true of the two Bills of Rights. The Tories are concerned about social decline and a perceived loss of social and personal responsibility. But their focus is as much on the desire to control rights inflation, and to make sure that the fight against terrorism is efficiently prosecuted. Their mistake, as we have argued, lies in the belief that repeal of the Human Rights Act will help them to do so.

The present government, by contrast, are not especially moved by concern over rights inflation, but believe that legislation and government action should be used rhetorically as a means to encourage people to behave in the "right" way. They perceive a decline in public values and public behaviour, and they are reaching for legislation to address that decline. This mindless resort to legislation, we have argued, misconceives the solution and has further malign effects of its own.

It is notable, however, that both the main political parties have avoided two traps that some campaigning groups have fallen into: their Bills of Rights would not be entrenched, and so threaten the sovereignty of Parliament; and they would not allow judges to strike down legislation, and so politicise the judges.

But otherwise, both sides miss the real target. Responsibilities talk is beguiling because of public concern at a decline of social values and loss of respect. But intellectually it comes out of a contractarian approach, which encourages corporatism and slippage into an enterprise society. This is profoundly hostile to British constitutional traditions, which emphasise the importance of civil society and equality before the law. Properly considered, the law is not a solution to the wider problem of social decline, but the framework within which that problem can be addressed.

No, the real target should be the growing ineffectiveness of many of our public institutions, as they have lost independence and become corban to the state. The civil service, executive agencies and quangos have fallen victim to a craven administrative culture that uses the language of rights to cover its own agendas and avoid risk. The same is

true of local government. This process has in turn been aided and abetted by government policy, which has flooded these institutions with foolish legislation and converted entitlements into so-called “rights” for political reasons. It has been allowed to happen by the inability of Parliament itself to restrain the executive. And ultimately, it has its roots in colossal public ignorance of British social, political and constitutional history, and of the basic values and philosophy that inspired that history.

The result is lack of vision, weak leadership and huge unnecessary expense. But we have written about these problems elsewhere, and they are not the topic of this book. That is simply to recognise the true value of the Human Rights Act as our own Bill of Rights, and to use that recognition to start a process of public reflection and reform.

Appendix: The Human Rights Act (abridged)

Human Rights Act 1998

(1998, c. 42)

An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes.

[9th November 1998]

1. The Convention Rights

- (1) In this Act “the Convention rights” means the rights and fundamental freedoms set out in:
 - (a) Articles 2 to 12 and 14 of the Convention,
 - (b) Articles 1 to 3 of the First Protocol, and
 - (c) Article 1 of the Thirteenth Protocol,as read with Articles 16 to 18 of the Convention.
- (2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).
- (3) The Articles are set out in Schedule 1.

...

2. Interpretation of Convention rights

- (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any:
 - (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
 - (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
 - (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

...

3. Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section:

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

4. Declaration of incompatibility

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied:

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility.

...

- (6) A declaration under this section (“a declaration of incompatibility”):
- (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
 - (b) is not binding on the parties to the proceedings in which it is made.

6. Acts of public authorities

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) Subsection (1) does not apply to an act if:
- (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
 - (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
- (3) In this section “public authority” includes:
- (a) a court or tribunal, and
 - (b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

- (4) In subsection (3) “Parliament” does not include the House of Lords in its judicial capacity.
- (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

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- (6) “An act” includes a failure to act but does not include a failure to:
- (a) introduce in, or lay before, Parliament a proposal for legislation;
 - or
 - (b) make any primary legislation or remedial order.

7. Proceedings

- (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may:
- (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
 - (b) rely on the Convention right or rights concerned in any legal proceedings,
- but only if he is (or would be) a victim of the unlawful act.

...

8. Judicial remedies

- (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
- (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.
- (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including:
- (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
 - (b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

...

19. Statements of compatibility

- (1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill –

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- (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or
 - (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.
- (2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

Schedule 1

The Articles

Section 1(3)

Part I: The Convention

Rights and Freedoms

Article 2 – Right to life

- 1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- 2 Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4 – Prohibition of slavery and forced labour

- 1 No one shall be held in slavery or servitude.
- 2 No one shall be required to perform forced or compulsory labour.
- 3 For the purpose of this Article the term "forced or compulsory labour" shall not include:
 - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
 - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

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- (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - (d) any work or service which forms part of normal civic obligations.

Article 5 – Right to liberty and security

- 1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- 2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
- 3 Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall

be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

- 4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
- 5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 6 – Right to a fair trial

- 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- 3 Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain

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- the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7 – No punishment without law

- 1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
- 2 This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8 – Right to respect for private and family life

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9 – Freedom of thought, conscience and religion

- 1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- 2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 – Freedom of expression

- 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 – Freedom of assembly and association

- 1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
- 2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12 – Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 16 – Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17 – Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18 – Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Part II: The First Protocol

Article 1 – Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2 – Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the

State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3 – Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Part III: Article 1 of the Thirteenth Protocol

Abolition of the Death Penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Acknowledgements

This book is about the Human Rights Act, but it is not a law book and neither of the authors is a lawyer. We are therefore very grateful to lawyers from Liberty who have helpfully answered our legal questions. Many people have discussed the Act with us in recent years, and we owe them thanks. Thanks too to Shami Chakrabarti for her Preface.

Our families remain forbearing to a degree that is beyond thanks.

Endnotes

A note on terminology: throughout the text we distinguish between “Conservatives” with a big “C”, who are politically affiliated to that party; and small-c “conservatives”, who may in principle belong to any political party, or to none.

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Of the 17 declarations of incompatibility that have become final: ten have been remedied by later primary legislation (which in relation to two cases is not yet in force); one has been remedied by a remedial order under Section 10 of the Human Rights Act; three relate to provisions that had already been remedied by primary legislation at the time of the declaration; one is the subject of public consultation (in conjunction with the implementation of a judgment of the European Court of Human Rights); and two are under consideration as to how to remedy the incompatibility.

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Peter Osborne's latest film, *Holy Warriors*, was screened on Channel 4's *Unreported World* on 2 October 2009.

This book makes the Conservative case for the Human Rights Act. It shows how the Act is not a charter for socialism, but contains the most basic rights from 900 years of British history.

These Convention rights include the great conservative ideas of freedom under law, restraint on the power of the state and the deep link between individual liberty and private property. They were inspired by Sir Winston Churchill, and drafted by Conservative politicians. It is time now for the Conservative Party to reclaim this legacy.

