Article for the *Legal Democrat*

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CONSTITUTIONAL SAFEGUARDS OF HUMAN RIGHTS

Almost forty years ago I urged in a public lecture that Convention rights should be brought home to the UK. This was in the wake of Parliament's removal on racial grounds of the right of entry to British Asian asylum-seekers from East Africa. The European Human Rights Commission decided that the legislation had subjected our fellow British citizens to inherently degrading treatment because of their ethnicity.[2] The East African Asians case showed how a vulnerable minority needed legal protection against an executive-dominated Parliament and what JS Mill termed the "tyranny of the majority". It seemed obvious, at least to me, that the Convention needed to be given legal force in the UK.

Now, under the Human Rights Act, British courts must give direct effect to the Convention rights and provide effective remedies for breaches by public authorities. The Human Rights Act is no ordinary law. Although its provisions are not entrenched in a written constitution, it is a constitutional measure that profoundly affects our entire legal system – private law as well as public law. It is a first major step towards a full and enforceable modern British Bill of Rights. The Act is an essential element in the constitutional resettlement of the different nations and regions of the United Kingdom, and the recognition of the people of the United Kingdom as citizens endowed with human rights as their birthright. The Act also strengthens Parliament's role over the Executive, with the aid of the Joint Select Committee on Human Rights and its independent legal advisers.

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[2] *East African Asians v United Kingdom* (1973) 3 EHRR 76.

Attacks on the Human Rights Act

Six years since the Act came into force, there is a continuing and deeply worrying failure at the highest levels of Government to respect the culture of human rights upon which the effectiveness of the Act depends. There have been publicly – orchestrated attacks on the Act by the Prime Minister and some other Cabinet Ministers, the official opposition and right-wing sections of the press.

This hostility to the Act is not new. Back in 2003, on "Breakfast with Frost", the Prime Minister said that the position regarding asylum and illegal immigration was "unacceptable" and that if necessary Ministers would "fundamentally" re-examine the UK's obligations under the Convention. In the wake of the London bombings, Tony Blair once again threatened to amend the Human Rights Act to make it easier to remove and exclude suspected terrorists and their accomplices. The Prime Minister said: "Let no-one be in any doubt, the rules of the game are changing." By this he seemed to mean that the Convention and the Human Rights Act need changing.

The Prime Minister persists in undermining public confidence in the rule of law and the protection of human rights by the senior British judiciary. When Mr Justice Sullivan held that there had been a serious abuse of power at the highest level of government in seeking to flout a judicial decision on the right to asylum of the Afghan plane hijackers,[3] the Prime Minister rushed to disparage the High Court's judgment as "an abuse of common sense". The Government also suggested that the Human Rights Act had played a negative role in the case of a prisoner who committed a murder following his release from prison, despite clear evidence to the contrary, and that the Act had been an impediment to the deportation of foreign nationals.

[3] *R (S and others) v Secretary of State for the Home Department* [2006] EWHC 1111 (Admin).

Instead of explaining the ways in which the Human Rights Act gives necessary protection to the civil and political rights of everyone, and not only unpopular or vulnerable minorities – the right to life, and freedom from torture or other ill-treatment, to liberty without arbitrary arrest or detention; to freedom of speech, assembly and association, fair trials by independent and impartial courts respecting the presumption of innocence, to personal privacy, home and private property, to education, and to equal treatment without unfair discrimination – the Government aided and abetted the media has fed the myths and misperceptions that surround the Act. The Government which introduced this vital constitutional measure ought rather to explain how the Convention enshrines British values and shields the governed against abuses of power by their governors in a way which combines effective remedies for the misuse of power with the legislative supremacy of Parliament.

The Government should recall how the British drafters of the Convention made sure that public safety was at the heart of the Convention, qualifying individual rights with the need (in Convention language) to protect the interests of national security, public safety, the prevention of disorder or crime, and the rights and freedoms of others. It should recognize the positive and sensible way in which our senior judges have interpreted and applied the Human Rights Act and the Convention rights. Contrary to the frequent attacks on the Act and the judiciary, they have given enlightened leadership, not violating the separation of judicial from legislative and executive powers through excessive "activism", and approaching the Strasbourg jurisprudence *through* rather than *round* British law. UK case law is now influential in Strasbourg, and the volume of British complaints to the over-burdened Strasbourg Court has declined.

The Department of Constitutional Affair published a "Review of the Implementation of the Human Rights Act" in July 2006 which conceded that none of the controversial cases publicised over the summer justifies amendment or repeal of the Act. The Review also happily ruled out both withdrawal from the European Convention and repeal of the Act. The Review concluded that decisions of the UK courts under the Act have had no significant impact on criminal law or the Government's ability to fight crime. It acknowledged that in other areas the impact of the Act upon UK law has been beneficial, and has led to a positive dialogue between UK judges and those at the European Court of Human Rights.

However, the Review did conclude that the Act has had an impact on the Government's counter-terrorism legislation, with the main difficulties arising not directly from the Act itself but from decisions of the European Court of Human Rights. What the Government finds objectionable is the Court's ruling in *Chahal v UK*[4] that, even if someone is a threat to national security, he must not be deported to a country where there is a substantial risk that he will be subjected to torture. That ruling is reinforced by Article 3 of the UN Torture Convention, ratified by the UK in 1988, which prevents a State Party from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that he would be in danger of being tortured.

In my view, it is inconceivable that the Strasbourg Court would now interpret Article 3 more narrowly.[5] And, if, as the Prime Minister has threatened, the

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[4] *Chahal v UK* (1996) 23 EHRR 413.

[5] In its judgment in *Attorney-General v Zaoui* [2005] NZSC 38, the Supreme Court of New Zealand noted that the prohibition against torture in the International Covenant on Civil and Political Rights and in the Convention against Torture is stated to be absolute, even in wartime. The Supreme Court concluded that, in deciding whether to certify that the continued presence of a person in New Zealand constitutes a threat to national security and ordering his deportation had to be satisfied that the person would not be in danger of being arbitrarily deprived of life or of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Human Rights Act were to be amended to require our courts to balance the absolute prohibition against torture against national security, this would be plainly contrary to Article 3 of the Convention and of the Convention against Torture,[6] and would breach the requirement to provide an effective domestic remedy in Article 13 of the Convention for Article 3 breaches. Such a change would undermine the authority of the Human Rights Act.

In oral evidence to the Parliamentary Joint Select Committee on Human Rights, Lord Falconer fairly conceded that human rights law does not prevent democratically elected governments from responding to the problem of terrorism. He stated that "Human rights law is not some rigid doctrine that can never be broken; it is something where a balance needs to be struck. If the state is threatened, it will allow the necessary steps to be taken to protect the democratic society which those values serve. I do not accept it has had a significant effect on inhibiting the fight against terrorism".[7] It is to be hoped that this attitude is shared by the Prime Minister and his Cabinet colleagues.

The Commission for Equality and Human Rights

If properly led, structured and organized, the new Commission for Equality and Human Rights should play a vital role in dispelling the myths and misperceptions surrounding the Human Rights Act. While the Government has undertaken to carry out its own work in this respect, the authoritative voice of an independent and impartial champion of human rights should be influential. This is why amendments to the Equality Act 2006 to guarantee the Commission's

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[6] See *Attorney-General v Ahmed Zaoui* [2005] NZSC 38, Supreme Court of New Zealand. The prohibition against torture is absolute, and the decision-taker cannot deport to a country where he has substantial grounds for believing that, as a result of deportation, the person would be in danger of being subjected to torture or to inhuman or degrading treatment or punishment.

[7] 'The Human Rights Act: the DCA and Home Office Reviews', Joint Committee on Human Rights, HL Paper 278, HC 1716, published 14 Nov. 2006, Ev 11.

independence and accountability and to enable it to seek judicial review of human rights abuses were so important.

The new Commission will be set up by October 2007 and will have significant powers and duties in relation to human rights. These include the power to monitor the law and advise government about the effectiveness of equality and human rights enactments and about the likely effect of a proposed change of law; to monitor progress towards the development of a society characterized by the protection of human rights and equality; to provide information and advice, education and training, and the conduct of research; to conduct inquiries into any matter relating to its duties; to provide legal assistance to individuals; and, importantly, bringing and intervene in judicial review proceedings.[8] The Commission's remit will not be limited to the human rights protected by the Human Rights Act: it may consider human rights guaranteed by other international human rights treaties, including economic, social and cultural rights.[9]

If it is well led, professional staffed, and well resourced, the Commission should provide much-needed institutional support for human rights in the UK. One of the aims of the HRA was to develop a culture of awareness of human rights throughout society, yet much is still to be done if this is to be achieved.

The new Commission will also provide institutional protection for the first time for people suffering from discrimination on the grounds of sexual orientation, religion or belief and age and will be a "one-stop shop" for those suffering from multiple grounds of discrimination. It will help overcome so-called "silo-thinking" by each equality strand, which does not take into account experiences

[8] See Equality Act 2006, Part 1.
[9] Equality Act 2006, section 9.

of multiple discrimination. A single equality commission will encourage an overarching and strategic approach to the principle of equal treatment without discrimination, bringing together the different strands and avoiding wasteful duplication.

But the Commission will not be able to operate effectively unless it is able to operate within a legal framework which provides equal protection from unlawful discrimination to all. There is an urgent need for a comprehensive, coherent and user-friendly Single Equality Act to replace tangled and incoherent mess of existing equality laws. The current Discrimination Law Review, run by Ruth Kelly's new Department for Communities and Local Government, is responsible for the reform of discrimination law. This work must, if it is to be effective, ensure that a Single Equality Bill is more than a patchwork of existing discrimination laws. The groundwork for such a reform has already been done: following the Independent Review of the Enforcement of UK Anti-Discrimination Legislation, my Single Equality Bill was passed by the House of Lords in 2003 and received the backing of 246 MPs who signed an Early Day Motion in support.

A "British" Bill of Rights

The Human Rights Act 1988 was a first major step towards a modern and enforceable British Bill of Rights, but it is weaker than the written constitutions of other Commonwealth countries. The "special status" conferred on it by the courts is not underpinned by the protection of an explicitly constitutional framework, and it does not empower courts to strike down legislation that is unconstitutional.

A Bill of Rights as part and parcel of a written constitution would go further than the HRA and would entrench a framework of protection for human rights in line

with our international treaty obligations, under the ICCPR and other instruments, embracing economic, social and cultural rights as well as establishing fundamental freedoms. It would also provide a national statement of fundamental values with respect to citizenship.

The Government's renewed commitment to the Human Rights Act is to be welcomed. But the history of persistent attacks on the Act by the Government, the opposition and the press demonstrate its fragility, and the importance of entrenching rights in a written Constitution. This would also answer misguided Tory and tabloid criticisms of the Human Rights Act as an alien import from Europe. It is an important element in the process of achieving an enduring constitutional resettlement in this country, in which Liberal Democrat Lawyers should play an important role.