PERSONAL DETAILS

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INTRODUCTION

The Government is right in saying in the Foreword to its consultation paper that "The United Kingdom has a long, proud, and diverse history of freedom." Unfortunately such a boast from this Government, whose Home Office equally boasts of a long and proud record of coming to the aid of asylum seekers, serves only to ring alarm bells. The alarm sounds ever louder as one reads what follows, with proposal after proposal revealing a hypocritical pose in defence of human rights covering up attempts to limit them or render them ineffectual.

The Government's claims of "mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society" cannot stand up to scrutiny. An "originalist" interpretation of the Convention would involve a grotesque regression in human rights in a world where much that is entirely normal would have been alien to the drafters of the Convention text - hence the "living instrument" concept - but any over-enthusiasm for innovation has been and is being progressively governed by the developing emphasis on "subsidiarity" and the "margin of appreciation" that allow for national variations in the implementation of the Convention.

While the consultation paper acknowledges these developments (and indeed boasts of the UK's part in bringing them about) the Government still appears to base its public view of human rights on hostile press reports and mischievous or careless speeches by politicians who are at base suspicious of any legislation on human rights at all. Indeed, it seems at times that the Government is on the verge of seeing support for human rights as a conspiracy to inhibit its own freedom of action - but rather than openly admit this it talks without justification of "spurious" cases and exploitative lawyers. It produces minimal or no evidence for its claims either of such abuses or of "judicial creep".

If in the Government's view a court imposes an impractical or unduly costly means of bringing practice into conformity with human rights, it is open to it to propose to Parliament a preferable solution. Similarly, if case law develops in an incoherent and partial manner, the answer may be to negotiate amendments to the Convention that clarify and bring up to date the definitions in the Convention itself. Neither if these possibilities is even mentioned in the paper.

The fact is that the Human Rights Act has worked well. As the president of the European Court of Human Rights, Judge Robert Spano, said in January at a news conference: "when it comes to the implementation of the convention, at national level in the United Kingdom,

we have seen a marked and positive development… [The system] bring[s] human rights and the engagement with human rights into the hearts and minds of the national authorities… We now have 70,150 cases before our court. We have 118 cases from the United Kingdom. And if we use the average we usually use, which is how many cases per 10,000 inhabitants, the UK has a percentage of 0.03%, which is the lowest of the 47 member states… What that tells us is that the convention is being applied, not always necessarily in favour of the applicants but is being applied at national level in a comprehensive manner."

Rather than celebrate this success, the Government is proposing to weaken the domestic protection of human rights - and to do so with ill-considered proposals, the result of minimal or no consultation, that contrast starkly with the careful and deeply considered drafting of the Human Rights Act itself. Moreover, its proposals go well beyond the limited area that the Independent Human Rights Act Review (IHRAR) was asked to examine, so that its far-reaching proposals in relation to (say) Articles 8 and 10 are being rushed forward without due consideration, while several recommendations from the IHRAR are ignored or rejected without comment. One would have expected a reasoned response to each of the Review's proposals explaining the Government's acceptance or (more importantly) rejection.

The whole notion of a Bill of Rights is misguided when what is required at most is a few amendments to the Human Rights Act. That Act establishes our rights in UK law - the rights that the UK agreed to guarantee when it acceded to the European Convention on Human Rights. The notion of a Bill of Rights suggests a new fundamental law, maybe a law protected from casual amendment by an ordinary Act of Parliament or a statutory instrument under some Henry VIII clause, maybe embracing new rights (perhaps the economic and social rights so much needed in our ever more deeply unequal and divided society in which so many struggle even to afford the basic necessities of life).

But the Government has proposed neither any such new rights (beyond, that is, an unnecessary qualified right to jury trial and an unclear proposal to "guide" the judiciary in cases about freedom of expression) nor any constitutional entrenchment. Rather it gives prominence to the protections provided by common law, which are undoubtedly important but cover a much restricted area by comparison with the European Convention on Human Rights and which can easily be negated by legislation unlike rights under the Convention and the Human Rights Act. Its proposals amount to a watered down version of the Human Rights Act that will encourage a reversion to resort to the Strasbourg court and an end to the near-perfect record of the United Kingdom in being rarely taken to Strasbourg and winning a great majority of its cases there.

The Government seems to be motivated by temporary and transparently political considerations, including hostility to anything with a European label, as a result of needing to buy the favour of a powerful right wing faction within its Parliamentary party. This is evidenced by the absurdly one-sided and negative portrayal of the operation of the Human Rights Act in chapter 3 of the consultation paper, reminiscent again of ministers' disgraceful "pet cat" misrepresentations: it acknowledges no positive changes to our legal system while ignoring the findings of the IHRAR and of Parliament's Joint Committee on Human Rights.

Moreover, it is seeking to defend its position by purporting to defend the "will of

Parliament" while failing to acknowledge that what it is truly defending is the freedom of the Executive from accountability for its actions.

ANSWERS TO THE CONSULTATION QUESTIONS

1. We believe that the domestic courts should be able to draw on a wide range of law when reaching decisions on human rights issues. We would welcome your thoughts on the illustrative draft clauses found after paragraph 4 of Appendix 2 of the consultation document, as a means of achieving this.

I reject both options. Both were rejected by IHRAR:

> Option 1: 'The repeal of section 2 would result in there being no formal link between the HRA and the Convention. While the UK remains a party to the Convention, this option has nothing to commend it' (p79)
>
> Option 2: 'Any such gap would undermine the HRA's aims and lead to an increasing number of applications, including successful applications, brought against the UK before the European Court of Human Rights.' (p78).

Both would reduce the extent to which judgments by the European Court of Human Rights (ECtHR) can be taken into account by our courts, leading inevitably to greater resort by unsuccessful claimants to the Strasbourg court. Our courts always have been and are still able to take account of "a wide range of law" and they do so. They are not bound slavishly to follow Strasbourg case law, and (as above) the devices of the margin of appreciation and subsidiarity are now more in use than immediately after the Human Rights Act was passed: Professor Roger Masterman (in *The Mirror Crack'd*, UK Constitutional Law Association, 2013) demonstrated that even 9 years ago the courts had moved from an initially cautious approach to a freer one that does not see Strasbourg jurisprudence as necessarily binding.

Human rights are and human rights law should be universal. The law should be clear and so far as possible predictable, so that in principle the UK should build into its system a means of keeping pace with emerging Strasbourg case law, which is just what sn.2 does. The Government's proposals would move in the opposite direction.

2. The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights. How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

There is no doubt about the UK Supreme Court's supremacy within the legal system and so (as the IHRAR found) no case for any new legislative provision - especially given the scope for domestic interpretation of the Convention built into the 'margin of appreciation'. (Politically and morally, of course, the Government has conceded supremacy to the European Convention on Human Rights and hence the European Court of Human Rights so long as it does not denounce the Convention, but there is little the European Court of

Human Rights or the Council of Europe can do if the UK chooses to flout the Court's rulings and so trash its reputation as a liberal democracy governed by the so-called British value of rule of law.)

3. Should the qualified right to jury trial be recognised in the Bill of Rights?

No. The law about entitlement to trial by jury has changed not infrequently during my lifetime so that an attempt to build it into some variety of fundamental law would be hedged with limitations or else subject to amendment every time the substantive procedures changed. There is no risk to jury trial from the European Court of Human Rights and it is mischievous to pretend otherwise in the attempt to justify a so-called Bill of Rights.

4. How could the current position under section 12 of the Human Rights Act be amended to limit interference with the press and other publishers through injunctions or other relief?

Sn.12 has on the whole worked well to protect freedom of expression. The most important current threat to freedom of speech comes from SLAPPs (Strategic Litigation Against Public Participation) but this is best dealt with by the readily available means advocated by many MPs in the debate in the House of Commons on 20 January this year on 'Lawfare and UK Court System' (see https://hansard.parliament.uk/commons/2022-01-20/debates/4F7649B7-2085-4B51-9E8C-32992CFF7726/LawfareAndUKCourtSystem). Other problems can be dealt with by a consolidated Act on privacy or by amendment to the Data Protection Act 2018. It is inappropriate and undesirable to clutter a basic law on human rights with provisions to deal with specific and possibly even ephemeral problems.

5. The government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into account the considerations in the consultation document. To this end, how could clearer guidance be given to the courts about the utmost importance attached to Article 10? What guidance could we derive from other international models for protecting freedom of speech?

Article 10, backed by sn.12, already provides strong protection for freedom of expression and the Government has failed to demonstrate any need for changes to the framework they set for the courts to determine the balance of considerations relevant to this qualified right. The 'limited and exceptional circumstances' referred to in the question can only be those already set out in paragraph 2 of the Article: they must be "prescribed by law and ... 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".

Anything more specific is likely to trivialise the law by picking out ephemeral political concerns. It is far from clear what the Government has in mind, but insofar as its concern is with protection of journalists' sources, it would be better to use ordinary legislation (including a strengthening of the law on whistleblowing and accepting the Law Commission's recommendations on reform of the law on official secrets) or by firm instructions to public bodies not to use non-disclosure agreements to cover up their faults and derelictions of duty (and action to negate such NDAs when they have been or are made).

6. What further steps could be taken in the Bill of Rights to provide stronger protection for journalists' sources?

See 5.

7. Are there any other steps that the Bill of Rights could take to strengthen the protection for freedom of expression?

No. The Government's emphasis on freedom of expression, admittedly one of the most important freedoms protected by the European Convention on Human Rights, looks suspiciously as if it emanates from its current purely political obsession with what it contumeliously terms 'woke' culture. The law on human rights is not the place for such trivial politicking.

8. Do you consider that a condition that individuals must have suffered a 'significant disadvantage' to bring a claim under the Bill of Rights, as part of a permission stage for such claims, would be an effective way of making sure that courts focus on genuine human rights matters?

No, and the proposal has all the appearance of risking the UK breaching its obligations under Article 34 of the European Convention on Human Rights: "The High Contracting Parties undertake not to hinder in any way the effective exercise of this right". The Government has entirely failed to demonstrate any need for such a retrograde step which would tend to operate to the disadvantage of claimants lacking resources and/or from unpopular groups. In any case cases brought by way of judicial review are already in effect subject to a permission stage.

Bringing claims is anyway a fraught process with a test of victimhood resulting from an unlawful act to be passed that is not always straightforward. Some infringements of rights may be of grave importance to an individual but may seem trivial ("frivolous"?) to others: a test of "significant disadvantage" would be unable to make such distinctions while denying to some redress (short of going direct to the Strasbourg court) for abuse of their rights.

Besides, minor infringements of human rights by the Government or another public authority may affect very large numbers of people, maybe mainly without resources, and a

succession of them may amount in due course to a serious diminution of freedom for the persons affected. This is apparently recognised by the Government (see question 9) and getting round it would require unnecessary procedural complications that the Government has not spelled out but that would act as a further deterrent to prospective claimants.

The lack of any substantiation of its claim about "frivolous or spurious cases" suggests that it is motivated principally by misleading press reports, too often unwarily taken up by Ministers. This significant and potentially highly damaging proposal was not within the scope of the IHRAR and no such drastic move should be embarked upon without proper consultation with those - unlike the Government - who are knowledgeable and experienced in the subject.

9. Should the permission stage include an 'overriding public importance' second limb for exceptional cases that fail to meet the 'significant disadvantage' threshold, but where there is a highly compelling reason for the case to be heard nonetheless?

No: there should not be a permission stage (see above) and so this question does not arise.

10. How else could the government best ensure that the courts can focus on genuine human rights abuses?

The consultation paper takes it for granted that the courts focus on fake (not genuine - or maybe trivial?) human rights abuses without producing evidence to substantiate this claim - no doubt because any evidence the Government could produce would be taken apart by legal and other experts.

What can most of all "bring human rights into disrepute" is misrepresentation of genuine claims by the press and Government with an apparent agenda of doing just that - the Government's agenda being evidenced most particularly by this very consultation, based as it is on phony assumptions, proposals that formed no part of the IHRAR's remit, and failure to produce evidence of a genuine need for reform beyond perhaps a few minor amendments to the Human Rights Act.

11. How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation?

The question betrays the Government's fundamental hostility to human rights and unwillingness to adopt its essential nature as a 'living instrument', evolving to meet changed circumstances and new problems according to the basic principles enshrined in its Articles. The Government's attitude - that delivery of human rights depends on the cost not breaching some maximum limit - would appal the British lawyers who played such a major part in drafting the Convention. The suggestion in para 230 of the consultation paper is that the Government would prefer to sail as close to the wind as possible, arguably

abusing people's human rights, rather than give priority to treating them fairly. Since this is indeed the record of this Government it is at least honest of them to admit it, however implicitly.

Importantly, it is not just through litigation but even more through stimulating the review of policies in the light of the Human Rights Act and its evolving application to the modern environment that the Act and its developing case law on positive obligations has its impact. The 'originalist' approach seemingly implicit in this and other questions would see a huge part of the human rights gains since the Act was passed (let alone since the Convention was adopted) stripped away.

12. We would welcome your views on the options for section 3.
Option 1: Repeal section 3 and do not replace it
Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation. We would welcome comments on the above options, and the illustrative clauses in Appendix 2 of the consultation document.

The relevant section of the consultation paper is headed "Respecting the will of Parliament". It is transparent that the Government's concern is not with respecting the will of Parliament at all - it has shown its attitude to Parliament too often, not least in its failed attempt to prorogue it so as to avoid its scrutiny at a crucial stage of Brexit. Instead, respect for the will of Parliament is a duplicitous cover for enlarging the Government's freedom from accountability, not least to Parliament itself. With a working majority, control of business and extensive (and growing) powers to operate through secondary legislation, any government is almost always able to get its way: Parliament in the sense of an independent arm of the State is too often a comforting pretence.

These proposals to weaken or abolish sn.3 of the Human Rights Act - which run exactly counter to the Government's statement that it is "minded to agree" with the IHRAR that the section should not be repealed - are a prime example of using Parliament's supposed will as a cover for exempting human rights abuses, in this case in existing legislation, from examination in the Courts.

And the word 'supposed' to describe Parliament's intentions is important. Parliament's will was (in most relevant cases) expressed most recently in its passing of the Human Rights Act itself, where it made clear by the strong wording of sn.3 that it wanted any legislation that failed to conform with the European Convention on Human Rights to be reinterpreted "so far as it is possible to do so" while providing in sn.4 a way for the courts to signal to Parliament cases where such reinterpretation was not possible.

The Government alleges that the section has been used to alter significantly the balance of power between the legislature and the courts but in making its case it says highly significantly that the judgement in R v A (No.2) [2001] UKHL 25 "is often regarded as the high-point of the courts' expansive approach to section 3", thus admitting that since that

very early case a few months after the Act came into force the courts have been more conservative and cautious in their rulings, to the point of reluctance to use sn.3 at all, as has been independently observed by many experts.

In fact there has been on average little more than one case a year since the Act came into force in which sn.3 has been used and most such cases have been uncontroversial. Besides, the Government ("Parliament") is fully capable of amending the law established by any sn.3 ruling so as to adopt a preferred means of bringing the law into conformity with human rights if it wishes.

Moreover, this manner of interpretation of legislation by the courts antedates the Human Rights Act, being used (for example) in 1991 to abolish the defence of being married to charges of rape.

More specifically:

(a) the phrase in both draft clauses "consistent with the overall purpose of the legislation" means that when that overall purpose is implicitly contrary to human rights the courts will be prevented from adopting even "an ordinary reading of the words used... that is compatible with the rights and freedoms in" the proposed new legislation;

(b) there is at least one common wording in legislation and probably more where the 'natural reading of the words used' enshrines an out-of-date prejudice contrary to (for example) equality law. I refer to the use in the law of the word "religion" and related terms. Under the Equality Act 2010 (and its 2006 predecessor) discrimination in favour of religion and against non-religious beliefs is outlawed. The proposed clauses would leave the courts unable to bring laws that refer only to "religion" into conformity even with the UK's own equality legislation. They would take us back to the time when a High Court judge could solemnly declare that "As between different religions, the law stands neutral, but it assumes that any religion is at least likely to be better than none" (Cross J in Neville Estates v. Madden [1962] Ch. 832 at 853).

It is moreover highly important to note - as the Government does not - that one of the most significant effects of sn.3 is to change the culture of public authorities and others without any recourse to the courts at all. Officials and elected representatives have over the years since the Human Rights Act came into force felt obliged or indeed happy quietly to amend policies that previously did not conform to human rights requirements. In other cases when authorities were reluctant to do so the requirements of sn.3 have allowed advocates for human rights to argue, if necessary threatening litigation, that policies needed to be reformed.

Tellingly it is often central government that is most reluctant to listen to such arguments, putting convenience, prejudice or reactionary conservatism ahead of human rights and conformity to the Convention. Two obvious current examples are:

(a) the Government's refusal over many years (contrary, it may be noted, to the clear will of Parliament as implicit in debates on the Marriage (Same Sex Couples) Bill in 2013) to

legislate for humanist marriages, and

(b) the Department for Education's denial of any need to re-examine the current law on religious education despite the clearest possible statement (see [39] in the Fox judgement: [2015] EWHC 3404 (Admin)) of the already firmly established requirement of human rights law under the Convention for an "objective, critical and pluralistic" approach to education concerning religion and non-religious beliefs.

Examples such as this can only encourage the most sceptical approach to any proposals from the Government for changes in human rights law.

13. How could Parliament's role in engaging with, and scrutinising, section 3 judgments be enhanced?

As recommended by the IHRAR there is a clear role here for the Joint Committee on Human Rights - one that may require enhanced resources.

14. Should a new database be created to record all judgments that rely on section 3 in interpreting legislation?

Yes - as recommended by the IHRAR.

15. Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament?

No. The question as put here is seriously misleading given that the consultation paper says "We wish to explore whether there is a case for providing that declarations of incompatibility are also the only remedy available to courts in relation to certain secondary legislation" *(emphasis added).* Responses to this question from those who have not noticed those words are liable to be based on the instant reaction "why not?" but by asking the question in this devious manner the Government has undermined the validity of the responses it will receive.

Secondary legislation is adopted with minimal or no Parliamentary scrutiny and so the sn.4 compromise of declarations of incompatibility to preserve the sovereignty of Parliament is not needed or justified: introducing them would amount to an unnecessary denial of human rights, leaving the offending legislation in place. In RR v Secretary of State for Work and Pensions [2019] UKSC 52, the Supreme Court held that public authorities may disapply secondary legislation in cases of incompatibility with the Human Rights Act. This was already implicit in the expressed will of Parliament in sn.6(1) of the Human Rights Act, and as the Court noted the exemption in sn.6(2)(a) extends only to primary, not secondary, legislation. Common law (not the Human Rights Act) already provides for secondary legislation to be struck down in judicial review proceedings and this proposal would amount to an anomalous retreat from protection of human rights.

The proposal to extend the exemption for public authorities in sn.6(2)(b) to cover cases where the public authority is giving effect to the clear intentions of Parliament (para 274) is entirely unnecessary and is premised on a mere assertion that the current law has caused "confusion and risk aversion for frontline public services" etc. Examination of this claim should have formed part of the IHRAR's remit; it should not be implemented without some comparable independent examination.

16. Should the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill be extended to all proceedings under the Bill of Rights where subordinate legislation is found to be incompatible with the Convention rights?

The highly controversial Judicial Review and Courts Bill has not yet been passed by Parliament and one would have expected an interval of reflection before the Government sought to extend its procedures elsewhere. The serious dangers with suspended and especially prospective quashing orders is that they (a) allow the Government to get away with breaches of the law, which in the longer term will encourage careless legislation, and (b) discourage potential litigants from contesting abuses since they may find the courts unable or unwilling to grant any remedy, operating in effect to deny justice.

Further, to the extent that the proposal is to give the courts discretion in deciding how to act in cases where a breach of human rights is found, the effect will be that the courts are in practice making rather than interpreting the law - something contrary to the Government's expressed policy.

17. Should the Bill of Rights contain a remedial order power? In particular, should it be:
a. similar to that contained in section 10 of the Human Rights Act;
b. similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself;
c. limited only to remedial orders made under the 'urgent' procedure; or
d. abolished altogether?

Since there is no need for a so-called Bill of Rights and indeed strong arguments against at any rate most of the Government's plans for legislation, there is no need either to amend sn.10 or to introduce a different provision in any new law. Remedial orders under the Human Rights Act have been few and far between (only eight since the Act came into force) and have given no cause for concern.

18. We would welcome your views on how you consider section 19 is operating in practice, and whether there is a case for change.

The duty to make a declaration of compatibility is scarcely onerous, and sn.19 already provides for cases where the Minister "is unable to make a statement of compatibility [but] the government nevertheless wishes" to proceed with a Bill. The Government appears to wish to be able either to introduce legislation that they know is incompatible with the

Convention without acknowledging the fact or to proceed with legislation without bothering to check on its compatibility. Little could be more illustrative of the Government's disdain for human rights than its proposal that this petty obligation should even be questioned.

19. How can the Bill of Rights best reflect the different interests, histories and legal traditions of all parts of the UK, while retaining the key principles that underlie a Bill of Rights for the whole UK?

With the greatest difficulty, since both the Scottish and the Welsh governments have declared their fundamental opposition to the whole idea of the so-called Bill of Rights and since the proposed legislation pays scant regard to the different traditions and conventions found (for example) in Scotland, where Roman law has played and still plays an important part alongside an element of common law. No legislation should be introduced until agreement has been reached with the devolved administrations as to how (and how far) it should apply to them. This involves particular complications in the case of Northern Ireland where no Bill of Rights has yet been introduced and the Good Friday agreement brings the Irish government into consideration.

20. Should the existing definition of public authorities be maintained, or can more certainty be provided as to which bodies or functions are covered? Please provide reasons.

On the face of it there is nothing wrong with the definition of a public authority in sn.6(3) but the courts, despite ministerial assurances at the time the Bill was debated, have interpreted in an excessively narrow way the words "any person certain of whose functions are functions of a public nature". It is therefore desirable to make explicit that charities and other organisations that contract with a public authority to carry out functions (and in particular statutory functions) on its behalf fall within the definition and are bound by the Act. This is particularly important given that many religious organisations are taking on such contracts but then making use of the exemptions they have from equality law in a way that would be patently unlawful for the public authorities on whose behalf they are acting. Clients for the services they provide will have no remedy and no way of knowing in advance whether the service they use will be subject to such religious impairment. It should be noted that the persons adversely affected include those with religious beliefs other than those of the contractor organisation as well as those with non-religious beliefs or no religious beliefs.

21. The government would like to give public authorities greater confidence to perform their functions within the bounds of human rights law. Which of the following replacement options for section 6(2) would you prefer?
Option 1: Provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully; or
Option 2: Retain the current exception, but in a way which mirrors the changes to how

legislation can be interpreted discussed above for section 3. Which of the following replacement options for section 6(2) would you prefer?

Both these proposals are unnecessary and objectionable. Public authorities should have no difficulty either in knowing the legal obligations under which they operate or in maintaining an awareness of developing interpretations of such obligations by the courts - indeed, such information is readily available. Yet again the Government seeks by salami tactics to cut away at people's human rights.

22. Given the above, we would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict.

The Government should accept the recommendation of the IHRAR that although there may be a need for greater clarity "[a] unilateral solution, for instance by legislative amendment of the HRA, would not resolve the position... and would risk damaging vital UK interests (particularly in the Military and Intelligence spheres) in cases before the European Court of Human Rights." The IHRAR recommended exploration of the problem domestically and in inter-governmental negotiations, "augmented by judicial dialogue between UK Courts and the ECtHR."

23. To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under the Human Rights Act? We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this?
Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'.
Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.
We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2 of the consultation document.

Neither of these options is desirable or necessary. The courts are fully capable of interpreting the law as it stands and do not require "guidance" from an executive that is patently an interested party in many of the cases involved. The impossible-to-define concept of "the public interest" would tend to work against the interests of marginal or stigmatised groups, such as prisoners or asylum seekers. Legislation of this nature would be a first step on the (admittedly very long) path that the Polish government has chosen of political interference with the work of the judiciary.

24. How can we make sure deportations that are in the public interest are not frustrated

by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons.
Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment;
Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights; and/or
Option 3: provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State.

This is the first of a sequence of questions bent on restricting the rights of foreign citizens, would-be immigrants and asylum seekers that, deplorable enough in themselves, are entirely out of place in a consultation on human rights. Once again the Government cannot conceal its fundamental hostility to human rights, and pandering as it is to a sizeable but unrepresentative body of its own backbenchers is inhibited only (one suspects) by its assessment of what it may be able to get away with.

This first question assumes that deportations that are arguably contrary to human rights (for example, by entailing a risk of torture, as in the case of Abu Qatada) are nevertheless in the public interest. This assumption is entirely objectionable and none of these proposals should be entertained for a moment. The UK's present procedures for deportations are frequently open to the strongest criticism for gross inhumanity and serious discrimination against ethnic minorities. It is vital that they remain open to challenge by readily available procedures on grounds if not as broad as inhumanity then at least covering all aspects of human rights. The risk of torture is mentioned in the consultation paper but the Home Office has shown itself unmoved by such risks in the pursuit of clocking up another deportation. The current proposals for easier procedures for depriving people - even without notice - of their British citizenship (as if it needed to be easier than at present when such deprivation is a matter of routine for the Home Secretary) illustrate how shallow is the Government's commitment to human rights.

25. While respecting our international obligations, how could we more effectively address, at both the domestic and international levels, the impediments arising from the Convention and the Human Rights Act to tackling the challenges posed by illegal and irregular migration?

The need is rather to enhance the role of the Convention and the Human Rights Act in impeding the Government's notorious abuse of the human rights of immigrants and would-be immigrants including those seeking asylum from persecution in their home countries. Having blocked virtually all safe routes for asylum seekers to reach the UK, the Government now plans to criminalise those who manage to reach here by "irregular" and frequently dangerous routes. They deplore the role of people smugglers while all the time guaranteeing them a perpetual lucrative business by their own illiberal laws contrary to their treaty obligations. Human rights are universal, not restricted to UK citizens or those

whom the Government chooses to favour. Instead the Government now proposes that it should be free, unfettered by any power of the courts to apply the Human Rights Act, to persecute and abuse would-be immigrants and asylum seekers in pursuit of what it sees as its political advantage.

26. We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include:
a. the impact on the provision of public services;
b. the extent to which the statutory obligation had been discharged;
c. the extent of the breach; and
d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation. Which of the above considerations do you think should be included? Please provide reasons.

The Government is here again (as in the Judicial Review and Courts Bill) proposing to interfere with the freedom of the judiciary, including in cases where it is likely to be an interested party. If public authorities including the Government are concerned at the amount of damages they may become liable for should pay more attention to not breaching people's human rights in the first place.

27. We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this? Please provide reasons.
Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or
Option 2: Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.

The consultation paper complains of unjustified claims, mainly brought by prisoners, and gives particular prominence to their cost to the public purse (although the sums involved are utterly trivial as a price for a universal system of human rights). These proposed remedies do not in any case address this problem. Instead, they propose that claimants in whose cases abuse or denial of human rights has been proved should - in a process that amounts to punishment without trial - be subject to penalties for reasons of conduct that may be entirely unrelated to their cases. No such provisions as proposed should be contemplated: human rights do not have to be earned by good behaviour and compensation for their abuse should continue to depend as now on the harm done. Such payments are in any case small by comparison with damages awarded in other areas of the law.

28. We would welcome comments on the options for responding to adverse Strasbourg judgments, in light of the illustrative draft clause at paragraph 11 of Appendix 2 of the consultation document.

The draft clause seems designed to create opportunities for prevarication in those (very few) cases where the UK is found in breach of the Convention by the European Court of Human Rights - and is maybe designed in anticipation of there being many more such cases in future if the other changes the Government is now proposing go ahead. In any case the procedures outlined are already open to the Government (and once again highlight the pretence that Parliament is not effectively controlled by the Government). No legislation is required to enable the Government to initiate debates in Parliament.

(29.) We would like your views and any evidence or data you might hold on any potential impacts that could arise as a result of the proposed Bill of Rights. In particular:
What do you consider to be the likely costs and benefits of the proposed Bill of Rights?
What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform? Please give reasons and supply evidence as appropriate.
How might any negative impacts be mitigated? Please give reasons and supply evidence as appropriate.

The proposals would damage the culture of human rights that (contrary to the Government's claims) has been of such benefit since the Human Rights Act was enacted. They would promote the notion of human rights as an "optional extra" and limit access to human rights for many people. They would create popular and professional confusion about the law and their enactment would provide the Government with further opportunities to propagate false ideas about abuse of human rights in its own political interest. Significantly the Government has ignored the IHRAR's recommendation that there should be more public education about the UK constitution and HRA in schools, universities, and adult education.

Specifically, as set out in my earlier answers, interference with sn.3 of the Human Rights Act would significantly impair access to their human rights for people with no religion, in that the courts would be obliged to interpret narrowly references in legislation to religion in a way that excluded non-religious beliefs and absence of religious beliefs.

Such non-religious people are among those ('other-religious' people are similarly affected) who are already adversely affected by the current overly restrictive definition of "any person certain of whose functions are functions of a public nature" in cases where public authorities contract out functions and duties to religious bodies that can claim exemptions from the Equality Act.