After the Human Rights Act: Problems and Perspectives – a Speech by Edward Garnier QC MP, Shadow Minister for Justice, at Leeds University's Centre for International Governance at the University School of Law on Friday, 5 June 2009.

I was flattered, if a little alarmed, that Steve Wheatley's response to my acceptance of his invitation to speak at this conference was put in these terms: "We are particularly pleased to have your involvement as much of the discussion about reform has been prompted by policy proposals outlined by your Party (indeed it was that which prompted the decision to hold the workshop)… and on that basis, we would like you to outline the policy considerations and or your thinking on the issue of reform at the moment."

Reform is all round us; or at least talk of reform. In the immediate context we have not been concentrating on reform in relation to human rights legislation and treaties but reform within parliament itself. This, as must be obvious to anyone but a hermit without access to the Daily Telegraph or any other media outlet, has been prompted by the MPs' expenses scandal against the backdrop of one of the most difficult periods of economic bad news for generations. The public, already acutely hurt and confused by the recession, are now faced with the knowledge that those they elected to run the country and to make laws in the national interest have had their fingers in the till and their snouts in the trough through their generous interpretation of the rules covering expense claims.

Some of the MPs whose claims have been made public may face criminal charges; some MPs have stretched the rules to make claims of undeniably questionable probity, if not actually fraudulent; some have already been required, both freely and under protest, to pay back sums to the House of Commons in respect of claims which have failed the test of public acceptability, irrespective of whether they were made in good faith and within the rules as understood by the MPs in question and the House authorities at the time they were made; and many MPs have done nothing wrong, either in fact, in law, morally or in the light of the rules governing expenses claims. But all MPs, the political class as a whole, in both Houses of Parliament, in the European Parliament, and county, district and borough councillors are all now tarnished.

It is my feeling that the public has lost confidence, not just in this Government (and we know the results, or some of them, from yesterday's county council elections and will by Monday morning know the results of the European elections), but they have lost confidence in this House of Commons. My suspicion is, and this is borne out in opinion polls, that the electorate wants desperately to press the reset button and to start again with a new Parliament. My understanding of the political climate has been reinforced by the announced departures from Government of James Purnell, Hazel Blears and Jackie Smith from the Cabinet, and a number of other ministers outside the Cabinet. If they won't stay in Government, and several other senior MPs do not want to stay in the Commons and have said they are retiring, why should the electorate bother to place any confidence in the present Parliament?

Clearly the issues surrounding human rights, how they should be identified, protected, litigated, and in what legal instruments, conventions, treaties, statutes and unwritten conventions should they be described, whether we need the rights of British citizens to be exclusively contained in British instruments or whether they can be adequately protected or proclaimed internationally, remain to those of us who take an interest in them as lawyers, as academics and as politicians, matters of great importance. But we need to understand that in terms of public salience they have to cede precedence to the current and more pressing public concerns. But the picture will not always be one of storms and tempests and our country, both in good times and in bad, and all the more so in bad times, needs to be sure that it has the institutions and legal instruments to ensure that the rule of law governs our disputes and differences, and that people's rights and duties as citizens are understood by them as individuals and the authorities we permit to govern us.

About 5 years ago I was asked to speak at a conference in Qatar in the Persian Gulf to an international audience about the universality of human rights. I said that I believed that human rights are universal as a matter of principal but that, as we all know, how they are protected or the priority that different jurisdictions give to them varies. They are universal as rights but nationally applied. That enabled me, intellectually dishonest and cowardly politician that I am, to please everyone.

The Declaration of the Rights of Man and of the Citizen, promulgated by the French National Convention in 1789, declared amongst other things that "the inprescriptible rights of man" were "liberty, property, security and resistance to oppression." Since the monarchy was seen as evidence of oppression and it was abolished and the king

executed, the French felt able to amend the Declaration in 1793 by substituting "equality" for "resistance to oppression". It also included provisions on freedom of thought and expression, the freedom to peaceful assembly and of religion, the protection of property rights and, even in our times a matter of greater controversy, what I would describe as a social right, that of universal access to education.

That the authors of this document were themselves guillotined in 1794 is as much a commentary on the febrile political atmosphere in revolutionary France as on the quality or relevance of the rights in the Declaration but it is also worth noting that Jeremy Bentham criticised the French Declaration in his paper, "Anarchical Fallacies" on the grounds that whilst the rights it declared were all against the government it failed to provide any legal remedies to enforce them. Insurrection, he said, was no remedy but an invitation to anarchy.

Jeremy Bentham further complained that the Declaration referred to the rights of man as opposed to Frenchmen. Rights, he considered, were essentially national in character and should be set within the framework of a national legal system. In his opinion the French Declaration was no more than a yardstick against which standards of conduct within Government had to be compared and criticised and overthrown for failing to measure up to. Beyond that he said that the rights were too abstract to have any real meaning.

It has always been my somewhat untutored view as a jobbing and intuitive lawyer who has spent the last 30 years practising as a media and defamation barrister, rather than an analytically academic one thinking deeply about the matter, that the English legal system has traditionally provided remedies, such as damages and injunctions, to deal with particular disputes that have been presented to the courts for arbitration. The courts have increasingly applied their powers to award damages and grant injunctions against the executive either by direct means or more obliquely via the Divisional or Administrative Court by means of judicial review. They ask themselves, has an injury or wrong been committed or is one anticipated, is someone or something responsible to the complainant for that actual or anticipated wrong, and in the absence of some legal justification for the act or omission, how can the complainant best be compensated for it or protected in advance from its likely consequences? Judicial review and the remedies available under it, it seems to me, are just another way of ensuring that public authorities such as Governments act within the law and are stopped when they try to act outside their law-given powers.

Other jurisdictions, on the other hand, have preferred to make declarations or high-sounding statements about people's rights which, although they provide a standard for political criticism and debate, nonetheless provide access to similar remedies to those available under English law. Bentham goes a lot further than I do, but one has to admire his self-confidence as an Englishman, when he says this:
"It is in England, rather than in France, that the discovery of the rights of man ought naturally to have taken its rise: it is we, we English, that have the better right to it…Our right to this precious discovery, such as it is, of the rights of man, must I repeat it, have been prior to that of the French. It has been seen how peculiarly rich we are in materials for making it. Right, the substantive right, is the child of the law; from real laws come real rights; but from imaginary laws, from the laws of nature, fancied by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights."

To him, it would seem that those who set out to declare what human rights are or should be are insufficiently serious, they are mere dilettantes, and unlikely to provide practical answers. I do not know what he thought about the United States Declaration of Independence written by Thomas Jefferson in 1776 – perhaps more nonsense on stilts - but it is, on any view, a masterly and vivid piece of writing all too absent from 21st century political discourse in this country. Perhaps the language is too florid and the reference to the Deity embarrassing to modern ears but if you are going to found a great republic I can think of no more fitting way to do it than with words such as these: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness." Quite how you protect the right to happiness I do not know but that is beside the point. I also leave aside for present purposes that, as in ancient Athens, the freedoms and rights proclaimed did not belong to all men but only to the 18th century oligarchy of white landowners and lawyers who largely made up the governing and commercial class that founded the United States. Black slaves and American Indians were not, it seems, created equal and did not become so, if they ever have, for almost 200 years. And in the same era that Jefferson was writing the Declaration of Independence Lord Mansfield was freeing the black slave in England and Wilberforce was beginning his campaign to end the slave trade through the practical application of a common law remedy and the passing of a statute that, to use the jargon of the television advertisement, did exactly what it said on the tin.

I by no means, of course, dismiss the United States' example, not just because I am an admirer of Jefferson and his contemporary, and predecessor as President, John Adams, but because the United States Supreme Court is a powerful influence and brake on arbitrary or unconstitutional conduct. It may take a different view on the application of the right to free expression with regard to comment on current criminal proceedings compared to our system of contempt of court here, it may express itself about the moral rights of pro- and anti-abortionists which here we arrive at via parliamentary argument and the passing of statute law, but the United States has adapted over the years a way of promulgating inter-related personal rights or freedoms and protecting them, or altering them within the rule of law. In countries such as 18th century revolutionary France, present day Zimbabwe or Russia, no matter what the rights of the citizen may be in terms of public statements, constitutions or Bills of Rights, they were and are worthless without a strong and independent judicial system to police them.

Here, both politically and as students of the law, we are most concerned, not with declarations from the 18th century, but this county's relationship with the European Convention of Human Rights to which for over 50 years we have been a signatory. Lord Hoffman in the Judicial Studies Board Annual Lecture in March of this year made the following interestingly sharp observations, and I make no apology for citing them at some length. I do so willingly but always aware of the threat of being exposed as a plagiarist at examination time:

> "I would entirely accept that the practical expression of concepts employed in a treaty or constitutional document may change. To take a common example, the practical application of the concept of a cruel punishment may not be the same today as it was even 50 years ago. But that does not entitle a judicial body to introduce wholly new concepts, such as the protection of the environment, into an international treaty which makes no mention of them, simply because it would be more in accordance with the spirit of the times. It cannot be right that the balance we in this country strike between freedom of the press and privacy should be decided by a Slovenian judge saying of the German Constitutional Court:- 'I believe that the courts have to some extent and under American influence made a fetish of the freedom of the press…It is time that the pendulum swung back to a different kind of balance between what is private and secluded and what is public and unshielded.'

“What grandeur, Bentham would have said. What legislative power the judicial representative of Slovenia can wield from his chambers in Strasbourg. Out with this pernicious American influence. What do their courts or Founding Fathers know of human rights? It is we in Strasbourg who decree the European public order. Let the balance be struck differently, I say, and all the courts of Europe must jump to attention.

“These thoughts prompt another reason why an international court such as Strasbourg should be particularly cautious in extending its reach in this way. That is because, unlike the Supreme Court of the United States or the Supreme Courts of other countries performing a similar role, it lacks constitutional legitimacy. The court now has 47 judges, one for each member state of the Council of Europe. One country, one judge; so that Liechtenstein, San Marino, Monaco and Andorra, which have a combined population slightly less than that of the London Borough of Islington, have four judges and Russia, with a population of 140 million, has one judge. The judges are elected by a sub-Committee of the Council of Europe’s Parliamentary Assembly, which consists of 18 members chaired by a Latvian politician, on which the UK representatives are a Labour politician with a trade union background and no legal qualifications and a Conservative politician who was called to the Bar in 1972 but so far as I know has never practised. They choose from lists of 3 drawn by the governments of the 47 members in a manner which is totally opaque.

“It is therefore hardly surprising that to the people of the United Kingdom, this judicial body does not enjoy the constitutional legitimacy which the people of the United States accord to their Supreme Court. This is not an expression of populist Euroscepticism. Whatever one may say about the wisdom or even correctness of decisions of the Court of Justice in Luxembourg, no one can criticise their legitimacy in laying down uniform rules for the European Union in those areas which fall within the scope of the Treaty. But the Convention does not give the Strasbourg court equivalent legitimacy. As the case law shows, there is virtually no aspect of our legal system, from land law to social security to torts to consumer contracts, which is not arguably touched at some point by human rights. But we have not surrendered our sovereignty over all these matters. We remain an independent nation with its own legal system,

> evolved over centuries of constitutional struggle and pragmatic change. I do not suggest belief that the United Kingdom's legal system is perfect but I do argue that detailed decisions about how it could be improved should be made in London, either by our democratic institutions or by judicial bodies which, like the Supreme Court of the United States, are integral with our own society and respected as such."

Lord Hoffman has now retired as a Law Lord, or is about to, but he remains an independent cross-bench peer. He is not, as he makes clear, a populist Eurosceptic nor, I stress, is he a member of the Conservative Party, but he does, if I may respectfully suggest, neatly and cogently point out what concerns people in this country about the way in which the ECtHR goes about its business, who its judges are and how they are appointed. My Party shares those concerns, for despite the doctrine of the margin of appreciation which requires the Court to take account of national laws and customs we are still governed by a judiciary that can, as Lord Hoffman commented in relation to the Slovenian justice in the case from Germany, come to some fairly eccentric conclusions for some fairly eccentric reasons.
Lord Hoffman's remarks about the ECtHR have themselves generated renewed criticism of both the Human Rights Act and the European Convention on Human Rights which the HRA incorporates into our domestic law. I was never attracted to, let alone convinced by, Jack Straw's claim that the Labour Government was "bringing human rights home" by introducing the Human Rights Act 1998. Although it had a catchy ring to it and fitted the sound bite requirements of the New Labour Government, it was both silly and historically inaccurate, as any person with even the briefest acquaintance with the common law of England knows.

In the debates on the Bill in the Commons Sir Nicholas Lyell and I, as respectively the Shadow Attorney General and Shadow Minister to the Lord Chancellor's Department, and shortly before I became the Shadow Attorney myself, led for the Opposition. I pointed out that the Human Rights Bill, once enacted, would create some unnecessary but foreseeable constitutional collision points between the judiciary on the one hand and parliament and the executive on the other. Whose view should preside on matters of social policy such as health or education provision when it is the Government in Parliament that must control taxation and public expenditure and when the courts decide that the citizen's right to life is infringed by a lack of resources devoted to cancer or coronary treatment within the National Health Service or to special education needs by the Department for Schools? Is abortion to

be countenanced by Parliament but held to be an infringement of Article 8 by the courts? Should the Convention apply to soldiers in the battle field? This last question has just been decided in favour of its application, or to be precise, in relation to a case involving the death from heat exhaustion in a theatre of war, to the consternation of the Government and, no doubt, military planners and policy makers, and we now await the Government's decision on whether to appeal or to deal with the problem politically.

Of course I was delighted to read Lord Hoffmann's critique. It supports the reasoned criticisms that we have been making of both the Strasbourg Court and the HRA, and undermines Labour's mantra that any criticism of either places one in some sphere of illiberal outer darkness. Ever since the Human Rights Act, the Government have ducked all debate on any problems that have arisen with its operation, and refused to consider whether there could be better ways to protect our freedoms. But the Act (in some respects a compromise between our former system where Parliament was supreme and, say, the American system whereby statutes can be struck down by the Supreme Court) has not worked in an entirely satisfactory way - and this debate, highlighted in Lord Hoffman's lecture, is not going away.

So what has gone wrong and how can we fix it? First, as we could see from Lord Hoffmann's principal criticism, it is apparent that the Strasbourg Court has not limited itself to the strict judicial discipline of interpreting and applying Convention rights. Armed with the self made doctrine of the "living instrument", it has as Lord Hoffmann put it: "…been unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on member states." Lord Hoffmann spelt out as an example how the Strasbourg Court has expanded the right to privacy and family life to second-guess UK regulation governing night flights at Heathrow. His point is that the courts have a duty to apply the law vigorously, but should be wary of law-making, which is the job of elected law-makers. The ECHR is supposed to allow for the interpretation of Convention rights to differ between states under the "margin of appreciation", but this is not being allowed to develop as intended.

In my view, this process has been exacerbated by the Human Rights Act, which in practice has been interpreted here as requiring UK judges to match the Strasbourg case law in domestic law - although this is not required by the Convention, nor practised by many other countries. Take deportation. It is well known that the Strasbourg Court has made clear that member states cannot deport people back to a

place where they risk being tortured. But under UK law the HRA has also been interpreted to block deportation where it might also infringe on the right to family life. That goes further than either the Convention or the Strasbourg Court requires and risks fettering our ability to deport some criminals or those who pose a risk to national security.

The Human Rights Act also imposes a duty on our courts under Sections 2, 3 and 4 (and I paraphrase) to interpret legislation to make it ECHR compatible, effectively a licence to re-write laws which reflected the will of Parliament. But at the same time the HRA has not provided adequate protection against the Government's attack on our core freedoms. It is a shame that it took eight years of litigation, ending up in Strasbourg, to force the government to review its retention of the samples of innocent people swabbed and stored on its DNA database. What Lord Hoffmann did not say was that the human rights principles enshrined in the ECHR text are wrong or perverse. Indeed it would be difficult to fault them in this country as they reflect deeply held British values on the rights of the individual against arbitrary or excessive state power, but which have inevitably been kept fairly general so as to apply to different legal systems. Such a document has real usefulness in defining core values and freedoms. I confess that I am slightly mystified by those who argue that we should rely solely on the common law, Magna Carta, Habeas Corpus and the Bill Of Rights of 1689, because they have surely not appreciated the fact that these statutes were enacted precisely because the common law did not provide sufficient protection against Royal, state and executive power. And, as has been repeatedly stated, these statutes have been eroded and are still threatened with erosion, as the attempt at introducing 90 days detention without charge and curtailing jury trial amply demonstrated. In addition, being a party to the ECHR is a powerful statement to the world about our commitment to fundamental freedoms.

The Conservative approach, which David Cameron set out in his speech in June 2006, is to replace the HRA with our own home-grown Bill of Rights. It would be a Bill of Rights that would be compatible with the ECHR. In areas where ECHR rights are absolute, such as the Article 3 prohibition of torture, those protections will not be removed. But there is no reason why our courts in considering English, Scottish, Welsh and Northern Irish or United Kingdom matters should be bound by Strasbourg Court jurisprudence, if their own interpretation is different, particularly where rights should be balanced by responsibilities.

We should also look at restoring a better balance between Parliament and the courts so as to avoid, or at least mitigate the constitutional collisions I referred to earlier. It is wrong that primary legislation can be altered by Statutory Instrument if found incompatible with the Human Rights Act. Nor should our courts have power to stand a statute on its head. All these things can be addressed in our proposals for a Bill of Rights, along with the protection of historic rights such as jury trial on which the ECHR is understandably silent. We are also looking, for example, at how the right to privacy might be better balanced with the right to freedom of expression, matters which are touched on not just by Articles 8 and 10 of the ECHR but Sections 12 and 13 of the HRA - and I say this despite having for all of my time at the Bar been predominantly concerned with balancing these rights through the perspective of the common and statute law to see whether my clients were entitled to an injunction to prevent publication and damages for libel, or if acting for a publisher, to resist the claims. We need though to consider what other historic freedoms might be specifically protected.

The argument put forward by some is that none of this will work because we will still have surrendered ultimate authority to the Strasbourg Court and we should not live with this infringement of our sovereignty. Yet, there is no duty in the ECHR to follow Strasbourg case-law, and the obligation on the United Kingdom to respect adverse Strasbourg Court decisions, in a particular case to which this country is a party, is an international treaty obligation. Much of the Strasbourg case law is fact- and country-specific. Not to comply with the Court's opinion or decision in a case could no doubt create diplomatic and political ructions, depending on the facts of the case, but it would be interesting to see how and who would enforce the matter at law. Of course the Convention is an important treaty because it defines civilized standards of State conduct, now accepted by every European country except Belarus. It would be a strange thing indeed to abandon it and could bring international disadvantage. But it would have not any bearing on our membership of the European Union. Nor would it solve many of the issues that exercise people. The USA is not bound by it, but it can no more deport undesirable inmates held at Guantanamo to their home countries where they might be tortured than we can or should, because it is bound by another international convention for the prohibition of torture. I also, and I hope not naively, believe that the widely accepted standards of civilised behaviour held by American jurists would create an inherent brake on such misconduct.

By enacting a well-drafted Bill of Rights compatible with the rights in the text of the ECHR it will be far less likely that our domestic courts' interpretation of it will be faulted by the Strasbourg Court which, although sometimes given to flights of fancy, has shown itself respectful of individual countries' constitutional laws. It is a sensible way forward, which we will continue to work on in Opposition. My job and that of my colleagues is to remind the ill-motivated or the confused that just because the adjective "European" prefixes the word "Convention" does not mean that it is to be rejected out of hand or that we have nothing to gain from membership. But equally, a rational, composed and calm approach to the design of a legal instrument that suits us and our country should not be beyond us and, if done right, will enhance public confidence in parliament, the judiciary, democracy and the rule of law.