

## RESPONSE TO TRACK SEVEN

Plenty of agreement this week – but also a healthy difference of opinion I am delighted to see: this project can only gain from respectful but energetic dispute!

## LIBERAL JUDGES

Paul Bernal asks a key question: ‘What can be done in the event of a judicial lurch in a conservative or reactionary direction?’ You are all pretty well in agreement with me about the current judiciary but as Wenwen Lu puts it, ‘Not every judge or set of judges would do the same’ as Lord Bingham and the current Supreme Court justices (we are talking now about the UK). Or as Holly Bontoft suggests, we have been ‘mostly lucky in the first generation of judges’.

One answer is surely as Christina puts it (and, Christina, we are delighted to have you with us!) ‘more women in the judiciary, and at the top.’ This is not to say that ‘woman = progressive’, but it is to open up opportunities for the development of fresh language which moves law in a more human rights oriented direction, while tending to copper-fasten the moves that have already been made.

For the same reason I agree with Duygu Akdag about working to produce a ‘more independent and more representative’ judiciary.

Louise Thomson echoes Paul in reflecting on the change since the 1980s – what would happen if we were to return to those dismal times, so far as the judges were concerned anyway?

The answer I’d say lies partly in the architecture of the Human Rights Act (HRA) itself, the way the measure prevents itself from being destroyed by the judges. If we had a truly progressive legislature and a reactionary set of judges, the former would simply have to be crystal clear and willing to take negative declarations of incompatibility on the chin – almost celebrating them as evidence of progress.

In short I think the HRA contains the answer to Paul’s question within itself.

## RIGHTS AND RESPONSIBILITIES

Alex did a great job here challenging our assumptions about the perniciousness of responsibilities. I note, though, that for Alex it is the ‘responsibility to respect the rights of *others*’ that matters to him – on this I am in complete agreement. There is a role for the idea of responsibilities for sure, with Wenwen giving us a good example of an ethical charter in South Africa which uses this kind of language. And of course there is (the obvious?) responsibility to obey the law.

I think Christina is right, though, when she says that ‘responsibility is a red herring.’ I think this is the case insofar as it is being used as an idea which is being set up *in opposition* to rights. In fact I’d go further and say that it’s more dangerous than a red herring (assuming herrings of any colour are not dangerous). Sophia is particularly good on this. As Wenwen says, ‘rights should not be contingent on performing responsibilities’ – down that route comes selectivity and desert – a move away from universality in other words. Not what Alex wants we can see that – but it is what many advocates of responsibilities more or less explicitly desire. This is what causes many of us to be suspicious of the agitation for a bill of rights and responsibilities to take over from the HRA.

## ‘POLITICAL CORRECTNESS GONE MAD’?

Alex throws in another provocative remark: ‘the HRA has done more to damage what the popular understanding of human rights should be ... than it has [done] good’. . I think Alex is wrong about the HRA – I agree with Paul’s defence of it and his searching engagement with Alex. But I acknowledge Alex’s good faith and recognise his warning to us - we must not just assume we are right.

Louise’s analogy with opera is terrifically apt, and scary. Her warning is against the dangers of preaching only to the converted – as she says, ‘let’s not congratulate ourselves for alienating the majority’.

Our subject must engage in discussion, debate, explanation and dialogue, as Sophia (strongly supported by Christina) say. I hope that this whole project can be viewed as an exercise in just such outreach, an effort to engage with more than those whom we know.

The human rights community must be more than cheerleaders for its own set of fans.

## THE HRA AS A PARADIGM?

With Anthony J Langlois I certainly think so. And not just Australia but many other places as well. And not just civil and political rights but possibly other kinds of entitlements. I am confident that the balance between democracy and rights is very well judged in the HRA and that it is worth trying in other places and with other rights. Yes I know of the risks of majoritarianism so well described by Louise, but no system is risk-free and the HRA has fewer than most so far as democratic abuse and judicial excess are concerned.

## THE STRASBOURG COURT

Duygu raises this – should there be a ‘stronger role’ in the HRA for the European Court of Human Rights? Well, I’m not so sure. I think its no harm that the Strasbourg court does not *have* to be followed – and sometimes (as in the [Horncastle case](#), some might say) it is right that it is disregarded. In the [eighth track](#), released today I talk about a line of cases on compensation for property confiscation that I wish did not exist and which (it follows) I’d prefer we did not have to just obey.

I think that to work properly, Parliament must never be *obliged* to follow any court’s instructions, whether that court be domestic or European.

## LAST WORD

I’ll have a common track shortly which goes into more detail on how I feel the HRA has performed since it came into force just over ten years ago. Please watch out for that.

For now, though I leave you with something Holly says which strikes me as both profound and exactly in point:

'If human rights are part of politics, then they will always involve compromises. This compromise does not mean that the HRA is frail, but that it is working.'