It's lawyers v politicians in the battle for human rights

The Conservative Party has published plans to change Britain's human rights law. They have been criticised by many lawyers. But, whilst the politicians may have got the law wrong, many lawyers seem to have got the politics wrong. It is an unattractive position for an intelligent society to find itself in and leads to meaningless arguments between those who should know better.

Human rights lawyers are fond of challenging critics of the European Convention to say which of the Convention rights they would want to see withdrawn. The right to life? The right not to be enslaved? Or not to be tortured? The list goes on. Earlier this month, it was the turn of Sir Keir Starmer QC, former Director of Public Prosecutions and prospective Labour parliamentary candidate. Speaking at the Mishcon de Reya Academy, Sir Keir rattled through many of the rights granted by the European Convention in a manner which suggested that only a knave or a fool would want to remove them. It was simultaneously poignant and amusing – though, dare I say it, utterly pointless – because the challenge isn't to the rights. It is to the way they are currently applied.

And herein lies the politics. There is little doubt that Britain signing-up to the Convention in 1951 commanded popular support. After all, "it's the Brits wot wrote it", as the Sun might have claimed. But, if the same question arose today, it is far from clear that signing-up would command similar levels of support. That is a problem in a democratic society. It is a problem which needs to be addressed carefully, thoughtfully and with greater attention to the underlying law and politics than many advocates for the status quo appear to have devoted to it.

The British public's change of heart has not arisen because the nation has become anti-rights. Surveys show that the public overwhelmingly support each of the Convention rights. The change in attitude seems to have been triggered by the divergence between the rights which the public think they are endorsing in surveys and the rights which judges are actually enforcing in Strasbourg (and in the Strand). The explanation for this is well-known to lawyers, but unfamiliar to many others. The Convention is treated as a living instrument, which "must be interpreted in the light of present day conditions". It is this doctrine which allowed the Strasbourg Court to decide, for example:

- in 1978 that birching was degrading treatment, contrary to Article 3;
- in 1999, that banning homosexuals from serving in the armed forces was an interference in their private life, contrary to Article 8; and
- in 2004, that a blanket ban on prisoners voting was in breach of the right to free and fair elections, contrary to Protocol 1.

It is accepted by lawyers that these decisions are not what the original drafters intended. As Baroness Hale of the UK Supreme Court has said, the living instrument

doctrine even permits the Strasbourg Court to arrive at decisions which "the drafters definitely did not intend." This is evident from the fact that the ban on prisoners voting was already enshrined in UK law when the Convention was drafted, as was the use of birching as a punishment for specified criminal offences. And homosexual acts between males were a criminal offence in the UK, even in Civvy Street, until 1967.

The Conservative Party's proposal to solve the problem revolves around the notion that any judgement by the Strasbourg Court that UK law is incompatible with the Convention would be treated as "advisory". It would not be binding in UK law unless Parliament agrees that it should be enacted as such.

This is obviously contrary to the Convention as it currently stands (or else the Conservatives wouldn't need to propose it) and has attracted ridicule from some quarters, even from within the party itself. Dominic Grieve QC, until recently the Attorney General, has said the proposal "undermines entirely the principles that underpin international law" and suggested it is "inconceivable that [the UK] can negotiate a special status for ourselves".

But what if the proposals were re-expressed in a format which didn't undermine international law and which didn't require a special opt-out for the UK, because it applied equally to all signatories in a manner recognised in law?
An international treaty is a contract between nations. It would be a pretty useless contract if a finding of breach could simply be disregarded by the party which committed it. But the Convention is not a typical contract. Not only does its meaning change over time under the "living instrument" doctrine, the Strasbourg Court has also recognised that, on some matters, national authorities should be allowed to judge what is necessary in a democratic society – a discretion known as the "margin of appreciation".

It should not be past the wit of lawyers to construct a protocol under which the living instrument doctrine and/or the margin of appreciation gave greater weight than at present to the will of national legislatures. Under such an arrangement, decisions of the Strasbourg Court would continue to be immediately binding on the parties in relation to judgements based on the original meaning and intent of the party when they signed the Convention. But other judgements would be in the nature of a decree nisi, with a time limit set by which a contrary vote, either in parliament or in a public referendum, would be sufficient to prevent the judgment becoming absolute.

There will be much talk, as we move into 2015, of Magna Carta's 800th anniversary and Britain as the "home" of human rights. What better way to celebrate than with a constructive discussion on the way forward, in place of point-scoring activism and advocacy.