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Page 48 of the Conservative Party Manifesto, 2019 and the proposed Constitution, Democracy & Rights Commission

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1 Page 48 of the Conservative Party Manifesto for the December 2019 General Election contained a paragraph which has attracted much comment.

> **After Brexit we also need to look at the broader aspects of our constitution: the relationship between the Government, Parliament and the courts; the functioning of the Royal Prerogative; the role of the House of Lords; and access to justice for ordinary people. The ability of our security services to defend us against terrorism and organised crime is critical. We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government. We will ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays. In our first year we will set up a Constitution, Democracy & Rights Commission that will examine these issues in depth, and come up with proposals to restore trust in our institutions and in how our democracy operates.**

2 The paragraph begins by stating: "*After Brexit we also need to look at the broader aspects of our constitution*" and then sets out a number of areas which are to be considered by a "*Constitution, Democracy & Rights Commission*".

3 The establishment of such a Commission, with a mission to reform and improve, is welcome. Unlike the work of the proposed Commission which is to "*examine these issues in depth*", this short paper sets out some preliminary thoughts on a number of the issues addressed in that paragraph.

4 The purpose of the Commission is to "*restore trust in our institutions and in how our democracy operates*". There can be no more important task.

"We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government"

5 ***Human rights are not always easily identified***: many people would agree that basic human rights would include such matters as freedom of expression, a prohibition on torture, due legal process and so forth. Those are rights which should be regarded by any democracy as both universal and uncontentious. But other human rights are more contentious: e.g. reproductive freedom / abortion. Consideration should be given to whether such rights – which might go beyond those listed in the European Convention of Human Rights – should be set out expressly, perhaps in a British Bill of Rights. However, a note of caution must be sounded: enshrining highly-contested "rights" in a quasi-constitutional document effectively removes such issues from the legislative sphere, where they may more appropriately belong, and places them in the domain of the courts.

6 ***The European Convention of Human Rights (ECHR) is an important statement of human rights***: the UK is a signatory to the ECHR and should remain so. The rights set out by the ECHR are rights which, as drafted, should be regarded by any democracy as both universal and uncontentious. The UK should remain a signatory to the ECHR as a public statement of its commitment to human rights.

7 ***The problem with the ECHR is really about its interpretation and application by the European Court of Human Rights (ECtHR), not the document itself***: the ECtHR adopts a "living instrument" approach to interpreting and applying the ECHR. The ECtHR reads into the text the rights, or the application of existing rights, which it considers a 21st century democracy should have. Thus by the "living instrument" doctrine, the ECtHR writes into the ECHR either rights, or the application of rights, which are not present in the text to which the signatory states subscribed. This can lead to a conflict between the rule of law on a national basis and the role of a multi-national court, embodying a different legal and interpretative tradition, of

whose judges we have little or no knowledge, accountable to no-one in the UK and whose judgments could have a direct and immediate effect in the UK.

8 ***The UK should not withdraw from the ECHR***: some have argued that the ECtHR's approach to the interpretation of the ECHR means that that UK should withdraw as a signatory. I do not agree. Having become a signatory to the ECHR, it would be internationally damaging both for the UK and the ECHR system were the UK to withdraw.

9 ***But the UK should engage with the other ECHR signatories to consider the interpretation and application of the ECHR by the ECtHR and how that might be improved***: one option would be a protocol either setting out how the text is to be interpreted and applied by the ECtHR, or to permit reservations and derogations in specified circumstances (i.e. beyond those already present in the ECHR). We have to recognise, however, that not every signatory to the ECHR has an equal commitment to the rule of law and the operation of precedent, nor does each signatory see those issues in the same terms. The UK must therefore be prepared to take its own approach if necessary.

10 ***It is not unconstitutional not to comply with a decision of the ECtHR and Parliament should say so***: constitutional sovereignty ultimately lies in Parliament, as elected by the people, and not with the Judges of the ECtHR. A UK Government would think long and hard before defying a decision of the ECtHR, and putting itself in breach of an international convention. But it should be recognised (perhaps formally) that Parliament can so decide and it would not be unconstitutional for it to do so; as a matter of domestic law, decisions of the ECtHR are not of binding authority. In the UK, ultimate sovereignty lies in the Queen in Parliament, and a statutory declaration and explanation of the fullness of what that actually means, rather than just focusing on what goes on in the House of Commons, should be considered.

11 ***A Human Rights Act is not the only way to protect human rights***: Protecting the human rights, or the "rights of individuals", is a key element of any democracy. Many see the Human Rights Act as a means of protecting those

rights. But the United Kingdom was a democratic country before 1998, when the Human Rights Act came into effect, and countries which do not have the equivalent of a Human Rights Act (e.g. Australia) are still democratic. A country does not need a Human Rights Act (or equivalent) to be a democratic country or a country which respects human rights and dignity.

12 ***The Human Rights Act should be reconsidered but not repealed***: some have argued that the Human Rights Act should be repealed. I do not agree: that would be a retrograde and unnecessarily controversial step. But over 20 years have passed since its enactment and consideration should be given as to how it can be improved. This consideration should include whether a UK court should continue to be required or indeed able to make a "*declaration of incompatibility*" under section 4 if it determines that a UK statute infringes the ECHR. Further, section 2 requires that decisions of the ECtHR be "*taken into account*"" by UK courts when deciding cases under the Act; although UK courts are able to, and often do, look further afield as well, consideration should be given to requiring UK courts to have regard to decisions of other common law countries also. Judgments of the ECtHR should be of persuasive authority for UK courts (to a greater degree than, for example, the US Supreme Court, given that the UK is a signatory to the ECHR), and it should be possible for a UK court to note ECtHR jurisprudence on a given issue, even where it does not follow that non-binding precedent in a particular case.

13 ***Consideration should be given to the temporal and spatial application of the Human Rights Act***: there are powerful arguments that the Human Rights Act should apply from the date of its commencement and not before, and to the UK but not outside the UK. This was the intended temporal and spatial scope of the Human Rights Act when it was passed.

14 ***Consideration should be given to protecting secondary as well as primary legislation***: the current position is that primary legislation cannot be quashed as being incompatible with ECHR, but secondary legislation can be. It has been suggested that the Human Rights Act be amended to treat secondary legislation in the same way as primary legislation. But unless and until

secondary legislation receives Parliamentary scrutiny similar to that given to primary legislation, such that it could really be said to the will of Parliament, this would be an unattractive amendment; another option for consideration is that a Court would be empowered to make a declaration of incompatibility in relation to secondary legislation.

"We will ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays"

15 ***Judicial review does not always involve human rights***: although judicial review is a means to vindicate induvial human rights, not every judicial review case involves human rights. There is little doubt that judicial review has sometimes been used by campaigners and single-issue pressure groups to try to obtain a result which they have been unable to achieve by way of the political process.

16 ***Judicial review can create better government***: the role of judicial review in ensuring that public bodies take decisions *intra vires*, by proper processes, and on the basis of relevant (and not irrelevant) material should be uncontroversial, and conducive to good governance. Judicial review should not be seen as necessarily being in opposition to the government of the day. It is in everyone's interest – including that of the government – that administrative and executive decisions are taken on proper grounds and within the ambit of the relevant legal power or authority.

17 ***The availability and scope of judicial review might be put on a statutory footing***: the availability and ambit of judicial review has grown over time by way of decisions of the courts. A review of the ambit of JR, and grounds on which a Court can rule, and the remedies open to the Court, would be beneficial and, following this, it would be logical to place it all on a statutory footing. Lawyers and judges are as susceptible to "mission-creep" – whether conscious or unconscious – as any other group of people, and consideration should therefore be given to setting out broadly what kind of public acts are susceptible to judicial review, on what grounds, and what the court can do on any review. Parliament should thus consider whether to place judicial review on a statutory footing and to consider its availability (who can apply?), its scope (what decisions are reviewable?) and its limits (is proportionality a free-standing basis for judicial review?). Of course such legislation will itself fall to be considered by the courts, but that is both inevitable and necessary. It

should be possible to chart a course which preserves the ability of individuals to hold public bodies to account, and vindicate their rights, without permitting abusive proceedings that seek to conduct politics by other means.

"To look at … the relationship between the Government, Parliament and the courts; the functioning of the Royal Prerogative"

18 ***Parliamentary sovereignty is the fundamental principle of the UK constitution***: the doctrine of Parliamentary sovereignty ought to underpin any discussion of the relationship between the Government, Parliament and the courts. Ultimately each Parliament is sovereign: a Parliament can repeal an Act of a previous Parliament or legislate to undo a decision of the courts. Although Parliamentary sovereignty is often used as a shorthand, the traditional definition of the UK legislature as "The Queen in Parliament" – the Sovereign, the House of Lords and the House of Commons – reminds us that the existence and exercise of the Royal Prerogative is an intrinsic part of the constitution.

19 ***The Supreme Court is the UK's final court of appeal, and is not a constitutional court***: the Supreme Court is the successor to the Appellate Committee of the House of Lords, and as such is the UK's final court of appeal. Although it hears cases of constitutional importance, there is no constitutional court in the UK. Some have suggested that the name of the UK's final court of appeal be changed (again) to reflect the fact that it is not a constitutional court, but while this might not be inherently objectionable, it is – or ought to be – unnecessary. Although separating the final court of appeal from the legislature was probably a good thing, at least optically, the traditional role of the Lord Chancellor as the traditional defender of the judiciary within Government is now somewhat confused, and consideration should be given to that role being formally separated from the post of Secretary of State for Justice.

20 ***The Supreme Court's decision in Miller 2 ought to be considered by Parliament for the precedent which it establishes***: by holding that the advice to the Queen to prorogue Parliament was subject to judicial scrutiny, and could be quashed if in the court's view it had "*an extreme effect on the fundamentals of our democracy*", the Supreme Court has opened the door to further challenges to prerogative powers. Parliament should consider the

extent to which prerogative powers are subject to judicial challenge, and to set the boundaries of what is justiciable. For example, if the Fixed Term Parliaments Act is repealed, the prerogative power to dissolve Parliament and call a General Election ought not be subject to judicial intervention. The setting of such boundaries should not be seen as an attack on the judiciary or the role of the courts; it is in the interests of the executive, Parliament and the courts that the province of each is understood and clarified.

21 ***The Government must abide by a decision of a UK court, but does not have to say that it agrees the decision***: there is a clear constitutional principle that the Government must abide by the decision of a UK court. but there is no constitutional principle that the Government cannot say that a decision of a court is wrong; that is particularly the case where the decision of the Supreme Court overturns the decision of senior judges in Court of Appeal. In a democracy, judicial decisions must be open to scrutiny and criticism, even though they are to be carried into effect. Otherwise, the development of the law could be stifled, and the balancing of rights (which the courts carry out but in which Parliament must ultimately play a key role) would be deprived of thorough public examination. When it comes to discussing judgments, even adverse ones, freedom of speech applies to the Government, too.