

‘Fascinating and inspiring’ Peter Hennessy

**FIVE**

*How our freedom*

**IDEAS**

*is under threat*

**TO**

*and why it matters*

**FIGHT**

‘[An] engaging combination of practicality and passion’ Vikram Seth

**FOR**

**Anthony Lester**

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# Five Ideas *to* Fight For

*How Our Freedom  
Is Under Threat and  
Why It Matters*

ANTHONY LESTER



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# CONTENTS

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[Dedication](#)

[Acknowledgements](#)

[No Time for Apathy](#)

[1 Human Rights](#)

[2 Equality](#)

[3 Free Speech](#)

[4 Privacy](#)

[5 The Rule of Law](#)

[The Fight Ahead](#)

[Index](#)

For Katya, Gideon, Maya and Benjamin.

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This book began three years ago prompted by Zoe McCallum, a postgraduate working for the Bill of Rights Commission. I needed to be persuaded because there are too many self-serving political memoirs and lawyers' casebooks, and I did not want to add to them. But Zoe prevailed and he collaborated in drafting and editing a book about the ideas for which I have fought. She is an exceptional young writer and political advocate (soon to be at the Bar).

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I of course take full responsibility for the contents of the book, and for errors of fact and judgement.

# NO TIME FOR APATHY

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This book charts the ways that ideas about human rights, equality, free speech, privacy and the rule of law have evolved over the last sixty years. It explains why they matter, how well they are protected and how they are threatened. It describes what has been achieved, how it happened, and what we need to fight for now. There is never a time for apathy, especially now.

This is not an autobiography, though some account of my life is given where relevant. It is not a lawyer's casebook, though cases I have argued are discussed where they have inspired reforms. It is not a political memoir, though it is highly political. It is not a scholarly work, but rather an overview of practical change in the five fields, drawing on my experience as a barrister, parliamentarian and campaigner – at home and abroad.

I want to show that it is possible to bring about change and to encourage active engagement. The British political system has been decaying for decades and is falling apart. The main parties are split into hostile factions. They play clumsy games with our fragile constitution, like children playing with boxes of matches. The American diplomat Dean Acheson once observed that Britain had lost an empire but not yet found a place in the world. That remains true. Britain is only half in Europe, a semi-detached and grumpy member punching below its weight and size. Foreign invasions, terrorism and mass migration have bred fear and insecurity, conditions easily exploited by extremists.

Our increasingly disunited kingdom is threatened by powerful forces of nationalism – pressure exerted by those who would quit the European Union or the United Kingdom or both, and from those who would impose their values and beliefs on the rest of us. This threatens our secular tradition. There is a risk that our governors may sleepwalk the UK into leaving the European Union, and that Scotland may leave the rest of the UK, and that Northern Ireland will remain politically polarised.

Disintegration of the UK and disengagement from Europe would weaken our capacity to tackle the problems that cannot be solved by a single country – perplexing problems of corruption, inequality between rich and poor, racism, terrorism, xenophobia, the misuse of religion as a weapon of mass destruction, and the devastation of the global ecosystem.

The Astronomer Royal, Martin Rees, has warned that we are 'destroying the book of life before we have read it'. The pressures of a growing human population and economy, on land and on water, are already high and we have a responsibility 'to our children, to the poorest, to steward the diversity and richness of life on earth'.<sup>1</sup> Working across Europe and beyond it, we must also tackle world hunger, disease and over-population; the effects of wars that have destroyed stable societies and resulted in millions of refugees; terrorism, racism and political extremism.

This is the worrisome context in which the book explores the five ideas I have chosen to fight for. They reflect my practical experience and personal choices. They are not presented as a hierarchy of greater and lesser importance. The ideas are interdependent but each is looked at separately. Each has a particular history and its own dilemmas and puzzles. Each is under threat.

Do we really know why we are the way we are? Short of consulting a psychiatrist, I cannot be sure why I have spent my adult life fighting for these ideas. It had to do with my upbringing by Jewish

parents whose European relatives had been murdered in the Holocaust and who sympathised with disadvantaged people. It had to do with my education at a liberal school – Asquith’s City of London School – in the 1950s, and with feeling the pinpricks of English anti-Semitism during National Service. It had to do with what I learned about politics when I studied history at Cambridge (discussed in the ‘Equality’ chapter).

When I left Cambridge in 1960, I had been put off a legal career by the austere diet of English law on which I had been fed. The unwritten common law was the staple curriculum for law undergraduates. Acts of Parliament were treated as unfit for university study. One ancient law professor from my college lamented the fact that industrial law and family law were entering the syllabus even though they sprang from statutes.

I learned about the legal rules governing contracts, torts (civil wrongs) and crime but little attention was paid to law in context. Public law was undeveloped. My mentors, like the judges at that time, were uncritical of the way that state powers were used. Written constitutions were regarded with disdain as suitable only for less mature societies than ours. There was no developed equality or human rights law. English judges, sitting in the Judicial Committee of the Privy Council in appeals from the former Empire, gave judgments condoning racial discrimination in Africa and Canada.

In 1962, I came back from the United States reluctantly, to a country whose rulers were depressing and complacent. At Harvard Law School I had learned the benefits and burdens of a written constitution and Bill of Rights. I had seen from abroad the flaws in the English legal system, which was narrow, legalistic and ethically aimless – without a compass to steer by. In those days, our most senior judges, the Law Lords, had denied themselves the power to overrule a previous judgment even if it was wrong.

I went back to the States for Amnesty International during what became known as the long hot summer of 1964. I was tasked to report on racial justice in the Deep South. It was a transformative experience. When I returned home and began to practise at the Bar in 1965 I was determined to use what I had learned and seen to protect human rights. I was uncomfortable in the snobbish, male-dominated, racist and arrogant world of the English Bar in those far-off days. I was initially refused tenancy in my chambers on the ground that I was too political – too close to politics and the press. At that time I regarded the American system of government under law as vastly superior to ours.<sup>2</sup>

But the spirit of the age was beginning to change. It was reflected in the work of a new breed of legal scholars who were internationally minded. They understood the need for stronger safeguards against the misuse of the powers of the state. In 1959, Stanley de Smith had published his seminal work *Judicial Review of Administrative Action*. In 1961, after I had left Cambridge, H.R.W. Wade, my former mentor in property law, published *Administrative Law*. In 1963, Harry Street published *Freedom, The Individual and the Law*, the first survey of civil liberties in Britain. A year later, de Smith published *The New Commonwealth and its Constitutions*.

These oracles encouraged me to hope that a change of government to Labour would be infused with this new spirit. I was sadly mistaken. In 1963, Gerald Gardiner, soon to become Lord Chancellor in Harold Wilson’s Labour government, published a book of collected essays with Andrew Martin, soon to become a member of the Law Commission. It was entitled *Law Reform Now*. Many of its proposals were progressive but the book said nothing about the need to protect fundamental human rights. At a time when the judges were executive-minded and timorous in challenging government decisions, one essay on administrative law in the book even rebuked judges for being over-enthusiastic in using the powers of judicial review.<sup>3</sup>

In 1966, the Wilson government allowed cases against the UK to be taken to the European Court of



Human Rights in Strasbourg. But it shied away from making rights enshrined in the European Convention on Human Rights part of domestic law, or strengthening the courts' ability to curb abuses of power. A year later I argued the first British case to the European Commission of Human Rights on behalf of a Pakistani mill worker from Bradford and his young son, who had been refused permission to join him in the UK. We won the argument and the government undertook to allow the boy to join his father. It also promised to introduce an immigration appeal system – the first of its kind.<sup>4</sup> This made me appreciate that the European Convention system could provide remedies where there were none in our courts.

The following year, in 1968, Harold Wilson's Labour government rushed an emergency Bill through Parliament in three days and nights. It took away the right of British Asians from East Africa to enter and live in the UK. It was racist, and in breach of a pledge by a previous British government – that if East Africa's newly independent governments expelled British Asians, they would retain the right to settle in the UK. But because the Westminster Parliament is supreme and the courts cannot strike down Acts of Parliament, the only way of challenging the law was to complain to the European Commission of Human Rights in Strasbourg. That seemed to me to be absurd. The Commission was a vital long stop – but we needed effective remedies for violations in our own courts.

In November 1968, I gave a Fabian lecture advocating a Bill of Rights built on the European Convention on Human Rights. It would put a protective fence around fundamental rights and freedoms.<sup>5</sup> There were plenty of American but few British thinkers that I could rely on to support my argument. In 1859, J.S. Mill had warned in his essay *On Liberty* against populism becoming a weapon of arbitrary power – the 'tyranny of the majority'. Eight decades later, in 1939, H.G. Wells had championed the need for an international declaration of human rights. In 1945, Hersch Lauterpach (later to become the British judge on the International Court of Justice) published his seminal work *An International Bill for the Rights of Man*, which faced up to the English dogma of parliamentary sovereignty. Harold Laski, influenced by his contact with the United States, observed in 1948 that the real value of a Bill of Rights was to act 'as a rallying-point in the State for all who care deeply for the ideals of freedom'.<sup>6</sup>

The *New York Times* chief London correspondent, Anthony Lewis, attended my lecture. He agreed with the need for a modern British Bill of Rights based on the Convention but doubted it would ever come to pass. Most British thinkers fifty years ago regarded the idea of fundamental rights with disdain – suitable for the United States or Napoleon's Europe or newly independent Commonwealth countries, but not for the United Kingdom. Ivor Jennings, a leading British constitutional scholar and grand poo-bah of his day, regarded India's written constitution with disdain. In 1954, Herbert Morrison, former Deputy Prime Minister, published *Government and Parliament*, glorifying the status quo without any mention of abuses of power or the rights of the individual. In 1957, Prime Minister Harold Macmillan told his fellow Conservatives that the British had 'never had it so good'.

In several cases I tried to persuade our judges to take human rights more seriously, quoting American and European analogies. My successes were few. I found that I was able to achieve more in two years as special adviser to Roy Jenkins at the Home Office – in 1974–76 – than in ten years at the Bar. We shaped sex and race discrimination laws and advanced the case for a British Bill of Rights.

When I returned reluctantly to the Bar in 1976 I no longer had a practice in commercial law. But I developed a practice in what is now known as public law – the judicial review of the actions of public bodies to ensure they act lawfully, rationally and fairly. I acted as well in cases on equality, free speech, privacy and other human rights, making submissions before a new generation of judges who

values were very different from those of their predecessors.

Meanwhile, the Labour Party turned against Europe and liberalism and became dominated by trade union corporatism. My political life declined after I was rejected as a parliamentary Labour candidate whose views were out of favour. When the Gang of Four<sup>7</sup> broke with Labour and set up the Social Democratic Party I went with them, and later joined the merged Liberal Democrats. During that time my barristers' chambers were enriched by a new generation of women and men – better educated than we had been and keen to take on public interest cases.

There were clear limits to what could be achieved using the judicial process. In 1993, I turned down the offer of a High Court judgeship for which I was ill suited. Thanks to Paddy Ashdown, then leader of the Liberal Democrats, I became a member of the House of Lords instead, focusing on the constitutional and human rights issues that I cherish.

Peers are unelected and independent-minded – counter-majoritarian and sometimes in the vanguard of ground-breaking reform. About a fifth of the House of Lords are not appointed by the political parties. That secures our independence. Because of them, the government does not have a commanding majority and can be defeated by cross-party alliances. We have much more time than members of the Commons to debate and introduce reforming Bills. And among the politicians of yesteryear are experts in many fields, including law and government, academia and the professions.

For all but the five years of coalition government, I have sat on the opposition benches under Conservative and Labour governments, working with colleagues from all parties and none, as well as civil society. My maiden speech was about the need for better human rights protection. I used public lectures and questions to ministers and Private Members' Bills to achieve reforms – Bills on human rights, equality, civil partnership, forced marriage, constitutional reform and defamation.

When Gordon Brown replaced Tony Blair as Prime Minister in 2007 he made a powerful statement on the case for constitutional reform. I was invited informally to rejoin the Labour Party and become a minister. When I declined I was invited to become an unpaid independent adviser to the Lord Chancellor, Jack Straw, as what became known as a 'goat' – a reference to a 'government of all the talents'. My experience as a tethered goat inside Gordon Brown's big tent was an exercise in futility. I resigned after fifteen months when it became plain that Gordon Brown, Jack Straw and the other colleagues had wasted the opportunity of a generation for constitutional reform.<sup>8</sup>

There was one redeeming achievement by the Brown government before it lost power. Under Harriet Harman's determined leadership, what became the Equality Act 2010 was successfully navigated. It became law on the eve of the General Election on 6 May 2010. It was modelled on my Private Member's Equality Bill, introduced seven years before, and had crucial support from the Liberal Democrats.

The five years in coalition with the Conservatives were painful because we Lib Dems had to support measures with which we strongly disagreed. An embarrassing example of excessive loyalty arose during the passage of the Public Bodies Bill designed to axe or merge many 'quangos'.<sup>9</sup> The former Lord Chief Justice, Lord Woolf, had accused ministers of treating some of the quangos in a cavalier fashion. So I introduced an amendment restricting the way ministers could use their new powers by forcing them to ensure that they respected judicial independence and human rights.

The government was vigorously opposed to my amendment. When I was strong-armed I tried to withdraw it – but the cross-benches objected and my amendment was passed.<sup>10</sup> From a surfeit of loyalty I voted idiotically against my own amendment. I am much happier to be back in opposition, no longer having to perform political contortions to vote for unconscionable proposals.

The Liberal Democrats suffered a devastating defeat in the 2015 General Election, but I do not believe that the British people rejected liberalism. The current government wants to suppress extremist activity, and the Prime Minister and Home Secretary define extremism as ‘vocal or active opposition to fundamental British values’. Those surely are the values of a liberal society that include freedom for political dissent and respect for human rights and the rule of law (see the ‘Free Speech’ chapter).

Those fundamental values are threatened not only by terrorists but by the state and its agents and populist politicians. Human rights are under threat at home and abroad. So is the international reputation of the UK as a country that respects the European rule of law. David Cameron’s government was elected with a pledge to tear up the Human Rights Act, replacing it with a ‘British Bill of Rights and Responsibilities’. It is not likely to give greater protection to our rights and freedoms than what we have now. The European Court of Human Rights is under attack by ministers for having supposedly undermined the sovereignty of the Westminster Parliament.

Successive governments have continued to flout the Strasbourg Court’s judgments requiring at least some convicted prisoners to be entitled to vote in parliamentary elections. That violates our international legal obligations. It sets a shameful example for pseudo-democracies when they too violate human rights.

I hope that this book will encourage readers to fight for the country we love – and for a more open democratic society based on equal justice under the rule of law. Each chapter highlights the history of the threats we face and the challenges to human rights, equality, free speech, privacy and the rule of law.

<sup>1</sup> ‘Scientists and politicians alike must rally to protect life on earth’, *Financial Times*, 6 September 2015.

<sup>2</sup> I no longer think so. American judges are politically appointed or elected. Elections are dominated by wealth and the electoral machinery is wide open to corruption. The politically polarised US Congress filibusters obstruct much needed reforms on healthcare, gun control and other important topics. Public figures are defamed by wickedly untrue libels by Fox News and other media. Racism persists in criminal justice and prisons, and the death penalty is still lawful.

<sup>3</sup> *Law Reform Now* (London: V. Gollancz Ltd, 1963), p. 52. The essay was presumably written by John Griffiths, a fierce left-wing critic of the judiciary for what he regarded as its reactionary decisions.

<sup>4</sup> *Alam and Khan v United Kingdom* Application 2991/66 (1967).

<sup>5</sup> *Democracy and Individual Rights*, Fabian Society Tract 390 (London: Fabian Society, 1969).

<sup>6</sup> Harold Laski, *Liberty and the Modern State* (London: George Allen & Unwin Ltd, 1948), p. 65.

<sup>7</sup> Roy Jenkins, Shirley Williams, Bill Rodgers and David Owen.

<sup>8</sup> Anthony Lester, ‘My misery as a tethered goat in Gordon Brown’s big tent’, *Guardian*, 27 July 2009.

<sup>9</sup> Quasi-autonomous non-governmental organisations.

<sup>10</sup> HL Deb 23 November 2010, vol. 722, cols. 1010–1041.

# HUMAN RIGHTS

*‘Power is delightful and absolute power is absolutely delightful.’* Notice on a Home Office immigration official’s desk in the 1960s

*‘For too long we have been a passively tolerant society, saying to our citizens “as long as you obey the law, we will leave you alone”.’*

David Cameron (13 May 2015)

The way we protect human rights is under sustained attack. Politicians and sections of the press peddle lies and distortions about the European Convention on Human Rights, the Strasbourg Court and the Human Rights Act. They allege that the system distorts justice, preventing evil people from getting their just deserts. They complain that it hampers governments in tackling terrorism and serious crime. They decry rulings preventing deportation to a country where there is a risk of torture or the death penalty. They object when a court rules that bed and breakfast owners must not refuse to accommodate a gay couple. They blame the Human Rights Act when our soldiers are made to account for complicity in torture. They accuse the Strasbourg Court of undermining democracy by being too activist and overriding our sovereign Parliament.

The phrase ‘human rights’ has become a buzzword used to attack judges and the rule of law here and in Europe. It has weakened public confidence in the system that protects our basic rights and freedoms – as well as public confidence in our judges, who cannot answer back.

Journalists and the public need human rights law to protect a free press. Newspapers rely on the Convention to protect free speech, but many editors and their owners do not accept that they must respect the human rights of those whose private lives they expose for commercial gain. That is one reason why the public is fed a diet of half-truths and downright lies about the so-called ‘threats’ to our way of life. Story after story is run each week attacking what they describe as ‘this human rights farce’,<sup>1</sup> calling the Human Rights Act a ‘gift to our enemies’,<sup>2</sup> and demanding that the government ignore the rulings of ‘this foreign court’.<sup>3</sup> That makes good copy and boosts sales, as does salacious gossip about the private lives of public figures. But it undermines public confidence in the very system that protects their and their readers’ free expression.

Populist ministers are also to blame. In September 2013, the Home Secretary, Theresa May, voiced her frustration at her inability to deport the radical cleric Abu Qatada to Jordan because of the risk that evidence gained through torture might be used against him in a trial there. She found it ridiculous that the government should have ‘to go to such lengths to get rid of dangerous foreigners’. That is why, she explained, ‘the next Conservative manifesto will promise to scrap the Human Rights Act . . . It’s where the Conservative position is clear – if leaving the European Convention is what it takes to fix o

human rights laws, that is what we should do'.<sup>4</sup>

The then Lord Chancellor, Chris Grayling, also declared his hostility to the Act and the Strasbourg Court. Kenneth Clarke and Dominic Grieve were the only two Conservative ministers within the coalition to stand up publicly for the European rule of law. Clarke retired and Grieve was removed from office shortly afterwards.

It was not ever thus. After the Second World War, the Conservative Party led the way under Winston Churchill and David Maxwell Fyfe in creating the Convention system. Yet now the Cameron government wants to tear up the Human Rights Act to replace it with a 'British Bill of Rights'. It invokes the Conservative election manifesto to justify its threatened measures. At first it hinted at the possibility of withdrawing altogether from the Convention and the institutions which oversee it, the European Court of Human Rights and the Council of Europe. It then rowed back from that position. The Prime Minister, Justice Minister, Home Secretary and their supporters in Parliament are populists, driven by the wish to appease anti-European MPs in the Commons and to be rid of Strasbourg Court rulings with which they disagree. They have amended the Ministerial Code to delete the duty to comply with international law and treaty obligations.

Ministers want to be free to send away a suspected terrorist even to a country where he would risk torture or face the death penalty. They would like Parliament to limit the courts' powers to review the legality of what they can and cannot do. They would like to give more power to themselves and Parliament to overrule judgments that they dislike. If we do not succeed in defending the way we protect human rights, five decades of hard-fought progress will be lost.

## What are human rights?

We must strive to protect the basic rights we all enjoy because of our shared humanity. They include the right to life, the right not to be tortured or subjected to inhuman or degrading treatment or punishment, the right not to be enslaved, the right to a fair trial, to freedom of thought, conscience and religion, to freedom of expression, to respect for private and family life, the right to marry, the right to private property, to education, to take part in free and secret elections, and to enjoy these rights without discrimination. They are the bedrock of a democracy based on the rule of law and on common humanity and dignity. They call for special protection against undue interference and abuse, whether by elected politicians or public officials.

Human rights are not the gift of governments. They are our birthright. Some believe human rights are part of natural law and religious teachings; for others they are fruits of the eighteenth-century Enlightenment; for pragmatists they are the basic freedoms of the individual. Philosophers and theologians reflect about origins and sources of fundamental rights. I am neither a philosopher nor a theologian. What matters to me is whether they are observed in practice and whether there are effective remedies for victims when they are breached.

Some rights are suitable to be enforced by judges. Others should be put into effect by the government. It is the responsibility of the political branches to secure and protect economic, social and cultural rights. Judges have no competence or expertise to decide how to create a health service or tackle poverty, or make the trains run on time. It is not the judges' function to solve political problems or to consult the public about them. Judges have no mandate to make law and must take care to keep off the political grass when deciding how to balance individual rights and the public interest.

It is only rarely, when the democratically elected arms of the state have failed completely to fulfil their obligations to protect economic, social and cultural rights, that the courts may intervene, f

example, to prevent starvation or to halt discrimination in providing healthcare. If the court attempted to impose an economic theory or a political ideology, they would undermine both the legitimacy and public confidence in the administration of justice.

## Origins of the European system

The European Convention on Human Rights came into force in 1953. The barbarous atrocities of the Second World War – the mass extermination of millions of Jews, gypsies, gay men and the disabled, mass torture, discrimination and pillage – enabled the newly born Council of Europe to muster enough political will to create the Convention in the late 1940s. Without Hitler's Nazi Reich, there would have been no Convention – no moral compass to guide governments and to protect the governed through European and national laws.

The Council of Europe's founders understood the need to forge a new international system of human rights protection that transcended political and legal frontiers. They sought to guard against the rise of new dictatorships, to reduce the risk of relapse into another disastrous European war, and to provide a beacon of hope for the peoples of Central and Eastern Europe living under the yoke of totalitarian Soviet regimes. They were determined never again to permit state sovereignty to shield the perpetrators of crimes against humanity from international liability; never again to allow governments to hide with impunity behind the traditional argument that what a state does to its own citizens or outsiders is its business and beyond the reach of international law.

The Strasbourg system was a revolutionary initiative. For the first time, individual men and women would be able to enforce their rights against their own governments before an international court, the European Court of Human Rights. British politicians and lawyers made key contributions to the final wording of the Convention. They were determined that it would reflect the values that our country had fought to preserve in our battle against Hitler. The final version is as British as roast beef and Yorkshire pudding.

When the Convention was being prepared, in 1949, Clement Attlee's Labour government had deep reservations about it. The Cabinet papers reveal that Lord Chancellor Jowett opposed the creation of a supranational court. The Chancellor of the Exchequer, Stafford Cripps, believed the Convention was inconsistent with a planned economy. The Attorney General, Hartley Shawcross, regarded the possibility of UK citizens lodging complaints against their government in Strasbourg as 'wholly opposed to the theory of responsible government'.<sup>5</sup>

Like David Cameron's government today, the Attlee government saw itself as protecting the integrity of the British constitution and the judicial system against subversive European influence. But the Foreign Secretary, Ernest Bevin, argued that the European movement could not be held back and that the UK was in danger of being politically isolated. He persuaded the Cabinet to agree to ratification. It did so reluctantly, on condition that the UK would not allow individuals to take a case against the state to Strasbourg. In those days the system allowed governments to deny individuals the right to bring a case.

On 8 March 1951, the UK became the first among the nineteen founding Council of Europe states to ratify the Convention. Lord McNair, a British scholar of international law, became the first President of the European Court of Human Rights, in 1959. Successive governments continued to refuse the right to complain against the UK to the European Commission and Court of Human Rights or to make the Convention rights part of British law; so the Convention had no practical value to victims in the UK.

It was Harold Wilson's Labour government that accepted the right of individual petition in January 1966. The decision was taken at a time when the Strasbourg Court had decided only one case. There was no formal decision by the Cabinet and no parliamentary debate. Yet the consequences were far-reaching. It meant that individuals could challenge Acts of Parliament and judgments of our highest courts for violating Convention rights.

After the collapse of the Soviet Empire in 1989, membership of the Convention rapidly enlarged to include formerly totalitarian states. Today, the Convention binds forty-seven members of the Council of Europe. It requires each of them to give effective remedies in their national systems for breaches of the Convention rights and obliges them to comply with the Court's final rulings against them, however much they disagree. It gives – or is supposed to give – equal protection to some 820 million citizens of Europe, as well as non-citizens, from Ireland in the West to Azerbaijan in the East, from Russia in the North to Greece in the South.

Because it is an international court of last resort and not a court of appeal, the Strasbourg Court does not take the place of the national authorities. It takes on a case only when the national system fails to provide an effective remedy for a violation of a Convention right. It grants governments a margin of appreciation, aware that contracting states have a better knowledge of their own political, social and cultural traditions than a European Court. When it finds a violation, the Court recognises that it is for the state concerned to choose how to give effect to its ruling. In other words, the Court is cautious not to trespass into the political arena.

The prime responsibility for securing the Convention rights is at national and not at European level. But it is a convenient fiction for governments and European bureaucrats to suppose that the Convention is properly observed across Europe. And it is remote from what happens in practice. Few countries have courts that are really independent, decide cases impartially and respect human rights, however unpopular or inconvenient the decision may be to a citizen, the public or the state. The worst repeat offenders are Turkey, Italy, Russia, Romania and Ukraine.<sup>6</sup> The UK continues to flout binding judgments requiring at least some convicted prisoners to be allowed to vote in parliamentary elections.<sup>7</sup>

## English opposition to bringing rights home

It took decades to win the right to complain to our *own* courts about violations of their Convention rights. Although from 1966, alleged victims of UK violations could seek redress in Strasbourg after the damage had been done, they could not rely directly on their Convention rights in UK courts. While the Convention was not part of our law, ministers, politicians and public authorities could not be called to account in our courts for decisions that were incompatible with it.

There was strong resistance among English politicians and civil servants to the idea of giving the Convention rights direct effect in UK law. When I suggested the idea in a public lecture in 1968, I was greeted with incredulity by almost everyone. In 1998, we won the Human Rights Act at last. We now rely upon the Act, on the Strasbourg Court and our own courts (as well as the common law) as our legal bulwark against the abuse of power by the state and its agents.

Hostility to judicial enforcement of fundamental rights is deeply rooted in history. Since the seventeenth century, the UK has been governed by a peculiarly English constitutional principle: the absolute sovereignty of Parliament. Under the English system a governing party with a majority in the Commons can make or unmake any law without the restraint of a supreme law of the constitution. The Dentists Act could in theory repeal the Act of Union 1707 with Scotland or the Scotland Act 1998, or

the Bill of Rights 1689. That is because our courts treated all Acts of Parliament as equal and equal able to be trumped by a future Act of a future Parliament.

That is not the position in the rest of Europe or the rest of the democratic Commonwealth, apart from New Zealand. Their written constitutions require their legislatures to use their powers in a way that is compatible with their Bills of Rights, and that is what the Human Rights Act now does in a more nuanced way.

Fifty years ago, we had no modern system of public law and no Human Rights Act. There was nothing our courts could do to protect us from a Parliament that abused its powers. Francis Bacon, the seventeenth-century Lord Chancellor, warned judges to remember that their office is ‘to interpret law and not to make law, or give law’. His essay ended: ‘let them be lions, but yet lions under the throne, being circumspect that they do not check or oppose any points of sovereignty’.<sup>8</sup> Our judges have been careful to obey the warning, but some judges have cautioned that they could one day be provoked to refuse to recognise the legitimacy of an arbitrary Act of Parliament.<sup>9</sup> If that were to happen, there would be a major constitutional crisis.

Each society has its own pathology of human rights violations. Fifty years ago, most British human rights problems stemmed from a lack of judicial control of powers delegated by Parliament to ministers and public officials. The conventional wisdom was that the gentlemen in Whitehall knew best, and that they and their ministers could be trusted to act fairly and reasonably without the need for judges to look over their shoulders. Civil servants would use their benevolent wisdom in acting as guardians of the public interest. Powers would be protected from misuse by ministers’ sense of fair play. If a politician erred, the free press would expose the wrongdoing. The remedy would be achieved through politics and publicity, not the courts. If powers were abused, the rascals would be booted out at the next election.

That conventional wisdom has much in its favour. One virtue of our unwritten constitution is that it is flexible. It can be changed easily to meet current needs and values. Change comes from legislation when governments have the necessary political will and skill. It comes from court rulings that gradually clarify and develop the law. Another advantage of parliamentary supremacy is that it does not give exclusive responsibility to judges to protect human rights. It recognises the crucial role of the elected branches of government. It also avoids the trap of legalism – that is, strict obedience to the letter rather than the spirit of the law.

But our system has serious disadvantages too. Most modern democracies protect their civic values in their written constitutions as well as in ordinary laws. In the UK, we do not have a codified constitution expressing our core civic values. Our system is based on the supremacy of the Westminster Parliament, the rule of law and a political culture that cherishes individual liberty. We have important Acts of Parliament defining and protecting some of our basic rights – the Equality Acts, the Freedom of Information Act and the Representation of the People Act, for example. But unlike France, Germany, Italy, Canada, India, South Africa or the United States, we have no supreme constitution that proclaims our political and legal values, subject to alteration only by special procedures.

A government with a commanding majority in the House of Commons enjoys much greater power than most other democracies, and can trump the unelected House of Lords. That is why a former Lord Chancellor, Lord Hailsham of St Marylebone, described our system as an ‘elected dictatorship’. In theory, there is nothing in law that would prevent a future Parliament from abolishing the courts unless the courts themselves were to decide not to recognise what Parliament had done because



violated the rule of law and the basic structure of our (unwritten) constitution.

In the 1960s, UK governments exported the Convention wholesale to many countries of its former Empire. The Convention rights were codified in independence constitutions in Commonwealth Africa, Asia and the Caribbean. But UK governments still refused to make those rights directly enforceable in our own courts. It was fine to bridle the powers of Commonwealth governments and legislatures but not the Crown in Parliament.

A cynic might describe opposition to a modern Bill of Rights as based on the self-interest of bureaucrats for whom power is delightful and absolute power absolutely delightful.<sup>10</sup> Ministers and their civil servants of that age enjoyed being able to use their powers without the inconvenience of judges looking over their shoulders and applying a code of human rights. There was much to be said in favour of their view that a culture of liberty matters more than a hundred paper constitutions. Law is not a panacea. A charter of human rights can only work if it commands public confidence and is rooted in a culture of respect for it. The written constitutions of Soviet countries were full statements of rights and freedoms, but they were meaningless in practice.

The Whitehall mandarins who were so hostile to a Bill of Rights saw themselves as independent Platonic guardians of the national interest, maintaining the integrity of government from London across the realm. They believed that the benevolent discretion of the administrator is preferable to lawyers' legalisms and an inflexible codified constitution. They considered themselves better able to understand the needs of government and the governed than judges remote in their ivory towers. They worried that a concern for individual rights would be at the expense of the interests of the community. They feared that a rights-based approach would undermine our parliamentary system. They worried that the inevitably vague language of a Bill of Rights would give too much power to unelected judges to make law – disguising it as interpretation.

These objections need to be taken seriously. But they do not justify root and branch opposition to the Human Rights Act, European oversight or a written constitution protecting human rights. The plight of vulnerable minorities in the UK thirty years before the Human Rights Act shows how much we need the oversight of the Convention system.

The Convention and the Strasbourg Court protected the right of gay people to love each other at a time when homosexual love was criminalised in the UK. In 1983, Strasbourg ruled that the very existence of the criminal offence caused fear and suffering and violated the right to a private life<sup>11</sup> and later, in 2000, that a blanket ban on gay men and women serving in the armed forces breached the Convention.<sup>12</sup>

The Convention system provided redress to children in the 1980s and 1990s, when UK law still permitted corporal punishment in schools<sup>13</sup> and still allowed a stepfather to beat his stepson with impunity.<sup>14</sup> It protected parents when their local authority banned them from seeing their children without giving them a means to question the decision or argue against it.<sup>15</sup>

The Convention protected the right to privacy before it was recognised as part of UK law. The Strasbourg Court ruled that police could not tap telephones unless Parliament enacted a law specifically authorising them to do so.<sup>16</sup> It found against the authorities for deporting vulnerable people to countries where they faced a risk of torture or inhumane treatment.<sup>17</sup> It decided that a worker claiming unfair dismissal from his job had a right to have his case determined by the court within a reasonable time.<sup>18</sup>

In the years before UK courts recognised a common law constitutional right to free speech, the Strasbourg Court came to the rescue. It recognised the vital role of the press as public watchdog and purveyor of information on matters of public interest<sup>19</sup>. It emphasised that restrictions on the publication of information and opinions must be exceptional and objectively justified.<sup>20</sup> It ruled against the UK for using broad contempt of court laws to prevent the media from reporting on a public health tragedy<sup>21</sup> and to punish the public disclosure of information about a controversial prison regime involving solitary confinement.<sup>22</sup>

What is known as the *Ireland v United Kingdom* case showed the value of European supervision in exposing abuses that would otherwise have been condoned or covered up. It arose in the context of the longest and most violent terrorist campaign witnessed in either part of the island of Ireland. The violence found expression in part in civil disorders and in part in terrorism, that is, organised violence for political ends. Five judges were murdered in their cars. The judiciary lived and worked under constant threat of assassination, with police officers watching over them at home and in court. The 'Troubles' led to the civil rights movement, to 'Bloody Sunday', a deadly spiral of sectarian violence and a secret war between the British security and police forces and the IRA.

Between August 1971 and December 1975, the Northern Ireland authorities used special extrajudicial powers of arrest, detention and internment. The Irish government brought the case against the UK, complaining of the ill treatment of men deprived of their liberty.

The European Commission of Human Rights heard evidence from 119 witnesses. It found that the Royal Ulster Constabulary had used five interrogation techniques on fourteen men, including wall standing, hooding, subjecting detainees to continuous loud noise and depriving them of sleep, food and drink.

The English Intelligence Centre had taught the techniques as a way of extracting confessions from those suspected of terrorism. They were used in unidentified interrogation centres in Northern Ireland. They were applied in combination, with premeditation and for hours at a stretch. They caused intense physical and mental suffering, and acute psychiatric disturbances during interrogation. They aroused in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly of breaking their physical or moral resistance.

I was a member of the British legal team. The Attorney General, Sam Silkin QC, promised the Strasbourg Court that the five techniques would not in any circumstances be reintroduced as an aid to interrogation. The Strasbourg Court accepted the undertaking and agreed with the government that although the treatment was inhuman it did not amount to torture.

The Treasury Solicitor heading the government legal service was Basil Hall. He had been awarded the Military Cross for bravery during the Second World War and had been involved in the first inquiry into the 'Bloody Sunday' shootings. He had initially been sceptical about the Strasbourg system but had been impressed by the quality of the fact-finding of the European Commission of Human Rights 'as good as a British High Court judge'. He told me that without the Commission he doubted whether the truth would have emerged about what had happened in Northern Ireland. Basil was so impressed that, after his retirement as treasury solicitor, he served as a member of the Commission in the 1990s.<sup>23</sup>

## Changing judicial attitudes

When I began at the Bar in 1965, the British judiciary was narrowly restrictive and executive-minded

Judges from a generation that had lived through the Second World War and its aftermath were excessively deferential to authority. There was no developed system of public law to review abuses of governmental power. Most lawyers and politicians regarded written constitutions and Bills of Rights as suitable for lesser breeds but unnecessary in our mature democracy.

During the next three decades there was a gradual but profound shift. Social attitudes changed from a climate of deference to one more critical of authority – including the attitudes of a new generation of judges. After the UK joined the European Community in 1972, judges had to interpret a system of European fundamental law and to set aside inconsistent legislation. Senior judges sitting in the Privy Council also heard appeals from Commonwealth countries and the remaining British colonies. They learned how to interpret generously guarantees of human rights modelled on the Convention and included in the new independence constitutions.

The Strasbourg Court's rulings made English judges more willing to take the Convention into account when developing the unwritten common law and reading statutes, even though Parliament had not made the Convention rights part of UK law. The way they interpreted Acts of Parliament changed from a focus on the letter of the law to considering its purpose, context and impact.

English judges decided in the mid-1970s to reform their outmoded procedures for reviewing the actions and omissions of public bodies. They later created a specialist division of the High Court to deal with applications for judicial review. Judges became adept at protecting the individual against the abuse of power. They developed principles of law that require public authorities to act lawfully, fairly, with proper authority, and in a way that does not defy logic or accepted moral standards.

Where could the judges discover those accepted 'moral standards'? By whom were they 'accepted'? Parliament had not produced a code of moral standards. The common law lacked a moral compass. Were the standards to be found in the Bible? Or in the opinions professed by the editor of the favourite newspaper? The judges were given no guidance by Parliament.

Under the UK system, an international treaty does not become part of the law of the land unless and until Parliament enacts legislation to incorporate it into domestic law. The Convention is a treaty but even though Parliament had not made Convention rights part of our law, the new generation of judges increasingly had regard to Convention law for guidance in making their rulings – in interpreting ambiguities in the law, or in deciding moral questions about life and death.

When the Law Lords decided whether a local authority could end a mother's access to her child, they looked to the Convention right to a private and family life.<sup>24</sup> When they decided whether a journalist could refuse to disclose his sources to the police, they looked to the Convention right to freedom of expression.<sup>25</sup> They did so too when giving guidance to prevent juries from awarding excessive amounts of damages in libel cases.<sup>26</sup> Without any statutory mandate, they developed the common law – that is, the body of our law developed by the courts rather than by Parliament – to match the rights and freedoms protected by the Convention. They went as far as they could without trespassing on political grass.

But there were limits that confined them. Because Parliament had not made the Convention part of our law, the Law Lords felt unable to intervene to protect free speech when the Home Secretary banned Sinn Féin and the IRA from taking part in broadcasts of any kind with the aim of depriving them of the oxygen of publicity.<sup>27</sup> They considered that it was wrong for them to do through the back door what Parliament had failed to do through the front door. The only way that ministers could be made to comply with the Convention rights was by a new Act of Parliament – what became the Human Rights Act 1998.

## The political campaign for a Human Rights Act

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For thirty long years I campaigned in favour of a Bill of Rights. Senior civil servants used sneaky tactics to fight the idea. In 1976, a Whitehall committee on which I served produced a report on the pros and cons of making the Convention part of our law. The Permanent Secretary at the Home Office tried to persuade me that the report should not be published. When he failed, Whitehall mandarins briefed the Cabinet to oppose publication. When the Cabinet rejected that advice, the Home Office craftily printed only a few hundred copies<sup>28</sup> and it was hardly noticed by anyone.

A year later, in Northern Ireland, officials linked with the Home Office shelved a report by the Standing Advisory Commission on Human Rights that advocated bringing the Convention into UK law.<sup>29</sup> I had contributed to the report as special adviser to the Committee. In 1984, another senior civil servant at the Home Office tried to stop me from being appointed chair of an Anglo-American conference on a Bill of Rights because I was biased in favour. When he failed to persuade the conference director to remove me, he insisted that Enoch Powell MP should be invited to take part. Powell enlivened the proceedings by explaining that a black person did not become British merely by being born in Britain. He also suggested that I was guilty of treason, for bringing cases in Strasbourg against the Crown.<sup>30</sup>

The 1980s were an ice age for constitutional reform, though Margaret Thatcher was radical in other ways. It was not until the 1990s that the tide began to turn in favour of bringing the Convention right home. NGOs and the Institute of Public Policy Research published proposals in favour of incorporation. Members of both Houses of Parliament introduced Private Members' Bills to incorporate the Convention, and I introduced a couple of my own in the House of Lords. Two former Lord Chancellors, two former Home Secretaries, the Master of the Rolls, the Lord Chief Justice of England and Wales, leading Law Lords, the Bar Council and the Law Society came out in favour.

Before New Labour won power in 1997, Labour and the Liberal Democrats cooperated with one another in devising a programme of constitutional reform. Robin Cook and Robert Maclennan negotiated a crucial agreement bringing together key elements of constitutional reform.<sup>31</sup> It included making the European Convention part of UK law and setting up a parliamentary Joint Committee on Human Rights to monitor compliance with human rights.

### An ingenious compromise

The Human Rights Act subtly reconciles respect for parliamentary supremacy with the need for effective remedies for violations of the Convention rights.<sup>32</sup> The Act does not empower the courts to disregard Acts of Parliament that conflict with the Convention.<sup>33</sup> That would have made its passage through the Commons unlikely. Instead, it requires the courts to read and give effect to statutes in a way that is compatible with the Convention rights. Where that is impossible, it enables the courts to make a declaration of incompatibility. It is left to politicians to decide whether to take remedial action or leave it to the claimant to go to Strasbourg. In this way, the Act respects parliamentary sovereignty, but it is anchored in the Convention and the right of recourse to Strasbourg if the national system fails to deal with a case properly.

Our courts are in a weaker position in dealing with human rights issues than the courts of many other European and Commonwealth countries. Those courts have the power to strike down law that is unconstitutional. Ours can only declare that a given statute is incompatible with a Convention right.

On the other hand, the political branches of government in the UK share responsibility with the courts in giving effect to the Convention rights. That is a great advantage.

The Act requires a minister in charge of a draft law to make a statement as to whether the Bill is compatible with the Convention before it is debated in Parliament. This might appear technical and boring but it is of real practical value. The statement alerts ministers and parliamentarians to the human rights implications of what they are doing. It ensures that any attempt to authorise a violation of Convention rights is properly debated.

The parliamentary Joint Committee on Human Rights was set up after the Act came into force. It looks at every government Bill and decides whether it agrees with the Minister's view that it passes muster under the Convention. It takes evidence from ministers and civil society and reports to Parliament so as to inform members of both Houses, including ministers, about the human rights implications of pending legislation. It monitors whether the UK is complying with judgments of the Strasbourg Court, and with the various international human rights treaties by which the UK is bound. It undertakes inquiries on issues affecting human rights in the UK, such as domestic violence, trafficking, children's rights and the rights of people with disabilities. It is well staffed and resourced.

When the UK joined Europe in 1972, British judges received no special training about the immense legal implications for the British system of parliamentary government and law. But after the Human Rights Act was enacted, the government waited for two years (until October 2000) to bring it into force. This allowed time to train the judiciary and the civil service about the impact of the Act. Nothing like it had ever happened before. As a result our judges were well prepared, as were the legal profession and the civil service.

## Teething problems

Whenever a court or tribunal determines a question that engages a Convention right, the Human Rights Act says it must 'take into account' Convention case law. In 2004, Tom Bingham, the senior Law Lord, explained that the British courts have a duty 'to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.<sup>34</sup> His words 'no more, but certainly no less' were repeated again and again but they created the impression that British courts must follow all decisions of the Strasbourg Court strictly and go no further. The Conservatives complained in their 2015 General Election pledge that 'problematic Strasbourg jurisprudence is often being applied in UK law'.<sup>35</sup> In fact, the requirement does not mean that Strasbourg judgments have to be followed slavishly as binding precedents if our courts think them wrong in principle. 'Take into account' does not mean 'bound by'.

British judges have matured in their understanding of the Human Rights Act and have become more self-confident. They have made it clear that they are not strictly bound by the Strasbourg Court judgments.<sup>36</sup> They have sometimes departed from Strasbourg decisions. As a result, the European Court has thought again and changed its mind. For example, the Strasbourg Court held that it was incompatible with the right to fair trial to convict a man of sexual assault using a dead victim's witness statement.<sup>37</sup> The Supreme Court declined to follow this decision because the Strasbourg Court had disregarded other protections given to criminal defendants within our trial processes. As a result of our Supreme Court explaining its reasoning, the European Court modified its approach.

This dialogue between our courts and Strasbourg is important in both directions. The Convention and its case law need to be woven into the fabric of the British political and legal system, maintaining

the integrity of British laws and public confidence in the way the system works. The Human Rights Act makes that possible. It encourages European law to be approached *through* UK law, rather than *around* it. In the absence of a written constitution, we need our courts to articulate our constitutional principles in their judgments.

UK involvement with European Convention law has brought great benefits to Europe as well. Because of the way the Human Rights Act works, our courts give the Convention case law high priority than in countries such as France or Germany whose written constitutions are paramount. The standards of advocacy of British advocates, schooled in the common law tradition, are high. Even though only a tiny minority of four<sup>38</sup> of Europe's forty-seven states have legal systems based on the common law, we should take pride in having had a significant influence on the thinking and practice of the Strasbourg Court.

### Threats from within

We rely upon the Human Rights Act together with the common law to protect us against the misuse of power. The British system is a subtle set of checks and balances. It works well for judges, lawyers and civil society, and for the devolved institutions. But it is fragile and can easily be weakened or destroyed because it is not protected as supreme constitutional law.

Because the Human Rights Act uses the Convention rights as a substitute for homegrown constitutional rights, it arouses the hostility of Euro-sceptics. Our system has come under increasing onslaught, not from 'activist' judges but from political opportunists supported by right-wing newspapers that have made 'human rights' dirty words.

Critics of the Strasbourg Court complain of its 'activism'. They say that the Court's rulings go much further than is needed to protect human rights. In particular, they do not like the method by which the Court interprets the rights by current standards, rather than the views that prevailed when the Convention was drafted sixty years ago. They call it 'mission creep' and complain that the Court has interpreted the Convention far more broadly than its founders ever envisaged – and far beyond its proper limits.<sup>39</sup> There are a few judgments that they target as examples of 'activism'.

One arose in Sidney Golder's case.<sup>40</sup> Golder was a convicted prisoner serving his sentence on the Isle of Wight. In 1969, there was a serious disturbance in which a prison officer was hurt. The officer accused Golder of swinging vicious blows at him. Golder denied having done so and wanted to bring a claim for libel against the officer – but he was refused permission to consult a solicitor. He complained to Strasbourg that the refusal of permission impeded his right of access to the courts in breach of the Convention right to a fair trial. The puzzle for the Court was that the Convention did not specifically refer to a right of access to the courts but only to a fair, public and expeditious judicial procedure.

The Court pointed out that if the Convention were interpreted literally as applying only to proceedings already before a court, a state could do away with its courts without breaching the Convention. It is hard to understand how the Court's judgment could fairly be cited as an example of undue judicial activism or overreach. The right to a fair hearing by an independent court would be meaningless if one had no right of access to the court. A literal interpretation of the English text of Article 6 would have had that perverse result.

Anthony Tyrer's case is also cited by critics as evidence that Strasbourg has gone beyond its mandate.<sup>41</sup> Tyrer was a British citizen living on the Isle of Man. In 1972, he pleaded guilty in the

juvenile court to assault causing bodily harm to another pupil at his school. He was sentenced to three strokes of the birch. It was carried out in the presence of his father and a doctor. He was told to take down his trousers and underpants and made to bend over a table. Two policemen held him down while a third administered the punishment, pieces of the birch breaking at the first stroke.

In Britain judicial corporal punishment was abolished in 1948. The UK government considered it degrading punishment in breach of violation of Article 3 of the Convention, but the Isle of Man government thought otherwise and defended its case to the Strasbourg Court unsuccessfully. The Court accepted that the treatment might have been normal at the time the Convention was drafted. But it ruled that the Convention is a living instrument to be interpreted in the light of present-day conditions. It found that Tyrer was treated as an object in the power of the authorities and that the institutionalised violence had harmed his dignity and physical integrity.<sup>42</sup>

Those who accuse the Court of undue activism attack its interpretation of the Convention as 'living instrument'. They argue that it should be read and given effect only in accordance with the values and conditions that obtained when the Convention was drafted and came into force. That is similar to the 'original intent' approach of Justice Scalia as a member of the American Supreme Court. He insisted that the American Constitution must be read strictly and literally in accordance with the original intent of the eighteenth-century gentlemen who devised it.

It is not the approach of the courts of other common law countries or of our own courts. They interpret legislation in accordance with contemporary values and conditions to avoid statutes becoming ossified relics of a bygone age. As long ago as 1930, the Judicial Committee of the Privy Council had to decide whether women were eligible under the British North America Act to become members of the Canadian Senate even though the reference to persons in the Act referred only to men.<sup>43</sup> The Lord Chancellor, Viscount Sankey, ruled that the Act was 'a living tree capable of growth and expansion within its natural limits'. The reference to 'persons' included women. Presumably today's critics would regard that as undue 'activism'.

The Privy Council has explained<sup>44</sup> that laws giving effect to basic freedoms call for a generous interpretation – avoiding what has been called 'the austerity of tabulated legalism'. That approach has been commended again and again by British courts. It is also Strasbourg's approach. Conservative critics would like Strasbourg and our courts to be narrowly literal. They would like the tree of justice to be petrified dead wood.<sup>45</sup>

Another criticism levelled at the Court is that its rulings encroach on the province of legislators, not judges. Judges are not elected and do not have a mandate to make the law. According to this view Strasbourg undermines the sovereignty of Parliament. In reality the Strasbourg Court is careful to respect the principle of subsidiarity and to leave it to the state to choose an appropriate means of giving effect to its judgments.

The UK system is alone in Europe and most of the common law world in placing Acts of Parliament beyond the reach of our courts. If Parliament enacts a racist law, there is nothing our courts can do except to make a declaration of incompatibility, leaving the alleged victim to go to Strasbourg. If the right to complain to the Strasbourg Court were removed, an executive-controlled Parliament would have absolute power.

The opponents of the Convention system give few examples of what they regard as 'judicial legislation' by activist judges. Their arguments are based on ideology rather than fact. The case that has aroused widespread political anger concerns prisoner voting. English law long banned convicted prisoners from voting in parliamentary and local elections while in custody. John Hirst,

convicted murderer, challenged the ban as incompatible with Article 3 of Protocol No. 1 to the Convention, which protects ‘the free expression of the opinion of the people in the choice of legislature’. He lost in the English courts but won in Strasbourg.<sup>46</sup>

The Strasbourg Court found that the ban on convicted prisoners was arbitrary and disproportionate. It is an automatic blanket ban treating all convicted prisoners alike, whether heinous murderers or petty shoplifters, regardless of their particular circumstances. The blanket ban is, in the Court’s words, ‘a blunt instrument. It strips of their Convention right to vote a significant category of persons and does so in a way that is indiscriminate’.

The Court did not conclude that all convicted prisoners should be entitled to vote. It recognised the ‘margin of appreciation’ – that is, the amount of discretion allowed to the state – is wide, and that it is primarily for the state concerned to choose the means to comply with the Court’s judgment. There are many different ways of organising and running electoral systems in Europe.<sup>47</sup> However, any departure from the principle of universal suffrage risks undermining the democratic validity of the elected legislature. The right to vote is no longer the privilege it was seen to be in the time it was denied to women. The presumption in a democratic state should be in favour of inclusion.

Without any fuss, the governments of Cyprus and Ireland changed their rules to give prisoners the postal vote. Yet in Britain, Hirst’s victory aroused fury among opponents of the Court, on the left and right of British politics. Instead of introducing a measure to comply with the judgment, Jack Straw candidly admits that, as Labour Lord Chancellor and Justice Secretary in government, he spent three years ensuring that the government took no decision in response to it.<sup>48</sup> He says he ‘kicked the issue into touch, first with one inconclusive public consultation, then with a second’. After he lost office, Straw went to Strasbourg with David Davis, the former Shadow Home Secretary, to discuss the concerns with the President of the Court. David Cameron told the Commons that giving any prisoners the right to vote made him feel ‘physically sick’.

The coalition government published a draft Bill on the eligibility of prisoners to vote. A parliamentary Joint Committee examined it and published a report in December 2013. It recommended that the government bring forward legislation to permit only prisoners serving sentences of twelve months or less to vote in UK parliamentary, local and European elections. The government did not give effect to that modest recommendation.

In violation of international law, successive governments have failed to introduce a Bill to comply with the Strasbourg Court’s judgments. That has gravely undermined the UK’s good reputation as a state that respects the rule of law. It has set a terrible example to other states that do not respect human rights. In September 2015, the junior Minister of Justice, Dominic Raab MP, went to the Committee of Ministers of the Council of Europe to defend the government’s refusal to give effect to the judgment. He came under strong attack from many governments across Europe, but the Russian Federation indicated that it might follow the UK’s example, and in December 2015 passed a law allowing the Russian Constitution to trump the Convention.

## Why human rights matter now

In comparison to his predecessor, Chris Grayling, Michael Gove is a welcome improvement as Justice Secretary. He promised Parliament that he would not withdraw from the oversight of the Convention system, nor weaken human rights protection. He even promised to legislate for an additional right to trial by jury. But his assurances are at best uncertain because of his attachment to parliamentary sovereignty and his refusal to abide by the final judgment of the Strasbourg Court on prisoner voting.



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