The Rt Hon Nick Herbert MP

Kingsland Memorial Lecture

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What's gone wrong with rights?

*** CHECK AGAINST DELIVERY ***`

I am honoured to be delivering the second lecture in memory of Christopher Kingsland, and very grateful to Policy Exchange for inviting me.

I worked closely with Christopher when he was our spokesman in the House of Lords, a position he held until his untimely death in 2009. He was a vice-president of Justice: someone with a keen regard for the rule of law, but also for the constitutional arrangements which have made England a beacon of liberty for the world.

Indeed, it was largely due to Christopher's efforts that the office of Lord Chancellor, with his traditional constitutional role of protecting the rule of law and the independence of the judiciary, survived.

Christopher was Shadow Lord Chancellor when the Human Rights Bill was being steered through the Lords.

He told the House:

> 'We often find that the judges in the court in Strasbourg – brilliant and well-meaning lawyers though they are – lack an understanding of our constitutional ways which are, after all, unique... in that context, putting the interpretation of the convention in the hands of our own judges has its attractions.'

How prescient this was.

And he went on:

> 'We must be cautious about changing our constitution which has stood us in good stead for many hundreds of years. Most other countries in the world admire it greatly. Indeed, many are very jealous of it.'

How right he was.

In this lecture I want to argue that the greatest threat to the cause of human rights and civil liberties in this country comes, ironically, from those who purport to be their most ardent defenders.

First, rights have been misinterpreted and misapplied. The very ubiquity of rights in legal and political discourse has actually contributed to their devaluation.

Second, we have seen a rise of legalism and a hollowing out of our ethical obligations.

Third, rights have come to be deployed for personal advantage rather than as components of our shared humanity. We see this in the pernicious form of the compensation culture...

... in vexatious litigation...

... but, at worst, in 'lawfare' where rights are deployed as weapons in a political or ideological struggle.

Fourth, the law has become imbalanced as the rights of a few have obtained disproportionate influence to the detriment of safety and security and the rights of the majority to go about their business in peace.

Fifth, I want to set out how this narrow rights-based legalism – indeed legal elitism – has seen democratic institutions sidelined.

And when rights are pitted against democracy they are vulnerable...

... because respect for human and civil rights cannot be sustained by courts and quangos alone. It needs every member of society to understand the value of rights. When they are misused, they become harder to protect.

I reject the crude accusation that criticising the rights culture undermines the concept of human rights. Not everything that is done in the name of rights has positive consequences. Indeed, the reverse may be true: fetishising rights, with a corresponding lack of concern for responsibilities and duties, has helped to bring rights into disrepute.

But there is a way to reclaim rights. I will propose that the UK should complete the process of repatriating Convention rights begun under Tony Blair's government by withdrawing from the jurisdiction of the European Court.

And I will argue that by doing so, we have the opportunity to redeem rights in the mind of the public, without whose support any institutional protection for human rights cannot succeed.

Great rights

In the UK, we can be proud of our record of respect for human and civil rights. It is almost 800 years since Habeas Corpus and the right to a fair trial were

hard-wired into our constitutional arrangements. Magna Carta and the Bill of Rights helped to inspire, in Revolutionary France, the Declaration of the Rights of Man and in the embryonic United States, their own Bill of Rights.

Then, in the aftermath of the Second World War and the Holocaust, we had to ensure that the abuses that had taken place – genocide; oppression; torture and truly dehumanising, degrading and debasing treatment – never happened again...

... and it was British lawyers who helped draft the Universal Declaration of Human Rights and the European Convention.

However, the framers of those documents were grounding them in rights and liberties which they presupposed our citizens to enjoy. They reflected rights and liberties which had already been fought for, won, and incorporated into our constitutional arrangements.

As Edmund Burke observed:

> 'From Magna Carta to the Declaration of Right, it has been the uniform policy of our constitution to claim and assert our liberties as an entailed inheritance derived to us from our forefathers, and to be transmitted to our posterity.'[1]

Two years ago I visited the concentration camp at Dachau...
I saw tiny cells where inmates were forced to stand for days...

[1] Edmund Burke, Reflections on the Revolution in France, 1790

... a housing block, with hooks from which prisoners were hung as a form of torture...
... a museum with stark photographs charting chilling stories of political prisoners interned as enemies of the State; of others incarcerated for being of the wrong race or sexuality.

It was gross abuses such as these which spurred the creation of the Universal Declaration and the European Convention....

... documents focused on what I would call ‘great rights’...

... the right not to be tortured ...
... the right to a fair trial ...
... the right to free speech ...
... the right to life...
... the right to liberty and restrictions on arbitrary detention.

As Liberty ask...
... ‘What’s not to like?’

Rights misapplied and misinterpreted

Yet something new has happened: human rights have become an object of opprobrium, not acclaim.

I recently attended a fundraising event hosted by Human Rights Watch – an organisation which helps people who suffer some of the most egregious breaches of their rights; monitoring those governments which operate with a casual disregard for the rights of their citizens.

A guest on my table explained that she had been assailed by her taxi driver on the subject when she had explained where she was going.

Now, I don't pretend that taxi drivers are necessarily representative of public opinion...

... but it occurred to me that something tragic is happening. Respect for human rights should represent one of the pinnacles of civilisation. Instead, human rights are too often now derided.

Much of the blame for this must lie in the fact that litigants and lawyers have, in applying the concepts of human rights in trivial and inappropriate ways, contributed to their devaluation – what Dominic Raab MP has referred to as 'rights contagion'...

... the prisoner who argued that the failure of his in-cell toilet breached the prohibition against inhuman or degrading treatment...

... the father who kept his son out of lessons claiming that his school's ban on ponytails breached his human rights.

Each year, Liberty hosts an awards ceremony to honour those who have advanced the cause of human rights...

... last year one of the nominees was a 12-year old boy who had worn a skirt to school in protest at its uniform policy.

But it is not just trivial cases such as these – which courts more often than not have the common sense to throw out – that have contributed to this devaluation.

As Professor Richard Thompson Ford has pointed out in his brilliant book, *Rights Gone Wrong*:

> 'Cynical opportunists and reckless extremists on both the left and the right have hijacked civil rights, using them to gain personal advantage at public expense, to push radical schemes despite democratic opposition and in some cases, even to reverse and undermine the social justice goals civil rights were supposed to achieve.'[2]

Because in the modern environment, rights are seen – to use the philosopher Ronald Dworkin's words – as 'trumps' which take priority over social welfare and other forms of moral obligation. So those who have wanted a greater focus on, for instance, protection of the environment, or greater welfare, have felt compelled to frame these campaigns as being for the recognition of new rights.

There has been, as Lord Justice Laws recently put it, a tendency to treat 'I have a right to...' as a synonym of 'I would like...'[3].

And regretably, the courts, in particular the European Court of Human Rights, have been complicit in this. The Strasbourg Court's conception of the Convention as a 'living instrument' has allowed it to go way beyond simply applying the Convention principles to new developments, to creating entirely new categories of rights through its interpretation.

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[2] Richard Thompson Ford, Rights Gone Wrong – How Law Corrupts the Struggle for Equality, 2011, Farrar, Straus and Giroux

[3] Lord Justice John Laws, 'Do Human Rights Make Bad Citizens', Northumbria University, Inaugural Lecture, November 2012

As one President of the Court has noted, it has interpreted Article 8, the right to respect for family and private life, to cover issues as diverse as corporal punishment in schools, disclosure of medical records, aircraft noise, assisted suicide, and the application of immigration rules.

So a Romanian prisoner was able successfully to use Article 8 to sue prison authorities over the smell from a neighbouring rubbish tip. The stale air didn't damage this fraudster's health, but he was rewarded with £6,500 for the damage to his 'quality of life'[4].

Rise of legalism

A further consequence of our obsession with legally-enforceable rights over other forms of moral duties has been an increasingly litigious society.

This has coincided with an increased willingness by the courts to question the actions of Government, accelerated by the Human Rights Act.

In 1997, Lord Irvine, one of the architects of the Human Rights Act, predicted that 'a culture of awareness of rights [would] develop' in its wake. What has actually been unleashed is a culture of grievance.

Once the Act was in force, its advocates encouraged the public to use the Convention rights to effect changes, and make new demands, for the delivery of public services. This was legalism in action, with quangos and interest

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[4] Braduse v Romania

groups using the courts to achieve through litigation what they could not achieve democratically.

Far from developing a respect for human rights, Lord Young's report for the Prime Minister last year noted that:

> 'a blame culture has developed in which ... somebody must always be at fault and financial recompense is seen to make good any injury ...'

This in turn leads officials, and sometimes ministers, to take decisions motivated primarily by a concern to avoid legal challenge. Since the mid-1980s, civil servants have been warned, and in turn have warned Ministers, of the so-called 'Judge Over Your Shoulder'.

As a result we have seen decision-making skewed in favour of the path of least resistance.

I experienced this as a Justice Minister.

My colleagues and I have long pointed to the chilling effect of the Human Rights Act in relation to the naming of offenders in the community, in particular those who have escaped or absconded from custody.

In fact, in 2009 we announced that we would allow the authorities to name offenders at large.

I discovered that officials were proposing to block the release of information on dangerous offenders on the run, including convicted killers and sex offenders, on the grounds that to do so would breach their rights.

It seemed to me that there was a very strong public interest in releasing this information. After all, there was no question that releasing it would drive them

underground – as is so often asserted in relation to sex offenders – because the truth is that these people were already lost to the authorities.

Moreover, it seems to me that, in seeking to block this information, too much importance was being placed on the rights of offenders ...

... and too little on the rights of members of the public.

The default setting, until challenged, was to suppress the information, and thereby avoid anyone challenging the policy.

But legalism gives rise to larger problems than just litigiousness.

As Richard Thompson Ford says:

> 'Rights go wrong when we lose sight of their highest purposes.'[5]

There is a tendency among professionals, and among those whom David Blunkett has termed the 'liberati', to prioritise process over the public interest; to become overly attached to rules and procedures and to confuse these for great principles.

The over-riding principle of justice is to convict the guilty and acquit the innocent.

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[5] Richard Thompson Ford, Rights Gone Wrong – How Law Corrupts the Struggle for Equality, 2011, Farrar, Straus and Giroux

But remember the protests when the then Government allowed courts to draw conclusions from a defendant's exercise of the right to silence?

You would have thought that they were proposing to put suspects on the rack.

Or take the limited exemption allowed to the double jeopardy rule. In some cases, the blunt instrument of double jeopardy, intended to protect acquitted defendants from oppressive retrials, thwarted that over-riding principle of justice. So Parliament amended it.

Yet when Gary Dobson, one of the killers of Stephen Lawrence, was brought to justice, Liberty was asked if they would like to comment. They declined to do so, because they had campaigned against that limited reform.

What the case of Gary Dobson brought out is that the moral purpose of justice is the reason we have rules of law; but we should not confuse those rules with justice itself.

When society is conceptualised only through legal rights and responsibilities alone it is diminished. Narrow legalism provides a framework for society, but it cannot provide a comprehensive morality.

The aspiration of some supporters that the Human Rights Act could amount to a new overarching morality – 'values for a Godless age'[6] – was surely misguided.

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[6] Francesca Klug, Values for a Godless Age, 2000, Penguin

This is a point which has been developed by Professor Guglielmo Verdirame who argues that:

> 'the warm embrace between international law and human rights has reduced – and some would say impoverished – argument about liberty into a legal and often legalistic form... a technical argument about rules ... open only to those with a training in human rights law. Even lawyers from other fields are dismissed by the human rights clique because their credentials are allegedly not good enough.'[7]

He notes that this is the reason why human rights judgments so often jar with the public – because they clash with

> 'the deep-seated liberal moral intuitions of large sectors of society [who] have no difficulty accepting that torture is a political, social and certainly a moral evil, but ... refuse to put the deportation of a convicted foreigner or voting rights for prisoners in the same category'[8].

How can we believe in democracy if we don't believe that the public's moral intuitions are essentially sound?

Rights and responsibilities

But a functioning democracy also requires that people have an understanding of their responsibilities.

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[7] Guglielmo Veridame, 'What's Gone Wrong With Rights?', unpub MS

[8] Guglielmo Veridame, forthcoming paper for Policy Exchange

Responsibilities are not the opposite of rights: they go hand in hand. Every right places obligations on others: to respect those rights, sometimes to facilitate them.

However, as Jonathan Fisher QC notes:

> 'The [Convention] is hopelessly unbalanced by its omission to incorporate any notion of civil obligation into the text'[9].

Of course, in a free country the responsibilities we owe to the State should be as few as possible. But that is not to say that we do not have wider responsibilities to society at all:

... responsibilities to one another...

... responsibilities to use scarce resources wisely...

... responsibilities to protect the environment for this and future generations...

... a responsibility, for that matter, to ensure that we do not pass debts incurred through our own profligacy onto those generations.

Social responsibilities or duties – those we owe to others, not to the State – may not be legally enforceable, but that does not make them any less important.

As Richard Thompson Ford says:

> 'Civil rights make sense only as part of a social contract of mutual respect and cooperation among citizens, where the rights of others and the common good are as important as personal entitlements.'[10]

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[9] Jonathan Fisher QC, 'A British Bill of Rights and Obligations', Conservative Liberty Forum,

Rights as legal weapons

An increasingly atomistic view that privileges our rights above our responsibilities can actually boundaries between us. As Lord Justice Laws has said:

> 'the assertion of a right is systematically self-centred. When X asserts a right against Y, he is making a claim ... that his interests should come first.'[11]

Rights viewed in this way can become instruments of aggression.

We see this in our prisons, where inmates with time on their hands and grievances to pursue are positively encouraged to litigate first, and even discouraged from reporting matters to the proper authorities . One current advertisement, for instance states:

> 'If you have been a victim of violence in prison ... the powers-that-be probably won't help you. See if we can.'

Vexatious litigants in prison may be annoying and expensive, but they are, in general, safely out of harm's way. The same, sadly, is not true when those

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[10] Richard Thompson Ford, Rights Gone Wrong – How Law Corrupts the Struggle for Equality, 2011, Farrar, Straus and Giroux

[11] Lord Justice Laws, 'Do Human Rights Make Bad Citizens?', Northumbria University, Inaugural Lecture, November 2012

whose ultimate aim is the destruction of our way of life – including our traditional liberties – are allowed to make a mockery of our legal procedures as part of their ideological struggle, a practice some commentators have called 'lawfare': ...

... law as a mechanism of war by other means.

As the former Home Secretary, Lord Reid, has pointed out, the Convention was drafted to deal with the fascist state, but we now face the challenge of fascist individuals, who exploit our legal system as part of their struggle against values we hold dear[12].

And it is precisely because their attachment to those processes is superficial and instrumental, that this lawfare is asymmetrical. It is darkly ironic that preachers of hate who so despise our western democracy think nothing of sheltering under its protections. They are able to use every possible legal device to prevent their being brought to justice, while Governments struggle to fulfil their fundamental duty to protect the public.

As a point of principle we should not demur from our commitment to human rights and civil liberties. That would be to hand victory to our opponents.

But that does not mean we should allow liberal democracy to become an object of ridicule. That, too, would hand victory to our opponents.

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[12] per Matthew D'Ancona

We should hold true to our principles, while recognising that the way in which we manifest those principles may need to change. So for instance, our commitment to justice usually requires that it should take place in the open.

But sometimes it is necessary, in the interests of justice, to do otherwise. So we allow rape victims to retain their anonymity; we close trials of juveniles; we limit access to family courts.

Justice is not served if Governments have to settle cases out of court because they are unable to adduce evidence due to genuine national security concerns.

Rights vs public safety

The aim of reasonable security measures in a liberal democracy is to protect citizens and their rights, not to undermine them. Yet by looking at one set of rights alone, we so often lose sight of that aim.

No less a figure than Sir Robert Peel observed that 'liberty does not consist in having your home robbed by organised gangs of thieves'[13]. If the strong opposition to Peel's plans, on the mistaken grounds of civil liberties, had succeeded, he would not have been able to found the Metropolitan Police. Yet such reflexive sentiments find their echo today.

Moreover, if rights are 'trumps', then the right to life is, as one philosopher put it, the 'ace of rights'. The State has a positive duty to protect the lives of its

[13] Letter from Robert Peel to the Duke of Wellington, 5 Nov 1829, quoted in English Historical Documents, 1959

citizens so that they can enjoy the full panoply of freedoms that come with living in a free society.

And on occasion, the rights and liberties of others may have to be curtailed in order to facilitate this.

I do <u>not</u> believe that those who commit crimes, or preach hatred, or seek to undermine democracy and the rule of law, thereby forfeit all their rights...

... but I do believe that where a balance has to be struck between the rights of these people and the human and civil rights of the law-abiding, then the latter should take priority.

And too often, those who purport to speak up for human rights, and those charged with guaranteeing them – including the European Court of Human Rights – have got this balance wrong.

As the Prime Minister told the Council of Europe:

> 'you can end up with someone who has no right to live in your country, who you are convinced – and have good reason to be convinced – means to do your country harm.
>
> 'And yet ... you cannot try them, you cannot detain them and you cannot deport them.

> ‘So having put in place every possible safeguard to ensure that ECHR rights are not violated, we still cannot fulfil our duty to our law-abiding citizens to protect them.’[14]

Ultimately, the first duty of any Government is to protect the security of its citizens. After all, if a foreign terror suspect, out on bail because he can neither be detained nor deported, were to commit an atrocity while at large, it is not the courts or the Special Immigration Appeals Commission who Parliament and the public would hold to account; it is the Home Secretary and the Prime Minister.

Rights vs Democracy

It is understandable that in the aftermath of World War Two the drafters of the Convention sought to constrain the activities of governments. However, even among the representatives, there was a divide between those from countries such as Denmark, Norway, Sweden, the Netherlands, and the UK who felt that representative democracy was the best protector of liberty, and others – including Belgium, France, Italy and Ireland – who felt rights could not be secured without a supra-national court.

One of the British representatives, the Labour MP Lynn Ungoed-Thomas, shortly afterwards a High Court judge, argued that for a court to be empowered to decide whether a legislature had violated the rights of its citizens was ‘the most anti-democratic procedure we could possibly conceive’[15].

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[14] David Cameron, Speech to the Council of Europe, 25 January 2012
[15] quoted in Peter Hennessy, The Hidden Wiring, 1995

The result was a messy compromise in which states were permitted to sign up voluntarily to the jurisdiction of the Court. It was not until 1966 that the British Government agreed to do so.

This development came towards the end of a period in which the Court had had very little impact. But it coincided with a domestic legal and political movement that was distrustful of the ability of elected representatives to secure human and civil rights. In 1968 Anthony Lester published his call for the European Convention to be directly incorporated into British law[16].

Through the 1970s and 1980s lawyers and later increasingly the courts, came to question the capacity of Parliament to protect fundamental rights. Professor Francesca Klug recently claimed that 'Parliamentary sovereignty is a misnomer in our system. It really means government sovereignty'.

But is surely wrong. Though it may be unfashionable to say so, the evidence is that Parliament has never been more independently-minded than it is now. The heyday for partisan voting was the 1950s. MPs can no longer afford to treat their electorates with the disdain that was possible in previous decades.

Conversely, nor should we assume that the detachment of judges and tribunals from the people guarantees benign decision-making. The logical endpoint of such an argument would be that the people would best be served by a dictatorship of the judiciary.

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[16] Astrid Kjeldgaard-Pedersen, 'The Evolution of the Right of Individuals to Seise the European Court of Human Rights', Journal of the History of International Law, 2010, Vol. 12, pp. 267-306; Conor Gearty, 'The United Kingdom' in 'European Civil Liberties and the European Convention on Human Rights: a Comparative Study', 1997

In fact, Parliament has shown itself to be a doughty defender of human rights and civil liberties.

Defenders of the Human Rights Act like to portray it as Winston Churchill's legacy, but it was the chamber of the House of Commons – 'that little room' – that Churchill described as 'the shrine of the world's liberties'[17].

It was Parliament which stood firm against 90, then 42, days' detention without trial. Going further back in history, it was Parliament which ended the slave trade, gave women the vote, and ended the criminalisation of homosexuality. And looking forward, I am confident that Parliament will soon say that the right to marry should not be restricted on the grounds of a person's sexuality – a matter on which the European Court has declined to intervene.

Ultimately, fundamental human rights cannot endure if they rest on narrow legalism alone; they require the support of the public. As I said in a lecture at the British Library four years ago:

> '[Human rights] cannot be an elitist ideal, imposed upon an unwilling public. Jefferson might have believed that men's rights were "endowed by their Creator", but he also believed "That to secure these

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[17] quoted in Peter Hennessy, The Hidden Wiring, 1995

> rights, Governments are instituted among Men, deriving their just powers from the consent of the governed"'[18].

And as the late Lord Bingham put it, respect for the law is likely to be undermined if groups can achieve through the courts what they cannot achieve through democratic means.

Criticism of European Court of Human Rights

Yet too often the Strasbourg Court has failed to recognise this point. Instead, it has seen itself as better placed than national governments to balance the rights – and the implicit responsibilities – in the Convention.

In Lord Hoffmann's words:

> 'the Strasbourg Court has taken upon itself an extraordinary power to micromanage the legal systems of the member states.'[19]

This aggrandizement has taken a number of forms. We see it in the Court's caseload, nearly doubling in just over a decade. We see it in the growing backlog of over 150,000 cases awaiting a judgment.

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[18] Nick Herbert, Rights Without Responsibilities, Speech to the British Institute of Human Rights, British Library, 24 November 2008

[19] Lord Hoffman in introduction to M. Pinto-Duschinsky, 'Bringing Rights Home', Policy Exchange

We also see it in the Court's conception of the Convention as a 'living instrument', allowing it to reinterpret the Convention to go way beyond what was intended by its signatories.

This Court does not limit itself to reinterpretation in the light of changing circumstances – for instance, applying notions of freedom of expression drafted in the 1940s to cover the digital technology, or applying the right to family life to gay and lesbian couples.

It actually means creating new rights which in some cases the contracting parties had deliberately excluded from the Convention.

For instance, Dominic Raab has shown that the drafters of the Convention deliberately left out the right to vote, conscious, among other things, that in the UK, the franchise was not extended to peers, lunatics, and convicted prisoners.

Nonetheless, in *Hirst,* the Court, decided that the right to vote was a right that people ought to have, so they concocted it from a much more limited requirement on states to hold free and fair elections.

This also reflects another legitimate criticism of the Court: it has too often paid lip service to the doctrine of the margin of appreciation, while ignoring it in practice. As Lord Hoffmann said in his Judicial Studies Board lecture of 2009:

> 'the Court has not taken the doctrine of the margin of appreciation nearly far enough. It has been unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member

> States. It considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe'[20]

Nor is it only British judges who have been critical. The President of the Belgian Constitutional Court has complained that the Strasbourg Court is now acting as a court of fourth instance.

As a recent example, only this month, in *Redfearn*, the Court argued that British employment law was incompatible with the Convention. Redfearn was a bus driver who stood as a councillor for the BNP. When his colleagues protested, he was sacked. He was unable to sue for wrongful dismissal because he had been employed for less than twelve months.

The Court held that the twelve-month qualifying period for unfair dismissal rights did not afford sufficient protection for employees' right to freedom of expression and association. As a result, it is likely that the UK will have to pass a new law extending protection against unfair dismissal to reasons connected with political activities to new employees.

Now it may well be that there is an argument for doing so. After all, we have seen only this weekend in Rotherham the dangers of authorities discriminating against people on the basis of their party affiliation.

Equally, making it harder to sack new employees actually discourages employers from taking on new staff, which is why Parliament recently voted to extend the qualifying period from twelve to twenty-four months,.

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[20] Lord Hoffmann, The Universality of Human Rights, Judicial Studies Board Annual Lecture, March 2009

The point is that a democratically elected Parliament is better placed to judge this balance than an unaccountable court sitting in another country.

As the dissenting judges put it:

> 'Doubtless the balance could have been struck ... in a different way and further exceptions to the qualifying period might have been created to cover claims for dismissal [on grounds] of ... political affiliation. However, this is a different question from the one which the Court is required to determine, namely whether the United Kingdom exceeded its wide margin of appreciation'[21].

But perhaps the most concerning aspect of the European Court has been its impact on national security cases.

In particular, the willingness of the Court to issue interim measures in cases of removal, extradition or deportation has enabled a series of individuals, some with criminal convictions for terrorism and hate-crimes, others with no right to be in the UK in the first place, to thwart removal from the UK.

Perhaps the best example of this is the case of Abu Hamza. The US formally requested Hamza's extradition in September 2006, and it was approved by a judge within a few weeks. Yet it took over six years for Hamza to be deported because each time a decision was made he would appeal, and deportation would be postponed pending it.

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[21] Redfean v United Kingdom, Joint partly dissenting opinion of Judges Bratza, Hirvelä and Nicolaou, para. 4

In the case of Abu Qatada, the Court extended the principle first formulated in *Chahal*, that a person cannot be removed to a country if there is a real risk that they will face torture, to cover the risk that a person might face a breach of Article 6, the right to a fair trial: specifically, the risk that evidence obtained by torture might be used against him.

Domestic courts have long held that evidence obtained by torture should play no part in British legal proceedings.

Let me be clear: torture is abhorrent and has no place in a civilised society.

But Abu Qatada is not in any danger of being tortured: the UK has agreements in place with Jordan that guard against that risk and both our courts and the European Court accept that those assurances would be effective. Nor is there a risk that other people will be tortured if he is deported.

As Lord Phillips put it in the lead House of Lords judgment on Qatada:

> 'the prohibition on receiving evidence obtained by torture is not primarily because such evidence is unreliable [and] will make the trial unfair. Rather it is because "the State must stand firm against the conduct that has produced the evidence". That principle applies to the state in which an attempt is made to adduce such evidence. It does not require this state, the United Kingdom, to retain in this country to the detriment of national security a terrorist suspect unless it has a high

> degree of assurance that evidence obtained by torture will not be adduced against him in Jordan.'[22]

Yet that is precisely what the European Court required.

Nor did the Court even insist that Qatada show that such evidence would, or even probably would, be used against him. They said such evidence was necessarily hard to find, and therefore all that would be required would be evidence of a real *risk* that torture evidence might be used.

We should not underestimate the seriousness of this matter. We have the President of the Supreme Court telling us that an interpretation of the Convention rights now adopted by the Strasbourg Court means that we have to accommodate on our streets a terrorist suspect at the expense of national security. And as a direct result of that ruling, a domestic tribunal has been forced to release a man described by a High Court judge as “a truly dangerous individual”. Our inability to remove those who threaten our country isn’t just ludicrous: it is in fact an outrage.

This situation should not be allowed to continue. Faced with a choice between our national security and the rights of our citizens to live in safety, and the perverse judgement of the Strasbourg court, a responsible government must be allowed to put the safety of its citizens first.

Reform of the European Court of Human Rights

So what is to be done?

[22] OO (Jordan) v Secretary of State for the Home Department [2009], HL 10, para. 153

Earlier this year, Ken Clarke led negotiations in Brighton designed to address some of the problems of the European Court of Human Rights. This culminated in a declaration designed to encourage the Court to deal with its backlog, prioritise only those cases which deserve to be interrogated by an international tribunal and pay greater regard to the margin of appreciation.

I hope that these measures will succeed...
... although I note that the first response of the then President of the Court was to say that the declaration would "not change the way we do our jobs"...

... and after all, the Brighton declaration followed Interlaken and Izmir which made similar exhortations.

However, judgments such as *Redfearn*, and the Court's insistance that the UK's restrictions on voting by convicted prisoners are contrary to Protocol 1 of the Convention, do not give grounds for optimism.

Because even if less trivial claims are no longer entertained, the fundamental faultline remains: a supranational court can impose its will against ours. And this, in the end, represents a challenge to democracy which cannot be allowed to stand.

A complementary British Bill of Rights

So what is to be done?

In 2010, the Conservative Party stood on a platform of introducing a British Bill of Rights. Our hope was that a domestic Bill of Rights, true to our historical legacy, which placed rights in the context of the responsibilities we

owe to one another, would allow us to make greater use of the margin of appreciation in Strasbourg.

In line with the pledge made in the Coalition Agreement, the bipartisan Commission on a Bill of Rights was established last year under the chairmanship of Sir Leigh Lewis. I look forward to the Commission's recommendations. However, its terms of reference mean that the obligations that the UK has as a signatory to the Convention are not open to discussion. I am aware that its findings may well be limited if they are to secure consensus between the Commission's members.

I fear that, whatever the merits of that policy when we adopted it in 2006, the approach of the Strasbourg Court now means that a British Bill of Rights, alongside our obligations under the Convention, as interpreted and enforced by Strasbourg, would give us no greater flexibility than we have at present.

The Parliamentary Joint Committee on Human Rights, which took evidence on this point, has concluded that:

> 'it is both legally and empirically incorrect to suggest that a Bill of Rights would lead the European Court of Human Rights to give a greater margin of appreciation to the UK.'[23]

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[23] Joint Committee on Human Rights, 'A Bill of Rights for the UK?', 2007/08: HL165

Indeed, the opposite would most probably be true. The Human Rights Act requires domestic courts to 'have regard' to Strasbourg jurisprudence, not slavishly to follow it...

... but the ruling in *Ullah* effectively requires domestic courts to do just that:

> "to keep pace with the Strasbourg jurisprudence: no more, but certainly no less"[24].

However, as Baroness Hale has noted in a lecture on the margin of appreciation:

> 'when dealing with a British Bill [of Rights] the *Ullah*-type reasoning would not apply'[25]

The Convention would remain as a floor, but there would be no ceiling.

This was also the conclusion of Ministry of Justice-sponsored research by the University of Oxford, which found that:

> 'a "British Bill of Rights" would most likely result in stricter rights protections in British courts.'[26]

Far from giving us greater discretion to strike a balance between liberty and security, a British Bill of Rights, complementary to the Convention, would give us even less. Our courts would remain bound not only by the Convention, and Strasbourg's interpretation of it, but also by our judges' interpretation of the British Bill of Rights.

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[24] R v Special Adjudicator ex p Ullah [2004] HL 26
[25] Baroness Hale of Richmond, 'Law Lords at the Margin: Who defines Convention Rights?', Justice Tom Sargent Memorial Annual Lecture, 2008
[26] Ministry of Justice, 'Public Protection, Proportionality and the Search for Balance'

Repatriating the Convention rights

So I now believe that an accommodation with the Strasbourg Court that will respect the proper role of the British Parliament and domestic courts is a pipe dream.

The current stand-off over prisoner voting demonstrates the point.

The Government may have been able to comply with one of the demands required by the Council of Europe by tabling draft legislation within six months of judgment in *Scoppola*, but it is simply incapable of complying with the second part of that requirement, to enact that legislation. I do not believe that the House of Commons will vote for any relaxation in the ban on voting rights for convicted prisoners.

That means that future cases will come before the court; 2,500 are already in the pipeline. So far Strasbourg has refused requests for prisoners to be awarded compensation. It is unlikely that this will last once it becomes clear that Parliament has no intention of complying.

The British public will find it hard to stomach the sight of prisoners lining up to receive thousands of pounds in compensation.

We could, of course, do as some suggest and simply ignore the ruling.

But if one believes that law-breakers should not be law-makers, then the reverse is also true: we cannot simply ignore international law that we have signed up to.

We might – as the Blair government considered when unable to deport terror suspects overseas – denounce the Convention and re-sign having made a reservation, in this case in relation to prisoner voting.[27] But this would only address the immediate issue of prisoner voting, not the long-term potential tension between the UK, our courts, and Strasbourg.

And be in no doubt: there will be further conflict. Tomorrow, the Grand Chamber will hear an appeal in *Vitner v United Kingdom*, which concerns the legality of whole-life tariffs.

The court previously held, by the narrowest majority, and on a technicality, that whole-life tariffs are compatible with the Convention.

However, there was only a single vote in it: the minority held that 'depriving [the prisoner] of any hope for the future' breached the prohibition against torture and inhuman or degrading treatment.

If the Grand Chamber were to overturn the ruling and side with the minority – entirely possible – the UK would face having to set parole eligibility dates for some of the most notorious offenders in our jails: people like Rosemary West; and Levi Bellfield, the killer of Milly Dowler.

One can speculate how the public would respond to such a ruling. I simply raise it to show that if not prisoner voting, there will be another issue. We cannot keep kicking this particular can down the street.

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[27] Liberty, '"Denunciation of the ECHR". Legal Opinion on the Lawfulness of Government Proposal to Withdraw From the ECHR and Re-Ratify With Reservations as Part of its Asylum Seeker Strategy' by David Pannick and Shaheed Fatima, 2003

I propose a more radical solution. We should complete the repatriation of the Convention begun by Labour in 1998 – finally 'bringing rights home'. We should make our Supreme Court truly supreme by giving it prime responsibility for the oversight and enforcement of Convention rights.

Over the past decade, British judges have shown themselves perfectly capable of interpreting and applying the Convention rights. Accepting the jurisdiction of the Strasbourg court is not the only way of ensuring that Convention rights are protected: it is a task our domestic institutions are perfectly capable of performing.

Unfortunately, the option of withdrawing from the Court without formally denouncing the Convention is no longer open to us; we should have to go through the process of denunciation provided under Article 58.

But I am not suggesting that we should in any sense denounce the rights contained in the Convention. They are now written into our law through the Human Rights Act, and would continue to be so as part of a UK Bill of Rights.

Fully repatriating the Convention rights and withdrawing from the jurisdiction of the Strasbourg Court would not require us to withdraw from the Council of Europe. Membership of the Council requires states to respect the rights contained in the Convention: we would continue to do so.

Nor would it require withdrawal from the EU. The Lisbon Treaty requires accession states to be party to the Convention, not existing members. Indeed, the European Union sees itself as observant of the principles of the Convention without being subject to its machinery.

Some ask what signal it would send to other countries, such as those in Eastern Europe, were the UK to withdraw from the jurisdiction of the Strasbourg Court. As Dr Michael Pinto-Duschkinsky puts it – without endorsement -

> 'The only reason – so the argument goes – that Russia tolerates [adverse ECHR judgments] is that the governments of other member countries of the Council of Europe also are subject to the same process'[28]

However, once we accept that the UK will not abide by the ruling in *Hirst*, then the question must also be asked:
... what signal does it send for the UK to remain a signatory, wilfully disregarding a ruling of the Court and an instruction from the Council of Ministers?

In any case, the Court has already shown itself impotent when dealing with member states which have little regard to the rights of their citizens. There are over 8,000 unimplemented judgments of the Court. Almost 2,000 concern Turkey; over 1,000 Russia; almost 1,000 are against Poland. Just 40 UK judgments are outstanding – fewer than France or Germany.

It is often suggested that to withdraw from the European Court would leave the UK isolated as the only state apart from Belarus that is not a party to it, and we would somehow be a pariah state.

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[28] M. Pinto-Duschinsky, 'Bringing Rights Home', Policy Exchange

Looking more broadly, however, countries such as Australia, New Zealand and Canada have repatriated ultimate jurisdiction to their domestic courts without signing up to an international human rights court[29], and without becoming in any sense pariah states. On the contrary, their courts have developed a corpus of human rights law that English courts can draw upon, and would be freer to do so were they not required to give Strasbourg jurisprudence priority.

Repeal of the Human Rights Act

So I propose that we should resile from the European Court of Human Rights, repeal the Human Rights Act and introduce instead a UK Bill of Rights. In doing so, we could also address some of the flaws in the operation of the Human Rights Act.

By creating new grounds for judicial review, the Act has skewed decision-making and led to judges second-guessing decision-makers.

As Lord Justice Laws recently said, under the doctrine of proportionality, 'the courts seem to be invited to judge the merits of the decision under review; and it is here that the division between judicial and government power becomes, or looks like becoming, blurred and unprincipled, under the pressure of rights which tend to declare themselves absolute to their logical extreme'[30].

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[29] Canada is a member of the OAS – the equivalent to the Council of Europe for the Americas, but has not signed up to the jurisdiction of the Inter-American Court.
[30] Lord Justice Laws, 'Do Human Rights Make Bad Citizens?', Northumbria University, Inaugural Lecture, November 2012

Repatriating the Convention rights would enable our courts to develop, as proposed by Lord Justice Laws, a doctrine of minimal interference in which courts are slow to substitute their view of whether an interference with a Convention right is proportionate for that of the decision-maker.

As courts already have the power to declare primary legislation incompatible with the Convention rights, we could replace the 'read down' rule which invites courts to engage in a process of legislative re-interpretation.
We could also introduce new mechanisms to ensure better Parliamentary protection for human rights. For instance, the Joint Committee on Human Rights has proposed that Ministers should give greater information when they sign certificates of compatibility explaining why they believe that legislation is compatible with the Convention rights.

There is also a case for a legal requirement on Government to respond to each declaration of incompatibility with a report on what, if anything, it proposes to take. The Human Rights Act effectively gives Parliament a 'democratic override' over judgments of domestic courts, because it is not obliged to address incompatibilities.

There are good reasons for this. First, it is ultimately elected representatives in the House of Commons who will be held to account by the public, and striking the balance between competing rights and responsibilities will only be fully effective if the people, through their representatives, are on board. Second, it is first and foremost Parliament's role to protect human rights and civil liberties. Such a measure would effectively charge Parliament – not Government – with addressing breaches of the Convention rights.

Conclusion

So to conclude my case today: of course, the most basic human rights stand as moral absolutes: the right to life, the prohibition of torture, the wrongfulness of slavery. I do not deny that we have wider rights: rights to privacy; to dignity; to representative government; to freedom of thought, expression and association; to property; to be treated as individuals of equal worth; to marry and form families; to justice.

But these later rights, civil rights, social rights, talk of our place in society. They may be uncertain in application. On occasion, they conflict. And they exist in competition with other social imperatives: to secure economic well-being; to secure a safe and healthy environment; to advance health and wellbeing; to promote peace and ensure security; to give people the liberty they need to flourish as individuals; to enable people to take the responsibility that is also necessary to flourish as individuals.

And these competing social aims can only be satisfactorily aggregated through social mechanisms, above all through democracy, not through the narrow prism of legal rights.

Great harm is being done by allowing rights to derail other important social needs. And I believe that ultimately those who focus solely on rights, to the neglect of both the rights of wider society and its interests do it a disservice. As Professor Thompson Ford warns: “Distracted by the wrong rights, we may neglect to right wrongs.”

And great harm is also being done by allowing respect for rights to be undermined.

At the Human Rights Watch event which I mentioned earlier, I heard a brave Zimbabwean speak movingly about the threats and violence he has faced for

exposing brutality in the country's blood diamond mines. It is terrible abuses like these around the world that we need to address.

None of us should want to see the idea of human rights devalued in the eyes of the public. That is why we must now take the bold steps needed to see rights redeemed.

ENDS