

# **What is wrong with human rights?**

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The recent outbursts by the Prime Minister and the Home Secretary in the so-called “catgate” saga are but the latest of many expressions of hostility to human rights, the Human Rights Act 1998, the ECtHR as well as our own courts. Some politicians and some of the media seem to think that human rights bashing is easy meat. There is nothing new in this. The HRA is still very young, but it has had a difficult and embattled life.

18 December 2008 marked the tenth anniversary of the Human Rights Act 1998. In an anniversary encomium, Jack Straw described the Act as a “defining piece of legislation, a landmark which set the liberties we have long enjoyed in the United Kingdom on to a constitutional footing.” He added, “I believe that the 1998 Act will be seen as one of the great legal, constitutional and social reforms of this government.”

However it was not a cause for celebration for all. The then Shadow Justice Secretary, Nick Herbert marked the occasion by reflecting that the “legislation has been a gift to lawyers, an encouragement for undeserving litigants and a burden on frontline public servants who struggle to decide what the law is in practice.”<sup>1</sup> This is not an uncommon view, perhaps most frequently expressed by the popular media.

It was not long before the attitude of the Labour Government towards the HRA became, to say the least, ambivalent especially as the practical constraints that the legislation imposed on its fight against crime, the treatment of asylum seekers and the so-called “war on terrorism” became apparent. Labour Government ministers, in

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<sup>1</sup> Nick Herbert, *Human Rights Act: The law that has devalued your human rights*, the Daily Telegraph, 18 December 2008.

particular successive Home Secretaries and Lord Chancellors made disparaging remarks about the Act. These were usually in reaction to the decisions of judges in individual cases. As one Daily Mail report proudly put it “Blunkett, Reid and Clarke have all rallied against the Act and judges, and tried various measures to limit its effect. Tony Blair ordered a review of it and the former Lord Chancellor Lord Falconer issued briefings to judges to try and curb their one-sided interpretations.”<sup>2</sup>

As early as 2003 and following a decision requiring state support to be provided to genuinely destitute asylum seekers,<sup>3</sup> David Blunkett stated he was “personally fed up with having to deal with a situation where Parliament debates issues and judges overturn them.” The events of 9/11 soon after the Act came into force and the concern that the UK was facing unprecedented dangers brought into sharp focus the balance between national security and liberty. Following the London bombings in July 2005, Tony Blair declared “let no-one be in doubt, the rules of game are changing.” Speaking about the issue of deportation and diplomatic assurances he indicated that “should legal obstacles arise, we will legislate further including, if necessary, amending the Human Rights Act in respect of the interpretation of the European Convention on Human Rights.”

The HRA faced a barrage of criticism in 2006 following a number of high profile incidents including the murder of Naomi Bryant by Anthony Rice following his release from prison on licence, and the High Court’s decision that nine Afghani hijackers could not be deported to Afghanistan because they faced a real risk of torture or death there. John Reid described this decision, which caused widespread public disquiet, as “inexplicable or bizarre” and Tony Blair considered that it was “an abuse of common sense” to be in a position where the Government were unable to deport people who hijack a plane. He immediately called for a review of the legislation in particular “whether primary legislation is needed to address the issue of court rulings which overrule the government in a way that is inconsistent with other EU countries’ interpretation of the European Convention on Human Rights.” One option under

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<sup>2</sup> *What about OUR rights?* Daily Mail, 5 October 2007

<sup>3</sup> *R (Q,D,J,M,F & B) v Secretary of State for the Home Department* (2003) EWHC 195 (Admin).

consideration was to amend the HRA, to require a “balance between the rights of the individual and the rights of the community to basic security.”<sup>4</sup>

A report by the Joint Committee on Human Rights published in November 2006 was highly critical of Ministers’ statements in respect of events in the course of 2006. It concluded that “in each case, very senior ministers, from the Prime Minister down, made assertions that the Human Rights Act, or judges or officials interpreting it, were responsible for certain unpopular events when...in each case these assertions were unfounded. Moreover, when those assertions were demonstrated to be unfounded, there was no acknowledgement of the error, or any other attempt to inform the public of the mistake. We very much welcome the Lord Chancellor’s assurance that there is now an unequivocal commitment to human rights right across the Government.”

In March 2009, the Labour Government published a green paper entitled *Rights and Responsibilities*, which emphasised that there was no intention to resile from or weaken the HRA.<sup>5</sup> It proposed a new “Bill of Rights and Responsibilities” which would give prominence to responsibilities in addition to rights. The paper was somewhat difficult to pin down. On the one hand it made clear that rights would not be contingent on the exercise of responsibilities (para 2.22). On the other it stated that “it would be possible in a future Bill of Rights and Responsibilities to highlight the importance of factors such as the applicant’s own behaviour and the importance of public safety and security” (para 2.25).

The Conservative party was initially opposed to the HRA. Bu its position shifted somewhat under David Cameron’s leadership. In June 2006 he delivered a speech to the Centre for Policy Studies announcing that the party proposed to replace the HRA with a British Bill of Rights whilst remaining a party to the European Convention on Human Rights.<sup>6</sup>

In thinking about the way forward, he distanced himself from the old Conservative policy of simply repealing the HRA, recognising that this would not solve the

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<sup>4</sup> *Revealed: Blair attack on Human Rights Law*, the Observer, 14 May 2006

<sup>5</sup> *Rights and Responsibilities: developing out constitutional framework* (March 2009)

<sup>6</sup> D Cameron, “Balancing Freedom and Security – A Modern British Bill of Rights” (26 June 2006)

problem since “we would still be left with a situation in which terrorist suspects could go to the European Court” and it had the “strong disadvantage of taking a step backwards on rights and liberties.”

He also rejected the option of pulling out of the Convention. He proposed a new approach which “protects liberties in this country that is home-grown and sensitive to Britain’s legal inheritance that enables people to feel they have ownership of their rights and one which at the same time enables a British Home Secretary to strike a common-sense balance between civil liberties and the protection of public security... I believe that the right way to do that is through a modern British Bill of Rights that also balances rights with responsibilities.” His vision was as follows:

A modern British Bill of Rights needs to define the core values which give us our identity as a free nation. It should spell out the fundamental duties and responsibilities of people living in this country both as citizens and foreign nationals. And it should guide the judiciary and the Government in applying human rights law when the lack of responsibility of some individuals threatens the rights of others. It should enshrine and protect fundamental liberties such as jury trial, equality under the law and civil rights. And it should protect the fundamental rights set out in the European Convention on Human Rights in clearer and more precise terms. Greater clarity and precision would allow those rights to be enforced more easily and effectively in circumstances where they ought to be protected but it would become harder to extend them inappropriately as under the present law.

No-one could surely quarrel with these noble aspirations or this heart-warming espousal of British values. But what would it all mean in practice and where would it leave the UK as a signatory to the Convention? So far as I am aware, there has never been a satisfactory answer to these questions.

On 18 March 2011, the Coalition Government announced the establishment of an independent Commission to investigate the case for a Bill of Rights. It has undertaken to produce its final report by the end of 2012. It will explore a range of issues surrounding human rights law in the UK and will also play an advisory role in the Government’s continuing work to press for reform of the European Court of Human Rights in Strasbourg. On 28 July, it produced its Interim Advice to the Government

on reform of the ECtHR. It noted with concern that the backlog of cases now stood at more than 150,000 and suggested that a new and effective screening mechanism should be established that allows the court to decline to deal with cases that do not raise a serious violation of the Convention. The core of its interim advice was that the court should focus on its essential purpose as the judicial guardian of human rights across Europe. It should only address a limited number of cases that raise serious questions affecting the interpretation or application of the Convention and serious issues of general importance where the Court's intervention is justified. It should be a court of last resort and not a port of first call for all human rights issues. I shall return to the question of the ECtHR later. The Commission published a Discussion paper on 5 August to canvas views from the public on whether we need a UK Bill of Rights and if so what it might look like. It is no secret that the Conservatives are more enthusiastic about this than their Liberal Democrat coalition partners.

It will be seen from what I have said so far that one of the main reasons for the unpopularity of the HRA is the perception that it undermines public safety by making the fight against crime and terrorism harder.

One of the most controversial decisions of the Strasbourg court has been *Chahal v UK* (1996) 23 EHRR 413 where it decided that there is an absolute prohibition (not derogable in any circumstances) on torture, inhuman and degrading treatment, so that a state may not deport persons to a country where they face a real risk of torture etc regardless of how high a security risk they pose to the UK. This principle operates as a serious restriction on the ability of the state to deport convicted criminals as well as suspected terrorists. It means that even foreign nationals who have an appalling criminal record cannot be deported after they have served their sentences if there is real risk that they will be tortured or killed in their country of origin. This decision has been frequently criticised by the press and politicians alike. It led former Home Secretary John Reid to regret that his government had ever introduced the HRA.<sup>7</sup>

But according to the Joint Committee on Human Rights, the *Chahal* judgment only prevents the Government from taking into account the threat posed by a particular

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<sup>7</sup> Interview in the News of the World, 16 September 2007.

individual in a “relatively small number of cases,” something which the Lord Chancellor acknowledged in his evidence to the Committee (he recognised that “article 3 affects an extremely small number of people”).<sup>8</sup>

The UK Labour Government recognised that the “*Chahal* problem” was not attributable directly to the HRA: “the HRA makes no difference...not only because the *Chahal* decision pre-dates it, but also because it is an example of the Strasbourg Court directly interpreting article 3 of the ECHR.” Together with other states, it therefore sought to persuade the ECtHR to re-consider *Chahal* in view of the “threat posed by international terrorism,” intervening as a third party in cases involving deportations by the Netherlands and Italy (*Ramzy v The Netherlands, A v The Netherlands and Saadi v Italy*).

The Grand Chamber of the European Court unanimously rejected the UK’s submissions and reaffirmed the decision in *Chahal*. They said:

The Court cannot accept the argument of the United Kingdom Government, supported by the respondent Government, that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole... Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule... It must therefore reaffirm the principle stated in the *Chahal* judgment...

The Court observed that similar arguments were put forward and rejected in *Chahal*: “even if, as the Italian and United Kingdom Governments asserted, the terrorist threat has increased since that time, that circumstance would not call into question the conclusions of the *Chahal* judgment concerning the consequences of the absolute nature of Article 3.”

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<sup>8</sup> Thirty-second Report of Session 2005-06, *The Human Rights Act: the DCA and Home Office Reviews*, para 118.

Judge Myjer and Judge Zagrebelsky, in their concurring opinion, stated that “they would not be surprised” if some readers of the judgment at first sight “find it difficult to understand that the Court by emphasising the absolute nature of article 3 seems to afford more protection to the non-national applicant who has been found guilty of terrorist related crimes than to the protection of the community as a whole from terrorist violence.”

However they emphasised that “states are not allowed to combat international terrorism at all costs. They must not resort to methods which undermine the very values they seek to protect. And this applies the more to those ‘absolute’ rights from which no derogation may be made even in times of emergency.” This is reminiscent of the oft-quoted judgment given in 1994 by President Barak in the Israel Supreme Court when he declared that violent interrogation of a suspected terrorist is not lawful, even if doing so may save human life by preventing impending terrorist acts: “This is the fate of democracy, as not all means are acceptable to it and not all methods employed by its enemies are open to it. Sometimes a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and the recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.”

In the result, the Government was constrained to fall back on the policy of seeking diplomatic assurances or concluding memoranda of understanding if it wished to deport foreigners to their countries of origin . The UK has concluded agreements which embody assurances with countries such as Jordan, Libya, Lebanon, and Algeria, and has relied on them before the courts with mixed success. An important test of this policy was the case of *Abu Qatada*. When the Court of Appeal allowed his appeal in 2008, the Daily Mail headline read “Bewigged madness: How our judges have just issued an open invitation for terrorists to flock to Britain.”<sup>9</sup> But the House of Lords allowed the Secretary of State’s appeal in 2009 (*Othman v Secretary of State for the Home Department* [2010] 2 AC 110).

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<sup>9</sup> 10 April 2008.

Another case which attracted a good deal of public interest and criticism was that of *Learco Chindamo*. Mr Chindamo was an Italian citizen who was serving a life sentence for the murder Phillip Lawrence in 1995. The Home Office wished to deport Chindamo to Italy upon release, on the grounds that “he posed a continuing risk to the public and that his offences were so serious that he represents a genuine and present and sufficiently serious threat to the public in principle as to justify his deportation.” The AIT ruled that he could not be expelled, citing *among other things* his right to private and family life under article 8 of the Convention. The Daily Mail called it a “profoundly stupid and amoral ruling”. They wrote:

“We have of course seen many lunacies perpetrated in the name of human rights: compensation for IRA terrorist families, prisoners allowed porn, preachers of hatred freed to continue abusing our hospitality. But this ruling stands in a grotesque league of its own.”<sup>10</sup>

Mrs Lawrence was quoted as having said that she had always been a “staunch advocate of the Human Rights Act” and could not understand how it has now “allowed someone who destroyed a life to pick and choose how he wants to lives his.” David Cameron (then leader of the Conservative Opposition) responded by saying that the HRA should be replaced: "This does seem to be complete madness...And I'm not surprised that Mrs Lawrence has said there is something rotten at the heart of the Human Rights Act. We agree with that we think the Human Rights Act should be scrapped and should be replaced with a British Bill of Rights."

In reaching its decision the AIT had relied principally on EU law. What they said on the issue of human rights was unnecessary for their decision. Nevertheless, they said that, if the human rights issue had been determinative, they would have found that the removal of Chindamo would have violated his rights under article 8 of the Convention.

In my view, even if article 8 had been the principal basis on which the AIT had made their decision, it is difficult to see how the decision could be described as “complete madness” or “lunacy.” Chindamo had been living in the UK since he was six years

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<sup>10</sup> *When ‘human rights’ are an insult to us all*, the Daily Mail, 21 August 2007.



old, spoke no Italian and appeared to have no connections with Italy other than citizenship. All his connections were with the UK. It seems to me that, far from being mad, the decision of the AIT on the article 8 issue was plainly right.

There have been many cases where the issue has been whether article 8 is an obstacle to the deportation of foreigners on the grounds of their criminal offending or the fact that they are not lawfully present in the UK. In these cases, the court is called upon to carry out a difficult balancing exercise taking into account inter alia the alien's family situation, whether there are children of a relationship and, if so, their age and their best interests and well-being, and the seriousness of the difficulties which a spouse and any children are likely to encounter in the country to which the alien would be expelled. Those who are hostile to the Convention find this difficult to accept. Their attitude is that the UK should be able to rid itself of foreign criminals and those who have no right to be here in the first place; and that the fact that they and their families have put down strong roots here provides no justification for allowing them to stay.

But the concerns about the HRA are not confined to decisions in relation to crime, terrorism and immigration. A more general concern has been expressed that the Act has caused authorities to act in a risk-averse and sometimes ridiculous manner. In a speech to the Centre for Policy Studies, David Cameron noted that "even without actual litigation, some public bodies are now so frightened of being sued under the Human Rights Act that they try to protect themselves by making decisions that are often absurd and occasionally dangerous." A Daily Telegraph article criticises the HRA for engendering "a set of attitudes in public sector, especially in the Criminal Justice System, that have erred too much on the side of caution for fear of litigation.

According to a Daily Mail report, the most "worrying and insidious" thing about the HRA "is that it has made authorities frightened to act in the public interest. For example, when Derbyshire Police refused to release pictures of two escaped murderers in case it infringed their right to privacy, they might have been over-interpreting the law but they were acting in line with the new legal culture."<sup>11</sup>

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<sup>11</sup> Above.

There is a concern that the HRA has unleashed a “culture of grievance,” encouraging people to make frivolous claims which overburden the taxpayer and line the pockets of self-interested “fat cat” lawyers. The fear of litigation causes officials to adopt a defensive attitude to the detriment of the interests of the wider community. Moreover there is a sense that the human rights provisions are being applied to trivial cases in a way which was not intended by the drafters of the Convention. It is argued that all this serves to “devalue” human rights.

I have no doubt that many claims brought under the HRA *are* spurious and based on questionable interpretations of the Convention. Most, however, will not make it past the permission stage. There nonetheless remains a perception that such “ludicrous claims” are permitted under the HRA, which is then criticised for “bad decisions.”

If authorities make stupid decisions under the banner of the HRA or the Convention, it is almost certain that they are based on a misinterpretation of them. That is hardly a sensible reason for getting rid of the HRA or introducing a Bill of Rights, still less for abandoning the Convention. To the extent that there is a problem, it is a good reason for educating authorities to act wisely and with a proper understanding of the law.

A yet further concern is that it is said that the HRA marks a shift in power from Parliament to the unelected and unaccountable judiciary. The Daily Mail expressed this concern in the following terms:

“The Act encourages judges to think of themselves as legislators, giving them power to strike down laws passed by Parliament. This is not just profoundly undemocratic – who elected the judges? – but can lead, in the word of Downing Street to ‘barmy’ decisions. While ministers frame legislation to strike a balance between conflicting interests – such as the rights of terrorists and the rights of the public – judges tend to take a very narrow, legalistic view.”

Or as Nick Herbert wrote in the Daily Telegraph on 18 December 2008:

“It is claimed that the Act has helped to challenge unjust decisions by public bodies, such as the case of the elderly siblings who successfully overturned a council decision to house them apart in separate care homes. Yet it would surely be better to rely on democracy, rather than

the courts, to make elected authorities behave properly. Leaving such decisions to judges places them in the political arena and undermines their independence. When the courts insist that the Ministry of Defence equips our soldiers properly, the temptation is to cheer. But governments are elected to shoulder such responsibility. Extending the ambit of human rights law to the theatre of military conflict is deeply problematic. The next decision of the courts might not be so palatable.”

But I would respond that the HRA reflects a careful balance between Parliament, the Executive and Judiciary. It is not entrenched and denies the courts the capacity to “strike down” legislation for incompatibility. As Connor Gearty puts it, declarations of incompatibility “are courteous requests for a conversation, not pronouncements of truth from on high.”<sup>12</sup> In this way the Act specifically preserves Parliamentary sovereignty. If Parliament or the Executive disagree with a decision it remains open to them to change the law.

Nonetheless, I would accept that there is some force in the point that the incorporation of the Convention has called on today’s judges to determine issues which judges in earlier eras would have been horrified to be asked to decide. They would have refused to do so on the grounds that such issues belonged to the political dimension and were not justiciable. But this enlargement of the role of the judge is no more than the development of a trend that was in progress before 1998 with the growth of judicial review. One only has to recall Lord Irvine of Lairg’s memorable injunction to the judges: “get your tanks off my lawn”. That warning, uttered with all the weight of one of Cardinal Wolsey’ successors, was made well before the incorporation of the Convention.

Indeed, in their 2006 review the Department of Constitutional Affairs concluded that the HRA had not significantly altered the constitutional balance between Parliament, the Executive and Judiciary. This assessment was based on a review of court judgments which concerned either the relationship between the Judiciary and Executive or the relationship between the Judiciary and Parliament.

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<sup>12</sup> C Gearty, *Can Human Rights Survive?* The Hamlyn Lectures 2005.

Polemical attacks on the HRA coupled with complaints about the exorbitant power of the judiciary are sometimes made in order to advance a particular cause. For example, in his speech to the Society of Editors in November 2008, Paul Dacre discussed how the newspaper industry was facing a number of very serious threats to its freedoms. In his view by far the most “dangerous” was the development of a “privacy law” under the HRA:

This law is not coming from Parliament – no, that would smack of democracy – but from the arrogant and immoral judgments – words I use very deliberately – of one man. I am referring of course to Justice David Eady who has, again and again, under the privacy clause of the Human Rights Act, found against newspapers and their age old freedom to expose moral shortcoming of those in high places...If Gordon Brown wanted to force a privacy law, he would have set out a bill, arguing his case in both Houses of Parliament, withstand public scrutiny and win a series of votes. Now, thanks to the wretched Human Rights Act, one Judge with a subjective and highly relativist moral sense can do the same with a stroke of his pen.<sup>13</sup>

It can be seen from this short survey that from time to time human rights attract a good deal of hostility in the Press and from some politicians. It seems to me that there is no simple explanation for this. It is easy enough to see why Paul Dacre is hostile to the promotion of article 8 and the right to privacy at the expense of article 10 and freedom of expression. The exposure of the seamy side of the lives of celebrities sells newspapers. It is also not difficult to see why a politician who suffers a reverse in the courts in a human rights case may blame the human rights law rather than himself or his department for his defeat. I can also understand why the *Chahal* decision is unpopular, although I think that the Strasbourg court has been right on this issue.

And yet the results in the overwhelming majority of cases in which a human rights point arises are the same post-HRA as they would have been pre-HRA. My impression is that the decisions in such cases are rarely criticised. So why the generalised and somewhat unfocused attack by some sections of the Press and some politicians on the HRA and the Convention? After all, none of the criticisms touches

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<sup>13</sup> See his speech to the Society of Editors, 10 November 2008: <http://www.journalism.co.uk/2/articles/532774.php>

the text of the Convention, which to a great extent was intended to, and does, reflect common law understandings of human rights.

I think that if the complaints are properly articulated, they will be seen to be not so much about the substance of the Convention, but more about the approach by the ECtHR in Strasbourg to the interpretation and application of the Convention. This was the thrust of what Lord Hoffmann said in his Judicial Studies Board lecture “The Universality of Human Rights” (2009). His main thesis was that Convention issues should be decided at national level and not by a supra-national court manned by judges from 47 countries. He came close to suggesting that the ECtHR should be disbanded or, if not disbanded, have its powers severely curtailed. Why, for example, he asked, should an Eastern European judge (appointed to the court by an opaque process) be empowered to decide questions of English national law? I wonder whether he would have similarly strong objections to a UK judge deciding a question of Turkish national law in which a human rights issue arises.

Lord Hoffmann said that human rights are universal in abstraction, but national in application. So, he asked, why should an international court decide individual cases? For example, there is a human right to have a fair trial, but it does not follow that all the countries of the Council of Europe must have the same criminal procedure. What a fair trial requires is a matter for national courts to determine in the light of their own local circumstances and legal traditions. Lord Hoffmann acknowledged that the Strasbourg court has to a limited extent recognised the fact that human rights are national at the level of application. This it has done by the doctrine of the “margin of appreciation”. But he criticised the court on the grounds that there is no consistency in the application of the doctrine and the court has not taken the doctrine nearly far enough.

These criticisms are reflected in the interim recommendations of the Commission on a Bill of Human Rights to which I have already referred. ECtHR recognises the importance of the margin of appreciation and the need to take account of the special factors that apply at national level. The charge of inconsistency in the application of the doctrine of the margin of appreciation is easy to make. Anyway, which court has an unblemished record for consistency?

The Strasbourg court is aware of the concerns that the margin of appreciation is not being applied with sufficient rigour and it is only too keenly aware of the inexorable rise in the backlog of cases waiting to be dealt with. The margin of appreciation took centre stage in its controversial decision in the case of *Hirst v United Kingdom* (2006) 42 EHRR 41 where it decided that the blanket ban imposed by the UK on the right to vote of all prisoners serving a sentence of imprisonment breached art 3 of the first protocol. It said in terms that the rights bestowed by article 3 of the first protocol were not absolute and that the margin of appreciation in this area was wide. It accepted that the ban pursued a legitimate aim, but concluded that “such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be”. The decision caused a furore here. The Government proposed a ban on all prisoners serving a sentence of four years’ imprisonment or more. This proved unacceptable to their own back-benchers. But a compromise proposal of one year or more is also proving unacceptable. Those who object to allowing any serving prisoner the right to vote say that anyone who commits an offence sufficiently serious to warrant a custodial sentence not only forfeits his right to liberty, but also his right to vote. The issue has raised passions to a level of surprising intensity. David Cameron said that he was “exasperated and furious” at having to accept that there was no way to keep the 140 year-old blanket ban on prisoners voting.

It is to be noted that the ECtHR simply held that a blanket ban was contrary to article 3 of the first protocol and left it to the member state to devise a proportionate scheme which complied. It was not for the court to draft a legislative scheme to remedy the problem any more than it would be for our domestic courts to do so either.

Another example of a case where Strasbourg has arguably narrowed the margin of appreciation too much is *S and Marper v United Kingdom* (2009) 48 EHRR 50. This decision left the United Kingdom in the uncomfortable position of being told that a “blanket and indiscriminate” power to hold fingerprints, cellular samples and DNA profiles, as applied to the applicants in that case, overstepped the margin of appreciation. Yet beyond saying that it went too far in those cases, the decision gave

little guidance on what rules would be proportionate to the admittedly legitimate and important aim of detecting and deterring crime.

In any event, our national courts are not always bound to follow where Strasbourg leads. First, the obligation of our courts when interpreting the Convention is to do no more than “take account” of any relevant Strasbourg jurisprudence. As is well known, that obligation has been interpreted to mean that our courts should, in the absence of special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 para 20. It is true that this is of no relevance in cases where Strasbourg has pronounced on the very question at issue, such as in *Hirst* and *S and Marper*. Once Strasbourg has spoken on the very question at issue, there can be no further debate. But in most cases, Strasbourg has not yet spoken and section 3 of the HRA does afford a modest degree of flexibility to our courts.

Secondly, although the domestic court is required to take account of the Strasbourg jurisprudence, in a case which involves the application of principles which are clearly established and where the court is concerned that the ECtHR has not sufficiently appreciated or accommodated particular aspects of the domestic process, it might decline to follow a decision of the ECtHR. *R v Horncastle* [2010] 2 AC 373 is an example of this. This was a case about whether our procedural rules for admitting hearsay evidence in criminal trials is compatible with the right to a fair hearing given by article 6 of the Convention. But it is clear that the flexibility afforded by section 3 of the HRA and the *Horncastle* principle is very limited. The fact is that such a course can be justified only in exceptional circumstances. In my view, a refusal to follow clear jurisprudence of the ECtHR is likely to result in the case being taken to Strasbourg, with all the delay and additional cost that this will inevitably entail. The whole point of the enactment of the HRA was to avoid the need for that.

It is time to draw some of the threads together. I do not believe that there is anything wrong with the Convention itself. So far as I am aware, there is no pressure to amend its text. For the most part, the problem is seen as stemming from the role of the court in Strasbourg. There is a feeling in many quarters that Strasbourg takes too many cases and that it does not sufficiently leave the national courts to decide individual

complaints of violations of human rights. The result is that there is thought to be too much interference in our processes. It should, however, be pointed out that only relatively few cases adverse to the UK have been criticised.

I accept that there have undoubtedly been cases which Strasbourg has decided in a different way from our own courts. I have already referred to *Hirst* (the prisoners voting rights case). We should not make the mistake of thinking that our courts are always better than Strasbourg. They are not. A good example of a case where Strasbourg corrected our view of the law was the case of *Smith* which concerned the lawfulness of the policy of excluding gays from our Armed Forces.

At all events, in my view the criticisms of the court have been overstated, perhaps as a reaction to a small number of controversial decisions. Let me give an example of an explosive reaction to one of our domestic court human rights decisions, which was plainly exaggerated and unwarranted. The Sexual Offences Act 2003 provides that any person who is convicted of a specified sexual offence and is sentenced to a custodial term of 30 months or more is automatically subject for an indefinite period to certain requirements to notify the police of their whereabouts. In the case of *R (F (A Child)) v Secretary of State for Justice* [2010] 2 WLR 992, the claimants sought a declaration of incompatibility with the Convention on the grounds that the absence of any mechanism for review of the notification requirements was a disproportionate interference with the right to respect for private and family life guaranteed by article 8 of the Convention. A declaration was granted by the Supreme Court in April 2010. Surprisingly, this did not cause an outcry at that time. But when the Government proposed legislation which provided for a right of review in specified circumstances, its proposal attracted some very adverse comment from some of the Press. The usual cry of promoting the interests of sexual perverts over those of their potential victims was heard. It was only at this stage that the Government protested that it had been obliged to take this regrettable course by the courts who were making it impossible to govern the country.

But to revert to Strasbourg, I do not subscribe to Lord Hoffmann's root and branch criticisms of the court. I believe that, for the most part, the ECtHR has been a force for good. Most of its decisions have not been the subject of adverse criticism. It is



true that some of its decisions have been criticised with justification. But (dare I say it) the same can be and is said of some of the decisions of any court, including the Supreme Court. On the whole, the case-law of the ECtHR has strengthened and enriched our own human rights law. Take, for example, the development of our law on the investigation into deaths consequent on the interpretation by Strasbourg of article 2 of the Convention. The access that its jurisprudence gives us to the experience of how human rights issues are resolved throughout the 47 member states of the Council of Europe is one which we should not lightly abandon. There is also no doubt that the ECtHR has had a beneficial effect on human rights in some member states which do not enjoy the democratic traditions which we so much take for granted. That is surely a very good thing. For example, there has been a substantial reduction in the number of cases against Turkey that have been taken to Strasbourg in recent years. There has been a noticeable improvement in Turkey's human rights record and there can be little doubt that the ECtHR has played a significant role in this. We would be taking a myopic view of what is in our national interest if we were to disregard this as of no consequence for us.

Nevertheless, the court faces serious problems and this seems now to be recognised by most, if not all, of the members of the Council of Europe. I think that it is clear that the margin of appreciation is sometimes applied too narrowly. This has brought about two important consequences. First, the court takes too many cases and this has caused the alarmingly accelerating backlog to which I have already referred. This is unsustainable and cannot be allowed to continue. Secondly, there is a real danger that what is considered to be undue interference in the decisions of domestic courts will destabilise the carefully calibrated relationships between member states and the court in Strasbourg. I have already referred to the Commission established by the Coalition Government of the UK. In April 2011, a high level conference was held in Izmir on the future of the ECtHR organised within the framework of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe. It produced a fairly elaborate declaration recalling that the subsidiary character of the Convention mechanism constitutes “a fundamental and transversal principle with which both the ECtHR and the States Parties must take into account”; recalling the “shared responsibility of both the Court and the States Parties in guaranteeing the viability of the Convention mechanism”; and noting “with concern the continuing increase in the

number of applications brought before the Court”. The Conference made a number of proposals to streamline the process in order to reduce the backlog. One interesting proposal was to invite the court, when examining cases related to asylum and immigration, “to assess and take full account of the effectiveness of domestic procedures and, where these procedures are seen to operate fairly and with respect for human rights, to avoid intervening except in the most exceptional circumstances.”

The fact that such a proposal is expressed in these terms is an acknowledgement that at the present time the court applies the margin of appreciation too narrowly. There are reflections here of the thinking which underpins the proposal that is contained in the interim advice of the Commission established by the Coalition Government in the UK to which I referred earlier.

But great care needs to be taken. As the Izmir declaration stated, it is necessary to recognise “the extraordinary contribution of the ECtHR to the protection of human rights in Europe”. We must never forget that the Convention came into being in order to reduce the risk of a repetition of appalling human rights abuses of the kind that were committed in Europe in the 20<sup>th</sup> century. I am far from sure that the extraordinary contribution that the ECtHR has made to the protection of human rights would have been achieved if the court had done no more than decide cases of general importance and scrutinise domestic procedures to ensure that they were effective. It seems to me that much of the achievement of the court is attributable to the fact that it has been willing to decide individual cases and intervene where an individual applicant has shown that he has been a victim of a violation of his Convention rights. Some of these cases have raised important points of principle and/or have involved violations of the utmost seriousness. Others have not. In assessing the role of the court, we should not forget that some member states do not share the strongly entrenched democratic values of countries such as the UK.

So as in most things, there is a need for balance. There will have to be change, if only because the court is being overwhelmed by the number of applications that are made to it. The member states recognise this. The easier part of the solution to the problem is to streamline the court’s processes, for example, by introducing a filter procedure. The more difficult part is to decide whether to introduce criteria to restrict the type of

cases that the court will entertain and, if so, what these criteria should be. I suspect that, in time, this will lead to the formulation of a test which will limit the court's caseload to cases which raise points of general importance and/or really which involve allegations of serious violations of Convention rights. This will mean that, in effect, it will be an appellate court whose function is tightly circumscribed. A move in this direction will be driven by the twin pressures of the current overloading of the court and a growing demand from member states for a widening of the margin of appreciation. The proposal of the Izmir conference in relation to asylum and immigration is highly significant. As we have seen, asylum and immigration is one of the areas where the relationship between human rights and the need of a state to maintain a firm and effective immigration policy is most sensitive. Although the ECtHR asserts that it accords a margin of appreciation in this area, that view is by no means universally accepted. The Izmir proposal seems to me to be a sensitive attempt to find a solution which would restrict the type of case which comes before the court in this area. The interim advice of the Commission is another attempt, more broadly expressed.

One thing is clear. In its short life, the HRA has changed the legal landscape. Many said that it would not make much of a difference. They said that the principles would be established in the first 5 years and then things would settle down. Well, they were wrong. The flood of human rights cases in our jurisdiction continues unabated. The fact that, in the eyes of many, it has caused many changes to our law (some of them thought to be unwelcome) shows that they were wrong. My own view is that the criticisms of the Strasbourg case-law is largely unjustified. As I have said, for the most part it has been successful in raising standards. The court is not a wild maverick organisation. Its decisions are often criticised by human rights lawyers for being too conservative and not sufficiently protective of human rights. As we have seen, there are also those who think that the court goes too far the other way. Some complaints of the court and its decisions are based on reason and are expressed and with moderation. Lord Hoffmann's paper is a persuasive example. Others, I suspect, are fuelled by xenophobia and Euro-scepticism. I know from conversations with judges from other jurisdictions that the concern that Strasbourg is interfering too much is shared by other members of the Council of Europe. At all events, the Commission will report. Its interim recommendations give a strong hint as to what its final report

will say. For the time being, all we can say is that Convention law has not yet settled down. It continues to arouse strong sentiments on both sides, some primitive and instinctive and others sophisticated and based on reason. It is almost certain that the landscape will change again before too long.

There is clearly nothing wrong with human rights or with the text of the Convention. It is, of course, possible to criticise courts (whether Strasbourg or domestic) for the way in which they interpret the Convention and to complain about individual decisions made on the facts of particular cases. To the extent that there is a reasonable basis for criticism, it seems to me that it lies in the fact that Strasbourg has applied the margin of appreciation too narrowly and without a sufficient understanding of reasonable domestic ideas. But great caution should be exercised in taking this criticism too far. Some of us may consider that we have no need at all for an international court, in effect, to oversee the way in which our domestic courts interpret the Convention. I do not accept this. It is a view born of the arrogant belief that we know best and have nothing to learn from foreigners. In any event, Strasbourg cannot apply one set of criteria for the UK and other states which it considers to have strong democratic traditions including a strong independent judiciary and a different set of criteria for other states. And one of the great achievements of Strasbourg has been to raise standards in some of these other states.

Annual lecture at Hertfordshire University

3 November 2011