

Elson Ethics Lecture –

Britain, Europe & Human Rights – What Next?

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INTRODUCTION

1. Tucked away in the Conservative manifesto for the 2015 General Election was a commitment that few – including, one suspects, Mr Cameron – assumed would require action: to “scrap the Human Rights Act” and “curtail the role of the European Court of Human Rights”.² After the surprise of his election with a majority, Mr Cameron handed this unexpected chalice to Michael Gove, the new Justice Secretary, who was probably unaware of how poisonous were the contents of the cup passed into his hands.
2. Adopted in 1998, the Human Rights Act incorporated into British law the European Convention on Human Rights, one of the great international legal instruments of the 20th century, along with the United Nations Charter. Reflecting Winston Churchill’s Second World War aim of achieving the “enthronement of human rights”, it aims to hold to account the governments of 47 European countries who are members of the Council of Europe, offering rights and protections against governmental excess to individuals: freedom of

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² *Conservative Party Manifesto* (May 2015), <https://www.conservatives.com/manifesto>, p. 58.

expression, fair trials and the prohibition of torture are amongst the many rights enshrined. The UK was the first country to ratify the Convention.

3. Significantly, when it came into force in 2000, the 1998 Act allowed the courts of the United Kingdom, for the first time, to interpret and apply the Convention, requiring them to “take account” of judgments of the European Court of Human Rights in Strasbourg. Before then the Convention was an unincorporated treaty that produced no legal effects, as such, in the UK law, and courts could not take into account judgments of the Strasbourg Court. Even now, the courts are not bound by judgments from Strasbourg, as they are by judgments of the entirely different EU Court of Justice in Luxembourg. They are required only to take them into account.³

4. For reasons that are varied and sometimes not fully substantiated, the 1998 Act and the European Convention have come to be detested by some prominent members of the Government. They had sufficient support – and that of the Prime Minister – to lead to the removal from office (last year) of a distinguished Attorney General, Dominic Grieve QC, whose hanging offence was a desire to defend the Convention and the UK’s commitment to the rule of law. Its opponents would like to get rid of the Act as well as the Strasbourg Court, although quite what they would replace them with is unstated. They have proposed something called a British Bill of Rights, but we are not told what such an instrument would contain (as its proponents seem not to know), how it might work, and how – if at

³ Human Rights Act, 1998, section 2(1)(a) (“A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any ... (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights”).

all – it would relate to the European Convention. What we do know is that the proponents of change wish that foreign criminals could “be more easily deported from Britain”, and that our Supreme Court will be the “ultimate arbiter of human rights matters in the UK”.⁴

5. Mr Cameron has said that one recent Strasbourg judgment – which ruled that the UK’s blanket ban on any prisoner having a right to vote – caused him to feel “physically sick”.⁵ The case is *Hirst v United Kingdom*: the Applicant, who had been convicted for manslaughter, was barred by section 3 of the Representation of the People Act 1983 from voting in parliamentary or local elections, and claimed that he had been disenfranchised, in violation of Article 3 of the Convention’s Protocol No. 1, which provides for “free elections ... under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” Relying on the Article’s negotiating history and the interpretation of the provision in the context of the Convention as a whole, the Court ruled that the blanket ban on voting violated the right of the individual to vote, because the measure was disproportionate to the aim it sought to achieve. The Court noted that disenfranchisement was a “severe measure” that “must not ... be resorted to lightly, and that although the aim of the 1983 Act was legitimate the blanket nature of the means to achieve it was not. The Court ruled:

“The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual

⁴ *Conservative Party Manifesto*, p. 60.

⁵ *Daily Express*, 4 November 2010.

circumstances. 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, and as being incompatible with Article 3 of Protocol No. 1.”⁶

6. Quite why Mr Cameron felt “physically sick” is entirely unclear to me. The judgment is very obviously reasonable and, in my view, unimpeachable. It follows an approach taken by rather conservative courts in Hong Kong and Australia, and is premised on the recognition that one of the first things despotic governments do is put people in prison to deprive them of the right to vote. The Strasbourg judgment makes clear that a blanket ban on prisoner voting – which drawn no distinction between a minor offence (such as shoplifting) and a grave offence (murder) – is incompatible with the Convention. The shrill objection from some of our politicians and media is that the judgment goes against the will of Parliament. With respect, that is exactly why we needed and why we have a European Convention: in a globalised world the idea of an absolutely sovereign Parliament is a nonsense. Those who rage against the Strasbourg court are, by contrast, conspicuously silent when it comes to international courts protecting the rights of UK corporations against the actions of the parliaments of other states.

7. The Human Rights Act is now totemically denounced as an undemocratic fetter on a sovereign British state and its Parliament, and a threat to the fabric of our unwritten constitution. This portrayal has underpinned a growing movement that seeks the repeal of the

⁶ *Hirst v United Kingdom*, European Court of Human Rights, Judgment 6 October 2005, at paras. 71 and 82.

Act and – let us not run from the reality – a desire by some to reappraise the UK’s relationship with the European Court of Human Rights. Remarkably, withdrawal is on the agenda, a path that the Prime Minister has pointedly refused to exclude.⁷ As with so much, what exactly he wants, or why he wants it, remains unclear.

8. We may soon know a little more. In the coming weeks Mr Gove will announce a consultation on the Manifesto commitment.⁸ What will follow may have profound consequences for the future of human rights in this country, for the United Kingdom’s engagement with Europe, and for international law itself.
9. In this lecture I want to explore where we have come from, where we are, and where we are heading.

WHERE WE HAVE COME FROM

10. I begin with where we have come from. In today’s 21st century Europe it is easy to forget that the idea of holding a state accountable under international law for the actions of its government and other public is a new development. We forget that in the 1930s Nazi Germany and Communist Soviet Union were, as a matter of international law, free to treat their own citizens largely as they wished. In 1935 Hans Frank, whose life I have been researching for a book I will publish next year – *East West Street: On the Origins of*

⁷ Nicholas Watt, ‘Cameron refuses to rule out leaving European convention on human rights’, *Guardian*, 3 June 2015 (“Now our plans, set out in our manifesto, don’t involve us leaving the European convention on human rights. But let’s be absolutely clear. If we can’t achieve what we need – and I’m very clear about that when we’ve got these foreign criminals committing offence after offence and we can’t send them home because of their right to a family life – that needs to change. And I rule out absolutely nothing in getting that done.”)

⁸ M. Fouzder, ‘British bill of rights plan to be unveiled ‘this autumn’’, *Law Society Gazette*, 8 September 2015.

*Genocide and Crimes against Humanity*⁹ - told the German Academy of Law, of which he was the President, that there would be no individual rights in the new Germany, part of a policy of a total opposition to the “individualistic, liberalistic atomizing tendencies of the egoism of the individual”¹⁰ (“Complete equality, absolute submission, absolute loss of individuality”, the writer Friedrich Reck recorded in his diary, drawing from Dostoevsky’s *The Possessed* in reflecting on ideas of Frank’s kind).¹¹ The position was no different for the United Kingdom, as a colonial power in respect of individuals in those colonies, or indeed beyond: in 1919, Britain objected to the idea of a League of Nations that would protect the rights of minorities in all countries – as opposed to the vanquished, as the organisation would have “the right to protect the Chinese in Liverpool, the Roman Catholics in France, the French in Canada, quite apart from more serious problems, such as the Irish”.¹² Britain objected to any depletion of sovereignty – the right to treat others as it wished – or international oversight. It took this position even if the price was more “injustice and oppression”.¹³

11. Today many take it for granted that the limits of sovereignty are fettered by international law, that external constraints are a normal feature of our lives. They should not do so, for it was not always thus. The emergence of modern international human rights law – the idea that every human being has basic, irreducible human rights – represented a hard fought struggle, and a paradigm shift in an

⁹ Forthcoming, May 2016 (Alfred Knopf (US) and Weidenfeld & Nicolson (UK)).

¹⁰ Philippe Sands, *East West Street: On the Origins of Crimes against Humanity and Genocide* (unpublished manuscript, October 2015), p. 83

¹¹ Friedrich Reck, *Diary of a Man in Despair* (New York Review of Books, 2012, tr. Paul Rubens), 42.

¹² *East West Street*, p. 88.

¹³ Carole Fink, *Defending the Rights of Others: The Great Powers, the Jews, and International Minority Protection*. New York (Cambridge University Press, 2004), 154, n. 36.

international legal order that had always favoured the state over the individual.

12. For centuries sovereigns and states could do more or less as they pleased to their own people within their borders (the situation for foreigners has long been different). They were unrestrained by legal rules imposed from outside and free from scrutiny by other states and governments, or international judges. The idea of state sovereignty – paramount from well before the Peace of Westphalia enshrined it in 1648 as the foundation of the international legal order – provided that no state could dictate to another what it could or could not do to its own people. Non-interference meant that rulers and despots had a free hand to torture and persecute minorities, to kill and repress – safe in the knowledge that no system of international justice would ever call them to account.
13. The paradox is that a system of international law created by human beings elevated the state – an abstract political and legal entity – above all living persons. In the nineteenth century another German thinker, Georg Hegel, embraced the ideal of state supremacy in his *Theory of the State*. The state, Hegel said, is “absolutely rational” and enjoys “supreme right against the individual, whose supreme duty is to be a member of the state”.¹⁴ In Hegel’s world the state was always mightier than any man or woman, and it rightly reigned supreme.
14. Views differ about how far Hegel’s philosophy of state supremacy influenced the legal architects of the Third Reich, men such as Hans Frank. Bertrand Russell believed Hegel’s theory “justifie[d] every

¹⁴ Hegel, *The Philosophy of Right*, para 258.

internal tyranny and every external aggression that can be imagined”.¹⁵ Others were less sure. Whatever the philosophical lineage of the totalitarianism that ran rampant in the 1930’s, it is beyond dispute that one of the consequences of the horrors of that period was a radical reconstruction of the European legal order. The transformation firmly rejected the idea that people owe duties to states, but states owe no duties to people.

15. Many forces and people played a part in that legal revolution, in many countries around the world. However there are two individuals – a professor of international law at Cambridge University, and a pragmatic Scotsman and UK government cabinet minister – whose contributions I wish to highlight tonight. Their stories illustrate two important points about the Convention. First, the power of ideas to effect a transformation, creating a pan-European human rights framework was needed to help safeguard the people of Europe from a repeat of the horrors of the 1930s and 1940s. Second, the United Kingdom’s significant contribution to the Convention, one that seems to escape the memory of our current governors.

16. Sir Hersch Lauterpacht was perhaps the most distinguished and influential international lawyer of the last century. An academic and a member of the English bar, Lauterpacht’s contribution to the development of international law has no parallel in modern times. Of his many publications, one in particular has left an especially sharp imprint on today’s political and legal landscape.

¹⁵ Russell, *History of Modern Philosophy* (1946), 768-769.

17. Published in the summer of 1945, exactly seven decades ago, Lauterpacht's *An International Bill of the Rights of Man* confronted prevailing orthodoxies and contributed to a transformation of our international legal order. The importance of this visionary, seminal, transformative work can scarcely be overstated. Written over three years, as war raged, it set out a vision of an international legal order that would give legal life to Winston Churchill's political aspiration for "the enthronement of the rights of man".¹⁶ Lauterpacht's new model placed the protection of the individual human being, rather than the nation state, at the centre of the international legal landscape. He hoped, in his words, to end "the omnipotence of the state". In its place he imagined a new era in which "the individual human being – his welfare and the freedom of his personality in its manifold manifestations – is the ultimate unit of all law".¹⁷
18. That vision was ambitious and revolutionary, constructed on a belief in the power of the law – and international law – to protect humans against the inhumanity and barbarity that touched so many lives before and during the Second World War. Yet outside of legal circles the name Lauterpacht is unlikely to conjure recognition. He was born in 1897 in a small town called Zolkiew on the eastern outskirts of the Austro-Hungarian Empire. At the age of 14 Lauterpacht's family moved to nearby Lemberg (now Lviv, in the Ukraine, and before that Lwów in Poland). There he witnessed first hand the consequences of persecution based on religious identity, as Jews became victims of a violent struggle between Polish and Ukrainian communities. He later

¹⁶ *The Times*, London, October 30, 1942. It is of interest to note the use of the same turn of phrase by Gladstone, who said: "The greatest triumph of our time will be the enthronement of the idea of public right as governing the idea of European politics" (as quoted in *Speeches by the Earl of Oxford and Asquith* [New York, 1927], p. 218).

¹⁷ 29 *Transactions of the Grotius Society* (1944), 1-33.

studied in Vienna, completing doctorates in law and political science under Hans Kelsen, before moving to the London School of Economics and then to Cambridge, where he became a professor of international law, at the young age of 40.

19. In the spring of 1942 he received a commission to write a book on international rights. By then the Nazis had occupied Lemberg and Lauterpacht knew that his family was in great danger. It was not until some three and a half years later, however, whilst involved in the prosecutions of Nazi defendants at the Nuremberg trial, that he learned that his parents, brother and sister, and many other familiar members, had been murdered in August 1942. Coincidentally, he learned too that one of the men he was prosecuting, Hans Frank, was directly responsible for their deaths.

20. Lauterpacht's book, which coincided with the adoption of the United Nations Charter, the first multilateral treaty to enshrine the idea of "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" (Article 1(3)) was in three distinct parts. Lauterpacht began by outlining an intellectual and historical foundation for the very idea of an International Bill of Rights, founded on two core facts. The first was "the antiquity of the notion of the innate rights of man appertaining to him as a human being".¹⁸ With those words Lauterpacht tried to describe what he saw as a self-evident truth: that every man, woman and child possesses certain inalienable rights simply by virtue of their existence as a human being.

¹⁸ Hersch Lauterpacht, *An International Bill of Rights of Man* (New York: Columbia University Press), 25.

21. The second idea was “the close association of these rights with the doctrine of the law of nature”.¹⁹ Natural law describes a body of fundamental principles that are inherent in nature and universal in application. Such principles are said not to have been created by man, but may, it is argued, be deduced by the process of human reason, yielding binding, general rules of moral behaviour. The law of nature, with which Lauterpacht had an ambiguous relationship, affirmed the sanctity of the individual: he recognized a place for the law of nature not “consigned to the province of historical research”—but not its dominance. It was a means to an end, not an end in itself, offering a “spiritual basis” and “political inspiration” to place the rights of man on “a legal plane superior to the will of sovereign States”.²⁰ He relied on natural law as a spiritual opponent to the “pagan absolutism” that took hold in Germany after the First World War.
22. Having set out a theoretical foundation for the new legal order, Lauterpacht sought to give it a practical dimension. The Second Part of the book contained the text of the substantive civil rights his bill would protect. Amongst the protected rights were liberty, freedom of religion, expression, assembly and association, privacy, equality, nationality and emigration. By more contemporary standards, there are a number of notable omissions, including the absence of any prohibition on torture or cruel treatment, or any obligation not to discriminate against women. Equally striking is his approach to the situation of non-whites in South Africa, what he referred to as “the thorny problem of actual disenfranchisement of large sections of the

¹⁹ *Ibid.*

²⁰ *Ibid.*, 52.

Negro population in some States of the United States”, a painful expression of realpolitik necessary to allow those two countries to engage with his proposed International Bill.²¹

23. The Third Part of Lauterpacht’s book addressed the thorny issue of implementing and enforcing these newly minted rights. He was an idealist but also a realist: in researching his life I managed to find his student records at the University of Lemberg, which perhaps revealed one catalyst for that polarity, a course he attended from September 1916 which offered a daily lecture on a subject entitled *Pragmatism and Instinctivism*.²² The pragmatic Lauterpacht fell short of calling for an international court, advocating instead for an international supervisory mechanism to ensure national courts effectively upheld the rights protected in the Bill.
24. Lauterpacht’s work received a mixed reception. While there was broad acceptance of its scholarly merit, his desire to up-end the legal order attracted criticism as well as praise. In the years after its publication, however, following the dedicated efforts of Eleanor Roosevelt and many others, Lauterpacht’s vision of an internationally binding human rights framework took hold. The Universal Declaration of Human Rights adopted in 1948, the first international instrument to enshrine a code of fundamental human rights, albeit non-binding. It was followed two years later by the European Convention on Human Rights, the world’s first multilateral and

²¹ *An International Bill of Rights of Man*, 140–141.

²² Philippe Sands, *East West Street: On the Origins of Crimes against Humanity and Genocide* (unpublished manuscript, October 2015), p. 83

general instrument of human rights protection that established binding obligations.

25. The European Convention was a progeny of Lauterpacht's groundbreaking work. It came into force on 3 September 1953, eight years and a day after Japan's surrender marked the end of World War II. The aim was simple: to enumerate a list of inalienable rights possessed by every person and to establish an international mechanism for enforcing those rights.
26. One of the principal architects of the Convention was a distinguished British lawyer who had served as Attorney General and would later serve as Lord Chancellor, Sir David Maxwell Fyfe. Described by Brian Simpson in his magisterial work on Britain and the genesis of the ECHR as the "only ... home-grown British lawyer of an prominence ... in the promotion of the convention",²³ he happened to be a Conservative politician. This quintessentially establishment figure was born in Edinburgh in 1900, becoming a barrister and, at the age of 34, King's Counsel, reputedly the youngest to achieve that rank in more than two centuries. He was elected to Parliament and appointed as Recorder of Oldham, to juggle the roles of MP, judge and advocate.
27. In 1942 – the same year that Lauterpacht began work on his book – Churchill appointed Maxwell Fyfe as Solicitor-General. Like Lauterpacht, Maxwell Fyfe spent the war years contemplating the shape of the future legal order. He was an enthusiastic subscriber to

²³ A. W. Brian Simpson, *Human Rights and the End of Empire* (Oxford, 2001), 18.

Churchill's vision of enthroneing the rights of man, and resolved to play a part in realizing that ambition after the war's end.

28. Maxwell Fyfe performed a prominent role in the British prosecution team at the Nuremberg trials, where he worked closely with Lauterpacht. Famously, he was "sent in as cross-examiner to master [Hermann] Goring and to obtain what amounted to the fist confession from him", after the battle between Goring and US prosecutor Robert Jackson in which, as *New Yorker* correspondent Janet Flanner put it, in "the important struggle between two opposing men's brains and personalities ... Goring showed more of both".²⁴ In a letter to his wife about the trial of "the fat boy", Maxwell Fyfe boasted in typically genteel fashion that, "I knocked him reasonably off his perch". The experience of the trials underscored a lifelong resolve to create an international legal framework that would provide an early warning mechanism to help avoid future crimes.

29. In later years Maxwell Fyfe served as Home Secretary in Winston Churchill's cabinet. In 1950 he published a positive review of the 2nd edition of Lauterpacht's book in the *Observer*.²⁵ In 1954 he was ennobled and appointed Lord Chancellor, an eight-year stint that would be the longest term since Lord Halsbury's decade on the woolsack at the turn of the century.

30. Maxwell Fyfe was no bleeding heart liberal. He supported capital punishment and spoke favourably about the merits of flogging. He was the Home Secretary who refused to grant clemency to Derek

²⁴ Janet Flanner, *Janet Flanner's World – Uncollected Writings (1932-1975)*, (Secker & Warburg, 1980), 117.

²⁵ *Observer*, 27 October 1950, 7.

Bentley, ignoring a public campaign and the pleas of over 200 MPs to commute the death sentence imposed on the mentally disabled 19 year-old. (Bentley was granted a posthumous pardon four decades later and eventually had his conviction for murder quashed by the Court of Appeal 45 years after his execution.) As Lord Chancellor Maxwell Fyfe led opposition in the House of Lords to the decriminalization of homosexuality, opposing the recommendations of the Wolfenden Committee – a body he had set up to consider the case for reform.

31. Yet despite a deeply traditional social outlook, Maxwell Fyfe was also an ardent supporter of a pan-European bill of rights, and the idea of protecting the rights of individuals. In 1948 Churchill advocated the creation of a Charter of Human Rights “guarded by freedom and sustained by law”. Maxwell Fyfe took great pride in leading the British effort to realize that vision. Between 1948 and 1950 he oversaw the drafting of the Convention, which included a Commission and a Court of Human Rights to ensure enforcement, remarking that Lauterpacht “did much to inspire” the drafting of the ECHR,²⁶ reviewing early drafts and advising on the text.
32. After its adoption Maxwell Fyfe heralded the Convention as “a simple and safe insurance policy”, an instrument that enshrined “a minimum standard of democratic conduct”. For him, the Convention was nothing less than “a system of collective security against tyranny and oppression” which provided “a minimum standard of democratic conduct for all members”. Maxwell Fyfe was not blind to the revolutionary character of the new international framework he had

²⁶ *Ibid.*

helped to establish. Indeed, he recognised that “the Convention superimposes an international code on our unwritten constitution”, something to be welcomed not feared, the very point of the Convention. In his memoirs Maxwell Fyfe he recorded that: “I was very anxious that we should get an international sanction in Europe behind the maintenance of these basic decencies of life.”²⁷

33. In this way, as an instrument of collective security, the European Convention reflected the striking of a bargain: each participating state would shed a little of its own sovereignty, in return for which it would acquire the right to hold others to account.

34. It is interesting that these two vastly different men – Hersch Lauterpacht and David Maxwell Fyfe – with their contrasting backgrounds, ideologies and outlooks could agree on the idea of a binding international convention enshrining human rights. Both had lived through the terrible events of the 1930s and 1940s. It is a period about which many of our current politicians appear to be woefully ignorant, as our foreign policy (such as it is) on the Ukraine makes clear. They seem to have forgotten from whence we came.

WHERE WE ARE

35. I turn now to where we are, with a Human Rights Act. The European Convention was adopted in 1950, ratified by the UK in 1951, and came into force in September 1953. It was not incorporated into our domestic law, which meant that it could not be invoked before our domestic courts. An aggrieved citizen or inhabitant of the United

²⁷ *The Memoirs of Earl Kilmuir* (Weidenfeld & Nicolson, 1964), 176.

Kingdom would have to take claims under the Convention to Strasbourg, where the Council of Europe has its home. In 1966 the UK opted to accept the right of individual complaint to the European Commission of Human Rights. Individuals began to petition the Court directly. In its first decades there were relatively few decisions handed down against the UK, although some judgments were significant, not least the findings that the UK had engaged in cruel, inhuman and degrading treatment in Northern Ireland, and violated the right to life in killing three suspected IRA terrorists in Gibraltar. Such claims were handled by the nascent Convention organs, with what has been described as considerable “legal diplomacy”.²⁸

36. That remained the situation for more than three decades, until in 1998 Parliament passed the Human Rights Act. This implemented a Labour Party manifesto pledge to allow rights set out in the Convention to be enforced before the UK courts (how ironic it is that a Conservative Party that was once committed to the rights of the individual should now turn its back on the Convention, and a Labour Party that feared the Convention’s consequences for proposals on nationalisation and a national health service should now embrace it). The title of the White Paper – “Rights Brought Home” – reflected the Act’s ethos: UK rights reflected in an international instrument being returned, empowering British courts to interpret and apply rights granted under the Convention.

37. The Act requires our courts and tribunals to interpret legislation as far as possible in a way that is compatible with the rights enshrined in

²⁸ Mikael Risk Madsen, “*Legal Diplomacy*” – *Law, Politics and the Genesis of Postwar European Human Rights in Human Rights in the Twentieth Century* (CUP, 2011)

the Convention. Public authorities must not act incompatibly with Convention rights, and may be liable to pay damages or provide other remedies if they do. What of judgments of the Strasbourg Court? The UK courts must “take into account” such judgments, but they are not bound to follow them. If they consider that a Strasbourg judgment is wrong, the courts are free to go their own way. If legislation passed by Parliament is incompatible with a Convention right then the courts may make a declaration to this effect. Contrary to popular misconception, the courts have no power to ‘strike down’ an Act of Parliament. The response is a matter for Parliament, which remains legally sovereign.

38. Myths abound about the role of the Strasbourg Court. Judging by the rhetoric and the headlines in a couple of our national dailies, you might be forgiven for thinking that there has been an avalanche of Strasbourg Court rulings against the UK. What are the facts? In 2014 the Strasbourg Court addressed 1,997 applications against the United Kingdom.²⁹ The overwhelming majority of those claims were declared inadmissible or struck out at an early stage. In the same year the Court delivered 14 judgments in cases brought against the UK – of these, four found a violation by the UK, while ten ruled in the government’s favour.³⁰
39. Despite this modest number of adverse findings, the Court attracts significant ire from detractors in the UK. There are three principal complaints, none of which is particularly well-founded. The strength of feeling appears to be based on factors other than those that have little to do

²⁹ Press country profile of the United Kingdom produced by the European Court of Human Rights (July 2015), available at: http://www.echr.coe.int/Documents/CP_United_Kingdom_ENG.pdf Cite

³⁰ *Ibid.*

with merits of actual judgments. The words “European” and “human rights” have been spun into pejorative resonance.

40. What are the complaints? First, it is said that the Strasbourg Court has acted improperly in interpreting the Convention as a living instrument, straining the language of the Convention so as to invent rights that the Convention’s drafters never intended or imagined. The Court stands accused of judicial activism – a pejorative description used where judges create are said to have created new rights and rules – to have acted more like legislators – and gone beyond the black letter of the written law, or original intent. (The same accusation is often made of our domestic judges.) Allegations of activism resonate strongly with those concerned with the allocation of powers between elected lawmakers, on the one hand, and unelected judges, on the other.

41. Certainly the Strasbourg Court has been called upon to apply the Convention to circumstances that its drafters – and no doubt Lauterpacht and Maxwell Fyfe – are unlikely to have envisaged. Yet one is bound to ask: is that a problem of judicial activism, or a reflection of a world and values that have evolved since the drafting of the Convention in the late 1940s. Applying old documents to new scenarios is a challenge for any court. In the United States, for example, the courts must grapple with the constitutional protection found in the Eighth Amendment, ratified in 1791 to prohibit cruel and unusual punishment at a time when flogging, whipping and branding were widely perceived as acceptable punishments. Yet the Supreme Court has stated that the right must be interpreted by

reference to “the evolving standards of a maturing society”.³¹ On that basis, it has outlawed a panoply of punishments that would have found few opponents in the late eighteenth century. An ability to move with the times, and to adapt to changed understandings of respect and dignity, is surely a hallmark of an effective, legitimate court, recognising that reasonable people will often disagree as to where a particular line is to be drawn.

42. There will be some too who place a particular value on original intent – I have in mind here US Supreme Court Justice Antonin Scalia – yet the point I make is more limited: the mode of interpreting and applying the law in the face of changing values raises analogous considerations at the national level as at the international level. There is of course one significant difference: there exists no international legislature, like a domestic Parliament, which can intervene to right – or override – a judicial wrong. That fact causes international adjudicators to be pulled in different directions, needing both to be more cautious in adopting an interpretation that risks crossing the line that distinguishes between the interpretation and application of a text, on the one hand, and the legislating of a new rule, on the other. I am myself acutely aware of that when I sit as an arbitrator in investment disputes, called upon to interpret and apply the obligation to accord investments “fair and equitable” treatment: what might have been “fair and equitable” in Britain in 1965 might not be so in 2015. Am I bound to apply the standards of 1965? Merely to pose the question, I suggest, offers a rather clear answer. Curiously, those who seek a modern interpretation of what is “fair and equitable” in

³¹ *Trop v Dulles*, 356 I.S. 86 (1958), per Warren CJ.

relation to the rights of investors are pulled in a less modern direction when it comes to the rights of individuals.

43. One well-known human rights case illustrates the point. Jeffrey Dudgeon was a shipping clerk in Belfast who, in 1976, brought a case against the UK to the Strasbourg Court. Mr Dudgeon happened to be gay, and in Northern Ireland this was a problem: legislation dating back to the middle of the nineteenth century made it a criminal offence for consenting adult males to engage in sexual contact. Mr Dudgeon challenged those laws, which he said caused him fear, suffering and distress. The UK Government defended them on the grounds that they were necessary for “the protection of morals” and for “the protection of the rights and freedoms of others” in Northern Ireland. Across the Irish Sea, in England and Wales, the laws restricting homosexual conduct had since been relaxed, but the UK government argued that restrictions were needed in Northern Ireland to avoid damaging the moral fabric of Northern Irish society.

44. The argument put by the UK Government obtained the support of the Irish Judge, Judge Walsh, in a judgment given in 1981. “The fact that a person consents to take part in the commission of homosexual acts is not proof that such person is sexually orientated by nature in that direction”, he wrote. A distinction had to be drawn between homosexuals who are such because, as he put it, “of some kind of innate instinct or pathological constitution judged to be incurable and those whose tendency comes from a lack of normal sexual development or from habit or from experience or from other similar causes but whose tendency is not incurable”. As far as the incurable category was concerned, Judge Walsh believed that the activities

should be treated as “abnormalities” or “handicaps” and treated with “compassion and tolerance”, to prevent the victimization of persons with “tendencies over which they have no control and for which they are not personally responsible”. There was another category of persons, however, the non-incurable, characterised by Judge Walsh as the “many male persons who are heterosexual or pansexual [who] indulge in these activities not because of any incurable tendency but for sexual excitement.”³² Such person should not be treated with an equivalent “compassion and tolerance”.

45. That is one view, I suppose, but it was not the view that prevailed. The majority of the Strasbourg Court disagreed with the UK Government, observing that in the “great majority” of European States it was no longer considered appropriate to treat homosexual conduct as a matter for the criminal law.³³ While certain members of the public might be “shocked, offended or disturbed” by the commission of homosexual acts in private, this did not justify punishing consenting adults who engage in such acts. The Court ruled that the law applicable in Northern Ireland breached Mr Dudgeon’s right to respect for private life under Article 8 of the Convention.
46. Read today in Windsor – if not in Kampala – Judge Walsh’s dissent shows that the judges on the Strasbourg Court, like any judges, may bring to the process of adjudication elements that are prone to raise an eyebrow in the light of changing values and knowledge. Views may differ about whether the Court’s decision in *Dudgeon* followed or helped shape public opinion. It is difficult to imagine the judgment

³² *Dudgeon v United Kingdom* (1982) 4 EHRR 149, partially dissenting opinion of Judge Walsh, paras. 13 *et seq.*

³³ *Dudgeon v United Kingdom* (1982) 4 EHRR 149, para 60.

would have found much favour with some of the Convention's drafters, not least Sir David Maxwell Fyfe. Did the Strasbourg Court get it wrong? Should it have waited for a non-existent pan European legislature to have legislated on the issue? I suggest the questions answer themselves.

47. A second common complaint concerns the supposedly subordinate relationship between UK Courts and the Strasbourg court that is newly established by the 1998 Act. I do not consider the language of subordination to offer a fair reflection of the reality, a complex judicial relationship founded less on obedience and deference than on a respectful exchange of views that takes into account differing domains of expertise and experience as between the European and domestic judges.

48. As I have noted, the Human Rights Act does not compel the UK courts to blindly follow the Strasbourg court, and the UK courts have not taken it upon themselves to act in such a manner. Indeed, the UK courts have not hesitated to tell Strasbourg when they think it has fallen into error. Two recent cases about hearsay evidence demonstrate the point. In 2009 the European Court of Human Rights delivered a judgment that concluded that the right to a fair trial is invariably breached whenever a criminal conviction is based solely or decisively on hearsay evidence.³⁴ The UK courts disagreed. A not insignificant number of criminal convictions fell into that category, and the UK courts believed that the domestic law satisfied the requirements of Article 6. First the Court of Appeal, and then the Supreme Court, delivered robust judgments that challenged the

³⁴ *Al-Khawaja v United Kingdom* (2009) 49 EHRR 1.

reasoning of the Strasbourg Court.³⁵ The Strasbourg judges had misapplied their own case law and misunderstood critical aspects of English law, the UK judges ruled, issuing a mild rebuke and rather politely inviting the European Court to reconsider its judgment. In due course the Strasbourg Court did exactly that. The Grand Chamber re-examined the case and took heed of the UK courts' critique. The President of the Strasbourg Court at the time was Sir Nicholas Bratza, a highly respected UK judge. Amongst those on the Strasbourg Court who were persuaded to change their minds, his judgment heralded the case as "a good example of the judicial dialogue between national courts and the European Court".³⁶

49. A third criticism of the Strasbourg Court takes issue with the very notion of human rights law, as though it were an alien species that taints the purity of the common law, a complex and constantly evolving body of rights and rules created over centuries by the English courts. Insofar as this is used to attack the Human Rights Act, the objection overlooks the fact that the English common law has a rich history of protecting certain fundamental rights. In a recent Supreme Court judgment Lord Carnwath explained that "What we now term human rights law and public law has developed through our common law over a long period of time", that the process had quickened since the end of World War II, and that the growth of the state had presented the courts with "new challenges", and they had responded by "a process of gradual adaption and development of the common law to meet current needs". "This has

³⁵ *R v Horncastle* [2009] 2 Cr. App. R. 15; [2010] 2 A.C. 373.

³⁶ *Al-Khawaja v United Kingdom* (2012) 54 EHRR 23, concurring opinion of Judge Bratza, para 2 .

always been the way of the common law”, he added, “and it has not ceased on the enactment of the Human Rights Act 1998.”³⁷

50. The common law has long proved to be a bountiful source of fundamental rights. Freedom of expression, the right to silence and privilege against self-incrimination, the right to a fair hearing before an unbiased tribunal, freedom from arbitrary arrest and warrantless searches, legal professional privilege, open justice and access to court – all are originally creations of the common law. In a 2012 judgment Lord Justice Toulson emphasised that: “The development of the common law did not come to an end with the passing of the Human Rights Act.”³⁸ Far from neutering the common law, the Human Rights Act has contributed to the evolution of common law rights by bringing an increased focus on fundamental rights and supplying a source of inspiration for the development of long-standing common law doctrines. As a unanimous Supreme Court recently observed: “under the stimulus of the Human Rights Act 1998, the courts have become increasingly conscious of the extent to which the common law reflects fundamental values”.³⁹

51. In this way, it might be said that the Human Rights Act has allowed our courts to recognise the existence of a convergence between the content of the common law, on the one hand, and human rights law, on the other.

WHERE WE ARE GOING

³⁷ *Kennedy v Charity Commission* [2015] AC 455.

³⁸ *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618).

³⁹ *Montgomery v Lanarkshire Health Board* [2015] 2 WLR 768.

52. I turn finally to where we are going. The subject of the Human Rights Act and the European Convention are currently the subject of much debate. Elements of the Conservative Party seem hell-bent on tearing up the Act and withdrawing from the Convention. In the next few weeks Mr Gove, our Justice Secretary, will announce a consultation on the Conservative manifesto commitment.
53. I have seen first hand where this country might be heading. In the summer of 2010 the Coalition Government set up a Commission on a Bill of Rights, on which I served until January 2013. I was one of the eight members, four each appointed by the Prime Minister and the then Deputy Prime Minister, chaired by Sir Leigh Lewis. The Commission was intended to provide a solution to a split within the coalition government about the future of the Human Rights Act. The Conservatives had given a clear commitment to tearing up the Human Rights Act while their coalition partners, the Liberal Democrats, were strong supporters of the Act. We in the Commission were the long grass. To say that expectations as to what we might achieve were low would be an overstatement.
54. It was apparent from of our first meetings that the prospects of achieving a consensus on anything of note were slim. Such prospects as did exist evaporated as our deliberations progressed: Baroness Helena Kennedy and I formed a distinct impression that there might be a hidden agenda, an unspoken desire to use the idea of a British Bill of Rights to achieve another objective. Eventually we teased out the truth: three of the four Conservative appointees wished not only to repeal the Act but to withdraw from the European Convention on

Human Rights altogether. One of those colleagues, Lord Faulks, is now Minister of State for Justice.

55. We didn't reach a consensus on anything much, beyond the notion that it was best to refer to a UK Bill of Rights, not a British Bill (the "B" word was toxic in various parts of the UK, we learned) and that the subject raised sensitivities, should be addressed gradually, and ought to be addressed in a forum such as a Constitutional Convention that also addressed wider constitutional issues, including devolution.⁴⁰ A majority of the Commission supported the idea of a UK Bill of Rights, largely on the grounds that it might foster a greater sense of public ownership. They could not, however, agree on what might be in it, or how such an instrument might relate to the European Convention, on which they were split.
56. Baroness Kennedy and I were not willing to go along with the majority, and wrote a minority report, that was published in full in the *London Review of Books*.⁴¹ We did not wish to dissent but felt compelled to do so, and nothing that has happened since causes me to doubt that we were right to do so. We offered three reasons why the Act should remain in force, without tinkering or change.
57. A first compelling reason for keeping the Human Rights Act is found in the clear response of the British public to the Commission's consultations (we held two consultations, as our Conservative friends were not happy with the first, but the second the same results). The Commission posed a simple question: "retain or repeal the HRA?"

⁴⁰ Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before US*, Vol. 1, paras. 71-77 (2012).

⁴¹ Philippe Sands and Helena Kennedy, 'In Defence of Rights', *London Review of Books*, 3 January 2013

Some 88 per cent of respondents elected to retain. The figure was higher still in response to the question of whether Convention rights should continue to be incorporated in British law – 98 per cent answered yes to this question. The public meetings we held confirmed these results were no aberration. Indeed, most respondents wanted more rights for more people, not fewer rights for fewer people. We did not discover a problem with ownership of the Human Rights Act or any sense that it was, as some of our colleagues told us, un-British. There was no support for withdrawal from the Convention, and no groundswell of objection to the Strasbourg Court. Outside the confines of Westminster, a small number of newspaper editors, and southern Tory MPs, the avalanche of objection to the Convention, the Strasbourg Court and the Human Rights Act simply failed to appear. Baroness Kennedy and I took account of what we were told, the majority ignored it on the basis that they knew better.

58. Our second major concern related to devolution. It is not widely known that the Human Rights Act is embedded into the devolution arrangements for Scotland and Wales, or that the Good Friday agreement contains an explicit guarantee that Britain will incorporate the Convention into the law of Northern Ireland. Repealing the Act would unwind those delicate constitutional arrangements, with grave consequences. Short of repudiating the devolution arrangements altogether, it became clear to Baroness Kennedy and I that the only way of circumventing this obstacle would be to move to a situation in which different levels of human rights protection would have to be applied in the four nations that make up the United Kingdom. The fundamental rights you have would therefore depend on which part

of the United Kingdom you happen to live in. Such an approach would mean the end of the United Kingdom as we know it, or its demise altogether. I think that Mr Gove will come to recognise the risk, if he has not done so already: push too hard and his Government might be remembered as the one that caused the unraveling of the United Kingdom.

59. Our third reason for coming down strongly in favour of keeping the Act concerns the UK's continued membership of the Convention itself. Repealing the Human Rights Act would not in itself free the UK from its obligations under the Convention: it would merely disempower the UK courts from enforcing those rights. Aggrieved individuals would still have a right to petition the Strasbourg court, with all the additional expense and delay that entails. Judgments of the Strasbourg Court would continue to bind the UK in exactly the same way as they have done since 1953, although the possibility for UK judges to interpret and apply the Convention would go, and with it their ability to influence judgments in Strasbourg. Quite why Mr Gove would wish to diminish the influence of UK judges is entirely unclear to me: our judges are highly respected, with good reason, and they should be involved in interpreting and applying the Convention.

60. The reality is that there is another agenda, and it is UK withdrawal from the Convention. Baroness Kennedy and I teased out the unspoken reality. When asked last June to offer a confirmation that the UK would definitively remain a party to the Convention, Mr Cameron conspicuously declined to do so. As with EU membership, he plays with fire.

61. What would the leavers of the ECHR give us instead? What would a British Bill of Rights actually contain? What rights set forth in the Convention would be removed or replaced? We have no idea. We are left to speculate, but not entirely without a basis.
62. For into this vacuum stepped one of my colleagues on the Commission, Martin Howe QC, who is reportedly assisting the Conservatives to develop their ideas. In our work on the Commission he prepared a draft UK Bill, offering an insight into the kind of approach he has in mind. I do not have time to take you through the entirety of his unhappy text, but I must refer you to his draft Article 26, which is entitled “Application of the Bill of Rights as regards persons”. Essentially it divides human beings into three categories: Category 1 comprises citizens of the UK, who would enjoy all the rights and freedoms set forth in the Bill; Category 2, citizens of other members of the EU, would only be entitled to those rights to the extent provided by EU law; and Category 3, non-UK or EU citizens would only have some rights, although which these were Mr Howe did not feel able to specify.⁴²
63. The proposal speaks for itself. If human rights meant anything, when its modern international formulation emerged in 1945, it was that every human being would have certain minimum irreducible rights, irrespective of his or her origins or background, because he or she is a human being. When draft Article 26 was unveiled I could not help but think back to another period, to a speech given by Hans Frank in 1935 and to the reaction by the diarist Friedrich Reck. I appreciate that it was not the intention, but it will be the consequence, if not in

⁴² Martin Howe QC, ‘A UK Bill of Rights’, *ibid.*, 192 at 214.

this country then elsewhere. Reactions across Europe to the situation of forced migrants of war reveal the scale of what we face.

CONCLUSION

64. Where then are we? I fear that the Government is playing a dangerous game. This generation of politicians and newspaper editors has no actual experience of whence we came, and apparently no great sense of history either. One has the sense that many in our government would like to take us back to the perceived idyll of the 1930s, an isolated UK that is stripped of its connections to the continent of Europe, that leaves its own people deprived of rights or the means to enforce them before our courts, that fawns to the “golden era” of cash injections from a country that has scant regard for the rights of individuals.
65. The European Convention reflected a deal, a compact between countries that claim to share a sense of values as to the liberty and dignity of the human person. Maxwell Fyfe called it “a simple and safe insurance policy”.⁴³ In return for the shedding of some sovereignty, we obtain the right to hold others to account. The price paid in this country has not been a great one. Our common law has retained its essential vibrancy and values, the essence of which is exported through the Convention and its interpretation by our courts. There has been no avalanche of cases, no transformation of a cherished approach, no implosion of essential parliamentary

⁴³ *The Memoirs of Earl Kilmuir* (Weidenfeld & Nicolson, 1964), 180.

sovereignty, no dictatorship of the judges. Where Strasbourg has spoken against the UK, it has generally been right to do so.

66. On Saturday it was reported that a British Bill of Rights to repeal the HRA would be fast-tracked into law next summer, that a consultation would be conducted starting later this year, and that withdrawal from the ECHR would not be on the table.⁴⁴ The last point should be treated with great caution. For three members of our Commission repeal of the HRA and the idea of a British Bill of Rights offered the means to withdrawal from the European Convention. Talk about repeal of the HRA and withdrawal from the Convention fuel the discontent of others. On this issue, Mr Cameron and President Putin seem to be joined at the hip. Talk of repeal and withdrawal undermines the UK's international standing and its influence on the European stage. Talk of repeal and withdrawal offers succor to regimes with poor human rights records, for whom the Convention provides one of the few meaningful external constraints and effective accountability mechanisms. Talk of repeal and withdrawal amounts to a renunciation of the values promoted by the likes of David Maxwell Fyfe and Hersch Lauterpacht. Talk of repeal and withdrawal threatens profound consequences for the protection of human rights in this country, for the United Kingdom's engagement with Europe, for the United Kingdom, and for international law itself, which is only at the early stages of reinventing itself into a system that can look after the needs of people not states.

⁴⁴ Mark Leftly, 'British Bill of Rights to be fast-tracked into law by next summer', *The Independent*, 17 October 2015.