



Rescuing human rights

By Jonathan Fisher QC
March 2012



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ELIZABETH: Aha! Then, there are rights which you possess ...

SAM: In this house!

ELIZABETH: ... which are yours alone!

SAM: In this house!

ELIZABETH: (Smooth). Good; then we are not talking about the rights we pretend we give ourselves in this bewildered land of ours – life, liberty, and the pursuit of the unattainable – though we may be learning our limits – finally – here in the ... last of the democracies. Or just about”

From Edward Albee's THE LADY FROM DUBUQUE, Act II

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EXECUTIVE SUMMARY

This paper addresses the key human rights question in Britain today – Should the United Kingdom withdraw from the European Convention on Human Rights?

From the British perspective, the question arises because there is a widespread perception that the European Court of Human Rights:

- **intervenes too often with decisions of British courts;**
- **is a judicially activist Court, giving an artificially wide application to the European Convention on Human Rights far beyond the contemplation of the contracting parties;**
- **decides cases too often in favour of the complainant, at the expense of the law-abiding citizen and society in general, and which the Courts in Britain are obliged to follow.**

There is universal recognition in the Council of Europe that reform of the European Court of Human Rights is required, and attention has focused on radically reducing the number of cases it hears.

However, the proposed reforms, which are essentially procedural in nature, will not have any impact on the way in which the European Court of Human Rights decides the cases that it hears.

In answering the key question, this paper is divided into three sections.

First, the paper explores the history of the European Court of Human Rights and reviews how the perceptions about judicial activism have come to be held, and whether they are fairly held.

Secondly, the paper considers the arguments for and against withdrawal by the United Kingdom from the European Convention on Human Rights, and by necessary implication, from the jurisdiction of the European Court of Human Rights.

Thirdly, the paper proposes a solution to the problem. A new Protocol added to the European Convention on Human Rights which gives direction to the way in which the European Court of Human Rights should interpret and apply the Convention is required.

The paper concludes by answering the key question in the following way.

The United Kingdom should not withdraw from the European Convention on Human Rights at the present time. The United Kingdom has an important contribution to make in the field of international human rights, and there is the possibility that the Council of Europe and the European Court of Human Rights may respond positively to the suggestions put forward in this paper.

It is within the power of the Council of Europe and the European Court of Human Rights to rescue European human rights from their presently diminished status. It is earnestly hoped that they rise to the challenge.

PART 1:

WHAT HAS GONE WRONG WITH HUMAN RIGHTS?

A history of the European Court of Human Rights, how the perceptions about judicial activism have come to be held, and whether they are fairly held

Controversy from birth

Any consideration of the role of the European Court of Human Rights must begin with an understanding of its historical context and an appreciation of the fact that its function has been mired in controversy from birth.

The end of the Second World War presented the victorious powers with the need to resolve two critical issues bearing on the rights of man – first, how to hold the surviving leaders of Nazi Germany to account, and secondly, how to ensure for future generations that, in the words of the famous Atlantic Charter agreed between Franklin D Roosevelt and Winston Churchill in August 1941, “all the men in all the lands may live out their lives in freedom from fear and want”.ⁱ Although conceptually distinct, the issues were inextricably linked and their resolution has shaped the context within which human rights in Europe continues to operate today.

Holding war criminals to account

A number of important legal issues had to be addressed when considering how the surviving leaders of Nazi Germany were to be held to account. Were the Nazi leaders to be judged according to German law made during the time in which they had seized power, or the law of the country in which the leaders had caused their offending actions to be committed, or were the leaders

i. The Atlantic Charter, Department of State Executive Agreement Series No. 236, available at <http://avalon.law.yale.edu/wwii/at10.asp>

to be held to account under principles of international law? Questions also arose as to whether the Nazi leaders should be tried in a German court with German Judges, or by an international court with Judges appointed by the Allied Powers. The common thread linking these issues was the recognition of a country's sovereignty, and the notion rooted in international law that a State on whose territory a crime has been committed asserts the right of jurisdiction to try the case and punish the offender as a fundamental attribute of its sovereign rights.ⁱⁱ

A significant exception to the principle of sovereignty had been recognised after the First World War when, by Article 228 of the Treaty of Versailles in 1919, the Allied Powers were afforded the right to try war criminals even in cases where they had been tried previously by their national courts. Article 229 provided that a person guilty of criminal acts against the nationals of an Allied or associated Power would be brought before an international court, in this instance being a military tribunal composed of members of the Powers concerned.ⁱⁱⁱ

An international war crimes court

The Treaty of Versailles also provided an extremely powerful precedent. In Article 227, the Treaty specified that the Allied and Associated Powers would publicly arraign William II of Hohenzollern, formerly German Emperor, "for a supreme offence against international morality and the sanctity of treaties". Moreover, a special tribunal would be constituted to try the accused composed of five judges, one appointed by each of the following Allied and Associated Powers. Article 227 made clear that in reaching its decisions the tribunal would be guided by "the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality".^{iv}

Article 227 also required the Allied and Associated Powers to address a request to the Government of the Netherlands for surrender of the ex-Emperor so that he could be put on trial. In the event, the Netherlands refused and no trial ever took place.

ii. See, for example, Article 1 of the Treaty on International Penal Law 1889, signed at Montevideo, which provided that "Crimes are tried by the Courts and punished by the laws of the nation on whose territory they are perpetrated, whatever may be the nationality of the actor, or of the injured"

iii. Treaty of Versailles, 28 June 1919, Part VII, available at <http://avalon.law.yale.edu/imt/partvii.asp>

iv. Treaty of Versailles 1919, Article 227 http://avalon.law.yale.edu/subject_menus/versailles_menu.asp

The establishment of the International Military Tribunal (Nuremberg) at the conclusion of the Second World War built upon the precedent set by the Treaty of Versailles, establishing an international tribunal to recognize individual responsibility for the commission of crimes against peace, war crimes and crimes against humanity. The latter were defined as:

“murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated”.^v

But not an international human rights court

As the Second World War ended, Hersch Lauterpacht^{vi} published his seminal book, *An International Bill of the Rights of Man*, addressing the question of how human rights were to be protected in future generations.^{vii} The book is divided into three sections. Part 1 traces the idea of natural rights in legal and political thought. Part II presents the text of an International Bill of the Rights of Man, and Part III considers various ways to ensure the Bill’s enforcement. Interestingly, Lauterpacht rejected the model of an international tribunal as the mechanism for ensuring the enforcement of an international charter on human rights. Instead, Lauterpacht recommended the establishment of a High Commission operating within the framework of the United Nations to supervise the observance of an international charter on human rights. Where necessary, the High Commission would draw attention to “such infractions of the Bill of Rights as may call for action by the Council of the United Nations”.^{viii} Where the Council finds by a majority of three-quarters of its members that there has been an infraction and the State in question refuses to remedy the violation, “the Council shall take or order such political, economic, or military action as may be deemed necessary to protect the

v. Charter of the International Military Tribunal, Nuremberg Trial Proceedings Vol 1, Article 6(c), available at <http://avalon.law.yale.edu/imt/imtconst.asp>

vi. Professor Sir Hersch Lauterpacht QC was the most eminent international lawyer of the 20th century. He was a member of the United Nations’ International Law Commission from 1952 to 1954 and a Judge of the International Court of Justice from 1955 to 1960. In the words of former ICJ President Stephen M. Schwebel, Judge Sir Hersch Lauterpacht’s “attainments are unsurpassed by any international lawyer of this century [...] he taught and wrote with unmatched distinction” (S.M. Schwebel, *International Arbitration: Three Salient Problems*, xiii (Hersch Lauterpacht Memorial Lectures 1987))

vii. Lauterpacht, *An International Bill of the Rights of Man* (Columbia University Press, 1945)

viii. *Ibid* Articles 18 and 19, pp 194-198

Rights of Man".^{ix}

The reasons why Lauterpacht rejected the model of an international court as the mechanism for the enforcement of human rights repay the most careful consideration. In anticipating the problems that have beset the European Court of Human Rights, they were indeed prophetic. Lauterpacht foresaw the practical problems of an international court drawing upon itself an amount of litigation so vast that not one tribunal would be required, but many tribunals.^x In passing, it may be noted that as at 30th November 2011 figures released by the European Court of Human Rights disclosed that there were 152,800 cases pending before the Court.^{xi} With the Court deciding cases at the rate of around 50,000 cases a year, it follows that there is a backlog of around 3 years.

However, these “technical difficulties” were of minor importance when compared with the more pragmatic issues.

“The additional difficulties – other than those of ... the surrender of part of national legislative sovereignty to a foreign tribunal – of enforcement of the International Bill of the Rights of Man through international judicial review are obvious. The Bill of Rights is necessarily a document of great generality. Its details must be filled in by the mass of legislation and judicial precedent within the various States ... What is regarded as a sufficient measure of protection in one State may be utterly inadequate in another. The fact is that within the orbit of fundamental rights there is room for a wide divergence of law and practice and, with regard to most of the rights guaranteed in the International Bill of the Rights of Man as here proposed, the law and the judicial practice of States have evolved their own solutions and their own procedures. It is possible – though highly improbable – that at some distant date the laws of States will merge into one world law in this and in other matters. The International Bill of the Rights of Man cannot attempt to introduce such a world law. On the contrary, it must be enforced through the law of States, suitably adapted, if need be, to the fundamental requirements of the Bill of Rights. That municipal law

ix. Ibid Article 20(5), p 207

x. Ibid p 174

xi. European Court of Human Rights, Statistical Reports for the period 1.1.11 to 30.11.11, available at <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+data>

What has gone wrong with human rights?

of States cannot be administered by international courts possessing no requisite knowledge of the law, of the legal tradition, and of the social and economic problems of the individual States".^{xii}

European Court of Human Rights – a baptism of fire

Notwithstanding Lauterpacht's clear objections, the Council of Europe proceeded to establish the European Court of Human Rights amidst a baptism of fire. Examination of the working papers which preceded the signing of the European Convention on Human Rights reveals that there was a bitter dispute over whether there should be a Court at all. Italy, France and Ireland favoured the establishment of a Court, arguing that a Court was necessary to institute a European legal order. The United Kingdom, however, considered it would be sufficient if there was an organisation to take action if political changes in any country threatened the fundamental liberties which the Convention enshrined. Reflecting the competing positions, the Consultative Assembly of the Council of Europe rejected an amendment seeking to delete all references to a Court from the Convention text, whilst conversely the conference of senior officials rejected by seven votes to four a proposal to establish a European Court of Human Rights with compulsory jurisdiction. Eventually, around 9 years after the Convention had been signed, the deadlock was broken by the approval of a compromise formula, whereby a European Court of Human Rights would be established, but its jurisdiction would be optional for each contracting state. The compromise was ultimately adopted by the Committee of Ministers.^{xiii}

Critically, the contracting parties did not agree upon how the newly created European Court of Human Rights would discharge its role when interpreting and applying the Articles set out in the Convention. Perhaps the contracting parties felt no need to offer the new Court any direction. There are established international principles of interpretation and there was no reason to think that these principles would not apply to the European Convention on Human Rights in the same way as they apply in the case of other international treaties.

Interpreting international treaties

As the European Convention on Human Rights is an international treaty, it

xii. Lauterpacht, *An International Bill of the Rights of Man* (Columbia University Press, 1945) p 175

xiii. Nicol, *Original Intent and the European Convention on Human Rights* [2005] Public Law 152, p 164 to p 166

falls to be interpreted in accordance with the principles of interpretation set out in Articles 31 to 33 of the Vienna Convention. Although the Vienna Convention was signed in May 1969, international lawyers recognise that its terms apply to the interpretation of earlier treaties, since the Articles of the Vienna Convention reflect a codification of the existing rules of international law produced by the International Law Commission of the United Nations partly for this purpose.

On occasions, the European Court of Human Rights has faithfully applied the principles set out in Articles 31 to 33 of the Vienna Convention in accordance with expectations, but there have been other instances where the European Court of Human Rights has developed its own approach to treaty interpretation, in a manner which Articles 31 to 33 of the Vienna Convention would not recognise.

The proper approach

The decision of the European Court of Human Rights in *James v United Kingdom*^{xiv} is a good example of how the correct principles should be applied. In this case, the exercise of a tenant's property rights under the Leasehold Reform Act 1967 was challenged as an unlawful deprivation of a property right. In reaching its decision, the European Court of Human Rights explicitly applied Article 31(1) of the Vienna Convention when determining that the text of the Convention and its Amending Protocols had to be interpreted in accordance with its ordinary meaning.^{xv}

The Court followed a similar approach in *Johnston v Ireland*^{xvi} when holding that the absence of any provision in law for divorce did not violate Article 12 of the Convention (the right to marry). Although the Court did not cite Article 31(1) of the Vienna Convention in its judgment, the Court replicated Article 31's language when concluding that "the ordinary meaning to be given" to Article 12 did not include a right to divorce.^{xvii}

One academic writer, when analysing these decisions, has pointed out that the substance of these cases involved matters in respect of which the European Court of Human Rights afforded a wide discretion to contracting States and that "it is possible that the Vienna Convention was used as a

xiv. [1986] 8 EHRR 123

xv. *Ibid* para 61

xvi. [1987] 9 EHRR 203

xvii. *Ibid* para 51

means to provide greater legitimacy to the interpretation adopted by the Court”.^{xviii} In other words, it should not be thought that the application of the principles of interpretation in the Vienna Convention dictated the outcome of the cases; rather, that the principles of the Vienna Convention conveniently supported the conclusion which the Court had reached on policy considerations.

In addition to requiring an international treaty to be interpreted in accordance with its ordinary meaning, Article 31(1) provides that the ordinary meaning is to be given to the terms of the treaty “in their context and in the light of its object and purpose”. Article 31(2) makes clear that “the context” is deemed to comprise, amongst other things, the preamble and any annexes to the treaty. Article 31(3) requires a Court interpreting a treaty to take into account:

- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) Any relevant rules of international law applicable in the relations between the parties.

Finally, there is provision in Article 32 for an interpreting Court to ensure that the application of Article 31 does not render the ordinary meaning of the treaty ambiguous or obscure, or lead to a result which is manifestly absurd or unreasonable. This outcome may be avoided by a Court having recourse to supplementary means of interpretation which includes the preparatory work of the treaty and the circumstances of its conclusion.

A good example of the European Court of Human Rights reviewing the preparatory work of the treaty is to be found in *Witold Litwa v Poland*^{xix} where, relying on Article 5(1) of the Convention (right to liberty and security), the applicant complained that his detention in a sobering-up centre had been unlawful and arbitrary. The applicant’s ability to assert his rights turned on the wording of one of the derogating circumstances which specified “the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or

xviii. M Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press, 2010) p 29.

xix. [2001] 33 EHRR 53

drug addicts or vagrants". The question for the European Court of Human Rights was whether the applicant could be lawfully detained simply because he was an alcoholic, or whether there had to be an additional reason for his detention, such as prevention of harm to himself or members of the public.

It is most instructive to explore the way in which the European Court of Human Rights resolved this issue, since it stands in stark and glaring contrast to the approach taken by the Court a few years later in the now infamous case of *Hirst v United Kingdom*^{xx} involving prisoner voting:

"The Court affirms that, in ascertaining the Convention meaning of the term 'alcoholics', it will be guided by Articles 31 to 33 of the Vienna Convention ...

In that respect, the Court reiterates that, in the way it is presented in the general rule of interpretation laid down in Article 31 of the Vienna Convention, the process of discovering and ascertaining the true meaning of the terms of the Treaty is a unity, a single combined operation ...

... That process must start from ascertaining the ordinary meaning of the terms of a treaty in their context and in the light of its object and purpose, as laid down in paragraph 1 of Article 31. This is particularly so in relation to the provisions which, like Article 5(1) of the Convention, refer to exceptions to a general rule and which, for this very reason, cannot be given an extensive interpretation.

The Court observes that the word "alcoholics", in its common usage, denotes persons who are addicted to alcohol. On the other hand, in Article 5(1) of the Convention this term is found in a context that includes a reference to several other categories of individuals, that is, persons spreading infectious diseases, persons of unsound mind, drug addicts and vagrants. There is a link between all those persons in that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds. It is therefore legitimate to conclude from this context that a predominant reason why the Convention allows the persons mentioned in paragraph

xx. [2006] 42 EHRR 41

1(e) of Article 5 to be deprived of their liberty is not only that they are dangerous for public safety but also that their own interests may necessitate their detention ...

The Court further finds that this meaning of the term “alcoholics” is confirmed by the preparatory work of the Convention. In that regard, the Court observes that in the commentary on the preliminary draft Convention it is recorded that the text of the relevant Article covered the right of the signatory States to take measures to combat vagrancy and ‘drunkenness’ (*l’alcoolisme* in French). It is further recorded that the Committee of Experts had no doubt that this could be agreed ‘since such restrictions were justified by the requirements of public morality and order’.

On this basis, the Court concludes that the applicant’s detention fell within the ambit of Article 5(1)(e) of the Convention”.^{xxi}

The interesting aspect of the decision rests in the way in which the European Court of Human Rights sought to explore the meaning of the Convention’s text, in the light of the preparatory work and the circumstances in which the relevant words came to be included. It is true that the reference to “object and purpose” in Article 31(1) of the Vienna Convention brings the teleological element of interpretation into the general rule, but as a leading academic writer has pointed out, this element functions “as a means of shedding light on the ordinary meaning rather than merely as an indicator of a general approach to be taken to treaty interpretation”. Moreover, the teleological approach “is not one allowing the general purpose of a treaty to override its text. Rather, object and purpose are modifiers of the ordinary meaning of a term which is being interpreted, in the sense that the ordinary meaning is to be identified in their light”.^{xxii}

It is an enormous pity that the European Court of Human Rights did not confine itself to the application of these principles of interpretation. Instead, the European Court of Human Rights has sought to use the interpretive principle in Article 31(1) as a foundation for the development of its own methods of interpretation, focusing in particular on the Convention’s preamble to maintain human rights and fundamental freedoms. In so doing, the Court’s approach to the Convention’s interpretation has strayed far beyond the

xxi. Ibid paras 59-64

xxii. R Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) pp 189-190

text of the Convention and, most significantly and controversially, into the realm of judicial activism and creativity. For as often as the Court may make mention of its enthusiasm for the purposive approach to interpretation, it is not possible to regard Article 31 as the progenitor of autonomous interpretive concepts such as the “living instrument” doctrine, “common consensus” or “European consensus”, and “the margin of appreciation”. None of these principles of interpretation appear in Articles 31 to 33 of the Vienna Convention and there is no place for them there.

Fork in the road

The European Court of Human Rights encountered the fork in the road between the textual approach to treaty interpretation and the principle of judicial activism more than thirty five years ago, in the seminal case of *Golder v United Kingdom*.^{xxiii} There, a serving prisoner had been refused permission to consult a solicitor with a view to instituting libel proceedings against a prison officer. The European Court of Human Rights held there had been a breach of Article 6 (right to a fair trial) and Article 8 (right to respect for private and family life), the case under Article 6 turning upon whether the right to a fair trial included the right of access to a solicitor.

A majority of the Court held that Article 6 secured a right of access to a solicitor, since, in the words of the Court, “[i]t would be inconceivable ... that Article 6 (1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court”.^{xxiv} The Court explained its justification for the decision in the following terms:

“As stated in Article 31 (2) of the Vienna Convention, the preamble to a treaty forms an integral part of the context. Furthermore, the preamble is generally very useful for the determination of the ‘object’ and ‘purpose’ of the instrument to be construed. In the present case, the most significant passage in the Preamble to the European Convention is the signatory Governments declaring that they are - resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps

xxiii. [1979-80] 1 EHRR 524

xxiv. *Ibid* para 35

for the collective enforcement of certain of the Rights stated in the Universal Declaration of 10 December 1948.

In the Government's view, that recital illustrates the 'selective process' adopted by the draftsmen: that the Convention does not seek to protect Human Rights in general but merely 'certain of the Rights stated in the Universal Declaration' ...

The 'selective' nature of the Convention cannot be put in question ... The Court however considers ... that it would be a mistake to see in this reference a merely 'more or less rhetorical reference', devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to 'take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration' was their profound belief in the rule of law. It seems both natural and in conformity with the principle of good faith to bear in mind this widely proclaimed consideration when interpreting the terms of Article 6 (1) according to their context and in the light of the object and purpose of the Convention ...".^{xxv}

The *Golder* case having exposed an omission in the minimum rights set out in Article 6, the Court determined the issue by reference to the broad aspirations articulated in the Convention's preamble instead of conducting a textual analysis of the words used by the Convention's drafters at the time when the Convention was concluded.

The United Kingdom Judge, Sir Gerald Fitzmaurice, delivered a thundering dissent on the Court's approach, and his reasoning has continued to resonate until the present time. Profoundly disagreeing with the approach which the majority of the European Court of Human Rights had taken, Sir Gerald Fitzmaurice argued for a more cautious approach:

"In my view, the correct approach to the interpretation of Article 6 (1) is to bear in mind not only that it is a provision embodied in an instrument depending for its force upon the agreement—and indeed the *continuing* support—of governments, but also that it is an instrument of a very special kind emulated in the field of human rights only by the Inter-American Convention on Human Rights signed at San José nearly 20 years later ... Speaking generally, the various conventions and covenants on Human Rights, but more

xxv. Ibid para 34

particularly the European Convention, have broken entirely new ground internationally, making heavy inroads on some of the most cherished preserves of governments in the sphere of their domestic jurisdiction or *domaine réservé* ... For these reasons governments have been hesitant to become parties to instruments most of which, apart from the European Convention, have apparently not so far attracted a sufficient number of ratifications to bring them into force ...

These various factors could justify even a somewhat restrictive interpretation of the Convention but, without going as far as that, they must be said, unquestionably, not only to justify, but positively to demand, a cautious and conservative interpretation, particularly as regards any provisions the meaning of which may be uncertain, and where extensive constructions might have the effect of imposing upon the Contracting States obligations they had not really meant to assume, or would not have understood themselves to be assuming ...

Any serious doubt must therefore be resolved in favour of, rather than against, the government concerned—and if it were true, as the Judgment of the Court seeks to suggest, that there *is* no serious doubt in the present case, then one must wonder what it is the participants have been arguing about over approximately the last five years!”^{xxvi}

Sir Gerald Fitzmaurice pointed out that what divided the parties was not so much a disagreement about the meaning of terms as a difference of attitude or frame of mind, and there was no solution to the problem “unless the correct—or rather acceptable—frame of reference can first be determined”.^{xxvii} As events have unfolded, the British Judge’s view has been shown to be both prescient and entirely apposite.

xxvi. Ibid paras 38-39

xxvii. Ibid para 23

A living instrument

The European Court of Human Rights has expanded its remit beyond the intended boundaries of the European Convention on Human Rights by inventing a principle of treaty interpretation which regards the text of the Convention as “a living instrument”. This is not an application of the principle of “dynamic and evolutive” interpretation reflected in Article 31(3)(b) of the Vienna Convention since the latter is engaged where subsequent practice in the application of an international treaty has already established the agreement of the parties regarding its interpretation. There is certainly no agreement amongst the contracting parties as to the application of the living instrument doctrine and unsurprisingly the doctrine had been foreign to the Court’s jurisprudence until a ground-breaking case involving the United Kingdom in 1979.

The first pronouncement by the European Court of Human Rights of the Convention as a “living instrument” occurred in the famous *Isle of Man* case involving birching, *Tyrer v UK*.^{xxviii} The issue in the case was whether an adolescent had been subjected to degrading punishment contrary to Article 3 (prohibition of torture) for assault on a fellow pupil. With a majority of six to one, the European Court of Human Rights held there had been a violation of Article 3, explaining that:

“The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field...”^{xxix}

In point of fact, it was incorrect for the Court to purport to “recall that the Convention is a living instrument” since this was the first time the notion had been mentioned, and even if commonly accepted standards in the penal policy of member States had emerged by this time, which in itself was a highly debatable proposition, it could not be said that, in the language of Article 31(3)(b) of the Vienna Convention, subsequent practice in the application of the Convention had established the agreement of the parties regarding its interpretation. The intellectual sleight of hand perpetrated by

xxviii. [1979-80] 2 EHRR 1

xxix. Ibid, see para 31

the European Court of Human Rights is easily demonstrated by making the simple point that since the birching issue had emerged in a case involving a member State, it could not possibly be said that a prohibition on birching as a means of punishment reflected the commonly accepted standard of *all* parties who had agreed to the Convention.

Nevertheless, the dye was cast and the living instrument doctrine was subsequently developed by the European Court of Human Rights in a number of other cases. In *Sigurdur A Sigurjonsson v Iceland*,^{xxx} the European Court of Human Rights repeated that the Convention was a living instrument which needed to be interpreted in light of modern day conditions,^{xxxi} and in 1995 the Court extended the reach of the doctrine by applying it to the interpretation of Articles 25 and 46 of the Convention which govern the Convention's enforcement machinery.^{xxxii}

The high watermark was reached with the expression of principle articulated by the European Court of Human Rights in *Soering v United Kingdom*.^{xxxiii} This case involved the extradition of a person to a country where the extradited person could face the risk of being exposed to the death penalty in circumstances where the conditions awaiting execution were degrading. Amongst the points considered by the European Court of Human Rights was whether the exception permitted for the death penalty following conviction by court of law set out in Article 2(1) of the Convention should be treated as abrogated by the prohibition in Article 3 against inhuman or degrading treatment or punishment. Plainly, the drafters of the Convention must have contemplated that the imposition of the death penalty following a conviction by court of law would not contravene the Convention, for otherwise the express reference to this exception would have been otiose. But this line of thinking did not restrain the Court from determining that since capital punishment had ceased to exist amongst the contracting parties, it could treat the exception in Article 2 for the death penalty as implicitly abrogated. In the words of the European Court of Human Rights:

“Subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as

xxx. [1993] 16 EHRR 462

xxxi. *Ibid*, para 35

xxxii. *Loizidou v Turkey* [1995] 20 EHRR 99, paras 70 to 72. See also *Selmouni v France* [2000] 29 EHRR 403

xxxiii. [1989] 11 EHRR 439

establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2(1) and hence to remove a textual limit on the scope for evolutive interpretation of Article 3".^{xxxiv}

The application of the living instrument doctrine in this case was criticised by commentators who considered that before reaching this conclusion the European Court of Human Rights ought to have required proof of an intention not to re-introduce this punishment on a future occasion.^{xxxv} It is true that in April 1983 the contracting parties to the Convention agreed to the abolition of the death penalty (Protocol 6), and this was affirmed in May 2002 (Protocol 13), but it does not follow that because contracting countries had ceased to impose capital punishment within their own territories, it necessarily followed that those countries had also decided that, whether in April 1983 or May 2002, the existence of capital punishment in a non-member State should operate to prevent a person's extradition to that State for this reason. The European Court of Human Rights' reliance on subsequent practice to justify its interpretation of Article 3 is not merely a legal fiction; rather, it is illogical thinking and a *non-sequitur*, for it remains incontrovertible that (a) at the time when the contracting parties agreed to the language of Article 3, the exemption for the death penalty was extant, and (b) at the time when the contracting parties agreed to delete the exemption in Article 2 there was no mention whatsoever of any potential impact of the change on the intended reach of Article 2.

Another good illustration of the scope of the living instrument conceived by the European Court of Human Rights can be found in the case of *Selmouni v France*^{xxxvi} where the complainant had been physically and mentally assaulted whilst in police custody. The question was whether this conduct constituted a breach of Article 3 of the Convention (prohibition against torture). During the course of its judgment, in a passage remarkable for the breadth of its judicial creativity, the Court noted that:

"[It] has previously examined cases in which it concluded that there had been treatment which could only be described as torture

xxxiv. Ibid., para 103

xxxv. Caffish and Cancado Trindade: "Les Conventions Americaine et Europeenne des Droits de l'Homme et le Droit International General" [2004-1] 108 RGDIP 5, p 19; Merrills: *The Development of International Law by the European Court of Human Rights*, (2nd ed.,1993) at page 82

xxxvi. [2000] 29 EHRR 403

(*Aksoy v Turkey* [1997] 23 EHRR 553, paragraph 64; *Aydin v Turkey*, [1998] 25 EHRR 251, paragraph 73, 83–84 and 86). However, having regard to the fact that the Convention is a “living instrument which must be interpreted in the light of present-day conditions” (*Tyrer v. United Kingdom* [1979–80] 2 EHRR 1, paragraph 31, *Soering v. United Kingdom* [1989] 11 E.H.R.R. 439, paragraph 102; *Loizidou v. Turkey* [1995] 20 EHRR 99, paragraph 71), the Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies”.^{xxxvii}

The principle in *Soering v United Kingdom* was applied two years later in *Stafford v United Kingdom*^{xxxviii} where the Home Secretary’s role in determining when convicted murderers should be released on licence was held to be incompatible with Article 5 of the Convention (right to liberty and security). On any view, a breach of Article 5 was not an obvious conclusion and the House of Lords had held that the Home Secretary acted within the wide statutory discretion which Parliament had afforded him.^{xxxix} What made the decision in *Stafford v United Kingdom* particularly striking was that the European Court of Human Rights had held in a previous case, *Wynne v United Kingdom*,^{xl} that the Home Secretary’s role in determining when murderers should be released on licence was indeed compatible with Article 5. But the European Court of Human Rights declined to follow its earlier decision because, in the eight short years which had elapsed between these two cases, there had been “significant developments in the domestic sphere” which caused the Court to “re-assess in the light of present-day conditions” the application of the Convention.^{xli}

Supporters of the living instrument doctrine have sought to deflect criticism of its application by blaming the sparseness of the justifications put forward

xxxvii. *Ibid*, para 101

xxxviii. [2002] 35 EHRR 32

xxxix. *R v Secretary of State for the Home Department ex. p Stafford* [1999] 2 A C 38

xl. [1995] 19 EHRR 333

xli. [2002] 35 EHRR 32, para 69

by the European Court of Human Rights in these cases. For example, Professor Mowbray records that:

“A weakness in the Court’s resort to the living instrument doctrine is the sparseness of the justifications for its application in some cases. As we have already observed, it was introduced in *Tyler* with virtually no explanation of its origins, benefits and limitations. While in *Selmouni* the Court referred to the ‘increasingly high standards being required in the area of protection of human rights’ without expressly providing linked supporting evidence. Such failures give ammunition to critics who contend that the Court is prone to policy making. A greater judicial willingness to elaborate upon the application of the doctrine in specific cases would help alleviate potential fears that it is simply a cover for subjective ad-hockery.”^{xlii}

However, the flaw with the living instrument doctrine lies not in its articulation but its conception. It is a construct which the European Court of Human Rights has used as a fig leaf to cover its enthusiasm for judicial creativity, at the expense of the Convention’s scope which the Convention’s drafters had intended. The simple reality is that the European Court of Human Rights has been over-reaching itself in its methods of interpretation and transgressed into the realm of policy making. As one distinguished former Judge of the Court has frankly acknowledged:

“... the Convention organs have on occasion reached the limits of what can be regarded as treaty interpretation in the legal sense. At times they have perhaps even crossed the boundary and entered territory which is no longer that of treaty interpretation but is actually legal policy-making.”^{xliii}

European common consensus

Articles 31 to 33 of the Vienna Convention on the Law of Treaties do not contain any reference to the notion that an international treaty should be applied in accordance with a Court’s perception of a common consensus pertaining amongst the signatory States as to how the treaty should be

xlii. Mowbray, *The Creativity of the European Court of Human Rights* [2005] HRLR 5:1, p 71

xliii. Judge Franz Matscher, *Methods of Interpretation of the Convention*, in “*The European System for the Protection of Human Rights*”, R.St. J. Macdonald et al. ed., (1993) Martinus Nijhoff Publishers, see pages 69-70, Judge Matscher was the Austrian Judge of the Court between 1977 and 1998

applied in a particular case. Nonetheless, the language of a common consensus is frequently employed by the European Court of Human Rights when explaining its decisions.

Supporters of the Court's approach acknowledge that the standards for interpreting the Convention differ from those applicable to other international instruments, justifying the difference by reference to the fact that the Convention is based on a common tradition of constitutional laws and large measure of legal tradition common to the countries of Europe.^{xliv} If the European Court of Human Rights had confined itself to the common traditions of the contracting parties articulated in the Convention's text, this approach would have been unobjectionable. Instead, the Court has used the language of common consensus as a cloak for its incremental extension of the Convention's application beyond the agreement of the contracting parties. As the writers of a leading textbook acknowledge, when deciding a case by reference to a common consensus the European Court of Human Rights "does not necessarily wait until only the defendant state remains out of line before it recognizes a new approach."^{xlv} Yet if other member States are also out of line, it begs the question as to whether the common consensus perceived by the Court exists at all. The point is easily demonstrated by reference to the number of dissenting judgments in these cases. If the Court's Judges are not agreed amongst themselves as to the existence of a common consensus, the vacuity of the Court's language is brutally exposed.

It is a difficult if not impossible task to discern the existence of a common consensus amongst Judges from 47 disparate nations. Moreover, there is no guidance in the Convention or from the European Court of Human Rights itself as to what is meant by a common consensus. Are the Judges seeking to discern general agreement amongst the member States, and if not unanimous agreement, by what majority is consensus to be determined? Also, to what is the common consensus to relate – a legal consensus, or a social and political consensus? And is the Court looking for a consensus amongst the political class, the general public or perhaps an expert group? These questions demonstrate the problems inherent in the application of a common consensus approach to the interpretation of the Convention.

The divergent opinions expressed by members of the European Court

xliv. Jacobs, White & Ovey, *The European Convention on Human Rights* (5th edn, Oxford University Press) p 77.

xlv. Harris, O'Boyle & Warbrick, *Law of the European Court of Human Rights* (2nd edn, Oxford University Press) p.8.

of Human Rights in *Frette v France*,^{xlvi} a case involving the rejection of an application by a single man to adopt a child, is a paradigm illustration of the problem. The majority of the Court noted that “[I]t was indisputable that there is no common ground on the question”,^{xlvii} whilst three dissenting Judges reached the opposite conclusion, that “it may ... be reasonably argued that a European consensus is now emerging in this area”.^{xlviii}

This is not to say that the outcomes of cases where the European Court of Human Rights has sought to have applied the common consensus approach are necessarily wrong. Indeed, the history of the European Court of Human Rights is replete with examples of cases where the Court has found no breach of the Convention in the absence of agreement that a common consensus exists.^{xlix} Rather, it is the Court’s methodology which is criticised since in the converse situation where the European Court of Human Rights does determine the existence of a common consensus, the consensus will be more virtual than real. This being so, it is not a sound footing for any form of judicial activism when determining the extent of Convention rights.

The difficulties of the common consensus approach are graphically illustrated by a consideration of the way in which the European Court of Human Rights reached its decision in *Dudgeon v United Kingdom*.¹ The Court held by a majority decision of 15 to 4 that the law in Northern Ireland criminally prohibiting homosexual activity between consenting males over 21 infringed Article 8 of the Convention (right to respect for private and family life). Today, few people would quarrel with the outcome, but the way in which the Court reached its decision is instructive. It would surely have been open to the Court to have decided the case by concluding that the original intent of the Convention must have been to protect against discriminatory laws of any kind. In the wake of the Nuremberg Trials, the Convention’s drafters would have been acutely aware that Hitler’s discriminatory laws had been directed at homosexuals as well as other minority groups. Instead, the Court resorted to the concept of an emerging common consensus with divisive effect.

In an effort to isolate the position in Northern Ireland, the European Court

xlvi. *Frette v France* [2004] 38 EHRR 21

xlvii. *Ibid* para 41

xlviii. *Ibid* per Sir Nicholas Bratza, Judge Fuhrmann and Judge Tulkens, para 0-112

xlix. See, for example, *X, Y and Z v UK* [1997] 24 EHRR 143; *Vo v France* [2005] 40 EHRR 12 v

1. [1982] 4 EHRR 149

of Human Rights noted that:

“As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member-States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member-States”.^{li}

Unsurprisingly, the approach taken by the majority of the European Court of Human Rights was not shared by all. One dissenting Judge disagreed with the majority decision, noting that “all civilised countries until recent years [had] penalised sodomy and buggery and similar unnatural practices” and that [t]here is no uniform European conception of morals”.^{lii} Another dissenting Judge disputed that the common consensus was relevant since “[t]he 21 countries making up the Council of Europe extend[ed] geographically from Turkey to Iceland and from the Mediterranean to the Arctic Circle and encompass[ed] considerable diversities of culture and moral values”.^{liii}

To sum up, as writers of one of the leading textbooks have noted:

“Even establishing a European consensus is a formidable proposition in a Convention system of now nearly fifty states, the traditions of which are more diverse than they were when the Court first seized on the idea of a European standard as an element in the interpretation of the Convention”.^{liv}

Margin of appreciation

The margin of appreciation is the mechanism applied by the European Court of Human Rights to limit the sphere of its activity by recognising that it should defer to the judgment of member States when determining whether

li. Ibid para 60

lii. Ibid per Judge Zekia paras 2, 5A

liii. Ibid per Judge Walsh para 15

liv. Harris, O’Boyle & Warbrick, *Law of the European Court of Human Rights* (2nd edn. Oxford University Press) p 354; see also Helfer, ‘Consensus, Coherence and the European Court of Human Rights’ (1993) 26 *Cornell International Law Journal* 133, 135

or not there has been a breach of the Convention. As one academic writer describes it:

“On the structural concept, the margin of appreciation imposes limits on the powers of judicial review by virtue of the fact that the European Convention of Human Rights is an international convention. It is the idea that the [European Court of Human Rights’] power to review decisions taken by domestic authorities should be more limited than the powers of a national constitutional court or other national bodies that monitors or review compliance with an entrenched Bill of Rights.”^{lv}

The origin of the margin of appreciation is found in the case of *Handyside v United Kingdom*^{lvi} where the European Court of Human Rights held that a conviction for possessing an obscene article, the Little Red Schoolbook, was a justified limitation upon freedom of expression. Although Article 10(1) of the Convention guarantees freedom of expression, Article 10(2) makes clear that the protection is “subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”. The rights enshrined in Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), and Article 11 (freedom of assembly and association) are subject to similar exclusions. The key aspect focuses upon an assessment of whether the derogating measure, such as offences under the Obscene Publications Act 1957 in the *Handyside* case, were “necessary in a democratic society”, and more particularly, whether the determination of this issue fell to be made by a democratically elected Parliament, with its legislation applied by a national Court or the European Court of Human Rights sitting in Strasbourg.

It was against this background that the Court recognized in the *Handyside* case that “[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better

lv. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007) p 90

lvi. [1979-80] 1 EHRR 737

position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them. Consequently, Article 10 (2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator (‘prescribed by law’) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.”^{lvii}

The tender area, of course, is the scope for intervention by the European Court of Human Rights when it forms a judgment about the necessity of a measure which is different from the judgment reached by a domestic legislature or national court. As the Court noted, the contracting States do not have an unlimited power of appreciation.^{lviii}

In the years which have passed since the *Handyside* case, the width of the margin of appreciation has broadened considerably. Following hard on the heels of the *Handyside* case, the European Court of Human Rights repeated its articulation of the margin of appreciation principle, on this occasion widening its application in an Article 10 case where an injunction had been granted against a newspaper to restrain reporting of the Thalidomide tragedy. The European Court of Human Rights made clear in *Sunday Times v United Kingdom*^{lix} that its jurisdiction was not limited to ascertaining whether a contracting State had exercised its discretion reasonably, carefully and in good faith. A contracting State remains subject to the Court’s control as regards the compatibility of its conduct with the engagements it has undertaken under the Convention, which, in the view of the Court, is a different matter.^{lx}

The outcome of *Handyside v United Kingdom* and *Sunday Times v United Kingdom* cases may not be objectionable, but the difficulty with the methodology is that it requires the European Court of Human Rights to substitute its own judgment for the judgment made by a democratic legislature or national court when determining whether or not a restrictive measure is “necessary” and therefore compatible with rights contained in the Convention. Inevitably, there will be an element of subjective discretion injected into the decision-making process, as the Court came close to

lvii. Ibid para 48

lviii. Ibid para 49

lix. [1979-80] 2 EHRR 245

lx. Ibid para 59

acknowledging in *Hatton v United Kingdom*^{lxi} when it noted that conflicting views regarding the application of the margin of appreciation could be reconciled “only by reference to the context of a particular case”.^{lxii} The writers of a leading textbook express the position well when they note that although the margin of appreciation principle can probably be justified, “the difficulty lies not so much in allowing it as in deciding precisely when and how to apply it to the facts of particular cases”.^{lxiii}

A key case in point is *Dickson v United Kingdom*,^{lxiv} where the European Court of Human Rights held that Article 8 (right to respect for private and family life) was infringed after a convicted prisoner was refused permission to use facilities for artificial insemination. Whilst serving as a prisoner, he met his wife through a penfriend arrangement and they married. But having been convicted of murder, it was unlikely that they would conceive naturally, given the likely age of the prisoner at his notional release date. When refusing permission, the Secretary of State was concerned about the impact on any child of the prolonged absence from his or her father, due to the father’s incarceration. The European Court of Human Rights noted that although this was an area in which the contracting states enjoyed a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals, nevertheless the Secretary of State’s decision “effectively excluded any real weighing of the competing individual and public interests, and prevented the required assessment of the proportionality of a restriction, in any individual case”.^{lxv} Five dissenting Judges saw the matter differently, noting that “States have direct knowledge of their society and its needs, which the Court does not have [and that where] they provide for an adequate legal basis, where the legal restrictions serve a legitimate aim and where there is room to balance different interests, the margin of appreciation of states should be recognised”.^{lxvi}

In many cases, the application of the margin of appreciation is inextricably

lxi. [2003] 37 EHRR 28

lxii. *Ibid* para 103

lxiii. Harris, O’Boyle and Warbrick, *Law of the European Court of Human Rights* (2nd edn, Oxford University Press) p 14.

lxiv. [2008] 46 EHRR 41

lxv. *Ibid* para 82

lxvi. *Ibid* para 0-116

linked with the European Court of Human Rights' views on European common consensus and the interpretive doctrine of a living instrument. The point is neatly demonstrated by consideration of the following passage from the Court's judgment in *A, B and C v Ireland*^{lxvii} where the Court was asked to consider whether Ireland's prohibition on abortion was compatible with the Convention:

“... the question remains whether this wide margin of appreciation is narrowed by the existence of a relevant consensus. The existence of a consensus has long played a role in the development and evolution of Convention protections beginning with *Tyrer v United Kingdom*, the Convention being considered a “living instrument” to be interpreted in the light of present-day conditions. Consensus has therefore been invoked to justify a dynamic interpretation of the Convention.^{lxviii}

Conclusion

The coalescence of these interpretive tools - namely, the margin of appreciation, a European common consensus, and the notion of a living instrument - have underpinned an era of judicial activism by the European Court of Human Rights, but at a significant cost. They have led the European Court of Human Rights astray, for in a number of emblematic cases the Court has utilised these tools to exceed its remit and stray far away from the Convention's original intent. The decisions have exposed the European Court of Human Rights to unprecedented criticism in the United Kingdom, with the consequence that the assertion of Convention rights is frequently reported by the media as a refuge for criminals and undeserving persons. With strongly worded attacks from politicians and senior Judges alike, the cause of human rights is seriously diminished and worryingly debased.

lxvii. [2011] 53 EHRR 13

lxviii. Ibid para 234

PART 2

TO WITHDRAW OR NOT TO WITHDRAW

Arguments for and against withdrawal by the United Kingdom from the European Convention on Human Rights

Political and media disquiet

Prisoner voting

Judge Sir Stephen Fitzmaurice's prediction about the consequences which would follow if the European Court of Human Rights exceeded its interpretational remit have been borne out by the furore following the Court's decision in *Hirst v United Kingdom*.^{lxix} The Court determined that section 3 of the Representation of the People Act 1983 infringed a prisoner's Convention rights by preventing him from voting during the period of his imprisonment. The Convention right contained in Article 3 of Protocol No 1 required contracting States "to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

Although the Court recognised that contracting States must be allowed a wide margin of appreciation in this sphere and there are numerous ways of organising and running electoral systems which each contracting State can mould into their own democratic vision,^{lxx} ultimately it was for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 had been met.^{lxxi} In the Court's view, automatic disqualification

lxix. [2006] 42 EHRR 41, p 505, p 506

lxx. Ibid para 61

lxxi. Ibid para 62

of prisoners from voting fell outside of the wide margin of appreciation,^{lxxii} notwithstanding the fact that the United Kingdom was not alone among Convention countries in depriving all convicted prisoners of the right to vote and that the law in the United Kingdom is less far-reaching than in certain other States.^{lxxiii}

Although the decision in *Hirst v United Kingdom* was delivered in October 2005, the United Kingdom has steadfastly refused to amend section 3 of the Representation of the People Act 1983. On the 10th February 2011, the House of Commons voted to ignore the decision. The resolution before the House was expressed in the following terms:

“That this House notes the ruling of the European Court of Human Rights in *Hirst v United Kingdom ...*; acknowledges the treaty obligations of the UK; is of the opinion that legislative decisions of this nature should be a matter for democratically-elected lawmakers; and supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand”.^{lxxiv}

The resolution was passed by a majority of 234 to 22.^{lxxv}

It is disastrous for the cause of human rights for a situation to have arisen whereby the United Kingdom is openly defying a European Court of Human Rights judgment. But as Jack Straw, who held high political office as former Home Secretary, Foreign Secretary and Secretary of State for Justice between 1997 and 2010, said during the debate:

“... [T]he problem is not the plain text of the Convention, but the way in which it has been over-interpreted to extend the jurisdiction of the European Court ... [T]he problem has arisen because of the judicial activism of the Court in Strasbourg, which is widening its role not only beyond anything anticipated in the founding treaties but beyond anything anticipated by the subsequent active consent

lxxii. Ibid para 82

lxxiii. Ibid para 81

lxxiv. *Hansard*, HC, column 493, (10 February 2011)

lxxv. Ibid para 584

of all the state parties, including the UK.”^{lxxvi}

The political disquiet is readily understandable, for as Dominic Raab explained in his paper published by Civitas, the decision flew in the face of the agreement made at the time when the Convention was signed.^{lxxvii} In August 1949, the French delegate sought to incorporate the words “universal suffrage” in the text of Article 3 of Protocol 1 but after objections from the British delegate the French proposal was withdrawn. The British delegate pointed out that although suffrage in the United Kingdom was extremely wide, it was not unqualified and these qualifications would vary from State to State. Raab does not mince his words:

“In *Hirst*, the Strasbourg Court ignored the normal rules of treaty interpretation and defied the fundamental democratic principle that states are only bound by the international treaty obligations they freely assume”.^{lxxviii}

IRA and Gibraltar

Another case which provoked criticism was the decision of the European Court of Human Rights in *McCann v United Kingdom*,^{lxxix} where the Court decided that Article 2 (the right to life) had been infringed after SAS soldiers had killed three IRA terrorist suspects in Gibraltar. The soldiers believed that the suspects were about to detonate a bomb. Although the Court rejected the suggestion that the killing was planned, it held that the anti-terrorist operation was badly organised and the use of violence could have been avoided with better organisation. In the words of the Court:

“In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the

lxxvi. Ibid column 501-502

lxxvii. Raab, *Strasbourg in the Dock: Prisoner voting, human rights & the case for democracy* (Civitas, 2011) pp 5-6.

lxxviii. Ibid p 6.

lxxix. [1996] 21 EHRR 97

meaning of Article 2 paragraph 2 (a) of the Convention”.^{lxxx}

However, 9 of the 19 Judges dissented from this conclusion. The dissenting Judges were concerned that the Court should resist the temptations to micro-manage the operation with the benefit of hindsight:

“The authorities had at the time to plan and make decisions on the basis of incomplete information. Only the suspects knew at all precisely what they intended; and it was part of their purpose, as it had no doubt been part of their training, to ensure that as little as possible of their intentions was revealed. It would be wrong to conclude in retrospect that a particular course would, as things later transpired, have been better than one adopted at the time under the pressures of an on-going anti-terrorist operation and that the latter course must therefore be regarded as culpably mistaken”.^{lxxxi}

Moreover, the dissenting Judges were satisfied that “there were no failings in the organisation and control of the operation which could justify a conclusion that force was used against the suspects disproportionately to the purpose of defending innocent persons from unlawful violence”.^{lxxxii}

The United Kingdom’s reaction to the Court’s judgment was ferocious. The following day the Independent carried a report under the headline “Tory anger as European Court condemns Gibraltar killings” which recorded that:

“The Government was last night reviewing its support for the European Convention on Human Rights, after a Strasbourg court ruling condemned the SAS killing of three IRA terrorists on Gibraltar in 1988. Downing Street reacted with incredulity and anger, dismissing the judgment as “defying common sense”.^{lxxxiii}

Deportation

Perhaps the greatest amount of disquiet has been voiced regarding the application of Article 8 (right to respect for private and family life) and deportation of persons who have come to the United Kingdom and

lxxx. Ibid para 213

lxxxi. Ibid Joint Dissenting Opinion para 8

lxxxii. Ibid para 25

lxxxiii. Mills, Brown & McKittrick, *Tory Anger as European Court condemns Gibraltar killings*, The Independent, 28 September 1995, <http://www.independent.co.uk/news/tory-anger-as-european-court-condemns-gibraltar-killings-1603179.html>

committed criminal offences whilst here. It is one thing to stop deportation on the grounds that the deportee might lose his life (Article 2) or be tortured (Article 3), but preventing deportation on grounds of respect for private and family life (Article 8) is something else. Cases such as *Chindamo v United Kingdom*, where the United Kingdom was prevented from deporting an Italian citizen after he was convicted of murdering the head teacher Philip Lawrence on the ground of respect for his private and family life, have continued to cause much political and public concern.^{lxxxiv}

Theresa's cat

The touch paper was lit under this topic at the Conservative Party conference in October 2011 after Theresa May, the Home Secretary, spoke about the “violent drug dealer who cannot be sent home because his daughter for whom he pays no maintenance lives here, the robber who cannot be removed because he has a girlfriend, [and] the illegal immigrant who cannot be deported because – and I am not making this up – he had a pet cat”.^{lxxxv} In point of fact, the pet cat did not found the basis for stopping the migrant’s deportation when the case was reconsidered on the second occasion by the Immigration and Asylum Tribunal.^{lxxxvi} But the position was different when the case was first considered by the Tribunal.^{lxxxvii} On this occasion, the keeping of the pet cat was taken into account by the Judge as “reinforcing his conclusion on the strength and quality of the family life that the appellant and his partner enjoy”.^{lxxxviii} Therefore, the thrust of the point the Home Secretary was seeking to make in the “catgate” saga was unquestionably correct. It is surely absurd that a state of affairs has been reached whereby it is relevant for an Immigration Tribunal to spend time considering what inferences can properly be made from a migrant’s ownership of a cat when considering the application of Article 8 rights in a deportation case.

Criticisms have been directed at the United Kingdom’s domestic courts, with claims that Judges are ignoring the exceptional circumstances in which a migrant’s rights under Article 8 can be defeated, for example, where

lxxxiv. Court rejects challenge over Chindamo deportation ruling, *The Guardian*, 31 October 2007, Q & A, The Chindamo case, BBC website <http://news.bbc.co.uk/1/hi/uk/6958638.stm>

lxxxv. Theresa May, Conservative Party Conference speech, 4 October 2011, <http://www.politics.co.uk/comment-analysis/2011/10/04/theresa-may-speech-in-full>

lxxxvi. Asylum and Immigration Tribunal, IA/14578/2008, 10.12.08, Senior Immigration Judge Gleeson

lxxxvii. *Ibid* Immigration Judge Devittie

lxxxviii. *Ibid* para 15

deportation is necessary for the prevention of crime or disorder.^{lxxxix} But the reality of the position is that the British courts are constantly looking over their shoulder towards Strasbourg, since in the last twenty years the European Court of Human Rights has arrogated for itself the power to micro-manage the outcome of these cases. In short, Britain has lost control of her borders.

In the case of *Moustaquim v Belgium*,^{xc} the European Court of Human Rights made clear that although contracting States were concerned to control the entry, residence and expulsion of aliens, the Court would find a breach of Article 8 rights if the contracting State could not show that deportation was necessary in a democratic society and justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.^{xcii} In reaching this determination, the European Court of Human Rights made clear in *Boultif v Switzerland*^{xciii} that it would not confine itself to deciding the case on an issue of principle but rather the Court would examine in detail the evidence of the migrant's private and family life:

“In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he is going to be expelled; the time elapsed since the offence was committed as well as the applicant's conduct in that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage, and if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse is likely to encounter in the country of origin, though the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself exclude an expulsion”.^{xciii}

lxxxix. Stop foreign criminals using family rights to dodge justice, Daily Telegraph, 23 April 2011; We can and should deport foreign criminals, never mind their family ties, The Guardian 11 October 2011

xc. [1991] 13 EHRR 802

xcii. Ibid para 43

xciii. [2001] 33 EHRR 50

xciii. Ibid para 48

In this type of case, the Court has indicated it will perform a balancing exercise, to establish whether the refusal to renew the applicant's permission to reside has achieved a fair balance between the interests of all the parties, namely, on the one hand, the applicant's right to respect for his family life and, on the other, the prevention of disorder or crime.^{xciv}

The view from Strasbourg

The current President of the European Court of Human Rights, the British Judge Sir Nicholas Bratza, is unrepentant about the approach which the Court has been taking. In an article published in the Independent newspaper in January 2012, Sir Nicholas Bratza said that the criticism relating to unwarranted interference is "simply not borne out by the facts":

"The Strasbourg court has been particularly respectful of decisions emanating from courts in the UK since the coming into effect of the Human Rights Act, and this is because of the very high quality of those judgments. To take 2011 as the most recent example: of the 955 applications against the UK, the Court found a violation of the Convention in just eight decided cases".^{xcv}

This was a moderated response for the British Judge. In an academic article published some months earlier, Sir Nicholas Bratza had written that the "vitriolic – and I am afraid to say, xenophobic – fury directed against the judges of the Court is unprecedented in my experience". He added that "[t]he scale and tone of the current hostility directed towards the Court, and the Convention system as a whole, by the press, by members of the Westminster Parliament and by senior members of the Government has created understandable dismay and resentment among the judges in Strasbourg".^{xcvi}

Michael O'Boyle, the Deputy Registrar of the European Court of Human Rights, has also responded to the criticisms, somewhat acerbically noting that "[o]ver the years certain governments have discovered that it is electorally popular to criticise international courts such as the Strasbourg court: they are easy targets, particularly because they tend, like all courts, not to answer back".^{xcvii}

xciv. *Yılmaz v Germany* [2004] 38 EHRR 23, para 43; *Keles v Germany* [2007] 44 EHRR 12, paras 54-55

xcv. Britain should be defending European justice, not attacking it, Independent, 24 January 2012

xcvi. Bratza, "The relationship between the UK courts and Strasbourg" [2011] European Human Rights Law Review 505

xcvii. O'Boyle: "The Future of the European Court of Human Rights"[2011] 12(10) German Law Journal 1862

The approach to interpretation of the Convention has some strong supporters in the United Kingdom too. Writing in *The Times* in December 2011, Lord Lester expressed his view that “criticisms of the supposed judicial “activism” of the European Court of Human Rights are unfair and politically motivated; they are also dangerous and counter-productive”. Citing the decision in *Hirst v United Kingdom* as an example, Lord Lester said that:

“It is also untrue to claim that the court has overreached itself or become “activist” in a political sense. It has repeatedly stressed that national authorities are better placed than an international court to judge local needs and conditions and that these national courts and parliaments have a wide margin of discretion in enforcing convention rights at home”.^{xcviii}

Interestingly, Lord Lester’s defence of the European Court of Human Rights in 2011 contrasts with his recognition thirteen years earlier that, as the number of contracting parties to the European Convention on Human Rights increased, “this enormous court will find itself having great difficulty in developing consistent principles of law ... [and] ... [t]here will be the danger of variable geometry developing in the human rights area”.^{xcix}

The defenders of the Court might have been able to overcome the sting of the criticisms if they had been confined to comments made by politicians and the media, but when strong criticisms of the European Court of Human Rights are made by an impressive list of senior Judges with no political axe to grind, the hollowness of the defenders’ protestations is brutally exposed.

Judicial concerns

A number of senior Judges have expressed concerns about the way in which the European Court of Human Rights has approached its work. In particular, Judges have criticised the Court’s failure to apply the principle of subsidiarity with sufficient rigour and a tendency to treat the margin of appreciation as too narrow in certain instances. Although the concepts of subsidiarity and margin of appreciation are distinct, in the sense that subsidiarity relates to the type of cases selected for hearing by the Court whereas margin of appreciation attaches to the way in which the selected cases are decided, the common thread running through the criticisms is that the European

xcviii. *The Times*, 6 December 2011

xcix. Debate on the Human Rights Act, Hansard, HL, Vol 584 col 1269 (19 January 1998)

Court of Human Rights is deciding issues in cases which ought to be left for national Courts to determine. This is a powerful point, since it suggests that the European Court of Human Rights has been trespassing upon national sovereignty in a manner neither envisaged nor justified by the Convention.

Lady Justice Arden

The criticism that the European Court of Human Rights has failed to apply the principle of subsidiarity with sufficient rigour is the less contentious of the two criticisms, and it is also essentially pragmatic since the Court is weltering under the weight of its enormous, and unanticipated, caseload. Lady Justice Arden summarised the position in the Annual Sir Thomas More Lecture in 2009:

“My view is that subsidiarity, including the margin of appreciation, is a concept which the Strasbourg court should develop in its jurisprudence. It should also build on the idea of subsidiarity in another direction. The Strasbourg Court has a daunting burden of work. In 2008, the Strasbourg Court issued 30,200 decisions but it received 50,000 applications, increasing its backlog of cases to 97,000. Some of these cases may be capable of being dismissed summarily as manifestly ill-founded. However, that would still leave a large residue. The only solution as I see it is to share the load with the national courts ...”^c

Lord Hoffmann

The most trenchant criticism of the role played by the European Court of Human Rights came from Lord Hoffmann when he delivered the Annual Lecture of the Judicial Studies Board in 2009:

“If one accepts, as I have so far argued, that human rights are universal in abstraction but national in application, it is not easy to see how in principle an international court was going to perform this function of deciding individual cases, still less why the Strasbourg court was thought to be a suitable body to do so

The fact that the 10 original Members States of the Council of Europe subscribed to a statement of human rights in the same terms did not mean that they had agreed to uniformity of application of these

c. Lady Justice Arden, “Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe”, Annual Sir Thomas More Lecture 2009, para 58

abstract rights in each of their countries, still less in the 47 States which now belong...

The Strasbourg court, on the other hand, has no mandate to unify the laws of Europe on the many subjects which may arguably touch upon human rights”.^{ci}

Lord Kerr

Lord Hoffman’s unhappiness with the European Court of Human Rights was echoed by Lord Kerr in a lecture at University College Dublin in November 2009:

“I need not dilate on Lord Hoffmann’s criticism of some of the judgments delivered in those cases ... beyond saying that he demonstrated, fairly effectively to my mind, how the Strasbourg court had in two of the cases reversed settled law that had provided an entirely workable framework in the UK in the past”.^{cii}

Lord Scott

Lord Scott is also deeply unhappy with the quality of decisions made by the European Court of Human Rights in the context of Article 1 of the 1st Protocol which provides that a person shall not be “deprived of his possession[s] except in the public interest and subject to the conditions provided for by law”. In *Stretch v United Kingdom*,^{ciii} the European Court of Human Rights held that when a local authority made a promise to extend a lease in circumstances where it had no legal ability to make the promise, the disappointed lessee’s Convention rights had been infringed because his legitimate expectation constituted a possession for this purpose. Lord Scott described the Court’s reasoning as “extraordinary”, noting that “the Strasbourg Court [had] show[n] itself willing to expand the Article 1 concept of ‘possessions’ to a startling extent”.^{civ} Noting that the lessee’s disappointment had not been caused by any arbitrary executive interference with possessions and that the decision was “profoundly unsatisfactory”, Lord Scott asked:

ci. Lord Hoffmann, “The Universality of Human Rights”, Judicial Studies Board Annual Lecture, 19 March 2009, para. 23-24

cii. Lord Kerr, “The Conversation between Strasbourg and National Courts-Dialogue or Dictation”, J.M Kelly Memorial Lecture, University College Dublin, 20 November 2009, p. 14

ciii. [2004] 38 EHRR 12

civ. Lord Scott: Property Rights and the European Convention on Human Rights, Paper delivered to the Property Bar Association, 19 November 2009. In *Doherty v Birmingham City Council* [2008] UKHL 57, Lord Scott (supported by Lord Hope and Lord Rodger) had criticised an earlier decision of the European Court of Human Rights, *McCann v United Kingdom* [2008] 47 EHRR 40, on the application of Article 8 as based on a “mistaken understanding” of English law.

“What can be the justification for treating Article 1 as a springboard for the grant of compensation for a misrepresentation of law not made knowingly and not found to have been made negligently?”

Baroness Hale

The most powerful criticism of the approach taken by the European Court of Human Rights came from Baroness Hale in a lecture at Gresham College last year. As Baroness Hale acknowledged, she is a supporter of the work of the Strasbourg Court, and there is a heartfelt quality to her words:

“..sometimes we have been troubled by an apparent narrowing of the margin [of appreciation]. *Hirst* is one example. *S and Marper v United Kingdom* [the case involving retention of DNA records] may be another. It leaves the United Kingdom in the difficult position of being told that a ‘blanket and indiscriminate’ power to hold fingerprints, cellular samples and DNA profiles ... overstepped the margin of appreciation. Yet beyond saying it went too far in those cases, the decision gives little guidance on what rules would be proportionate to the admittedly legitimate and important aim of detecting and deterring crime. My particular concern is that the positive obligation to protect the vulnerable against rape and other attacks upon the right to respect for their bodily integrity should not be hindered or hampered by an unduly restrictive approach. It is no wonder that Parliament has taken different views about where the balance should be struck ...

As a supporter of the Convention and the work of the Strasbourg Court, my plea to them is to accept that there are some natural limits to the growth and development of the living tree. Otherwise I have a fear that their judgments, and those of the national courts which follow them, will increasingly be defied by our governments and Parliaments. This is a very rare phenomenon at present and long may it remain so”.^{cv}

A judicial swerve

The recent judicial swerve on the binding nature of the Court’s decisions also evidences the extent of the concern about the excessive intervention by the European Court of Human Rights in domestic affairs.

cv. Baroness Hale of Richmond, “Beanstalk or Living Instrument? How Tall Can the ECHR Grow?”, Barnard’s Inn Reading 2011

In the *Alconbury*^{cv} case involving the power of the Secretary of State for the Environment to decide planning applications, Lord Slynn set the scene in 2003 by making clear that as a general rule the UK's domestic courts must follow the jurisprudence of the European Court of Human Rights.^{cvii} The high watermark was reached six years later in *Secretary of State for the Home Department v AF*^{cviii} where, prior to the case reaching the House of Lords for determination, the European Court of Human Rights held in *A v United Kingdom*^{cix} that Article 6 (right to a fair trial) required a terrorist suspect to be informed of the gist of the case against him, and it would be insufficient merely to inform a Court appointed special advocate acting on the suspect's behalf. The House of Lords allowed the appeal, following the earlier European Court of Human Rights decision. Lord Hoffman expressed "very considerable regret" because he thought that the European Court of Human Rights decision was wrong.^{cx}

"Nevertheless, I think that your Lordships have no choice but to submit. It is true that section 2(1)(a) of the Human Rights Act 1998 requires us only to "take into account" decisions of the European Court of Human Rights. As a matter of our domestic law, we could take the decision in *A v United Kingdom* into account but nevertheless prefer our own view. But the United Kingdom is bound by the Convention, as a matter of international law, to accept the decisions of the European Court of Human Rights on its interpretation. To reject such a decision would almost certainly put this country in breach of the international obligation which it accepted when it acceded to the Convention. I can see no advantage in your Lordships doing so."^{cx}

Lord Rodgers noted pithily that "[e]ven though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentorum locutum, iudicium finitum* - Strasbourg has spoken, the case is closed".^{cxii}

cv. *R(Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295

cvii. *Ibid* para 26

cviii. [2010] 2 AC 269

cix. [2009] 49 EHRR 29

cx. [2010] 2 AC 269 para 70

cx. *Ibid* para 70

cxii. *Ibid* para 98

Lord Carswell was diffidently deferential:

“Whatever latitude this formulation may permit, the authority of a considered statement of the Grand Chamber is such that our courts have no option but to accept and apply it. Views may differ as to which approach is preferable, and not all may be persuaded that the Grand Chamber’s ruling is the preferable approach. But I am in agreement with your Lordships that we are obliged to accept and apply the Grand Chamber’s principles ...”.^{cxiii}

Lord Brown also commented that the House of Lords was “bound to apply *A [v United Kingdom]* in the determination of these appeals”.^{cxiv}

In the last twelve months, the tone has changed as members of the senior judiciary have sought to wriggle away from the strictures of the European Court of Human Rights jurisprudence.

Lord Neuberger, giving judgment on behalf of nine Supreme Court Justices, in *Pinnock v Manchester City Council*,^{cxv} a housing case involving Article 8 (right to respect for private and family life) issues, has recalibrated the United Kingdom’s position on the binding nature of Strasbourg decisions in more nuanced terms:

“This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law: see eg *R v Horncastle* [2010] 2 AC 373 . Of course, we should usually follow a clear and constant line of decisions by the European court: *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 . But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in *Doherty v Birmingham City Council* [2009] AC 367, para 126, section 2 of the 1998 Act requires our courts to “take into account” European court decisions, not necessarily to follow them. Where, however, there is a clear and

cxiii. Ibid para 108

cxiv. Ibid para 114

cxv. [2011] 2 AC 104

constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line.^{cxvi}

Also, in evidence to the House of Lords Select Committee on the Constitution on 19th October 2011, Lord Judge indicated that the Supreme Court has yet to finalise its stance on the point.^{cxvii} Asked by Lord Renton whether Strasbourg always wins, Lord Judge contradicted the answer given by Lord Phillips^{cxviii} and expressed the position in the following terms:

“I would like to suggest that maybe Strasbourg should not win and does not need to win ... I think for Strasbourg there is yet a debate to happen—it will have to happen in the Supreme Court - about what we really do mean in the Human Rights Act, or what Parliament means in the Human Rights Act when it said the courts in this country must take account of the decisions of the European Court of Human Rights. I myself think it is at least arguable that, having taken account of the decisions of the court in Strasbourg, our courts are not bound by them. They have to give them due weight; in most cases obviously we would follow them but not, I think, necessarily”.^{cxix}

cxvi. Ibid para 48

cxvii. *HL Select Committee on the Constitution*, Inquiry on Judicial Appointments Process, Evidence Session 5, 19th October 2011, Evidence from Lord Judge and Lord Phillips, Question 164

cxviii. Ibid, “In the end, Strasbourg is going to win as long as we have the Human Rights Act, and the Human Rights Act is designed to ensure that effect is given to that part of the rule of law that says we ought to comply with our conventions”

cxix. Ibid Question 164

Withdrawal calls

If the judges of the European Court of Human Rights continue to eschew traditional principles of treaty interpretation and maintain the vigorous judicial activism which has characterised its decisions in the last thirty years, there is a real risk that the experiment in international human rights jurisdiction will end in the manner of a Greek tragedy. For without question, the judicial activism of the European Court of Human Rights has spawned a significant swathe of influential opinion which believes that the sooner the United Kingdom withdraws from the Convention and repeals the Human Rights Act 1998 which incorporated the Convention into United Kingdom law, the better.

The media

Examples of damaging publicity engendered by the judicial activism and creativity of the European Court of Human Rights abound and it would be wrong to blame the “red top” newspapers for sensationalist reporting. The inexorable fact is that the European Court of Human Rights overreaches itself on occasions and reaches daft decisions, with extremely damaging effect. In *Massey v United Kingdom*,^{cxx} for example, the European Court of Human Rights found that a prisoner’s rights under Article 6 (right to a fair trial) had been breached because of unreasonable delay, and notwithstanding the fact that the prisoner had sexually abused young boys, the Court awarded him compensation of £5,496. The headline in the Telegraph read “We need common sense and justice – not ‘human rights’”.^{cxxi}

On the 14th December 2011, the Times carried an article under the headline “European ruling blamed for huge fall in rape trials”. The opening sentence of the article warned that the crime of rape had become “virtually unprosecutable” in Scotland following a European judgment which gave enhanced suspects’ legal rights. The underlying Strasbourg judgment was given in the case of *Salduz v Turkey*^{cxxii} where the Court held that suspects must be offered legal representation before being questioned by the police. According to the Times, the problem with the practical application of the ruling in rape cases was that before the ruling men might admit to sexual intercourse but claim it was consensual whereas after taking advice from lawyers they decline to make any comment in interview. Unlike English

cxx. Application No. (14399/02), Strasbourg, 16 November 2004

cxxi. Telegraph, 4 March 2005

cxxii. [2009] 49 EHRR 19

law, Scots law affords defendants additional protection from injustice by requiring evidence of corroboration, but where the allegation is one of rape and there is no admission by the defendant that intercourse has taken place, corroborative evidence of the sexual act is not always easy to find. According to Scottish government statistics, 81 cases of rape and attempted rape were tried in 2010-11, and in 52% of cases the accused was acquitted. In the previous year, 118 rape cases had been prosecuted.

The decision of the European Court of Human Rights was applied by the Supreme Court in *Cadder v HM Advocate*.^{cxxiii} Lord Hope gave the leading judgment, with which the other six Justices agreed, and made clear that he was less than impressed with the European Court of Human Rights' judgment which was given by Judge Bratza. Lord Hope commented that if the primary concern of the Strasbourg Court was to eliminate the risk of ill-treatment or other forms of physical or psychological pressure as a means of coercing the detainee to incriminate himself, it might have been thought that the use of techniques such as tape-recording would meet the need to monitor fairness:^{cxxiv}

“I have the greatest respect for Judge Bratza, who has made an outstanding contribution during his time as the United Kingdom’s judge on the Strasbourg court. But I cannot help thinking that there is an air of unreality about his insistence that a detainee should have access to legal advice from the moment that he is taken into police custody, otherwise there will be a violation of Article 6”.^{cxxv}

Against this background, calls to repeal the Human Rights Act 1998 and withdraw from the Convention are hardly surprising.

Cornerstone Group

In September 2005, a group of Conservative MPs known as the Cornerstone Group published a paper entitled “A Cornerstone of Policies to Revive Tory Britain”. Within this collection of essays, a number of Conservative MPs advocated withdrawal from the European Convention of Human Rights.^{cxxvi} This was followed by the publication of a draft report by Douglas Carswell

cxxiii. [2010] 1 WLR 2601

cxxiv. Ibid para 34

cxxv. Ibid para 37

cxxvi. “A Cornerstone of Policies to Revive Tory Britain” (September 2005) p 33, 39

MP which argued that withdrawal from the Convention was the only way in which the United Kingdom could “curtail the ability of the unelected and unaccountable” Strasbourg court.”^{cxxvii} In April 2009, a leading Conservative journalist, James Forsyth, wrote on the Spectator blog that the only solution to the problems posed by the European Court of Human Rights is withdrawal from the Convention.^{cxxviii}

European Convention on Human Rights (Withdrawal) Bill

The issue of the United Kingdom’s continued participation in the Convention surfaced again in February 2011 when the House of Commons discussed the ruling in *Hirst v UK*.^{cxxix} During the course of one of the debates, a Conservative MP questioned whether there was “an intellectual case for, in time, bringing powers back to Westminster in this area by repealing the Human Rights Act 1998 and withdrawing from the European Convention of Human rights?”^{cxxx} Five days before the debate, the Daily Mail carried an article under the heading “The European Human Rights judges [are] wrecking British law”,^{cxxxi} and two days later the same newspaper published a second article under the heading “European Court of Human Rights Court is out of control – we must pull out”.^{cxxxi} Shortly thereafter, a Private Members Bill entitled “The European Convention on Human Rights (Withdrawal) Bill” was presented to Parliament.^{cxxxi} The Bill was not moved for debate in September 2011 and the order to read the Bill a second time lapsed. In October 2011, when the United Kingdom’s chairmanship of the Council of Europe was the subject of consideration in the House of Commons, Priti Patel MP made clear her view that the United Kingdom should withdraw from the European Convention on Human Rights, saying that “decisions on human rights laws must be

cxxvii. Joint Committee on Human Rights, Draft Report “Why the Human Rights Act must be Scrapped”, 32nd Report, Formal Minutes, 7 November 2006, available at <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/27811.htm>

cxxviii. James Forsyth, “The European Court of Human Rights is a threat to British Law that must be dealt with”, The Spectator Blog, 5th April 2009, available at <http://www.spectator.co.uk/coffeehouse/3515656/the-european-court-of-human-rights-is-a-threat-to-british-law-that-must-be-dealt-with.thtml>

cxxix. Hansard, HC, column 493 (10 February 2011)

cxxx. Jonathan Isaby, “David Ruffley suggests withdrawing from the ECHR over votes for prisoners”, available at <http://conservativehome.blogs.com/parliament/2010/11/david-ruffley-suggests-withdrawing-from-the-echr-over-votes-for-prisoners.html>

cxxxi. Named and Shamed, Daily Mail, 5 February 2011

cxxxii. Daily Mail, 7 February 2011

cxxxiii. European Convention on Human Rights (Withdrawal) Bill 2010, available at <http://services.parliament.uk/bills/2010-11/europeanconventiononhumanrightswithdrawal.html>

brought back home, because having British courts interpreting British laws is a better and more democratic position than having European judges and their officials ignoring our national interest”.^{cxxxiv}

Policy Exchange

More urbane arguments have been advanced by Conservative thinkers deeply troubled by the problems which the European Court of Human Rights has posed. In February 2011, after a thorough analysis of the tension between the activities of the Strasbourg Court and the maintenance of Parliamentary democracy in the United Kingdom, in a paper for Policy Exchange, Michael Pinto-Duschinsky indicated the need for negotiations to find agreed ways to ensure that Judges at Strasbourg give greater discretion to domestic judges in contracting countries.^{cxxxv} More ominously, Pinto-Duschinsky added that:

“If such negotiations are unsuccessful, the UK should consider withdrawing from the jurisdiction of the European Court of Human Rights ... and establishing the Supreme Court in London as the final appellate court for human rights law”.^{cxxxvi}

Civitas

In the following month, Civitas published a paper prompted by the problems which had arisen in the *Hirst v United Kingdom* case. The paper was written by Dominic Raab MP who proposed a different solution and called for the Human Rights Act 1998 to be amended to ensure that adverse Strasbourg rulings against the United Kingdom are subject to a debate in the House of Commons, coupled with a political commitment by the main parties to permit free votes. Raab also recommended amending the Human Rights Act to enable the Supreme Court to have the last word on the interpretation of Convention rights as the United Kingdom’s final court of appeal.^{cxxxvii}

cxxxiv. Hansard, HC, col 530 (27 October 2011)

cxxxv. Pinto- Duschinsky, “Bringing Rights Back Home” (Policy Exchange, 2011), available at <http://www.policyexchange.org.uk/publications/publication.cgi?id=225>

cxxxvi. Ibid p 13

cxxxvii. Raab, “Strasbourg in the Dock: Prisoner voting, human rights and the case for democracy” (Civitas, 2011) p xv

European Research Group

A report written by the European Research Group in December 2011 took Raab's suggestion one step further, contending that the United Kingdom Parliament should be given the power to overturn European Court of Human Rights judgments directed at the United Kingdom, and that if the other contracting States are not willing to accept this position, the only viable option is for the United Kingdom to extract itself from the jurisdiction of the Strasbourg Court altogether. The report's conclusions are supported by ten Conservative MPs.^{cxviii}

More recently still, there have been reports in the newspapers that the United Kingdom's withdrawal, or perhaps temporary withdrawal, from the European Convention is winning support among senior Conservative ministers and would be supported by a large number of Conservative MPs.^{cxix}

The Prime Minister

Comments made by the Prime Minister in his speech to the European Court of Human Rights in January 2012 contained a clear warning of the United Kingdom's unhappiness at the way in which the Court had been deciding its cases. David Cameron told the Court that "at times it has felt to us in national governments that the margin of appreciation ... has shrunk ... [and that] ... together we have to find a solution to this. As a result, for too many people, the very concept of rights is in danger of slipping from something noble to something discredited – and that should be of deep concern to us all". Clearly the United Kingdom does not wish to be associated with "something discredited", and certainly not for an extended period.^{cxl}

A precedent for withdrawal

It would be a mistake for the European Court to perceive the threat to withdraw as an empty one. There is a precedent for the United Kingdom's withdrawal from an international organisation which bears an uncanny resemblance to the present situation. In December 1985, the United Kingdom withdrew from the United Nations Educational, Scientific and

cxviii. Broadhurst, "Human rights: Making them work for the people of the UK" (European Research Group, 2011), available at <http://www.makinghumanrightswork.org.uk/Human%20rights%20-%20Making%20them%20work%20for%20the%20people%20of%20the%20UK%20%5Bweb%5D.pdf>

cxix. Britain challenges power of human rights court, *The Telegraph*, 21 January 2012

cxl. David Cameron, speech on the European Court of Human Rights, 25 January 2012

Cultural Organisation (“UNESCO”) because it was concerned about the political policies the organisation had been pursuing. In particular, the United Kingdom was concerned that UNESCO’s activities had been harmfully politicised, and coupled with worries about inefficient management and excessive expenditure, the country withdrew from the organisation whilst continuing to remain a member of the United Nations.^{cxli} The United Kingdom rejoined UNESCO in 1997.

Withdrawal consequences

Under Article 58, the United Kingdom can withdraw from the Convention after giving six months’ notice.

Council of Europe

One question which arises is whether the United Kingdom would also need to withdraw from the Council of Europe. There is no explicit requirement for a member of the Council of Europe to join the European Convention of Human Rights, although at the present time all 47 countries are contracting parties and all new countries joining the Council of Europe are required to ratify the Convention. Article 3 of the Statute of the Council of Europe requires members to accept the principles of the rule of law and “collaborate sincerely and effectively in the realisation of the aim of the Council”.^{cxlii} Although withdrawal from the Convention does not sit happily with sincere and effective collaboration, it would not constitute a “serious violation” of the Council’s aims which is the only basis on which a member State can be expelled. Moreover, a two-third majority of the Council of Europe is required for a member to be expelled under Article 8 of the Statute. It would be surprising to think that the Council of Europe might eject the United Kingdom for withdrawing from the European Convention whilst retaining Turkey, Russia and the Ukraine as members. In any event, the United Kingdom’s expulsion would leave the Council of Europe with a shortfall of around £20 million, which is a prospect the Council of Europe is unlikely to encourage.^{cxliii}

cxli. Timothy Raison, Minister for Overseas Development, Statement to the House of Commons, Hansard, HC, Vol 88 col 448 (5 December 2011). See also Dutt, “The UK and UNESCO” [1995] 266 Contemporary Review 71; Hocking, “Words and deeds, why America left UNESCO” [1985] 14(4) World Today 75

cxlii. Statute of the Council of Europe, London, 5.V.1949

cxliii. Written Ministerial, Hansard, HC, col 57-58 (15 September 2011). Statements (per Mr David Lidington)

The European Union

Withdrawal would not place the United Kingdom in breach of its obligations in relation to the European Union, as long as the United Kingdom continued to respect fundamental freedoms, and the rule of law, principles which are common to the member States.^{cxliv} The Union and its member States must respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and a member State will find itself in difficulty only where it has acted in a way which constitutes “a clear risk of a serious breach” of these principles of fundamental freedoms.^{cxlv}

There is one significant practical limitation on the ability of the United Kingdom to expunge the influence of the European Court of Human Rights from its jurisprudence, but it is not insurmountable.

The European Union is likely to formally accede to the European Convention on Human Rights in the near future. Following accession, the European Court of Human Rights would be able to overrule the European Court of Justice on human rights matters and it follows that even if the United Kingdom were to withdraw from the European Convention on Human Rights whilst retaining its membership of the European Union, jurisprudence decided by the European Court of Human Rights would remain a significant part of United Kingdom law and could not be entirely expunged. This would include issues involving, for example, deportation of foreign nationals from the United Kingdom to another European Union country. However, the impact of the European Union’s accession would be limited to the range of matters covered by European Union law and would not include issues relating to the operation of the criminal justice system.

Foreign policy

Meanwhile, there is no reason why the United Kingdom’s vision for promoting international human rights should not remain as a core element of its foreign policy even if it withdrew from the European Convention on Human Rights. The Foreign Secretary, William Hague, has repeatedly made clear that British foreign policy is influenced by human rights considerations, emphasising that “our foreign policy should always have consistent support

cxliv. Consolidated Version Of The Treaty On European Union, 24.12.2002 EN Official Journal of the European Communities C 325/5, Article 6(2)

cxlv. Ibid Article 7(2), 7(3)

for human rights and poverty reduction as its irreducible core and we should always strive to act with moral authority, recognising that once damaged it is hard to restore.”^{cxlvi} Mr Hague’s remarks were echoed in a recent report issued by the Foreign and Commonwealth Office which made clear that although “each country is different and we work with the local grain to achieve our goals”:

“This does not mean that we will ever overlook human rights abuses; indeed, we raise our human rights concerns wherever and whenever they arise, including with our allies and those countries with which we seek closer ties. But our approach is a practical one, working with others to promote human rights in a pragmatic and effective way that strengthens the global commitment to universal human rights, the rule of law, democracy and respect for all. We also have a strategic interest in promoting these values, as they are integral to long-term stability and prosperity, both for the UK and more widely.”^{cxlvii}

In this regard, British foreign policy has been remarkably consistent. Back in 1997, Robin Cook, incoming Foreign Secretary for the newly elected Labour Government, promised to maintain an ethical dimension in British foreign policy, saying that:

“Our foreign policy must have an ethical dimension and must support the demands of other peoples for the democratic rights on which we insist for ourselves. The Labour Government will put human rights at the heart of our foreign policy and will publish an annual report on our work in promoting human rights abroad”.^{cxlviii}

As the Prime Minister pointed out in his speech to the European Court of Human Rights in January 2012, the United Kingdom has an international commitment to human rights. When the Arab Spring erupted, the United Kingdom was a principal supporter of resolutions at the UN Human Rights Council and it has been working through the United Nations to empower

cxlvi. William Hague, “Britain’s Foreign Policy in a Networked World”, 1 July 2010, available at http://www.conservatives.com/News/Speeches/2010/07/William_Hague_Britains_Foreign_Policy_in_a_Networked_World.aspx

cxlvii. Foreign and Commonwealth Office, “Human Rights and Democracy: The 2010 Foreign and Commonwealth Office Report”, Cm 8017, March 2011, available at <http://www.official-documents.gov.uk/document/cm80/8017/8017.asp>, p 8

cxlviii. Robin Cook, 12 May 1997, available at <http://www.guardian.co.uk/world/1997/may/12/indonesia.ethicalforeignpolicy>

women in Afghanistan, Iraq and the Middle East. The United Kingdom is a leading European Union partner in maintaining pressure on Syria, securing sanctions against Iran and assisting the people of Libya.^{cxlix}

Devolved assemblies

It is often overlooked that if the United Kingdom withdrew from the European Convention on Human Rights, there would be a consequential impact on the devolved assemblies of Scotland, Wales and Northern Ireland, but again the difficulties are capable of resolution. Under the devolution arrangements made by the last Labour Government in 1998, the European Convention is presently inextricably interwoven with the powers which have been devolved to the Scottish, Welsh and Northern Irish assemblies.^{cl} In each case, the competence to legislate is circumscribed by explicit reference to the rights set out in the European Convention on Human Rights. If the United Kingdom were to withdraw from the European Convention, the Convention would need to be replaced with a United Kingdom Bill of Rights, and the requisite amendments would have to be made to the relevant legislation. The provisions of the United Kingdom Bill of Rights would need to be co-extensive with Convention rights, for otherwise the legislative scope of the devolved assemblies would be altered. This is a matter of considerable sensitivity and care would need to be taken to ensure that a decision taken by the Government in Westminster for the United Kingdom to withdraw from the European Convention on Human Rights did not plunge the United Kingdom into a constitutional quagmire. It would be a strange situation if the devolved assemblies were able to keep the United Kingdom locked into an international convention from which the Government at Westminster wished to withdraw, by virtue of its constitutional niceties.

Option of last resort

Although withdrawal from the European Convention on Human Rights is a serious option for the United Kingdom to consider, it must surely remain an option of last resort. If the United Kingdom were to withdraw, unquestionably it is an action which would be taken in sorrow and not in anger. There are strong arguments suggesting that as matters presently stand, the Council of Europe and the European Convention on Human Rights represent causes worthy of the United Kingdom's continuing support.

cxlix. David Cameron, speech on the European Court of Human Rights, 25 January 2012

cl. Northern Ireland Act 1998, section 6(2)(c); Scotland Act 1998, section 298(2)(d); Government of Wales Act 2006, section 81(1)

International dimension

Two leading academics, Keller and Sweet, published extensive research in 2008 which showed that in the case of late-ratifying countries such as Spain, Slovakia, Poland and the reunified Greece following military rule, “the Convention offered an established external and therefore legitimate, normative standard for the transition to constitutional democracy”.^{cli}

At one point, the European Court of Human Rights was flooded with applications claiming violations of the right to property which revealed systemic failures in Greece, Italy and Turkey with regard to its administration of Cyprus. “Having received literally hundreds of clone applications from Poland, the Court began to experiment with pilot judgments to help States resolve such failures”.^{clii} The Spanish experience is interesting. Keller and Sweet note that in Spain the capacity of the legal system to guarantee the effectiveness of the Convention is virtually perfect. “Indeed”, the authors note, “by every measure Spain is one of the great success stories of post-authoritarian, rights-based democratization, and the [Convention] is an important part of that story”.^{cliii}

There are, however, obvious limitations to the impact that the European Convention on Human Rights has been able to make in nations where there is weak democratic accountability and little respect for the Rule of Law. In many cases where the European Court of Human Rights has found violations of the Convention, the Court’s findings have been undermined by the unwillingness and inability of states to implement changes in domestic law. Most commonly, it is States which have most recently ratified the Convention that fail to recognise its effect and their obligation to comply with the Court’s judgments. As Keller and Stone note:

“In countries in which the most serious human rights violations are observed, such as Russia and Turkey, the Court confronts delicate political conflicts ... Moreover, Russia, Turkey and the Ukraine have yet to establish firm foundations for the development of stable pluralist-democracy and the rule of law. Often enough to matter a great deal, officials in these States express hostility to human rights

cli. Keller & Sweet *Europe of Rights :The Impact of the ECHR on National Legal Systems* (Oxford University Press, 2008) p 679

clii. *Ibid* p 680

cliii. *Ibid* p 684

as alien (West European) norms and values that are imposed upon them. Clearly, the Court is not well equipped to deal with deep-rooted problems such as these; indeed, they test the limits of the supervisory system in dramatic fashion. Moreover, these States (today the biggest drain on the Court's resources) routinely choose not to comply with the Court's rulings, thus undermining the creditability of the system as a whole. On the other hand, these cases reflect the Court's strong commitment to closing gaps in domestic accountability where officials refuse to investigate or choose to ignore credible claims of serious human rights violations."^{cliv}

It is in exactly these States where there is concern that withdrawal from the Convention by the United Kingdom could produce most harm. As Christopher McCrudden, a leading academic lawyer, has said, it is one thing for the robust United Kingdom debate to be picked up in other stable constitutional democracies with good human rights records, but "[i]t is another thing entirely where the British debate is transmitted to barely democratic European states with a debatable human rights record, and a weak commitment to constitutionalism".^{clv}

In these cases, it appears that the Convention has a useful role to play in an emerging democracy which is seeking to enhance its adherence to the Rule of Law. However, in the absence of a commitment to democratic government and adherence to the Rule of Law, the Council of Europe is impotent when it comes to the enforcement of European Court of Human Rights decisions.^{clvi} For some, this impotence fatally undermines the argument that the United Kingdom's continued involvement with the European Convention of Human Rights has any beneficial impact at all.

Domestic benefits

It is a moot point whether the Rule of Law in the United Kingdom would be diminished by its withdrawal from the Convention. Certainly there have been

cliv. *Ibid* p 698

clv. UK Constitutional Blog, Christopher McCrudden: Duties beyond borders: the external effects of our constitutional debates, 30 May 2011

clvi. See Neumayer, "Do international human rights treaties improve respect for human rights?" *Journal of Conflict Resolution*, Vol. 49 No. 6, December 2005, 925-953. Neumayer concludes that that rarely does treaty ratification have unconditional effects on human rights. Instead, improvement in human rights is typically more likely the more democratic the country. Conversely, in autocratic regimes with weak civil society, ratification of international human rights treaties has no effect and is sometimes even associated with more rights violation.

a number of cases where the Strasbourg Court has made unobjectionable decisions in domestic matters, even though the determination has contradicted the decision made by the national court. Needless to say, the substance of these cases tends not to involve areas of law which have been the subject of consideration in Parliament.

The decision of the European Court of Human Rights in *Financial Times v United Kingdom*^{clvii} is a good example. In that case, a Belgian company obtained an order against a number of newspapers requiring them to disclose documents relating to a confidential takeover bid. The Court of Appeal ruled in favour of the Belgian company, and the House of Lords refused leave to appeal. The European Court of Human Rights disagreed, ruling that Article 10 (freedom of expression) had been infringed, since the public interest in the protection of journalistic sources was not outweighed by the company's arguments that the institution of proceedings against the sources would eliminate the threat of damage by any future dissemination of confidential information and would compensate it for past breaches of confidence. As the Court explained:

“The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and that, in that context, the safeguards guaranteed to the press are particularly important. Furthermore, protection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital “public watchdog” role of the press may be undermined and the ability of the press to provide accurate and reliable reporting may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect that an order for disclosure of a source has on the exercise of that freedom, such a measure cannot be compatible with Article 10 unless it is justified by an overriding requirement in the public interest”.^{clviii}

clvii. [2010] 50 EHRR 46

clviii. *Ibid*, para 59

Dialogue

The increased willingness to engage in dialogue between the United Kingdom Supreme Court and the European Court of Human Rights is an aspect of the relationship from which the latter can vastly gain. In *Gale v Serious Organised Crime Agency*,^{clix} the Supreme Court was required to consider the compatibility of the civil recovery regime established by Part 5 of the Proceeds of Crime Act 2002 with the right to a fair trial guaranteed in Article 6 of the Convention. The Supreme Court examined the European cases, with some members of the Supreme Court coming to the conclusion that some of the decisions given by the European Court of Human Rights were mutually inconsistent and it was not easy to identify the guiding principle in others. Judges in the Supreme Court suggested a way in which the cases could be reconciled and urged that these cases should be re-considered by the Grand Chamber of the European Court of Human Rights in due course. Certainly the Grand Chamber of the European Court of Human Rights will look carefully at the reasoning put forward by Justices sitting in the United Kingdom's Supreme Court, as occurred recently in the case of *Al-Khawaja v United Kingdom*^{clx} where the Grand Chamber examined at length Lord Phillips' judgment in *R v Horncastle*.^{clxi}

Against this background, it behoves the United Kingdom to work hard to present solutions to the present problems, not only in so far as they relate to the procedural abyss into which the European Court of Human Rights is presently staring, but also the activist way in which the Court continues to decide its cases, paying insufficient regard to the decisions made by democratically elected legislatures in the contracting States.

clix. [2011] UKSC 49

clx. Application No. (26766/05) 15 December 2011

clxi. [2009] UKSC 14

PART 3

AN END TO JUDICIAL ACTIVISM

A solution – adding a new Protocol to the European Convention on Human Rights giving clear direction to the way in which the European Court of Human Rights must interpret and apply the Convention

Recognising the need for a solution

It has been recognised at an international level that the European Court of Human Rights' approach to the way in which it determines its cases requires reconsideration. At the High Level Conference on the Future of the European Court of Human Rights (Interlaken Declaration) held in February 2010, the contracting parties stressed "the subsidiary nature of the supervisory mechanism established by the Convention"^{clxii} and called upon the Court to "apply uniformly and rigorously the criteria concerning admissibility and jurisdiction and take fully into account its subsidiary role in the interpretation and application of the Convention".^{clxiii} Whilst the principle of subsidiarity bites on the selection of cases for determination and not the way in which cases are decided, it is highly significant that the Interlaken Declaration made reference to the Court's "subsidiary role in the interpretation and application of the Convention", which is arguably a different matter. There was an echo of this recognition at the High Level Conference on the Future of the European Court of Human Rights (Izmir) held in April 2011 when the contracting parties agreed that the Court must "confirm in its case law that it is not a fourth-instance court, thus avoiding the re-examination of issues

clxii. High Level Conference on the Future of the European Court of Human Rights (Interlaken Declaration) held on 19th February 2010, Recital 6

clxiii. Ibid para E9

of fact and law decided by national courts".^{clxiv}

In taking forward the Interlaken and Izmir Declarations, attention has focused more on the principle of subsidiarity than the way in which the European Court of Human Rights applies the Convention in its case law. The emphasis has been driven by the concern to solve the problems posed by the Court's enormous caseload, the Izmir Declaration having set out a "follow up plan" focusing on matters such as the right to individual petition, implementation of the Convention at a national level, filtering of cases, Advisory Opinions by the Court, the handling of repetitive applications, Court admissibility procedures, simplified procedure for amendment of the Convention, and supervision of the execution of judgments. The plan ought also to have included a declaration of principles of interpretation for the European Court of Human Rights to follow when applying the Convention to its reduced caseload. Its absence is a missed opportunity, but one which it is not too late for the contracting parties and the European Court of Human Rights to rectify, if minded to do so.

An interpretive Protocol

The problems surrounding the way in which the European Court of Human Rights has come to decide its cases, with a spirit of judicial activism which has characterised its approach, can be swiftly solved by the adoption of a new Protocol to the Convention.

A new Protocol should contain two provisions. First, the European Court of Human Rights needs to be instructed to follow more closely the principles of interpretation set out in Articles 31 to 33 of the Vienna Convention. Secondly, the European Court of Human Rights needs to be instructed to presume that the margin of appreciation applies where a measure has been considered by a democratically elected legislature in a contracting State. The presumption would be rebuttable only where a complainant could establish that his fundamental rights under the Convention had been infringed.

Principles of interpretation

The application in a new Protocol of interpretive provisions which follow the spirit of the Vienna Convention would declare that the European Court of Human Rights must focus on the meaning and application of the

clxiv. High Level Conference on the Future of the European Court of Human Rights (Izmir)in 26 – 27 April 2011, para F2(c)

Convention's text when determining whether a breach of the Convention has occurred. This would mean that instead of extending the application of the Convention by reference to the living instrument doctrine and notions of European common consensus, the European Court of Human Rights would explore whether the text of the Convention applied to the alleged breach brought before it. Fundamentally, when determining this issue the Court would interpret the text in the light of its original intent and purpose. The impact of this interpretive approach would be significant, since it would require the European Court of Human Rights to focus its attention to the text of the Convention agreed by the contracting parties.

To the extent that the European Court of Human Rights would explore the original intent and purpose of the text, the interpretive approach would remain teleological. Although the essence of a teleological approach is that it fastens onto a goal or an end purpose, the critical aspect in any new interpretive provision would be to ensure that the determination of the goal or end purpose engages the text of the Convention's Articles rather the vague aspirations articulated in the Preamble. It is the goal or end purpose envisaged by the Convention text which is paramount.

A leading academic writer, Jeffrey Brauch, argues that unless the European Court of Human Rights abandons its reluctance to determine cases by reference to a textual analysis, the Rule of Law is significantly threatened.^{clxv} The thrust of Brauch's criticism is that the adoption of the evolutionary approach to the Convention's interpretation has led the European Court of Human Rights to decide cases on the basis of policy, using the margin of appreciation as its favoured moderating tool to substitute its own values in place of those the contracting State:

“The margin of appreciation, with its focus on policy-oriented interest balancing and consensus analysis, has had an unintended consequence. It has freed the Court from having to do the real and challenging work of interpreting the meaning and contours of the rights that are protected by the Convention The Court must return to the text It is by clearly, consistently, predictably, and equitably applying the text that the Court will fulfil its duties as a Court and restore the rule of law”.^{clxvi}

clxv. Jeffrey Brauch, “The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law”, 11 Colum. J. Eur. L. 113 (2004), p 149

clxvi. Ibid p149, p150

The application of a teleological but textually based approach would have produced a different result in the case of *Mustafa v Sweden*,^{clxvii} where a tenant's rights under Article 8 (right to respect for private and family life) and Article 10 (right to freedom of expression) were held by the European Court of Human Rights to have been infringed in circumstances where their landlord refused to permit the installation of a satellite dish in their flat. The landlord had stipulated in the tenancy agreement that he did not wish outdoor antennae to be established, but notwithstanding the fact that the tenancy agreement was an arrangement in private law between the landlord and the tenant, the Court held that the Swedish national courts were obliged to ensure that the complainant's Convention rights were not infringed in proceedings brought by the landlord to evict the tenant for breach of the agreement. A textual approach to the application of the Convention would have produced a different outcome since it is difficult to see how Article 8 or Article 10 could have been engaged in this situation. The distance travelled by the European Court of Human Rights from the protections envisaged by the text of the Convention is readily apparent from a consideration of this decision.

A legally rebuttable presumption

A new interpretive Protocol must also include a direction to the European Court of Human Rights as to the way in which it applies the margin of appreciation. In an interpretive Protocol, the contracting parties could require the European Court of Human Rights to presume that a matter falls within a contracting State's margin of appreciation where the substance of the alleged breach of a Convention rights relates to a matter which has been considered by the contracting States' national legislature. This presumption would be rebutted only where the complainant is able to establish that the nature of the breach is so grave as to deprive the complainant of his fundamental rights (determined by applying a teleological approach to the application of the Convention's text).

A legal presumption operates as an assumption of the truth or regularity of a state of affairs, and it is grounded on general experience, probability or merely on grounds of policy and convenience. On whatever basis it rests, a legal presumption operates in advance of argument or evidence, by taking something for granted.

clxvii. [2011] 52 EHRR. 24

A presumption of this sort, sometimes called a “compelling presumption”, is a familiar tool to lawyers educated in the tradition of the common law. As a young Tom Denning (later, Lord Denning) explained, in an article written before he became a Judge, “it often happens that a party proves facts from which the Court must in law draw an inference in his favour unless the other side proves the contrary or proves some other fact which the law recognises as sufficient to rebut the inference”.^{clxviii} For instance, under the old corruption legislation, once money was proved to have been received by a public servant from a person seeking a Government contract, the money is deemed to have been corruptly received unless the contrary is proved.^{clxix} There are many other examples. Once a child is proved to have been born in wedlock, the child is presumed to be legitimate unless the other party in the case proves non-access or incapacity by the husband.^{clxx} When two people die at about the same time, for example, in an accident, the younger is presumed to have survived the elder in relation to the passing of property, unless it is proved that the elder survived the younger.^{clxxi}

A provision of this sort would have the considerable advantage of permitting the European Court of Human Rights to show wide deference to democratic accountability and the sovereign interests of a contracting State, whilst at the same time preserving its ability to intervene in rare circumstances where the approach of the contracting State is so flawed that it constitutes a breach of the complainant’s fundamental rights. The practical impact of the provision is that it would switch the onus of proof away from the contracting State to satisfy the European Court of Human Rights that any derogation of the complainant’s rights was proportionate. Instead, the European Court of Human Rights would be required as a matter of law to presume that the derogation fell within the contracting State’s margin of appreciation, and the Court could intervene only where the complainant could satisfy the Court that his Convention right had been infringed.

The case for self-correcting measures

In truth, both these measures could be adopted by the European Court of Human Rights in the absence of mandatory directives in a new interpretive

clxviii. A T Denning, “Presumptions and Burdens” [1945] 61 Law Quarterly Review 379, p 380

clxix. The Prevention of Corruption Act 1916, section 2

clxx. Gardner v Gardner [1877] 2 App Cas 723

clxxi. Law of Property Act 1925, section 184

Protocol if it were minded to do so. However, the present indication coming from the European Court of Human Rights is that although it is sensitive to concerns which have been expressed, it continues to be wedded to its activist approach. This is a grave error and the Court should reconsider its position as a matter of urgency.

Historical perspective

The European Court of Human Rights has been mired in controversy since its inception, and as a creature borne of political compromise it is incumbent upon the Court to act with a greater sense of deference to its history and sensitivity to the sovereignty of its contracting States which govern themselves in a democratically accountable fashion and are committed to the Rule of Law.

So far as Britain was concerned, the objective of the European Convention on Human Rights Convention was vitally important but comparatively limited. Simply expressed, the intent underlying the Convention was to preserve democratic government in Europe and ensure that the horrors of Nazi Germany were never to be repeated. Sir Hartley Shawcross, the Attorney General in 1950, told Ministers that the Convention was “in essence, [a] statement of the general principles of human rights in a democratic community, in contrast with their suppression under totalitarian government”.^{clxxii} The Attorney General’s sentiment was echoed by Lynn Ungood-Thomas, the Solicitor General in 1951, when he noted that “what we are concerned with is not every case of injustice which happens in a particular country, but with the question whether a country is ceasing to be democratic”.^{clxxiii} It was against this background that Britain argued for a narrowly defined series of rights, with support from Norway, Denmark and Greece.^{clxxiv}

There was, however, an alternative school of thought which wanted the European Convention on Human Rights to extend far wider than merely preserving post-war democracy. As Danny Nicol has noted, for many negotiators it would not only fortify the structure but widen the bases of

clxxii. Wicks, “The United Kingdom Government’s Perceptions of the European Convention on Human Rights at the time of entry” [2000] Public Law 438, p 441

clxxiii. Ibid p 442

clxxiv. Ibid p 439

fundamental freedoms:^{clxxv}

“To sum up, in the case of the “controversial rights”, the usual division between those who supported a supranational Bill of Rights and those who merely sought a collective defence against totalitarianism was overlaid with a Left-Right split on issues such as public ownership and private education. This apart, the common thread was disagreement over where to draw the line between the ‘core’ undisputed rights and ordinary party politics. Those who saw the European Convention on Human Rights merely as a device to prevent dictatorship wished democratic governments to retain their existing unlimited choice of policies; those who sought a wider rights instrument wanted to restrict politics to a narrower domain”.^{clxxvi}

Ending the tension

The tension between the different conceptions of the European Convention on Human Rights has played itself out in the European Court of Human Rights. Again, to quote Nicol:

“The landmark cases were characterised by tension between two competing philosophies: a minority of judges believed that the purpose of the European Convention on Human Rights should be solely to ward off fascism and communism, whereas the majority wanted the European Convention on Human Rights to have a more far-reaching character. The former (the self-restrainers) pressed for narrow interpretation and a presumption in favour of trusting governments to abide by the European Convention on Human Rights; the latter (the activists) sought to develop the Convention in conformity with the evolution of European society. In other words, the disagreement in the courtroom replicated the disagreement of the negotiating chambers”.^{clxxvii}

It is high time that this tension was ended. Irrespective of whether or not a new interpretive Protocol is agreed, the European Court of Human Rights has the ability to resolve the tension and perform its role as guarantor of

clxxv. Nicol: Original intent and the European Convention on Human Rights [2005] Public Law 152, page 156

clxxvi. Ibid, p 164

clxxvii. Ibid, p 167

fundamental human rights whilst eschewing the need to indulge in bouts of judicial activism.

Although the European Court of Human Rights is unlikely to be overcome with expressions of remorse and *mea culpa*, the Strasbourg Judges do not operate in a political vacuum and the Court is not entirely immune to the possibility that there is a need to act with far greater restraint. In this connection, it is interesting to note that towards the end of an article in which he vigorously defended the actions of the European Court of Human Rights, Sir Nicholas Bratza indicated five things “which can be done on our side” to ensure greater harmony between the Strasbourg Court and national courts.^{clxxviii}

Judge Bratza’s “to do” list

First, the European Court of Human Rights must show greater awareness of the consequences of its judgments on domestic law and practices, not only in the respondent state but more widely throughout Europe.

Secondly, in cases where a balance must be sought between competing Convention rights, the Strasbourg court must be particularly cautious about interfering with the way the balance is struck by national courts where those courts have sought to apply the relevant Convention principles and have struck a balance which is on its face reasonable and not arbitrary.

Thirdly, the European Court of Human Rights should strive for greater clarity in the way in which it expresses its judgments which too frequently seem to have caused exasperation among national judges, confronted with the task of interpreting them.

Fourthly, whilst it is important that the Court’s case law should evolve to deal with new factual and legal situations, it is equally important that the Court should show respect for precedent and recognise the vital need for consistency.

Fifthly, there is more room for increased dialogue between the judges of the courts, both informally and through their judgments.

These emollient words are significant, but they fall far short of adopting a textual approach to the application and interpretation of the Convention. It

clxxviii. Bratza, “The relationship between the UK courts and Strasbourg”, [2011] EHRLR 505,510-512

is the whole thrust of the Court's conception of its role which needs to be changed, but this is certainly a start in the right direction. This central point is borne out by an examination of some of the Court's most recent cases, decided after Judge Bratza had published his article and articulated his "to do" list.

Lautsi v Italy

Initially, it appeared that the European Court of Human Rights had begun to take the message to heart. In *Lautsi v Italy*,^{clxxix} a case decided a few weeks before the Izmir Declaration, the European Court of Human Rights afforded the contracting party an extremely wide margin of appreciation in a case where a complainant unsuccessfully asserted a breach of Protocol 1 Article 2 (the right to education in conformity with parent's religious and philosophical convictions) and Article 9 (freedom of thought, conscience and religion) after a school refused to take down a crucifix secured to the wall in each classroom. The Court made clear that a State enjoyed a margin of appreciation in its efforts to reconcile the exercise of its functions in relation to education with respect for parents' rights to ensure such education in conformity with their own religious and philosophical convictions. This applied to organisation of the school environment, as well as to setting the curriculum. Accordingly, the Court considered that it had a duty in principle to respect the State's decisions in those matters, including the place it accorded to religion, provided that those decisions did not lead to a form of indoctrination.

Al-Khawaja v United Kingdom

More recently, in *Al-Khawaja v United Kingdom*,^{clxxx} the European Court of Human Rights Conviction declined to find a breach of Article 6 (right to a fair trial) where a complainant's conviction was based solely or decisively on statements from absent witnesses which were read out at trial. As long as there were sufficient counterbalancing factors to compensate for the difficulties of admitting hearsay evidence, including strong procedural safeguards to ensure a fair trial, the Court held that there would be no breach of the Convention. The Court reminded itself that:

“... the admissibility of evidence is a matter for regulation by national law and the national courts and that the Court's only concern is to examine whether the proceedings have been conducted fairly”.^{clxxxi}

clxxix. (2012) 54 EHRR 3 [2012]

clxxx. 15 December 2011, 26766/05. Application No (26766/05), 15 December 2011

clxxxi. *Ibid* para 118

Hanif v United Kingdom

However, the decisions in *Lautsi v Italy* and *Al-Khawaja v United Kingdom* have to be contrasted with the decision in *Hanif v United Kingdom*^{clxxxii} where the European Court of Human Rights unashamedly substituted its own view of fairness in the context of trial procedure, in place of the view of fairness formed by Lord Phillips, then Lord Chief Justice, and Sir Igor Judge, now Lord Chief Justice. The case concerned a drugs trial where a policeman on the jury indicated that he knew one of the police officers giving evidence against the defendants. The judge did not discharge the policeman from the jury because he had not worked with the police officers at the same station, or in the same team, and they did not know each other personally. The defendants pointed out that the policeman had known the police officers for ten years and they had worked together on three occasions on the same incident, but this was not sufficient to persuade the Court of Appeal (Criminal Division) to overturn the criminal convictions on the grounds that the defendants had not been afforded a fair trial. The European Court recognised that “in each individual case it must be decided whether the familiarity in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal”, and substituting its own view of the facts in this case, it decided that the defendants’ rights under Article 6 had been violated.^{clxxxiii}

Abu Qatada v United Kingdom

Shortly after *Hanif v United Kingdom* was decided, the European Court of Human Rights ruled against the British Government in *Abu Qatada v United Kingdom*,^{clxxxiv} blocking the complainant’s extradition to Jordan on the basis of an infringement of Article 6 not on account of the risk of evidence obtained from the complainant by torture but rather because of the risk that the complainant might face a trial in which evidence obtained by torture from a third party would be used. The complainant is alleged to have been closely associated with Osama Bin Laden and had been convicted in Jordan, in his absence, of involvement in two terrorist conspiracies. The House of Lords had held that the complainant’s deportation would be stopped only where there were substantial grounds for believing that there was a real risk that there would be a fundamental breach of his right to a fair trial which would lead to a miscarriage of justice that itself constituted a flagrant violation of the deportee’s fundamental rights. However, instead of

clxxxii. Applications nos. 52999/08 and 61779/08, 20 December 2011

clxxxiii. Ibid para 141

clxxxiv. Application no 8139/09 17 January 2012

maintaining a separation between the (a) the real risk of a breach of the right to a fair trial and (b) the effect of the breach leading to a miscarriage of justice, the European Court of Human Rights preferred to elide the two concepts, ruling that if the applicant can demonstrate there is a real risk that witnesses were tortured into providing evidence against him, the use of this evidence would of itself amount to a flagrant denial of justice.^{clxxxv} The Home Secretary, Theresa May, said that she found the Court's decision "disappointing", and Blair Gibbs from Policy Exchange commented that the ruling was flawed because it drastically raised the bar for deportation cases. "We urgently need a new human rights settlement because it is our own courts, and not Strasbourg, who are best qualified to balance the rights of defendants against wider national security."^{clxxxvi}

Other possible solutions

In an attempt to preserve the United Kingdom's relationship with the European Convention on Human Rights, a contemporary narrative is developing to explore how particular decisions of the European Court of Human Rights could be overridden by reference to the democratic process.^{clxxxvii} It is sometimes said that the European Court of Human Rights needs to be more democratically accountable to contracting parties, and the resolution in the House of Commons on the decision in *Hirst v United Kingdom* has stimulated debate along these lines. There are a number of variants also under consideration; for example, it might be possible to devise an architecture whereby the Council of Europe has power to override a decision of the European Court of Human Rights.

Council of Europe override

A mechanism for democratic override involving an entrenched majority of the Committee of Ministers is certainly an interesting possibility. However, leaving aside for the moment any theoretical objections, there are two practical concerns. First, if the paradigm case of *Hirst v United Kingdom* is taken as an example, there is no certainty that an entrenched majority (two-thirds or three-quarters) of the contracting States would have voted

clxxxv. Ibid para 282

clxxxvi. BBC News, Abu Qatada wins Jordan deportation appeal, 17 January 2012, <http://www.bbc.co.uk/news/uk-16590662>

clxxxvii. See the letter dated 28th July 2011 to Ministers from the Bill of Rights Commission established by the Coalition Government in March 2011, "Considering some form of 'democratic override' or dialogue", at pages 4 to 6, <http://www.justice.gov.uk/downloads/about/cbr/cbr-court-reform-chairs-letter.pdf>

to override the European Court of Human Rights decision. Secondly, a mechanism for democratic override could be established only if the contracting parties came to an agreement to this effect. And if agreement on reform of the way in which the Court decides its cases can be achieved, it is surely better for the agreement to focus on an interpretive Protocol. Apart from anything else, this would vastly reduce the need for any form of democratic override at all.

Whilst the exploration of every possible avenue is to be encouraged, there are formidable theoretical objections to the notion of any form of democratic override. The struggle for supremacy between Parliament and the Courts has an extensive history, and just as Parliament expects the Courts to show deference and sensitivity to the political process, it is incumbent upon Parliament to show deference and sensitivity to the Rule of Law. It is an unedifying prospect to posit a determination by a political body, whether a domestic Parliament or an organ of the Council of Europe, to override a decision of the European Court of Human Rights. It begs the question as to the purpose of an European Court of Human Rights if, ultimately, one or more of its decisions on the application of a person's fundamental human rights could be overruled by the democratically elected polity. The subliminal message concerning adherence to the Rule of Law would be less than wholesome.

National democratic override

There is a more fundamental concern in relation to democratic override by a national legislature. Once it is recognised that there is value in the establishment of an international instrument protecting fundamental liberties, there needs to be some mechanism for enforcement, for otherwise the whole exercise is rendered futile and pointless. Although it is unpalatable to remember, the inexorable lessons of history teach that the Nazi party won a higher share of the vote than competing parties on two occasions in 1932 which enabled Hitler to seize power and subvert the democratic institutions in Germany. More recently, the Iranian people voted in 1980 for the theocracy of Ayatollah Khomeini, and in January 2006 the people of Gaza gave a decisive victory to Hamas (a violent group designated in many countries as a terrorist entity) in the Palestinian Parliament.

The risks of democratic subversion in the United Kingdom are thankfully very

low,^{clxxxviii} but it does not behove the United Kingdom to arrogate to itself a discretion for Parliament to override a decision of the European Court of Human Rights when it would surely be squeamish about the exercise of the same discretion by other Convention countries such as Turkey, Russia and the Ukraine who have a less mature tradition of democratic government. The House of Commons precedent in the *Hirst v United Kingdom* case is an interesting one, but it is the wrong one.

Postscript

The author cannot stress too strongly that this paper is directed not at reducing the protections afforded by human rights but at rescuing human rights. At the present time, the cause of European human rights is drowning in a sea of public, political and judicial condemnation, and the European Court of Human Rights (with the Human Rights Act 1998 which embedded Convention rights into United Kingdom law) has become an object of ridicule and derision amongst too many sections of the community. This is a devastating indictment, and corrective action must be taken before it is too late. The dignity of mankind demands the enjoyment of fundamental rights and liberties. On this, we can all agree.

clxxxviii. The warning given by Lord Scarman about “fear stalking the land” (English Law, The New Dimension, Hamlyn Lecture 1974) and Lord Hailsham’s concern about the dangers of an “elected dictatorship” (BBC Dimbleby Lecture 1976) come to mind

JANNING: Judge Haywood.

[The emotion in Janning's voice stops Haywood. Janning goes to him. It's coming, thinks Haywood. Now it comes. The moment he had hoped to avoid].

The real reason I asked you to come. I want to know. I want to hear from a man like you. I want to hear – not that he forgives, but that he understands!

[Haywood stands a moment trying to put it into words]

HAYWOOD: I understand the pressures that you faced. No man can say how he would have faced those pressures himself unless he had actually been tested. But how can you expect me to understand sending millions of people to gas ovens?


JANNING: I did not know it would come to that! You must believe it. You must believe it!

[There is a moment]

HAYWOOD: *[saying the words as though he were speaking to a child]:* Herr Janning. It came to that the first time you sentenced to death a man you knew to be innocent.

[Haywood exits. Janning watches him go. Haywood's words come over him in a wave. They have come from the only man in the whole world who could have given him absolution. And that man has laid at his door a greater guilt than he has ever contemplated].

**From Abbey Mann's JUDGMENT AT NUREMBERG
Act II, Scene: Palace of Justice – Prison Cell**



**‘If you believe in the
cause of freedom, then
proclaim it, live it and
protect it, for humanity’s
future depends on it.’**

Henry M. ‘Scoop’ Jackson

(May 31, 1912 – September 1, 1983)

U.S. Congressman and Senator for Washington State from 1941 – 1983