

Lady Hale at the Warwick Law Lecture 2013

What's the point of human rights?

28 November 2013

The British used to be proud of their record on human rights. We are, after all, the land of the Magna Carta, signed by King John at Runnymede in 1215. The doors into the library of the Supreme Court of the United Kingdom are engraved with a facsimile of the copy kept in the British Library, with one of its two most important clauses picked out: 'To no man shall we sell, or deny, or delay, right or justice' (article 40). The other is: 'No free man shall be taken or imprisoned or dispossessed, or outlawed or exiled, or in any way destroyed, nor shall we go upon him, nor shall we send against him, except by the lawful judgment of his peers or by the law of the land' (article 39): clear precursors here of articles 5 and 6 of the European Convention on Human Rights. Thus it became the King's duty to uphold the rule of law. Thus it is that the writ of habeas corpus, and other remedies controlling the abuse of public power, were and still are issued in the name of the monarch. In the revolutions of the 17th century, culminating in the Bill of Rights of 1689, it was established that the monarch alone could not make or change the law. Only the King or Queen in Parliament could do that.

So it is not surprising that after the Second World War British Conservatives enthusiastically promoted the idea of a European Convention on Human Rights, to combat the right wing

totalitarianism of the recent past in western Europe and the left wing totalitarianism of the then present in the east. They took a leading part in its drafting. They almost certainly thought that its provisions reflected the then existing state of United Kingdom law. They were probably right about that. But as it was originally only a treaty between states which only states could enforce, it did not matter very much if they were wrong. But then in 1966 the United Kingdom recognised the right of individuals to petition the European Court of Human Rights if they thought that their rights had been violated. The expectations of the drafters were soon confounded. They had reckoned without two things.

One was the ingenuity of the British and Irish lawyers who appeared before the Court. The other was the evolutive approach developed by the court in its four landmark decisions of *Golder v United Kingdom*,¹ *Tyrer v United Kingdom*,² *Marckx v Belgium*³ and *Airey v Ireland*.⁴ I do not think that it is any coincidence that three of these cases came from common law countries and provoked strong dissents from Sir Gerald Fitzmaurice, the UK judge. He thought that they were taking the Convention way beyond the original intentions of its drafters and the States Parties who ratified it.

Those cases established three principles. The first, and perhaps the most important, was of purposive rather than a literal construction of the language used. Thus, in *Golder*, as access to the courts was an essential prerequisite to the rule of law, to which the states parties had declared their commitment, the right of access was 'inherent' in the right to a fair trial under article 6(1). The

¹ (1979-80) 1 EHRR 524 (Judgment of 21 February 1975).

² (1979-80) 2 EHRR 1 (Judgment of 25 April 1978).

³ (1979-80) 2 EHRR 330 (Judgment of 13 June 1979).

⁴ (1979-80) 2 EHRR 305 (Judgment of 9 October 1979).

second, articulated in *Tyrer*, is that the Convention is a 'living instrument'. This was an echo, whether conscious or unconscious I do not know, of the words of a British Lord Chancellor, Lord Sankey, in *Edwards v Attorney General for Canada*,⁵ where he said that that the Constitution of Canada should be seen 'as a living tree capable of growth and expansion within its natural limits'. I rather like the 'living tree' concept, because it recognizes both growth and limits to growth, whereas the current problem facing both Strasbourg and the member states is whether there are any limits to how far the Convention can be developed. The third idea, first articulated in *Airey*, is that the rights protected must be 'practical and effective' rather than 'theoretical or illusory'.

These principles, in their turn led to substantive developments: most importantly, that certain rights have to be implied into the Convention if the express rights are to have any meaning: what is the point of a right not to be killed or tortured by the state unless the state has some duty to investigate what has happened? It also follows that the state may have positive obligations to protect rights as well as negative obligations to refrain from interfering with them. Thus it was that in *Marckx v Belgium* the court was able to spell out of the right to respect for family life in article 8 a duty to recognize the family relationships of children born outside marriage on equal terms with those of children born within it. Sir Gerald Fitzmaurice appeared almost apoplectic in his dissent.

Thus it was that we discovered that United Kingdom law did not always conform to the rights which had been spelled out in the convention. It did not, for example, recognize a right of privacy which would prevent the armed forces from intruding into the private lives of its soldiers, sailors

⁵ [1930] AC 124, at p 136.

and airmen by excluding those of homosexual orientation.⁶ The other discovery, of course, was that even if the common law did indeed recognize rights such as freedom of speech or rights of property, there was nothing to stop our sovereign Parliament taking them away, for example, by providing for compulsory purchase without compensation at full market value.⁷ The idea that the citizen might have rights which he could assert against the state itself was unknown to us.

Thus it was that the occasional proposals for a British Bill of Rights, which had emanated from such disparate voices as Lord Scarman in 1974,⁸ Sir Keith Joseph in 1975,⁹ and Mrs Shirley Williams in 1976,¹⁰ eventually focused on incorporating the European Convention into our law. This became Labour party policy before they won the General Election of 1997. That year, I had the honour to be one of the select group of High Court judges sitting on the woolsack at the state opening of Parliament and heard the Queen announce that legislation would be introduced to make the European Convention part of United Kingdom law.¹¹ I well recall the judicial excitement. Here was the biggest constitutional development since the European Communities Act 1972.

The puzzle was how to combine enforceable convention rights with the sovereignty of the UK Parliament. The Human Rights Act which Parliament passed in 1998 adopted what many thought at the time, and most still think, to be a very ingenious solution. It did four main things:

⁶ *Smith and Grady v United Kingdom* (2000) 29 EHRR 548.

⁷ *James v United Kingdom* (1986) 8 EHRR 123, *Lithgow v United Kingdom* (1986) 8 EHRR 329.

⁸ Sir Leslie Scarman, 'English Law – The New Dimension', *The Hamlyn Lectures Twenty Sixth Series* (1974).

⁹ 'Freedom under the Law', Speech at a Conservative Political Centre conference, 26 January 1975.

¹⁰ *Report of Human Rights Sub-Committee of Home Policy Committee of the National Executive of the Labour Party*, 1976.

¹¹ Hansard (HL), 14 May 1997, Col 6.

- (1) It turned the rights in the Convention into rights which were enforceable in UK law.
- (2) It required the UK courts to take into account the jurisprudence of the European Court of Human Rights and other Council of Europe organs in interpreting those rights.
- (3) It required the UK courts 'so far as possible' to read and give effect to legislation in a way which was compatible with the convention rights; subordinate legislation could be ignored if this was not possible.
- (4) It empowered the higher courts to make a declaration that a provision in an Act of the UK Parliament was incompatible with the convention rights; alongside this, it required a Government Minister promoting a Bill to make a statement confirming whether or not its provisions were compatible.

The effect has been profound and was intended so to be by the promoters of the Act. Jack Straw, the Home Secretary, promised that 'over time, the Bill will bring about the creation of a human rights culture in Britain'. Lord Irvine, Lord Chancellor, described it as a 'modern reconciliation of the inevitable tension between the democratic right of the majority to exercise political power and the democratic need of individuals and minorities to have their rights secured'.¹² However, experience with operating each of its techniques suggests that that 'inevitable tension' is very far from being 'reconciled'.

Enforcing convention rights in UK law

Section 6(1) of the Act makes it unlawful for a public authority to act in a way which is incompatible with a convention right. Many of the convention rights require a balancing exercise, between the rights of the individual and the interests of other individuals, groups or the general public, and this is

¹² Lecture to the UCL Constitution Unit, 8 December 1998.

not always easy for a court to conduct. How, for example, is your average judge doing a list of possession actions in a busy county court to balance the convention right of a council tenant to be protected in her home, even though she has no right in our domestic law to be there, against the claims of all the other would-be tenants whose need is as great or greater than hers?¹³ It was perhaps easier to balance the right of a Muslim school girl to manifest her religion by wearing a jilbab in defiance of carefully worked out school uniform regulations against the right of the other girls in the school not to be put under pressure to do the same against their will.¹⁴

Another difficulty is the extent to which these new rights against the state are also enforceable against private entities. The Act did not create any new statutory tort against them, but it did provide that the courts were public authorities and thus obliged to act compatibly with the convention rights.¹⁵ This came up in the context of newspaper intrusions into the private lives of celebrities (and others) and it was held that we could develop the existing law of breach of confidence so as to enable us to balance the article 8 privacy rights of individuals against the article 10 freedom of expression rights of newspapers and other media. Thus a newspaper should not have published a photograph of supermodel Naomi Campbell leaving a narcotics anonymous meeting.¹⁶

A third difficulty is the standard of review of the actions of public authorities. Should we adopt the familiar *Wednesbury* principles¹⁷ in deciding whether they had acted incompatibly with the convention rights? I never had any doubt that it was not the right approach: it was for the court itself to decide whether what had been done was, or was not, compatible. But where questions of balance and

¹³ As now required by *Manchester City Council v Pinnock* [2010] UKSC 45, [2010] 2 AC 104.

¹⁴ *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100.

¹⁵ S 6 (3)(a).

¹⁶ *Campbell v MGN Ltd* [2004] UKHL 22, [2004] AC 457.

¹⁷ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

judgment come into play, as they so often do, the decision-maker may be better equipped than the court to weigh the competing interests. In *R (Quila) v Secretary of State for the Home Department*,¹⁸ most of us thought it disproportionate for the Home Secretary to insist that both husband and wife had to be over 21 before a UK resident could sponsor a foreign spouse to enter the UK. This was avowedly for the purpose, not of efficient immigration control but of preventing forced marriages, yet it was acknowledged that many perfectly happily married young couples would be prevented from setting up home here together as a result. But Lord Brown dissented. He thought that the Home Secretary was better equipped to make that judgment and we should defer to her views: ‘in a sensitive context such as that of forced marriages it would seem to me not merely impermissible but positively unwise for the courts yet again to frustrate Government policy except in the clearest of cases’. One reason for that is that, if the Home Secretary disagrees with our decision, she cannot complain to Strasbourg, whereas the young couple can.¹⁹

Taking into account the Strasbourg jurisprudence

That case was a good illustration of another problematic area. The Act only requires us to ‘take into account’ the Strasbourg jurisprudence.²⁰ We do not have to follow it if we do not agree with it. However, as a common law country, we all love working with case law. Counsel have a tendency to treat Strasbourg case law as if it were the case law of our courts. This (as I have previously observed²¹) is odd, because Strasbourg case law is not like ours. It does not set binding precedents

¹⁸ [2011] UKSC 45, [2012] 1 AC 621.

¹⁹ See para 97.

²⁰ S 2 (1)

²¹ ‘Argentoratium locutum: Is Strasbourg or the Supreme Court Supreme?’ H.R.L. Rev. 2012, 12(1), 65-78,

in the way that our decisions do. It states the general principles, but usually in a way which leaves plenty of wriggle room for the future.

Nevertheless, as the principal object of the Act had been to stop cases going to Strasbourg, the House of Lords very soon took the view that where there was a ‘clear and constant’ line of jurisprudence, especially at Grand Chamber level, we should generally follow it.²² We recently followed that line in the prisoners’ voting case of *Chester*.²³ Two Grand Chamber decisions have held that a ‘blanket ban’ on all sentenced prisoners who happen to be in prison on polling day is incompatible with the right to vote (which is implied into the duty to hold free elections at reasonable intervals which will ensure the free expression of the opinion of the people), although Italy’s more measured approach has been upheld.²⁴ One of us was sorely tempted to say that Strasbourg should allow the member states a much wider margin of appreciation on such a matter, and that its approach was no less arbitrary than our present law. However, we repeated our now well settled view:²⁵

‘Where . . . there is a clear and 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.’

²² *R (Alconbury Developments Ltd and Ors) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295.

²³ *R (Chester) v Secretary of State for Justice; McGeoch v Lord President of the Council* [2013] UKSC 63, [2013] 3 WLR 1076.

²⁴ *Hirst (No 2) v United Kingdom* (2006) 42 EHRR 41, *Scoppola v Italy* (2013) 56 EHRR 19.

²⁵ *Ibid* at para 26 (quoting from the judgment of Lord Neuberger in *Manchester City Council v Pinnock* [2010] UKSC 45, [2010] 2 AC 104 at para 48).

There are occasions where we can engage in a ‘meaningful dialogue’ with Strasbourg if we think that they have gone too far, but there are only two really good examples of this. One concerns the use of hearsay evidence in criminal trials. In *Al-Khawaja*, a chamber held that the use of a dead victim’s witness statement to convict a man of sexual assault was incompatible with his right to a fair trial despite the evidence that he had done the same to others. In *R v Horncastle*,²⁶ we explained at great length why we thought this over-prescriptive and disregarding of the numerous protections given to criminal defendants in our trial processes. The object was to persuade the Grand Chamber to take the case, which they did. And after some considerable deliberation, they subtly modified their approach.²⁷ But in the prisoners’ voting case, there was clearly no prospect of their doing that, so there could be no more meaningful dialogue; nor could we see this as going to ‘some fundamental substantive or procedural aspect of our law’.

That is the principle when it is clear that, if we find against the individual and he goes to Strasbourg, he will win. But what about the cases where we do not know what Strasbourg would say or where, as the jurisprudence currently stands, he would lose? In *Ullah*,²⁸ as is well-known, Lord Bingham enunciated what has since been termed the ‘mirror’ principle: ‘The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less’. And *Al-Skeini*²⁹ Lord Brown reversed this: ‘no less, but certainly no more’. Indeed, I agreed with him then, but I no longer do.

²⁶ [2009] UKSC 14, [2010] 2 AC 373.

²⁷ *Al-Khawaja v United Kingdom* (2011) 54 EHRR 23.

²⁸ *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323.

²⁹ *Al-Skeini v Secretary of State for Secretary of State for Defence* [2008] AC 153, 106 and 93.

‘No less’ we understand, but why ‘no more’? Why should we not develop the convention rights in the ways which we think right, whether or not Strasbourg would do the same? There is every reason to believe, from what was said before and during the Act’s passage through Parliament, that this is what its promoters thought that we would do. The preceding white paper, for example, had said that incorporation would enable the British judges ‘to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe’.³⁰ Jack Straw, the Home Secretary who saw the Bill through the House of Commons, had said the same in Parliament.³¹ Moreover, the reason which Lord Bingham gave for the ‘mirror principle’ was that the meaning of the Convention should be the same throughout the states party to it: elsewhere he had said that national courts should be cautious in developing the rights, otherwise states parties might become bound by obligations which they had never agreed to. That is, of course, a good reason for Strasbourg to be cautious, but nothing we do in interpreting and applying the rights in the UK is in anyway binding on Strasbourg or on any of the other states parties. So this is not a good reason for us to hold back.

I think there is a distinction to be drawn between working out our own answer to a problem which has not yet arisen in Strasbourg and deliberately ignoring a line which Strasbourg has drawn in the sand. So, for example, in *Rabone*,³² we held that there was a positive obligation to protect the life of a mentally ill young woman who had been admitted to hospital informally because of serious attempts to take her own life. She was given leave of absence from the hospital despite her parents’ serious concerns and she did indeed take her own life. That went further than any Strasbourg case had yet

³⁰ 1997, Cm 3782, para 1.14.

³¹ HC Deb, Vol 313, col 424 (3 June 1998).

³² *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, [2012] 2 AC 72.

done, but Lord Brown himself said³³ that it would be ‘absurd’ for us not to decide a question merely because Strasbourg had not done so. Why should we wait for something which might never come? As it happens, unbeknown to us, Strasbourg had a very similar case coming up, brought by the mother of a suicidal schizophrenic man who had been placed in a sixth floor room of a ‘crisis centre’ and thrown himself out of the window. Strasbourg referred to *Rabone* in its judgment and clearly thought that we were right.³⁴ This is a recent example, but there are others, perhaps most notably *Limbuela*,³⁵ where we held it degrading treatment contrary to article 3 deliberately to reduce an asylum seeker to utter destitution. Strasbourg has no objection to our doing such things, even if it would not do so itself.

We can compare this with the ‘no less, but certainly no more’ case itself: in *Al-Skeini*, we decided that civilians injured in the course of our peace-keeping activities in Basra were not ‘within the jurisdiction’ of the United Kingdom for the purpose of article 1 of the Convention, and therefore not covered either by the Convention or by the Human Rights Act. We thought that the Grand Chamber had indeed drawn a line in the sand in *Bankovic*,³⁶ by insisting that jurisdiction was ‘primarily territorial’, with only very limited exceptions. As it turned out, we were wrong about that,³⁷ but I don’t think we are obliged to anticipate some of the more surprising or adventurous things that Strasbourg may do.

³³ Para 112.

³⁴ *Reynolds v United Kingdom*, (2012) 55 EHRR 35.

³⁵ *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396.

³⁶ *Bankovic v Belgium* (2007) 44 EHRR SE5.

³⁷ *Al-Skeini v United Kingdom* (2011) 53 EHRR 18.

It is interesting that the two politicians most closely associated with the Act, Lord Irvine³⁸ and Jack Straw,³⁹ have both recently delivered lectures disapproving of the so-called ‘mirror principle’. They cite the views expressed to Parliament that we might be *more* adventurous than Strasbourg has been: Lord Irvine approved of Lord Kerr’s dissent in *Ambrose v Harris*,⁴⁰ where the majority had held that there was no right to legal advice before being questioned by the police before being taken to the police station. The majority were only too well aware of the storm which had arisen in Scotland after the earlier decision that suspects had to have access to legal advice before being interviewed in a police station.⁴¹

But I wonder whether, in reality the independent line which past and present Government Ministers would like us to take is *not* to follow what they would regard as Strasbourg’s more adventurous decisions. Jack Straw has been quite blunt in blaming Strasbourg’s ‘determination . . . to expand its jurisdiction and to fail to provide a very wide margin of appreciation save over the protection of basic human rights’ for the conflicts which have emerged with what he calls ‘the people’s will’ in member states.⁴² In his view, the Human Rights Act has been a great success, and the problem lies with Strasbourg, not with us. But there are other politicians, some of them now in government, who have identified the Human Rights Act as the problem and pledged to repeal it if the Conservative party has a majority at the next election.⁴³

³⁸ ‘A British Interpretation of Convention Rights’ [2012] P.L. April 237.

³⁹ ‘The Human Rights Act and Europe’, Second Hamlyn Lecture, published in *Aspects of Law Reform: An Insider’s Perspective* (Cambridge, Cambridge University Press; 2013).

⁴⁰ [2011] UKSC 43, [2011] 1 WLR 2435.

⁴¹ *Cadder v HM Advocate (HM Advocate General for Scotland intervening)* [2010] UKSC 43, [2010] 1 WLR 2601, following *Salduz v Turkey* (2009) 49 EHRR 19.

⁴² *Loc cit*, p 26-27.

⁴³ The Home Secretary announced at the Conservative Party Conference in September 2013 that the Conservative Party manifesto for the 2015 election would contain a pledge to repeal the Human Rights Act.

‘Read and give effect’

This brings me on to the relationship which the Act creates between our sovereign Parliament and the courts. Section 3(1) of the Act states that: ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’. In *Ghaidan v Godin Mendoza*,⁴⁴ the House of Lords held that this was meant to be the principal solution where legislation was incompatible. This had in fact been clear in the ministerial statements to Parliament when the Bill was going through.⁴⁵ By a majority, we held that a person who had been living with a deceased tenant ‘as his or her wife or husband’ could include the survivor of a same sex couple in a stable, committed union, even though at that stage there was no formal legal status akin to marriage for them to contract into. Frankly, I did not find that in the slightest bit difficult. It would be as easy (or as difficult) to recognize the sort of same sex relationship which qualified as it was to recognize the sort of opposite sex relationship which did so. But Lord Millett did not agree: he thought that the words ‘husband and wife’ inevitably meant a man and a woman and could not be applied to two people of the same sex.

So far so not very exciting. But statements from Lord Nicholls, Lord Steyn and Lord Rodger also gave a very broad meaning to what was ‘possible’ – as long as an interpretation was not contrary to the scheme or essential principles of the legislation, words could be read in or read out, or their meaning elaborated, so as both to be consistent with the convention rights and ‘go with the grain of the legislation, even though it was not what was meant at the time. They also said that this approach

⁴⁴ [2004] UKHL 30, [2004] 2 AC 557.

⁴⁵ Jack Straw, Hansard (HC Debates), 16 February 1998, col 778; Lord Irvine, Hansard (HL Debates) 5 February 1998, col 840.

would apply to future as well as to past legislation, thus in effect saying that the Human Rights Act had limited the power of Parliament to pass incompatible legislation. This is, in Lord Phillips' view, contrary to the general principle that Parliament can make or unmake any law, although it is the equivalent of what Parliament provided for in the European Communities Act 1972.⁴⁶ This is not, of course, to say that Parliament cannot expressly repeal either or both of those statutes: it clearly can. But unless and until it does so, or expressly repeals or excludes the relevant sections on interpretation, it appears to have limited its own powers.

Perhaps surprisingly, this aspect of the Act has not attracted as much criticism from politicians (although it has from others). Ministers, it would appear, would usually prefer us to solve an incompatibility problem for them rather than make a declaration of incompatibility. The system of control orders introduced by the Prevention of Terrorism Act 2005 provided for the use in proceedings to challenge an order made by the Home Secretary, of 'closed material', secret information not disclosed to the controlled person, but scrutinized by a 'special advocate', who is there to protect his interests but cannot discuss it with the controlled person without leave of the court. The clear intention of the 2005 Act was that the High Court could uphold a control order even if the non-disclosure of closed material meant that the controlled person would not have a fair hearing. In *MB*⁴⁷ however, we held (by a majority) that the provision had to be read down to prevent this, so that, if the hearing could not be fair without disclosure, the Home Secretary would have to choose between disclosure and getting the order.

⁴⁶ 'The Art of the Possible: Statutory Interpretation and Human Rights'. The First Lord Alexander of Weedon Lecture, 22 April 2010.

⁴⁷ *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440.

When the case came back to us⁴⁸ on the question of what the minimum requirements of a fair hearing were in those circumstances, Strasbourg having by now given some further guidance,⁴⁹ one of our number pushed counsel for the Secretary of State quite hard to argue that we had been wrong to do this first time round and should instead have made a declaration of incompatibility. But counsel quite clearly had instructions not to do this. As Lord Phillips commented, Ministers do not like declarations of incompatibility. They would rather live with our adventurous interpretations, provided that the main thrust of their legislation is not impaired.

Declarations of incompatibility

But there are occasions when we cannot interpret our way out of the problem. Then the higher courts have power under section 4 to declare the provision incompatible. This has no effect upon the validity of the provision or of anything done under or in pursuance of it. But it sends a strong signal to government and Parliament that we think that the UK government will lose if the case goes to Strasbourg. As of September 2012, there had been 28 such declarations, eight of which had been overturned on appeal, leaving 20 still standing, but one is under appeal to us and listed for hearing on 9 December.⁵⁰

Deciding whether an Act of Parliament, especially an Act passed after the Human Rights Act, is incompatible raises the issue of respect for the decisions of our democratically elected representatives much more acutely than does deciding whether the actions of public authorities and

⁴⁸ *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269.

⁴⁹ *A v United Kingdom and others* (2009) 49 EHRR 29.

⁵⁰ *R (T) v Chief Constable of Greater Manchester and others*.

Government Ministers are incompatible. The second main example of a successful dialogue with Strasbourg illustrates this. *Animal Defenders International*⁵¹ concerned our very widely drawn ban on political advertising in the broadcast media. A Strasbourg decision against Switzerland, on very similar facts, had held the ban incompatible with the article 10 right to freedom of expression. So when introducing the Communications Bill to Parliament, the Minister had been unable to say that the provision in question was compatible with the convention rights, but Parliament had passed it nonetheless. We upheld it, because we thought that the restriction of expenditure on political advertising was an important objective which Strasbourg had not fully explored. We do not want our elections determined or distorted by whoever has the deepest pockets. There was then another Strasbourg decision against Norway which followed their earlier decision against Switzerland. Eventually, however, the Grand Chamber upheld our decision, albeit by nine votes to eight.⁵² It introduced a widened margin of appreciation for ‘general measures’ which apply to predefined situations regardless of the individual facts of each case. This ban was proportionate, given the extensive pre-legislation consultation, the undesirability of distortion of public debate by wealthy groups and the fact that alternative methods of communication remained open.

A similar example of respect for the recent judgment of Parliament limiting qualified rights can be found in our declining to declare that the ban on hunting certain wild animals with dogs was incompatible.⁵³ This was upheld in Strasbourg. Sir Nicolas Bratza, recently retired as UK judge there, has commented that Strasbourg ‘has been particularly respectful of decisions emanating from

⁵¹ *Animal Defenders International v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] AC 1312.

⁵² *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21.

⁵³ *R (Countrywide Alliance) v Attorney-General* [2007] UKHL 52, [2008] AC 719; upheld in Strasbourg, *Friend v United Kingdom* (2010) 50 EHRR 51.

courts in the United Kingdom since the coming into effect of the Human Rights Act . . . In many cases the compelling reasoning and analysis of the relevant case law by the national courts has formed the basis of the Strasbourg judgment'.⁵⁴

But sometimes we have to make a declaration. Government and Parliament then have three choices. The first is to use the 'fast track' remedial procedure under section 10 of the Act. This applies, not only when we have declared legislation incompatible, but also where the incompatibility is clear from a ruling of the Strasbourg court. It allows a Minister to cure the defect by subordinate legislation. This is most suitable where it is fairly clear how to do this. Three out of the 19 declarations have been cured in this way. The most recent concerned the lack of any provision for removing a person's name from the sex offenders register, with the burdens that entails, even if there is every reason to believe that he no longer poses any risk of such offending.⁵⁵ Curiously, when introduced the order in Parliament, the Prime Minister was highly critical of our decision, but made no mention of the fact that the Government could have chosen to do nothing about it.

The second option is to change the law by Act of Parliament. This is most suitable if a new legislative scheme is required to replace the offending provision, with choices to be made. The best known example of this is the 'Belmarsh' case,⁵⁶ where the Government replaced the executive detention of suspected foreign terrorists which we had found incompatible with the control order scheme.

⁵⁴ N Bratza, 'The relationship between the UK courts and Strasbourg' (2011) EHRLR 505, at 507.

⁵⁵ Sexual Offences Act 2003 (Remedial) Order 2012.

⁵⁶ *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

The final option is to do nothing. But the only example so far has been prisoners' voting. Strasbourg first decided that our law was incompatible in *Hirst v United Kingdom (No 2)*, but did not give us any help to decide what would be compatible.⁵⁷ The Scottish Registration Appeal Court made a declaration of incompatibility in 2007.⁵⁸ Strasbourg returned to the issue in *Greens and MT v United Kingdom*,⁵⁹ and gave the UK a deadline within which to do something about it. Eventually, in 2012, the Government introduced a draft bill to Parliament which contained three options, one of which was to do nothing – in other words, it was consulting rather than proposing. A committee has now been set up to examine those options.

Meanwhile, two further prisoners' voting cases have come before us.⁶⁰ The Attorney General appeared in person before us to argue that we should disagree with Strasbourg: once it was accepted, as Strasbourg has now accepted, that some prisoners can be denied the vote, the threshold for putting a person in prison was a perfectly sensible criterion for deciding who should be disqualified. As I have already mentioned, we thought that we should follow Strasbourg's clear line that this would not do. However, we did not make a declaration of incompatibility. One reason was that there was no point in repeating what had already been declared by the Scottish court. But I initiated another small rebellion against Strasbourg. The two claimants in the case were convicted murderers sentenced to life imprisonment. One had not yet completed the punishment part of his sentence. The other had done so, but was still in prison because the parole board did not consider that he was

⁵⁷ See n 24 above.

⁵⁸ *Smith v Scott* [2007] CSIH 9; 2007 SC 345.

⁵⁹ [2011] 53 EHRR 21.

⁶⁰ See n 23 above.

safe to be let out. There is now every reason to think that the Strasbourg court would uphold legislation which denied each of them the vote (and no chance of the UK Parliament passing legislation which would give it to them). Usually, Strasbourg does not grant remedies in abstract, divorced from any consideration of how the rights of the individual before the court have actually been violated. They did so in the *Hirst* case, despite a strong dissent including the then President of the Court and his immediate successor. I thought that we should follow the normal and sensible practice of the Court and refuse to grant any of the remedies available to us, including a declaration of incompatibility, to an individual whose own rights had not been violated, other than by being subject to a law which might violate the rights of others.

I have no personal view on which prisoners should be given the right to vote. But I do think that the issue is a good example of why we need human rights legislation. It is not at all obvious that the franchise should be decided only by those elected under the present franchise. Parliament is rightly proud that it represents and is accountable to the people. But members elected under the present franchise do not represent, and are not accountable to, the people who are currently disenfranchised. The purpose of any human rights protection is to protect the rights of those whom the majority are unwilling to protect: democracy values everyone equally even if the majority do not.⁶¹

But what of the future?

It is obvious, from this short account of the novel things that the Human Rights Act requires us to do, that there is plenty of scope for controversy. There are now many voices raised against the Act.

⁶¹ *Ghaidan v Godin-Mendoza*, n 44, para 102.

Sections of the press and media have always been hostile, perhaps not surprisingly, as it was seen as a threat to press freedom from the outset. But this has been fuelled by a perception that it has prevented us from sending some dangerous foreigners back to their home countries and generally allowed people with no right to be in this country to stay here once they have established a private or family life here. Not every member of the public is persuaded that we should not export people if there is a real risk that they will be tortured in the country to which we send them. Perhaps not every member of the public is convinced that we should not deprive British children of their right to live and grow up and be educated here if this will be the effect of deporting their only or primary carer. Some Parliamentarians and commentators are concerned about the perceived threat to Parliamentary sovereignty, despite the clever and careful structure of the Act, which most people support.⁶² Many are concerned about what they see as the imperialism of the Strasbourg court.⁶³ There is indeed a serious debate in Strasbourg itself about the limits to its evolutive approach.⁶⁴ Some critics are simply hostile to anything European.

It may be no coincidence that it is the Home Secretary, in charge of police and immigration, and the Justice Secretary, in charge of prisons and the criminal justice system, who have been most vocal in their opposition to the Act.⁶⁵ The Justice Secretary has promised that in the New Year the Conservative party will publish a document setting out what they will do, when they will do it and how they will do it. Later next year, they will publish a draft Bill. This will scrap the Human Rights

⁶² Eg M Pinto-Duschinsky, *Bringing Rights Back Home, Making human Rights compatible with parliamentary democracy in the UK*, Policy Exchange 2011 (with a Foreword by retired Law Lord, Lord Hoffmann).

⁶³ Including Jonathan Sumption QC, before taking up his appointment as a Justice of the UK Supreme Court, in 'Judicial and political decision-making: the uncertain boundary', the 2011 FA Mann lecture (2011) JR 301.

⁶⁴ It was the subject of their seminar at the opening of the legal year on 28 January 2011.

⁶⁵ Eg 'Grayling's manifesto to rescue justice from Europe', *The Sunday Telegraph*, 3 November 2013.

Act, make it clear that with legal rights come legal responsibilities, and that the Supreme Court should be in Britain and not in Strasbourg.

In 2008, the Parliamentary Joint Committee on Human Rights produced a report on whether we should have a United Kingdom Bill of Rights.⁶⁶ When the present government came into power, it set up a Commission to examine the question, on the same assumption that it would incorporate and build upon all our obligations under the European Convention. The option of withdrawal was not on the table, to the evident disappointment of some of its consultees and even some of its members. It was perhaps unlikely that the Commission would ever produce a unanimous report and indeed it did not do so.⁶⁷ The majority favoured a UK Bill of Rights, despite the fact that most of their consultees favoured the status quo, principally because ‘many people feel alienated from a system that they regard as “European” rather than British . . . it is this lack of “ownership” by the public which is . . . the most powerful argument for a new constitutional instrument’.⁶⁸ The present position, they believe, is unstable. The voices raised are now so strident and the public debate so polarized that there is a strong argument for a fresh beginning.⁶⁹ Quite what that fresh beginning would entail is not so clear,⁷⁰ save that it should give no less protection than the current Act, and maybe even more, and that it should retain the possibility of declaring an Act of Parliament incompatible, but not of striking it down.

⁶⁶ ‘A Bill of Rights for the UK?’ Twenty-ninth Report, Session 2007-08, HL Paper 165-1, HC 150-1

⁶⁷ ‘A UK Bill of Rights? The Choice Before Us’, Report of the Commission on Human Rights, 18 December 2012

⁶⁸ *A UK Bill of Rights? The Choice Before Us, Report of the Commission on Human Rights*, 18 December 2012, para 80.

⁶⁹ Para 84.

⁷⁰ See M Elliott, ‘A Damp Squib in the Long Grass: The Report of the Commission on a Bill of Rights’ [2013] EHRLR 137.

But once Pandora's box is opened, the range of options is not limited to doing nothing or having a bigger and better UK Bill of Rights. There are clearly some who are willing to contemplate repealing the Act and replacing it with nothing. The Home Secretary told the Conservative party conference that if leaving the European Convention on Human Rights is what it takes to "fix our human rights laws" that is what we should do. That would take us back to the constitutional position before the Act was passed, but it would raise all sorts of interesting questions about the effect of the decisions which have been made during the period while the Act was in force and whether the common law would now embrace many of the rights which were established during that time. A former Justice of the High Court of Australia, where they do not have a federal bill of rights, Dyson Heydon, has asked 'Is there any fundamental right referred to in the Act which was not given reasonable protection in domestic law before 2000?'⁷¹ I hope that I have illustrated how and why the answer is 'yes' and that there is indeed a point to the Human Rights Act.

⁷¹ JD Heydon, 'Are Bills of Rights necessary in Common Law systems?' Lecture delivered at Oxford Law School on 23 January 2013.