

OPENING SLIDE

Political impetus

- "As our last manifesto promised, the next Conservative government will scrap the Human Rights Act."
- "By 2015 we will need a plan for dealing with the European Court of Human Rights. All options – including leaving the Convention altogether – should be on the table."

Rt Hon Theresa May MP, ConservativeHome conference, March 2013

These remarks were made in a political context – but they demonstrate something important. The idea of a UK without Convention rights is not just a academic counter-factual but something that is possible in the real world.

Like the Home Secretary, I am going to divide my remarks into two parts – first the so-called scrapping of our domestic statute, the Human Rights Act, and secondly the more dramatic option, certainly internationally, of leaving the Convention system altogether.

For what it is worth, my own opinion is strongly against both those ideas. However there is a paradox here. The first idea – scrapping the HRA – has been sedulously debated for many years – not least by the recent Bill of Rights Commission – and yet seems to be considered to be without merit by nearly everybody who has looked at it. (Some, admittedly, favour re-badging or extending the HRA: but that is hardly the same thing.)



The second idea – pulling out of Strasbourg – is one that has by contrast received rather little attention: it was indeed expressly excluded from the remit of the Bill of Rights Commission. Though wrong (in my opinion) there is logic in it, at least for those people – and there are many of them – who apply a purely domestic perspective.

The second idea is conventionally met by the lazy answer "We couldn't do that, they would throw us out of the European Union". But it must be acknowledged as the days go by that this can no longer be considered a complete or even sufficient response. Indeed in some circles it might be considered an incentive rather than a deterrent. So I shall conclude that those of us who support and understand the Convention system need to make the case for our continued participation in a more wholehearted way than we have so far managed.

HRA – the threat

- Human Rights Act is used:
  - Too widely 75%
  - About right 12%
  - Not enough 4%
  - Don't know 9%

(YouGov, 2456 GB adults, March 2011)

A couple of slides just to demonstrate that neither of the Home Secretary's proposals could be described as academic – indeed rather the reverse. The people of this island – though, not I suspect, those of Northern Ireland – seem to have been persuaded, perhaps uniquely in the world, that an Act whose purpose is to protect our freedoms against the over-mighty State is itself over-mighty, or at least over-used.

Media



And leaving the Strasbourg system which we did so much to establish and sustain seems also to be a popular option in some quarters.

Features of the HRA

- A conservative collection of rights
- Few controversial higher court decisions (though *F (a child)* [2010] UKSC 17)
- Policy formulation and execution
- Dialogue with Strasbourg (*Z* 2000, *Cooper* 2003, *Kay* 2008, *al-Khawaja* 2011)

I start with the Human Rights Act which of course gives effect in our own legal systems to the European Convention rights that are scheduled to it.

If you look at what it has actually done, rather than how it is portrayed, it seems to me to have been successful on all counts.

Appropriately for a country so nervous about the whole idea, it is a small-c conservative collection of civil and political rights. There is no equivalent to the social and economic rights in Title IV to the EU's Charter, unless you count the very modest measures in the First Protocol, and not even a general equality duty.

Contrary to the fears expressed by some, it has not had the undesirable effect of politicising or over-exposing our judiciary. Indeed one could argue that it remains under-exposed, as witnessed by the almost complete absence of public reaction when three new judges were appointed a few weeks ago.



I can think of only one decision of the higher courts that attracted major political controversy when it was handed down – the declaration of the Supreme Court in *F (a child)* to the effect that there should be a procedure, however rarely used, for having oneself removed from the sex offenders' register.

That was the judgment that the Prime Minister described as "completely offensive" and that brought forward the setting up of the Bill of Rights Commission. But it stands alone in terms of controversy in the higher courts, which is why those wishing to attack our domestic courts have to refer to Immigration Tribunal decisions and myths about judicial review.

The Human Rights Act has been influential in policy formulation and execution.

And the hope of a dialogue between our top court and Strasbourg has been fulfilled – though not all the dialogues have been since 2001, not all of them end satisfactorily from the point of view of the UK courts. *Osman/Z* was about immunities in tort, *Cooper* about courts martial, *Kay* about evictions from publicly-owned property and *al-Khawaja* about hearsay. The fact that our domestic courts are looking at the same text and the same case law as the ECtHR is surely an advantage in making those dialogues productive.

The Bill of Rights Commission (1)

- "Experience to date of the HRA is that a statute expressly protecting basic rights and freedoms can provide a valuable safeguard against .. abuse of power."
- "The Majority are agreed that such a Bill should have at its core the rights currently in the ECHR including those Protocols which the United Kingdom has accepted."

Commission on a Bill of Rights, December 2012, 12.10 – 12.11

What is striking to me about the majority report of the Bill of Rights Commission – to which all the Conservative appointees subscribed as well as some of the others – is that it favoured not the "scrapping" of the HRA, but its replacement by a Bill of Rights that would look remarkably like the HRA.

The Bill of Rights Commission (2)

- "Were there to be a UK Bill of Rights, consideration should be given to whether it should contain rights in addition to those in the original Convention."
- "It should contain a similar mechanism to the declaration of incompatibility …, which we think strikes a sensible balance …"

Commission on a Bill of Rights, December 2012, 12.18, 12.25

Some additional rights were contemplated, including a free-standing discrimination right and the right to trial by jury.

But the constitutional balance was not challenged or even discussed by the Commission, which considered that existing mechanisms strike a sensible balance between the ultimate sovereignty of the UK Parliament and the duty of the courts to declare and enforce the law.

Their main concern indeed appears to have been an essentially presentational one, to counter the negative associations between the HRA and Europe: that the new Bill should be "written in language which reflected the distinctive history and heritage of the countries within the United Kingdom". Ancient liberties, rather than human rights? And even that rewriting exercise should be contemplated only after the Scottish devolution referendum.

Leave the Strasbourg system?

- Success of the HRA
- Delays / backlog in Strasbourg
- Commonwealth models
- Excessive interference?

What about the second proposal – to leave the Strasbourg system? A number of factors have taken this idea out of the realms of fantasy and closer to the world of practical politics.

(1) The success of the HRA has meant that we now routinely have our own excellent senior judges applying the European Convention. We consider them just as able as the Strasbourg judges, and like all national judges they have the added advantage as Strasbourg itself reminds us from time to time of understanding the situation as it is in this country. So why are they not enough?

(2) The Strasbourg court is perceived as slow and overburdened – and there are doubts as to whether the reforms that we saw at Interlaken, Izmir and Brighton are going to be enough to sort it out.



(3) We can look at other countries with legal traditions similar to our own that appear to flourish outside the ECHR system – though one must acknowledge that they are not in Europe. Canada has a charter at domestic level; Australia has not.

To a well-informed Briton, "A UK without Convention rights?" spells neither freedom nor danger: it spells Australia. And the answer to the question "A UK with Convention rights but no international enforcement of them" spells Canada. Neither country is a pariah in international human rights terms, though each has its critics. Indeed I am often struck by the similar tenor to our own of the debates in those two countries on anti-terrorism law and human rights.

(4) Finally there is the inflammatory question of whether the Strasbourg court has interfered too much, to which I now turn.

Excessive interference?

- "The Strasbourg court has taken upon itself an extraordinary power to micromanage the legal system of the member states of the Council of Europe (or at any rate those who pay attention to its decisions)."
- "There are means by which .. we can repatriate our law of human rights. It is worth a try."
  - Lord Hoffmann, foreword to Policy Exchange pamphlet 2011

One does not have to be a politician to take this view.

One can be a very senior judge with an intimate knowledge of the Strasbourg case law - as these comments from Lord Hoffmann demonstrate.

Are those comments supported by evidence?

More interventions

Four-year period	Findings of UK violation	Top court not approved
1985-1988	5	1
1989-1992	8	1
1993-1996	14	1
1997-2000	38	2
2001-2004	78	6
2005-2008	59	5
2009-2012	47	10
	Source: House of Commons Library Note SN 05611, 2013	Source: Brice Dickson, *Human Rights and the UK Supreme Court*, OUP 2013

Of course the number of successful applications to Strasbourg is a tiny percentage of the total number of applications lodged. But a more relevant figure is perhaps the *number* of findings of violation, rather than the *proportion* of cases that succeed.

And here, as you can see from this table, there has been a very significant increase in the past 15 years – ironically, starting at precisely the time when interest in incorporating the ECHR began to grow in this country. I've arranged them in four-year periods for ease of comprehension (by Olympiad, if you like).

If anyone thought the Convention was going to choke off the number of applications to Strasbourg, or the number of successful applications, they were wrong. The cases continue to come, and I believe they are generally seen in Strasbourg as among the best-argued and most interesting of all the applications they get. They reflect a greater interest and competence in human rights law, fostered by the HRA but also by our very active legal profession and NGOs and by organisations such as the Human Rights Lawyers' Association.

And the second column is particularly interesting. I took it from an appendix to Brice Dickson's excellent and very new book, *Human Rights and the UK Supreme Court*. The top court I think in all these cases was actually the House of Lords rather than the Supreme Court. But it is *since* the HRA came in that the rulings of that court have been regularly challenged.

Vive la différence …?

Case (ECtHR)	Year (ECtHR)	Article(s)	House of Lords	ECtHR
S& Marper	2009	8	0-5	17-0
A	2009	5(4)	0-5	17-0
Kay	2010	8	0-7	7-0
JM	2010	14	1-4	7-0
Clift	2010	14	0-5	7-0
MAK and RK	2010	6,8, 13	1-4	7-0
Gillan	2010	8	0-5	7-0
Al-Skeini	2011	1,2	0-4	17-0
Al-Jedda	2011	5	0-5	17-0
Othman	2012	6	0-5	7-0

This table shows the 10 cases in which the House of Lords was told it was wrong over the past four years.

Together with the scores. Claimants first, public authorities second. And the same in Strasbourg: applicants first, then respondent states. So in the first case on the list the claimants lost 5-0 in the House of Lords but won 17-0 in Strasbourg. And in fact if you add in the lower courts, it was a 10-0 defeat in England followed by the 17-0 victory.

Though there are other cases where bringing in the lower courts makes for a slightly less stark picture: in the last case on the list, *Othman*, (abu Qatada), the CA effectively took the same line as the Strasbourg court.

Looking at this table you have to wonder whether the OMEGA which is such a prominent feature of the Supreme Court flag, signalling the fact that it is the last port of call, is really appropriate or whether it should be replaced by some slightly earlier letter of the Greek alphabet.

And you wonder whether all these differences are simply a matter of our top court being poor at anticipating what Strasbourg will do – or whether they are an indicator of a more profound discrepancy in the judicial temper of the two courts – particularly perhaps in relation to Article 8.

Judicial acquiescence

- "My concern is simply to indicate how very clear a case this seems to me to be. Indeed my only real problem now .. is in discerning any coherent basis on which the challenge can be sustained".
  R (S) v CC Yorkshire Police [2004] UKHL 39
- "The earlier decision of the House of Lords can no longer stand and the existing scheme must now be recognised to be unlawful – so much, indeed, is clear and conceded."
  R (GC) v MPC [2011] UKSC 21

What is impressive is the apparent absence of rancour that our own judges show in the face of being repeatedly told that they were wrong. It is one thing to be corrected by Strasbourg in relation to a Convention which one had no jurisdiction to apply; but it must be quite another to be corrected on the basis of precisely the arguments that one had rejected.

I have used as an illustration two comments of Lord Brown, the first from the case that became S and Marpur, where he was explaining his reasons for rejecting the challenge, and the second from a later case, after the judgment of Strasbourg, in which in common with other colleagues who had sat in both cases he gracefully ate humble pie.

Our Chairman (Lord Dyson MR) was I think in the second case but not the first, so didn't have to eat humble pie.

Judicial internationalism

"The Strasbourg court's approach to problems posed by the Convention .. is to provide principled solutions that are universally applicable in all the contracting states.
...
There is no room in its jurisprudence for, as it were, one rule for the countries in Eastern Europe such as Turkey on the one hand and those on its western fringes such as Scotland on the other."

Cadder v HM Advocate [2010] UKSC 43, per Lord Hope at §40

And Lord Hope and Lord Rodger were similarly principled and indeed internationally minded when they accepted that the binding force of a case against Turkey required them to overturn centuries of Scots legal tradition and acknowledge the right of an arrested suspect to consult a lawyer in the police station.

Not every retreat was so graceful: in *AF #3*, after the Strasbourg court had told them to gist the evidence presented in closed material proceedings to detainees and control order subjects, the ruling was accepted with visible unwillingness; and in *Horncastle* the Supreme Court suggested to Strasbourg, successfully, that it might want to change its mind.

Political resistance

- "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."

  ECHR, Art 46

- "No one should be under any doubt – prisoners are not getting the vote under this Parliament."

  The Prime Minister, October 2012

But it remains the case that resistance comes not from the judges, but from the politicians. And as this comment on the *Hirst* judgments suggest, the gloves are off.

ECtHR - vehicle for our values?

- "Are we really limiting human rights abuses in other countries? I'm sceptical."

  Rt. Hon. Theresa May, March 2013

- "It is significantly more difficult for us to fight for universal human rights in our country if your country publicly walks away from the same universal human rights."

  Hossam Baghat, Tahrir Square veteran, cited by Liberty 2011.

So how do we defend the continued role of the Strasbourg court in our legal system?

- For some, it will be enough to say that its rulings are *better* than those of our Supreme Court. I am often of that mind myself, including in the field of terrorism which I have recently been getting to know. But it is unlikely to be a basis that commands general assent.

- For me, the principal justification for our continuing to play a role in this international court must be an international one. Always difficult to demonstrate with hard evidence, but none the less real for that.

-There is a famous passage in the Frank Capra film "A wonderful life" in which the Jimmy Stewart character, on the brink of suicide, is visited by a guardian angel who shows him how different, and how inferior, the world would have looked had he never lived. That, I think, is what we all need where membership of the Council of Europe is concerned.



I certainly don't have a full grasp, but my experience a few years ago on monitoring missions for the Secretary General of the Council of Europe has shown me some small parts of the picture.

- I have seen in places like Russia, Ukraine, Georgia and Turkey – despite everything that goes on – that European human rights standards are something that their governments wish at least to be seen to comply with.

- I have observed how ready their governments are to draw attention to the failings of more established Council of Europe members, in order to excuse or downplay their own. How much stronger the excuses would be if a major contracting state were to pull out altogether. Indeed one has to wonder whether the system could survive in its current form.

- And I have seen in the abu Qatada case how standards laid down by the Strasbourg court can be influential even in countries beyond its jurisdiction.

-But the Home Secretary is sceptical, and I am not entirely surprised because I am not sure that we who presume to call ourselves internationalists have made our case very effectively or indeed at all. I would suggest that there is no better or more necessary time to do so than now.