The Human Rights Act: Bastion of Freedom or Bane of Good Government?

Rt Hon Lord Howard of Lympne CH QC PC
With Edward Garnier QC MP

Policy Exchange

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About the Authors

The Rt. Hon. Lord (Michael) Howard of Lympne QC (Conservative) is a former leader of the Conservative Party, having served as a Member of Parliament in the House of Commons for nearly three decades. Lord Howard served as Secretary of State for Employment, Secretary of State for the Environment and Home Secretary in the Conservative government before taking the front-bench opposition roles of Shadow Chancellor, Shadow Foreign Secretary and leader of Her Majesty's Official Opposition. He was elected to Parliament in 1983 and served as an MP until April 2010 before being appointed a Conservative Life Peer. Prior to his career in government, Lord Howard practised as a barrister for over 20 years, achieving the rank of Queen's Counsel in 1982.

Edward Garnier QC MP was appointed Solicitor General by Prime Minister David Cameron on 13 May 2010. Mr Garnier has been Member of Parliament for Harborough since 1992. He was appointed Queen's Counsel in April 1995, a Crown Court Recorder in 1998 and a Bencher of the Middle Temple in 2001. He was the Hon Secretary of the Foreign Affairs Forum 1988-92, and has been a Vice-Chairman since 1992. He was Secretary of the Conservative House of Commons Foreign Affairs Committee from 1992-94 and a member of the Home Affairs Select Committee between 1992 and 1995. He was Parliamentary Private Secretary to the Rt Hon Alastair Goodlad MP and David Davis MP, Ministers of State at the Foreign and Commonwealth Office from 1994-95. In October 1995 Mr Garnier was appointed Parliamentary Private Secretary to the Rt Hon Sir Nicholas Lyell QC MP, Attorney General and PPS to Sir Derek Spencer QC MP, Solicitor General and PPS to the Rt Hon Roger

Freeman MP, and Chancellor of the Duchy of Lancaster in November 1996. He was the Opposition Front Bench Spokesman for the Lord Chancellor's Department from 1997 to June 1999. He was a Visiting Parliamentary Fellow at St Anthony's College, Oxford, from 1996-97. From June 1999 to September 2001, he was Shadow Attorney General. In May 2005, he was appointed as a Shadow Minister for Home Affairs. In July 2007, he was appointed as a Shadow Minister for Justice and in September 2009 was appointed Shadow Attorney General. Mr Garnier was born in 1952. He was educated at Wellington College, Berkshire, Jesus College Oxford (Modern History) and the College of Law, London. He is married to Anna Garnier and they have a daughter and two sons.

About Christopher Kingsland

Christopher James Prout, Baron Kingsland TD QC PC (1942-2009) was educated at Sevenoaks school and from 1960, went on to obtain three economics degrees from Manchester University, Queen's College, Oxford, and Columbia University in New York. His early career was spent working for the United Nations as an economist in Washington DC before he took up law.

He served as a lecturer at Sussex University, and was called to the bar in 1972. He worked as a lawyer at Middle Temple and was a Bencher there from 1996, where he specialised in competition law. He was an expert on planning and environmental law and was made a QC in 1988. His legal career included time as a member of the judiciary, becoming an assistant recorder on the Wales and Chester circuit in 1997, a recorder in 2000 and in 2005, a deputy high court judge. He contributed to three volumes of *Halsbury's Laws of England*.

His political life was long and varied. He was elected MEP for Shropshire and Stafford in 1979 and served for 15 years. He won election to be leader of the Conservative Group in the European Parliament in 1987, a position he held for 7 years, and for a period he was also Leader of the wider European Democratic Group (EDG) at Strasbourg.

He was knighted in 1990 and raised to the peerage as a life peer in 1994, as Baron Kingsland of Shrewsbury, and became a Privy Counsellor. In 1997 he was appointed Shadow Lord Chancellor, and served as a member of the Official Opposition for a total of 11 years. During this time he shadowed Lord Irvine of Laing, and after 2008, he was Shadow Minister for Legal Affairs.

He spent several decades in the Territorial Army, serving with the 16/5 The Queen's Royal Lancers and on headquarters staff of the 3rd

Armoured Division, rising to the rank of Major. In 1987 he was awarded the Territorial Decoration (TD). He was a vice-chairman of the law reform group Justice, and Master Gardener at Middle Temple. He was appointed Deputy Lieutenant for Shropshire in 1997.

Lord Kingsland died in 2009 at the age of 67. His legacy is preserved by an annual legal competition for aspiring barristers – the Kingsland Cup and Prize Moot – established by his old chambers, Francis Taylor Building, and through the dedication of the Lord Kingsland Research Fellowship at Plymouth Marine Laboratory, where he was the founding Chairman. His widow, Carolyn Kingsland, gave permission for the think-tank Policy Exchange to host an annual legal lecture series in Christopher's memory, beginning in 2011.

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1. Introduction

Edward Garnier, QC MP

Tonight we are doubly fortunate. First, we have through this inaugural lecture an opportunity to celebrate the life and work of one this country's foremost legal and political thinkers of recent times, the Rt Hon the Lord Kingsland QC, with the blessing and in the presence of his widow, Carolyn. It is delightful to see you here and thank you for allowing us to name these lectures after Christopher.

The second reason for our good fortune is that Michael Howard is the first to give the Christopher Kingsland Memorial Lecture. I can think of no better subject than the Human Rights Act as the subject of a lecture by which to remember Christopher and no better qualified person to give this first lecture than Michael Howard. Lord Howard is like Lord Kingsland in many respects: a brilliant planning Silk before he came to Parliament with the ability to get to the very centre of any legal issue and to present his case with clarity, lucidity and determination.

"Lord Howard is like Lord Kingsland in many respects: a brilliant planning Silk before he came to Parliament with the ability to get to the very centre of any legal issue and to present his case with clarity, lucidity and determination"

And like Christopher he is not a lawyer's lawyer. He speaks English in a way that you can understand. He brought that skill to his work as a Conservative politician, as a member of parliament, as a minister and a Cabinet minister holding some of the highest offices of state including as Home Secretary and Leader of the Opposition.

To listen to Michael Howard getting to grips with an argument, to watch him drive home his points is to see one of our most effective political lawyers at work although I think it fair to say that

he has concentrated rather more on the practice of politics than the law over the last 30 years.

I suspect it will not be controversial to say that he and Christopher took a slightly different approach to our Party's and our country's political relationship to Europe, but not to the role of the ECtHR in our own jurisdiction. Both were and are keen supporters of the rights of the oppressed, of human rights generally, and of the benefits of the rule of law and parliamentary democracy, so it is fitting that Michael Howard should be the first Kingsland Memorial lecturer.

Christopher Prout was possessed of a formidable intellect which he first deployed in the study of economics both as an undergraduate and a post graduate before turning his mind to the study and practice of the law – as a public lawyer, a planning Silk, Crown Court Recorder and Deputy High Court Judge – and then of politics. And we know of him in Westminster and in the Temple as a lawyer and as a loyal and hard-working front bench spokesman and Shadow Lord Chancellor for 11 years in the House of Lords who used his brain, his experience, his humour, his powers of analysis and problem-solving, his judgment and his voice to great effect.

Quentin Letts memorably described Lord Kingsland as "*a skinny, bald brain-box with one of those skulls that you can almost see pulsating as he ponders.*" Well, it is true that he was not fat, it is true that he did not have a full head of hair, and it is true that he was very clever; it also true that as he sat on the front bench in the Lords, thinking what he was about to say or how to unpick the arguments of his opponent, he would take on the aspect of an anguished professor wrestling with how, in all good conscience, he could deal with an intervention or a contribution without letting it be known that his interlocutor was far from the point or just plain stupid.

Christopher was never rude, never condescending and always kind and understanding of those less gifted than he – as I know to my benefit after working with him for many years.

To describe Lord Kingsland as Quentin Letts did, though kindly meant, is to miss so much of what made Christopher the man he was.

As his obituarists were good enough to recognise (and those of us who knew already realised), his razor-sharp intellect was accompanied by great generosity of spirit, and when he died peers from all sides of the House spoke of "*his unfailing sense of justice and integrity*".

He was held not only in respect, but with great affection by his colleagues in the Lords. He had a wry, self-deprecatory sense of humour, exemplified in his explanation of why he did not call himself Lord Prout when raised to the peerage: he confessed to a fear that he might be called "Lord Brussels Prout".

Europe is a word closely associated with Lord Kingsland. He was Leader of the Conservative Group in the European Parliament, never an easy job but one which enabled him to play to his strengths. It was no coincidence that he was an adept but competitive yachtsman as well as a dashing tank commander and cavalry officer.

He reinforced his reputation when the Labour government was taking the Human Rights Bill through Parliament. Always without a note but always with a well-thought out case to make, he cut through the bluff and the rhetoric and got to the very heart of the constitutional, political and legal issues that the Bill exposed.

In the Commons I was perhaps occasionally to be found using a bludgeon, fulminating at the Dispatch Box about the silliness of some aspects of Jack Straw's case on human rights – it was such piffle to say that the Labour Party was bringing human rights home – or about the dangers of creating constitutional collisions between the judiciary and Parliament.

Christopher on the other hand unpicked the Bill in an altogether more effective way in the Lords, teasing out the arguments, pushing the government to explain itself, expressing his disappointment at its failure to think things through, using the rapier, not the club, and was all the more effective for being calm, considered, deadly accurate – and right.

It therefore gives me great pleasure to welcome and to introduce to you all to a man who needs no introduction, the Rt Hon The Lord Howard of Lympe CH QC PC.

2. Kingsland Memorial Lecture – *The Human Rights Act: Bastion of Freedom or Bane of Good Government?*

23 November 2011

The Lord Howard of Lympne, QC PC

Introduction

May I begin by saying how honoured I am to have been asked to give this lecture in memory of Christopher Kingsland, particularly since his widow Carolyn has done us the honour of being with us this evening.

I had the pleasure and privilege of practising in the same set of chambers as Christopher for a number of years so I am in a particularly good position to know just how distinguished a lawyer he was as well as the very significant part he played in our political life, both as Leader of the Conservative Group in the European Parliament, never an easy berth to fill, and, later as Shadow Lord Chancellor in the House of Lords. His death was a grievous loss to us all and he continues to be greatly missed.

Christopher and I did not agree on everything and I cannot guarantee that he would endorse all I have to say this evening. But I am happy to begin the substantive part of what I have to say by quoting what he said on the Second Reading of the Human Rights Bill in the House of Lords on the 3rd of November 1997.[1]

1 HL Deb 3 November 1997
vol 582 c1234

He said:

> *"If the Bill becomes law it will be a defining moment in the life of our constitution. Perhaps the only other examples this century of such defining moments were the passage of the Parliament Acts of 1911 and 1949. As your Lordships are acutely aware, they had a dramatic effect on the balance of power between your Lordships' House and another place.*
>
> *If this Bill reaches the statute book it will have an equally defining influence on the balance of power between the legislature and the judiciary. Whatever the inherent merits of its contents, I hope that your Lordships will be aware... of how deep are the implications for that relationship.*
>
> *They lie at the heart of the doctrine of the separation of powers in our constitution, which has been the hallmark of our liberties through the centuries."*

All that has happened in the 14 years that have passed since that debate has testified to the truth of those observations.

Before I continue let me make an important distinction – the distinction between human rights and the legal instruments which purport to give effect to them. The argument is not about human rights, to which we all subscribe.

I am proud of the fact that when I was Leader of the Opposition we defeated the then government's plan to allow detention without charge for 90 days.[2] That protection of that basic human right was achieved in and by Parliament – despite the fact that the government of the day had a very large majority. And it is to Parliament that we have looked, down the ages, for that protection. No, the argument is whether arrangements such as the European Convention and the Human Rights Act actually help to protect such rights or, by the way in which they have been operated, tend to bring the whole concept into disrepute and get in the way of good government.

2 Amendment No. 55 to the Terrorism Bill 2005-06, voted on 9 November 2005: Ayes 291, Noes 322. HC Deb, 9 November 2005, cc377-78

The European Convention

To examine these propositions it is helpful, as it so often is, to start at the beginning.

And the beginning, of course, lies with the drafting and adoption of the European Convention on Human Rights in the years immediately following the Second World War. As is frequently pointed out, indeed Christopher himself pointed out in the speech from which I have just quoted, the shape of the Convention owed a great deal to Sir David Maxwell Fyfe, who, as Lord Kilmuir, subsequently became a Conservative Lord Chancellor.[3] And it had the support of the then Leader of the Opposition, one Winston Churchill.

> "The way in which the Convention has been interpreted in recent years is far removed from the intentions of its founders"

These events are sometimes referred to as support for the argument that it is somehow odd or eccentric or inconsistent for today's Conservatives to have doubts about the way the Convention has been interpreted since, as many of us clearly do. But the truth is that the way in which the Convention has been interpreted in recent years is far removed from the intentions of its founders. As the Attorney-General, Dominic Grieve has said,[4] in a speech he made in 2009, as Shadow Justice Secretary:

> *"The ECHR was designed to set a standard for the behaviour of states towards their citizens which would prevent the re-emergence of totalitarianism and tyranny in Western Europe…*
>
> *But the rights were drafted in very general terms and set out very general rights such as freedom of speech, freedom of arbitrary arrest and the prohibition of torture.*
>
> *For the first 13 years of its existence it was simply an international treaty with no opportunity for the individual citizen of any country to enforce its provisions until in 1964 a mechanism of direct petition to the European Court of Human Rights was conceded…*

3 Lord Kilmuir began his career as a barrister and MP for Liverpool West Derby and was a prosecutor at the Nuremberg Trials. In government he served as Solicitor General (1942-45), Attorney General (1945), Home Secretary (1951-54), and Lord High Chancellor of Great Britain (1954-62).

4 "Can the Bill of Rights do Better than the Human Rights Act?", 30 November 2009, Middle Temple

> *In the process it has been transformed from an international tribunal adjudicating on a few major cases of international significance into an appeal court ruling on the minutiae of administrative decision making ranging from what is allowable in smacking a child, to what degree of ill health is needed before deportation becomes a cruel and inhuman act…"*

Those were the words of the Attorney-General.

The best way of assessing the extent to which the Court has departed from the intention of its founders is by considering its decisions. The well known case of Hirst,[5] decided in October 2005, is particularly instructive and I should say that I am indebted to Dominic Raab, the Member of Parliament for Esher and Walton, for his clear analysis of the decision in his recent pamphlet "Strasbourg in the Dock."[6]

Hirst had been convicted of manslaughter. He sued the U.K. government, claiming that the denial of his right to vote under U.K. law was a violation of Article 3 of Protocol 1 of the Convention.[7]

Article 3 provides:

> *"The High Contracting Parties undertake 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."*

The Article does not contain any reference to universal suffrage. This omission is not an accident. On the 29th August 1949, the French delegate proposed that such a reference should be included. The United Kingdom opposed this, conscious no doubt of the fact that peers, felons and the insane did not have the vote.[8] The British argument was accepted; the French proposal was withdrawn in its entirety.

This was completely ignored when the European Court of Human Rights adjudicated in favour of Hirst, notwithstanding the fact that the High Court had dismissed his claim on the basis that this was

5 *Hirst v. United Kingdom (No 2)*, no. 74025/01 (2005) ECHR 681

6 Raab D., 'Strasbourg in the Dock: Prisoner Voting, Human Rights & the Case for Democracy', *Civitas*, 21 April 2011

7 Protocol 1, which was opened for signature on 20 March 1952 and has since been ratified/acceded to by 45 member states, creates additional rights that were not included in the original text of the Convention. These rights are (1) the right to peaceful enjoyment of one's property; (2) the right to education; and (3) the right to free and fair elections.

8 Felons were barred from voting under the Forfeiture Act 1870. The Representation of the People Act 1918 declared peers, prison inmates, "idiots", and "lunatics [...] not in a lucid interval" legally incapacitated from being registered to vote.

"*plainly a matter for Parliament not for the courts.*"[9] This is but one example of the extent to which the judges have assumed a legislative function.

Concern about this growing development has been widely expressed. The former Law Lord, Lord Hoffmann, in his Foreword to the Policy Exchange report by Michael Pinto-Duschinsky, 'Bringing Rights Back Home',[10] complained that the "Strasbourg Court has taken upon itself an extraordinary power to micromanage the legal systems of the member states of the Council of Europe (or at any rate those which pay attention to its decisions)…". The Liberal Democrat peer, and former Director of Public Prosecutions, Lord Macdonald has said that "the threshold to bring a case must be very high."[11] He says,

> "…*[E]gregious breaches of the right to life, or of the right not to be tortured or to be subjected to brutal punishment, or to be enslaved, the right to a fair trial, the right to speak freely… these are all constitutional issues for an international constitutional court, and by all means let Strasbourg speak loudly, declaring the inviolability of these European values and enforcing them whenever it can.*
>
> *But a right to privacy, the conditions of work or the insistence that governments give expression to one social value rather than another? Well, let the national courts adjudicate these questions so that if change is needed it is not falsely delivered from a provincial French town, but rather won, as political change always has been, through debate and popular struggle.*"

So what can be done?

The best solution would be a radical expansion of the "margin of appreciation", the doctrine invented by the European Court itself to give weight to the right of each member state of the Council of Europe to have some discretion in the way in which it interprets Convention rights according to local circumstances. That doctrine has, however, been far too narrowly interpreted by the Court and, as a consequence, it has had relatively little influence. Moreover, efforts

9 *R (on the applications of Pearson and Martinez) v. Secretary of State for the Home Department* [2001] EWHC Admin 239 (4 April 2001).

10 'Bringing Rights Back Home', 7 February 2011, http://www.policyexchange.org.uk/publications/category/item/bringing-rights-back-home-making-human-rights-compatible-with-parliamentary-democracy-in-the-uk

11 'Strasbourg is no longer fit for our purpose', *The Times*, 12 September 2011

to reform the working of the Court to expand the doctrine have not hitherto met with success.

In 1996, the then Lord Chancellor, Lord Mackay of Clashfern, proposed reforms to the Convention's enforcement machinery. The position paper put forward by the United Kingdom suggested a resolution in the Committee of Ministers of the Council of Europe, the body responsible for the enforcement of decisions of the Court, that account should be taken of the fact that democratic institutions and tribunals in Member States are best placed in to determine moral and social issues in accordance with regional and national perceptions.[12] I was, of course, Home Secretary at the time, and remember meeting some of the members of the Court to discuss these issues. I emphasised the significance of the fact that the House of Commons, unlike the Court, was elected and accountable to the electorate. They did not seem impressed.

"Efforts to reform the working of the Court to expand the doctrine have not hitherto met with success"

Now we have another opportunity. Two weeks ago the United Kingdom assumed the Chairmanship of the Council of Europe.[13] On that occasion, the Foreign Secretary made a speech[14] in which he announced the U.K. priorities for our Chairmanship. Prominent among them are what William Hague described as "measures to strengthen subsidiarity." "*This involves*," he said, "*strengthening the implementation of the Convention at national level, to ensure that national courts and authorities are able to assume their primary role in protecting human rights…We should ensure that the way the Court works reflects the proper balance between its role and that of national authorities.*" This is indeed a commendable aim, particularly when taken in conjunction with another of Mr. Hague's priorities, which is to initiate "*a process of strategic thinking about the future role of the Court*."

These aims reflect the interim recommendations of the Commission on a Bill of Rights[15] which refer to the essential need "*to ensure that Member States and their national institutions … assume their primary responsibility for securing the Convention rights and providing effective remedies for*

12 'A Partnership of Nations. The British Approach to the European Union Intergovernmental Conference' 1996 Cm 3181, March 1996

13 The UK holds Chairmanship of the Council of Europe from 7 November 2011 to 14 May 2012.

14 'Priorities for UK Chairmanship of the Council of Europe', 7 November 2011, Council of Europe

15 Interim Advice to Government, Commission on a Bill of Rights, http://www.justice.gov.uk/downloads/about/cbr/cbr-court-reform-interim-advice.pdf

violations." The question is – how is this very desirable objective to be achieved? One way would be to return to the suggestion put forward by Lord Mackay in 1996. Another would be to introduce a measure of what might be called "democratic override" – a possibility raised in the letter written to Ministers by Sir Leigh Lewis, the Chair of the Commission on a Bill of Rights, which accompanied the interim advice to government given by the Commission in July.[16] This could take a number of forms, perhaps the most effective of which might be a provision empowering the Committee of Ministers to determine that a Court judgment should not be enforced if it considered that that course of action was desirable and justifiable in the light of a clear expression of opinion by the relevant member State's most senior democratic institution.

It is particularly encouraging that the government's stated priorities include proposals for reform which include amendment of the Convention itself.[17] The announcement by Ken Clarke, the Justice Secretary, in Saturday's Daily Telegraph,[18] that he wanted the court "*back to its proper business as an international court which takes up serious issues of principle when a member state or its courts, or its parliament, are arguably in serious breach of the convention*" is also welcome. But we don't as yet know what Mr. Clarke's method of achieving this is to be and his formulation does leave open the possibility that the Court will continue to take an expansionist view of the principles he has set out. Everyone accepts that the Court's backlog, which now consists of over 160,000 cases,[19] needs to be dealt with but dealing with that problem will not in itself bear on the questions of subsidiarity which are at the heart of so many concerns.

The government has set itself a challenging agenda. I have set out a number of ways in which its objectives might be achieved. I have enough international negotiating experience to know that it is not always wise to be too prescriptive about your tactics in the early stages of such negotiations so I do not propose this evening to set out my weapon of choice. But I will identify a criterion by which

16 'Reform of the European Court of Human Rights', http://www.justice.gov.uk/downloads/about/cbr/cbr-court-reform-chairs-letter.pdf

17 Priorities of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe (7 November 2011 – 14 May 2012), https://wcd.coe.int/ViewDoc.jsp?id=1859397&Site=CM ('In accordance with the deadline set by the Interlaken declaration, the package [of reform measures] should include proposals for reform which require amendment of the Convention.')

18 'Ministers on the brink of human rights reform, says Ken Clarke', The Daily Telegraph, 18 November 2011, http://www.telegraph.co.uk/news/worldnews/europe/eu/8900227/Ministers-on-the-brink-of-human-rights-reform-says-Ken-Clarke.html

19 Attorney General Dominic Grieve in the House of Commons, HC Deb 15 November 2011 c696

it will be possible to identify success. If the new arrangements, whatever form they take, preclude the Court from reaching a decision like the one they reached in the votes for prisoners case, or, at the very least ensure that such a decision would not be enforced by the Committee of Ministers, the government will be entitled to claim success. If not, I fear that a golden opportunity will have been lost.

The Human Rights Act

Where does all this leave the Human Rights Act? Unfortunately, many of the charges laid against the Strasbourg Court can also be levelled at the way in which our own courts have interpreted the Act. Perhaps the most fundamental example is the way in which, in interpreting the Act and the Convention, our courts have felt constrained to follow the decisions of the Strasbourg Court. Section 2 of the Act does not require them to do so, mandating them only to "take account" of the Strasbourg Court's decisions.[20] Indeed, during the passage of the Human Rights Bill through Parliament, a number of attempts were made to amend the relevant clause by inserting stronger language than the words "take account" including substituting the word "follow". These attempts were all rejected by Parliament.

Fortunately, there have been a number of recent observations by some senior members of the judiciary, including the Lord Chief Justice, to the effect that the practice of our courts in this respect need not, itself, be followed.[21] The sooner that happens, the better. Perhaps an amendment to the Act would put the matter beyond doubt.

But that is not the only cause for concern. In a number of cases, our domestic courts have explicitly gone beyond the Strasbourg case law in extending their interpretation of the Convention. Dominic Raab, in the pamphlet which I previously mentioned, identifies a string

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

21 Joint Committee on Human Rights, 'Human Rights Judgments' (Uncorrected Transcript of Oral Evidence), 15 November 2011 (response to Q81)

of such cases in the context of deportation proceedings and the application to them of Article 8 of the Convention. Article 8 (1) provides –

> *"Everyone has the right to respect for his private and family life, his home and his correspondence."*

But it is qualified by Article 8 (2):

> *"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

"In a number of cases, our domestic courts have explicitly gone beyond the Strasbourg case law in extending their interpretation of the Convention"

That would appear to give government a wide discretion in the exercise, for example, of their powers under statute to deport those in the country illegally or having committed serious criminal offences. But in, for example, the case of Gurung,[22] cited by Dominic Raab, the Immigration Tribunal held that a Nepalese offender, convicted of homicide, was able to defeat an attempt to deport him because of his right to family life despite the fact that he was an adult with no dependants.

The effect of this jurisprudence on national security has drawn the expressed concern of Lord Carlile, the Liberal Democrat peer who, until recently, was the government's reviewer of counter-terrorism. He has said that the impact of human rights law on deportation "*is to make the U.K. a safe haven for some individuals whose determination is to damage the U.K. and its citizens, hardly a satisfactory situation*

22 RG (Automatic deport – Section 33(2)(a) exception) Nepal [2010] UKUT 273 (IAC)

save for the purist."[23] One wonders how long Lord Carlile's purist would remain one if he were the victim of an attack by such an individual.

These problems arise largely because Parliament has now asked our judges to carry out the kind of balancing exercise between conflicting rights which would previously have been made by elected politicians. It is not the fault of the judges that they are doing what Parliament has asked them to do. But it is legitimate to ask, on the basis of more than a decade's experience, whether the results have led to a strengthening of our democracy and command widespread public confidence. The comments I have cited, and many others in the same vein, suggest that the answer is in the negative. After all, if a member of the public is aggrieved by any failure of government to take the kind of action which he, or she, thinks appropriate it is to their Member of Parliament to whom they are likely to turn for redress, not to some remote and inaccessible judge. It is to their Member of Parliament that they will, indeed, have access- one of the glories of our constituency based system of democracy. And, crucially, it is their Member of Parliament whom they can turn out at the next election. And they are not likely to be satisfied if their Member of Parliament tells them, "*I'm afraid there's nothing I can do about it. This is what the judges have decided and that's it.*"

"These problems arise largely because Parliament has now asked our judges to carry out the kind of balancing exercise between conflicting rights which would previously have been made by elected politicians"

Little wonder that we have already heard demands for parliamentary input into the selection of the next British judge to be nominated to the European Court of Human Rights.[24] If present trends continue it can only be a matter of time that similar demands are made in the context of the appointment of judges to our domestic courts. After all, this is what happens in countries like the United States where the judges exercise similar power.

23 'Britain has become a safe haven for foreign terrorists, Lord Carlile warns', *The Times*, 3 February 2011. See also, 'Lord Carlile warns of new wave of foreign terrorists to be released onto Britain's streets', October 2011, http://www.policyexchange.org.uk/media-centre/insight/category/item/lord-carlile-warns-of-new-wave-of-foreign-terrorist-to-be-released-onto-britain-s-streets

24 See, e.g., Anthony Speaight, 'A proposal for Parliamentary input into the selection of the next British judge at Strasbourg', October 2011, http://www.policyexchange.org.uk/media-centre/insight/category/item/a-proposal-for-parliamentary-input-into-the-selection-of-the-next-british-judge-at-strasbourg

The remedy, as Lord Judge, the Lord Chief Justice, only last week told the Parliamentary Joint Committee on Human Rights, lies with Parliament itself.[25] If Parliament is not content with the way in which our courts "follow" the judgments of the European Court of Human Rights rather than simply "take them into account", it could legislate to clarify the position. If it is not content with the way in which the right to family life is being extended in deportation cases it could pass an amendment to the Human Rights Act to rebalance the way in which Article 8 of the Convention should be interpreted by our courts. Of course, these legislative interventions are likely to have limited effect if they fall foul of the European Court, which is why the reforms in that area, to which I have previously referred, are so essential.

"Legislative interventions are likely to have limited effect if they fall foul of the European Court, which is why the reforms in that area are so essential"

But, if those reforms are achieved, and if we are to improve the current state of affairs it will be necessary to take action at home as well. That could be done by piecemeal amending legislation of the kind I have described. Or it could be part of the new Bill of Rights which is currently under consideration.

The speech by the Attorney General to which I earlier referred contained a passage headed "How a Bill of Rights Might Work". That passage included the following paragraph:

> *"Where rights are qualified and not absolute and a balance has to be struck between competing rights, as must happen in relation to many of the Articles of the ECHR we should also consider if we wish through interpretation clauses to give a more detailed guide consonant with our own legal and political traditions than does the ECHR text itself as to the weight to be given to each of them."*

That is a clear recognition of the possibility that a Bill of Rights could be the vehicle for a comprehensive rebalancing of the Human Rights Act. It is an intriguing prospect.

25 Joint Committee on Human Rights, 'Human Rights Judgments' (Uncorrected Transcript of Oral Evidence), 15 November 2011 (response to Q64)

Conclusion

To sum up. Sixty years after the establishment of the Convention and a decade after the enactment of the Human Rights Act we are at a crossroads. We have a once in a generation opportunity to change things. There are encouraging signs that the political will to effect these changes is now present. We might finally arrive at that brave new morning that some of us have been arguing, and waiting for, for so long.

3. Further Reading

- Grieve, Dominic. 'Can the Bill of Rights do Better than the Human Rights Act?' – Speech at the Middle Temple, 30 November 2009: http://www.middletemple.org.uk/Downloads/Grieve%20Bill%20of%20Rights%20lecture%2030%2011%2009.pdf
- Herbert, Nick. 'Rights without Responsibilities - A Decade of the Human Rights Act' – Speech at the British Library, 24 November 2008: http://www.bihr.org.uk/documents/lunchtime-lectures/24-november-2008
- Pinto-Duschinsky, M., Gibbs, B. (ed). 'Bringing Human Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK', Policy Exchange, 2011: http://www.policyexchange.org.uk/publications/category/item/bringing-rights-back-home-making-human-rights-compatible-with-parliamentary-democracy-in-the-uk
- Raab, D. 'Strasbourg in the Dock: Prisoner Voting, Human Rights & the Case for Democracy', Civitas, 2011: http://www.coronetbooks.com/books/new/stra7211.html
- Uncorrected transcript of evidence to the Parliamentary Joint Committee on Human Rights (JCHR) by Lord Phillips and Lord Judge, November 2011: http://www.parliament.uk/documents/joint-committees/human-rights/JCHR%2015%20November%20transcript.pdf