

The Vote to Make Votes Matter:

How we risk a Great British disenfranchisement

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“The British people have not repelled the extraneous power of the papacy in spiritual matters and the pretensions of royal power in temporal in order to subject themselves to the unchallengeable rulings of unelected judges.”¹

Introduction

On Thursday 10 February 2011, MPs will have the chance to vote for or against a motion ostensibly relating to ‘voting by prisoners’.² In reality, the outcome of the vote will be of monumental importance to the evolution of the British constitution.

In 2005, the European Court of Human Rights (ECtHR) ruled that section 3 of the Representation of the People Act 1983 was incompatible with Article 3 of Protocol 1 of the European Convention on Human Rights (ECHR).³ After years of swaying between passive inertia and seemingly endless reviews, the Government is finding its hand forced into action. Frightened into submission by the risk of having to compensate the affected prisoners, senior government figures, including the Justice Secretary Ken Clarke, have called on MPs to bend to the will of the European Court. However, the potential ramifications of the debate stem far beyond extending the franchise to the convicted prison population. The sovereignty of the UK Parliament – the “bedrock of the British constitution” – risks being eroded, even eradicated, if our MPs fail to combat the ECtHR.⁴ The debate is no longer whether or not prisoners should have the right to vote; it is whether or not we want our elected representatives to be able to make this decision on our behalf.

Parliamentary Sovereignty

Dubbed by the great constitutional lawyer, A. V. Dicey, as “the very keystone of the law of the constitution”⁵, the principle of Parliamentary sovereignty “distinguishes us from all other members of the European Union, the United States, almost all the former Dominions and those former colonies to which this country granted independent constitutions”⁶. Professor Bogdanor has summarised the meaning of the phrase in eight short words: “What the Queen in Parliament enacts is law.”⁷ Parliament has the right to make any law it so chooses. (Indeed, with the Gender Recognition Act 2004, Parliament

¹ T. Bingham, *The Rule of Law* (London, Allen Lane, 2010), p.168

² <http://www.publications.parliament.uk/pa/cm/cmfbusi/a01.htm>

³ *Hirst v United Kingdom (No. 2)* (2005) 19 BHRC 546

⁴ *Jackson and others v Attorney General* [2005] UKHL 56, per Lord Bingham

⁵ A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th edn. (1959), ed. E. C. S. Wade (Macmillan)

⁶ T. Bingham, *The Rule of Law* (London, Allen Lane, 2010), p.160

⁷ V. Bogdanor, *Politics and the Constitution: Essays on British Government* (Dartmouth, Aldershot, 1996), p.5

has seemingly broken even Dicey's limitation, that it "can do everything but make a woman a man, and a man a woman".⁸) Even with the European Communities Act 1972, the Human Rights Act 1998 (HRA), and the 1998 Acts devolving limited powers to Scotland, Wales and Northern Ireland, Parliamentary sovereignty remains a fundamental element of our unique constitution.

The principle demands that the right of Parliament to make any law it wishes is not vulnerable to legal challenge. Unlike in other modern democracies, the UK courts have no ability to strike down Acts of Parliament. Even declaring a legislative measure ECHR incompatible under HRA, s.4 does not render that legislation invalid. For our domestic judges, appreciation of this subtle constitutional balance is quasi-instinctive, if sometimes difficult to define.⁹

ECHR: A History

Drafted in the shadow of the atrocities committed during the Second World War, the European Convention is a sound abstract statement of the need to protect human rights and freedoms. Britain was the first country to ratify the Convention, and significantly influenced its content and scope. Even now, over sixty years later, the broadly drafted principles continue to resonate with our modern-day political and legal priorities.

The ECHR was granted its own supranational guardian, the European Court of Human Rights. While the text of the Convention has not changed, its scope and meaning has been repeatedly inflated by this judicial powerhouse. Although through the Human Rights Act 1998, Parliament intended to bring rights home, the ECtHR has been engaged in a sustained campaign to keep the protection and definition of rights firmly within its own exclusive control.

How Has the ECtHR Expanded?

In 2005, Lord Woolf published a report entitled 'Review of the Working Methods of the European Court of Human Rights'. The document suggested some sensible administrative reforms to tackle the substantial backlog of cases that threatened to cripple the Court's "long-term viability".¹⁰ Many of these pragmatic suggestions were adopted in the subsequent so-called Wise Persons Report¹¹, and have received support from UK judges. However, the ECtHR has grossly distorted the purpose of these measures, seeking not to streamline and enhance the quality of its judicial decision making, but rather to fuel its pursuit of a wider remit, encroaching on and trampling over not only the jurisdiction of national courts, but also national democracy.

⁸ A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th edn. (1959), ed. E. C. S. Wade (Macmillan), p.43

⁹ *Jackson v Attorney General* [2005] UKHL 56

¹⁰ 'Review of the Working Methods of the European Court of Human Rights', December 2005, p.8; <http://www.echr.coe.int/NR/rdonlyres/40C335A9-F951-401F-9FC2-241CDB8A9D9A/0/LORDWOOLFREVIEWONWORKINGMETHODS.pdf>

¹¹ 'Report of the Group of Wise Persons to the Committee of Ministers', November 2006; <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1063779&Site=CM>

It is painfully ironic that the UK judges and those in Strasbourg agree in principle on many areas of reform. In a carefully considered seminar last year, Lady Justice Arden argued that the “only solution” to the ECtHR’s “daunting burden of work” is to “share the load with the national courts”, leaving the judges in Strasbourg free to “focus on the more important cases”.¹² On this point, Lady Justice Arden and the ECtHR entirely concur. In June 2008, Swedish ECtHR judge, Elisabet Fura-Sandström drew attention to Strasbourg’s “decisions of principle”, cases which reflect “what is important and new in the eyes of the Court”.¹³ These would constitute the pilot judgements, which, in combination with the newly adopted Protocol 14 procedure, could be applied by a single judge to deal summarily with similar cases.

However, where the two entirely diverge is in the appropriate scope of the European Court’s influence. While Britain calls on Strasbourg to “resist the temptation of deciding matters which properly fall within the margin of appreciation”, it is evident that the European judges are intent on pursuing their own, antithetical agenda.¹⁴ The Wise Persons sought greater cooperation with national courts as a means to enhance Strasbourg’s authority, not as a sign of “respect for the role of national institutions”.¹⁵

The Wise Persons state that it is imperative that the Council of Europe “continues and expands as far as possible its activities relating to human rights training for national judges”.¹⁶ Somewhat disingenuously, Fura-Sandström then emphasises the need to secure the support of bar associations on account of the “legitimacy” afforded by the very independence the Court seeks to undermine.¹⁷ “Human rights and the Court’s case-law [meaning only that of the ECtHR] must be a part of the curriculum at all law faculties.”¹⁸ Moot courts should be promoted, and students recruited to further the Court’s teachings. Rather than accepting a wide margin of appreciation as it purports to do, the ECtHR wishes to mould the national courts into obedient clones of itself. In essence, domestic courts can be trusted only when they will decide cases in a way that Strasbourg deems to be acceptable.

Under Fura-Sandström’s vision of decisions of principle, the ECtHR can carve out the areas of law it believes still require reform, and shape these as it sees fit once a petition is made. In particular, the Court is concerned to target purported rights violations “resulting from structural or general short comings in State’s law or practice” – in other words, cases arising from the national political and legal systems, presumably the cases most likely to touch on issues of national sovereignty and self-determination.¹⁹ Cases concerning other areas can be left to the newly obedient domestic courts.

¹² The Rt. Hon Lady Justice Arden DBE, *Is The Convention Ours?* (January 2010);

<http://www.judiciary.gov.uk/Resources/JCO/Documents/lj-arden-european-court-human-rights-29012010.pdf>

¹³ Elisabet Fura-Sandström, *Amplifying the effect of the Court’s case-law in the States Parties* (June 2008);

<http://www.echr.coe.int/NR/rdonlyres/E0FC84E3-35AA-46A1-A67F-B4932560E19D/0/StockholmdiscoursFuraSandstr%C3%B6m0910062008.pdf>

¹⁴ The Rt. Hon Lady Justice Arden DBE, *Is The Convention Ours?*, p.7

¹⁵ *Ibid.*, p.7

¹⁶ ‘Report of the Group of Wise Persons to the Committee of Ministers’, November 2006

¹⁷ Elisabet Fura-Sandström, *Amplifying the effect of the Court’s case-law in the States Parties* (June 2008), p.5

¹⁸ *Ibid.*, p.5

¹⁹ ‘Report of the Group of Wise Persons to the Committee of Ministers’, November 2006

This is a world apart from the British vision. Lord Neuberger has echoed Lady Justice Arden's calls for a greater dialogue between the national courts and the ECtHR.²⁰ However, far from the unbalanced relationship Strasbourg claims, this view envisages a relationship of mutual respect and learning, each helping to shape the jurisprudence and understanding of the other. Through this reciprocal dialogue, Lady Justice Arden believes that "[t]he national court can in effect send a message to the Strasbourg court by reflecting its views on the Strasbourg jurisprudence".²¹

Statements such as these do not reflect a naivety on the part of our national courts. Indeed, our judges are acutely sensible to the creeping expansionism of their European counterparts. Towards the beginning of her address, Lady Justice Arden resolutely declares: "This is really a call for judicial restraint by the Strasbourg court".²²

Let us be absolutely clear: this is not an attack on any of the Convention rights. The UK rightly does and should maintain its commitment to the principles enshrined in the ECHR. We have not reneged on the commitment we made in 1951; rather, when the UK ratified the Convention over six decades ago, we did not and could not predict the power-hungry judicial dynamo the European Court of Human Rights now threatens to become. Accepting the text of the ECHR and taking into consideration Strasbourg jurisprudence is a situation quite distinct from being crushed into submission by an unelected and insatiably expansionist Goliath. It is quite distinct from allowing the "European Constitutional Court" that Fura-Sandström desires to become a reality.²³

As Lord Hoffmann aptly notes, "[w]e got into this position by lack of foresight", not by a lack of rights protection.²⁴ In a Judicial Studies Board lecture in December, Lord Neuberger concluded with the old familiar adage, "If I was going there I wouldn't start from here". Perhaps if we had known where the ECtHR would ultimately force us to go, we wouldn't have started along that route at all.

Hirst

The current debate arose as a result of a series of legal challenges to the disenfranchisement of convicted prisoners in the UK. There is little to commend in the judgement. Finding against the Government, the Grand Chamber judges swing unashamedly between indefensible ambiguity, deliberate confusion, and brazen arrogance.

Firstly, the Court demonstrates a destructive desire to curtail the margin of appreciation to the point of non-existence. Although the Grand Chamber boldly states that "it is for each contracting state to mould [the electoral system] into their own democratic vision", the remainder of the Court's reasoning serves

²⁰ Lord Neuberger, *The Incoming Tide: The Civil Law, The Common Law, Referees and Advocates* (June 2010); <http://www.judiciary.gov.uk/NR/rdonlyres/1F3A87BF-5025-48CC-97BF-4EF48CD8F6DD/0/mreurocircuitlecturejune2010.pdf>

²¹ The Rt. Hon Lady Justice Arden DBE, *Is The Convention Ours?*, p.4

²² The Rt. Hon Lady Justice Arden DBE, *Is The Convention Ours?*, p.3

²³ Elisabet Fura-Sandström, *Amplifying the effect of the Court's case-law in the States Parties* (June 2008), p.6

²⁴ Lord Hoffmann, *The Universality of Human Rights* (March 2009), at 44

only to undermine and qualify this otherwise laudable claim.²⁵ It is axiomatic that, whilst the margin of appreciation is wide, it is not “all-embracing”.²⁶ Nonetheless, the Court goes too far in subjecting the “determination of its limits” to “European control”.²⁷

The Court objects to the blanket nature of the ban, which it claims applies to all prisoners “irrespective of the nature or gravity of their offence”.²⁸ Of course the Court is right that all convicted prisoners fall under the ban, however this narrow few fails to appreciate that its application is in no way “indiscriminate”.²⁹ There are variations in sentencing practice, and similar offences will not necessarily warrant the same sentence. However, all those sentenced to prison have crossed the custody threshold. Prisoners will have been convicted of a range of offences of widely different levels of severity, yet in each case their behaviour has been deemed by a judge to be ‘so serious’ as to warrant imprisonment.

In a statement which would be laughable for its unfathomable absurdity did it not come from so influential a source, Judge Caflisch (concurring) declares: “It cannot simply be assumed that whoever serves a sentence has breached the social contract.”³⁰ This begs the question, why does an individual receive a custodial sentence in the first place?

In complete disregard of established fact, the majority contend, “there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote”.³¹ The judges note that the issue was considered by the multi-party Speaker's Conference in 1968. They know that a working party did not seek to extend the franchise beyond unconvicted prisoners. Yet, with flagrant pomposity, they conclude that there was no “substantive debate by members of the legislature” on the issue.³²

The dissenting judges rightly criticise their colleagues’ objections to this purported lack of domestic debate: “it is not for the court to prescribe the way in which national legislatures carry out their legislative functions”.³³ That the sovereignty of our Parliament is under such attack by a remote judiciary at all is an affront to our constitution; that this judiciary so casually dismisses our political model makes a mockery of the supranational system.

Judges Tulkens and Zagrebelsky appear to have grasped the sensitivity intrinsic to this delicate judicial balance:

“This is an area in which two sources of legitimacy meet, the court on the one hand and the national Parliament on the other. This is a difficult and

²⁵ *Hirst v United Kingdom (No. 2)* (2005) 19 BHRC 546, 562

²⁶ *Hirst v United Kingdom (No. 2)* (2005) 19 BHRC 546, 547

²⁷ *Hirst v United Kingdom (No. 2)* (2005) 19 BHRC 546, 571

²⁸ *Hirst v United Kingdom (No. 2)* (2005) 19 BHRC 546, 567

²⁹ *Hirst v United Kingdom (No. 2)* (2005) 19 BHRC 546, 567

³⁰ *Hirst v United Kingdom (No. 2)* (2005) 19 BHRC 546, 572

³¹ *Hirst v United Kingdom (No. 2)* (2005) 19 BHRC 546, 565

³² *Hirst v United Kingdom (No. 2)* (2005) 19 BHRC 546, 565

³³ *Hirst v United Kingdom (No. 2)* (2005) 19 BHRC 546, 577

slippery terrain for the court in view of the nature of its role, especially when it itself accepts that a wide margin of appreciation must be given to the contracting states.”³⁴

It is mystifying why they then still concur with the majority opinion.

This is not to say that the margin of appreciation permits infinite discretion. The dissenting judges rightly distinguish the disenfranchisement of an ethnic minority among the Cypriot population³⁵ from the categorical disenfranchisement of convicted prisoners. In ‘The Rule of Law’, the eminent Law Lord and jurist, Tom Bingham highlights that “some categories of people should be treated differently because their position is in some important respect different”.³⁶ He lists children as a self-evident example, but also prisoners, who “are treated differently...since the very object of imprisonment is to curtail rights...which are enjoyed by the rest of the population”.³⁷

The ECtHR judges fail to respect the decision of the UK Parliament not because it was reached without proper and reasoned debate, but because the conclusion grates against its own political ideal. The majority entirely fail to comprehend that “human rights are universal in abstraction but national in application”.³⁸

In stark contrast, it is difficult to fault the reasoning of the ECtHR minority and the self-denying ordinance that they so willingly, even presumptively, adopt. Mindful of the “sensitive political character of this issue”, the dissenting judges cannot accept their colleagues’ attempts to “impose on national legal systems an obligation” to so radically alter an arrangement which “[i]t must be assumed...reflects political, social and cultural values in the United Kingdom”.³⁹

In modern times, “virtually all significant moral and political controversies in contemporary Western societies involve disagreements about rights”.⁴⁰ Ceding to Strasbourg such substantial swathes of political power would be to allow a distant body of unaccountable and increasingly reckless judges to usurp the authority of our Parliament, and hence of our electorate. Given Strasbourg’s refusal to bow to the “essentially national character of rights, embedded in a national legal system”, the relationship between the UK courts and the ECtHR can only function effectively under the framework and attitudes envisaged by our domestic judges.⁴¹ It must be hoped that the appropriately self-restricting attitude of the minority in *Hirst* permeates throughout their self-aggrandising colleagues.

³⁴ *Hirst v United Kingdom (No. 2)* (2005) 19 BHRC 546, 574

³⁵ *Aziz v Cyprus* (2004) 19 BHRC 510 at paras 29-30

³⁶ Tom Bingham, *The Rule of Law* (London, Allen Lane, 2010), p.55

³⁷ Tom Bingham, *The Rule of Law* (London, Allen Lane, 2010), p.56

³⁸ Lord Hoffmann, *The Universality of Human Rights* (March 2009), at 23

³⁹ *Hirst v United Kingdom (No. 2)* (2005) 19 BHRC 546, 577-8

⁴⁰ The Rt. Hon. Lord Bingham, *The Rule of Law and the Sovereignty of Parliament* (October, 2007); <http://www.kcl.ac.uk/content/1/c6/01/45/18/TheRuleofLawandtheSovereigntyofParliament.pdf>

⁴¹ Lord Hoffmann, *The Universality of Human Rights* (March 2009), at 5

The dissenting judges are emphatically right when they state: “Our own opinion whether persons serving a prison sentence should be allowed to vote in general or other elections matters little.”⁴² The rest should heed Lady Justice Arden’s statement: “What we need in the United Kingdom is to be able under our domestic law to say to the Strasbourg court that it has...misunderstood national law or the impact of its decisions on the legal system.”⁴³

What is at stake?

We are suspended in an illogical constitutional anomaly, whereby our courts can refuse to follow Strasbourg judgements, but our supposedly sovereign Parliament cannot. So what is at stake on Thursday? Let us start by saying what is not at stake. What is emphatically not at stake is our commitment to the protection and promotion of human rights. Supporting Thursday’s motion is not tantamount to seeking exemption from the guarantee of the very highest degree of fundamental rights principles that we made when we drafted and signed the ECHR. We are not seeking to excuse ourselves from any of the standards we adopted under this original text. Thursday’s vote does not aim to enable MPs to pick and choose those rights they are happy to uphold and those more inconvenient rights they would rather dismiss. Britain’s longstanding and well deserved international reputation in this field is not at stake.

What is at stake is far closer to home. What is at stake is the “keystone” on which the British constitution rests, the “bedrock” of what makes our political and legal institutions unique and enviable on the world stage. Parliamentary sovereignty is not a grand, abstract principle, relevant only to constitutional lawyers and those politicians motivated enough to care. It is of relevance to everyone in the UK who wants a say in how their country is run; to everyone who wants to be able to hold to account the bodies that decide the rules by which we must live our lives; to everyone who wants their vote to count.

In recent times, there has been much angst and antipathy over the state of politics in Britain. Frittering away the sovereign power of our Parliament cannot but perpetuate and exacerbate political apathy.

What is at stake? “What is at stake is the location of ultimate decision-making authority – the right to the ‘final word’ in a legal system. If the judges were to repudiate the doctrine of parliamentary sovereignty...they would be claiming that ultimate authority for themselves.”⁴⁴

⁴² *Hirst v United Kingdom (No. 2)* (2005) 19 BHRC 546, 578

⁴³ The Rt. Hon. Lady Justice Arden DBE, *Is The Convention Ours?*, p.5

⁴⁴ J. Goldworthy, *The Sovereignty of Parliament* (Oxford, OUP, 1999), p.3