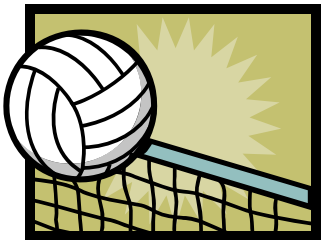
# THE CREANEY MEMORIAL LECTURE

## Storey's Gate, Westminster

## Wednesday 26 February, 2014

# Hitting the Balls out of Court: Are Judges Stepping Over the Line? [1]



*Those judges are doubly mad! In the first place, because they are politically mad, and in the second place, because they are mad anyway. If they do that job, it is because they are anthropologically different from the rest of the human race*.[2]

No, not the Home Secretary, expressing her views on the Strasbourg court or its recent view that the reach of the European Convention on Human Rights stretches far beyond Europe. They were a response to what might be described as a number of little local difficulties with which Prime Minister Berlusconi was faced, rather than a difference of view as to legal principle. But before we condemn those words as little more than the oft-heard response of a defendant caught with his hands in what

[1] I am grateful for all the research by Elizabeth Bardin and Lynne Middleton, and the advice from Beatson LJ and Dean Godson.
[2] Spectator interview 6.9.2003

decorum demands we describe as the till, we should pause for a moment to reflect on two significant features of that customarily moderate criticism: first, that it appeared to be yet another example of an expression of frustration by a politician at judicial usurpation of the proper function of the democratically elected representative of the people, and, second, it was a response to the result of a particular judicial determination, a reaction to the decision of the Italian magistrates to pursue 'il Divo', Andreotti, in respect of alleged mafia connections.

Although I did not know John Creaney, I have some insight into his importance and influence because of my experience of one of his pupils, the former LCJ of NI, Lord Kerr, since he now sits in our Supreme Court, where he frequently overrules my decisions. I shall not dwell on John Creaney at this stage…he has an important role to play in my conclusion.

The starting point for my subject tonight is the frequently expressed fear that the balance between the role of the judge and the role of an elected government is being undermined by the influence of a foreign court in Strasbourg. But that is only the spur. Tonight I am not going to debate that question yet again. I want to underline certain features of that debate which I regard as significant; they should not be forgotten during the seemingly endless controversy as to the meaning, scope and application of the Convention.

The current arguments will be familiar to you all, prompted by decisions as to its application to military action in Afghanistan, (*al-Skeini*[3] and *Smith v MOD)*, the blanket ban on the right of a prisoner to vote in *Chester,* and the imposition of whole life tariffs (*Vinter)*. Have the judges there gone too far, and have our own courts, particularly the Supreme Court, been too submissive to a Strasbourg interpretation? Do we need to domesticate an apparently untamed foreign invader? There are two aspects of the current debate which I wish to stress. First, the echoes of the past sounded by this controversy and, second, a more novel *leitmotiv* which may be

[3] (2011) 53 EHRR 589,[2013]UKSC41,[2013] UKSC 63,[2012] 55 EHRR 34

detected by those with the ability to discern any coherent theme in the present cacophony: the tune now played by the judicial pipers.

Even to an occasional observer, let alone to a participant in the relationship, a feeling of *déjà vu,* if not *weltschmerz*, is inescapable. The dispute between those who welcome the progressive protection by Strasbourg of Convention rights and those who fear the erosion of all that is so dear and fundamental to the British Constitution (I deliberately proffer it as extreme disagreement, since that is how it is so often portrayed) bears many of the hallmarks of disputes as to the proper role of judge or of politician since the dawn of judicial review. Central to every post-war history of the law already written and, I fear, to be written, will be the apparent tension between those who rely upon the legitimacy of the ballot box and those who invoke their duty to the rule of law.

This ever rumbling controversy erupts from time to time into more vigorous exchange. We will all have our favourite examples…is it Michael Howard on the *Today* programme in 1995: *the last time this particular judge found against me, which was on a case which would have led to the release of a large number of illegal immigrants, the Court of Appeal unanimously decided he was wrong* (our present Master of the Rolls), or is it in 2003, David Blunkett: *I am personally fed up with having to deal with a situation where Parliament debates issues and judges overturn them*? It is 17 years since Joshua Rozenberg wrote his *Trial of Strength, the Battle between Ministers and Judges over who makes the Law*. *Do judges have respect for Ministers? On the whole, no*[4]*.* (Well that's wrong, some of us have enormous respect but as you know, when judges say "with respect", they are about to disagree.) *Is there,* he continues*, any respect for the judiciary in government circles? Not as much as there should be.* (Not sure about that, either, how much should there be? Total respect would be as bad for the judges as anyone else.) He quotes Lord Steyn[5] *…It is when there is a state of perfect harmony between the judges and the*

[4] All quotations from Rozenberg, Trial of Strength 1997 Richard Cohen Books, and pages 213-214,
[4]Lord Steyn, Admin Bar Association Annual Lecture 1996

*executive that citizens need to worry. A state of tension between the judges and the executive, with each being watchful of encroachment into their province, is the best guarantee the subject can have against the abuse of power.*

Over all these years the struggle is usually about encroachment across the boundary…that there is such a boundary has not been disputed. But throughout the years of judicial review no cartographer has been able to draw that line with any particular clarity, or at least with the precision necessary to recognise a case of trespass. [6]*There has been,* Lord Bingham wrote in 1996, *difficulty and dispute on the frontier, not alleviated by doubt about where the frontier should be*, or, more directly, Lord Goff in 1993[7], *although I am well aware of the existence of the boundary, I am never quite sure where to find it*. The absence of any clear boundary is convenient for both those who cry trespass and for the alleged trespasser.

For Government, for any politician, or journalist, it is far more persuasive not to quarrel with the result of any particular determination but rather to dress disappointment in the cloak of high principle. The loser does not like losing. Most, if not all, complaints against the result are likely to be regarded as no more than the protest of the disappointed litigant who believes he has been done an injustice. So it is far better to complain not at the result, but to contend that the court has breached some fundamental principle of law or undermined our democratic institutions by crossing over the border into impermissible political activism, and has usurped the role of government. And it is far easier to repackage disappointment at a particular decision as an infringement of principle, if the boundary which separates the power of the judge and the power of government is difficult to find. [8]

There is another traditional convenience about the dispute as to the proper scope for the exercise of judicial authority. It will often be highly convenient for government and parliament that the last word resides with the court and not with

[6] Business of Judging ,Oxford 1996
[7] Woolwich Building Society v IRC [1993] AC 173
[8] Judges and Politics in the Contemporary Age Hodder-Williams 1996 Bowerdean

government. Many of the most difficult questions the courts have to answer are questions to which there is no *right or correct answer*. They are questions over which reasonable people may reasonably differ BUT, and this is the point, they are questions on whose merits politicians are in rancorous disagreement.

Let me give an example close to the concerns of Policy Exchange. The issue as to whether it should be open to servicemen or their relatives to sue the MOD in court for death or injury for negligence in failing to provide adequate protective clothing or material is of acute difficulty and sensitivity. The Supreme Court has, as you all know, recently in *Smith and Others*, endorsed the right of a serviceman or his relatives to do so, not merely invoking the tort of negligence, but also Art. 2 of the Convention. It should be recalled that *Smith* was not concerned with whether the claims in negligence for a breach of Art. 2 succeeded, but whether they could be brought at all. It was the forensic equivalent of a TEWT, a tactical exercise without troops. The majority of the Supreme Court reversed its previous decision as to the territorial scope of the Convention and followed Strasbourg's ruling that where a state exercises control or authority over an individual, then it is under an obligation to secure to that individual the rights relevant to that person's situation.

The majority ruled that decisions taken about training or procurement were at a high level of command and closely linked to the exercise of political judgment, the judges cannot second-guess such judgments; decisions taken in the heat of battle were likewise, not capable of being questioned in litigation…the question was whether those cases fell within a middle ground between the two. It would not be fair or reasonable to strike out those cases which may possibly fall within that middle ground "at this stage". Lord Hope then gave words of warning…*But it is of paramount importance that the work that armed services do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things go wrong. The court must be especially careful to have regard to the public interest.*[9]

[9] Para.100

The minority, of course, struck gold in the heart of the armed services, particularly in its reference to the judicialisation of war…they were the heroes, because they could not recognise any sensible distinction between decisions taken as to supply of technology and equipment, training for active service and decisions taken on active operations. The minority did not think that Lord Hope's injunction to be cautious was a real solution; they feared extensive litigation.

Tugendhat and Croft in *The Fog of Law,* with the sub-heading *An Introduction to the Legal Erosion of British Fighting Power, a*dvanced a powerful case as to the damage to preparation and conduct of military operations caused by judicial intervention…it argued that discipline and lawful behaviour should be enforced by the armed forces themselves.

*Smith* demonstrates the advantages for government of not having to make a decision but leaving it to the courts…if an adverse decision of eye-watering difficulty has to be made, how much easier and more acceptable to be able, should it be regarded as adverse, to blame it on someone else…the judges. Any government answerable to the electorate must be delighted that they do not themselves have to make the decision as to what should be done.

Lord Carnwath in *Smith* drew attention[10] to the power of the Secretary of State to reinstate the exemption of the Crown from being sued, an exemption which had existed up to 1987. The previous exemption had caused injustice and protest. In 1955 a reservist, Adams[11], had been killed by a live shell and his death was certified as attributable to service for pension purposes. But his parents could not sue as personal representatives because they did not qualify under the pension scheme. Despite protest, it was 32 years before Parliament removed the exemption. No Secretary of State has ever sought to re-activate the immunity, although in the US it is not possible to bring claims for injuries incident to service.

[10] Paras 176-177
[11] Adams v War Office [1955] 1 WLR 1116

Any attempt by the Secretary of State to prevent a member of the armed forces or their relatives suing would be bound to stir up huge controversy amongst the electorate. The views of the electorate are bound to fluctuate. How much better to leave it to the courts to resolve questions not only as to the facts but the extent to which the courts should recognise that any duty is owed. If the decision is unpopular and imposes liability then those who dislike the result can dress their disagreement up in the cloak of…high principle that the courts have interfered with that which is a matter for Whitehall and the Admiralty. And as for the families of the servicemen and the wounded themselves: Dr Johnson said it all…*the English soldier seldom has his head very full of the constitution…*[12]

The debate in the House of Lords[13] which followed the Policy Exchange paper, the *Fog of Law*, demonstrates this important feature: that the arguments in favour and against permitting servicemen to sue are difficult of resolution, and whether decided one way or the other are likely to stir up vociferous opposition calculated to make the decision-maker highly unpopular with those who disagree with that decision, although, as I pointed out in the foreword which I was lucky enough to be asked to write, they eschewed the discourtesy of adding an 's' to their description of judicial creep.

Their Lordships argued both for and against immunity and the need to avoid the military having to act with a judge, coroner or chairman of an inquiry peering over their epaulettes. The author of the leading judgment, Lord Hope of Craighead, spoke in the debate to ensure that his judgment should not be misunderstood.

Lord Hope was not the only law lord who turned up for the debate. Armed with the well-known ability of communication amongst judicial colleagues which rivals, if not surpasses, signals sent in the smoke of battle, Lord Brown had thought *he* was the

[12] Johnson the Bravery of the English Common Soldier, quoted Hill, Liberty against the Law, Allen Lane 1996
[13] 7 November 2013

only Law Lord available for debate and he argued that the judgment was more measured and nuanced than generally understood…not sure whether that was code for his agreement or disagreement…Lord Guthrie blamed government for what he described as "legal mission creep".

And the Government response? The Under-Secretary of State, Ministry of Defence said that *The Fog of Law* deserved respect and careful consideration…but he did not believe that the ability or operational flexibility had been impaired; he thus demonstrated the view that it is so much more convenient for government to leave difficult decisions to the judges.

The debate highlighted the use of the European Convention as a convenient whipping-post. Lord Craig, amongst others, suggested that fears that the introduction of the HRA 1998 on effective control and command of the armed forced were now proved to be well- founded. But the effect of *Smith* on active service operations does not depend on the HRA or the application of the Convention. The damage caused to the command and control of the armed services, argue the authors of the Fog of Law, is done by any civilian *ex post facto* enquiry into decisions of commanders or execution of those commands…it is done whether it is the UK common law which is applied or the Convention on Human Rights. But much popular support is to be gathered by blaming the effect of the Convention.

Are questions not of judicial encroachment but of foreign judicial encroachment any different? I suggest they are not. But you would be forgiven for thinking they were different if you listen to some of the attacks on foreign judicial encroachment. Criticism of our judges has been diverted onto foreign judges in an international court. The Home Secretary in 2011 echoed her predecessor in 1995. *We all know the stories about the violent drug dealer who cannot be sent home because his daughter - for whom he pays no maintenance - lives here. The robber who cannot be removed because he has a girlfriend. The illegal immigrant who cannot be deported*

*because - I am not making this up - he had a pet cat* [14]*,* and long after it became known that the Home Secretary had not made it up but had been misinformed, long after it was revealed that the reason for the reversal of the decision to deport was the failure of the Home Office to follow its own guidelines in relation to established same sex couples, and long after the magisterial rebuke from Lord Neuberger that persuasion should be based on truth and not on propaganda[15], the sting of the accusation remains and the response is soon forgotten.

Yet again the protest is that of trespass over the frontier between the realm of the judiciary and the sovereignty of an elected government. But it is, of course, far more telling and advantageous that the judges criticised are not our own dear judges, but judges in, if I may adopt and adapt post-Munich language, far away countries, of whom we know nothing.

But there is a novel feature: enter into this acute controversy our judges. For thirty years the Kilmuir rules had prevailed so that no judge could broadcast without the express permission of the Lord Chancellor, so as to isolate judges from what were described as "*the controversies of the day*". The rules were abolished by Lord Mackay in 1987 and he gave advice that judges *must avoid public statements on general issues or particular cases which might cast doubt on their complete impartiality. Above all, they should avoid any involvement, either direct or indirect, in issues which are or might become politically controversial*.[16]

The current controversy as to the role of the Court in Strasbourg underlines how spectacularly that rule appears now to have been, the kindly observer might say, finessed, the unkind, ignored.

Discussion by sitting judges of the nature and effect of incorporation of the European Convention on Human Rights is not new. After all, Lord Scarman had

[14] Conservative Party Conference,4.10.2011
[15] Judicial studies Board Annual Lecture March 2011
[16] Rozenberg ibid.pp 49-50

argued for a Bill of Rights in his Hamlyn lectures in 1974, eight law lords and the then Master of the Rolls, Sir Thomas Bingham, supported Lord Lester's Human Rights Bill in the House of Lords in 1994 and when finally the Government introduced the Human Rights Bill in October 1997, senior judges participated, particularly Lord Bingham, suggesting that Convention rights should be fully recognised and enforced in the United Kingdom, and expressing doubts as to whether Convention rights were already sufficiently protected by the common law.

It was hoped that by increasing the power of judges to construe and apply the Convention in solving domestic challenges to the actions of public authorities, the power of the judges in Strasbourg would be reduced. What a paradox, that the attempts to diminish the force of Strasbourg influence should thereafter have merely strengthened vociferous complaint as to the invasive growth of what is condemned as alien jurisprudence!

The tone of judicial intervention was set by Lord Hoffmann, a month before he retired. In his lecture in March 2009, the *Universality of Human Rights*[17], Lord Hoffmann identified what he regarded as a basic flaw in the concept of having an international court of human rights; he emphasised the essentially national character of rights in different countries. He chose three examples of cases, in which the court had cloaked itself with unwarranted grandeur (his word, not mine), exhibiting enthusiasm for the right to silence, for the hearsay rule and, thirdly, a case which Lord Hoffmann described as *about as far from human rights as you can get*, night flights at Heathrow. And thus he masked his opposition to the result in those three cases in the trappings of high principle.

He attacked the constitutional legitimacy of the judges. *Liechtenstein, San Marino Monaco and Andorra, which have a combined population slightly less than the London Borough of Islington, having four judges and Russia, with a population of 140 million, has one judge…*The 18 members of the sub-committee who elect them, were

[17] JSB Annual Lecture 2009

chaired, he said by a Latvian politician, with a labour trade unionist without legal qualification and a conservative politician called to the Bar in 1972 who, *so far as I know has never practised*.

Now my purpose tonight is not to demonstrate what my Latvian grandmother would have called *chutzpah* by challenging Lord Hoffmann's conclusions. His criticism is used as if it was an authoritative decision of the Court…and not just here, but by other members of the Council of Europe. In 2010 the President of the Constitutional Court in Belgium attacked the Strasbourg court for *sneakily broadening its own competences. It has granted property rights on unemployment benefits and has thus realised something that Karl Marx never could.* And when asked whether others shared his views he said: *The British Lord Hoffmann has, at his goodbye speech as Senior Law Lord of the United Kingdom in 2009, expressed very sharp criticism on the way in which the Court works, and on the manner in which the Judges are elected*[18]*.* At least Judge Bonello was in court in Strasbourg when he criticised some of his colleagues' decisions.

The Strasbourg court had refused to uphold the complaints of secular children about fellow-pupils wearing crucifixes in school in Italy. Judge Bonello in his concurring judgment said:

*A court of human rights cannot allow itself to suffer from historical Alzheimer's. It has no right to disregard the cultural continuum of a nation's flow through time, nor to ignore what, over the centuries, has served to mould and define the profile of a people. No supranational court has any business substituting its own ethical mock-ups for those qualities that history has imprinted on the national identity. A European court should not be called upon to bankrupt centuries of European tradition. No court, certainly not this Court, should rob the Italians of part of their cultural personality*[19]*.*

[18] Bossuyt Gazet van Antwerpen 11 May 2010
[19] Lutsi v Italy

Lord Hoffmann's trend has not been confined to retired or foreign judges. In his FA Mann lecture 2011, the about to be elevated Jonathan Sumption QC, in *Judicial and Political Decision-Making - the Uncertain Boundary*, identified judgments, particularly in the field of immigration, deportation and asylum, as by their nature, political; he said *the judicial resolution of inherently political issues is difficult to defend.* He called for a coherent or principled basis for distinguishing between those questions properly a matter for decision by politicians answerable to Parliament and the electorate, and those which are properly for decision by the courts. The Convention, he says, removes important areas of policy from the domain of democratic accountability.

In 2013, by now firmly embedded in the Supreme Court, Lord Sumption went to Kuala Lumpur to pose the question *What is a question of Law? What is a question of Policy?*...He commented that the Strasbourg court…*has become the international flag-bearer for judge-made fundamental law extending well beyond the text which it is charged with applying. The moment one moves beyond cases of real oppression and beyond the truly fundamental, one leaves the realm of consensus behind and enters that of legitimate political debate where issues ought to be resolved politically*. The Human Rights Act, he said, involves the transfer of part of an essentially legislative power to another body…the judges.

Amongst the qualities a candidate for the Supreme Court must show is *a willingness to participate in the wider representational role of a Supreme Court Justice, for example, delivering lectures*, and our justices have certainly taken that quality to their hearts. Lord Sumption in Malaysia, Lord Mance in Monte Carlo and Baroness Hale, Lord Hope, Lord Reed, Lord Kerr, Lord Dyson and Lord Neuberger all over the place…most if not all of our top judges, have lectured on the relationship between the Supreme Court which they adorn and the Strasbourg Court.

Do not for one minute think that the judicial signposts point all one way. Lord Mance, in Monaco, thinks the Strasbourg court has given *real weight to the member states' evaluation of local circumstances in significant recent decisions…the potential*

*for good in fundamental provisions at European level ought not to be ignored. Nor should we think we are the only country whose lay or legal population feels from time to time strongly about some decisions*…He speaks of an *unprecedented net of governmental and institutional collaboration offering inspiration and assistance to emerging democracies* and cites removal of sentencing discretion from the executive, lifting the ban on homosexuals in the armed forces, the ending of detention without trial of aliens suspected of terrorism, prevention of deportation of aliens facing torture abroad…*a positive inspiration,* he says.[20]

He echoes the Master of the Rolls, Lord Dyson, in his speech in 2011 at Hertfordshire University, where less exotic surroundings left his enthusiasm undimmed…*We should not make the mistake of thinking that our courts are always better than Strasbourg…the court, he said, was a force for the good. I am far from sure that the extraordinary contribution that the Court has made to the protection of human rights would have been achieved if the court had done no more than decide cases of general importance…the achievement of the court is attributable to the fact that it has been willing to decide individual cases….*

Not so, suggests the author of the latest series of Hamlyn Lectures, described by Lord Judge[21], who agrees with their conclusion as superb, Lord Justice Laws champions the ability of our own common law to interpret and protect human rights and fears for the damage caused by Strasbourg jurisprudence…. *We can make*, he says, *the law of human rights truly our own, perceived and rightly perceived as a construct of English law…we shall quell these fears of the incoming tide*[22].

The debate is often focussed on what is meant in Section 2 of the Human Rights Act by the obligation imposed on the courts to *take account* of the decisions in Strasbourg. The original position taken by Lord Bingham in the House of Lords in 2004 (*Ullah)*[23] was that their lordships were bound to follow the decision of the

[20] Destruction or Metamorphosis of the Legal Order World Policy Conference 14 December 2014
[21] Constitutional Change UCL 4 Dec 2013
[22] Lecture III The Common Law and Europe
[23] [2004] 2 AC 323

Strasbourg Court which alone could authoritatively expound the correct meaning of the Convention…no more but certainly no less…. Lord Brown later emphasised that the duty of the court to keep pace with Strasbourg means "no less, but certainly no more"[24]. In *Smith* the Supreme Court regarded itself as bound by Strasbourg's ruling on the extra-territorial jurisdiction of the Convention, in *Chester* the court again regarded itself as bound by the Grand Chamber's definitive ruling decision as to voting rights.

This is described by Laws LJ as an important wrong turning in the law. Those in power in 1998 agree (Lord Irvine and Jack Straw last year)…and there are examples where the court has declined to follow (the reliance on the evidence of a written statement to convict without opportunity for the witness to be cross-examined (*Horncastle*[25]))…or where it would, to use the current President, Lord Neuberger's language (*Pinnock*[26]*) be not only impractical to do so but where it would be inappropriate*…

And so the elusive concept of *taking into account* itself provides a fruitful source of dispute…enter into the lists Baroness Hale, in Warwick, Wales and Barnard's Inn Reading[27] and Lord Kerr in his Clifford Chance lecture[28]. Both forcefully argue that it is absurd that our Supreme Court should not decide a question merely because Strasbourg had not done so and if that is so, they suggest that our courts might be more adventurous than Strasbourg…Baroness Hale has suggested that a fresh beginning should give no less protection than before and *maybe even more*.

Lord Kerr, in the Supreme Court[29] dissented from the view the majority took and was of the view that a suspect who had not had access to legal advice could not be questioned…the majority view had been based in part on the absence of any such rule in Strasbourg jurisprudence. In his lecture in January 2012[30], he argued that

[24] Al-Skeini para 106
[25] [2010] 2 AC 373
[26] Manchester CC v Pinnock [2010] 2 AC 104
[27] What's the Point of Human Rights 28 Nov 2013, The Supreme Court in the UK Constitution 12 Oct 2012, Beanstalk or Living Instrument? 2011
[28] 25 January 2012
[29] Ambrose v Harris [2011] 1 WLR 2435
[30] The UK Supreme Court the Modest Underworker of Strasbourg?

Strasbourg is not the inevitable and ultimate source of all wisdom but that it is open to our courts *to give a more generous scope to Convention rights*. Thus, for him, the open-textured general words of the Convention provide an opportunity to develop and advance the protection afforded by the Convention.

The reason for so many lectures may be that the subject-matter of the debate is by no means straightforward. It requires careful reading of lengthy judgments. Judges mask their views, some more successfully than others, in reasoned analysis, for fear of being accused of political controversy. They leave the protagonists to pick and choose a juicy sound-bite. The protagonists for reform do not often speak of the effect of the UK's withdrawal from the court on our relations with our European neighbours; the withdrawal of our engagement with the protection of the rights of others in countries where even the most insular might think our influence could be for the good. Daily in the extradition courts, the judges emphasise the importance of judicial comity and the trust between the members of the European Union which demands speedy extradition to other European member states. We trust such member states and they trust us because they apply Convention standards. Does judicial comity and trust only exist when we want to shift someone from our shores or get a fugitive from our justice back? Does it suit anyone to observe that when the UK government wins in Strasbourg, as it usually does, the court provides international affirmation of the lawfulness of the government's action, in the same way as our domestic courts affirm the legality of government decision when they reject a judicial review? Judges leave it to others to speak about or ignore loss of international reputation, for fear of being accused of engaging in political controversy. Although not all, if you read the detailed and persuasive analysis of Sales J in his defence of the proposition of the principle that our courts should follow Strasbourg: *it would severely damage the moral standing and international prestige of any state in the Council of Europe and would tend to undermine the Council of Europe and the Convention if it failed to respect a judgment given against it by the Court*[31].

[31] Strasbourg Jurisprudence and the Human Rights Act Public Law 2012

Professor Oliver has explained: *the long and short of it is that the Human Rights Act and the ECHR simply do not fit popular culture in the UK*[32]*.* Some of our most senior judges continue to stick a judicial fork into the hot political potato. And politicians have made an enjoyable meal of it. The debate hit the Today programme over last New Year; Lord Judge, with all the authority of a recently retired Lord Chief Justice, repeated the view he expressed in his lecture to UCL in December 2013, and spoke of his belief that the Court does not need to follow Strasbourg and that the common law provides sufficient protection, and the day after, the Lord Chancellor, citing him as support for his determination to do away with….well until his proposals are published it is not clear precisely what… *"We have got a situation where the European Court of Human Rights has lost its legitimacy in the UK by doing things that frankly the people of this country and their elected representatives do not want"…*and he referred to the recent decision of the court in Strasbourg as to whole life tariffs when he said: *That is what the people of this country want, that is what the elected Parliament wants. It is not for a European Court to tell us to change the way that we govern our country. I do not believe that key decisions about the way this country is governed - we are a democracy after all - should be taken elsewhere, they should be taken in our Supreme Court. We have to replace the Human Rights Act which as Lord Judge says is one of the key reasons why the Court of Human Rights seems to have such sway in the UK*[33].

The Lord Chancellor and Lord Judge made clear their devotion to the text of the Convention; it was its interpretation to which they objected. But let us suppose, parking our international obligations to one side and the right of a claimant in the UK to make an application to the Strasbourg Court, interpretation will be left to our judges. Already it can be seen that a domestic interpretation may not be as restricted as hoped, or feared (depending on your point of view). The Court of Appeal's decision as to whole life tariffs shows our law is not inconsistent with

[32] Ch.16 Law in Politics, Politics in Law, ed Feldman, Hart 2013
[33] 30 Dec 2013

Strasbourg's view of the Convention, contrary to popular superstition, and that a whole life sentence is always subject to the possibility of release before death.

Freedom from the bondage of Strasbourg precedent gives liberty to one judge to develop and enhance, whilst to another the opportunity to restrict and diminish…for Lord Justice Laws...*the bigger human rights get, the weaker they get...*while for others, *there is no good reason to hold back*.

By now the avid reader may be forgiven for feeling something else, apart from the intrusion of the law, which creeps…a sense of bewilderment…whose authority should we follow? Who will prevail? I think there is no cause whatever for despair…there are after all certain underlying constants that I suggest we all need to remember. That is, that the concepts so many discuss, like the text of the Convention itself, are protean, they can take any shape…and you will recall that although Proteus had received the gift of prophecy from Neptune, when consulted he refused to give answers by immediately assuming different shapes…unless he was properly pinned down.

But it suits no-one to pin the issues down….each protagonist can thrive on the vagueness of the terminology to advance his or her own point of view…

How is one to distinguish between a *vulnerable minority* and some other minority, what is *real oppression* as opposed to democratically legitimate oppression…what does *inappropriate or impractical* mean? What are the fundamental rights? Are they different from the abstract statement of rights in the Convention? Or are they merely different from the way those rights have been applied by the Court in Strasbourg? How fundamental has the right to be to require the protection of the courts? To these questions there is no precise answer.

And just like so many of these arguments which seek to identify the difference between a question of law and a question of policy, it is highly convenient that no-one can agree on the terminology used… When some call for a domestic view of human rights what do they mean? It surely is not limited to *what the people*

*want*…such a view seems miles away from Lord Bingham's…*I do not accept the distinction between democratic institutions and the courts. It is of course true that the judges in this country are not elected and not answerable to Parliament…Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself*[34]. Even in relation to what judges may speak about there is ambiguity. Lord Neuberger, in his *Judges and Policy: A Delicate Balance,* accepted*…that the Judiciary has a limited right, indeed an obligation to speak out on matters concerning the rule of law.*[35] If only there was agreement on the limits of the proper arena into which a judge may descend. As for the judges' lectures, unauthoritative though they may be, they share this with the case law, the true authorities: they can be cited for any proposition you may care to advance.

The inability to define with anything approaching clarity seems to me a matter for optimism and not despair. *If you set aside ambiguity it is always to your own detriment*[36]*,* said Cardinal de Rèze. Ambiguity gives scope for compromise. Compromise seems a pretty dull goal but no-one has ever promised that the truth should be interesting. Compromise and concession is apparent in discussions with the court leading to the Izmir Declaration in 2011 identifying the *shared responsibility of both the Court and States Parties in guaranteeing the viability of the Convention mechanism* and more recently the Brighton Declaration when, in April 2012, the UK was chairman of the Council of Europe which reaffirmed the member states' attachment to the right of individual application to the Strasbourg Court, underlining the willingness of the Court to pay heed to the anxieties of member states, not just as to delay, but as to intrusion. This relationship of give and take, in which domestic courts yield their sovereignty on occasion and remain obdurate from time to time, mirrors the messy relationship between the stuff of politics and the stuff of the law…as Professor Feldman teaches…the Strasbourg Court's adoption of *pluralism, tolerance and broad-mindedness as hallmarks of a democratic*

[34] A v SSHD [2005] 2 AC 42
[35] Institute for Government 18 June 2013
[36] Quoted by Philip Short, Mitterand, A Study in Ambiguity, 2013 Bodley Head

*society…restricts the capacity of states' governments and legislatures for self-determination but the idea of self-determination is not the same as democracy: if a state wants to be accepted as democratic, it has to make concessions to the rights of all its citizens in order that self in self–determination relates to the people and not just to some of them*[37].

Lectures are not authorities. They lack even the authority of academic writing, the force and acceptance of which Beatson LJ has now convincingly demonstrated[38]. We are free not to follow them. Each of us has an independent view, the others do not speak for us. That is, perhaps, the danger in this hubbub of judicial discussion: that the protagonist may cloak them with the authority of a judgment; certainly those seeking to persuade will cite the tit-bits. It is our independence of view where so much of the debate began…it was in many cases British lawyers and advocates who advanced the arguments that led to the developing interpretation by Strasbourg of the text of the Convention…just as independent interpretation of the common law by our judges prompted the calls for restriction in the past. That seems to me to be why it is so fitting that my trudge through the foothills of the debates should be in honour of John Creaney. What surely he personifies is an independence of view, serving justice. And it is, after all, in the tortuous and meandering pursuit of that ambiguous and ambivalent concept…justice, that the controversy starts and, I hope, will find conclusion.

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[37] Law in Politics Ch.17

[38] Legal Academics: Forgotten Players or Interlopers Beatson LJ 2013, Essays to the memory of Lord Rodger.