THE EUROPEAN COURT OF HUMAN RIGHTS AND THE HUMAN RIGHTS ACT BRITISH CONCERNS

Lord Lester of Herne Hill QC

Blackstone Chambers, Blackstone House, Temple, London EC4Y 9BW
Tel: +44(0)20 7583 1770 Fax: +44(0)20 7822 7350 Email: clerks@blackstonechambers.com

www.blackstonechambers.com

THE EUROPEAN COURT OF HUMAN RIGHTS AND THE HUMAN RIGHTS ACT

BRITISH CONCERNS

LORD LESTER OF HERNE HILL QC[1]

Public Law Project Annual Conference, 13 October 2011

"The spirit of liberty is the spirit that is not too sure that it is right."
Judge Learned Hand

The role and function of the Strasbourg Court has been controversial ever since the making of the Convention some sixty years ago.[2] The Court is in a state of crisis which threatens its ability to provide effective European supervision of the States parties to the Convention in securing the Convention rights (in accordance with Article 1 of the Convention[3]) to everyone within their jurisdiction. The future of the Court and its relationship with the British political and legal system is a subject of great practical importance to not only public law practitioners but everyone here and elsewhere in Europe, as is the future of the Human Rights Act 1998 or further legislation and case law in giving effect to the Convention rights.

The Court interprets and applies international human rights law. It is not intended to be an appellate court or a court of first recourse. The Convention system depends upon faithful adherence to the principle of subsidiarity by the Court and by the public authorities of the Contracting States. Article 1 obliges the States to secure Convention rights to those within their jurisdiction, and Article 13 to provide effective domestic remedies for the violation of Convention rights. It is the responsibility of all three branches of government – the political branches and the independent judiciary – to exercise their functions in ways compatible with the Convention. Both

---

[1] The author wishes to thank Sophia Harris, Parliamentary Legal Officer at the Odysseus Trust for her help in preparing this paper.

[2] Lester, Pannick and Herberg, Human Rights Law and Practice, 3rd ed., April 2009, paragraphs 1.12-.24.

[3] "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."

the Court and the Committee of Ministers in their supervision of the execution of the Court's judgments, recognise that there is a wide area of discretionary judgment – the "margin of appreciation" accorded to national institutions. And, as Judge Sir Nicolas Bratza has observed "The Court's judgments are replete with statements that customs, policies and practices vary considerably between Contracting States and that we should not attempt to impose uniformity or detailed and specific requirements on domestic authorities, which are best positioned to reach a decision as to what is required in a particular area."[4]

The prime responsibility for securing the effective enjoyment of the Convention rights is not that of the Court but of the States parties through their governments, legislatures, courts and tribunals, and public authorities of all kinds, as well as the legal profession, and the media, and NGOs. It is for them to make the initial ethical and policy choices, not the Strasbourg Court. The rights and freedoms protected by the Convention have to be brought home throughout Europe, and there must be effective access to effective remedies by well-funded and qualified independent and impartial courts and tribunals. This means that there must be adequate legal aid and assistance for the poor and not so rich to be able to have access to justice here and across the European space. States are also obliged to abide by the Court's judgments against them as a condition of membership of the Council of Europe. The Strasbourg Court is an international court and no substitute for national courts and legislative and executive authorities with front-line responsibility.

There is much controversy among senior British politicians, jurists, the media and civil society about what needs to be done to reform the system which has become the victim of it's own success. At the European level, what is known as the Interlaken process of reform has raised important issues about the role and reform of the Strasbourg Court, and is to be given a boost when the UK assumes the Chairmanship of the Committee of Ministers of the Council of Europe for six months from November. Within the Court itself under the presidency of Sir Nicolas Bratza, there is engagement with the need for reform. One large question is whether it will be possible to

[4] Sir Nicholas Bratza, SPLG Edinburgh Seminar, March 2011.

muster sufficient support among Europe's governors for necessary reform. It took far too many years to secure the necessary unanimity to make the modest changes to the Convention system by adopting Protocol No. 14. Will Europe's governors come to the Court's rescue by making the necessary changes and willing the means of putting them into practice? A window of opportunity will open in November when the UK occupies the presidency of the Council of Europe for six months.

The old Court was a part-time Court, sharing European supervision of human rights with a part-time Commission and a politically-motivated Committee of Ministers. The old Court dealt with relatively few cases and only where the Commission had filtered applications, established the facts, and decided they should be referred to the Court. For many years it was starved of work. Its jurisdiction was subject to the periodic consent of each State. Individual applicants had no right of audience but had to be represented via the Commission. The system was slow and cumbersome, but it won wide acceptance and achieved notable success in promoting respect for human rights and the European rule of law.

Eventually, it was replaced by a single full-time Court[5] with compulsory jurisdiction and a Committee of Ministers mandated to act more judicially in supervising the execution of the Court's judgments. Since the collapse of the Soviet empire, the States parties to the Convention have increased dramatically and the present system is unable to cope. There are now forty-seven member States and forty-seven judges of the Court. When the European Union accedes to the Convention, there will be another judge and still more work for the Court. If some suggestions for change were adopted, such as the ability of national courts to refer questions of law to the Court on EU lines, or to seek advisory opinions, the Court's burdens would increase further.

The system is in a state of crisis, and, unless the governments of Europe can muster sufficient will to come to the Court's rescue, it will inevitably become ever less able to cope with its burgeoning case load, or to maintain the quality of its jurisprudence. The current backlog of

---

[5] Under Protocol 11 which entered into force on 1 November 1998.

pending applications exceeds 150, 000, and is increasing by 20, 000 a year. A large part of this massive case load comes from a few States with a poor record of protecting the human rights of their citizens and providing effective legal remedies[6].

The UK had a fine record in abiding by the Court's judgments in accordance with our international obligations under Article 46 of the Convention, until the Court's judgment in *Hirst*, the prisoners' voting rights case, where, as everyone knows, the Court declared the blanket ban on convicted prisoners voting in Parliamentary elections to be disproportionate. Other common law countries, notably Cyprus[7] and Ireland[8], gave effect to the judgment promptly and without controversy, as did the government of the Hong Kong Special Administrative Region, following a judgment by the Court of First Instance under Hong Kong's Basic Law and Bill of Rights Ordinance[9].

Most regrettably, the Lord Chancellor and Justice Secretary, Rt Hon Jack Straw, MP, decided not to abide by the *Hirst* judgment but to bequeath it as a poisoned chalice to his successors. And most regrettably the Coalition Government has caved in to pressure from the media and a section of the Conservative Party, and has failed to introduce any legislative proposals for Parliament to consider even as a draft measure. Jack Straw MP tabled a motion in the House of Commons with David Davies MP which suggested that despite the UK's international obligation to comply with judgments of the Strasbourg Court, prisoners should not be entitled to vote[10]. A group of backbenchers voted overwhelmingly in this Commons debate against compliance[11]. Parliament has not, however, been given the opportunity to consider a concrete proposal.

---

[6] European Court of Human Rights, Annual Report 2010: http://www.echr.coe.int/NR/rdonlyres/F2735259-F638-4E83-82DF-AAC7E934A1D6/0/2010_Rapport_Annuel_EN.pdf

[7] Section 2, Civil Registry (Amendment) Act 2006 (Law 13(I)/2006).

[8] Electoral (Amendment) Act 2006.

[9] Hong Kong Special Administrative Region Ordinance Nº. 7 of 2009, Voting by Imprisoned Persons, 25 June 2009: http://www.legco.gov.hk/yr08-09/english/ord/ord007-09-e.pdf

[10] *Hansard* HC, vol. no 523, col. 493, 10 February 2011.

[11] MPs voted by 234 to 22 votes to retain the ban.

The UK has always proclaimed its commitment to the European rule of law, but the prisoners' voting issue has undermined our international reputation and set a very bad example to other European governments. The UK has been given yet more time to comply, while the Grand Chamber deliberates on an Italian case[12], but if the delay continues, this festering sore may poison the next General Election.

The right of individual petition and direct access to the Court is a basic right of every one of the 800 million men, women and children living within those forty seven countries. But its real worth is gravely devalued when there is no prospect of it resulting in a judgment within a reasonable time.

Because the Court has the power to rule on the decisions and actions of the final courts and the elected legislatures as well as governments of each Contracting State, it is essential for the judges of the Court to be, and to be seen to be, appointed on merit – wise and experienced judges of undoubted independence, capable of commanding public confidence[13]. But although the system has recently been improved by the creation of an advisory screening panel elected by the Committee of Ministers[14], the panel is starved of resources and cannot afford to interview the candidates. There are no requirements for national processes of advertising, interview and nomination of the kind we now have in this country, and some of those appointed lack judicial experience and are at a very early stage in their careers.[15] It is heartening that some excellent new judges have been elected.

There is a pressing need for this to continue, especially since so many senior members of the Court, including the President, Sir Nicolas Bratza, must soon retire. A court of such size and

---

[12] *Scoppola v. Italy (no. 3)* (no 126/05) the hearing for which is on 2 November 2011.

[13] Jutta Limbach, Pedro Cruz Villalón, Roger Errera, Anthony Lester, Tamara Morshchakova, Stephen Sedley, Andrzej Zoll for Interights, *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*, May 2003, available at:
http://www.interights.org/jud-ind-en/index.html

[14] Resolution Res(2010)26, adopted on 10 November 2010.

[15] The problem is not confined to the Strasbourg Court. The International Criminal Court faces concerns over standards in selecting judges: see *Financial Times*, 15 September 2011.

cultural diversity necessarily depends on being well supported by legally-qualified staff of personal integrity in the Court's Registry. It is a collegiate institution very different from our own judicial system but much influenced by UK jurisprudence.

Another British concern is about the relationship between Strasbourg jurisprudence and the common law. This is a topic which has been much discussed by senior British judges, including Baroness Hale[16], Lord Hoffmann[17], Lord Scott of Foscote[18], Lady Justice Arden[19], and, Sir Nicolas Bratza[20].

Only four of the forty seven States parties to the Convention have legal systems based on the common law – Cyprus, Ireland, Malta and ourselves. Beyond Europe, the common law tradition is part of the constitutional and legal heritage of the Commonwealth and the United States. There is British concern that the Strasbourg Court, dominated by judges from civil law systems, may not give full faith and credit to our common law system.

A yet further British concern is about 'judicial activism' and perceived threats to Parliamentary sovereignty. These concerns came to a head in the wake of the *Hirst* case but have been simmering long before the Human Rights Act. The charge of undue activism by unelected judges is made against our own judges as well as both European Courts. It is alleged that the European and British judiciary are guilty of usurping the functions of our democratically elected House of Commons. Criticism is made of the Strasbourg Court for having adopted a dynamic interpretation of the Convention since the case of *Tyrer*[21]. Judge Sir Gerald Fitzmaurice's dissenting opinions in *Golder*[22] and *Tyrer* are relied upon by those who criticise the Court's 'activism' in

---

[16] Baroness Hale, *Common Law and Convention Law: The Limits to Interpretation*, Human Rights Lawyers Association, 28 June 2011.
[17] Lord Hoffmann, *The Universality of Human Rights*, Judicial Studies Board Annual Lecture 2009, 19 March 2009.
[18] Lord Scott of Foscote, *Property Rights and the European Convention on Human Rights*, 19 November 2009.
[19] Arden LJ, *Peaceful or Problematic? The Relationship between the National Supreme Courts and Supranational Courts in Europe*, The Honourable Society of Lincoln's Inn, The Annual Sir Thomas More Lecture, 10 November 2009.
[20] Sir Nicholas Bratza, SPLG Edinburgh Seminar, March 2011.
[21] *Tyrer v United Kingdom*, (1978) 2 EHRR 1.
[22] *Golder v United Kingdom* (1972) 1 EHRR 524.

adopting a dynamic, purposive and contextual approach to argue for a literal interpretation based on the original intent of the founders of the Convention, an approach reminiscent of Justice Scalia's school of US constitutional jurisprudence.

A similar charge is made against our own senior courts for adopting an updating interpretation of legislation[23], and for applying Sections 3 and 6 of the Human Rights Act in ways which undermine Parliamentary sovereignty or established common law principles. The charge is made with repeated vehemence by some sections of the British media because of the way in which the Strasbourg and British courts have fashioned a right to respect for personal privacy against unwarranted media intrusion.

The political legitimacy of the Human Rights Act is also under challenge from politicians and the media, and some proposals for a "British Bill of Rights" would involve enabling Parliament to override not only judgments of our own courts, as at present, but also judgments of the European Court of Human Rights. The previous Government pondered whether there should be a British Bill of Rights, as did the Joint Parliamentary Committee on Human Rights. Neither was in favour of the repeal of the Human Rights Act.

The previous Government's proposal was for an instrument that would not be legally enforceable but would sit with the Human Rights Act emphasising responsibilities as well as rights, and the importance of the principle of subsidiarity in interpreting and applying the Convention rights. It also proposed a set of socio-economic rights that would not be justiciable but would serve to guide decision-takers, rather as section 1 of the Equality Act 2010 required public authorities, when making decisions of a strategic nature about how to exercise their functions, "to have regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage." The duty was expressed in flatulent language and was political window-dressing. It has not been brought into force by the Coalition Government.

---

[23] *Quintavalle v HFEA* [2005] UKHL 28

The Joint Committee on Human Rights proposed adopting a Bill of Rights and Freedoms which was aspirational as well protecting the human rights which already exist. The JCHR's Bill included rights to education, housing, health and an adequate standard of living placing Government under a duty to progress towards realising these rights and reporting to Parliament. The Bill did not give the courts a strike down power but instead retained the HRA's interpretative obligation except where Parliament expressly derogates. The JCHR's Bill referred to responsibilities in its Preamble[24]. The then-Government proposed its own "Bill of Rights and Responsibilities" in 2009 which would have included a statement of the responsibilities owed by members of society as well as a statement of all the already existing economic and social rights currently located in legislation. The rights and responsibilities it contained would not have been legally enforceable. The previous Government did not draft a suggested Bill of Rights.[25]

The Coalition's Programme for Government said: "We will establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties. We will seek to promote a better understanding of the true scope of these rights and obligations."[26] The Commission's creation was announced in a Written Statement on 18 March 2011[27]. It is independent and is chaired by a distinguished former Permanent Secretary, Sir Leigh Lewis. I have the privilege of serving with seven Commissioners, and we are supported by a small secretariat of civil servants.[28] Our terms of reference are:

---

[24] The JCHR's Report and draft Bill is available at: http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf
[25] The Government's Green Paper on a Bill of Rights and Responsibilities is available at: http://www.justice.gov.uk/publications/docs/rights-responsibilities.pdf
[26] http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition-programme_for_government.pdf
[27] HC Hansard, col.32WS.
[28] Jonathan Fisher QC, Martin Howe QC, Baroness Kennedy of the Shaws QC, Philippe Sands QC, Anthony Speaight QC, Professor Sir David Edward QC, and Dr Michael Pinto-Duschinsky. The views expressed in this paper are those of the author and not of the Commission.

"The Commission will investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties.

"It will examine the operation and implementation of these obligations, and consider ways to promote a better understanding of the true scope of these obligations and liberties.

"It should provide interim advice to the Government on the ongoing Interlaken process to reform the Strasbourg court ahead of and following the UK's Chairmanship of the Council of Europe.

"It should consult, including with the public, judiciary and devolved administrations and legislatures, and aim to report no later than by the end of 2012."

The Commission has published a Discussion Paper entitled, "Do We Need a UK Bill of Rights?", as part of a public consultation. It is available on the Commission website (www.justice.gov.uk/about/cbr/index.htm) and open for responses until 11 November 2011. The Commission asks four questions:

1. Do you think we need a UK Bill of Rights? If so,
2. What do you think a UK Bill of Rights should contain?
3. How do you think it should apply to the UK as a whole, including its four component countries of England, Scotland, Wales and Northern Ireland?
4. Having regard to our terms of reference, are there any other views which you would like to put forward at this stage?

There has already been a considerable response, and the views of the Public Law Project will be important in view of your expertise and practical experience of the way in which the Human Rights Act has operated since it came into force in October 2000, as well as your experience of the Convention system.

The Commission has also provided interim advice to the Government on the ongoing Interlaken process to reform the Strasbourg Court, ahead of the UK's Chairmanship of the Council

of Europe. The interim advice was laid before Parliament and published on the Commission's website on 8 September 2011[29]. It raised two basic questions:

i. what is the central purpose of the Strasbourg Court for the 800 million citizens of the 47 Member States? And

ii. how is that purpose most likely to be achieved?

The Commission found it

> "evident that the current structure and functioning of the Court, as it struggles with a voluminous and ever-growing case-load, places it in an impossible situation. From this, three areas of fundamental reform appear to us to be particularly pressing and cannot be addressed by mere tinkering at the edges:
> first, the need to reduce very significantly the number of cases that reach the Court by introducing new screening mechanisms;
> second, the need to reconsider the relief that the Court is able to offer by way of just satisfaction;
> third, the need to enhance procedures for the selection of well-qualified judges of the Court."

The Commission made five interim recommendations as follows:

1. "The Government should vigorously pursue the need for urgent and fundamental reform to ensure that the European Court of Human Rights is called upon, as an international court, only to address a limited number of cases that raise serious questions affecting the interpretation or application of the Convention and serious issues of general importance. It is essential to ensure that the Member States and their national institutions – legislative, executive and judicial – assume their primary responsibility for securing the Convention rights and providing effective remedies for violations. Failure to put in place the necessary machinery for compliance should itself constitute a violation of the Convention."

2. "The Government should use its Chairmanship to initiate a time-bound programme of fundamental reform."

3. "The Government should ensure that an urgent programme of fundamental reform addresses the need to give practical effect and meaning to the essential role of the Court, by establishing a new and effective screening mechanism that allows the Court to decline to deal with cases that do not raise a serious violation of the Convention."

[29] See: http://www.justice.gov.uk/downloads/about/cbr/cbr-court-reform-interim-advice.pdf

4. "The Government should ensure that a programme of fundamental reform addresses the need to revisit the meaning and effect of Article 41 of the Convention and the role of the Court in awarding 'just satisfaction'."

5. "The Government should seek to ensure that a programme of fundamental reform establishes agreement on appropriate objective and merit-based principles and rules, and adequate resources, for the selection of judicial candidates at the national level, and for the appointment process at the European level."

The Commission noted that a number of other areas for potential reform of the Court have been raised including further suggestions to address the backlog; and a number of suggestions intended to address concerns regarding the respective roles of the judiciary and the democratic institutions of the Council of Europe and the Member States, and concerns regarding the case law of the Strasbourg Court which have been expressed not only in this country but in others. The Commission has formed no collective view about these suggestions and will be returning to these issues amongst many others in its work programme.

A separate letter from the Commission's Chair to Ministers[30] set out some of these suggestions as follows:

1. "Using retired judges to determine admissibility as a further filtering mechanism to decide on the admissibility of cases." This could clear the backlog while the Court's judges worked on cases but would have to avoid creating an extra bureaucratic burden;

2. "Authorising officials of the Registry to take decisions on admissibility" which, though a more fundamental change in that admissibility would be determined by officials rather than judges would be more akin to the original procedure put in place where the secretariat to the Commission, under supervision by the Commission, decided admissibility. We understand that the registry officials, under the supervision of a single judge, are already determining the admissibility of cases;

3. "Requiring applications to the Court to be signed by a lawyer or NGO [in order] to involve the legal profession and NGOs in sharing responsibility for reducing the very high number of manifestly inadmissible cases which currently arrive at the Court. […] The aim of this proposal would be to involve the legal profession and NGOs in sharing responsibility for reducing the very high number of manifestly inadmissible cases which currently arrive at the

---

[30] Available at: http://www.justice.gov.uk/downloads/about/cbr/cbr-court-reform-chairs-letter.pdf

Court. The requirement would not be for individuals to have full legal representation, and safeguards would need to be considered to ensure that well-founded cases were not rendered inadmissible simply because it was not possible or practical in the local circumstance to gain a lawyer's signature."

4. "Enabling the Court to deliver advisory opinions either at the request of the national court or on its own initiative." This could enable the Court to deliver an opinion where a case was essentially well-founded but not sufficiently serious or clear cut as to require a specific and binding determination by the Court. However, advisory opinions could leave the legal position in the States Parties unclear and the parties unsure as to their obligations. It may also be at odds with the Court's role of deciding concrete cases, granting effective remedies and advising States on the measures required for compliance with the Convention;

5. "Enabling preliminary references to be made from the highest national court." This procedure could allow the highest national court to refer to the Court a question on a point of law arising under the Convention, leaving it to the national court to apply the legal conclusion to the facts of a particular case. This could enhance the principle of subsidiarity and potentially remove some cases from the Court's caseload. However, unless the Court in Strasbourg were able to respond to such requests far more quickly than its present case load would seem to allow, could delay the ultimate resolution of the cases concerned to an unacceptable degree. In addition, the Convention system presupposes that the national court decides the facts and whether Convention rights have been infringed; recourse to the Court being open only after all available and effective domestic remedies have been exhausted;

6. "Introducing a Statute of the Court which would allow the working practices of the Court to be changed more quickly […] possibly requiring only a resolution of the Committee of Ministers." Such a measure could increase the flexibility of the Contracting States to undertake future reforms where necessary. However, it may be difficult to persuade the Governments of all 47 States to widen the Court's ability to manage its cases and exercise a wider area of discretionary judgment. The Court's perceived interventionism might also be reinforced by a Statute conferring greater independence on the Court in respect of procedural topics;

7. Considering some form of 'democratic override' or dialogue in order to recognise the legitimate role of Parliaments and the democratic process in all of the Member States and modelled on the override granted to the legislature where a constitutional or supreme court strikes down legislation. This could allow the Parliamentary Assembly or Committee of Ministers or both to override a Court judgment Another method of democratic override could be to empower the Committee of Ministers to disapply a Court judgment if this was desirable and justifiable in light of a clear expression of opinion by the respondent State's most senior democratic institution. The Court could also be obliged to consult the other Council of Europe institutions where it proposes to find a ground-breaking violation and to take into account a collective expression of opinion. The counter-arguments are that any possibility of override, however democratic, is fundamentally inconsistent with the Rule of Law inherent in the Convention system and with the concept of the Convention as a charter of fundamental rights

and freedoms – a freedom is not fundamental if it can be overridden; and that the Strasbourg Court is the last line of protection against majorities voting against minorities;

8. Introducing subsidiarity reviews by analogy to the EU treaty or accepting the jurisdiction of an external international body competent to determine a challenge that the Strasbourg Court had exceeded its jurisdiction by infringing of the principle of subsidiarity. This could increase subsidiarity but the counter-arguments are that there is little evidence indicating that subsidiarity is not adhered to by the Council of Ministers and the Court, and the Court requires no guidance on how to interpret the Convention from international or national governments. In addition, the Council of Europe has no directly elected body equivalent to the European Parliament which could fulfil this guidance role.

The British reaction to the Commission's interim advice and the Chair's letter has been varied. Several commentators have welcomed the Commission's view that Contracting States should accept and comply with their responsibilities to protect human rights and our suggestion that the Court should examine only serious cases[31] and there have been attacks against and defences of human rights law and of the Human Rights Act[32].

Various sections of the written press have concentrated on the suggestion mentioned in the Chair's second letter but not examined by the Commission of a democratic override, inaccurately reporting that the Commission has favoured this[33]. Others have misreported the Commission's advice as stating that "[h]uman rights judges should stop interfering in the minor details of British

---

[31] See, for example, Joshua Rozenberg in *The Guardian*:
http://www.guardian.co.uk/law/2011/sep/14/clarke-european-court-human-rights
and Lord Macdonald of River Glaven in the Times:
http://www.thetimes.co.uk/tto/opinion/columnists/article3161159.ece

[32] See, for example, Sunday Express, David Cameron: Human Rights In My Sights, 21 August 2011:
http://www.express.co.uk/posts/view/266219/David-Cameron-Human-rights-in-my-sights ,
the Guardian, Human beings need human rights – in Britain as well as Libya, 25 August 2011:
http://www.guardian.co.uk/commentisfree/2011/aug/25/need-uk-bill-of-rights
the Guardian, Reforming Human Rights in Europe, 28 August 2011:
http://www.guardian.co.uk/law/2011/aug/28/reforming-human-rights-europe?INTCMP=SRCH
the Guardian, Britain should be proud of the Human Rights Act – and protect it, 29 August 2011:
http://www.guardian.co.uk/commentisfree/2011/aug/29/human-rights-act-protect
the Telegraph, Rights bill was key Tory pledge, 9 September 2011:
http://www.telegraph.co.uk/news/politics/8751116/Rights-bill-was-key-Tory-pledge.html

[33] See, for example, the Guardian, *Ministers 'could get powers to overrule European court of human rights'*, 9 September 2011:
http://www.guardian.co.uk/law/2011/sep/09/ministers-power-european-court-human-rights
and The Times, *Cameron risks coalition rift with plan to let MPs overrule human rights court*, 9 September 2011:
http://www.thetimes.co.uk/tto/news/politics/article3159241.ece

law and justice [and that] there should be 'urgent and fundamental reform' to limit the meddling."[34]

Such comments have created concern in the corridors of the Council of Europe that the Commission and even the Government may consider that there should indeed be power within our Parliament and the Parliamentary Assembly of the Council of Europe to override judgments with which those bodies disagreed. That is not the case, as any reader of the documents would realise.

The idea that the UK is contemplating refusing to abide by the *Hirst* judgment or support measure to enable legislatures to override judgments with which an elected majority disagrees, is greeted with enthusiasm by those European governments that do not respect the European rule of law, and weakens the ability of the Coalition Government to make progress in the much needed reform of the Court.

The fact that we are conducting a wide public consultation on whether the UK needs a Bill of Rights is surely welcome. It gives the people across the UK the chance to express their views about the Human Rights Act and whether it needs to be amended or replaced. One difficult problem concerns what should happen in and across the four countries of the United Kingdom. The Good Friday Agreement promised a Bill of Rights for the special needs of Northern Ireland. There may be pressure for something similar in Scotland. At present the powers of the legislative, executive and judicial bodies in Northern Ireland, Scotland and Wales are constrained in the devolution legislation as well as the Human Rights Act to act compatibly with the Convention. If there were a new Bill of Rights for the UK, how would that fit with separate Bills of Rights for Northern Ireland, and perhaps Scotland and Wales? We are not a federal state, and the constitutional and legal problems are complex.

---

[34] Daily Mail, *Stop meddling in our laws, Clarke tells Euro judges*, 9 September 2011: http://www.dailymail.co.uk/news/article-2035091/Stop-meddling-laws-Clarke-tell-Euro-judges.html#ixzz1Xpd1ooxw

We very much look forward to the contribution to the Commission's work from the Public Law Project.

Lord Lester of Herne Hill QC

October 2011