

## **LSE Law and The Wyndham Trust Corbishley Lecture**

### **On Fantasy Island: British politics, English judges and the European Convention on Human Rights**

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My first encounter with the fantasies that underpin English public law came in the 1980s. I had just starting teaching constitutional law and was taking my first year students through Dicey: the independent rule of law; the availability of remedies to all, without fear or favour; the common law's marvellous protection of civil liberties; how great we were, how terrible the continent; and all the rest of it. Outside the classroom, striking miners were being routinely beaten up by the police, their picketing disrupted by road blocks, their liberty eroded by mass bail conditions. The Campaign for Nuclear Disarmament was having its marches banned and its protests inhibited by 'no-go' areas arbitrarily erected by the police around American bases into which it had been decided to move a new generation of nuclear weapons. Some of my students were even beaten up themselves, on a march against education cuts in London – much to their surprise given what I was teaching them.

Far from confronting any of this from the perspective of principle, the courts were happy to act as a benign legitimating force, their various rulings invariably serving to throw the necessary constitutional camouflage over successive exercises of raw state violence. Eventually the judges overreached themselves even by the standards of the day: their absurd determination to prevent publication of a book (*Spycatcher*, by Peter Wright) containing serious allegations of criminality against the security services fell apart thanks partly to being published in the US under the protection of the first amendment but mainly to the determination of a European Court of Human Rights to take freedom of expression more seriously than had the supposed guardians of liberty on the Strand. (More on this court later, of course.) The determined commitment of a succession of senior judges to keep Irish prisoners in jail for serious terrorist offences long after it was obvious to all that the men (and in some cases children) involved had been victims of serious miscarriages of justice eventually brought the reckless reactionary partisanship of the senior judiciary to center stage where it could finally be seen and understood by all: the true perspective of the Dennings, the Diplocks, the Lanes, the Bridges, the Donaldsons was eventually exposed for all to see. By the early nineties, the Dicey fantasy I had found on arrival in England was in ruins, believed by almost no one, exposed as a construct founded on deceit.

It is invariably easier to expose the iniquities of the past than it is to address the problems of today. The judiciary has remade itself in a way that has been undoubtedly successful; they are certainly not as they were in the 1980s: aloof, national service men, bound by the Kilmuir rules to an extra-judicial omerta that removed them from all public discourse. The first generation of judges after the catastrophes of the late 1980s responsible for this make-over took to human rights as their penance for past sins and when they got the Human Rights Act (for which many of them had quietly campaigned) they went about interpreting it in a way that has been beneficial. But these men (and a very few women) are now largely going or gone, being replaced by a newer generation of senior figures – even more male than in the immediate past – whose pride in what they do seems untainted by any awareness of past wrong. And in their excitement at their success, not only past wrongs are

being forgotten but truths are being constructed in a way that bears striking resemblance to that past. This revival of fantasy is now reacting with the current political atmosphere in a way that threatens to produce a poisonous cocktail that could destroy modern England. I do not believe I exaggerate.

So who are these judges who are at a political front-line many of them probably don't know exists? We can learn far more than we used to of how they see the world. There are many speeches and public lectures: the Kilmuir rules are long forgotten. The habits of certainty and decisiveness so essential to adjudication are not easily laid aside at the lectern when judges approach it. Perspectives are laid out not as tentative scholarly arguments so much as authoritative findings of fact. As President of the Supreme Court, Lord Neuberger is understandably one of the more prolific speech-makers. His talk at the Supreme Court of Victoria in Melbourne on 8 August this year introduces us to our first contemporary fantasy: the myth of Whiggish inexorability. We learn from Lord Neuberger that '[t]he history of Human Rights and the United Kingdom in the last 100 years can be divided into several periods': the 'dark ages pre 1951 when Europe became 'sharply aware of the need for [a] strong, clear and codified set of human rights' when we in the UK did not; the 'middle ages' between 1951 and 1966 (when individuals were first allowed to take the UK to the European Court of Human Rights); the 'years of transition' between 1966 and implementation of the Human Rights Act 2000 when 'human rights started to leak into the judicial cerebellum' and – inevitably – 'the age of enlightenment' of today:

There is nothing here about the European choice directly after the war being governed by politics and the fear of the Left that has been so convincingly demonstrated in recent scholarship: the work of Marco Duranti in particular. There is no nod towards the decay of the judges' standing in the 1980s in the UK that precipitated the move to rights – on Neuberger's account human rights just sort of leaked into judicial grey matter. And like all such triumphalist accounts of the past, the present is treated as a destination (we are in the 'still early days' in our 'age of enlightenment'), rather than just a brief moment on a journey to somewhere else.

Lord Neuberger is also an exemplar of our second fantasy, that of the civil libertarian common law. The 1980s (and indeed all earlier decades) have been forgotten: 'there is no doubt that the common law was in many ways the origin and promoter of individual rights' its only problem being (and the reason for the turn to rights) that 'it developed such rights in a somewhat haphazard and leisurely way.' Well that is one way to describe it – the partisanship of the common law for property and contract rights over gender and racial equality; an hostility to trade unions and the Labour party so severe that neither could have survived without legislation directly overturning judicial malevolence; the common law's service as a base for the serial abuses of liberty with which I began this lecture. In his recent, beautifully written Hamlyn lectures, the celebrated Court of Appeal judge Lord Justice John Laws (*The Common Law Constitution*) sings a hymn of praise to the old common law, arguing that it is the unifying principle of the constitution and that 'its distinctive method has endowed the British State with profoundly beneficial effects.' The recently retired Lord Chief Justice Lord Igor Judge took a not dissimilar line in a recent lecture at University College London where he defended the courts from executive interference against a background of unquestioned acceptance of the fact of the 'independence of judicial decision making' as 'an integral structure of the constitution'.

Now it is only one step from this position to say that actually the common law is so wonderful that it ought to have superiority over Parliament itself, a position once held by the judges in eras gone by of course, but which one might have thought had been laid to rest by democratic revolution. In fact that is not the case. At least some of the judges have allowed the enthusiasm of certain academic scholars for such a possibility to lead them to what Lord Neuberger in his Melbourne speech called 'the interesting point' of whether the courts can in fact overturn Parliament itself. A mini-spate of cases in the Supreme Court have allowed the idea to grow without the unanimous disavowal that would surely have been its fate only a little while ago. On any current account the obstacles against such a judicial overriding of parliament would need to be very high: some draconian flouting of the rule of law

or what Lord Neuberger called (and even then only possibly) 'exceptional circumstances'. Perhaps these are what Lord Carswell in *Jackson v Attorney General* [2005] UKHL 56 referred to (albeit in the context of a law passed under the Parliament Act) as legislative acts amounting to 'a fundamental disturbance of the building blocks of the constitution' (at para 178).

The Human Rights Act currently controls judicial capacity here by its well-known reaffirmation of the principle of Parliamentary sovereignty in sections 3(2), 4(6) and 6(2) – well-known that is to everybody except senior members of the current Government who seem to think that the Act empowers the courts to strike down primary legislation – this fantasy of judicial supremacism in human rights law is a delusion seemingly restricted to the upper reaches of the Conservative party, guided by advisers no doubt to invent a problem in order better to be able to curry favour with the electorate by dealing robustly with it. The prime minister has had many opportunities over the past few years to demonstrate how important it is to introduce law into the study of Oxford's PPE degree – the lack of awareness of the contempt of court demonstrated by his intervention in the trial of the Saatchi PAs and the recent, forthright denial that EU legal obligations apply to British money come to mind. But the nadir was surely his apparent (contrived? genuine?) belief that in implementing a declaration of incompatibility issued in respect of the sex abuse register (so as to afford a modicum of due process to those whose lives had been hugely adversely affected by being on it) he was being forced by the courts to act. The whole point of the Human Rights Act – as my colleague professorial research fellow Francesca Klug has pointed out on occasions too numerous to count – is that declarations of incompatibility do not have to be followed. Lady Hale – who was one of the judges in the case – put it with characteristically understated precision in commenting on this incident: 'Curiously, when introducing the order in Parliament, the Prime Minister was highly critical of our decision, but made no mention of the fact that the Government could have chosen to do nothing about it'

Repeal of the Human Rights Act – a policy to which the Conservative party is now committed – might well produce exactly that judicial supremacism about which the prime minister complains. Most really strong attacks on the rule of law and/or 'the building blocks' of the constitution would inevitably also entail a direct undermining of at least one and possibly more Convention rights – the wholesale abolition of legal aid for example would breach the implied right of access to the courts in Article 6, under the Golder and Airey principle. The expulsion of asylum-seekers and others to face torture abroad would engage article 3 and so on. As things stand the judges could surely do nothing about such attacks however fundamental they believed them to be because of the explicit protection afforded parliament when it comes to legislation violating human rights – sections 3, 4 and 6 again. But take that protection away, and the common law solicitude for human rights that would replace it would not necessarily be so beholden to parliament. The primary laws themselves might become vulnerable. This would certainly be very odd: action to end something that could never happen would only serve to bring it about. The fiction of judicial supremacy would be turned into fact by efforts made to deal with it. But abolishing something that isn't there creates it: in the social as well as earth sciences two negatives do indeed make a positive. Maybe the Tories genuinely don't care about this – in modern politics the spin is the thing: fantasy rules.

It might seem a little odd to be talking about the British judges in this way, since they have not been at all in the firing line in recent years. The executive and the popular press appear to have a finite capacity for populist indignation against courts and since the decision in the prisoner-voting case of *Hirst v United Kingdom* in 2005 ((2006) 42 EHRR 41), most of this has been heading out of town, away from the Royal Courts of Justice and towards Strasbourg. True there have been past periods of noisy British scepticism towards the European Court of Human Rights (one thinks in particular of *Ireland v UK* (1978) 2 EHRR 25 and the Gibraltar decision of *McCann v United Kingdom* (1996) 21 EHRR 97 holding the UK responsible for the killing of an IRA active service unit) but nothing has been as sustained or as vehement as the head of steam that has been built up over this – it has to be said – relatively minor question of prisoner voting. True the litigant was not ideal from a human rights point of view: an axe-wielding killer celebrating his win with champagne as he pours Youtube abuse on the

authorities was something of a low point even in the world of unsavory human rights defendants: And it was unlucky of Strasbourg that they were left holding this particular package when the music stopped – the local courts having deftly avoided trouble by refusing to find any human rights violation when the matter came before them. How the issue has escalated as it has must be a matter for sociologists and political scientists. One of the more remarkable features of the strange times we live in is that the case has produced a myth to which it is own refutation. The myth is that of Strasbourg supremacism: what the European Court of Human Rights says goes. Or as Lord Rodger of Earlsferry famously put it in *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 at para 98, ‘Argentoratum locutum: iudicium finitum – Strasbourg has spoken, the case is closed’. But if this were true, prisoners would now be voting. Not only are they not voting; the Supreme Court has itself, in *R (Chester) v Secretary of State for Justice; McGeoch (AP) v Lord President of Council* [2013] UKSC 67, specifically refused even to issue a declaration of incompatibility to put pressure on the government that they should allow such votes. The obligations under the Council of Europe’s Convention on Human Rights are international not domestic: our legal system does not require their implementation, immediately or indeed ever (see article 46). True adherence to international law is an important matter, one that has many repercussions – the UK might find it harder to tell other countries what to do with regard to human rights; it might find itself in trouble at the Council of Europe; the UK judge at Strasbourg may end up lunching alone; and so on. Importantly for present purposes none of these effects is legal, or more precisely legal in the domestic sense.

The extraordinary way in which our public culture has been mustered to savage the Strasbourg court is one of the dismal wonders of our politically constricted age. That court has rescued the English common law from itself on far more occasions than it has made itself an unnecessary nuisance: the maltreatment of gays purely on account of their sexual orientation (*Dudgeon v United Kingdom* (1981) 4 EHRR 149); corporal punishment in schools (*Campbell and Cosans v United Kingdom* [1982] ECHR 1); the inhuman and degrading treatment of internees (*Ireland v United Kingdom* (1978) 2 EHRR 25); the deliberate shooting of suspected terrorists (*McCann v United Kingdom* (1996) 21 EHRR 97); draconian contempt laws that prevented campaigning newspapers from exposing wrong (*Sunday Times v United Kingdom* (1979) 2 EHRR 245); long periods of detention without trial (*Brogan v United Kingdom* (1988) 11 EHRR 117); cruel invasions of privacy (*Kaye v Andrew Robertson and Sports Newspapers Ltd* [1991] FSR 62) – all unnoticed by the common law’s supposed celebration of individual rights, not leaking into ‘the judicial cerebellum’ so much as being rammed into it by Continental judges in the teeth of domestic opposition. Often this opposition has been led by politicians of course: the annoyance at having executive discretion constrained combines with awareness that the Strasbourg court will not answer back to produce a temptation to play to the gallery that is rarely resisted. But at least politicians have the excuse that they need votes and therefore have to please the Mail, potential UKIP voters and others who for various reasons are disinclined to look honestly at the facts. What excuse do British judges and former judges have for their recent attacks on the Court?

There is a long if not venerable tradition here of British mistrust of what Strasbourg does. The distinguished lawyer F A Mann once gave revealing expression to it in a note in the *Law Quarterly Review* inveighing against the majority judges in a leading Strasbourg case not on the basis of what they said but on account of the puny countries from which they came: (1979) 95 *Law Quarterly Review* 348. In the politest 1990s as the chastened judges rebuilt their reputation, such modest recoiling from Strasbourg’s incoherence as there was produced only occasionally expressed judicial puzzlement and a range of tentatively-articulated extra-judicial speeches in favour of incorporating the Convention into UK law and so giving British judges the first say over what it meant, a good example being the late Lord Bingham’s, ‘The European Convention on Human Rights: time to incorporate’ (1993) 109 *Law Quarterly Review* 390.

Now though we seemed to have entered a new era of vulgarity. Perhaps it was Lord Hoffmann who started this with his famous speech in 2009 to the judicial studies board on the ‘Universality of Human

Rights' in which he paraded a startlingly ridiculous set of remarks from a dissenting judge on the Strasbourg bench as though they were typical of agreed interventions by a unanimous grand chamber. Lord Judge's recent interview in Counsel magazine was sufficiently forthright to receive the doubtful accolade of the following Daily Mail headline 'HUMAN RIGHTS COURT "IS A THREAT TO DEMOCRACY": EX-LORD CHIEF JUSTICE BLASTS UNELECTED STRASBOURG JUDGES' There is another fantasy here, that of the neutral judge, the convention that he or she stands above the eddies and flows of the political. No doubt Lord Judge believes that he is making an apolitical point when he writes of the supremacy of parliament and of the need for judges not to get involved in political questions. But saying as much these days is in itself a political intervention. Lord Sumption manoeuvred himself into exactly the same position in his F A Mann lecture on judicial and political decision-making in 2011, shortly before he took up his position as a supreme court judge. His excoriation of the tendency of the Strasbourg court to develop its jurisprudence across all 47 member states in a way which conflicted 'with some very basic principles on which human societies are organised' grew out of his belief that the Strasbourg jurisprudence had got out of control, with its 'large number of derivative sub-principles and rules, addressing the internal arrangements of contracting states in great detail'. But calling for the court to pull back is itself a political intervention. The Conservatives echo this critique when they call for the Strasbourg Court to disown its jurisprudence on the evolving meaning to be accorded rights in the Convention. In doing this they are mimicking the American emphasis on original intent dreamed up by Reagan's attorney general Ed Meese and supported by the anti-federalists and Christian right as a way of providing scholarly cover for the forced retreat of the US federal government on the one hand and the overturning of the celebrated abortion decision Roe v Wade on the other (In seeming through their arguments to eschew the world of politics both Lord Judge and Lord Sumption are in fact entering that world, their conservative position disguised as neutral by the judicial garb one has just taken off and the other was just about to put on).

A subset of the fantasy of Strasbourg supremacism, encouraged by Lord Rodgers's ill-advised plunge into Latin, is that Strasbourg's cases are required to be followed by the British courts. As even first year law students know, this is simply not the case. The Human Rights Act could not have been clearer in section 2 when it required of the judicial authorities interpreting the Act that they take into account such jurisprudence – no further requirement to (in the English common law sense) 'follow' such decisions appears in the Act. Now it is perfectly true that the courts here themselves have tended to support Strasbourg decisions (Lord Bingham's 'mirror principle' in *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323) on the sensible basis that it is wise to keep in tune with a body to which your own litigants (or at least the non-governmental ones) can appeal. Never invariable, that mirror principle has loosened up of late, with the courts treating the Strasbourg menu as if not quite a la carte then at least one from which there is a decent choice, including if needs must a house special grown entirely from British produce: *R v Horncastle* [2009] UKSC 14, [2010] 2 WLR 47. Strasbourg has on the whole gone along with this, conceding some positions to help keep the peace (as in *Al-Khawaja and Tahery v United Kingdom* (2012) 54 EHRR 23 (GC)) revisiting its case-law in light of guidance from their lordships, (*Animal Defenders v United Kingdom* (2013) 57 EHRR 21 (GC)) and even recanting when it has been caught out in foolishness (*Z v United Kingdom* (2002) 34 EHRR 97). This is what all informed observers call 'dialogue' – it is not dictatorship. The Conservative Party's recent peculiar set of proposals, already referred to, for 'changing Britain's human rights law' was full of invective against the Strasbourg court and this led its authors to conclude that the Human Rights Act needed to go (not Strasbourg, oddly). But why the Human Rights Act? The crime is that all this Strasbourg rubbish ('problematic jurisprudence') is getting into our law ('often being applied') and this has to stop. But then a bit later the paper volunteers that Strasbourg is 'creating legal precedent for the UK'. So which is it 'often' or 'always'? The paper appears to believe it is both, simultaneously. If section 2 did not already exist it would be produced as the solution to a problem – Strasbourg supremacy - that is simply not there, or at least not there in our domestic human rights law.

I end with the largest fantasy of all, the fantasy that drives all the others on this little island, or accurately a bit of this little island, and which is the only reason I can find for what would otherwise be incomprehensible. Lord Neuberger has it spot on when he told a Cambridge audience in February this year that '[t]he loss of the Empire and the loss of world premier league status has inevitably caused problems to the national psyche' and that it is therefore understandable that 'a transformation from a global pre-eminent status to just one of many EU or Council members requires an almost super-human attitudinal adjustment' It is not one that some have been able to make, especially those, it seems, whose entire education has never required departure from the quads, cloisters and colleges of past glory or any kind of mustering in with that England known to the other ninety per cent. The Conservative part of the government increasingly gives the impression that the Act of Union with Scotland was the beginning of an heroic English age of imperialism to which we can now return, the people cheering from the sidelines as they did when Disraeli paraded Victoria as Empress of India. Down that route is a provincial backwater peopled by well-educated fools, shouting loudly. No judge, past or present, should be encouraging this fantasy of English exceptionalism, especially now as it gathers such populist steam.

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