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SOCIETY OF CONSERVATIVE LAWYERS

Democracy Must Prevail

A Call for a Conservative Intellectual Revival in Law and Human Rights

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FOREWORD

The future of the Human Rights Act and our continued relationship with the European Court of Human Rights in Strasbourg remains an issue of abiding concern not just to lawyers and politicians, but to ordinary members of the public. It is, however, an issue where the need for clarity of thought is paramount.

Anthony Speaight is a leading expert in the field. One of the Commissioners on a Bill of Rights, appointed by the Government in 2010, he made an important contribution to the Report published in December 2012. In this pamphlet he explains with great lucidity how the interpretation of the European Convention as a living instrument has led to so many unpopular decisions and why the European Court of Human Rights is departing from principles of International Law.

Even more importantly, Anthony identifies the lack of any significant challenge to prevailing liberal orthodoxy on legal issues. He points to the occupation of academic, editorial and institutional territory by the left and the almost total absence of a conservative presence. This paper deserves to be widely read. It is a clarion call to the Intellectual Right: the time has come to express your views and to foster a challenge to that orthodoxy that has been left unchallenged for far too long. In this the Society of Conservative Lawyers has a central role to play.

The Society of Conservative Lawyers was founded in 1947 and remains a vigorous organisation with a proud history, which has helped influence Conservative policy in a range of areas since its inception. If you would like further information about the Society please e-mail socconlaw@aol.com or visit the website on www.conservativelawyers.com

The Lord Faulks QC
Chairman of Research, Society of Conservative Lawyers
January 2013

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A Call for a Conservative Intellectual Revival in Law and Human Rights

An expanded version of an address to the Society of Conservative Lawyers and Justice fringe meeting at the Conservative Party Conference on 9th October 2012

By ANTHONY SPEAIGHT QC

I should like to describe a problem, say why it matters, identify the cause, and propose a solution.

The problem

The problem – at surface level – is the excessive interventionism of the Strasbourg Court. At a deeper level the problem is a lack of respect for established principles of international law. Because the contention that the approach of the Strasbourg Court ignores international law may surprise some people, I need to take a few minutes to make it good.

The European Convention of Human Rights is, of course, an international treaty. There are established principles of international law for interpreting treaties. These principles are today embodied in the Vienna Convention. The proper approach is expressed thus by Professor Brownlie in the leading textbook "Principles of International Law"[1]:

> *"what matters is the intention of the parties as expressed in the text."*

The European Convention of Human Rights ought to be interpreted in accordance with these principles. This has been recognised by leading writers, for instance in the current edition of the textbook by the present Deputy Registrar of the Strasbourg Court[2]:

> *"The [International Law] Commission and the Institute of International Law have taken the view that what matters is the intention of the parties as expressed in the text, which is the best guide to the more recent common intention of the parties."*

In other words, one should apply a similar principle to that with which English lawyers are familiar for the construction of contracts. Distinguished judges have regarded this as the correct approach to interpreting the Convention: for instance Lord Bingham in Brown v Stott in 2003[3] said:-

> *"In interpreting the Convention, as any other treaty, it is generally to be assumed that the parties have included the terms which they wished to include on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree. Thus particular regard must be had and reliance placed on the express terms of the Convention .... This does not mean that nothing can be implied into the Convention.... But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept."*

However, the Strasbourg Court has in recent years ever more clearly developed a jurisprudence at various with those principles, and which under the banner of "living instrument" has repeatedly held contracting states bound by obligations which they did not expressly accept and clearly would not have been willing to accept. I shall give some examples.

1 *6th ed 2003 Oxford University Press p.602*
2 *"Law of the European Convention on Human Rights" Harris, O'Boyle & Warbrick (2nd ed, 2009)*
3 *Lord Bingham in Brown v Stott [2003] 1 AC 686 at p.703*

In *Hirst* v *UK*[4] and in *Scoppola* v *Italy*[5] the Court held that a law denying votes to prisoners simpliciter was an infringement of 1st Protocol Art 3. However, in the course of the negotiation of the Convention a proposal to include the words "universal suffrage" was rejected after the UK representative pointed out that the UK barred the vote not merely from prisoners, but also peers and the insane[6]. Under article 32 of the Vienna Convention preparatory work is an admissible aid to interpretation in the event of ambiguity[7].

In *Wynne* v *UK*[8] the Court held that the Home Secretary's role in determining when to release life prisoners was compatible with the Convention. Just 8 years later in *Stafford* v *UK*[9] the Court decided the opposite. If the Court in 2002 considered that its decision in 1995 had been mistaken, then one could understand its decision. But that was not the reason for the change: the reason was said to be developments which caused reassessment "in the light of present-day conditions". But if the 1995 decision correctly interpreted the intention of the parties when making the treaty as expressed in the text, it is impossible that subsequent developments can have altered that intention.

In 1986[10] and 1990[11] the Court rejected the suggestion of a right for post- operative transsexual to have their birth certificates altered to reflect a change of gender. But in 2003 the Court held that article 8 did create such a right, by reason of a continually emerging European and national consensus[12].

In *Sigurjonsson* v *Iceland* (1993) 16 EHRR 462 a domestic law required taxi- drivers to belong to a specified occupational association: the Court took note of the fact that travaux preparatoires showed that those drafting the Convention had deliberately omitted a right not to be compelled to belong to an association, but held nonetheless that the applicant had such a right. The Court was influenced by a "growing measure of common ground at international level", including a 1989 Charter of Social Rights of Workers adopted by the European Community, of which Iceland was not a member.

In *Sufi & Elmi* v *UK*[13] the Court in 2011 held that the rights of two Somalians with atrocious criminal records in England would be infringed by their deportation, because the chaotic internal conditions in Somalia would amount to "inhuman or degrading treatment or punishment"; it was not suggested that the UK was responsible for the internal state of Somalia. Yet the obligation on contracting states in art 1 of the Convention is to secure rights only "within their jurisdiction"[14]. It cannot be seriously suggested by anybody that the contracting states in 1950 considered that a state would be breaching art.3 by such a deportation.

In July 2011 the Strasbourg Court heard the case of *Al-Jeddah*. It concerned events in Iraq whilst the British Army was discharging its role as part of the multi-national occupying force between 2004 and 2007. Britain's role in that occupation was fully authorised by a series of resolutions from the UN Security Council. Al-Jeddah was detained by the British Army and held in prison for 3 years. Intelligence provided compelling evidence that he was planning acts of terrorism as part of the insurgency in Iraq. The UN resolution authorised the UK to take "all necessary measures to contribute to the maintenance of security and stability in Iraq". It was made clear to the UN at the time of that resolution that this would involve internment. Accordingly, the House of Lords dismissed his claim. But despite all this, the Strasbourg Court ordered the UK to pay him 25,000 euros damages for wrongful detention. At the time the Convention was being drafted the UK and France had very recent experience of being occupying powers in the aftermath of the Second World War. That experience included the detention without trial of potential hostile combatants. It would be far fetched to suggest that the UK and France intended the Convention to require full trial process during such operations.

4 *(2006) 42 EHRR 41*
5 *Scoppola v Italy (no.3) no 126/05, judgment of Grand Chamber on 22 May 2012*
6 *Research into this is set out in "Prisoner Voting, Human Rights & the Case for Democracy" Dominic Raab MP (Civitas, 2011) pp.5-6*
7 *Brownlie op. cit. p.605*
8 *(1995) 19 EHRR 133*
9 *(2002) 35 EHRR 32*
10 *ReesvUK(1986)9EHRR56*
11 *Cossey v UK (1990) 13 EHRR 622*
12 *Goodwin (Christine) v UK (2002) 35 EHRR 447*
13 *28 June 2011 judgment on applications 8319/07 and 11449/07*
14

There is a further reason why the Strasbourg Court's decision in *Al-Jeddah* exceeded its jurisdiction in international law. That is that the crucial point at which it parted company with the reasoning of the House of Lords was over the correct interpretation of a UN Security Council resolution: the former held that resolution 1546 conferred an obligation to intern when the UK considered detention was necessary for imperative reasons of security, whereas the latter considered it conferred only a power to do so. Only the Security Council itself can give an authentic interpretation of one of its resolutions[15], and no such interpretation had been given in this case. That being so, it was open to a national court to work on its own bestg interpretation. But the Strasbourg Court has no power to interpret UN documents, just as it has jurisdiction on a disputed point of English domestic law. Its jurisdiction is confined to interpreting and applying a Council of Europe document, namely the Convention. Therefore, even if the Strasbourg judges personally felt drawn to a different interpretation of resolution 1546 from that of the House of Lords, they ought not to have interfered. The danger of the Strasbourg Court exceeding its proper role is that it fuels the case for the UK to withdraw from the Convention, which is a course, as I shall explain, which I would regret.

In *Abu Qatada's* case[16] a few months ago the Court invented a new type of violation by holding that the UK would fail within its jurisdiction to secure a fair trial for him if it expelled him, since Jordan might put him on trial when he got home and might admit evidence obtained by torture. By no stretch of the imagination does the UK have responsibility for the law of evidence in Jordan. Nor was this an extradition case, where the purpose of the deportation is to put a person on trial: a Home Secretary had decided to expel him in the interests of Britain's national security.

The intellectual explanation for many of these decisions, is the Strasbourg Court's "living instrument" approach, under which the Court interprets it "in the light of present day conditions"[17]. The Court's attitude is to forget that its jurisdiction is limited to interpreting a treaty, and exceeding its function by behaving as if it were a European Supreme Court. That a different jurisprudential approach is possible is illustrated by the strong dissents by the British judge, Judge Fitzmaurice in the earlier years of the Court: he protested against the inroads which the majority of his judicial colleagues wished to make into "a state's domestic jurisdiction", and called for a "cautious and conservative interpretation"[18]. But sadly since his retirement there has been no such voice on the Court.

The idea of a "living instrument" is unobjectionable if it merely means what a common lawyer would understand by our interpretative presumption that a statute is "always speaking"[19]; in other words its meaning develops as circumstances change, for instance with technological inventions. But this cannot justify a wholesale importation of a meaning not justified by the text. An informative example of how the Court has abandoned its own proper principles is afforded by the change in the way the Strasbourg Court has interpreted article 1. This states that contracting parties shall secure the rights to "everyone within their jurisdiction". The territorial intent of that phrase is underlined by the presence of another article allowing states to apply the Convention to overseas territories which they govern. Discussion recorded in the working papers makes it clear beyond doubt that by "jurisdiction" the negotiating parties in 1950 intended to refer to the geographical territory of a country.

In *Bankovic* v *Belgium* in 2001[20] there was an attempt to allege infringement of the Convention by the NATO bombing of a television station in Belgrade in the Balkan operation. The countries of the former territory of Yugoslavia were not at that date parties to the Convention. The Court held that the complaint was inadmissible, since Convention could apply outside the territory of contracting states only exceptionally and when a state, as in the case of Turkish-controlled zone in Cyprus, had effective control of a territory. The Court in *Bankovic* said that, whilst there might be a living instrument approach

15 *"The Interpretation of Security Council Resolutions" Michael C Wood at http://www.mpil.de/shared/data/pdf/pdfmpunyb/wood_2.pdf*
16 *Othman (Abu Qatada) v UK, 17 January 2012*
17 *Tyrer v UK (1978) 2 EHRR 1 para 31*
18 *Golder v UK (1975) 1 EHRR 524, Tyrer v UK (1978) 2 EHRR 1*
19 *Bennion on Statutory Interpretation 5th ed section 288 at pp.889-914*
20 *application 52207/99*

to other articles, the Vienna Convention must apply to article 1, since it was "determinative of the very scope of contracting parties obligations and the reach of the entire Convention system"[21]. In *Bankovic* the Court quoted travaux preparatoires to demonstrate that the parties in 1950 had intended "within their jurisdiction" to refer to the land territory of an adherent country. As recently as 2010 that was still found to be the effect of the Strasbourg Court's case-law by exhaustive analysis by 9 members of the UK Supreme Court in *R (Smith)* v *Oxford Coroner*[22], summarised in the headnote this:-

> *"Having regard to the jurisprudence of the European Court of Human Rights and to the historical context in which the Convention had been formulated, the contracting states, in concluding its provisions, would not have intended it to apply to their armed forces when operating outside their territories; that article 1, unlike the other articles, was not to be interpreted as a living instrument subject to changing conditions; that jurisdiction under article 1 was essentially territorial in nature and other bases of jurisdiction were exceptional, requiring special justification in the particular circumstances of the case; that such exceptions consisted either of territorial jurisdiction by a state over the territory of another contracting state, extensions of territorial jurisdiction by analogy, such as a military base or hospital, or extensions of jurisdiction to accommodate circumstances which were plainly within the scope of the Convention, but that to the extent that jurisdiction was based solely on authority and control by state agents over individuals abroad, it was inconsistent with the established jurisprudence...."*

However, in June 2011 in *Al Skeini* v *UK* the Court gave article 1 a significantly wider meaning. There were 6 applicants, all relatives of individuals who had died in the Basra area of Iraq in the early months of the UN-authorised presence of British troops: their complaint was at the lack of an independent investigation into the deaths. One was a shocking case, that of Baha Mousa, an innocent hotel receptionist who died at the hands of British soldiers whilst in custody in a British army base; but no violation was found in that case, since there was a full public inquiry under a retired judge. On the other hand a violation was found in respect of an Iraqi who was killed in cross-fire when British soldiers on patrol were ambushed by insurgents. The House of Lords held that the UK was not in effective control of Basra, and so the Convention could not apply to that incident[23]. The Divisional Court had heard evidence of the generally lawless conditions and how little a relatively small number of troops could do to bring law and order[24]. Despite that, and despite being in no position to substitute different findings of fact, the Strasbourg Court held that southern Iraq was within the UK's jurisdiction: in striking contrast to the *Bankovic* judgment there was now no mention of the Vienna Convention or the drafting history. The upshot is both awkward in practical effect, by applying the Convention to battle-field situations, and a great extension in legal principle.

Why this matters

Attractive as it may at first sight seem for the law to keep pace with social changes, it is hard to reconcile such flexibility with one of our cornerstone British values, the rule of law. For one of the essential features of the rule of law is that the content of the law is known.

In his magisterial book "The Rule of Law"[25] Tom Bingham identifies eight characteristics or principles of the rule of law. The first is:

> *"The law must be accessible, and so far as possible intelligible, clear and predictable."*

The importance of predictability is supported by leading academic writers. Professor Finnis in "Natural Law and Natural Rights"[26] has emphasised the importance of stable ground rules ascertainable in advance:-

21 *Bankovic at paragraphs [62] to [63]*
22 *R (Smith) v Oxfordshire Coroner [2011] 1 AC 1*
23 *R (Al-Skeini) v Defence Secretary [2008] AC153*
24 *R (Al Skeini) v Defence Secretary [2007] QB 140 at [40] to [46]*
25 *2010 Allen Lane*
26 *Oxford 1980 page 270*

"A legal system exemplifies the Rule of Law to the extent (it is a matter of degree in respect of each item on the list) that (i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; that (iii) its rules are promulgated, (iv) clear, and (v) coherent one with another; that (vi) its rules are sufficiently stable to allow people to be guided by their knowledge of the content of the rules; that (vii) the making of decrees and orders applicable to relatively limited situations is guided by their knowledge of the content of the rules; that (vii) the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and that (viii) those people who have authority to make, administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor."

Professor Sir Neil MacCormick has made the same point[27]:-

"Where the Rule of Law obtains, the government of a state ... is carried on within a framework laid down by law. ... Where the law prevails, you know where you are, and what you are able to do without getting yourself embroiled in civil litigation or in the criminal justice system.

There cannot be a Rule of Law without rules of law.... Values like legal certainty and legal security can be realized only to the extent that a state is governed according to pre-announced rules that are clear and intelligible in themselves."

The consequence of these imaginative interpretations of the Convention is that there is an ever growing list of restrictions on the scope for choices by the UK's Parliament and Government - not by reason of obligations freely and consciously agreed, but by reason of the Strasbourg Court treating the words of the Convention as a blank cheque enabling it to make decisions without any predictable boundary. This is not just a pooling of national sovereignty in a transnational democratic institution, such as the EU, where decisions are taken by elected governments in the Council of Ministers and be a directly elected European Parliament. When it occurs, this is an erosion of parliamentary democracy in favour of what might be called a dikastarchy[28].

The irony of this situation is that the preamble to the Convention refers to both the rule of law and what it calls "effective political democracy".

In addition to the incompatibility with principles which are sacred to some of us, the modern approach of the Strasbourg Court has another unfortunate effect in trivialising the concept of human rights. The UK Government was recently ordered to pay £232,000 to Mirror Group Newspapers[29]. The Mirror had been found liable to Naomi Campbell in heavy litigation and after appeals up to the House of Lords[30]. The bill in costs was just over £1 million, of which some £270,000 was a success fee. The Strasbourg Court considered that the paper's right to freedom of expression was infringed by liability for the success fee. It merely trivialises the important concept of human rights to hold that they are infringed by an extra 20% on the costs bill for a large newspaper proprietor.

The Court's expansive jurisprudence sometimes undermines what it is supposed to be protecting in a particular, as well as that general, sense.

Take *McCann*[31], the case about the IRA team on Gibraltar. The UK's obligation under article 2 of the Convention was to protect life. Hundreds of lives would have been at risk if the IRA had detonated their car bomb. It was the UK's duty to try to stop that. It was bizarre to hold that by reason of some supposed negligence in planning the operation the UK infringed the IRA's art 2 rights.

27 *"Rhetoric and the Rule of Law" OUP 2005 p.12*
28 *δικαστης - a judge*
29 *Application 39401/04, judgment becoming final on 12 September 2012*
30 *Campbell v MGN Ltd [2004] 2 AC 457*
31 *McCann and others v UK (1995) series A no.324*

Something which many of us might think is a human right is to take and disseminate photographs of what happens in a public place, as Arab Spring demonstrators did in Tahrir Square. Indeed, Liberty felt such an empathy with the Egyptian uprising that it placed a quotation from an Egyptian at the head of its submission to our Commission. Yet only a few years previously 6 judges of the Strasbourg Court found that a breach of art 8 in just that when the photographs were of Princess Caroline in a public street out shopping[32]. Although the Grand Chamber recently reversed that decision[33], it did so only because Princess Caroline was a public figure of general interest, with the implication that there would or could be a breach of the Convention in publishing photographs of you or me in the public street.

If each Council of Europe country is subject to a higher law which can change its meaning as often as the Court chooses, then we have entered territory in which the concepts of both law and a court are subtlety changed from those to which we have been accustomed. Dr David Robertson, an Oxford academic who has made a special study of the development of rights jurisprudence in post-communist Eastern Europe, has written that one good way to think about a court applying rights in the modern European context[34],

> *"... is to see them not as judges ... but as professional political theorists."*

That is true of Strasbourg. It is not a court of law, as understood by lawyers in this country.

Sir Edward Garnier QC MP recently described it "this interesting, and strange, and somewhat small 'p' political body"[35]. You might say that this is politics, dressed up as a court. More accurately, the European Court of Human Rights is a blend of politics and court of a kind which the British have not known before: the procedures and language are those of a system of justice, but the subject matter of the decisions is often the making of a political judgment.

The cause

What is the cause of the Court developing in this way? I suggest that it is in large part the prevailing intellectual atmosphere in which the judges operate. The criticism which they tend to hear from decent, intelligent people is that the Court is too timid.

A good example of this intellectual climate is afforded by the reaction to the British Government's recent proposal that the Convention Treaty be amended to include an express reference to the margin of appreciation and subsidiarity. Those are principles which the Court says it follows, so you might think it was a modest proposal. Many of you might also find it a welcome proposal. The importance of the Court respecting subsidiarity and the margin of appreciation is held not just within the two parties in the Coalition Government, but also by many leading members of the Labour Party.

But nine non-governmental organisations, including several based in Britain, got together to lodge repeated joint submissions against it. They included Amnesty International, the British Institute of Human Rights, the Helsinki Foundation for Human Rights, the European Human Rights Advocacy Centre, Human Rights Watch, Liberty, the International Commission of Jurists and JUSTICE. They "strongly opposed" the amendment of the Convention to include these principles. It is not hard to perceive their tactical motivation. They did not want an increased emphasis on subsidiarity. On the contrary they would welcome further vigorous growth of the living and flexible tree.

It is instructive to observe how the expression "the NGOs" has come to mean pressure groups of one persuasion – the persuasion which in the United States would be called "liberal". Although it is less than perfect in the European context, I shall in the remainder of this talk use the term "liberal", for want of any other.

32 *Von Hannover v Germany [2005] 40EHRR1*
33 *Von Hannover v Germany (no.2) [2012] 55 EHRR 15*
34 *"Democratic Transitions and a Common Law for Europe" Dr David Robertson Europaeum 2000*
35 *In interview with Joshua Rozenberg, reported on the Human Rights Blog on November 7th, 2012.*

In America the alternative point of view is called "conservative": in the European context it might be called the parliamentarian or democrat approach.

The "liberal" NGOs have earned their influential position because for years they have been making "third party interventions" of the highest intellectual calibre.

I take as an example, more or less at random, the Submission to the Strasbourg Court from JUSTICE and Amnesty International in the Abu Qatada case. It referred, using nearly 100 footnotes to published sources, not only to UK and Strasbourg case-law, but also inter alia to:-

7 Human Rights Watch reports
4 Amnesty reports
the UN Committee against Torture Cases
the UN High Commissioner on Human Rights
the UN Commission on Human Rights
the UN Convention against Torture
the UN Special rapporteur on Torture
the European Convention for the Prevention of Torture
the European Parliament Temporary Committee on Illegal CIA Activity in Europe
the Spanish National Criminal Court.

When the same case was in the House of Lords there was a submission drafted by Lord Pannick QC and two juniors, filed by Herbert Smith.

I take one other example to illustrate the impressive learning of some NGO interventions. JUSTICE's submission in Horncastle at Strasbourg. In the light of references by the UK Supreme Court to other common law jurisdictions, it set out the law on hearsay in Australia, Canada, Hong Kong, Ireland, New Zealand and South Africa. It also contained a remarkably wide-ranging historical review of the role of live confrontation in a trial, touching not only on old case-law but also the writings of Bentham, Jardine and Blackstone, the 1776 Virginia Constitution, and finding apt references from Shakespeare and the King James Bible.

In *Binyam Mohammed* JUSTICE and Liberty argued against the redaction on grounds of national interests of security information received from the US Government. JUSTICE and . Liberty both intervened in support of the applicant's arguments in *Al Jeddah*. Nine NGOs lodged a submission in *Al Sadadoon* in favour of extra-territorial application of the ECHR. Many years earlier Liberty intervened in *Chahal*, which some of us regard as the most unfortunate decision ever to be given by the Strasbourg Court.

In *YL* the British Institute of Human Rights and other NGOs argued (unsuccessfully) in the House of Lords that in Human Rights Act, the expression "public authority" applied to a private company, on the ground it was performing an activity which otherwise the state would be performing.

Nobody could doubt that these interventions make a constructive and effective contribution to the work of the courts. Nor would anybody dispute the right of liberal NGOs to press their views. All that I am drawing attention to is their prevalence, their quality and, in the best sense of the word, their bias.

Almost always such interventions at Strasbourg are in support of applicants, not quite invariably. I have located one instance where Liberty has intervened on the side of a government, urging the Strasbourg Court to reject a case. It is that of *Ladele & McFarlane*, Ladele is a Christian who was sacked as a registrar for declining on conscientious grounds to register civil partnerships, notwithstanding the availability of colleague registrars in the same office to perform such work. McFarlane is a Christian who was employed as a counsellor by Relate: he had no problem counselling homosexual couples on relationship issues, but doing so on sexual dysfunction or behaviour issues involved a conflict with his religious beliefs; despite that he was willing to do so, but Relate sacked him. Liberty, which this year intervened in support of a Muslim applicant complaining of France's ban on wearing a veil covering the face[36], urged that a broad margin of appreciation be allowed to the UK in order to defeat Ladele and McFarlane.

An indication of the extent of the influence of the liberal NGOs may be seen in the fact that a representative from the NGO movement, Mrs Nuala Mole, was invited to address the recent Intergovernmental Conference at Brighton. She began by saying that she was speaking on behalf of "colleagues from civil society". As if the 47 democratically elected governments taking part represented something other than civil society.

The influences on the Court come not just from NGOs. Another source are National Human Rights Institutions. The UN encourages all countries to have such quangos, and even operates an accreditation system. They are supposed to promote human rights. They seem in practice to reflect a similar viewpoint to the liberal NGOs, and with the benefit of government money. The UK body is the Equality and Human Rights Institution. Its Legal Director is John Wadham, who was formerly at Liberty.

Another reflection of the prevailing climate may be seen in the specialist journal, the European Human Rights Law Review. I have subscribed to this since its very first issue in 1995. I cannot ever remember seeing an article reflecting anything other than the liberal perspective. Its first editor was Ben Emmerson. Its Editorial Board includes no member of the Conservative Party and nobody of a remotely Tory viewpoint. It does include the present Director of Liberty, and Mrs Nuala Mole, and John Wadham.

I am not criticising any of these organisations. JUSTICE in particular is an excellent body, of which I have been a member for a number of years, and which every lawyer should be encouraged to join. It is entirely proper that all these bodies should express their viewpoint.

I am complaining at ourselves. We have let this happen. There is no NGO reflecting a conservative or parliamentarian approach to the human rights. I do not suppose that the European Human Rights Law Review has ever been offered an article presenting an intelligently argued challenge to the liberal orthodoxy. Apart from two wonderful submissions by Lord Carey and Bishop Nazir-Ali in relation to the current Christians' cases, I am not aware of any interventions at Strasbourg challenging the prevailing liberal orthodoxy. When Jonathan Fisher QC published his booklet "Rescuing Human Rights" earlier this year[37] it was, I believe, the first occasion on which anybody in print had exposed how the living instrument jurisprudence is in conflict with international law.

In short, we have allowed vast swathes of territory, intellectual and organisational territory, to be occupied by our philosophical opponents without as much as firing a musket.

The remedy

If we were talking just about an area of academic law, this would be of limited consequence. But, as I have said earlier, we are talking about politics.

There is a view starting to grow within our Party that we should opt out of this game, and withdraw from the ECHR. But it would be rather a pity to leave a Convention which we played so great a role in establishing. It would be a pity, too because today's 47- member ECHR, stretching through the Baltic states and Eastern Europe, through several of the outer former Soviet republics, and now embracing even Russia itself -- all signed up to a document which was largely drafted by British Conservatives as an embodiment of our values -- is in many ways a monument to the Thatcher-Reagan achievement in destroying the iron curtain.

I would readily agree that some of the arguments for the UK remaining in the ECHR are bad arguments. For instance, it is flatly wrong to say that it would entail leaving the EU. But resignation from any Club should be the last resort. Without there having first been a period of sustained intellectual challenge, with some serious attempt to find allies overseas who share our concern at the Court's activism, withdrawal would be misunderstood. It would probably be seen as a somewhat petulant reaction to a few decisions we dislike, and might actually make it harder to get a hearing for our real case which is one of high principle and philosophy. It would not be easy to explain how withdrawal could be compatible with what William Hague has called his rights-based foreign policy in a networked world[38].

36 S.A.S. v France application 43835/11, intervention in May 2012

37 "Rescuing Human Rights" Jonathan Fisher QC, The Henry Jackson Society, March 2012

Moreover, the liberal heresies do not just affect Strasbourg. There is now also an EU Charter of Fundamental Rights which has already affected the development of EU law at the Luxembourg Court; and if any of you believed that Tony Blair secured the UK an opt-out from that Charter, you were sadly misled[39]. For instance, in 2004 there was a Council Directive which permitted the use of gender in setting insurance premiums where this was based on relevant and accurate statistical data: that was EU legislation made by a political body representing democratically elected governments. But last year the European Court of Justice held that that Directive was contrary to the EU Charter of Fundamental Rights and so invalid[40]. No democratic override of that decision is possible; and in the result young female drivers in Britain will be paying higher insurance premiums. Then there are a host of other international bodies from the International Criminal Court to World Trade Organisation arbitrations all potentially affected by the flexible law jurisprudence.

There is here a political and philosophical engagement which we cannot avoid, and which must be won on the plane of a battle of ideas.

Some inspiration may be obtained from the other side of the Atlantic. Thirty years ago liberal ideology was unchallenged in the law faculties of American universities, leading to a chilling effect on conservative students. Then a group of conservative students founded the Federalist Society, whose guiding principle is that the role of a court is to say what the law is, not what it ought to be. From small beginnings it has developed an intellectual and academic network of conservative lawyers extending to all levels of the legal community. It now has branches in every law school and it has become possible for conservatives to find academic posts at top law schools. Its mode of operation concentrated on hosting debates with liberal lawyers in an environment of respect and open dialogue. By its courage in allowing its arguments to be tested in open debate with opponents it has fostered a conservative intellectual revival in law faculties and in the courts.

Another important American organisation is the Cato Institute, a libertarian think tank committed to the idea of a society free from excessive government power. It regularly files what there are called amicus briefs in the Supreme Court – the very thing which the liberal NGOs here do all the time and we never have.

A third relevant body is the Heritage Foundation, a large think tank. Amongst its many activities has been the publication of papers exposing the hypocrisy of some UN so-called human rights work.

We need intellectually credible publications. We need to identify those few academics both in Britain and across Europe who oppose the liberal orthodoxy. We need able people undertaking research. We need to be filing third party submissions both in domestic courts and at Strasbourg. We need occasional big events – perhaps an annual Fitzmaurice lecture – and many small ones. We need speedy press statements responding to Strasbourg decisions. We need spokesmen able at the shortest notice to accept media invitations.

We need to reach out beyond this Party to the many others in this country, including some well-known Liberal Democrats and Labour Party members, who are unhappy at the trend of Strasbourg jurisprudence.

It may be that in time a new NGO, perhaps called DEMOCRACY, can be floated as a counterpoint to the liberal NGOs.

In the shorter term the resource for our movement can, I hope, be supplied from existing organisations. Sympathetic think tanks, such as Policy Exchange and Civitas, would have much to contribute.

And no organisation, I hope, will be more central than the one which has to date almost single-handed nurtured serious thinking critical of the liberal orthodoxy, our own Society of Conservative Lawyers.

38 Speech by Rt Hon William Hague at Lincoln's Inn on 15 September 2010

39 See Home Secretary v ME cases C-411/10, 493/10, ECJ , judgment 21st December 2011

40 Association Belge v Conseil des Ministres [2012] 1 WLR 1933

For further information about the Society of Conservative Lawyers, contact Sarah Walker (Administrative Secretary) at SocConLaw@aol.com

www.conservativelawyers.com

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