The Road to Rome and Strasbourg via San Francisco: Human Rights in Charters and Declarations

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To propound a British Bill of Rights to supersede[1] the Human Rights Act 1998 is both preposterous and absurd, what Jeremy Bentham would have described as "nonsense on stilts".[2] The proponents of a domestic form of human rights today conflate, even confuse the elements of the British constitutional theory of government, with the 20th century origin and development of the international law of human rights. It is entirely appropriate that we should commemorate the event at Runnymede, 800 years ago, but we should take care in placing Magna Carta in the history and development of our island's modern democratic government, and so distort its antiquity in the context of our constitutional history. The international law of human rights has a quite different, and distinct, development, starting with the French and American declarations of independence. The European Convention on Human Rights in 1950 was, historically, not drafted "in large parts by British lawyers".[3] It was derived, in 1948, from the Universal Declaration of Human Rights.

The proposition postulated by politicians and others is that our human rights should be expressed simply for its citizenry as a home-made product. As such, it might be explained as unbridled nationalism, or simply as an emanation of human emotion: in which case it can easily be described and socially dismissed. Even if Parliament's decision in passing the Human Rights Act 1998 is theoretically reversible, it is still without much of a prospect of political upheaval in a system that has proved valuable: the jurisprudence of the House of Lords in the Bingham era and the case-law of the UK Supreme Court since 2009 has been extensive and helpfully expansive. The recent ruling of seven Justices to two in the assisted suicide appeal indicates the distribution of powers between the legislature and the

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[1] Since it is not clear what will be added to the enactment of the Convention as promulgated in 1950, I have anglicised the word *supersedere*, which was a prerogative writ, staying proceedings. See *The Conservatives' Proposals for Changing Britain's Human Rights Law*, a document issued on October 3, 2014.

[2] The assertion of rights that are mischievous or rhetorical, as Jeremy Bentham, in *Anarchical Fallacies*, inaptly described the French Declaration of Rights. A more thoughtful comment on any such proposal comes from Andrew Blick in *Beyond Magna Carta* (Oxford: Hart Publishing, 2015), p.197; he observes that the proposal amounts as much to a "horizontal power grasp" from the UK to Parliament as it does from Strasbourg to the UK; the prescriptive nature of such political pronouncements seeks to limit (or, perhaps, confuse) the discretionary power of the judiciary in an area of international jurisdiction. Is this a stance inducing an ongoing conflict in the law of the UK? And will it confirm the UK's internationalism from human rights law?

[3] See, *The Times*, March 19, 2015, p.67—the essay which won the 2015 One Essex Court/Times award, which repeated the view that British lawyers were primarily involved in drafting the Convention.

judiciary.[4] We need to maintain the civil liberties that continue to face us in contemporary Britain. If the proclaimers of reform think it nevertheless sensible to propagate the suggested origin of the law—a European-Holocaust-British draftsmen of the Convention (a triage of immediate post-war events)—this is historically inaccurate, as well as an indulgence in political gamesmanship, a distorted form of geophysics. Misrepresentation of British constitutional history cannot be slotted into a modern development of international human rights law. They are distinct in their separate origins. The route to the Human Rights Act 1998 is Rome and Strasbourg via San Francisco; it is an outcrop of the internationalism during the total ambit of the 20th century, not just its outcome in 1948.

If the political exercise of the postulated plan is nonsense on stilts, it has some prominence in media support. Worryingly, there is a corpus of constitutional lawyers in the forefront of political advocacy. That support was signalled in December 2012 with an official report on the validity for a British Bill of Rights, produced to buttress the case for the manifesto of April 2015 in the forthcoming General Election. This conduct by the Conservative Party, vocally supported by the Prime Minister, despite its hopeless negativity towards recent Parliamentary action of the last two decades, deserves a reasoned refutation. It is best achieved by demonstrating the correct origins of human rights and civil liberties that form the freedom of the individual.

Magna Carta

Of all the Charters and Declarations traditionally associated with liberty, Magna Carta was the first to grant and instantly to withdraw, much less invent, liberty. Although it initiated the development in the limitation of protecting liberty against the Executive. It came to be attributed in origin to the victory of the Barons over King John. As one twister jocularly proclaimed, Magna Carta did no more than create "one Baron, one vote". As that great international lawyer, Sir Hersch Lauterpacht, said

> "the vindication of human liberties did not begin with their complete and triumphant assertion at the very outset. It (Magna Carta) commenced with recognising them in *some* matters, to *some* extent, for *some* people, against *some* organs of the State".[5]

Magna Carta and its successor instruments, like the Petition of Right, the Habeas Corpus Acts, the Bill of Rights of 1689 and the Act of Settlement as *declarations* of liberties were strictly not grants of liberty but of individual civil rights under the Common Law, which lie at the root of delivering the law to the people of England. We are in order to commemorate these rumblings of freedom, but their historical origins must be kept in their chronological age. Much more is attributable to the restoration of liberty that was achieved after the Civil War by the restraint of the prerogative powers of the Crown and establishing the power of Parliament.[6]

[4] *R. (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2014] 3 W.L.R. 200; [2014] H.R.L.R. 17.

[5] *An international Bill of the Rights of Man* (New York, 1945), pp.56–57.

[6] Cf., for the advocacy of the "values" of Magna Carta, Lord Judge, *The Times*, February 12, 2015. My flippant comment is that he was a fine Lord Chief Justice; while a brilliant judge, he is no historian.

If there is any virtue in the proponents' claim, it took 400 years to build on the event of Magna Carta.

The early declarations

Even well before the events of the 20th century, the international law of human rights was inspired by the Declarations of the Rights of Man during the French Revolution and the American Declaration of Independence of 1776. It was certainly the precedent of the Charter of the United Nations. The framers of the Universal Declaration of Human Rights in 1948 were surely making a deliberate choice in favour of a philosophy which saw human rights (as Thomas Jefferson and others did) as inherent in "human beings" and not just in the individyal gifts of governments or parliaments (in reality civil liberties). As the Russian novelist Turgenev wrote to his peer, Tolstoy, humanity is not an empty word. Human rights are nowadays said to be a collective of the equal rights of men and women, encompassed in a single Declaration or Charter, plus the qualified rights of civil liberties (fundamental freedoms, to adopt the second part of the title of the ECHR).

The precedents set by the French and American framers of their respective Declarations constitute an implied rejection at international level of the Benthamite positivism which dominated the jurisprudence in England—"no rights before law, no rights without law". It did not fully appreciate the seminal decision of Lord Mansfield in *R. v Barker* in 1762 that where there was identified a right which fairness demanded, the courts would provide the necessary remedy. The advocacy, however unlikely to be made reality, that contemplates the replacement of the Human Rights Act, which, consciously or not, would involve a British withdrawal from, or even unacceptance of, the Court at Strasbourg, can probably be explained by a desire to return to the halcyon positivist world of Bentham, Dicey and, dare one say it, of Herbert Hart. Observable facts do not triumph over ethical or moral values. Less charitably, the advocacy from the Conservative party (and specifically not accepted by the other party in the present Coalition government) smacks of politics rather than any kind of moral philosophy. Moreover, the current espousal of a home-made variety of human rights is a retrograde step, constitutionally.

Human Rights Act 1998

Until the incorporation of the European Convention on Human Rights and Fundamental Freedoms (to give it its full title) in Rome in 1950, it was widely assumed that the Convention owed its beginnings as an offshoot of the Council of Europe (which it was, in 1948), and that it owed its promptings to the combined events of the Second World War and the horrendous revelations of the Holocaust. In short, it was said to be a product of the existing (12 in number) members of the Council of Europe and dominated in its framing by British lawyers whose foreign office members had participated significantly in the diplomatic efforts in the formation of a European-based union of Western Europe. Forming the Council of Europe—a Churchillian aim—is one thing. A declaration of human rights, including a court, is quite another, less agreeable to English ears.

The premise that the European Convention on Human Rights is the direct and conclusive result of the wartime experience of Europe, with British lawyers the

main architects of its provisions, is historically untenable. After all, the experience of the Second World War was focused on the survival of liberal democracies over the extremism of authoritarian regimes. Yet why was it that the movement of human rights ignores (or at that time ignored) the campaigning efforts of HG Wells in his *Rights of Man* in 1939 or the studies in the mid-1930s of AN Mandelstam in Dijon, with its unique declaration of rights? Why had the architects of the United Nations in 1940 not recognised the earlier work of the League of Nations? Perhaps it was the focus of European suffering that stifled the internationalism which had dictated the international law of human rights. And what is more telling is that only in recent years, after the domestic impacts of the Human Rights Act 1998, was the genesis of the Convention in the 1950s more keenly felt by the politicians at home. It was a period of discombobulation—a neologism ascribed to the famous American journalist I.F. Stone, in his brilliant study of Socrates that expresses a form of psychological discomfort. Above all, who even today would guess that the draftsman of the Charter of the United Nations on May 1, 1945 (before the war had ended) was no less than General Jan Smuts, an internationalist if admittedly an Anglophile, in an international forum in San Francisco?

When the promotion of human rights was included among the purposes of the United Nations at the San Francisco Conference of 1945, the preamble to the Charter drafted on May 4 (before the war ended) by Smuts, which included the words "to establish faith in fundamental human rights", derived from an amendment from a South African proposal, and one from New Zealand to include in the Charter an obligation on all nations "to preserve, protect and promote human rights", which was not adopted.

There is no doubt that there is a link between the horrors of the Holocaust, in the process of the Nazi regime, and the emphasis based on the implementation of human rights in the San Francisco Charter, but this can only be an explanation. It is a classic example of *post hoc*, *propter hoc*. As Professor Richard Evans has explained in his magisterial essay in *The Guardian*'s Review section on February 7, 2015[7] the memory of the Holocaust entered the mainstream of European and American culture only in the last decade of the 20th century. History, he forcibly reminds us, is intertwined with memory. But history must always trump memories affected by politicians and other agenda-seekers.

Be that as it may, the wilful oversight of the work on human rights until the end of the first half of the 20th century needs explaining. For now we need only to note the lack of knowledge. The fact is that the European Convention of Human Rights authoritatively impacts only now, in the last two decades, on its safeguards. Any analysis of the role and function of the Court stems not from Europe (other than in a strictly geographic sense); nor does it derive its contents from liberties won and lost in past centuries. It derives fundamentally from the Universal Declaration of Human Rights. As the late Professor Brian Simpson wrote in his majestic work, *Human Rights and the End of Empire*, the Convention was framed as an international instrument. It was not inspired by British constitutional history:

> "The explanation why the United Kingdom promoted and ratified the convention must be sought not in the history of English constitutional thought,

[7] R. Evans, *Why are we obsessed with the Nazis?, The Guardian Review*, pp1–4, an extract from his book, *The Third Reich in History and Memory* (Little Brown, 2015).

> but in the general political history of the period. It was a product of British foreign policy, not of the British legal tradition, much less of British domestic policy. The belief in governmental circles that it was in Britain's interests to take the most prominent part of any of the major powers in the human rights movement, both in Europe and in the United Nations, arose as an aspect of the conduct of international affairs."

One of the most striking differences between the Covenant of the League of Nations in 1919 and the Charter of the United Nations in June 1945 has been that human rights found no place in the report. Apart from some references in art.23 to "fair and human conditions of labour' for everyone and to 'just treatment" of the native inhabitants of dependent territories, there was no mention of human rights during the drafting of the Covenant. Yet there was a good deal of debate about the obligations of all League members to respect religious freedom and to refrain from discrimination on the basis of religion. This is not to say that human rights had not been raised during drafting sessions. The concept of international human rights was at least embryonic. By the time of the First World War, there were angry pronouncements that activated the delegates at the conference at Dumbarton Oaks, a mansion belonging to Harvard University, between August and October 1944, prior to the establishment of the United Nations at San Francisco. Significantly, American involvement was evident. As regards an international status for human rights, the proposals for a new world organisation came from the US, the Soviet Union, China and the UK, although an American proposal to insert into the Charter a statement of principle about respecting human rights did not meet American expectations. Far stronger language on human rights had to await the Charter at San Francisco. Far from the two events dictating the status of human rights—the ending of the war and the revelation of the horrendous Holocaust—the founders of the United Nations at the Conference in San Francisco established internationally the promotion of human rights as an important part of the new world organisation.

Whereas, before World War II, the idea of giving human rights a positive political response was advocated by a few commentators, it was itself stimulated through the mainstream of public discussion. A flood of publications emerged, of which the most significant was President Roosevelt's peroration on the Four Freedoms, when addressing the US Congress on January 6, 1941. The opening passage in his speech is telling: "In the future days, which we seek to make secure, we look forward to a world founded upon four essential freedoms", after which he set out the freedom of speech and expression, freedom of worship, the freedom from want and the freedom from fear. That was not entirely novel, even if until then it had not been publicly pronounced. It reflected a determination of the US Government to avoid a repetition of the failure after World War I when the Senate withheld its approval to the Covenant of the League of Nations, for which President Woodrow Wilson had advocated at the Paris Peace Conference. But behind the political pronouncements, the scene had been set in the 1930s.

On October 23, 1939, H.G. Wells wrote a letter to *The Times* in which he referred to "the extensive demand for a statement of war aims on the part of young and old, who want to know more precisely what we are fighting for", but also to the practical responsibility of making any statement in terms of business, federations and political ramifications at the present time. The letter included the text of a draft

"Declaration of Rights" consisting of a short preamble and ten articles. Soon thereafter, a Penguin Special appeared, *The Rights of Man, or what we are fighting for*, containing the draft of October 1939. The book also reproduced the text of a declaration of rights emanating from the University of Dijon. This was the International Law Institute set up in Paris in 1921 to study the protection of universities and of human rights in general.

This burgeoning of scholarship in the international law of human rights was promoted by two eminent émigrés, first Professor Mandelstam, a Russian jurist who had been a diplomat in the Tsarist Government. He fled the Bolshevik revolution and devoted his studies to international law in Paris, as did another émigré, Professor Frangulis, a Greek jurist who had represented the Greek Government at the League of Nations from 1920 to 1922. In 1926 he founded the International Diplomatic Academy which organised conferences and published in the field. One of the first actions of the Academy was to set up the study of the protection of human rights. The safeguarding of human rights was always a feature of Frangulis' activities.

H.G. Wells' *Rights of Man* was a huge publishing success. It achieved widespread recognition and support. The human rights movement of the period between the two World Wars undoubtedly influenced events both during and after World War II. But did these events directly or indirectly lead to the establishing of the Council of Europe in 1948 and its judicial creation of a Commission and Court of Human Rights? Clearly not in any significant way. Official and unofficial activity in legal circles throughout the inter-war years were the cause of the Universal Declaration of Human Rights, and on to Strasbourg.

The Convention

The proponents' attack is directed not at the separate articles of the Convention, which binds its signatories by way of international law. Their target is a dislike (distaste, if you will) for its legal output, to put it mildly. In this approach, there is a loss of the role and function of the court. Hence my opening riposte that the proponents' assault on their internationalism is preposterous; they are contrary to common sense, if only expressing a perversity of legal history.

The drafting of the European Convention was swift by comparison with the negotiations for the Universal Declaration of Human Rights at the United Nations. The Convention was planned for September 1948 in Strasbourg, but that meeting never materialised. By January 1949, a somewhat obscure member of the English Bar, J. Harcourt Barrington (who subsequently became a County Court judge) was instructed to produce a memorandum and other documents, which he did at a meeting of the British section of the European movement. Early in February 1949 a meeting of the Committee of the Council of Europe was held in Paris: the plan was to produce "a statement in concise form of the fundamental rights and the right to free political elections, *based mainly upon the Universal Declaration of Human Rights* (italics supplied)". Uniquely it was designed to include means for implementation of enforcement of those fundamental rights.[8] A letter from Sir

[8] See A.W.B. Simpson, *Human Rights and the End of Empire*, pp.650–651.

David Maxwell-Fyfe, the leader of the team in the British section, explained the attitude to enforcement by the municipal courts of individual states: he stated that

> "the Charter [aka the Convention] would contain an undertaking by each State in charge of municipal law the fundamental rights set out in the Charter, and to give jurisdiction to its municipal courts to adjudicate upon the compatibility of legislative, administrative or other acts with those fundamental rights."[9]

This rule was emphatically stated as not taking the form of a right of appeal from municipal courts to an international court. And so it was translated into the ECHR at Rome in 1950 and ultimately into UK legislation by the Human Rights Act 1998. According to Simpson, "Maxwell-Fyfe did not himself undertake any drafting".[10]

There is nothing new in the British distrust ("dis-ease" may be a more appropriate expression) of the Strasbourg court.[11] The British lawyers who were actively engaged in the establishment of the Convention in the 1940s were hesitant, to say the least, about setting up a court in addition to the Commission of Human Rights. Their reluctance later relented in accepting the jurisdiction of the Court (as an appellate body to a Commission on Human Rights) and the right of individual petition as an optional provision.

The acceptance on January 14, 1966 of the Strasbourg jurisdiction was unostentatiously momentous, although its impact was more widely and keenly felt only when individuals began, after the Human Rights Act 1998, to exercise their right to action in the European courts. It is only now that the UK's declarations in 1966 of acceptance of the optional clause in the Convention for individual petition are partisanly regretted, although there was no ostensible criticism of the terms of the declarations in Parliament. More so now it is hard to see how, optionally, a deliberate departure from the declaration with the Secretary General of the Council of Europe can be so blithely disavowed. In accepting the jurisdiction, the Government in 1966 removed the individual subject's possibility of taking his or her case before the European Commission and Court of Human Rights; by virtue of the decision, Convention rights crossed the English channel to begin their entry into our legal system, as an act of internationalism. On August 9, 1965 Lord Gardiner commented that: "once we have taken the plunge any attempt to go back on our decision would surely attract so much publicity as to be highly embarrassing".[12] It took a further two decades for Parliament to enact the primary legislation of the Human Rights Act 1998—internationalism perfected.

The early use of the Strasbourg court in the mid-1970s and increasingly thereafter awakened in the legal profession a new outlet for complaints against the

[9] At p.322, Professor Simpson observes that it was for the United Nations that Foreign Office officials, "in uneasy relations with other departments", first developed policies on human rights. AWB Simpson, *Human Rights and the End of Empire*.

[10] A.W.B. Simpson, *Human Rights and the End of Empire*, p.650.

[11] An illuminating description of the *UK Acceptance of the Strasbourg Jurisdiction: what went on in Whitehall in 1965?* is aptly provided by Lord Lester in [1998] P.L. 237.

[12] Cited by A. Lester, "U.K Acceptance of the Strasbourg Jurisdiction: What really went on in Whitehall in 1965" [1968] P.L. 237, 248–249

administration.[13] It soon filtered through to a public untutored until the Human Rights Act 1998 in the expanding international law of human rights.

The Tyrer experience

Until incorporation of the Convention in the Human Rights Act 1998, there was still, domestically, a residual antipathy towards the idea of a foreign court exercising a jurisdiction over civil rights in Member States, and even to the Convention itself. This governmental commitment under international law (short of incorporation into UK law, which happened in October 2000) is demonstrably clear. In 1978 in the seminal case of *Tyrer* (the Isle of Man case where the birching of a teenage boy was held to be degrading punishment) the principle that the Convention was a 'living instrument' was adopted, effectively preventing any legal retrenchment to an originalist (1950) view of the Convention, or indeed to acceptance of the Convention.[14]

I appeared then as leading counsel for the UK Government as responsible for the international obligations of the Isle of Man. The UK Government, through me, did not defend the Manx penal sanction as being compliant with art.3 of the ECHR which guarantees protection against inhuman or degrading treatment. I stated specifically that Her Majesty's Government had abolished all birching of young offenders in the Criminal Justice Act 1948, and had no intention of reviving the penalty. I concluded by accepting the case against the UK Government, but the Attorney General was permitted, with the leave of the Strasbourg judges, to address the court in favour of the Manx law. Thus, there had been not merely an acceptance by the UK of a violation of art.3 of the Convention, but an affirmation of the Convention itself. The violation was subsequently removed legislatively by the Manx parliament.

An amusing feature of the court's decision is the dissent of Sir Gerald Fitzmaurice. He argued that the corporal punishment of the youth was not "degrading" within art.3. He personally had undergone that disciplinary treatment as a schoolboy:

> "I have to admit that my own view may be coloured by the fact that I was brought up and educated under a system according to which the corporal punishment of schoolboys (sometimes at the hands of the senior ones - prefects or monitors - sometimes by masters) was regarded as the normal sanction for serious misbehaviour, and even sometimes for what was much less serious."

Nothing since the *Tyrer* case has suggested any removal of the implied affirmation of the Convention. It is disingenuous now for anyone to state, as some do, that our courts are "bound" by Strasbourg. Binding is one thing. But taking its jurisprudence into account is altogether otherwise—a flexibility of dual jurisprudence.[15]

[13] See E. Bates, "British Sovereignty and the European Court of Human Rights" (2012) 128 L.Q.R. 382.
[14] *Tyrer v United Kingdom* (1979–80) 2 E.H.R.R. 1.
[15] I should mention that I am credited with having been the first English counsel in the 1970s to cite the provisions of the Convention in an English court—unsuccessfully! I am mildly chided for deploying too bold an argument, if only as a reminder that adventurous submissions in the wrong cause often make bad law! Murray Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1997), p.140, citing the appellant's [bold] argument in *R. v Chief Immigration Officer, Heathrow Airport Ex p. Bibi* [1976] 1 W.L.R 979; [1976] 3 All E.R. 843.

Sixty years ago, Sir Hersh Lauterpacht, in his majestic work, *International Law in Human Rights*,[16] predicted that the Convention amounted to the idea of "federalism" and still more so. Seven judges of the Strasbourg court recently (December 16, 2014) underlined the fundamental principle that the admissibility of evidence is a matter for national courts to regulate; the ECHR's sole task is to ascertain whether the criminal proceedings as a whole constitute a fair trial. Its role is complementary, not decisive: see *Horncastle v United Kingdom*.[17] The function of the two courts was, if not strictly, in harness. It is at least harmoniously arriving at the municipal court's final decision. Their assertion of separable judicial powers sounds very federalist.

The Strasbourg Court

Much too readily and facilely the European Court of Human Rights is equiparated with the status of the appellate courts of the individual Member States of the Council of Europe. This overlooks the fundamental nature of the Court. It is not an international court exercising appellate control of the municipal court, whether or not it applies the doctrine of precedence and therefore of binding authority. Parenthetically, there is validity in the complaint that "taking account" of decisions is at least ambiguous, if not lacking in certainty—which is capable of being rectified in the course of judicial construction. That apart, the court is supranational. To adapt the familiar phrase of Judge Learned Hand, it is the Platonic guardian of universal humanity. These are not empty words; they give meaning to the articles in the Convention, stripped of the myriad of legal rules that a municipal court applies under its individual country's constitution, written or unwritten. The judges of the European Court, representing their individual countries, owe their allegiance to the Council of Ministers. As such they imbibe the judicial culture fashioned out of the principles that lie behind the human rights and fundamental freedoms. It is humanity, judicially interpreted.

Human rights are historically and necessarily declared at a high level of generality. They need to be interpreted in some detail by the individual members' courts in specifying the range of the right, as indeed Lord Reed described aptly in the judgment in *Osborne v Secretary of State for Justice*. In performing this limited guardianship, Strasbourg is sharply focused in its task. It acts unencumbered by the host of factors that municipal courts must contend with and apply against a background of their own judicial culture, including their status constitutionally. The European Court of Human Rights, as Sir Nicolas Bratza stated in 2011

> "does in my perception pay close regard to the particular requirements of the society in question when examining complaints that a law or practice in that society violates the Convention".

That attitude explains the development by the Strasbourg court of the "margin of appreciation", which favours a variation in the application of declared rights. Thus it is the reason for legitimating legislation which deprives a class of convicted prisoners of the right to vote, whereas a blanket ban on the vote of all prisoners

[16] H. Lauterpacht, *International Law in Human Rights* (London: Stevens, 1950), p.455.
[17] *Horncastle v United Kingdom* (2015) 60 E.H.R.R. 31.

violates the Convention.[18] The UK can comply with the Convention if, for example, prisoners serving sentences of more than X (say, four) years alone lose the franchise. By this discrimination over the length of imprisonment, there is an easy compliance with the Convention. Whitehall and Strasbourg can be acting in harmony without the courts being in harness.

The most telling comment comes paradoxically from the malcontents and their professional advisers. They point to the fact that most of the Strasbourg judges are appointed from professorships at universities and know little or nothing about the real world outside the cloistered classroom. Just so. If the judges at Strasbourg are precisely academic and view the constitutional rights and civil liberties in a scholarly way, so be it. Untouched by the trimmings and trappings of the daily problems fought out in the courtroom, they bring to human rights a legalised and jurisprudential form of humanity unaffected by other considerations in municipal courts. These judges are not part of any one country's judicial culture. They are raised in the cultures of a variety of countries. The Convention expresses their collective approach to the inherent claims of common humanity. The fact is that we want the Strasbourg judges to be intellectually bright; this they achieve, not always to the satisfaction of positivists or pragmatists. So understood, it is easy to find accommodation between Strasbourg and London. The Human Rights Act incorporated these ideas in 1998.

The Strasbourg role

The matter does not rest with Platonic guardianship. The function of the ECHR is not to be treated as the same as any other appellate court that supervises, internationally, the totality of the law under consideration—that is, the issue(s) under the totality of a legal system in which the municipal judiciary acts in accordance with its own constitution and judicial culture. A supranational court—it has 47 justices, one from each Member State—Strasbourg seeks to rationalise the various human rights between different legal systems. It is the guardian (not the determiner, which is the role of the Convention) of those rights. It has no other constituency of the 800 million people of Europe. It reflects the cultural heritage of the region of 47 countries, not just the British Isles or the original 12 states that initially signed the Convention. The Court supervises all courts of last resort of all countries who have signed and ratified the treaty, not just Britain's; it then binds them as a matter of international law and leaves the domestic law as it is, unless and until international laws are specifically enacted.

It is important to remember that each Member State has freely decided to ratify the ECHR and to become bound by each of its standards. Further, both the ECHR and the Committee of Ministers (in fulfilling its role of supervising the execution of the ECHR's judgments) have consistently refrained from imposing particular measures on Member States that are required to be implemented in order to comply with a judgment of the Court.

In 2015, the 800th anniversary of Magna Carta, we are subjected to a literary torrent about the tussle between King John and the Barons in 1215. We may

[18] The Court has recently said that a declaration of non-compliance suffices as a remedy, and does not give rise to a claim in damages.

celebrate the event in its pristine context, a very early move towards the end of kingly sovereignty. It took at least another 400 years for England finally to turn off the monarchical rule, save only for a minor mode of constitutional monarchy. We might expect, however, an historical corrective to the adulation accorded to the happenings at Runnymede in 1215.

The extent of the literary offerings comes tantalisingly from the joint authorship of Anthony Arlidge QC and Lord Judge, the Lord Chief Justice from 2008–2013, in *Magna Carta Uncovered*. In a commendably short and clearly-written book, the authors deign to make one passing reference (at p.165) to the fact that "shortly after the Declaration" (known more widely among the *cognoscenti* as the Universal Declaration of Human Rights of 1948) the representatives of the members of the Council of Europe met to draft a European [sic] treaty which would protect the human rights that had been treated with such horrifying contempt in the Second World War. The authors conclude that

> "the resulting treaty, which came into force in 1953, contained a summary of rights and liberties … which are bred in the bone of the common law".

The authors write quizzically (perhaps "quizzably" might be preferred)

> "the question whether it is open to the European Court of Human Rights to order the British Parliament to enact legislation that will ensure compliance with the Court's view of the way in which the Convention should be applied in particular circumstances has yet to be resolved."

Thankfully, we have a definite answer. The decisions of the Strasbourg court do not bind our courts or our Parliament. That, as we have demonstrated, is not the function of the Platonic guardians of the European Convention on Human Rights and Fundamental Freedoms, now enacted (save for the remedial provisions in art.13 of the Convention) in the Human Rights Act 1998. Magna Carta is the stuttering start of the development of the British constitution with a single baronic vote: no more and no less, to adopt the words of Lord Bingham; after six excursions to the Supreme Court, Lord Bingham's aphorism can safely be implied as qualifying the UK courts' approach *beyond* the mirror image of strict compliance with Strasbourg jurisprudence as "certainly no more" than that. The result of a ruling from Strasbourg is deliberately left flexible in the hands of the municipal courts.

Anomalies abound in the process of law-making. Some of them are readily sustainable; others are too bizarre to contemplate, let alone comprehend. Their public resolution reminds us that good governance is the product of the Crown as Head of State; three arms of Government, operating their disparate functions, as seminally declared by Lord Mansfield in *R. v Barker* in 1762. Internationalism—the 20th century development of human rights and fundamental freedoms in the form of Charters and Declarations—belongs to modern democratic government in a global world.

Conclusion

I began this lecture by condemning the campaign to go back on what was widely applauded in the Human Rights Act 1998. I end this essay even more convinced of the wisdom of Parliament to accord to our citizens the right of access to our

specific remedies for violations of the European Convention on Human Rights and Fundamental Freedoms. The events of the enforcement internationally in 1950 reflected a society that was recovering from a world war on European soil, a disastrous war never to be repeated. For nearly 70 years the continent of Europe has been spared a major conflagration, buttressed by a declaration of the basic human rights and civil liberties, as envisaged perspicaciously since. But, like everything, lessons about civilised behaviour call for review and reform. The journey made to Rome and Strasbourg via San Francisco needs to be re-run, in marathon style of rather more speed than haste. In the global world of 2015, more than just a passing reflection on the restricted right to justice and denial of any delay in access to any judicial process, and reinforcement of arts 39 and 40 of Magna Carta, signed 800 years ago, would not go amiss. The delay in delivering justice, through legal aid, spelt out both in Magna Carta and in art.6 of the European Convention on Human Rights, reminds us of a vital element in a contemporary legal system. If the Global Summit, held in February 2015, is motivated by improved legal sources, carry on. *Protection of human rights in the UK*—the title of the Conservative Party's proposals for meddling with Britain's human rights—is built on the parliamentary decision of 1998; not its retraction.