# Why Keep Human Rights?

"To civil and religious liberty" was a favourite toast of Independents and Presbyterians, the forebears of the Unitarians, as well other Nonconformists in England from the 17th century. It was used by the religious dissident groups who had supported the Commonwealth and had civil and religious liberties and freedoms taken away by the English Parliament on the return of Charles II in 1660 and the reestablishment of the Church of England.

The civil and religious liberties and freedoms were slowly returned to religious dissidents over the next two centuries by such statutes as the Act of Toleration 1689, the Trinity Act 1813 and the Dissenters Chapels Act 1844. In exploring the uncodified British constitution for the foundations of British freedom, this history illustrates the legal nature of freedoms and liberties. Freedoms and liberties continue unless taken away. It is said that English freedoms exist in the gaps in the law. As far as prisoners of the UK are concerned, the Law Lords, Lords Wilberforce and Bridge agreed in 1982 the law to be that " a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication".1 The two Law Lords also confirmed that "a citizen's right to unimpeded access to the courts can only be taken away by express enactment." Where there was doubt before, the law affecting prisoners, including the administrative law of the Prison Rules, had come firmly under the supervision of the courts.

But the Law Lords' high-flown words do not give rights in the sense of clear protection for the citizen, whether or not a prisoner, against the power of the state. Firstly, the protections depend on the self-restraint of the law-makers. Parliament continues to make laws, often very quickly indeed, with no apparent regard for the freedoms and liberties of individual citizens and non-citizens. In electoral democracies, minority voters rarely influence power. Secondly, the words of the Law Lords "by necessary implication" are surely too vague to leave a clear right capable of unchallengeable assertion by an individual person.

In the late 1940s, representatives of the UK, as victors of World War II, drafted with others attending the Council of Europe a "convention" establishing clear rights for the individual citizens of Europe. It was to be a safeguard against the future exercise of arbitrary power by states such as Nazi Germany, especially against members of minorities. This became the Convention for Protection of Human Rights and Fundamental Freedoms Convention 1950 and, in short, the European Convention on Human Rights. It has been amended since 1950 by a series of Protocols but the core ideas set out in the 59 Articles are unchanged. Most of the Articles relate directly to the relations between public authorities and the individual persons within those countries. All member governments must actively promote the Human Rights in the Convention.

The Articles are usually described as falling into three types, absolute, special and qualified. Absolute rights include the right to life (Article 2), prohibition of torture and inhuman and degrading treatment (Article 3), of slavery (Article 4(1)) and of punishment without law (Article 7). Member states must observe absolute rights at all times but can derogate or set aside special rights in times of war or emergencies but not simply in the public interest. Special rights are the right to liberty and security (Article 5), the right to fair trial (Article 6) and right to marry.

Qualified rights under the Convention may be set aside by a state in times of emergency or in the public interest. What is "in the public interest" is a matter for the judges. While qualified rights are exposed to circumvention, they do allow flexibility, the "margin of appreciation" available to each country and as the attitudes of societies in Europe change with time. Such rights are the right to family and private life (Article 8), freedom of thought (Article 9), freedom of expression (Article 10) and freedom of association (Article 11).2

The Magna Carta of 1215 and the Bill of Rights of 1688, historical documents said to be fundamental to the uncodified British constitution, provided models to the British and French drafters of the original Convention at the Council of Europe in 1948. These documents and the Convention are statements of principles rather than detailed laws. To work effectively, the Articles of the Convention require legal interpretation using guiding principles such as "proportionality" and the "margins of appreciation".

Starting with the UK in 1951, the member countries of the Council of Europe ratified the Convention in 1953. By 1959, it had become clear that an international court was needed to deal with the appeals concerning individual persons. The Council of Europe then created the European Court of Human Rights with judges from each state. The legal squabbles between states expected to be the main work of the new court proved to be few. In 2013, over 93,000 accepted applications concerning individuals from all parts of Europe from Ireland to the eastern regions of Russia were decided by the ECHR albeit many of these could be dealt with quickly as "repeat cases", raising the same or nearly the same issues as decided cases.

The European Convention on Human Rights is an unusual international agreement in that it gives individual persons direct access to the Court rather than, as in the case of most international agreements, only to representatives of member states. An important point is that the European Convention on Human Rights, its Court and its Commission of officers have nothing to do with the other major European institutions such as the European Union or the European Court. The 1948 draft Convention was largely a British invention and the ECHR sits with British judges as well as judges from other member countries on almost all cases affecting the UK. Notwithstanding the purposeful blurring of the ECHR with other European institutions by the present British government and its supporting Press, the European Union is not a member nor a signatory to the Convention.

Notwithstanding the major contributions by the UK to the idea for, the drafting and ratification of the Convention in 1953, it was not absorbed into the English and Scottish legal systems until the Human Rights Act in 1998. It is said the UK in the 1950s

did not feel it necessary to do more than "comprehend" the Convention, given the many Human Rights-type cases decided by British courts over centuries. This did not stop some British appeals reaching the ECHR but such appeals were resisted by the UK government until 1966. However the Labour Government of 1998 fulfilled its manifesto pledge "to give further effect" to the Convention with the Human Rights Act 1998 which came into force in 2000.

The freedoms and liberties of the English and Scottish Common Law systems, where the law is made by judges guided by precedent cases, together with the rights given by British statutes are, in many ways, duplicated by the Human Rights of the Convention. However the Convention and British legal systems are not alternatives. They must be read together and British judges will go to great lengths to find consistency. If the High Court or Supreme Court cannot reconcile the British law and the Convention, it may make a "Declaration of Incompatibility". Just 28 such Declarations have been made by UK courts since 2000.

This pronouncement makes no difference to the parties in a civil action or the prosecution and defence in a criminal case. Their case continues to a conclusion but the Declaration draws attention to the incompatibility and which Parliament is obliged by the Convention to overcome by legislation.

There have been repeated statements by British politicians that they wish the UK to withdraw from the ECHR, to see "British Rights brought back from Europe". The Labour government is said to have been dissatisfied with the first 10 years of the Human Rights Act 1998. Lengthy articles exploring how the UK might withdraw from the ECHR and other European institutions notwithstanding their lack of connection have appeared since.[3]

The disappointment of Labour politicians with the operation of the 1998 Act may have arisen over what has been described as the interference by the ECHR (as well as British courts putting the Convention into effect) into British politics, especially when the decisions have concerned the return of alleged terrorists from UK to other countries. The disappointment has added to the long-term hostility of some politicians, political groups and their supporting attitude-formers in the Press against cooperation in European institutions. The inability of the UK coalition government to control the decisions of the ECHR has fanned the hostility. David Cameron, the Conservative Prime Minister, announced in 2013 that he proposed to seek how the UK might withdraw from the ECHR and replace the Convention with a new Bill of Rights.[4] How increased Human Rights, whether required or not to be compatible with the Convention but still to be enforced by British courts, will reduce the interference by judges with political decisions of government ministers is not at all clear.

There is no doubt that decisions on Human Rights in the British courts and the ECHR have raised hostility of UK governments. This is most clear in Prison Law and the Human Rights of prisoners. David Cameron also stated the ECHR has been invoked by foreign criminals and terrorists fighting deportation from Britain. He added: "But people should be in no doubt [if they elect] a Conservative-only government, led by me, there will be the ability to throw out of this country far more rapidly people

who threaten us and our way of life."[5] A recent proposal to prevent British citizens and others with established rights to reside who have joined the warfare in Syria or Iraq from returning to the UK, effectively making them stateless, appears to prepare another area of major contention over Human Rights.

The Convention and the Human Rights Act 1998 have been described in the UK by many commentators from among politicians and the Press as "a charter for criminals and terrorists".[6] It is said that the majority of appeals to the ECHR from 2000 have concerned the rights of prisoners in the UK. This is unsurprising given the history of control of prisons and imprisonment in the UK which developed not by statutes but under administrative rules made by the Home Office. Although the Prison Rules 1999 made with authority of the Prison Act 1952 were redrafted to take account of the Human Rights Act 1998, the steps from administrative rules in which prisoners had few or no "rights" but only "privileges" to a Human Rights-based system have proved too great. The inconsistencies have generated great numbers of appeals. The ECHR has intervened in issues such as the presumption of innocence and right to legal advice and representation in discipline matters, whether a prison governor's tribunal can amount to a fair trial or punish offences by "added days" and many more, all adding to the discomfort of the UK government but without the government shifting to a wholly rules-based prison system.

The problems of Prison Law and policy in the UK are, of course, made worse by the real conditions for prisoners. In 1990 at the time of the liberal Woolf Report following riots at Strangeways Prison, the UK prison population was about 45,000. By 2000, after major changes in government policies, "Prison Works", by the then Home Secretary, Michael Howard, the population rose to 65,000. Both major political parties appeared to see electoral advantage to vying for harsher criminal laws and policies. Additional legal powers dealing with deadly attacks by the IRA had been contained in two new statutes in the 1970s. But this measured pace of new legislation grew steadily following the Lockerbie bombing in 1988. By "9/11", the terrorist attack on the World Trade Centre in New York in 2001, the tide of new criminal legislation in the UK had become a torrent adding very considerably to the numbers of imprisonable offences. By 2010, the prison population had grown to 85,000 and in 2014 is 88,000. Moreover, neither of the major political parties see votes in a major refurbishment of the prison estate. Conditions for prisoners and prison staff, poor in 1990, have inevitably deteriorated, giving rise to increased legal proceedings calling upon the rights set out in the Human Rights Act, 1998.

Complaints of prison conditions amounting to violations of the Convention and 1998 Act have come not only from prisoners. Adverse annual reports from the Prison and Probation Ombudsman, first appointed in 1994, the HM Chief Inspector of Prisons, first appointed in 1982, and many other officials and official bodies have resulted in little or no major improvement. Every four years UK prisons are required to be inspected by the independent European Committee for the Prevention of Torture and Inhuman or Degrading Treatment. Adverse reports were entered in 1997, 2001 and 2005. The 2005 report was highly critical of the lack of time out of cells, the very small size of cells and the lack of exercise and activity.[7] The UK government rejected the recommendations. Visits in 2007, 2009 and 2012 by the

Committee have produced similar observations and recommendations but resulted in little or no improvement in conditions as the UK prison population has grown

Information about Human Rights violations and abuses in UK prisons has also come from prison staff and former prison staff. In his book "Death at the Hands of the State" published in 2005, David Wilson, a former prison governor, described the then situation in prisons as like a "secret death penalty" by suicide, assault or murder. In 2013, the number of deaths, self-inflicted and non-self-inflicted, in UK prisons reached 215.[8]

Notwithstanding the complaints against the Human Rights Convention and the ECHR, it is not clear British courts and judges have been successful in guarding against breaches of the major rights set out in the Convention, including the absolute right to life and against inhuman or degrading treatment.[9] This suggests courts and judges have interpreted the Convention to cause as little as possible conflict with English Common Law and statutes. It no doubt reflects the conservatism of British judges and their willingness to support the Common Law system and the government when it operates within the law as the judges interpret it. It must also reflect the corollary. British judges seem unwilling to give full force to the Human Rights of the Convention as interpreted by the ECHR and the development of the Convention within British legal conditions.[10]

If the current conditions for prisoners in UK prisons have arisen after 15 years of Human Rights in addition to the protections of the Common Law, one might be justified in wondering what conditions might have resulted without the 1998 Act and the ECHR. Surely prisoners have Human Rights as a result of being human and not behaviour? How might behaviour of any individual, however appalling, be used to decide on the extent of universal Human Rights?

There is one undecided "Declaration of Incompatibility" of the 28 Declarations made by British courts since 2000. This arose from the disenfranchisement of prisoners in the Representation of the People Act 1969 as amended in 2000 to exempt remand prisoners. The prohibition of voting by convicted prisoners in UK prisons was challenged in the case of Hirst v. UK (No, 2) in 2005 when the UK was found in breach of the Convention.[11] Much has been written over the past nine years about the disputed history of the removal of the right of prisoners to vote in Parliamentary and local elections and the justifications.[12] The UK government continues to argue that British history and conditions justify the disenfranchment. The ECHR has various powers to enforce compliance but has held back. The UK government has complied with 27 of the 28 Declarations since 2000. The proposal to give all or some of the convicted prisoners in the UK the right to vote has caused major political controversy and hostility to the ECHR.

It has been suggested, however, that the opposition to voting by prisoners in the UK has arisen not so much from the reasons raised by the UK before the ECHR but from antagonism towards the European Union and other European institutions. This antagonism has been whipped up by politicians and the British Press seeking the UK's withdrawal from the European Union or major renegotiation of the terms of membership.[13] The irony of the UK's contribution to the introduction of the Convention and its court to Europe and the lack of connection of the Convention

to the other European institutions is ignored. The UK meanwhile remains in breach of its major international treaty obligations.

## Conclusion

The withdrawal of the UK from membership of the European Convention on Human Rights seems unlikely notwithstanding the statements of the Prime Minister. But while the UK remains within the Convention the proposal for a new UK Bill of Rights is not unattractive. The Human Rights in the Convention and enforced by the ECHR would be further secured. A new Bill of Rights giving new and further rights could remedy many of the defects in the operation in the UK of the Convention revealed in the years since the Human Rights Act 1998. A new Bill of Rights offers the prospect of a more complete move towards a Human Rights-based greater security for the people of the UK, including its prisoners.

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*Do you have any comments on this Unitarian Penal Affairs Panel Issues Paper? Send them to the PAP at* bruce_chilton@hotmail.com

1 In the case of Raymond v. Honey (1982)1 AC 1. See also Solosky v. The Queen (1979)105 DLR 745.
2 For the currently published Convention, see www.echr.coe.int/Documents/Convention_ENG.pdf
3 See "Bringing Rights Back Home" by Dr Michael Pinto-Duschinsky (Policy Exchange, 2011). Text at http://www.policyexchange.org.uk/images/publications/bringing%20rights%20back%20home%20-%20feb%2011.pdf
4 Statements at Conservative Party conference in September 2013 by Prime Minister, David Cameron. See www.telegraph.co.uk/news/politics/conservative/10342403/Britain-may-need-to-withdraw-from-European-Convention-on-Human-Rights-says-Cameron.html
5 ibid
6 See www.dailymail.co.uk/debate/article-2173666/Human-rights-charter-criminals-parasites-anger-longer-enough.html
7 See www.cpt.coe.int/
8 See www.inquest.org.uk/statistics/deaths-in-prison
9 In Edwards v. UK (2002) 35 EHRR 19 a mentally ill prisoner murdered his cellmate (available on the Council of Europe's website, See http://www.echr.coe.int/sites/search_eng/pages/search.aspx# ).
10 For a most interesting discussion see "The Politics of Prisoner Legal Rights" by David Scott (Howard Journal, Vol. 52, 3, July 2013).
11 *Hirst v United Kingdom (No. 2)*, Application No. 74025/01, European Court of Human Rights, 6 October 2005; *Greens and M.T. v United Kingdom,* Application Nos. 60041/08 and 60054/08, European Court of Human Rights, 23 November 2010 (available on the Council of Europe's website, See http://www.echr.coe.int/sites/search_eng/pages/search.aspx# ).
12 See PAP Issues Paper 15 2013 "Votes for Prisoners" on www.unitarian.org.uk/pages/penal-affairs-panel for discussion of the issues.
13 For a detailed discussion of the role of the British Press in the votes for prisoners issue see "Human Rights and Prisoners' Rights: The British Press and the Shaping of Public Debate" by Des McNulty, Nick Watson and Gregory Philo (Howard Journal, Vol. 53, 4, September 2014.