

EUROPE'S PARIAH STATE?

THE FUTURE OF HUMAN RIGHTS IN BRITAIN

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Frances Webber, a retired human rights barrister and author of *Borderline Justice: the fight for refugee and migrant rights* (Pluto, 2012), examines Britain's difficult relationship with the European Human Rights Convention.

Ministers' use of nativist arguments to propose the removal of basic protections for citizens is causing alarm in Europe.

What does Britain have in common with Belarus? If justice minister Chris Grayling has his way, Britain will join Belarus as a 'pariah state' (in the words of attorney-general Dominic Grieve), outside the forty-seven-member Council of Europe, whose citizens are denied the protection of the European human rights convention.¹

Since taking office in September 2012, Grayling has made no secret of his desire to get rid of the Human Rights Act and to 'dramatically curtail' the role of the European Court of Human Rights in the UK.² In October he refused to rule out an exit from the European Convention, despite the concerns of senior Tories such as Grieve and Kenneth Clarke (Grayling's predecessor in the ministry). Grayling's front-bench colleague, home secretary Theresa May, was said to be drawing up a manifesto promise to repeal the Human Rights Act. And in April, the prime minister was reportedly considering temporary withdrawal from the Court in order that Abu Qatada can be deported.³

How has it come to this? How far are Tory ministers prepared to go in playing the nativist card? Renouncing the European Court would probably mean leaving the Council of Europe. Is it really conceivable that Britain, one of the founding members of the Council of Europe in 1949 and joint drafter of the European Convention on Human Rights, could turn its back on the system of protection of universal rights that the justice ministry describes on its website as 'fundamentally important in maintaining a fair and civilised society'?⁴

The Eastleigh effect

After UKIP beat the Tories into third place in the Eastleigh by-election at the end of February, securing over 11,000 votes on an explicitly anti-EU, anti-immigration platform, no suggestion seemed too extreme. In an attempt to placate the Eurosceptic right and win back those attracted to UKIP, Cameron had already promised a referendum on EU membership in the Tory manifesto for the next parliament, and is seeking to renegotiate the EU Treaty so as to repatriate powers over social and economic policy, flying the Union Jack in order to remove workers' rights and protections. European Council President Herman Van Rompuy and other prominent Europeans have warned Cameron of the dangerous game he is playing with the EU.⁵ But now, it seems that immigration has replaced the EU as the major preoccupation for those Tories considering UKIP. So since the by-election, the Tories have proposed (as well as removing legal aid for prisoners' challenges to the conditions of their incarceration) postponing migrants' eligibility for legal aid for a year after their arrival; checking the immigration status of children at school, stopping migrants getting social housing; and restricting access to benefits and the NHS for EU nationals, to stop 'benefit tourism' (targeting in particular the Romanians and Bulgarians who, prime minister David Cameron claimed in a speech in March, are preparing to swarm into the country and sign on as soon as restrictions on their employment in the UK are lifted on 1 January 2014).⁶

Cameron's talk was greeted with anger in Europe. EU employment commissioner László Andor said Cameron's claims were unintelligent and risked pandering to 'knee-jerk xenophobia',⁷ and Nils Muiznieks, Europe's human rights commissioner, described his speech as 'shameful rhetoric' which was 'fuelling stereotypes and

hostility towards migrants'.⁸ But in the context of the increasingly naked attacks on the living standards and rights of demonised groups – a category which seems to be ever expanding to include all poor people – the possibility of leaving the Court and the Council of Europe no longer seems so remote.

The battle against the human rights court

We have grown accustomed to home secretary May's strident attacks on judges for allowing the human rights appeals of foreign terrorist suspects and offenders, to the accompaniment of the chorus of outrage from the *Telegraph* and the *Mail*. The Right has wanted out of the European human rights system for a while, and the Bill of Rights Commission set up by the coalition in 2011 was, according to its two dissenting members, Baroness Kennedy and Philippe Sands QC, an attempt to find a lever out of the European Court by providing a much-diluted human rights protection system at home.⁹ One member of the hopelessly split panel, Martin Howe QC, suggested a three-tier system of rights, with protection strongest for British citizens and weakest for non-EU citizens.

Another strategy deployed last year saw May and justice minister Ken Clarke (since removed as too liberal, and replaced by hardliner Grayling) seek to renegotiate the European human rights system, so as to reduce the Court's scrutiny of foreigners' complaints about deportation.¹⁰ The Brighton Declaration, adopted by the member states in April 2012, promised to make complaints to the European Court more difficult to initiate and harder to win, by accepting for adjudication only those raising significant new legal issues, while giving states greater leeway in their human rights practice.¹¹

May did not wait for change in Europe, though. In July 2012, she brought in new immigration rules seeking to limit British judges' ability to take family life into account in deportation appeals. But the judges (who are not soft touches when it comes to the human rights of foreign national offenders) refused to accept that the home secretary's new rules could limit the factors they could consider or define what would and would not violate deportees' family life rights.¹² The judges went further in the case of a 27-year-old Nigerian drug offender who had lived in the UK since the age of six, and had a British girlfriend and a British child. Allowing the man's deportation appeal, they added that May's new rules were deficient in failing to acknowledge the rights of children who might be affected, in breach of international obligations including the UN Children's Rights Convention.¹³

Faced with this rebuke from the judges, May's response has been to propose defining family life rights in deportation cases in primary legislation, which British judges would be forced to obey. But this is unlikely to solve the problem. Although the British courts cannot overrule primary legislation, they can declare it incompatible with human rights. The government can ignore such declarations. But as long as Britain is a subscriber to the European Court, anyone affected by an adverse decision can take his or her complaint there. It is this right of petition direct to the Strasbourg court, which has made the court so effective in curbing attempts of signatory states to ignore, repress or get round the human rights of those they govern. It means that foreign offenders can argue in Strasbourg that any new national law which curtails their family life rights penalises them disproportionately. Theresa May knows this – that is why, in March, she rejected as counter-productive Dominic Raab's proposal that foreign offenders' family life rights should

simply be ignored in deportation. This incurred the wrath of right-wingers in her own party.¹⁴ Her draft law may be more nuanced than Raab's, but will satisfy no one.

Prisoners' rights and Abu Qatada

But it is the government's response to its inability to deport Abu Qatada and to the European Court's condemnation of its blanket ban on prisoners voting which has caused the most alarm among senior judges and human rights experts in Britain and Europe.

In January 2013, the new Council of Europe human rights commissioner, Nils Muiznieks, singled out the UK for special criticism over its continuing refusal to comply with the Court's 2005 ruling on votes for prisoners.¹⁵ The government was, he said, 'openly challenging the essence of the European human rights system' of which it was a founding member, by claiming that 'the UK should only implement some European Court of Human Rights judgments, not all of them'. The only other states singled out in the Commissioner's survey of the state of human rights protection in Europe were Azerbaijan, Hungary, Russia and Greece.¹⁶ The Council of Europe has previously indicated the importance of not excluding prisoners from voting, to promote their reintegration and reduce recidivism and crime, citing rulings of constitutional courts in Canada and South Africa that voting is 'a badge of dignity and personhood'; 'to be deprived of the right to vote is to be declared an outcast, a non-person'.¹⁷

Prime minister David Cameron's remark in November 2012 that the thought of prisoners voting made him 'physically sick' is in keeping with a divisive, punitive polity which is content to cast prisoners – along with foreign offenders, asylum seekers, Muslims, Romanians, Bulgarians and welfare 'scroungers' – as outcasts and non-persons. So although a new bill on prisoner

voting presented to parliament later in November offered MPs three options – a voting ban for prisoners serving four years or more; for those serving six months or more; or for all serving prisoners (ie, maintaining the status quo, which the European Court has said is illegal), Grayling and Cameron made no bones about their preference, which is the third option.¹⁸

If the prisoner vote case raises fundamental questions about the government's commitment to democratic rights, the case of Muslim cleric Abu Qatada raises questions about how seriously the government takes the principle of universality, in relation to the ban on torture and its fruits. Ever since 2005, after the House of Lords put an end to the indefinite internment of foreign terrorist suspects, governments have pursued his deportation to Jordan, where he was convicted and sentenced to death in his absence for support for terrorism on the basis of evidence obtained by torture of his alleged accomplices. He faces retrial on the same charges – and the same evidence. The Blair government sought to get round the ban on returning him to the prospect of torture¹⁹ by obtaining a diplomatic assurance from Jordan's government that he would not be tortured – an assurance accepted by the Special Immigration Appeals Commission (SIAC), the British appeal courts and the European human rights court. But the Court of Appeal and later, the European court ruled that the assurance did not cover the risk of a retrial tainted by torture evidence, and ruled his deportation unlawful. Despite Theresa May's efforts since – and her promise in April 2012 to 'put him on a plane and out of the country for good',²⁰ SIAC, and then in March 2013 the Court of Appeal, ruled that the risk of torture evidence is still too high to deport him.

Getting Europe 'off our back'

Instead of accepting the paramount importance of the international rule against torture and its

fruits, the government has once again cast the issue as one of national sovereignty – of European judges interfering to stop Britain disposing of a national nuisance. In the wake of the appeal court's judgment, justice secretary Grayling said he could not conceive of a majority Conservative government not repealing the Human Rights Act, and invited Labour to support legislation which would allow the cleric to be deported.²¹ And when in April the court refused the government permission to appeal to the supreme court, the *Telegraph* reported that Cameron, May and Grayling were considering a 'temporary withdrawal' from the European Court, so that they could get rid of him. The only precedent for such a temporary withdrawal is Greece under the dictatorship of the colonels, from 1970 to 1974, when the country withdrew from the human rights system and the Council of Europe.

The Tories seem bent on confrontation with the European Court and with other international bodies. Lord Neuberger, president of the supreme court and Britain's most senior judge, suggested that in order to send Abu Qatada to face a trial based on torture evidence, Britain would have to leave not just the Council of Europe but also the United Nations, whose Convention Against Torture expressly prohibits such conduct. Another supreme court judge, Lady Hale, warned that Britain's withdrawal from the jurisdiction of the human rights court would mean leaving the EU. For it is committed to acceding as an institution to the European Convention on Human Rights, and all its member states must abide by Article 2 of the Lisbon Treaty, which affirms that the Union is 'founded on values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'.

Back in November, human rights commissioner Muiznieks reminded the government that it surrendered some of its sovereignty when it

subscribed to the Human Rights Convention and accepted the jurisdiction of the European Court of Human Rights²² (just as it surrendered some sovereignty in order to join the European Community in 1973). These post-war institutions were set up to ensure that no government could ever again treat its citizens or those within its borders or subject to its jurisdiction as the Nazis treated the Jews, Gypsies and Communists in the 1930s and 1940s. The commissioner's and the judges' intervention in the debate are an indication of just how worrying is the government's assertion of a nineteenth-century view of British sovereignty and its rhetorical denunciation of the universality of human rights and the institutions designed to protect them.

Universality honoured in the breach

From the very beginning – from 1953, when the Convention entered into force - while lip service was paid to the principle of universality of human rights, in practice it was honoured in the breach. The government initially refused to accept the jurisdiction of the court, and until 1966 it refused to allow individuals (as opposed to governments) to take complaints. The reasons for this reluctance have become clear as evidence has accumulated of gross human rights abuses in the battles to retain Britain's colonies. Even as the excesses of foreign governments, particularly in the Communist world, were loudly condemned, anti-colonial insurgents in Malaya, Cyprus, Aden and Kenya were being rounded up in their hundreds of thousands and brutally tortured.²³ Closer to home, in Northern Ireland, the 'five techniques' of hooding, wall standing, deprivation of food, sleep and sensory stimulus, were being developed and used to break the spirit of detainees in Northern Ireland. (Condemned by the European Court as inhuman and degrading, the techniques were banned in the UK but resurfaced in Guantánamo and Iraq.) The dark shadows of massacre, industrial-scale violence

(including sexual violence) and impunity continue to fall - in Iraq, in the rendition of Libyan dissidents, in the collusion with torturers in Morocco and Pakistan.²⁴

A future without human rights?

With nativism, racism and fascism on the rise throughout Europe, informing government policies towards migrants and other unpopular minorities as well as popular right-wing, anti-immigrant, anti-Muslim and anti-Roma movements, the European system of human rights protection is vital. But its protection goes way beyond minorities. The rights enshrined in the Convention are designed to protect all of us from arbitrary deprivation of liberty, from unfair and secret trials, from undue interference with free expression, association and assembly and with our privacy, our homes and our family life.

We should have learned by now that measures targeting unpopular minorities have a habit of spreading. Internment, surveillance cameras, military-style policing with lethal weapons such as tasers all migrated from Northern Ireland to Britain, and defendants' rights such as the right to silence were removed there first too. Compulsory dispersal of destitute families out of London and the south-east began in the 1990s with asylum seekers, and has now spread to homeless British families. Savage benefit cuts, too, started with asylum seekers, who for the past few years have been expected to live on not £53 but £35 per week – but have now spread to others in the so-called dependency culture, who (like the asylum seekers before them) are stigmatised as parasites. Secret court procedures, the very epitome of unfair trials, started in SIAC, in appeals against deportation by foreign terrorist suspects. They got through parliament on the basis that they would apply only to a small handful of dangerous men – the implication being that these men didn't matter and didn't deserve

full fair trial protection. Now, the Justice and Security Act extends secret trial procedures to any civil court hearing in which a minister certifies that national security prevents full disclosure. These examples demonstrate that, a departure from the principle of universality in human rights has a tendency to lead to a universal deterioration in human rights protection.

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