Chapter 1

Introduction

Introduction

On a bright Saturday in February 2009, over 1,000 people gathered at the Institute of Education in central London under the banner of the Convention on Modern Liberty. This extraordinary event—which had parallel events in other major British cities—brought together people from all political parties and none, and from a bewildering range of pressure groups, from the TUC to Amnesty International to Red Pepper. Taunted subsequently as a 'Convention of Cant' by the New Labour establishment,[1] this was an assembly of the dismayed, expressing measured anger and deep disquiet about the continuing corrosion of civil liberties and political freedom in the United Kingdom under the Blair and Brown governments. It was also an assembly of the betrayed, people who had believed that New Labour would presage a radical shift in the role of the State and the protection of the individual, in the wake of the erosion of liberty under Conservative governments, now well documented but overshadowed in the light of what has happened since. For despite the vain protestations of ministers and those who would defend them, the New Labour record on civil liberties has been one of contradiction and paradox, with high profile measures such as the Constitutional Reform Act 2005 (designed to improve the independence and autonomy of the judiciary) and the Human Rights Act 1998 (designed to strengthen the rights of the subject) being contradicted by the conduct of central government, local authorities, the security and intelligence services, and the police, to say nothing of the paradoxical ineffectiveness of the courts and other supervisory bodies charged with the responsibility of defending our liberties. This book is concerned mainly to document this contempt for liberty and the principal means by which that contempt has been expressed.

[1] *The New Statesman*, 19 March 2009.

But it is also concerned to reveal the failure of constitutional principle in terms of the rule of law, and the futility of rights as a defence against State power in the modern British constitution. Sadly, it cannot be exhaustive, nor is it likely that matters will change under Cameron's New Tories.

The corrosion of liberty is a highly visible symptom of the failings of constitutional government and democratic politics in the United Kingdom. It is true that the New Labour administration embarked on a major programme of constitutional reform, to address some long-standing underlying problems. In addition to the measures already referred to, the programme included legislative devolution to Scotland, Wales, and Northern Ireland, freedom of information, the regulation of political parties, and the removal of the bulk of hereditary peers from the House of Lords (Bogdanor, 2009). But while these various measures are extremely important in their different ways, they are hardly revolutionary, and do not begin to address the core problem of British government, which Thatcher and Blair turned into an art form. This is the problem of centralised power and executive dominance, and the ability of governments with the support of the House of Commons to do pretty much what they want. It is also true that at the time of writing a Constitutional Reform and Governance Bill is swilling around, albeit with an uncertain chance of being passed before the general election in 2010. That Bill proposes to remove the remaining hereditary peers from the House of Lords, to allow for the resignation of life peers from the burden of a lifetime of service, to put the civil service on a statutory basis, and to require treaties to be laid before Parliament before being ratified. But while again these are admirable initiatives, they hardly strike at the core problem of British government, and the publication of the Bill was greeted with raspberries rather than applause, as a less than adequate response to the constitutional malaise that has gripped the nation. None of this will stop fresh restraints on liberty, a constant and evolving process that will be reversed—if at all—only by the introduction of meaningful political constraints on the power of government, of whichever 'New' variety. So while important skirmishes continue to be fought at the margins of the constitution (geographically and politically), as matters now stand it is chronic incapacities rather than constitutional niceties that impede the progress of State power.

Constitutional Principle and Civil Liberties

The first theme to be explored in the pages that follow is the context of constitutional principle within which the *Bonfire of the Liberties* ignited. As always, the starting point for any such discussion is the rule of law, one

of the three foundation principles of the British constitution.[2] The link between the rule of law on the one hand, and personal and political freedom on the other, is both clear and compelling, as those familiar with the work of Kafka and Orwell will be only too well aware.[3] The principle is, however, impossible to define in a way that commands universal agreement, with 'thin' and 'thick' versions (Goldsworthy, 2001), and many varieties in between. There is no thinner a version of the rule of law than that expressed by Vice Chancellor Sir Robert Megarry in *Malone v Metropolitan Police Commissioner*,[4] where he said that England (sic) is not a country where everything done by government is prohibited unless expressly permitted; rather England is a country where everything done by government is permitted unless formally prohibited. So it was held in that case that as a matter of common law the government was perfectly entitled to tap people's telephones, because in doing so it was not doing anything unlawful. But the position is now at least modified as a result of the European Convention on Human Rights (ECHR) which requires the government to act in a manner 'prescribed by law' before it violates some of the human rights protected by the Convention (and then only if the law meets certain standards of accessibility and precision).[5] This, however, is not so much a thin as a skeletal version of the principle, in the sense that the requirements of the rule of law would be met by a government that could point to legal authority under laws that had been properly made (Craig, 2005), regardless of their content or manner of operation. But even the qualification that law must be properly made would be of little significance in a constitutional system (such as that of the United Kingdom) where the rule of law states that the courts are not permitted to question the procedure for the making of an Act of Parliament, but are required only to give effect to an Act, whatever procedural impropriety may have occurred in the process of its enactment.[6]

It is true that there are as many theories or definitions or penumbra of the rule of law as there are people who write about it. Nevertheless, rule of law authors usually now require something more than the existence of legal authority alone. While important, a requirement that government should

[2] Indeed, according to Lord Hope, 'the rule of law enforced by the courts is the controlling principle upon which our constitution is based', observing also that 'it is no longer right to say that [Parliament's] freedom to legislate admits of no qualification': *R (Jackson) v Attorney General* [2005] UKHL 56, para [105]. See also Constitutional Reform Act 2005, s 1.

[3] See pp 53–54, 93 below.

[4] [1979] 2 All ER 620, and subsequently *Malone v United Kingdom* (1985) 4 EHRR 14.

[5] *Sunday Times v United Kingdom* (1979–80) 2 EHRR 245; *Malone v Metropolitan Police Commissioner*, above.

[6] *British Railways Board v Pickin* [1974] AC 765.

have legal authority for its actions is to express no more than a duty to rule *by* law. The rule *of* law is a step further, with some of the minimum requirements being most famously identified by Professor Raz (1977), as follows:

- all laws should be prospective, open and clear;
- laws should be relatively stable;
- the making of particular laws … should be guided by open, stable, clear and general rules;
- the independence of the judiciary must be guaranteed;
- the principles of natural justice must be observed;
- courts should have review powers over the implementation of the other principles;
- courts should be easily accessible;
- the discretion of crime prevention agencies should not be allowed to pervert the law.

But while thicker in content than the negative legality conception of the (now largely redundant) rule of law identified by Sir Robert Megarry, even this definition of the rule of law is 'not concerned with the actual content of the law, in the sense of whether the law is just or unjust, provided that the formal precepts of the rule of law are themselves met' (Craig, 2005). According to Professor Raz, the rule of law is only one of many virtues of a legal system, though it is nevertheless about something quite fundamental. Apart from the need for legal authority for government action, it imposes requirements about the nature and form of the law; the nature and manner of the exercise of legally grounded power by public officials; and the nature and form of the accountability of those who exercise that power. To require the rule of law to bear a heavier load (in terms of the substance of the law, rather than in terms of (a) its nature and form, and (b) the manner of its exercise) would be to rob the principle of what has been referred to as its 'independent function' (Craig, 2005), while its impact and significance would be diminished if 'in breach of the rule of law' were simply to become a slogan used by anyone who disagreed with a particular law.

A refinement of Professor Raz's position on the rule of law is to be found in Lord Bingham's well known lecture delivered some 30 years later at Cambridge University (Bingham, 2007), where he said that the rule of law contains a general overarching principle, which was no more than a requirement that

> all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts (ibid: 69).

From this, however, Lord Bingham deduced a number of sub-rules, as follows:

- the law must be accessible and so far as possible intelligible, clear, and predictable;
- questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
- the law must afford adequate protection of fundamental human rights;
- the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
- means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
- ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers;
- adjudicative procedures provided by the State should be fair;
- compliance by the State with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.

Much of this is incontestable and very close to Professor Raz, with the exception of the third and eighth sub-rules, whereby Lord Bingham appears to put his weight behind those who wish to give the rule of law a thicker or more substantive meaning. The former is a repudiation of Raz, inspired by a belief that a 'state which savagely repressed or persecuted sections of its people could not in [his] view be regarded as observing the rule of law' (ibid: 76), while the latter was said simply not to be 'contentious' (ibid: 82), perhaps surprising given that no apparent limits were placed on the international obligations to which it referred, while it would be hugely contentious constitutionally if this conception of the rule of law were to have domestic legal effects.[7]

For present purposes, however, it is not necessary (and in any event it is not possible) to resolve whether the rule of law should contain a commitment to human rights, or require compliance with international treaty obligations.[8]

[7] On the constitutional position of international treaties not yet incorporated into domestic law by statute, see Bradley and Ewing, 2007.

[8] However, Lord Bingham's sub-rules are controversial simply because it is unclear just what they mean, and also because they are contradictory. Lord Bingham takes the view in relation to his third sub-rule that it would not be contrary to the rule of law to violate all human rights, but only some, conceding that this is 'a difficult area' (Bingham, 2007: 76), that there is not 'a standard of human rights universally agreed even among civilised nations' (ibid), and that there is 'an element of

Nor is it necessary to conflate the principle beyond recognition, or devalue its currency beyond utility. As defined by Professor Raz and modified by Lord Bingham (without sub-principles 3 and 8) the rule of law applied to the question of civil liberties would have the following implications:

- the need for prior legal authority means in the context of personal liberty that State officials do not by virtue of their position alone have the right to stop, search, question, or detain people without their consent, while people should only be penalised for wrongs committed and not for suspicion that they might do something wrong. It also means that State officials do not by virtue of their position alone have the right to enter people's homes or businesses, place them under surveillance, or store information about them. They ought to be able to point to laws that are 'prospective, open and clear' (Raz, 1977); as well as 'intelligible, clear and predictable' (Bingham, 2007);
- the need for public power based on legal authority to be exercised lawfully means that State officials (uniformed or otherwise) should not use their powers arbitrarily, unnecessarily, or irrationally. Nor should power be used in a discriminatory way or to target particular political groups or individuals, if the 'discretion of crime prevention agencies [is] not to be allowed to pervert the law' (Raz, 1977); and if questions of 'legal rights and liability [are] ordinarily [to] be resolved by the application of the law and not the exercise of discretion', and if public officials are to 'exercise the powers conferred on them reasonably' (Bingham, 2007); while
- the need for accountability in the exercise of public power (with or without ostensible legal authority) means that public officials should obey the law, should have prior judicial authority before interfering with the rights of citizens, and should be answerable when they exceed the limits of their power. It also means that those whose rights have been violated by the

vagueness about the content of this sub-rule, since the outer edges of fundamental human rights are not clear-cut' (ibid: 76–77). So it is far from certain which human rights are necessary for the rule of law, beyond those which are 'seen as fundamental' within a particular society (ibid: 77), that is to say those that fall within the 'measure of agreement on where the lines are to be drawn' (ibid), the idea of human rights thus being disarmingly relative (and majoritarian) rather than absolute. If, however, only fundamental human rights are included by the third sub-rule, are not all human rights included by virtue of the eighth? Human rights instruments give rise to obligations under international law, and these transcend 'the full range of freedoms protected by bills of rights in other countries or in international instruments of human rights, or those now protected by our recently enacted Human Rights Act 1998 (Jowell, 2004: 23). Beyond the ECHR, they include the Council of Europe's Social Charter of 1961 (ratified by the UK), as well as the UN Conventions on Civil and Political Rights, and Economic, Social and Cultural Rights respectively, together with ILO conventions dealing with child labour, and freedom of association, which in the latter case are routinely violated by British law (Ewing and Hendy, 2004).

police, the security services, or other agencies of the State, should have a right of redress before an 'independent' judiciary, sitting in courts which are 'easily accessible' (Raz, 1977); or in accordance with 'adjudicative procedures provided by the State [which] should be fair' (Bingham, 2007).

As already suggested, compliance with these principles on a consistent basis is a necessary precondition for the protection of personal and political liberty against the arbitrariness of the State. Although respect for the rule of law (as an instrument of formal legality) is not a guarantee that civil liberties will be fully protected, disrespect for the rule of law (as an instrument of formal legality) will almost certainly help to ensure that they are fatally undermined. While it cannot be said that there is no respect for the rule of law under New Labour, it can be said that there is a lack of sufficient respect, contributing to the type of corrosion of liberty that we encounter in Chapters 2 and 3 in particular (to say nothing of the allegations of complicity in torture in relation to the security and intelligence services).

The Culture of Liberty under New Labour

This brings us to the second—and major—theme pursued in this book, which is simply to document the extent to which governments under New Labour have used the full extent of public power to continue the attack on liberty that had been associated with the Thatcher and Major regimes. Although—as already suggested—the election of a New Labour government had been expected to lead to a substantial improvement in the condition of liberty, if anything the situation is now worse, much worse, and it is thus New Labour's singular achievement to make us pine for the halcyon days of Freedom under Thatcher. Critics of those concerned by the corrosion of liberty under New Labour are right to remind us, however, that 'in recent years the power of the police and of the state generally has been regulated by statute in ways that simply did not exist in years gone by' (Gearty, 2009), the suggestion being that things have only got better as a result. But the fact that police powers are now in the legislation we encounter in Chapter 2 may be of little consequence if the same legislation has gradually but inexorably extended the already wide powers of the police.[9] And it may be of even less consequence if these extended powers are accompanied by the continuing militarisation, aggression, and lack of self control of police officers who now turn up in 'NATO helmets, [while] wearing … protective equipment and carrying

[9] See pp 35–42 below.

shields' (HMIC, 2009: 60), with others at the same time appearing to use vicious dogs as weapons. The death of news vendor Ian Tomlinson on 1 April 2009 as he made his way home after work around a demonstration in the City of London against the G20 meeting is only the latest in a long line of incidents under New Labour (as under previous governments) that scream 'danger', in the face of real police power.[10] Mr Tomlinson died following a violent confrontation with a police officer,[11] an incident which is being investigated at the time of writing, but which the police are said to have gone to some lengths unsuccessfully to cover up,[12] also allegedly covering themselves up so that the personal numbers and faces of officers were concealed behind military-style clothing.

But it is not only the police, with concerns also about the rise in the Surveillance Society, which perhaps more than anything else had been responsible for the Convention on Modern Liberty in the first place. Here under the supervision of the Home Office, we have a surveillance regime that would have caused Erich Honecker to glow with pride. As discussed in Chapter 3, it begins with the saturation coverage of CCTV cameras for the purpose of general surveillance,[13] it is followed by the targeting and watching of individuals by local authorities and others,[14] and it is extended by the growth of the DNA database, which the government boasts is now the largest in the world.[15] Alongside all of this, there is continuing reliance on the old staples, even if 'oddly' the exercise of State power has led to a more benign regime, with 'the rules regulating the interception of communications, brought in to replace an entirely unaccountable executive scheme which had operated for years in total secrecy' (Gearty, 2009). Under this more benign exercise of State power, however, the annual incidence of phone tapping has increased by 400 per cent since 1988, no doubt explained innocently by the increase in the number of phones now in use. And under this more benign exercise of State power, warrants continue to be issued by the Home Office (as they were under the entirely unaccountable executive scheme), with the statutory regime subject to scrutiny by a judicial commissioner (just like the entirely unaccountable executive scheme), who is not only appointed by the Prime Minister but who also reports to the Prime Minister (partially in secret).[16] On top of all of which

[10] For details, see *The Observer*, 5 April 2009, *The Guardian*, 6–11 April 2009, *The Observer*, 12 April 2009, *The Guardian*, 18 April 2009, *The Observer*, 19 April , *Sunday Times*, 19 April 2009, *The Guardian*, 20–22 April 2009.

[11] See <http://www.youtube.com/watch?v=HECMVdl-9SQ> for video footage of the incident.

[12] *The Guardian*, 9 April 2009, criticising also the slow response of the Independent Police Complaints Commission.

[13] See pp 55–60 below.

[14] See pp 60–68 below.

[15] See pp 79–83 below.

[16] See pp 74–79 below.

we must now add the anticipated National Identity Register, though concerns here have been overshadowed by the concerns about ID cards, despite both being the nasty offspring of the same piece of legislation (the Identity Cards Act 2006), to be phased in gradually to diminish what will be an inevitable public backlash as its full horrors become known.[17] In particular, the register will require a bewildering amount of personal information to be recorded by a State authority (for what purpose?), and will require individuals to update the register in the event of any change of circumstances, failure to do so giving rise to the risk of substantial financial penalties.

But it is not only surveillance. There is also the question of those people—some of whom we encounter in Chapters 4 and 5 below—who would confront the power of the State, with different forms of political protest, all encountering the intolerance of dissent.[18] We have the botched attempt to infiltrate the protest group Plane Stupid with tax-free financial inducements to activist Matilda Gifford if she would betray her colleagues;[19] we have brutal policing directed at climate camp protesters Val Swain and Emily Apple who had the audacity to seek to hold the police to account by asking officers to reveal their numbers;[20] and we have examples made in the criminal courts of those who dare to protest peacefully in the wrong place or in the wrong manner.[21] It is said, however, that there has been progress in the form of 'a recent House of Lords' decision on public protest which 'overruled police use of the common law on the basis that the police should now work within the statutory framework that parliament had enacted for them' (ibid).[22] But that 'progress'ive decision appeared on the contrary to accept the existence of the common law powers of the police, which more recently has provided the legal authority for the controversial practice of kettling,[23] justified paradoxically by one member of the House of Lords as necessary to prevent a fatality.[24]

[17] See pp 88–93 below.

[18] Though there is also the surveillance of protesters, with reports of the attempted infiltration of protesters (*The Guardian*, 25 April 2009), and a 'police databank on thousands of protestors' (*The Guardian*, 7 March 2009). See Ch 4 below.

[19] *The Guardian*, 25 April 2009. See Ch 4 below.

[20] *The Guardian*, 21 June 2009. See <http://www.guardian.co.uk/environment/2009/jun/21/king-snorth-protester-arrests-video-complaint> for a video recording. See Ch 4 below.

[21] Including Milan Rai (Whitehall), Lindis Percy (US bases), and Jane Tallents (Faslane). See Ch 4 below.

[22] See *Austin v Metropolitan Police Commissioner* [2009] UKHL 5.

[23] Said to have been used to describe the activities of the Nazi government in Warsaw: Professor John Veit-Wilson, Letter to the Editor, *The Guardian*, 8 April 2009; the same day's *Guardian* editorial said that the practice 'recall[ed] the Red Army's tactics at the Battle of Stalingrad'.

[24] *Austin*, above, para [47], per Lord Walker, referring specifically to Red Lion Square on 15 June 1974, when Kevin Gately, a Warwick university student was killed.

And evoking still more memories of Freedom under Thatcher when the Official Secrets Acts were deployed against people like Sarah Tisdall,[25] Clive Ponting,[26] and Duncan Campbell (Ewing and Gearty, 1990), we have witnessed the persecution, prosecution, and conviction of public servants who in the public interest put into the public domain information that the government wanted to keep secret. The roll-call includes Kathryn Gun, for leaking details of a dirty tricks operation against UN Security Council members in advance of a vote on the invasion of Iraq;[27] David Keogh and Leo O'Connor for leaking details of a meeting between Tony Blair and George Bush, in which the latter is alleged to have discussed plans to bomb *al Jazeera*;[28] and Dr David Kelly who had spoken to a BBC journalist about the conduct of the government in its preparation for the invasion of Iraq.[29]

And then there was the aftermath of 9/11, the carpet-bombing of Afghanistan, and the invasion of Iraq, which together served as an emetic for all manner of unpleasant discharges, most of them related in some way to what was then regarded as a 'global war on terror' (a term now regarded by those who coined it as being foolish and as counterproductive as the restraints on liberty it has produced), though the softening of the rhetoric has not led to a relaxation of controls. New Labour had already placed its Terrorism Act 2000 on the statute book, giving wide powers to the police to deal with terrorism, a term widely defined to include all forms of protest involving the use of criminal damage, the definition being so wide that it would have caught the suffragettes and striking miners had it been in force in earlier times, but applicable now to catch those who advocate the violent overthrow of the most vile regimes overseas. In the panic engendered post 9/11, these powers were not enough and new powers were introduced, powers which we encounter in Chapters 6 and 7 below. Prominent among the growing list of repressive measures unprecedented in peacetime Britain were the Anti-terrorism, Crime and Security Act 2001 (introducing executive detention of unlimited duration), the Prevention of Terrorism Act 2005 (introducing powers to impose control orders on terrorist suspects not convicted of any offence), and the Terrorism Act 2006 (introducing new restraints on free speech in an awkwardly drafted offence of 'glorifying terrorism').[30] Prominent among the growing list of casualties in the war on terror were 12 men (of whom 11 were Pakistani nationals) arrested (in some

[25] See *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 359.
[26] *R v Ponting* [1985] Crim L Rev 318.
[27] See p 154 below. [28] See pp 154–158 below. [29] See pp 145–149 below.
[30] See Chapters 6 and 7 below.

cases in the presence of gun carrying police officers) on 8 April 2009 at various locations in the North West, including the campus of Liverpool Hope University.[31] The men (mainly students) were seized for suspected terrorist offences, in a high profile operation that was said to have foiled a major terrorist attack. By 22 April, however, all had been released, the police stating that there was insufficient evidence to pursue charges and that 'these people are innocent'.[32] Nevertheless (and despite condemnation from the Muslim Council of Britain),[33] nine of the men were handed over to the UK Borders Agency for immediate deportation on grounds of national security, their appeal against a refusal of bail being denied by the Special Immigration Appeal Commission.[34]

The Futility of Human Rights

This is quite a record, and these are only the introductory highlights. But they bring us to the third theme of this book, namely the evident futility of human rights as a defence against executive power, and the failure of the judiciary to make more use of the powers that they sought. In retrospect the most prominent of the judges making claims for such new powers was Sir Thomas Bingham (as he then was). In another powerfully argued lecture delivered in 1992 while he was Master of the Rolls, Sir Thomas said:

> I would suggest that the ability of English judges to protect human rights in the courts and to reconcile conflicting rights in the manner indicated is inhibited by the failure of successive governments over many years to incorporate into United Kingdom law the European Convention on Human Rights (Bingham, 1993: 390).

Later in the same lecture, Sir Thomas said that incorporation would:

> restore this country to its former place as an international standard bearer of liberty and justice. It would help to reinvigorate the faith, which our 18th and 19th century forebears would not for one instant have doubted, that these were fields in which Britain was the world's teacher, not its pupil. And it would enable the judges more effectively to do right to all manner of people after the laws and usages of this realm, without fear or favour (ibid: 400).

Lord Bingham (who was to become the Senior Law Lord) was not the only judge to have made the case for incorporation so openly, though not

[31] *The Guardian*, 9 April 2009.
[32] *The Guardian*, 22 April 2009. [33] Ibid.
[34] *XC v Home Secretary*, Appeal No SC/77/81/82/83/2009, 21 May 2009.

all judges were in support (McCluskey, 1987). Others were drawn in, with a number making public statements, apparently concerned about the inadequate nature of the legal system which meant that it was unable properly to protect the vulnerable individual (Browne-Wilkinson, 1992; Laws, 1995). Such advocacy was not thought to compromise the political neutrality of the judges, and indeed the only judge who appears to have encountered difficulty professionally since the ECHR was incorporated is Lord McCluskey, who spoke out strongly against it.[35] The judges did not—of course—campaign alone; but their voice was an important and influential one, which was ultimately to secure a great prize.

With the Human Rights Act 1998, the Blair government would thus build on the legacy of the Attlee government (which had played a crucial part in drafting the ECHR) and the Wilson government (which had allowed the right of individual petition to the Strasbourg Court) by going a step further in allowing Convention rights to be enforced in British law. In taking this step, the government denounced those who questioned whether so much power should be given to the courts, with the finely considered response that they were 'ageing Marxist[s] decrying the establishment's conspiracy against the proletariat'.[36] Moreover, having been for so long the scourge of Labour governments, Lord Denning was now wheeled out as a hero by Mr Mike O'Brien, referring to him for the proposition that 'we have to trust someone, so why not trust the judges'.[37] The judges it seems were happy with the idea that they should be trusted, with the great bulk of the speeches in the Second Reading debate of the Human Rights Bill being given by serving or retired Law Lords, in what seems a curious twist of constitutional principle. Sometime opponents of incorporation like Lord Donaldson of Lymington joined the queue to pledge allegiance at the feet of an instrument that would extend their power, to enable them to do things for which in the past they had shown little inclination.[38] Some serving Law Lords were, however, so happy to be trusted that they took an active part in the Committee proceedings of the Bill as well,[39] with Lord Browne-Wilkinson speaking out strongly against an Opposition amendment that would have required the British courts to be bound by the jurisprudence of the European Court of Human Rights (rather as they are bound in another context by the

[35] See *Hoekstra v H M Advocate* 2001 SLT 28; and *Scotland on Sunday*, 6 February 2000 where Lord McCluskey criticises the Act in strong terms. See subsequently, McCluskey, 2007.

[36] HC Debs, 16 February 1998, col 858 (Mr Michael O'Brien).

[37] Ibid, col 857, citing Lord Denning (1982): 'Someone must be trusted. Let it be the judges' (p 330). The obvious question '*Why?*' was not asked.

[38] On the judicial record on civil liberties, see Ewing and Gearty, 1990, 2000; and Ewing, 2004.

[39] For a full account, see Ewing, 1999.

jurisprudence of the European Court of Justice). Although this has much to commend it on rule of law grounds, Lord Browne-Wilkinson rather disarmingly informed the House that as the only person present who would have responsibility for the interpretation of the Act , he saw no reason why the British judges should be constrained in this way.[40]

Unlike other countries (notably Canada and the United States) where rights are constitutionally entrenched, the Human Rights Act 1998 does not give the courts the power to strike down legislation. And unlike the EC Treaty (as construed by the European Court of Justice in the famous *Factortame* case),[41] the Act does not require the courts to refuse to apply legislation which is inconsistent with Convention rights. This does not mean, however, that the courts have no power over legislation, whether that legislation is passed before or after the Human Rights Act came into force on 2 October 2000. Nor does it mean that the power the courts wield is ineffective or of no consequence. In the first place, section 3 provides that 'so far as possible to do so', both primary and delegated legislation is to be read and given effect in a way that is compatible with these rights. There may, of course, be cases where it is not possible to construe a statute consistently with Convention rights, if an intention to violate these rights is clear on the face of the statute. In these cases, section 4 empowers a court to make a declaration of incompatibility, a power that applies to both primary and secondary legislation, though in the latter case only where the primary legislation authorising the making of the subordinate instrument 'prevents removal of the incompatibility'. The power to make such a declaration is limited to the higher courts (though the section 3 duty to interpret legislation consistently with Convention rights applies to all courts). If granted, a declaration of incompatibility has 'no operative or coercive effect', and 'does not prevent either party relying on, or the courts enforcing, the law in question':[42] it does not affect the validity, continuing operation, or enforcement of the legislation in question; nor is it binding on the parties in the proceedings in which it is made. Nevertheless, the current position seems to have satiated the judicial appetite, as the following exchange between the Chairman of the Joint Committee on Human Rights and Baroness Hale tends to indicate:

Q193 *Chairman:* Do you think there is any judicial appetite for more extensive powers than those in the Human Rights Act, the certificate of incompatibility and so forth?

[40] HL Debs, 19 January 1998, col 1260.

[41] *R v Transport Secretary, ex p Factortame Ltd (No 1)* [1990] 2 AC 95; *Case C-213/89, R v Transport Secretary, ex p Factortame Ltd (No 2)* [1991] AC 603.

[42] HL Debs, 18 November 1997, col 546.

Baroness Hale of Richmond: I have not detected any in the cases we have heard so far. Perhaps that is partly because of the approach we have taken to declarations of the incompatibility and because of the approach that the government and parliament have then taken to what to do about declarations of incompatibility.[43]

During the same exchange, Baroness Hale also pointed out that the declaration of incompatibility power was not 'in practice' all that different from the position in Canada, where the judicial power is formally much greater.[44] This is a revealing indication of what has been referred to as the inflationary effect of Bills of Rights (Allan, 2006; Allan and Huscroft, 2006; 2007), in the sense that they end up creating a greater de facto judicial power than might otherwise formally appear.[45] In the United Kingdom, this inflationary pressure is encouraged by the fact that an application to Strasbourg hangs over ministers like a sword of Damocles, which means that it is difficult to see how the government could do anything other than give effect to a declaration of incompatibility. In any event, it is a striking feature of the complaints that have been made to Strasbourg that most of them were not about the requirements of legislation alleged to breach the Convention, but about the use of statutory powers or the exercise of common law powers by the government or government agencies. Although there is growing concern about legislative restrictions on freedom as well as the manner of their exercise, the real engine of the Human Rights Act is nevertheless to be found in section 6 rather than section 4. This provides that it is unlawful for a public authority to act in a way that is incompatible with Convention rights, with a 'public authority' being widely defined to include a court or tribunal which exercises functions in relation to legal proceedings. The definition of a public authority was left deliberately open-ended, the government taking a policy decision to avoid a list,[46] and declining an invitation to specify precisely to which bodies the Convention rights should apply. This contrasts with the approach adopted in the case of the Freedom of Information Act 2000, which sets out in a Schedule the bodies to which it applies. Nevertheless, the intention of the government was clearly that the Human Rights Act should apply to central government (including executive agencies), local government, the police, immigration officers, the prison service, as well as to others. Ultimately, however, it is for the courts to decide the scope of application of the Human Rights Act, both in terms of the substance of the rights (guided but not bound by Strasbourg jurisprudence) and to whom

[43] Joint Committee on Human Rights, *A British Bill of Rights?,* Minutes of Evidence, 4 March 2008, HL 165-ii/HC 150-ii (2007–08), Q192.

[44] Ibid, Q195. [45] See also, pp 279–284 below. [46] HL Debs, 18 November 1997, col 796.

they apply. That is real power. But as should be clear from the previous section, and as will be developed in the pages that follow, it is a power with which the courts have not yet fully engaged.

Conclusion

What then is the case for the defence? Returning to the Convention on Modern Liberty, the event was sufficiently important to exercise the mind of the Lord Chancellor who felt obliged to pen a piece for a newspaper, published on the day before the Convention opened its doors.[47] In a rather tired and stale attempt at pre-emption, Jack Straw wrote that occasionally he asks the asylum seekers at his constituency surgeries 'why they made the very long journey to the United Kingdom rather than a much shorter one somewhere else'. 'The answer', he said, 'is almost always the same: it is better here. People have more rights and greater protection'. More to the point, 'despite the claims of a systematic erosion of liberty by those organising [the] Convention on Modern Liberty, my very good constituency office files show no recent correspondence relating to fears about the creation in Britain of a "police state" or a "surveillance society"'. And although accepting that 'Labour since 1997 has not achieved a state of grace in terms of the crucial balance between security and liberty', 'on any objective basis, this government has done more to reinforce and strengthen liberty than any since the war'. According to Mr Straw (like others after him):

> Part of the problem for those who question this is that their analysis assumes the loss of a golden age of liberty. No such age existed. The 60s, 70s and 80s were the decades of the informal 'judges' rules', the absence of statutory protections for suspects, 'fitting up', egregious abuses of power, miscarriages of justice, arbitrary actions by police, security and intelligence agencies, phone tapping without any basis in statute law or any legal protection for the citizen whatsoever, gaping holes where there should have been parliamentary scrutiny.

No one has, however, suggested that there is such a 'golden age'. Indeed, any such suggestion would reflect 'a serious lack of historical perspective', about something that 'has never existed' (Gearty, 2009).[48] On the contrary, what is being asserted is that there is a continuing corrosion of liberty, which is singularly more striking for the fact that it is happening on the watch of

[47] *The Guardian*, 27 February 2009. See also David Miliband, 'Free Society', <http://blogs.fco.gov.uk/roller/miliband/entry/free_society>.

[48] See also Gearty, 2007; and Bonner, 2009: 'More questionable is any implication that that we can hark back to some "golden age" of liberty'.

a Labour administration, which on this issue—as on others—appears too often to be in government but not in power.

As for the examples given in the preceding passage, it is also striking that the steps taken to deal with the abuses identified by the Lord Chancellor were initiatives of the Thatcher government—the Police and Criminal Evidence Act 1984, the Interception of Communications Act 1985, and the Security Service Act 1989, all attacked by Real Labour at the time for not doing enough to protect the individual, yet all still on the statute book in their original form, except where they have been toughened up subsequently. The Lord Chancellor's killer punch, however, is the Human Rights Act, by means of which New Labour provided an 'overriding and systematic protection for people's rights and liberties', Mr Straw promising that so long as New Labour remains in office it won't be 'watered down'. But as already suggested and as will be demonstrated at greater length in the chapters that follow, the Lord Chancellor's killer punch is a feather duster. The Human Rights Act more often than not fires blanks, and had it been wholly effective it would not have been necessary or possible to write this book to document the corrosion of civil liberties since 1997. More significantly perhaps (and despite claims that the Act won't be watered down so long as New Labour is in office), rather than provide a robust defence of liberty, the Human Rights Act has itself provided a political vehicle for further restraints, the government having decided that we cannot have (paper) rights without (more) responsibilities:

> The fundamental universal rights enshrined in the Act are not contingent on behaviour, but nor do they come without responsibility. Implicit in the [Human Rights Act] is the notion that we all owe one another obligations in the way we exercise our rights. The forthcoming green paper on a bill of rights and responsibilities is designed to generate public debate about how we can articulate these implicit duties more explicitly.[49]

The Green Paper has been duly published (Ministry of Justice, 2009), and although we may not be any more enlightened about the substance of our duties, we are much better informed about the continuing direction of travel on the issue of civil liberties. The route does not entail a strengthening of liberty, any more than it entails a commitment to equality, with inequality having increased under New Labour in the 2000s to a level unknown since the Old Tories in the 1960s.[50]

[49] For a critique, see G Aitchison, 'End Game Reaches the Bill of Rights Debate', <http://www.opendemocracy.net/ourkingdom/front?page=4>.

[50] *The Guardian*, 8 May 2009: 'Britain under Gordon Brown is a more unequal country than at any time since modern records began in the early 1960s, after the incomes of the poor fell and those of the rich rose in the three years after the 2005 general election'.