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Overcoming the Legacy of the 20th Century: Protecting Minorities in Modern Democracies

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Overcoming the Legacy of the 20th Century: Protecting Minorities in Modern Democracies

I

Political scientists are increasingly concerned with the problems of how to contain nationalism and how to protect minorities. Indeed, the creation of the European Union was in large part a response to the horrors undergone by minorities in the Second World War. That war was seen by many on the Continent less as a struggle between nation states than as a war of faith in which the nations themselves were divided. The most sinister of these faiths – national socialism – could be seen in this context as nothing more than an extreme and highly perverted form of nationalism. The European movement came into existence as a reaction against nationalism, and the European Union seeks to transcend it. It is natural, then, for the protection of minorities to have become a key theme in modern European politics.

But, how are minorities best protected? In modern times, two broad answers have been given to this question. The first is that they are best protected through legal processes. The second is that they are best protected through political and electoral processes. But in recent years the legal approach, exemplified in the European Convention of Human Rights, has become more dominant, to the neglect perhaps of the political approach. For one of the most striking intellectual trends of our time is the transformation of political questions into legal questions, the transformation of questions in political thought, political philosophy and the historical questions of political philosophy into jurisprudential questions. A central role in that transformation was played by the English philosopher, H.L.A. Hart, who re-founded

the study of jurisprudence in the 20th century. In 1955 he published a seminal article in 'The Philosophical Review' entitled 'Are there any natural rights?' thereby starting what became a trend towards the transformation of questions of political philosophy into questions of jurisprudence. Hart's lead was followed by many leading contemporary American political philosophers, John Rawls, Ronald Dworkin, and Robert Nozick to mention just three. This trend corresponds, I believe, with an alteration in the character of liberalism in modern times. Traditionally, liberal philosophers, such as John Stuart Mill, were concerned primarily with the balancing of interests, a balancing to be secured through processes of parliamentary debate and discussion. Rights were seen by the utilitarians as devices to protect the powerful. In his 'Anarchical Fallacies', Jeremy Bentham famously called discussion of rights 'nonsense', and imprescriptible rights 'nonsense on stilts'. Mill, and his leading modern disciple, Isaiah Berlin, wrote of an irreducible pluralism of values, and claimed that for liberals there are no right answers. Rights, however, purport to provide final answers, and these answers are to be given not by elected leaders, following a process of democratic debate and discussion, but by judges. When someone says 'I have a right' that ends the argument. It takes the argument out of politics so that no balancing of interests seems to be needed.

It may be that liberals have become more accustomed to the agenda of rights because they feel that they have lost the public debate; they have been unable to persuade politicians or people of the importance of minority rights, and therefore they have to rely on the judges. Bentham used to argue that rights were the child of law. What he meant by this was that the only meaning one could attach to the notion of a right was of something embedded in a legal system. To speak of a moral right was to speak of something that ought to be embedded in a legal system. In the modern world, however, rights are as much the parent of law as its

child. The European Convention of Human Rights translates into law a certain conception of human rights, and it forms the basis of Britain's Human Rights Act which came into effect in the year 2000 and is now the corner stone of what I regard as a new British Constitution.[1] It has transformed our understanding of government and of the relationship between government and the judiciary.

II

Many human rights cases concern the rights of very small minorities, minorities too small to be able to use the democratic machinery of electoral politics effectively. Often the minorities concerned are not only very small, but also very unpopular - suspected terrorists, prisoners, asylum seekers, and the like. Members of these minorities are not necessarily attractive characters. Therefore they are not usually able to win the electoral support to be able to make their case politically. Of course, life would be rather simpler if the victims of injustice were always attractive characters or nice people like ourselves. European political systems are probably quite good at securing justice for nice people. They are perhaps less effective at securing justice for people who may not be quite so nice. The European Convention, however, seeks to provide rights for all of us, whether we are nice or not: and perhaps there is no particular merit in being just only to the virtuous.

The European Convention, however, gives rise to the possibility of a conflict between judges and politicians. In Britain, the conflict has occurred very rapidly. Already, in 2006, just 6 years after the Act came into effect, the Prime Minister, Tony Blair, suggested that there should be legislation to limit the role of the courts in human rights cases. The Prime Minister's comments were supported by David Cameron, then Leader of the Opposition, who renewed the pledge in the Conservative Party's 2005 election manifesto to reform, or failing that, scrap the Human Rights Act. The 2010 election manifesto of the Conservatives, the leading party in Britain's coalition government, promises to replace

the Human Rights Act with a British Bill of Rights, and a commission has been set up to consider how this might be done.

The speed with which the HRA has led to a conflict between government and the judges in Britain is to my mind remarkable. In the US it took 16 years after the drawing up of the Constitution in 1787 for an Act of Congress to be struck down by the Supreme Court in the landmark case of Marbury v Madison of 1803; and it was not until after the Civil War, after 1865, that the Supreme Court really came into its own as a court that would review federal legislation. In France the 5th Republic established a new body in 1958, the Conseil Constitutionnel, empowered to delimit the respective roles of Parliament and the government. But this body did not really assume an active role until the 1970s.

The impact of the Human Rights Act in Britain has been much more rapid and it has had radical implications. But the impact has not been noticed as much as it might have been largely because Britain, almost alone among democracies, does not have a codified constitution. It is because Britain does not have a constitution that radical constitutional change tends to pass unnoticed. In Walter Bagehot's famous words, 'an ancient and ever-altering Constitution' such as the British 'is like an old man who still wears with attached fondness clothes in the fashion of his youth.: what you see of him is the same; what you do not see is wholly altered.'[2] In Britain, therefore, people have not noticed that the European Convention on Human Rights is now in practice if not in form, part of the fundamental law of the land. It is the nearest that Britain has to a bill of rights.

The Human Rights Act sought to muffle a conflict between two opposing principles; the sovereignty of Parliament, giving power to politicians, and the rule of law, giving power to judges. It perhaps presupposed a basic consensus on human rights between judges, on the one hand, and the government, parliament, and people on the other. It assumed that breaches of human rights would be inadvertent and unintended,

and that there would therefore not be significant disagreement between politicians and judges. But there is clearly no such consensus in Britain when it comes to the rights of unpopular minorities. Two issues in particular – concerning the rights of asylum seekers and suspected terrorists – have come to the fore since the Human Rights Act came into force and have led to conflict between politicians and judges.

The problem of asylum long predated the Human Rights Act, but it has grown in significance since the year 2000 and is now a highly emotive issue, capable, so politicians believe, of influencing voters in a general election and so determining the political character of the government. Terrorism has also taken on a different form since the horrific atrocity of September 11, 2001. The form of terrorism to which we were accustomed, that of the IRA, was in a sense an old-fashioned form of terrorism; it had a single, concrete and specific aim, namely the reunification of the island of Ireland. The terrorism of the kind championed by al-Qaeda is quite different; it is a new and more ruthless form of terrorism with wide if not unlimited aims, amongst which is the establishment of a new Islamic empire and the elimination of the state of Israel. Al-Qaeda apparently has terrorist cells in around 60 countries. To deal with this new form of terrorism, so many governments, including that of the United Kingdom, believe, new methods are needed and these new methods may well infringe human rights. Judges, however, retort that we should not compromise our traditional principles of habeas corpus and the presumption of innocence - principles which have been tried and tested over many centuries and have served us well.

But some senior judges have gone further. They have suggested that the conflict between the sovereignty of parliament and the rule of law should be resolved by, in effect, abandoning the principle of the sovereignty of parliament, that is the rule of the politicians. Indeed, a natural consequence of the Human Rights Act, according to this view,

should be a formal abnegation of the principle of the sovereignty of parliament.

In a case in 2005, Jackson and Others v Attorney General, which dealt with the legality of the Hunting Act (2004), Lord Steyn declared that the principle of the sovereignty of parliament was a construct of the common law, a principle created by judges. 'If that is so, it is not unthinkable that circumstances could arise when the courts might have to qualify a principle established on a different hypothesis of constitutionalism.' Lady Hale of Richmond said that 'the courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial powers'. She is saying, in effect, that courts might take upon themselves the power to strike down legislation. Reiterating this point, another law lord, Lord Hope said that 'parliamentary sovereignty is no longer, if it ever was, absolute; it is not uncontrolled, it is no longer right to say that its freedom to legislate admits of no qualifications whatever.' He then added that the 'rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.'[3]

Step by step, then, gradually but surely, the Human Rights Act is calling into question the principle of the absolute legislative sovereignty of parliament, the rule of the politicians. The implication of the remarks by the three law lords is that the sovereignty of parliament is a doctrine created by the judges which can also be superseded by them. They would perhaps like to see this doctrine supplanted by an alternative doctrine: the rule of law. But the great British constitutional lawyer, A.V.Dicey believed that the roots of the idea of parliamentary sovereignty 'lie deep in the history of the English people, and in the peculiar development of the English constitution.'[4] If that is right, the judges alone cannot supersede the principle of parliamentary sovereignty unless parliament itself (and perhaps the people as well through referendum) agrees.

H. L. A. Hart argued that the ultimate rule in any legal system was the rule of recognition.[5] This rule, Hart suggested, is not itself a norm, but a complex sociological and political fact, constituted by the practice of legal officials and judges. But legal officials and judges cannot alter a practice in a sociological or political vacuum. Surely parliamentary and popular approval is also required for any alteration in the fundamental norm by which we are governed. In Britain, at the present time, politicians clearly would not agree to give judges the power that it appears some seek, to supersede the sovereignty of parliament.

When the Blair government produced a White Paper in 1998, entitled, 'Bringing Rights Home', it declared that it found no evidence that the public wanted judges to have the power to invalidate legislation. It is unlikely that public opinion on these matters has changed since 1998. But, whatever the state of public opinion, it is clear there is a conflict between two constitutional principles, a conflict which the Human Rights Act sought to muffle.

In any society a balance has to be struck between the rights of the individual and the needs of that society for protection against terrorism, crime, and so on. But who should draw the balance, judges or politicians? Senior judges might say that they have a special role in protecting the rights of unpopular minorities, such as asylum seekers and suspected terrorists. They would say that in doing so they are doing no more than applying the Human Rights Act as Parliament has asked them to. Governments would say that it is for them as elected representatives to weigh the precise balance between the rights of individuals and the needs of society because they are elected and accountable to the people, while the judges are not. They would say that the Human Rights Act allows judges to review legislation, but that this should not be made an excuse for the judges to seek judicial supremacy; they should not seek to expand their role by stealth, as the American Supreme Court did in the 19th Century.

There is a profound difference of view in many European democracies as to how issues involving human rights should be resolved. Politicians tend to believe that they should be settled by the legislature; judges that they should be resolved by the courts. Politicians claim that judges are usurping power and seeking to thwart the will of parliament, whereas judges claim that governments are infringing human rights and then attacking the judiciary for doing its job in reviewing legislation and assessing its compatibility with human rights. The argument from representative democracy seems to point in one direction, the argument from the rule of law in another.

Eventually, no doubt, a new constitutional settlement will be achieved in Europe. But it may well be a somewhat painful process and there will be many squalls and storms on the way.

III

There is much debate in Britain on the legal protection of human rights. In August 2008, the parliamentary Joint Committee on Human Rights published a report, A Bill of Rights for the UK? HL165, HC 150, 2007-8. It recommended that Britain adopt a Bill of Rights and Freedoms since this would provide 'a moment when society can define itself.' Such a Bill should 'set out a shared vision of a desirable future society: it should be aspirational in nature as well a protecting those human rights which already exist'.[6] Such a Bill would, in the Joint Committee's view, have to build upon the Human Rights Act without weakening it in any way, and it would have to supplement the protections in the European Convention.

A British Bill of Rights, then, would increase the number of rights which the courts protect. Some suggest also that it should strengthen this protection by some form of entrenchment. The European Convention of Human Rights was regarded by its signatories in 1950 not as a ceiling, the maximum protection which member states should grant, but as a

floor, the very minimum which any state claiming to be governed by the rule of law, should support.

In Northern Ireland, there is already broad agreement that greater protection of rights is needed than is offered by the Human Rights Act. The 1998 Belfast Agreement recognised that there ought to be 'rights supplementary to those in the European Convention on Human Rights to reflect the particular circumstances of Northern Ireland — These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem and – taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland'. The Agreement provided for the establishment of a Northern Ireland Human Rights Commission providing for the identity and ethos of both communities in the province to be respected, and also a general right to non-discrimination. In addition, it envisaged that the Human Rights Commission in the Republic would join with that of Northern Ireland to produce a charter endorsing agreed measures to protect the fundamental rights of all those living in the island of Ireland. As yet, however, no Bill of Rights for Northern Ireland has been enacted.

It is not difficult to suggest rights additional to those in the ECHR which might be recognized in he United Kingdom as a whole – a right to privacy; a right to a healthy environment, something guaranteed in the 1996 post-apartheid South African constitution; a right to freedom of information; a specific right to anti-discrimination on grounds of sexual orientation; recognition of the rights of children, as recognized in the United Nations Charter on the Rights of the Child – these are all examples of rights which, so it has been argued, ought to be protected in addition to those protected by the Convention. There is also the large but contentious area of social and economic rights. The Convention recognizes a right to education but not, for example, a right to health care. Many of these additional rights are recognised in international treaties which the British government has signed.

But any new rights would have to be formulated very carefully. It would be difficult to make economic and social rights justiciable; and the law can never become a mechanism for resolving complex social or economic problems. In a case in 1995, Lord Bingham commented that:

'It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide all the treatments they would like; they cannot purchase all the extremely expensive medical equipment they would like, they cannot carry out all the research they would like; they cannot build all the hospitals and specialist units they would like. Difficult and agonizing judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. This is not a judgment which the court can make'. [7]

The courts must remain a last resort, not a path taken by those who cannot secure the reforms they wish to enact through the ballot box and Parliament. In its report, A Bill of Rights for the UK, the Joint Committee on Human Rights proposed five types of rights for inclusion.

1. Civil and political rights and freedoms, such as the right to life, freedom from torture, the right to family life and freedom of expression and association. It also proposed a new right to equality.

2. Fair process rights such as the right to a fair trial and the right of access to a court. The Committee also proposed a right to fair and just administrative action.

3. Economic and social rights, including the right to a healthy and sustainable environment. The Joint Committee accepted that such rights could not easily be made justiciable, and declared that they would impose a duty on the part of government and other public bodies, of 'progressive realisation', the principle adopted in the South African constitution. This principle would require the government to

take reasonable measures within available resources to achieve these rights and report annually to Parliament on progress. But individuals would not be able to enforce them against the government or any other public body.

4. Democratic rights, such as the right to free and fair elections, the right to participate in public life and the right to citizenship.

5. The rights of particular groups such as children, minorities, people with disabilities and victims of crime.[8]

One argument for adding such rights to those already recognised in the Human Rights Act is that it would make it easier for the British people to feel that they, as it were, 'owned' the bill of rights, that the bill of rights was indigenous. At present, many feel that the Human Rights Act is an elite project, designed only to protect highly unpopular minorities, such as suspected terrorists and asylum seekers. The Act, therefore, is not grounded in strong popular support. Rights that might be generally used by all would give human rights legislation greater popular salience, and might thus, paradoxically, make it easier to protect the rights of unpopular minorities.

But there is a fundamental difficulty with the idea of a British Bill of Rights. For some at least of the rights which might be embodied in a British Bill of Rights would seem to entrench upon the powers of the devolved bodies – the Scottish Parliament, the National Assembly of Wales and the Northern Ireland Assembly. Thus the extension of one aspect of the new British constitution – the protection of rights – might easily come into conflict with another – the devolution settlement. From a strictly legal point of view, of course, the protection of rights is a reserved matter. Nevertheless, the devolved bodies have responsibility for such matters as health care, and would undoubtedly see a British Bill of Rights providing for the right to health as a form of creeping centralisation, depriving them surreptitiously of powers which had been transferred to them by the devolution legislation. The devolved bodies

might well wish to decide for themselves whether or not to provide for additional rights to those in the European Convention. There is some tension, then, between the principle of devolution and that of the entrenchment of rights UK-wide; and, insofar as a British Bill of Rights was based on the idea of rights that were fundamental to British citizenship, it could serve to unpick the delicate settlement reached in the Belfast Agreement which served to reconcile the unionists of Northern Ireland, who wished to remain British citizens, and the nationalists, who did not, and who do not see themselves as British at all. It would be necessary, then, to secure the consent of the devolved bodies, as well as MPs at Westminster, to a British Bill of Rights. That would not be easy since neither the SNP nor Sinn Fein, would want to agree to something that they saw as 'British'. They would prefer rights for Scotland and Northern Ireland that were, as it were, self-generated. But, if the devolved bodies were not involved in the negotiations, they might not accept a British Bill of Rights as legitimate. In 1980, when Pierre Trudeau sought to patriate the Canadian constitution, he did not consult the Canadian provinces until required to do so by the Supreme Court of Canada. Quebec, which already had its own provincial bill or rights, refused to accept the patriated constitution, since this would deprive it of autonomy in relation to French language and education rights.[9] The issue remained as a running sore, poisoning relations between Canada and Quebec for many years. A British Bill of Rights, therefore, could prove a highly divisive issue both in Scotland and in Northern Ireland.

If the British government preferred not to involve itself in difficult disputes with the devolved bodies, the alternative would be to propose a bill of rights applying only to England. There would then be an English rather than a British Bill of Rights, and the devolved bodies could be left to adopt whatever arrangements they wished if they sought to add to the rights already recognised in the Human Rights Act. An English bill of rights, however, could hardly be expected to strengthen the sense

of Britishness. It could, on the contrary, weaken it. But, whatever the outcome, the question is bound to arise – to what extent is a bill of rights compatible with a decentralised or federal system of government – is it not bound, as it has been in the United States, and, as it would probably be in the European Union, a centralising instrument?

Even apart from this problem, a British Bill of Rights might prove of very limited value in strengthening the sense of citizenship. It can delineate only the very minimum requirements of citizenship. Some have proposed a British Bill of Rights and Duties. The suggestion is that such a document could encourage good citizenship. Yet, many, if not most of the duties of good citizenship – e.g the duty to be a good neighbour, the duty to contribute to one's community – are not such as can be ensured by law. They are problems for society, not for the legal system. It is a mistake to overburden the legal system by giving judges the duty to resolve complex social problems, problems that they are ill-equipped by training to resolve. Nor could the rights of the citizen become dependent upon the extent to which she performed her social duties. The right to freedom of speech and to the other rights enshrined in the Human Rights Act are not dependent upon the satisfactory performance of social duties. They are granted to everyone living in Britain, regardless of whether or not they are good citizens. Some of the most contentious issues relating to rights concern the rights of prisoners, people who, by definition, have shown that they are not good citizens. Therefore, one should expect too much from the law in the creation of the Good Society, a society in which the rights of minorities are fully recognised.

IV

The European Convention, I have argued, is of greatest value in cases concerning small and unpopular minorities; minorities that are unable to use electoral and political processes effectively. Larger minorities

are generally able to use these processes and perhaps for them, the Convention may be less helpful. Nor can the Convention be expected to resolve wider social issues. It cannot be expected to deal with the wider problems that face us in a multicultural society. It cannot resolve our culture wars.

Trevor Phillips, the Chair of the Equality and Human Rights Commission in Britain , has drawn attention to the range and nature of these conflicts in such areas as the implementation of affirmative action policies; the recognition and use in the British legal system of sharia law and sharia courts, where the testimony of a woman may be worth less than the testimony of a man – to what extent, if at all, should the civil courts recognise the jurisdiction of sharia courts; the legitimacy of arranged marriages and concerns over their potential for coercion; the role of faith schools in our society; where, for example, parents wish to send their child to a Jewish school, but the mother is a convert, should the school be able to decide whether to admit the child or should it be a matter for the courts; and the balance between the freedom of choice of parents in choosing schools and the goal of securing racial and social integration. With free choice of schools, many schools remain 100% white, others remain 50-60% peopled by members of ethnic minorities. Survey evidence has shown that very few English people have close friends from other cultures. The question originally asked people to list their 20 closest friends, but this question was abandoned since most English people do not have 20 close friends! Is it consistent with public policy that ethnic groups remain so separate?

None of these issues can be settled simply by invoking rights. All of them involve a clash of rights and a clash of interests. For this reason, they are not questions which judges can settle. The great danger, particularly with the idea of extending rights into the social and economic sphere is of bringing judges into areas that lie beyond their competence. There is a danger, in addition, that we seek to enlist the support of judges to transform our current liberal prejudices into

unshakable verities and eternal truths. For these reasons, perhaps the legal paradigm, inaugurated by the work of H.L.A.Hart, may have gone too far. It is worth remembering what American Supreme Court Justice Robert Jackson said of judges in the 1930s when the United States Supreme Court was using its power of judicial review to cripple President Roosevelt's economic and social programmes. 'We are not final', he said, 'because we are infallible, but we are infallible only because we are final'.[10] Justice Stone reminded his colleagues that 'While an unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check on our own exercise of power is our own sense of self-restraint'. [11] This was a salutary reminder.

V

On the Continent, much emphasis is placed upon political as well as legal means to accommodate minorities. The electoral system has an important part to play in this area. Most divided societies use one of the various methods of proportional representation to elect their legislature. Some proportional systems, for example those with panachage, as in Switzerland, or the single transferable vote used in Ireland, can assist the representation of minorities by enabling voters to support minority candidates from different parties if they so wish. Systems of personal proportional representation such as that used in Finland, whereby a primary election is combined with a general election, can also do much to assist minorities. They enable minorities to be effectively represented without the need to form separate ethnic minority parties that could do damage to the internal cohesion of the state.

But systems of proportional representation cannot of themselves do anything to ensure that minorities have a say in government. Indeed, they are not designed to do so. What is achieved is a fair representation of minorities. But a minority in the population will still remain a minority in the legislature, and therefore, in the absence of other

measures, at the mercy of a determined majority. So it was that the introduction of proportional representation for local and European elections in Northern Ireland in 1973 could not alter the fact that the nationalist population was a minority there. Proportional representation cannot convert a minority into a majority; it can only try accurately to represent both. It cannot ensure that minorities are treated fairly, only that their voice is heard.

Where a society is divided by ethnicity, religion or language, therefore, minorities may well require more than fair representation if their rights are to be effectively secured. Political scientists agree that there is one common feature marking those societies such as Switzerland that have been able to remain peaceful despite conflicts of language, religion or ethnicity. That common feature is a departure from the Westminster model of majority rule, based on the alternation or potential alternation of governments. In place of this model, those divided societies that have attained stability have all adopted a model of government whose essence is the sharing of power. Indeed, I am not aware of any divided society that has been able to achieve stability without some form of power-sharing. The precise arrangements in successful societies differ, but in all of them there is some set of arrangements whereby the different segments of the population share power roughly in proportion to their numerical strength so that no segment feels permanently left out in the cold. That is the kind of system embodied in the Belfast or Good Friday Agreement in Northern Ireland in 1998. Continental experience tends to confirm that the best protection for minority groups lies not only in statutory provisions but also in institutional instruments that assist in the sharing of power.

The essence of power-sharing is a departure from majority rule so that all the major groups in a country are enabled to play their part in government. Majority rule is bound to lead to alienation and instability on the part of minorities who have no chance to participate. Under majority rule, the Germans would always govern Switzerland, and

the Unionists, Northern Ireland. So long as electors vote on national or religious lines, there is no possibility of alternation and so the Westminster model cannot work. There is no check on the power of the majority, and, in consequence, the minority will be alienated from the state. Therefore, democracy in divided societies must be equated not with majority rule but with power-sharing at governmental level as achieved, for example, in the Belfast or Good Friday agreement, or in Switzerland success, and also to Estonia which, as early as 1925, adopted a Law of Cultural Autonomy providing for the fight of its various ethnic minorities to create their own self-governing cultural councils through separate elections among their members. In 1993, drawing inspiration from the law of 1925, the new democratic government in Estonia passed a law on Cultural Autonomy for National Minorities, based on the same principle. It is fair to say, however, that so far this law has proved of little more than symbolic importance.

In any case a system of personal federalism of this kind can only be successful if it is seen as one element – albeit an important one – in a broader pattern of minority protection, in which there is full confidence in the practical application of the rule of law. Anyone who fears direct or indirect discrimination as a result of public affiliation to a given national minority will hesitate to apply for registration. And there are of course many difficulties with the model – in particular – how can there be an appropriate demarcation of responsibilities, especially financial responsibilities, between the government and the councils, and how can it be ensured that the councils are both representative and accountable. Nevertheless, the approach is one that allows minority communities to unite and preserve their ethnic personality without disrupting the state.

It would of course be wrong to suggest that there is just one method by which the political protection of minorities can be secured. There

are a wide range of institutional devices, many of which have been adopted in the plural societies of Western Europe. It is not the adoption of a specific institution that is crucial but rather the spirit with which minority problems are approached. What is needed is to assimilate the democratic logic of 'one person, one vote' to a second democratic logic of cooperation between different groups. Once that second logic is accepted, the question of the appropriate institutional devices becomes merely a mater of what means is best adapted to secure an agreed end. The answer will legitimately vary from country to country.

What is clear is that a society cannot leave its liberties solely in the hands of judges. Bills of Rights and the European Convention show us only what is in the shop window, not whether one can buy the goods. It must be remembered that the American Bill of Rights, which is today so greatly lauded, did not prevent segregation or 'lynch law' existing in many states in the South for very many years. The equal protection clause of the 14th Amendment passed in 1870 was a mockery in practice for anyone belonging to the black minority during the Jim Crow years.

I conclude, therefore, that the philosophy of rights, while it may be necessary, is not sufficient to meet the challenges of the 21st Century. We need to return to an older form of liberalism, that championed by Mill, a liberalism which seeks to balance interests and competing claims. The philosophy of rights is most needed in cases dealing with vulnerable and unpopular minorities whose interests will not be recognised by the ballot box. But even in this very limited area, we must be aware of over-estimating what can be achieved by judges. Judges, constitutions and political institutions are necessary to protect human rights, but they can never be sufficient. The condition of society matters also. Mill famously criticised Bentham for believing that a constitution is a mere set of rules or laws, rather than a living organism representative of an evolving political morality. Our laws rest essentially on a public opinion that supports the protection of human rights, upon a culture of human rights. The protection of human rights, therefore, depends not

only on laws and institutions, but on a spirit favourable to human rights.

Edmund Burke is supposed to have said that 'all that is necessary for evil to triumph is for good men to do nothing.' No one has been able to find the source for this quotation, but whether he said it or not, there are very eloquent testimonies to its truth. We are mistaken if we believe that human rights legislation is sufficient to preserve the rights of minorities. In a book published long ago, in 1925, called The Usages of the American Constitution, the author tells the story of a church in Guildford, the Holy Trinity Church. On the site of this church was an earlier building which was destroyed in 1740 when the steeple fell and carried the roof with it. One of the first to be informed of the disaster was the verger. `It is impossible', he said, `for I have the key in my pocket'.[12] Human rights instruments are the key, but they will not of themselves prevent the fall of the steeple. Only a vigilant public opinion can do that.

Shortly after Woodrow Wilson produced his Fourteen Points in 1918, his Secretary of State, Robert Lansing, declared with some prescience, that the phrase self-determination 'was loaded with dynamite'. For it was founded on the nineteenth-century liberal idea that humanity was naturally divided into nations and that every nation should have its own state. But such an ideal can hardly be achieved in the multinational and multicultural societies of Europe where minorities are territorially dispersed. There is therefore an urgent need for new thinking about how the ethnic, linguistic and religious identities of peoples can be made compatible with democratic stability.

But the broad answer to the problem is clear. It lies in de-emphasising the concept of sovereignty. In the 20th century, Europe successfully overcame the legacy of Lenin. The democratic stability of our Continent now depends on whether it can also overcome the legacy of Woodrow Wilson.

References

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[3] [2005] UKHL 56, para. 102.

[4] Law of the Constitution, p. 69fn.

[5] *The Concept of Law*, Clarendon Press, 1961.

[6] *A Bill of Rights for the UK?* P. 5.

[7] R v Cambridgeshire Health Authority, ex parte B [1995] 1 WLR 898.

[8] HL165, HC 150, 2007-8.

[9] See Geoffrey Marshall, 'Canada's New Constitution (1982): Some Lessons in Constitutional Engineering', in Vernon Bogdanor, ed, *Constitutions in Democratic Politics*, Gower 1988.

[10] Brown v Allen 344 U.S.(1953) 540.

[11] United States v Butler 297 U.S. (1936) 79.

[12] H.W.Horwill, *The Usages of the American Constitution*, Oxford University Press, 1925, p. 243.

Annex A

The Europaeum Record

I. Mobility Schemes

❑ The ***Europaeum New Initiatives Scheme*** provides seed funding for innovative and imaginative forms of academic collaboration within the Europaeum academic community.

❑ The ***Europaeum Visiting Professors Scheme*** supports the movement of professors from one partner institution to another, for periods of up to two weeks for the purposes of lecturing, study, research and project development.

❑ ***Europaeum Mobility Schemes*** support individual academics and selected graduate students from member institutions participating in selected European events and activities, including conferences, seminars and summer schools.

II. Main Annual Academic Conferences

1993 Oxford	*Are European Elites Losing Touch with their Peoples?*
1994 Oxford	*Europe and America after the Cold War: the End of the West*
1995 Bonn	*Integration of East Central Europe into the European Union*
1996 Geneva	*Defining the Projecting Europe's Identity: Issues and Trade-Offs*
1997 Paris 1	*Europe and Money*
1998 Leiden	*Human rights, the plight of immigrants and European immigration policy*
2000 Bonn	*The Implications of the new Knowledge and Technology*
2001 Oxford	*Democracy and the Internet: New Rules for New Times*
2001 Berlin	European Universities Project: *Borderless Education: Bridging Europe*
2002 Paris 1	European Universities Project: *New Times : New Responsibilities*
2003 Oxford	*Whose Europe? National Models and the European Constitution*
2003 Bonn	European Universities Project: *New Partnerships: Opportunities and Risks*
2004 Leiden	*Moving the Frontiers of Europe: Turkey, Risk or Opportunity*
2005 Oxford	US-Europe: *Americanisation and Europeanisation: Rivals or Synonums*
2006 Oxford	*Diaspora/Homeland relations:Transnationalism and the Reconstruction of Identities in Europe*
2007 Washington	*Does the 'West' still exist? - America and Europe towards 2020.*

2008 Oxford *Dilemmas of Digitalization*
2009 Oxford *Constitutional Pluralism in the European Union and Beyond*
2010 Oxford *Federalisms - East and West - India, Europe and North America*
2011 Santander *Futures for Europe: 2030?*
2012 Lisbon *Open Societies, Open Economies and Citizenship*

III. Graduate week-long Summer Schools

1994 Leiden *Concepts of Europe*
1995 Bologna *The Problem of Political Leadership and the Ethnic Nation*
1996 Bologna *The Civic Nation and the Ethnic Nation*
1998 Budapest *Risk Policy Analysis*
1998 Oxford *Human Rights*
1999 Paris 1 *NATO and European Defence*
2000 Bologna *European Policy and Enlargement*
2000 Oxford *Church as Politeia*
2001 Oxford *Human Rights and the movement of People in Europe*
2002 Oxford *The Economics of European Integration*
2003 Prague *Old and New Ideas of European Federalism*
2004 Leiden *Islam and Europe: Building Bridges*
2005 Geneva *Multilateral Governance: Effective Ways Forward?*
2006 Krakow *Bridging the Divide: US-Europe Relatrions after 9/11*
2007 Helsinki *Borders of Europe - where do they end?*
2008 Bonn *Sacred Buildings in European Cities*
2009 Paris 1 *Ethics and Policy-making*
2010 Bologna *The Media, Europe & Democracy*
2011 Santander *The Future of Europe: Which Way Towards 2030?*
2012 Oxford *Conflict Resolution in Europe*

IV. Teaching Courses and Study

Programmes

2009- Lisbon Annual Graduate Student Debates

2008- Brussels Annual Policy-Making Seminars

2004- MA in *European History and Civilisation* (Leiden, Paris I and Oxford).

2006-2008 *European Business, Cultures, and Institutions symposia* (Leiden and Oxford).

2002-2004 *International Refugee Law* (Geneva and Oxford).

2001-2003 *Political Cultures and European Political Systems* MA (Bologna, Oxford and Leiden).

2001-2003 *Economics of European Integration* (Paris - BA module option).

1996-2000 *European Community Law* (Oxford, Leiden and Sienna).

The Europaeum played the key role in the creation at Oxford of the *Oxford Institute of European and Comparative Law*, the *European Humanities Research Centre*, the *Centre for European Politics, Economics and Society,* plus a number of fellowships, including the *Chair in European Thought* and, the *Bertelsmann Europaeum Visiting Professorship in 20th Century Jewish History and Politics*.

V. Linked Scholarship Programmes

2008- **The *El Pomar-Europaeum Transatlantic Junior Fellowship*** - One Europaeum student to USA research fellowship.

2004- **The *Roy Jenkins Memorial Fund*** - Four Europaeum students to Oxford and two outgoing Oxford students per annum.

1997- **The *Oxford-Geneva Bursary Scheme*** Annual bursaries for student exchanges between Oxford and the HEI.

1997- **The *Scatcherd European Scholarships*** - Fully funded places at Oxford for European graduates, and for Oxford graduates at European Universities.

1995-2001 **The *Europaeum Scholarships in Jewish Studies***

1990s ***Henry R Kravis Scholarships*** - Allowed students read an M.Phil or M.Juris in at Oxford.

VI. Joint Research and Support Projects

❑ The ***Future of European Universities Project 2001-5*****,** supported by Daimler-Chrysler Services A G, was a three-year investigation into the impact of new technology and the Knowledge Revolution with international expert conferences on *Borderless Education: Bridging Europe* (Berlin 2001); *New Times : New Responsibilities* (Paris 2002); and *New Partnerships: Opportunities and Risks* (Bonn 2003).

❑ The ***Europaeum Research Project Groups*** scheme encourages collaborative research across the association, supporting groups looking at such themes such as *Party System Changes*; *Churches and the Family*; *European Economic Integration*; *The Kosovo Stability Pact*; *European Identity*; *Regulation of E-commerce*; *Liberalism in 20th Century Europe*; *Transmission and Understanding in the Sciences*; and *Cultural Difference in Europe, Political Concepts in Europe, Race in European Universities*.

❑ ***Islam-in-Europe Programme*** **2004-8** supporting workshops and other events around this key theme, culmulating in an international lecture series and conference.

❑ ***Culture, Humanities, and Technology in Europe*** **2004-8** supporting workshops and other events around this key theme, culmulating in an international conference.

❑ The ***US-Europe TransAtlantic Dialogue Programme*** **2005-9** supporting workshops and other evemts around this key theme, culmulating in an international

VI. Recent Graduate Workshops

2008 Paris 1	*Roots of Modern Europe*
2008 Prague	*European Migration in the 21st Century*
2009 Bonn	*Thinking about Progress*
2009 Krakow	*Experience and Perceptions of Migration across Europe*
2009 Lisbon	*Ideas of Europe: Ideas for Europe?*
2009 Oxford	*Europeanisation: Historical Approaches*
2010 Bologna	*Sacred 'Spaces' in Modern European Cities ?*
2010 Leiden	*Political Parties, Migration and Public Rhetoric in Europe*
2010 Paris 1	*Risks from Climate Change: Lessons in Global Diplomacy*
2011 Bonn	*Globalisation and Cooperation*
2011 Leiden	*Europe and its "Giants" of Leadership: Past, Present and Future?*
2011 Oxford	*Europeanisation and the Roots of Modern Europe*
2012 Paris 1	*The Arab Spring: One Year On*
2012 Prague	*Rio +20: Challenges and Opportunities for Europe*
2012 Oxford	*Rousseau and Republican Traditions in Europe*

Europaeum University Members

OXFORD

Founded officially in 1249, though teaching is known to date back to 1096.

Vice-Chancellor:
Professor Andrew Hamilton

Liaison Coordinator:
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LEIDEN

Founded in 1575 by the States of Holland, at the behest of William of Orange.

Rector Magnificus:
Professor Paul van der Heijden

Liaison Coordinator:
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BOLOGNA

Constituted in 1158 by Emperor Frederick I Barbarossa, though independent teaching dates back to 1088.

Rector:
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BONN

Founded in 1818 by Kaiser Friedrich Wilhelm III, preceded by an Academy established in 1777.

Rector:
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KRAKOW

Founded in 1364 by King Casimir the Great. In 1817 the it was renamed Jagiellonian in honour of the Polish kings.

Rector: Professor Wojciech Nowak

Liaison Coordinator:
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GENEVA

Founded in 1927; associated to, but not part of, the University of Geneva.

Director:
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PARIS

Founded in the 12th Century, supressed during the French Revolution, and reconstituted in 1890.
President (to 2012):
Professor Jean-Claude Colliard

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PRAGUE

Founded in 1348, divided into Czech and German institutions in 1882. In 1945 the German section was abolished and Czech revived.
Rector:
Professor Václav Hampl

Liaison Coordinator:
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HELSINKI

Founded in 1640 as the Royal Academy of Turku. In 1917 when Finland became independent, the university was renamed.
Rector:
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IEP LISBON

Founded in 1996-7, Under the prestigious auspices of the Catholic University of Portugal
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FOM & COMPLUTENSE MADRID

Named after two of Spain's prominent liberal intellectuals on the 20th C. Founded in 1978.
Institute Director:
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