Human Rights Law: Bringing Power to the Powerless
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In the UK, everything goes along nicely as long as we trust that everyone is behaving well. But the law, and rules in general, are in place when people do not behave properly. And as we look around Britain and across the Continent, the populist storm clouds are roiling, and it would seem likely that the UK does not have the tools in place to confront the danger.

Let us begin with a lesson from my late mother, Jean Stafford Smith. She was a Conservative voter all her long life. While we did not agree on politics, she was a very decent Tory, of a libertarian ilk: Live and Let Live. One of my fundamental principles for which I must thank her is this:

> *I am privileged and, as a result of that random good fortune, it is my duty to look around the world for those who are the most hated and stand between them and the people delivering the hatred.*

The same concept was delivered in different words by an elderly black woman in the Deep South who called my colleague and human rights champion Bryan Stephenson (of *Just Mercy* renown) a 'Stone Catcher': she explained that you can either join the people who throw stones or catch the stones before they hit their target.

We must be the Stone Catchers who stand between those who are most vilified and the people hurling the stones. We are thereby an antidote to Populism. In this, one important protective shield comes in the shape of enforceable human rights, wielded by us – you and me – to protect the victims.

A second basic idea is to identify, and deal with, the *Tyranny of the Majority*. When I was taking the Louisiana Bar in 1984, I was told I had to use a pseudonym as there had been a history of corruption where those grading the papers knew the names of the students. I was bemused by this requirement and toyed with the idea of submitting my exams under the name of Karl Marx, since that would certainly send reverberations through the local legal establishment. However, someone suggested that it would likely lead to an automatic fail. Therefore, I chose John Stuart Mill since, as I used to walk past his statue on the Embankment, I was reminded that he was meant to have been the smartest person who ever lived. I'm not sure I believe those kinds of retrospective IQ evaluations, but I felt in need of help, as I had done very little studying.

While perhaps Alexis de Tocqueville was the person who coined it, the phrase "tyranny of the majority" is often associated with Mill. It describes a system where the many oppress the few who, according to Mill's democratic ideals, have just as much a right to pursue their legitimate ends. I call the victims on the receiving end the '*Vilified Minority*.' In Mill's view, the *Tyranny of the Majority* is particularly offensive because the Majority tend to be whipped up towards any number of prejudices that could impact every facet of the life of a member of the *Vilified Minority*.

It is not difficult to see this in our evolving world where so-called 'Populists' use vilification to incite their crowds on a plethora of fronts. Some people refer to such politicians as 'Wannabe Fascists',[1] but that is an inflammatory word that I would rather avoid. Let's stick with Populists.

That said, Populists use the same playbook as the fascists who went before them. They may as well be

[1] Frederico Finchelstein, *The Wannabe Fascists: A Guide to Understanding the Greatest Threat to Democracy* (University of California Press, 2024).

quoting Benito Mussolini, who said:

> *"In every society there is a need for a part of the citizens who must be hated."*[2]

It's not just the domestic citizen who is vilified: our Populists like to 'Other' people who are foreigners too. As one author has written recently,

> *"The connective tissue between Vladimir Putin, Victor Orban and Donald Trump has been their common enemies: immigrants, Muslims, LGBT communities, 'globalists', liberal elites, cancel culture, and George Soros."*[3]

I would not group Elites and Soros with the others as they are generally capable of defending themselves – though we should come to their aid when they are being unfairly singled out by the populists. The truly *Vilified Minorities* are those who have no power on their side, and who are being blamed for some flaw (real or imaginary) in society.

Even before I made it to law school, the first *Vilified Minority* whose plight cried out to me were those condemned to Death Row: there appeared to be no imbalance of power quite like the moment when the omnipotent US government decided to strap an indigent, often black, citizen in the Electric Chair, as a ritual sacrifice to the mythological god of deterrence. Here, the use of the occasional execution as the cure for crime was the false promise of the Populist Deep Southern prosecutor or politician. At the time, I planned (as a rather arrogant youth) to write *a* book that would change people's minds on the subject, but I rapidly decided I had better get a law degree instead. It is not that we should ignore the Court of Public Opinion, but I was far too green to be able to make much of it. The people on death row needed legal representation at the time much more than they needed a book that nobody would read (indeed, while I did write the book aged 20, nobody would even publish it!).

For me, the Guantánamo detainees came next, as the flames of Islamophobia were fanned into a bonfire of due process rights in the name of National Security. We were told that the response to Osama bin Laden killing 2,977 innocent people in New York should be to torture 780 young Muslim men, and then lock them up incommunicado in Cuba, labelling them Terrorists, Bad Men and the 'Worst of the Worst". It was madness to jettison 1000 years of the rule of law, supposedly to protect the ideals of democracy. Sure enough, it turned out that the vast majority of detainees were in fact harmless, but nobody would have known that if they had not got access to a lawyer to tell their story.

These are just two of the groups we are told to hate; there are many others. The *Vilified Minority* is generally found at the furthest, weakest end of the social or geopolitical spectrum. The Populist leader finds them easy to abuse, as they have few tools with which to fight back. Hence, to give another recent example from the UK, the last government seemed obsessed with getting the odd asylum seeker on a plane to Rwanda, to the point that all other political issues of the day became mere byplay. This was not a rational solution to any problem: in a country of some 60 million it would have been a fundamentally inconsequential 'achievement'.

Indeed, it is the common theme of this politics of hatred and fear to propose a false "solution" to what is sometimes a non-existent problem as a distraction from the ultimate truth – that government is hard work, and we ultimately live in an imperfect world that is only improved incrementally. In other words, it is "Government by the Big Lie".

If the common vice of the *Tyranny of the Majority* is to focus on a *Vilified Minority*, then it stands to reason that the weak and the vilified are those who are most in need of our protection. When two corporations disagree over a contract, they turn to the courts, but they don't *need* the protection of the law in the same way that a *Vilified Minority* does – to my mind, such work is not the bedrock purpose of our rule of law. Where both the Court of Law and the Court of Public Opinion become most important is when there is a need for them to protect the *Vilified Minority* from the hate-filled majority.

This is where the British judicial structure most obviously fails us.

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It is here that I would like to begin our discussion of British law and politics. When I look at the UK from afar, it seems to me that as a nation, we (the British) are fabulously complacent, thinking that our

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[2] Ben Rhodes, *American Descent*, New York Review of Books 27, at 28 (Aug. 15, 2024).
[3] Rhodes, *American Descent*, at 28.

parliament is the mother of all democracy; and that our legal system is the envy of the world. This could not be further from the truth: the British simply do not have the necessary tools for the struggle to combat the Populists. The UK legal system seems framed primarily to protect the Privileged Majority, not the *Vilified Minority*.

What, then, does the *Vilified Minority* need when seeking protection from the *Tyrannical Majority*: Power, from whatever source they can find it. We must therefore work out how best to give them this.

In the US it is easy enough. I like to say that I have sued the President of the United States 88 times and only lost once. In all the cases I have ever brought to a court, I have been representing someone who is powerless (on death row or in a secret detention) against one of the most powerful governments or individuals on the planet. Overall, I have got some kind of justice for the overwhelming majority of my clients (albeit with some terrible failures along the way). This does not reflect any genius on my part, but it does demonstrate that the system in the US is designed to bring power to bear on behalf of the powerless. Let us evaluate the elements that allow this to happen in the US and compare it to the UK.

The *Vilified Minority* must have an advocate. I use the word advocate, rather than lawyer, as the delivery of power is also needed in the court of public opinion, rather than the court of law; facts are generally more important than law; and educating the public can be more important than educating a court. Again, Guantánamo is an example of this. There were once 780 detainees on the notorious base. 750 have since departed and 17 of the remaining 30 are cleared for release. Of these 767 men who turn out not to be the "worst of the worst" at all, just two have been ordered free by a court of law; the rest have benefitted from advocacy in the media (often by the lawyers who had access to the client) exposing the reality of their wrongful detention.

The advocate for the *Vilified Minority* must be freely available and free of cost. While the 'Elites' and George Soros may be targeted for abuse by Populists, they can afford the help they need. The people who really need legal representation cannot.

In this, the UK manifestly fails the *Vilified Minority*. Much of the British system operates on a hopelessly inadequate legal aid system. Often a barrister must opine that the chances of success are something close to 50/50 for the client even to qualify for funding. This is madness. When we brought the original challenge to Guantánamo Bay, the law was clearly against us, though justice was (I thought) on our side. Fortunately, that turned out to be the case and the notorious prison was opened up to at least some of the rule of law. Likewise, I generally expect to litigate 100-plus issues in any capital case, losing most of them – but it may only take one winner to save a life.

Overall, in addition to deterring claimants, the UK practice stultifies the law, hamstringing lawyers who wish to bring imaginative (and often entirely valid) claims.

There are other ways in which money plays an unfortunate role, surprisingly more in the UK than the US. While British lawyers constantly (and justifiably) complain about problems with legal aid, the strikes in the British legal community tend to focus on the cut in payment *to the lawyers*, rather than the manifest injustice faced by the clients that result from the underfunding. This is unpersuasive. When we litigated access to justice in the US, we knew we had to focus on the injustices meted out to the clients. We also knew that any resolution we negotiated had to be totally independent of our own income, and if (as often happened) the government would offer a "solution" that involved us waiving legal fees altogether, that was what we had to do. So, we had to raise grant funds and charitable donations to keep cases going while we litigated the lack of resources made available to our clients by the state.

Certainly, the Government *should* pay a fair hour's wage for an hour's work for the *Vilified Minority* – but it is naïve to think it will, because the Government is the source of much of the vilification. Because we must always assume that the *Vilified Minority* has no money at all, our work has to have at least some philanthropic funding, and we have to maximise the efficient use of any state funds we can secure. This does not happen in the UK, to any meaningful extent. For example, one can name the UK charities doing full time criminal defence on the fingers of one hand; in New Orleans, there were that many such NGOs in my small downtown office building alone.

But there is another funding issue that is even more dangerous in the UK – the notion of "adverse costs risk". During the "War on Terror", when I wanted to bring a challenge to the rules governing the UK government's involvement in the American torture of my clients, I was told that the charity I was working with – which had very limited funds – would have to put up £50,000 in a "costs protection" arrangement in case we lost. This eviscerates access to justice. A prisoner being held incommunicado in the Dark Prison in

Afghanistan, for example, cannot be expected to put up thousands of pounds before litigation can begin, and nor should a charity.

The Populist critics of activist lawyers bang on endlessly about well-heeled barristers making a killing off the tax-payer, courtesy of the ECHR. I can say I personally have never been paid a penny of UK taxpayer's money for bringing a case. At the same time, there have been a number of valid cases I could not help initiating due to the adverse costs risk.

The wonderful advantage of the US system is that I can bring any case for any person who has no money, and not worry about whether they are going to get stuck with a bill at the end of it.[4]

All in all, British Justice seems to be much better at providing a venue for the disputes of the rich and powerful – commercial contracts or SLAP defamation cases – than a protective shield for the *Vilified Minority*. The rules established by our government ensure that it is extraordinarily difficult to hold Populists to account, whether they be politicians or media barons.

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Yet there is another tool that is vital for the Vilified Minority to get justice: truly *enforceable rights*. Again, this is an area where the UK falls far short.

The US constitution is not perfect. It was born in the era of both Slavery and an automatic assumption that the world was divided into Nation States.

Sometimes British critics of a constitutional process argue that such a written code prevents the evolution of the law. This is baloney. Of course, it is inevitable that society will evolve, so that a document written in *circa* 1789 will not cover all the problems of the 21st century. The Framers could not have imagined planes, trains, and automobiles, let alone the internet.

Many of them could have imagined an end to slavery and did not wish it to be protected by the constitution. In less than a century it was abolished – with notable exceptions – by the 13th Amendment. Changing the document is one way to keep up with the times. But there are many other avenues: Amending the constitution did not dissolve racist attitudes; for that to progress in any meaningful way the US needed a number of Civil Rights Acts. In Britain, such legislation is the only way to preserve rights whereas in the US you have a bedrock in the constitution on which to construct such legislation on a well-tested and longer lasting foundation.

One valid criticism of the US constitution is that it is a nation state document, focused on the relationship between Citizens and *their* Government. Thus, the US Bill of Rights generally provides protection for all people within US territory, but only to US citizens once they get beyond the boundary. This was again an issue we faced in Guantánamo – the Bush Administration removed the one US citizen from the prison, and then argued that because the base on Cuba was not US Sovereign territory, the US Constitution provided no protection to the *Vilified Minority* held there (foreign Muslim men).

Fortunately, the Bush Administration lost, but the flaw remains for most constitutional rights. By contrast "Human Rights" should, in theory, be available to all humans, not merely people who are parties to a specific country's social contract. One might think that any Human being tortured anywhere in the world could resort to a British court to enforce Rights. This is the notion behind "Universal Jurisdiction," yet it is an idea that the British courts strongly resist.

There is a far deeper flaw in the UK system when it comes to enforceable and inalienable rights. When it comes to the *Vilified Minority*, with the Government often the threat, the British notion of "*Parliamentary Supremacy*" can rip up any safety net of legal rights.

Consider the plight of the *Vulnerable Minority* in the gunsight of the last government: Asylum Seekers. Those seeking safety in Britain certainly have claims under international law, whether it be the ECHR or the UN Refugee Convention. Yet some of the current crop of Tory leadership candidates, most notably Robert Jenrick, want simply to pass a law removing Britain partially or entirely from the European Convention on Human Rights (ECHR), arguing anything short of this allows:

> *"Illegal migrants to make drawn-out individual appeals, fails to carve out Tony Blair's Human Rights*

[4] I do not suggest there should be no protection for those who face frivolous litigation. In the US there are Rule 11 Sanctions, but nobody has ever sought such a penalty in my career, because the claims of the *Vilified Minority* are manifestly not frivolous.

Act sufficiently, and provides insufficient protections against activist injunctions from the Strasbourg Court."

All this, simply so we can spend enormous sums of money flying a few asylum seekers to Rwanda. From the perspective of a US constitutional scholar, such a plan is simply deranged. Yet it is an inevitable consequence of the failure to develop a doctrine of '*Rights Supremacy*' where the courts (and the media) can protect the *Vilified Minority* from the whims of the Populist.

In the UK the notion of *Parliamentary Supremacy* has evolved in an incoherent and irrational way over 350 years.

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To understand the weakness of the British system, we must go back over the strange evolution of British political structures.

Consider first the outline of our parliamentary system. In the wake of 1776, the US Constitution laid out a structure that was similar to the theory of political structure in the UK: an Executive Branch (with President in place of King); a Legislative Branch (with Senate and House rather than Lords and Commons); and a Judicial Branch to settle any differences. The US Constitutional Convention saw this clearly not as a 'pure' Democracy, where there is an overt risk of the *Tyranny of the Majority*. Rather it was to be a Republic, with three independent arms of government that would hopefully act together towards the common good; however, if one Branch (perhaps a Populist President) seemed to be getting out of hand, the others would be there to check any excesses.

It does not work perfectly, but it is a sensible, logical structure.

In the UK, our structural evolution has drifted to the extent that it would no longer be deemed coherent by any political philosopher. To be sure, there has been a "democratic imperative" driving some of the change, since democracy could not abide either an inherited monarchy or a House of Lords where a father passed his political power to his eldest son. Yet the development has been *ad hoc*, without coherent logic.

First the Executive: In the 16th and 17th centuries, with despots who could dissolve parliament at will and have the heads lopped off wives and enemies alike, there was an obvious need to curb power of the monarchy. The notion of *Parliamentary Supremacy* originally, and most obviously, evolved to hold a STOP sign up to the King. Parliament gained significant power as a result of the *Bill of Right and the Claims of Rights Act of 1689* which defined the newly granted powers of the English parliament and the newly limited powers of the monarch in the wake of the deposition of James II the year before.

After that, over many decades, the original Executive lost all its practical authority, such that King Charles III is left with a few irrelevant and arguably inappropriate powers (such as checking his estate is not taxed too heavily). Yet nobody seemed to consider too carefully where the King's erstwhile power would end up.

At the same time the Legislative Branch was bowdlerised. The Lords had once been the most potent of the Houses of Parliament. Gradually, it lost much of its clout. It was reasonable enough to question the notion of an inherited peerage, just as it had been with the monarch. But democratic common sense did not necessarily mean the second chamber should be weakened – merely that it should be subject to elections. Instead, the Lords was emasculated, based on arguments about its un-democratic nature, yet we have kept a system of appointing members (one of only three unelected second chambers in Europe). The appointment system is manipulated by the parties in a manner that is generally incomprehensible, if not offensive to the very notion of democracy.

The Lords continues to be a good example of the strange world of British political evolution. By 1999, the number of Lords had swollen to 1,330 – twice the size of the Commons, and the second largest legislative body in the world after the National People's Congress of the People's Republic of China. A small step towards democracy took place in the 1999 Act, reducing the overall number to 669. Yet this still included 92 hereditary peers (why?) and 26 bishops from the Church of England (why again, and what about the other faiths?). When Jack Straw issued his plan for further reform in 2009, I was astounded to read that he felt that the Church of England should keep their seats until the Archbishop of Canterbury decided they should give them up. Yet nothing became of even Straw's modest proposals. As of 2021 the total number had randomly *risen* again, by almost a quarter to 818.[5]

[5] Lord Terry Burns, *The House of Lords is too large: party leaders must put aside short-term interests and agree plans to reduce its numbers* (June 5, 2021), available at

Unsurprisingly, given the continuing undemocratic nature of Britain's second chamber, there is little appetite when it comes to restoring meaningful power to the body.

Just as with the Executive Monarchy, the power of the Lords had to trickle away somewhere. The power of both ended up with a 'presidential' Prime Minister and a hand-picked cabinet. This is a system that is ripe for a takeover by a Populist, whether that might be Boris Johnson or someone even worse. The PM has the power unilaterally to do extraordinary things – as well illustrated by Liz Truss' lettuce-long tenure, where she and Kwasi Kwarteng cost each person in the UK large sums of money. They were able to unilaterally play with the economy as if it were a Monopoly board.

Indeed, the *un*democratic first-past-the-post electoral system contributes to the power of the Presidential Prime Minister: it generally results in a majority party in the Commons, such that the leader of that party meets few challenges.

It is now the *Tyranny of the Small Plurality*, because the Presidential Prime Minister probably may only need one fifth of the electorate to secure a massive majority. (In 2024, it was just 20.22%, as Labour secured 33.7% of the actual vote, on a 60% turn out.)

All this concentration of power, untrammelled by a written constitution, deprives Britain of any democratic coherence in other ways. When Gordon Brown wanted to stave off Scottish Independence, he essentially scribbled devolutionary changes on the back of a parliamentary cigarette packet. When David Cameron wanted to hold the Eurosceptic Wing of his own party at bay, he whipped out his own cigarette packet and declared a catastrophically ill-judged referendum without any consideration of what might happen if Scotland or Northern Ireland wanted to remain in the EU.

To call the Prime Minister 'Presidential' actually underestimates the role of Number Ten. The US President would give a kidney to have such unchecked power. The Prime Minister is not limited by a Lords (the Senate), barely has to pause before the Commons (the House), and only visits King Charles (the actual Executive) now and then, freely ignoring anything he might say.

It was perhaps the unprincipled impact of this evolution of the Judiciary that most obviously deprived the *Vilified Minority* of an effective shield. This comes about in large part due to a misunderstood notion of *Parliamentary Supremacy*.

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Back in 1689, the idea of *Parliamentary Supremacy* had nothing to do with limiting the judiciary – it was a power grab from the King. Indeed, even 300 years ago, it was clear in the UK that judges needed to be made independent of the monarch too. The *Act of Settlement of 1700* was a limited and imperfect step in that direction. The legislation was primarily aimed at ensuring a Protestant succession to the throne, but in passing it ended the royal habit of dismissing judges whose rulings irked them, and instead provided that a judge could only be removed by a vote of both houses.

This was a step towards *empowering* the judiciary. Nearly a century later, in 1789, the American Colonists would take this further, and create a Supreme Court where the justices could remain for life, with ultimate power to interpret the meaning of the law. The law was their bailiwick and nobody else (President, Senator or Representative) could take away the power to declare an action contrary to the Constitution.

In the UK, meanwhile, the notion of "*Parliamentary Supremacy*" was gradually misconstrued to give Parliament the power over judges, as well as the monarch. Something approaching reverence for this idea seems to permeate the British Establishment. The former president of the UK Supreme Court, Lord Tom Bingham, was a delightful and brilliant person who I used to meet in the pub from time to time. Over a pint, he would outline his view that Parliament was almost always supreme: if they didn't like one of his judgements, they could generally overrule it by changing the law.

This is Parliament's own view of its power, is described in its own website as follows:

> *Parliamentary sovereignty is a principle of the UK constitution. It makes Parliament the supreme legal authority in the UK which can create or end any law. Generally, the courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change. Parliamentary sovereignty is the most important part of the UK constitution.*

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https://constitution-unit.com/2021/06/25/the-house-of-lords-is-too-large-party-leaders-must-put-aside-short-term-interests-and-agree-plans-to-reduce-its-numbers/.

Supporters of this interpretation mutter about it being the essence of democracy, the expression of the will of the people. Yet it is really a reflection of an extreme form of 'democracy' that would have been rejected by John Stuart Mill because it fosters the *Tyranny of the Majority*: absent the checks and balances found in the US Constitution, Populist Prime Ministers can do almost anything they wish, leaving the *Vilified Minority* totally exposed.

One only has to see what came of those in Rishi Sunak's cabinet. James Cleverly, who once described the Rwanda rendition project as "batshit crazy", swung behind Sunak, who had lately decided that this hateful Populist folly was his best bet at re-election. Had he gone so far as to propose legislation removing ECHR oversight over the programme, there is every chance the Conservative majority would have voted it through. If they had, lawyers would have struggled to find how to waylay it.

The consequences of this imbalance of power manifest and stretch across the continent.

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While right-wing Europhobes bleat about the European Court of Human Rights (ECHR) as if it is a brutal constraint on the liberty of Britons, in truth it is woefully weak document compared to the US Constitution.

Again, it is worth revisiting history for a moment: it is perhaps ironic that the European Convention of Human Rights (the "Convention"), was drafted largely under the supervision of Sir David Maxwell Fyfe, later a Conservative Home Secretary; the UK was the first country to ratify the Convention in 1951; and Lord McNair, a British legal scholar, became the first President of the ECHR in 1959. All of this came to pass in the aftermath of World War Two as the dangers of fully-fledged Fascism were fresh in the memories of all. Over time, memory fades, and the rise of Populism reminds us that if we do not learn the lessons of history we are doomed to repeat them.

If one wants to criticise the ECHR, it would be best to focus on how weak it is, rather than on how it should be curtailed. For example, it is not easy for an average citizen to bring a case before the court – the litigant must go through the domestic British legal system first, with all its limitations described above. Once a complaint arrives in Strasbourg, it may take years to be heard. But even if a member of a *Vilified Minority* wins, the member states – often hostile – can take years to implement a decision.

Not long ago, the Parliamentary Assembly of the Council of Europe has raised as a "major source of concern" the delay in which many states take to executing judgements:

> *"The slow execution of Court decisions is a problem in a number of cases. In its recent annual report on the supervision of the execution of judgments, the Committee of Ministers notes for instance that although the percentage of cases pending for less than two years has decreased, the percentage of leading cases under supervision for more than two years has increased in 2010, as compared to 2009. There are currently more than 9,000 cases awaiting execution."*[6]

The assembly has credited these delays to "chronic non-enforcement of domestic judicial decisions; ill-treatment by law-enforcement officials and a lack of effective investigations thereof; unlawful detention; and excessive length of detention on remand."[7]

Delay in enforcement is one thing and goes to the heart of the legitimacy of the court. But there is an even more profound problem: politicians playing at Populism across Europe know they can get away with simply ignoring the rulings of the Court. Some of the *Vilified Minorities* on the receiving end of this are sadly predictable, as are the Populist culprits.

The Roma are a *Vilified Minority* in almost all European countries. In *D.H. and Others v The Czech Republic,*[8] eighteen Roma children, Czech nationals, claimed that they had been the victims of discrimination in education as, based primarily on their ethnic origin rather than anything else, they were placed in schools intended for children with intellectual disabilities. This made it more difficult for them to gain access to other levels of education, thus reducing their chances of flourishing in society.[9] While the

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[6] https://www.coe.int/tr/web/commissioner/-/judgments-issued-by-the-european-court-cannot-be-ignor-1

[7] https://www.coe.int/tr/web/commissioner/-/judgments-issued-by-the-european-court-cannot-be-ignor-1

[8] *D.H. and Others v The Czech Republic, Application No. 57325/00*

[9] Discrimination in education of children in central and eastern Europe in the jurisprudence of the European

court ruled in favour of the Roma children, the Czech Republic ignored it. Other member states, including Albania[10] and North Macedonia,[11] lost similar litigation, and also ignored the rulings.

Those who stand up for a *Vilified Minority* – the human rights advocates – are also targeted by Populists. In *Kavala v Turkey*[12] a landmark judgement was announced against Turkey for its continued failure to carry out the court's order to free the human rights defender, Osman Kavala. Likewise, the case of *Ilgar Mammadov v. Azerbaijan*[13] involved another opposition politician whose detention had been declared illegal, where Azerbaijan simply ignored the judgement. Authoritarian populists do not want to respect the rights of their critics.

Yet perhaps the most overt public scorn for an ECHR judgement involved the UK. One *Vilified Minority* in Britain is, of course, the "Criminal". In the case of *Hirst v. the United Kingdom (no. 2)*, ECHR 74025/01 (2004), the Court held that Britain's *carte blanche* disenfranchisement of 70,000 people who had been sent to prison violated the right to vote. The judgement allowed for various solutions, but Populism was already on the rise in Britain.

In 2011, by an overwhelming margin of 234 to 22 vote, the Commons called for the blanket ban to be maintained, refusing to fall in line with the ECHR judgement.

One of the more reasonable Tories, Attorney General Dominic Grieve, said that ultimately parliament could choose to ignore the ruling based on Parliamentary Supremacy:

> *"It is entirely a matter for parliament ultimately … to determine what it wants to do," he said. "Parliament is sovereign in this area. Nobody can impose a solution on parliament."*[14]

Perhaps the most extreme comments came from Prime Minister David Cameron. When told he must change the law to give some "Criminals" their franchise back he said this made him "physically ill".[15] What would happen if Cameron had said the idea of giving the vote to women, gays, or black people made him feel "ill"? This would surely have exposed him to prosecution under the UK 'Hate Speech' laws. However, there was no chance that Cameron would be put in prison with the very people they were vilifying.

The *Hirst* case stands out as a pristine example of how the British justice system is not equipped to protect the *Vilified Minority*. As far as you, the Stone Catcher, are concerned, the system is not fit for purpose.

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In the end, we must consider what the role of the Judiciary really is, and whether the UK has the balance of power seriously awry.

To be sure, the Supreme Court in both the US and the UK decides all kinds of cases. They both reconcile competing interests between elements of the nation – one state and the federal government, or the extent of devolution to Scotland. They both resolve disputes between corporations, based on company law.

While all these issues can, at times, be important, it is my view that the consistently vital function of a judiciary is to protect the weak against the strong. I can't say that I really worry too much about the rich and powerful, as they can protect themselves in a variety of ways, and they are generally worried about issues that are vastly less significant than life and liberty. I can't get too exercised about disputes between corporations, as they would do much better to mediate their disagreements than each pay extortionate legal fees in an adversarial court.

Court on Human Rights, Velina Todorova, 585

[10] *X and others v. Albania (Applications nos. 73548/17 and 45521/19)*

[11] *Elmazova and Others v. North Macedonia (Applications nos. 11811/20 and 13550/20)*

[12] No 28749/18 (2019). See Emre 3 EHRLR 288 (2020). The Court had found that he was detained in order to silence him in violation of Article 18.

[13] *Ilgar Mammadov v. Azerbaijan,* ECHR Application no. 15172/13 (2019).

[14] Patrick Wintour & Andrew Sparrow, *I won't give prisoners the vote, says David Cameron*, The Guardian (Oct. 24, 2012), available at https://www.theguardian.com/society/2012/oct/24/prisoners-vote-david-cameron.

[15]

But when it comes to protecting the rights of the *Vilified Minority*, the courts should play a vital role. I have had five cases go to the United States Supreme Court and each time it has been a question of whether the all-powerful Government (Federal or State) has the power to trample on a particular individual, a citizen (in the capital cases) or a foreigner (with respect to Guantánamo Bay). On each occasion, even the super-conservative Supreme Court has sided with the *Vilified Minority*. The success I have had in these cases is down to the fact that the American rules are explicitly in place to prevent the *Tyranny of the Majority*. In this sense, the structure of the US judiciary is fashioned precisely to protect the Weak from oppression by the Strong.

The US does not always get it right, but at least a logical structure is in place to allow for this. The same simply cannot be said for the UK. Until we see this, we cannot expect the debate to focus on appropriate change. And without significant change the courts will be ill-equipped to support us as we attempt to catch the fast-flung stones.