FIVE IDEAS TO FIGHT FOR

'Illuminating and accessible . . . [Lester] speaks with enormous authority . . . *Five Ideas to Fight For* summarises what we have gained, and the dangers we still face from political hostility, ignorance and apathy.'

David Pannick, QC, *The Times*

'Anthony Lester has throughout his life – and often far in advance of his times – been an eloquent fighter for freedom of speech, equality under the law, protection from official arbitrariness and much else besides. His views and actions – as lawyer, legislator and citizen – have often irked those in power but have conduced to justice, human dignity and a sense of reasonableness and decency in the world around him. In this book he combines legal and political argument with telling personal anecdote – and he does so with a most engaging combination of practicality and passion.'

Vikram Seth, author of *A Suitable Boy*

'The five ideas the great human rights lawyer, Anthony Lester, calls us to fight for are the foundations of liberty in the modern world. Today they are besieged by intolerance, cynicism and indifference.'

Shirley Williams

'All the forces that, for decades, abused the human rights of the thalidomide children, are on the rise again in an ugly xenophobic populism: those who have the loudest voices have the smallest vision. They must be repulsed and there is no better person to summon us to the ramparts than the author of this exciting book.'

Sir Harold Evans, editor-at-large for Thomson Reuters and former editor of *The Sunday Times*

'Anthony Lester has spent his life in the dedicated pursuit of freedom and justice, both as a lawyer and as a member of the House of Lords. We need to listen to his urgent case for upholding these core values and be inspired by the courage and passion with which he continues to fight for them.'

Mary Robinson, President of the Republic of Ireland, 1990–1997, and former UN High Commissioner for Human Rights

'Animated by the desire to protect fundamental human rights and freedoms in a long and distinguished career in law as a practitioner and lawmaker, Anthony Lester makes a passionate case for the defence of these rights – so hard won and so much under threat today.'

Southall Black Sisters

'This is a clarion call to action for all of us, in the United States as much as in his own country. *Five Ideas to Fight For* should be required reading for every lawyer and every politician.'

Hon. Margaret H. Marshall, former Chief Justice, Supreme Judicial Court, Massachusetts

'Reading this book is like holding a conversation with [Lord Lester]. His opinions and his arguments are bracing and incisive and the entire experience is intellectually exciting.'

Aryeh Neier, president emeritus of the Open Society Foundations and former executive director of both Human Rights Watch and the American Civil Liberties Association

'A challenging, and compelling, agenda for change.'

Harold Hongju Koh, Sterling Professor of International Law at Yale Law School and former Legal Adviser to the US Department of State under President Obama

'Eloquent, liberal and street-wise, Lord Lester makes a compelling case against complacency.'

Geoffrey Robertson QC

'Anthony Lester's *Five Ideas* are those which have made the United Kingdom a free country. He himself has fought to maintain them, both in the courts and in Parliament, often with signal success . . . A very good read.'

Sir Sydney Kentridge QC

'*Five Ideas to Fight For* is the powerful and provocative distillation of a lifetime of conviction.'

Marian Wright Edelman, President and CEO, Children's Defense Fund

'Lord Lester's five principles are of immense importance to everyone in this country. They go to the heart of British values.'

Lord Woolf of Barnes, former Lord Chief Justice

About the Author

Anthony Lester QC is Britain's most eminent human rights lawyer. In 2007, he received the Liberty and Justice Judges' Award for a lifetime of achievement in the service of human rights. He is a Liberal Democrat Peer and a frequent commentator on law and public policy.

Five Ideas *to* Fight For

How Our Freedom Is Under Threat and Why It Matters

ANTHONY LESTER

A Oneworld Book

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Australia by Oneworld Publications, 2016
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For Katya, Gideon, Maya and Benjamin.

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This book began three years ago prompted by Zoe McCallum, a postgraduate working for the Bill of Rights Commission. I needed to be persuaded because there are too many self-serving political memoirs and lawyers' casebooks, and I did not want to add to them. But Zoe prevailed and has collaborated in drafting and editing a book about the ideas for which I have fought. She is an exceptional young writer and political advocate (soon to be at the Bar).

My wife Katya patiently supported my work and writing and my tilting at windmills. Without her loving support I would have achieved little. Our son Gideon, who escaped law for theatre in the USA, suggested the title and shaped the work. Our daughter Maya, a far better barrister than me, enriched my understanding of the law and beyond.

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I of course take full responsibility for the contents of the book, and for errors of fact and judgement.

NO TIME FOR APATHY

This book charts the ways that ideas about human rights, equality, free speech, privacy and the rule of law have evolved over the last sixty years. It explains why they matter, how well they are protected, and how they are threatened. It describes what has been achieved, how it happened, and what we need to fight for now. There is never a time for apathy, especially now.

This is not an autobiography, though some account of my life is given where relevant. It is not a lawyer's casebook, though cases I have argued are discussed where they have inspired reforms. It is not a political memoir, though it is highly political. It is not a scholarly work, but rather an overview of practical change in the five fields, drawing on my experience as a barrister, parliamentarian and campaigner – at home and abroad.

I want to show that it is possible to bring about change and to encourage active engagement. The British political system has been decaying for decades and is falling apart. The main parties are split into hostile factions. They play clumsy games with our fragile constitution, like children playing with boxes of matches. The American diplomat Dean Acheson once observed that

Britain had lost an empire but not yet found a place in the world. That remains true. Britain is only half in Europe, a semi-detached and grumpy member punching below its weight and size. Foreign invasions, terrorism and mass migration have bred fear and insecurity, conditions easily exploited by extremists.

Our increasingly disunited kingdom is threatened by powerful forces of nationalism – pressure exerted by those who would quit the European Union or the United Kingdom or both, and from those who would impose their values and beliefs on the rest of us. This threatens our secular tradition. There is a risk that our governors may sleepwalk the UK into leaving the European Union, and that Scotland may leave the rest of the UK, and that Northern Ireland will remain politically polarised.

Disintegration of the UK and disengagement from Europe would weaken our capacity to tackle the problems that cannot be solved by a single country – perplexing problems of corruption, inequality between rich and poor, racism, terrorism, xenophobia, the misuse of religion as a weapon of mass destruction, and the devastation of the global ecosystem.

The Astronomer Royal, Martin Rees, has warned that we are 'destroying the book of life before we have read it'. The pressures of a growing human population and economy, on land and on water, are already high and we have a responsibility 'to our children, to the poorest, to steward the diversity and richness of life on earth'.[1] Working across Europe and beyond it, we must also tackle world hunger, disease and over-population; the effects of wars that have destroyed stable societies and resulted in millions of refugees; terrorism, racism and political extremism.

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1 'Scientists and politicians alike must rally to protect life on earth', *Financial Times*, 6 September 2015.

This is the worrisome context in which the book explores the five ideas I have chosen to fight for. They reflect my practical experience and personal choices. They are not presented as a hierarchy of greater and lesser importance. The ideas are interdependent but each is looked at separately. Each has a particular history and its own dilemmas and puzzles. Each is under threat.

Do we really know why we are the way we are? Short of consulting a psychiatrist, I cannot be sure why I have spent my adult life fighting for these ideas. It had to do with my upbringing by Jewish parents whose European relatives had been murdered in the Holocaust and who sympathised with disadvantaged people. It had to do with my education at a liberal school – Asquith's City of London School – in the 1950s, and with feeling the pinpricks of English anti-Semitism during National Service. It had to do with what I learned about politics when I studied history at Cambridge (discussed in the 'Equality' chapter).

When I left Cambridge in 1960, I had been put off a legal career by the austere diet of English law on which I had been fed. The unwritten common law was the staple curriculum for law undergraduates. Acts of Parliament were treated as unfit for university study. One ancient law professor from my college lamented the fact that industrial law and family law were entering the syllabus even though they sprang from statutes.

I learned about the legal rules governing contracts, torts (civil wrongs) and crime but little attention was paid to law in context. Public law was undeveloped. My mentors, like the judges at that time, were uncritical of the way that state powers were used. Written constitutions were regarded with disdain as suitable only for less mature societies than ours. There was no developed equality or human rights law. English judges, sitting in the Judicial Committee of the Privy Council in appeals from the

former Empire, gave judgments condoning racial discrimination in Africa and Canada.

In 1962, I came back from the United States reluctantly, to a country whose rulers were depressingly complacent. At Harvard Law School I had learned the benefits and burdens of a written constitution and Bill of Rights. I had seen from abroad the flaws in the English legal system, which was narrowly legalistic and ethically aimless – without a compass to steer by. In those days, our most senior judges, the Law Lords, had denied themselves the power to overrule a previous judgment even if it was wrong.

I went back to the States for Amnesty International during what became known as the long hot summer of 1964. I was tasked to report on racial justice in the Deep South. It was a transforming experience. When I returned home and began to practise at the Bar in 1965 I was determined to use what I had learned and seen to protect human rights. I was uncomfortable in the snobbish, male-dominated, racist and arrogant world of the English Bar in those far-off days. I was initially refused a tenancy in my chambers on the ground that I was too political – too close to politics and the press. At that time I regarded the American system of government under law as vastly superior to ours.[2]

But the spirit of the age was beginning to change. It was reflected in the work of a new breed of legal scholars who were

2 I no longer think so. American judges are politically appointed or elected. Elections are dominated by wealth and the electoral machinery is wide open to corruption. The politically polarised US Congress filibusters obstruct much needed reforms on healthcare, gun control and other important topics. Public figures are defamed by wickedly untrue libels by Fox News and other media. Racism persists in criminal justice and prisons, and the death penalty is still lawful.

internationally minded. They understood the need for stronger safeguards against the misuse of the powers of the state. In 1959, Stanley de Smith had published his seminal work *Judicial Review of Administrative Action*. In 1961, after I had left Cambridge, H.R.W. Wade, my former mentor in property law, published *Administrative Law.* In 1963, Harry Street published *Freedom, The Individual and the Law*, the first survey of civil liberties in Britain. A year later, de Smith published *The New Commonwealth and its Constitutions*.

These oracles encouraged me to hope that a change of government to Labour would be infused with this new spirit. I was sadly mistaken. In 1963, Gerald Gardiner, soon to become Lord Chancellor in Harold Wilson's Labour government, published a book of collected essays with Andrew Martin, soon to become a member of the Law Commission. It was entitled *Law Reform Now.* Many of its proposals were progressive but the book said nothing about the need to protect fundamental human rights. At a time when the judges were executive-minded and timorous in challenging government decisions, one essay on administrative law in the book even rebuked judges for being over-enthusiastic in using their powers of judicial review.[3]

In 1966, the Wilson government allowed cases against the UK to be taken to the European Court of Human Rights in Strasbourg. But it shied away from making rights enshrined in the European Convention on Human Rights part of domestic law, or strengthening the courts' ability to curb abuses of power. A year later I argued the first British case to the European Commission of Human Rights on behalf of a Pakistani mill

3 *Law Reform Now* (London: V. Gollancz Ltd, 1963), p. 52. The essay was presumably written by John Griffiths, a fierce left-wing critic of the judiciary for what he regarded as its reactionary decisions.

worker from Bradford and his young son, who had been refused permission to join him in the UK. We won the argument and the government undertook to allow the boy to join his father. It also promised to introduce an immigration appeal system – the first of its kind.[4] That made me appreciate that the European Convention system could provide remedies where there were none in our courts.

The following year, in 1968, Harold Wilson's Labour government rushed an emergency Bill through Parliament in three days and nights. It took away the right of British Asians from East Africa to enter and live in the UK. It was racist, and in breach of a pledge by a previous British government – that if East Africa's newly independent governments expelled British Asians, they would retain the right to settle in the UK. But because the Westminster Parliament is supreme and the courts cannot strike down Acts of Parliament, the only way of challenging the law was to complain to the European Commission of Human Rights in Strasbourg. That seemed to me to be absurd. The Commission was a vital long stop – but we needed effective remedies for violations in our own courts.

In November 1968, I gave a Fabian lecture advocating a Bill of Rights built on the European Convention on Human Rights. It would put a protective fence around fundamental rights and freedoms.[5] There were plenty of American but few British thinkers that I could rely on to support my argument. In 1859, J.S. Mill had warned in his essay *On Liberty* against populism becoming a weapon of arbitrary power – the 'tyranny of the majority'. Eight decades later, in 1939, H.G. Wells had championed the

4 *Alam and Khan v United Kingdom* Application 2991/66 (1967).

5 *Democracy and Individual Rights*, Fabian Society Tract 390 (London: Fabian Society, 1969).

need for an international declaration of human rights. In 1945, Hersch Lauterpacht (later to become the British judge on the International Court of Justice) published his seminal work *An International Bill for the Rights of Man*, which faced up to the English dogma of parliamentary sovereignty. Harold Laski, influenced by his contact with the United States, observed in 1948 that the real value of a Bill of Rights was to act 'as a rallying-point in the State for all who care deeply for the ideals of freedom.'[6]

The *New York Times* chief London correspondent, Anthony Lewis, attended my lecture. He agreed with the need for a modern British Bill of Rights based on the Convention but doubted it would ever come to pass. Most British thinkers fifty years ago regarded the idea of fundamental rights with disdain – suitable for the United States or Napoleon's Europe or newly independent Commonwealth countries, but not for the United Kingdom. Ivor Jennings, a leading British constitutional scholar and grand poo-bah of his day, regarded India's written constitution with disdain. In 1954, Herbert Morrison, former Deputy Prime Minister, published *Government and Parliament*, glorifying the status quo without any mention of abuses of power or the rights of the individual. In 1957, Prime Minister Harold Macmillan told his fellow Conservatives that the British had 'never had it so good'.

In several cases I tried to persuade our judges to take human rights more seriously, quoting American and European analogies. My successes were few. I found that I was able to achieve more in two years as special adviser to Roy Jenkins at the Home Office – in 1974–76 – than in ten years at the Bar. We shaped sex

6 Harold Laski, *Liberty and the Modern State* (London: George Allen & Unwin Ltd, 1948), p. 65.

and race discrimination laws and advanced the case for a British Bill of Rights.

When I returned reluctantly to the Bar in 1976 I no longer had a practice in commercial law. But I developed a practice in what is now known as public law – the judicial review of the actions of public bodies to ensure they act lawfully, rationally and fairly. I acted as well in cases on equality, free speech, privacy and other human rights, making submissions before a new generation of judges whose values were very different from those of their predecessors.

Meanwhile, the Labour Party turned against Europe and liberalism and became dominated by trade union corporatism. My political life declined after I was rejected as a parliamentary Labour candidate whose views were out of favour. When the Gang of Four[7] broke with Labour and set up the Social Democratic Party I went with them, and later joined the merged Liberal Democrats. During that time my barristers' chambers were enriched by a new generation of women and men – better educated than we had been and keen to take on public interest cases.

There were clear limits to what could be achieved using the judicial process. In 1993, I turned down the offer of a High Court judgeship for which I was ill suited. Thanks to Paddy Ashdown, then leader of the Liberal Democrats, I became a member of the House of Lords instead, focusing on the constitutional and human rights issues that I cherish.

Peers are unelected and independent-minded – counter-majoritarian and sometimes in the vanguard of ground-breaking reform. About a fifth of the House of Lords are not appointed by the political parties. That secures our independence. Because of

7 Roy Jenkins, Shirley Williams, Bill Rodgers and David Owen.

them, the government does not have a commanding majority and can be defeated by cross-party alliances. We have much more time than members of the Commons to debate and introduce reforming Bills. And among the politicians of yesteryear are experts in many fields, including law and government, academia and the professions.

For all but the five years of coalition government, I have sat on the opposition benches under Conservative and Labour governments, working with colleagues from all parties and none, as well as civil society. My maiden speech was about the need for better human rights protection. I used public lectures and questions to ministers and Private Members' Bills to achieve reforms – Bills on human rights, equality, civil partnership, forced marriage, constitutional reform and defamation.

When Gordon Brown replaced Tony Blair as Prime Minister in 2007 he made a powerful statement on the case for constitutional reform. I was invited informally to rejoin the Labour Party and become a minister. When I declined I was invited to become an unpaid independent adviser to the Lord Chancellor, Jack Straw, as what became known as a 'goat' – a reference to a 'government of all the talents'. My experience as a tethered goat inside Gordon Brown's big tent was an exercise in futility. I resigned after fifteen months when it became plain that Gordon Brown, Jack Straw and their colleagues had wasted the opportunity of a generation for constitutional reform.[8]

There was one redeeming achievement by the Brown government before it lost power. Under Harriet Harman's determined leadership, what became the Equality Act 2010 was successfully navigated. It became law on the eve of the General Election on 6

8 Anthony Lester, 'My misery as a tethered goat in Gordon Brown's big tent', *Guardian*, 27 July 2009.

May 2010. It was modelled on my Private Member's Equality Bill, introduced seven years before, and had crucial support from the Liberal Democrats.

The five years in coalition with the Conservatives were painful because we Lib Dems had to support measures with which we strongly disagreed. An embarrassing example of excessive loyalty arose during the passage of the Public Bodies Bill designed to axe or merge many 'quangos'.[9] The former Lord Chief Justice, Lord Woolf, had accused ministers of treating some of the quangos in a cavalier fashion. So I introduced an amendment restricting the way ministers could use their new powers by forcing them to ensure that they respected judicial independence and human rights.

The government was vigorously opposed to my amendment. When I was strong-armed I tried to withdraw it – but the cross-benches objected and my amendment was passed.[10] From a surfeit of loyalty I voted idiotically against my own amendment. I am much happier to be back in opposition, no longer having to perform political contortions to vote for unconscionable proposals.

The Liberal Democrats suffered a devastating defeat in the 2015 General Election, but I do not believe that the British people rejected liberalism. The current government wants to suppress extremist activity, and the Prime Minister and Home Secretary define extremism as 'vocal or active opposition to fundamental British values'. Those surely are the values of a liberal society that include freedom for political dissent and respect for human rights and the rule of law (see the 'Free Speech' chapter).

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9 Quasi-autonomous non-governmental organisations.

10 HL Deb 23 November 2010, vol. 722, cols. 1010–1041.

Those fundamental values are threatened not only by terrorists but by the state and its agents and populist politicians. Human rights are under threat at home and abroad. So is the international reputation of the UK as a country that respects the European rule of law. David Cameron's government was elected with a pledge to tear up the Human Rights Act, replacing it with a 'British Bill of Rights and Responsibilities'. It is not likely to give greater protection to our rights and freedoms than what we have now. The European Court of Human Rights is under attack by ministers for having supposedly undermined the sovereignty of the Westminster Parliament.

Successive governments have continued to flout the Strasbourg Court's judgments requiring at least some convicted prisoners to be entitled to vote in parliamentary elections. That violates our international legal obligations. It sets a shameful example for pseudo-democracies when they too violate human rights.

I hope that this book will encourage readers to fight for the country we love – and for a more open, democratic society based on equal justice under the rule of law. Each chapter highlights the history, the threats we face and the challenges to human rights, equality, free speech, privacy and the rule of law.

1

HUMAN RIGHTS

'Power is delightful and absolute power is absolutely delightful.'
Notice on a Home Office immigration official's desk in the 1960s

'For too long we have been a passively tolerant society, saying to our citizens "as long as you obey the law, we will leave you alone".'
David Cameron (13 May 2015)

The way we protect human rights is under sustained attack. Politicians and sections of the press peddle lies and distortions about the European Convention on Human Rights, the Strasbourg Court and the Human Rights Act. They allege that the system distorts justice, preventing evil people from getting their just deserts. They complain that it hampers governments in tackling terrorism and serious crime. They decry rulings preventing deportation to a country where there is a risk of torture or the death penalty. They object when a court rules that bed and breakfast owners must not refuse to accommodate a gay couple. They blame the Human Rights Act when our soldiers are made to account for

complicity in torture. They accuse the Strasbourg Court of undermining democracy by being too activist and overriding our sovereign Parliament.

The phrase 'human rights' has become a buzzword used to attack judges and the rule of law here and in Europe. It has weakened public confidence in the system that protects our basic rights and freedoms – as well as public confidence in our judges, who cannot answer back.

Journalists and the public need human rights law to protect a free press. Newspapers rely on the Convention to protect free speech, but many editors and their owners do not accept that they must respect the human rights of those whose private lives they expose for commercial gain. That is one reason why the public is fed a diet of half-truths and downright lies about the so-called 'threats' to our way of life. Story after story is run each week attacking what they describe as 'this human rights farce',[1] calling the Human Rights Act a 'gift to our enemies',[2] and demanding that the government ignore the rulings of 'this foreign court'.[3] That makes good

1 E.g. 'New human rights farce as police are afraid to release crooks' mugshots', *Mail on Sunday*, 14 July 2014; 'Criminal freed in human rights farce put teacher in fear', *Daily Mail*, 30 May 2011; 'This human rights farce', *Daily Mail*, 25 May 2007; 'May: I will kick foreign lags out: Home Sec vows to end human rights farce', *Sun*, 3 October 2011; 'Human rights "farce": Exclusive home office fury after drug dealer immigrant wins right to stay in UK because of his "family life" ', *Sunday Telegraph*, 28 April 2013; 'Human rights "farce" let 300 criminals stay in UK', *Express*, 3 September 2013; 'Human rights "farce" over migrant checks', *Express*, 3 August 2013.

2 'Human Rights Act is a gift to our enemies', *Daily Mail*, 8 November 2013.

3 E.g. 'The European Court of Human Rights is an absurd yoke around Britain's neck', *Telegraph*, 22 May 2012; 'Vote is criminal', *Sun*, 19 January

copy and boosts sales, as does salacious gossip about the private lives of public figures. But it undermines public confidence in the very system that protects their and their readers' free expression.

Populist ministers are also to blame. In September 2013, the Home Secretary, Theresa May, voiced her frustration at her inability to deport the radical cleric Abu Qatada to Jordan because of the risk that evidence gained through torture might be used against him in a trial there. She found it ridiculous that the government should have 'to go to such lengths to get rid of dangerous foreigners'. That is why, she explained, 'the next Conservative manifesto will promise to scrap the Human Rights Act . . . It's why the Conservative position is clear – if leaving the European Convention is what it takes to fix our human rights laws, that is what we should do'.[4]

The then Lord Chancellor, Chris Grayling, also declared his hostility to the Act and the Strasbourg Court. Kenneth Clarke and Dominic Grieve were the only two Conservative ministers within the coalition to stand up publicly for the European rule of law. Clarke retired and Grieve was removed from office shortly afterwards.

It was not ever thus. After the Second World War, the Conservative Party led the way under Winston Churchill and David Maxwell Fyfe in creating the Convention system. Yet now the Cameron government wants to tear up the Human Rights Act to replace it with a 'British Bill of Rights'. It invokes the

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2011; 'It would make a mockery of justice but foreign judges could rule that Britain's mass murderers have a human right to be set free', *Daily Mail*, 27 November 2012.

4 'Conservatives promise to scrap Human Rights Act after next election', *Guardian*, 30 September 2013.