THE DENNING LECTURE 1993

THE EUROPEAN CONVENTION ON HUMAN RIGHTS: TIME TO INCORPORATE

THE RIGHT HONOURABLE
SIR THOMAS BINGHAM,
Master of the Rolls

The Bar Association
for Commerce, Finance and Industry.

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It is a great pleasure, and of course a great privilege, for anyone who admires and repects Lord Denning as much as I do to be asked to give this lecture bearing his name. Such a lecturer also enjoys a position of special advantage, for Lord Denning's influence on the law during his long judicial career was so pervasive and so profound that almost any topic of the lecturer's choice could be justified as reflecting one of his special interests.

I would confidently hope that human rights, the subject of this lecture, qualifies and I am reassured to know that the argument I shall be advancing is one which Lord Denning, after some initial hesitation, came to support. [1] For there is no task more central to the purpose of a modern democracy, or more central to the judicial function, than that of seeking to protect, within the law, the basic human rights of the citizen, against invasion by other citizens or by the state itself. I hope this point is too obvious to need labouring. But I cannot resist two quotations. The first is from an Italian lawyer, who wrote (perhaps significantly) during the 1930s that

> "the state finds its highest expression in protecting rights, and therefore should be grateful to the citizen who, in demanding justice, gives it the opportunity to defend justice, which after all is the basic raison d'etre of the State." [2]

The second quotation is from the agreed statement issued at the end of an international conference on human rights, over which the Lord Chan-

[1] *Anthony Lester, QC, "Fundamental Rights: The United Kingdom Isolated?" (1984) Public Law, p.63, footnote 83.*

[2] *Piero Calamandrei, Eulogy of Judges, ALI-ABA, 1992*

cellor presided, held in Oxford in September 1992:

> "In democratic societies fundamental human rights and freedoms are more than paper aspirations. They form part of the law. And it is the special province of judges to see to it that the law's undertakings are realised in the daily life of the people." [3]

When, as sometimes happens, one right conflicts with another (the right of free expression, for instance, with the right to privacy) then the judge has, so far as the law allows, to reconcile the two.

I would suggest that the ability of English judges to protect human rights in this country and reconcile conflicting rights in the manner indicated is inhibited by the failure of successive governments over many years to incorporate into United Kingdom law the European Convention on Human Rights and Fundamental Freedoms. But I should like, in the manner of the modern fast bowler, to take a rather lengthy run up to that question, making some preliminary observations about the constitution.

Lord Hailsham, I think, once observed that judges are usually illiterate in constitutional matters. I should therefore preface my observations with a health warning. But I shall not talk a great deal of rubbish on this particular subject because I shall not say a great deal about it at all.

Most of us, I suspect, were reared on a fairly straightforward Diceyan concept of the constitution. The centrepiece of this was of course a sovereign parliament, able to do anything except make a man a woman or a woman a man. The executive was another arm of government, but not a separate arm since it was controlled by ministers who were of necessity members of one or other house of parliament. The third horse of the troika was the judiciary, separate from legislature and executive save for the anomalous position of the Lord Chancellor

[3] *Balliol Statement of 1992, 23 September 1992, para 6*

and (in theory, not in practice) the Law Lords, and bound to interpret and apply the law of the land including of course the law made by Parliament. Over all, as the ultimate source of power and authority, was the Crown.

On this view the protection of human rights would have been seen as first and foremost the business of Parliament: if a government were to propose or permit any derogation from fundamental human rights, then it could expect to be restrained and even voted down in Parliament.

Much of this picture remains accurate. But constitutional organs, like constellations, wax and wane and change position relative to each other and the present century has seen such changes in our constitutional arrangements. Most striking has been the increase in the size and power of the executive, in particular the Prime Minister, the cabinet and ministers. Almost equally striking has been the weakening of parliamentary influence on the conduct of governments. For this there are no doubt many explanations, but the decline of the truly independent member, the doctrine of the electoral mandate, the tightening of party discipline and the less deferential attitude of constituency parties are probably among them. At the same time Parliament, in practice if not in theory, has ceded a part of its sovereignty : for the first time ever a secular body beyond the mountains can bindingly declare Acts of Parliament to be unlawful. And the increase of executive power has been matched by a degree of judicial review unthinkable even a few years ago.

Where does all this leave the protection of human rights? Not in a very satisfactory position, I would suggest. The elective dictatorship of the majority means that, by and large, the government of the day can get its way, even if its majority is small. If its programme or its practice involves some derogation from human rights Parliament cannot be relied on to correct this. Nor can the judges. If the derogation springs from a statute, they must faithfully apply the statute. If it is a result of administrative practice, there may well be no basis upon which they can interfere. There is no higher law, no frame of reference, to which they can properly appeal. None of this matters very much if human rights

themselves are not thought to matter very much. But if the protection of its citizens' fundamental rights is genuinely seen as an important function of civil society, then it does matter. In saying this I do not suggest - and I must stress this - that the present government or any of its predecessors has acted with wilful or cynical disregard of fundamental human rights. What I do suggest is that a government intent on implementing a programme may overlook the human rights aspects of its policies and that, if a government of more sinister intent were to gain power, we should be defenceless. There would not, certainly, be much the judges could do about it. This would seem regrettable to those who, like me, would see the judges as properly playing an important part in this field.

Two factors give the question a special immediacy. The first of these is the parliamentary timetable. The pressure on parliamentary time is such that measures to remedy violations of human rights will not, in the ordinary way, find a place in the queue. They will not have featured in the party manifesto. They will not win elections. They command no political priority. If anyone doubts this, I would refer to the 38 reports of the Law Commission which currently await implementation. These reports, produced at quite considerable public expense, represent clear well-argued and compelling proposals for improving the law; only 2 of the 38 have been specifically rejected by the government of the day; they gather dust not because their value is doubted but because there is inadequate parliamentary time to enact them. So anyone who sees Parliament as a reliable guardian of human rights in practice is, I suggest, guilty of wishful thinking.

The second factor which gives the question a special immediacy is of quite a different nature. It is the increasingly heterogeneous nature of our society and the increasingly assertive stance of minorities. The inhabitants of these islands have never, of course, sprung from a pure common stock : Jutes, Angles, Saxons, Vikings, Normans, Huguenots and Jewish refugees from various parts of Europe are among those who have over the centuries blended with the native Celt and the indigenous Gael. But it is probably true that post-war immigration, particularly from the Indian sub-continent and the West Indies, has made us a more

heterogeneous people than we have ever been. And it is surely true that some of these more recent citizens have shown less willingness to be submerged in the prevailing British way of life, and more desire to preserve their own traditions of language, custom and religion, than most of their predecessors have been inclined to do. There is at the same time a general lessening of deference towards authority, a growing unwillingness to accept the say-so of the teacher, the local government officer or the man from the ministry. So it seems reasonable to predict a growing number of cases - not only involving the ethnic minorities, but very often involving some minority - in which prevailing practice, perhaps of very long standing, will be said to infringe the human rights of some smaller group or some individual. As it stands, our courts are not well-fitted to mediate in these situations.

Those who share my view that the situation is unsatisfactory may well ask whether it is nonetheless inevitable, one of those inescapable blemishes which must exist in an imperfect world. I would say not. In the European Convention an instrument lies ready to hand which, if not providing an ideal solution nonetheless offers a clear improvement on the present position.

I hope I may be permitted to touch on the history of the Convention, as I shall now call it, with apologies to those already very familiar with these points and with gratitude to Anthony Lester QC from whose work most of them are drawn. [4]

First, the Convention was not (as might have been thought) the aethereal brainchild of some continental professor. It was in large part prepared by British Lawyers and in particular by that most terrestrial of politicians, the late Lord Kilmuir. [5] Its main protagonists in the early stages were Churchill, Macmillan and John Foster, with Liberal and some Labour support.

[4] *Anthony Lester QC, "Fundamental Rights: The United Kingdom Isolated?" (1984) Public Law p.46.*

[5] *R.F.V. Henston, Lives of the Lord Chancellors 1940 - 1970, p.166*

Secondly, during the ante-natal stages of the Convention the focus of discussion was not the substance of the rights themselves, which was thought to be rather obvious, but the means of enforcement, a matter of some understandable difficulty.

Thirdly, despite the British contribution to siring the Convention, the United Kingdom's ratification of it was fraught with dissension. Although supported by Ernest Bevin, the Foreign Secretary, ratification was strongly opposed by the Chancellor of the Exchequer (Cripps), the Colonial Secretary (Griffiths) and, in particular, the Lord Chancellor (Jowitt), who reported to a colleague that the cabinet

> "were not prepared to encourage our European friends to jeopardise our whole system of law, which we have laboriously built up over the centuries, in favour of some half-baked scheme to be administered by some unknown court."

He also described the proposed Commission on Human Rights as "a sort of Court of Star Chamber". Sir Hartley Shawcross, the Attorney-General, was similarly of the view that

> "we should firmly set our faces against the right of individual petition which seems to me to be wholly opposed to the theory of responsible Government."

Only at Bevin's insistence did the United Kingdom continue to support the Convention, and then only on the clear understanding that the United Kingdom Government could not accept the right of individual petition and the proposed European Court of Human Rights, nor various amendments which had been proposed.

Fourthly, subject to these reservations the United Kingdom did sign the Convention and, on 8 March 1951 (the day before Bevin's replacement by Herbert Morrision), became the first state to ratify. But with no incorporation into United Kingdom law, no right of individual petition and no recognition of the compulsory jurisdiction of the Strasbourg Court, the Convention was - to the United Kingdom - a

hobbled horse. And when in October 1951 a Conservative government was returned to power, nothing was done to fulfil the ambitions of the Convention's founding fathers. When the Minister of State for Foreign Affairs was asked in 1958 what was the good of ratifying the Convention if one did not accept its application he answered:

> "As I understand it, if one subscribes to a Convention one then sees that the laws of one's country are in conformity with the Convention, and the individual cases are then tried under the laws of one's own country."

But he might of course have added that the laws of one's own country may not necessarily conform with the Convention until the citizen has been put to the trouble and expense of going to Strasbourg to procure that result.

Fifthly, it was not until December 1965 - after, but not immediately after, the election of a Labour government - that the decision was made to accept for a limited period the right of individual petition to the Commission and the compulsory jurisdiction of the Court. This momentous decision, so recently thought to jeopardise our whole system of law laboriously built up over centuries, and to undermine responsible government, was apparently taken without discussion by the Cabinet or any Cabinet committee.

Sixthly, the years since that decision was taken have seen publication of a report by the Northern Ireland Standing Advisory Commission on Human Rights and a Lords Select Committee Report, both recommending incorporation, and two Bills having that object have completed all stages in the Lords. Support has come from such distinguished and politically diverse quarters as Lord Hailsham, Lord Gardiner, Lord Scarman and Lord Jenkins of Hillhead.

Meanwhile, seventhly and lastly, on an ever-lengthening list of occasions, many of them well-publicised, the Commission or the Court have found the United Kingdom to be in breach of its obligations under the Convention. Her Majesty's Government has, as one would expect,

reponded appropriately by taking steps to cure the default and pay compensation where indicated. These breaches have been established on individual petition by the aggrieved citizens, who before applying are obliged to exhaust their remedies here. The whole process is one which takes a very long time and costs a great deal of money. And the problem is getting worse. On 12 October 1992 the Strasbourg Court gave judgement in four cases. In those cases, the total length of time which proceedings took before the Commission and the Court was 4 years 6 months, 6 years 8 months, 6 years 9 months and 7 years 1 month. [6] The Strasbourg machine is becoming overwhelmed by the burdens placed upon it. But despite unremitting argument over the last few years that the Convention should be incorporated into English law so as to make its provisions enforceable, like every other law, by judges sitting in this country, no governmental move has been made in that direction.

Since incorporation would seem, at first blush, to be a simple and obvious way not only of honouring the United Kingdom's international obligations but also of giving direct and relatively inexpensive protection to its citizens, one would suppose that very powerful reasons must exist for not taking this step. It is indeed true that over the years a number of arguments against incorporation have been powerfully and persistently put. I shall review what I believe to be the more important of these arguments.

Constitutional experts point out, first of all, that the unwritten British constitution, unlike virtually every written constitution, has no means of entrenching, that is of giving a higher or trump-like status, to a law of this kind. Therefore, it is said, what one sovereign Parliament enacts another sovereign Parliament may override : thus a government minded to undermine human rights could revoke the incorporation of the Convention and leave the citizen no better off than he is now, and perhaps worse. I would give this argument beta for ingenuity and gamma, or perhaps omega, for political nous. It is true that in theory an Act of Parliament may be repealed. Thus theoretically the legislation

[6] *Andrew Drzemczewski, "The need for a radical overhaul", New Law Journal, 29 January 1993 p.126 and p.134*

extending the vote to the adult population, or giving the vote to women, or allowing married women to own property in their own right, or forbidding cruel and unusual punishment, or safeguarding the independence of the judges, or providing for our adhesion to the European Community, could be revoked at the whim of a temporary parliamentary majority. But absent something approaching a revolution in our society such repeal would be unthinkable. Why? Because whatever their theoretical status constitutional measures of this kind are in practice regarded as enjoying a peculiar sanctity buttressed by overwhelming public support. If incorporated, the Convention would take its place at the head of this favoured list. There is a second reason why formal entrenchment is not necessary. Suppose the statute of incorporation were to provide that subject to any express abrogation or derogation in any later statute the rights specified in the Convention were to be fully recognised and enforced in the United Kingdom according to the tenor of the Convention. That would be good enough for the judges. They would give full effect to the Convention rights unless a later statute very explicitly and specifically told them not to. But the rights protected by the Convention are not stated in absolute terms : there are provisions to cover pressing considerations of national security and such like. Save in quite extraordinary circumstances one cannot imagine any government going to Parliament with a proposal that any human right guaranteed by the Convention be overridden. And even then (subject to any relevant derogation) the United Kingdom would in any event remain bound, in international law and also in honour, to comply with its Convention obligations. I find it hard to imagine a government going to Parliament with such a proposal. So while the argument on entrenchment has a superficial theoretical charm, it has in my opinion very little practical substance. There would be no question, as under community law, of United Kingdom judges declaring United Kingdom statutes to be invalid. Judges would either comply with the express will of parliament by construing all legislation in a manner consistent with the Convention. Or, in the scarcely imaginable case of an express abrogation or derogation by Parliament, the judges would give effect to that provision also.

A second and quite different argument runs roughly along the

following lines. Rulings on human rights, not least rulings on the lines of demarcation between one right and another, involve sensitive judgements important to individual citizens and to society as a whole. These are not judgments which unelected English (or perhaps British) judges are fitted to make, drawn as they are from a narrow, unrepresentative minority, the public-school and Oxbridge-educated, male, white, mostly protestant, mostly middle-class products of the Bar. They are judgements of an essentially political nature, properly to be made by democratically elected representatives of the people. I do not, unsurprisingly, agree with most of the criticisms which it is fashionable to direct at the composition of the modern judiciary, for reasons which could fill another lecture. Nor would I, again unsurprisingly, accept the charge sometimes made that protection of human rights cannot safely be entrusted to British Judges: no one familiar with the development of the law in fields as diverse as, for instance, the Rent Acts, the Factories Acts, labour law or judicial review could, I think, fairly accuse the judges of throwing their weight on the side of the big battalions against the small man or woman. But it is true that judgements on human rights do involve judgements about relations between the individual and the society of which the individual is part, and in that sense they can be described as political. If such questions are thought to be inappropriate for decision by judges, so be it. I do not agree, but I can understand the argument. What I simply do not understand is how it can be sensible to entrust the decision of these questions to an international panel of judges in Strasbourg - some of them drawn from societies markedly unlike our own - but not, in the first instance, to our own judges here. I am not suggesting that the final right of appeal to Strasbourg should be eliminated or in any way curtailed (which, indeed, is not something which most opponents of incorporation support). I am only suggesting that rights claimed under the Convention should, in the first place, be ruled upon by judges here before, if regrettably necessary, appeal is made to Strasbourg. The choice is not between judges and no judges; it is whether <u>all</u> matches in this field must be played away.

The proposition that judgements on questions of human rights are, in the sense indicated, political is relied on by opponents of incorporation to found a further argument. The argument is that if

British Judges were to rule on questions arising under the Convention they would ineluctably be drawn into politicial controversy with consequent damage to their reputation, constitutionally important as it is, for political neutrality. This argument, espoused by a number of senior and respected political figures should not be lightly dismissed. But it should be examined. It cannot in my view withstand such examination for two main reasons. The first is that judges are already, on a regular and day by day basis, reviewing and often quashing decisions of ministers and government departments. They have been doing so on an increasing scale for 30 years. During that period ministers of both governing parties have fallen foul of court decisions, not once or twice but repeatedly. Some of theses decisions have achieved great public notoriety. No fair-minded critic - I allude to a species which must surely survive somewhere - could, I think, argue with any plausibility that the judges' decisions were coloured by political bias or other extra-legal considerations. Political controversy there has been, on occasion, a-plenty, but it has not rubbed off on the judges. Why not? Because, I think, it is generally if not universally recognised that the judges have a job to do, which is not a political job, and their personal predilections have no more influence on their decisions than that of a boxing referee who is required to stop a fight. In a mature democracy like ours, this degree of understanding is not, surely, surprising, but it does in my view weaken this argument against incorporation.

There is, I suggest, a second reason why this is not a good argument. Although there are states other than the United Kingdom which have not incorporated the Convention into their domestic law, in particular the Scandinavian countries, most parties to the Convention have done so. Thus the judges of Austria, Switerzland, Italy, Belgium, Cyprus, France, Greece, Luxembourg, the Netherlands, Portugal, Spain, Turkey, Germany, Liechtenstein and elsewhere give effect to the Convention as part of their own domestic law. If doing so involves them in political controversy damaging to their judicial role one would expect to find evidence of that unhappy result. There is to my knowledge no such evidence, and I do not think that those who advance this argument have ever pointed to any.

An additional argument sometimes heard is that incorporation is unnecessary since the Convention rights are already protected by the common law. The House of Lords recently held that in the field of freedom of speech there is no difference in principle between English law and Article 10 of the Convention.[7] Lord Goff said the same thing in one of the Spycatcher judgements.[8] But the House of Lords' earlier Spycatcher decision[9] has itself been held to have violated the Convention, as of course have other of their Lordships' decisions. If in truth the common law as it stands were giving the rights of United Kingdom citizens the same protection as the Convention - across the board, not only in relation to Article 10 - one might wonder why the United Kingdoms' record as a Stasbourg litigant was not more favourable.

There are those who argue against incorporation on the grounds that to do so would give permanent form to a view of society and the human conditon which, though accepted immediately post-war at the time of drafting, has no claim to eternal verity. Further, it is said, a constraint is placed on the ability of the law to develop and change as the views of society develop and change. This is, in truth, an argument against the Convention itself. But is is not a very persuasive argument, since the Convention can of course be modififed to reflect changing views and values. And there is a more fundamental answer, which is to look, necessarily very briefly, at the rights which the Convention (including its First Protocol) protects.

The rights (shorn of very important qualifications) are: the right to life; the right to protection against subjection to torture or inhuman or degrading treatment or punishment; the prohibition of slavery and forced labour; the liberty and security of the person; the right to a fair trial; the prohibition of retrospective criminal legislation; the right to respect for private and family life, home and correspondence; the right

[7] *Derbyshire County Council v. Times Newspapers Ltd. 18/2/93.*

[8] *Attorney-General v. Guardian Newspapers Ltd. (No. 2), (1990) 1 AC 109 at 283-284.*

[9] *(1987) 1 WLR 1248.*

of freedom of thought, conscience and religion; the right to freedom of expression; the right to freedom of peaceful assembly and association; the right to marry and found a family; the right to peaceful enjoyment of property; the right to education; and the requirements that there be free elections at reasonable intervals by secret ballot.

Now it is obvious that the content of these rights will be held to change as social and political attitudes develop. This has demonstrably happened already. For example, punishments which were commonplace (at least in the United Kingdom) in 1950 have been held to be, and would now be very widely thought to be, degrading. Views are bound to change on what the articles of the Convention require and, not less important, what the qualifications to the articles permit. I cannot, however, for my part accept that these articles represent some transient sociological mood, some flavour of the month, the decade or the half-century. They encapsulate legal, ethical, social and democratic principles, painfully developed over 2,000 years. The risk that they may come to be regarded as modish or passés is one that may safely be taken.

I am conscious that I have given much time to considering the arguments against incorporation and rather less to the case in favour. This is no doubt because I regard the positive case as clear and the burden as lying on the opponents to make good their grounds of opposition. But there is one argument in favour of incorporation that I would like to mention. It is not a new argument. [10] but it is an important one, and it has recently been drawn to the House of Lords' attention by Lord Slynn (in his legislative, and not his judicial, mode) [11]. The Court of Justice of the European Communities has now made clear that the fundamental human rights which the Convention protects are part of the law of the Community which that court is bound to secure and enforce. Community law is, of course, part of the law of the United Kingdom. As Lord Slynn put it,

"... every time the European Court recognises a principle set out

[10] *See, eg, Andrew Drzenczewski, European Human Rights Convention in Domestic Law, 1983, chapter 9, p.229*

[11] *HL Deb., 26 November 1992, col.1096 - 1098*

> in the convention as being part of Community law, it must be enforced in the United Kingdom courts in relation to Community law matters, but not in domestic law. So the convention becomes in part a part of our law through the back door because we have to apply the convention in respect of Community law matters as part of Community law."

Drawing on his own experience as counsel appearing at Strasbourg, he felt it would be more satisfactory if the convention were to enter by the front door. It was, he said,

> "quite plain that many, although perhaps not all, of the cases could be dealt with just as well and more expeditiously by our own judges here."

I end on a downbeat note. It would be naive to suppose that incorporation of the Convention would usher in the new Jerusalem. As on the morrow of a general election, however glamorous the promises of the campaign, the world would not at once feel very different. But the change would over time stifle the insidious and damaging belief that it is necessary to go abroad to obtain justice. It would restore this country to its former place as an international standard bearer of liberty and justice. It would help to reinvigorate the faith, which our eighteenth and nineteenth century forbears would not for an instant have doubted, that theses were fields in which Britain was the world's teacher, not its pupil. And it would enable the judges more effectively to honour their ancient and sacred undertaking to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will.