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THE EUROPEAN CONVENTION ON HUMAN RIGHTS – AN ALADDIN'S LAMP?

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ABSTRACT

The lecture describes the European Convention on Human Rights, how it differed from the legal system in England until the enactment of the Human Rights Act 1998, and what has happened since then, giving many examples.

KEYWORDS

European Convention on Human Rights; European Court of Human Rights; Human Rights Act; Legislation; Justice

Mr President, thank you for asking me to give this year's Reading. I have chosen one of the topics suggested by former Presidents of the Institute, namely the European Convention on Human Rights; but, to add a bit of spice (and I hope an element of curiosity), I have added a reference to Aladdin's lamp. Is the Convention an Aladdin's lamp? If so, for whom?

But, before we come to Aladdin, whose story I am sure is well known, may I first speak about the Convention? You will all have heard of it, but I should like to say something about its background, its impact and the role of the judiciary in applying it.

The Convention is a collection of 11 fundamental rights which are accorded to each one of us. Bills of rights, declarations of fundamental freedoms and constitutions have illuminated the history of countries around the world, and, with varying success, have served as a guarantee for the ideals and values of a democratic society. They serve as the baseline beneath which future administrations may not go.

English judges and lawyers have been traditionally suspicious of such fundamental rights. For example, in 1958, Sir Ivor Jennings wrote: "In Britain we have no Bill of Rights; we merely have liberty according to the

law, and we think that we do the job better than any country which has a Bill of Rights.''

In an immigration case in the Court of Appeal, 30 years ago, Lord Denning, who was a great and well-known common lawyer, said this: "The European Convention is drafted in a style very different from the way which we are used to in legislation. It contains wide general statements of principle. They are apt to lead to much difficulty in application because they give rise to too much uncertainty. They are not the sort of thing which we can easily digest. The articles are so wide as to be incapable of practical application. So it is much better for us to stick to our own statutes and principles and only to look to the Convention for guidance in case of doubt.''

What Sir Ivor Jennings, who was the first author from whom I quoted, meant, was that England, historically, has been a country where everything is permitted except what is expressly forbidden. That is to say that, historically, our freedoms here have not been positively stated in a Bill of Rights or anywhere else. They are the sum of what is left over and of what is not prohibited by statute, or our common law.

The problem with this approach, which lasted until the Human Rights Act was enacted in 1998, was that there was no protection against a creeping erosion of those rights. We had encouraged the protection of fundamental rights in constitutions of former colonies around the world. For example, Nigeria became the first in December 1959. In fact, of course, when we handed back Hong Kong in 1997 and required them to have a Bill of Rights, we still had no Bill of Rights of our own; but we never saw the need for such a measure, and few advocated that we should. A notable and solitary exception was Lord Scarman, who advocated it strongly in his Hamlyn lectures in 1974.

The popular perception of the Convention, and, indeed, of the decisions of the European Court of Human Rights in Strasbourg, especially in the 1990s and the years leading up to the Human Rights Act, has been fairly poor. For example, when, in 1995, the European Court ruled that SAS soldiers who had shot dead three IRA terrorists in Gibraltar had acted illegally, after a Gibraltarian jury had found that the killings were justifiable, the *Daily Mail* wrote: "This is simply the latest in a long series of perverse rulings by the European Court against Britain and in favour of terrorists, drug barons, gypsies, squatters and trans-sexuals.''

When the European Court ruled that the Home Secretary of the day, Michael Howard, had wrongly increased the sentences of the young killers of Jamie Bulger, Norman Tebbit wrote: "How they were tried and punished is a matter for us, not for a bunch of foreigners.'' When the European Court decided that homosexuals should be allowed to serve in the armed forces, the *Daily Mail* — I am sorry, it is a frequent source of mine — complained: "the Court had included a judge from Albania, a Lithuanian, a Cypriot and a

judge from Austria. Those surely are not nations which have much to teach this country about human rights.''

Other challenges to the European Court about mixed hospital wards, a trans-sexual seeking to be recognised as the father of his partner's child, and by a 12-year-old boy who took his stepfather to the European Court for administering corporal punishment, did little to alter the popular perception.

But, in December 1996, I am sure that many of you will recall the Labour Party published a consultation paper entitled 'Bringing Rights Home'; and, when elected, the Labour Government decided to make the European Convention on Human Rights a part of English law. The Human Rights Act received Royal Assent in November 1998, and came into force in October 2000.

The Convention had emanated from the Council of Europe at the end of the Second World War, and it was designed to ensure that the recent atrocities should never re-occur, and that Europe should be forever insulated against the evils of fascism. The United Kingdom was an original signatory to the Convention in 1951, but it remained outside of our law as an international treaty for nearly 50 years, until it was incorporated into our law by the Human Rights Act in 1998.

When the European Court of Human Rights began work in 1961, it dealt with only about two cases a year. By the year 2000, it was dealing with about 200. In that time, the U.K. had come before the Court on about 115 occasions — that is to say, in about one-tenth of the Court's overall business — and it was found to have been in violation of the Convention in 72 instances.

Whenever a member state is found to be in breach of the Convention, it must review its domestic law and change it where necessary, and a European committee of ministers supervises that process. Sometimes this has necessitated creating an entirely new Act of Parliament. For example, the Contempt of Court Act 1981 was brought into existence here after the *Sunday Times* won its case against the U.K. Government after it had been wrongfully prevented from publishing its stories about the drug thalidomide. The Attorney General of the day had been concerned that the *Sunday Times* campaign had been putting improper pressure on Distillers, the drug manufacturer, to settle the claims that had been brought against it; but the European Court decided that this had been an overreaction and an interference with the newspaper's right of freedom of expression. Now the Contempt of Court Act regulates the circumstances in which the press can temporarily be muzzled, so as not to risk prejudicing Court proceedings.

Critics of the Human Rights Act, in this country, have felt that it would politicise the judiciary, and that it would give to unelected judges the power to thwart Government policy. There were calls for the judiciary to be appointed from wider pools to remedy this perceived danger.

The judiciary, of course, has not been politicised, although it has had to

deal with political cases. As Lord Lester, a leading human rights advocate, has said, our judges are independent, acting judicially, and not as knights errant, roaming at will in pursuit of their own ideal of goodness. But the important point is that, unlike in the United States of America and in Canada, where the judiciary is interventionist, our Human Rights Act never gave to the courts the power to strike down legislation of which it disapproved. If that had been the proposal before Parliament, then it is unlikely that the Human Rights Act would ever have been passed. Our Parliament retains the sovereign power to legislate as it thinks fit, and our courts must give effect to the clearly expressed will of Parliament. The Human Rights Act does not detract from that principle, but Parliament must legislate in unambiguous language if it wishes to limit, in a particular context, one of the fundamental rights protected by the Convention, otherwise the courts will strive to interpret the Act so as to comply with the Human Rights Act itself. Lord Hoffmann said that this is because there is too great a risk that the full implications of the unqualified meaning may have passed unnoticed in the democratic process.

The fundamental rights in the Convention are not inflexible statements of principle. If they were, then the Convention would become a charter for injustice. The fundamental rights of the individual are of supreme importance, but they are not unlimited. As Lord Steyn, a Lord of Appeal in Ordinary, said: "We live in a community of individuals who also have rights." To give an example, the privilege against self-incrimination is part of what is considered necessary for a fair trial; that is to say that nobody should be compelled to give evidence against themselves; but, in some contexts, strict adherence to this principle would be damaging. The road traffic legislation is an instance of that. Where a road traffic offence is suspected, the registered owner of a vehicle can be required to name the driver on a particular occasion or risk a fine or disqualification. This is justifiable, because, in that particular context, some form of regulatory regime is required to safeguard the rights and safety of the community.

What the Human Rights Act has done is to reinvigorate the relationship between the Government, Parliament and the Courts for the protection of our democratic freedoms. Firstly, the fact that these rights are now positively set out in the Act means that the Government must confront and justify any departure from them when framing new legislation. Secondly, the minister in charge of a new Bill must make a statement to the House before its Second Reading, confirming that it is compatible with the Human Rights Act; or, if not, that the Government, nevertheless, wishes to proceed. At that stage, Parliament should scrutinise the proposed legislation, and should be vigilant to see that fundamental rights are not unreasonably modified, or, if they are modified, then they are to no greater extent than is absolutely necessary.

If the Bill is enacted and later comes before the courts, then the

judges have the power to make a declaration of incompatibility with the Human Rights Act, if it is not made absolutely clear in the legislation that this incompatibility was intended by Parliament. Such a declaration by the judiciary amounts to an invitation to Parliament to amend the legislation.

This is the new regime, in theory. The pressure group 'Liberty' has recently suggested that Parliament is not, however, properly fulfilling its role as the scrutineer of new legislation, and that the judiciary is too cautious and concerned about not being seen to be too confrontational with the Government.

Some of the cases which pose the greatest difficulty for the judiciary, and indeed for the legal profession, are where Convention rights conflict; for example: freedom of information versus the right to private life; religious freedom versus the right of the majority; free speech versus fair trial; and the right to life versus the right to personal autonomy. I am sure that most of us will remember the tragic case brought by Dianne Pretty and her husband in that context.

It is in these cases, particularly, that the need for the judiciary to strike the right balance is so critical. There has grown up an international dialogue between the higher constitutional courts around the world, in which their approach and their reasoning to similar issues is carefully considered and sought after. Indeed, counsel in human rights cases are now expected to research Canadian, South African, Hong Kong and other authorities if in doubt.

Research, published in 2003, has shown that human rights challenges have not been anywhere near as high as the Lord Chancellor's Department — now, sadly, the Department of Constitutional Affairs — had anticipated. In another study, by King's College, London, some cause for optimism, however, exists, because, out of 149 cases studied (quirkily, not 150), in a six-month period, they concluded that 85 of them, that is to say about 57%, were affected by the Human Rights Act with regard to their outcome, reasoning or procedure.

It is worth recalling that judges, magistrates, tribunal members, civil servants and practitioners have had a very short lead-in time to October 2000 — which was the date on which the Human Rights Act came into practical effect — in which to become familiar with this new law.

It was made more difficult because, in 1999, the Judicial Studies Board was already overstretched with explaining the Woolf reforms which have revolutionised civil litigation. The board, however, had a budget, in early 2000, of about £6 million with which to train the full and part-time judiciary, principally via a one-day seminar and a stream of written materials. The Home Office Human Rights Unit trained over 5,000 civil servants and distributed about a quarter of a million leaflets to public authorities.

But, there is no doubt that the Government has failed to devote

sufficient resources to the promotion and explanation of the Act to the public at large, and there are still major misconceptions about the Act and its purview.

Perhaps the most litigated parts of the Convention are: Article 8, which is the right to private life; Article 10, which is the right to freedom of expression; and Article 6, which is the right to a fair trial.

May I briefly touch on one or two issues which have been thrown up by those important articles? With Articles 8 and 10, the right to private life and the right to freedom of expression, the battleground has been the tabloid press and its stories about the private lives of well-known people. Is there a legal right to privacy which the law will recognise and protect? As long ago as 1890, in the *Harvard Law Review*, Warren & Brandeis called this the right to be let alone.

In this country, despite endless debate and numerous reports, successive Governments have failed to legislate so as to create a right to privacy. The media have been free to publish the truth, however personal, unless that information is, in some sense, protected as being confidential. So, for example, there has been published the contents of telephone calls between princesses and their companions, or photographs of well-known sportsmen or actors coming out of doorways which, with better judgement or a clearer head, they might never have entered.

One notable casualty of the lack of such legal protection was the actor Gordon Kaye, notable for the TV comedy ' 'Allo, 'Allo', who, while suffering from serious brain injury, was photographed in his bed in the Charing Cross Hospital by a photographer from the *Sunday Sport*, who had simply gatecrashed his hospital room.

Many felt that the advent of the Human Rights Act, and Article 8, the right to private life, would enable the courts to step in where Parliament had feared to tread, and to recognise that a right to privacy had now been created in English law. Disappointingly for some, that, so far, has not happened.

In an early case, post the Human Rights Act, a Premier League footballer tried to prevent a newspaper from disclosing that he had had two adulterous relationships. The Court of Appeal declined to stop the paper from publishing, and declined to rule that Article 8 had ushered in a new right to privacy. Lord Woolf said, perhaps surprisingly: "The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, then there are will be fewer newspapers published, which will not be in the public interest." The other side of the coin, I suppose, is that some might think that life without the *News of the World* or *The Sun* would be very much in the public interest.

In another case, Michael Douglas and Catherine Zeta Jones tried to use the right to privacy to prevent *Hello* magazine from publishing unauthorised photographs of their wedding, having sold the picture rights exclusively to a

rival publication. The judge found in their favour on another basis, without having to decide whether or not the right to privacy now existed in English law.

Currently, the House of Lords is considering the matter in a case involving Naomi Campbell, who is suing the *Daily Mirror* for revealing that she had a drug problem and is seeking medical assistance. The judgment of the House of Lords in that case is keenly awaited.

I mention these cases, because they illustrate that the Human Rights Act raises difficult issues of principle, and that the proper bounds of the media in a democratic society are issues which are to be decided in the human rights context. Where the line should be drawn between freedom and excess is a matter for the judiciary in construing Article 8 and its proper ambit.

The only other article that I will briefly mention is Article 6; that is the right to a fair trial. This right is critically important, because it has such a wide application. It does not simply apply to criminal trials, but to quasi criminal, to regulatory and to disciplinary hearings as well — in fact, to any hearing where the potential outcome is imprisonment or a substantial fine. Because of the potential fines, for example, that can be levied by the Financial Services and Markets Tribunal, the Government has conceded that the hearings of that Tribunal, too, will be subject to Article 6 regulation.

The article covers every aspect of evidence and procedure, and it has forced our courts to look afresh at our own standards of fairness, and to move towards a uniformity of values which is shared by other member states. For example, Ernest Saunders, of the Guinness trial, won in Europe on Article 6, because our procedures had compelled evidence from him from a company's inspector, appointed under the company's legislation, and had allowed that evidence to be used against him in criminal proceedings.

Our courts martial system has had to be overhauled, because it did not pass the Article 6 muster. It was not sufficiently independent and impartial. Our trials of juveniles have been adapted, following a successful appeal by one of Jamie Bulger's killers to the European Court. They were found not to be sufficiently comprehensible for young defendants.

These, of course, are simply examples of some sizeable changes that the U.K. has been forced to make as part of the commitment to a European system of human rights.

And so I return to the title and to Aladdin. Aladdin, of course, lived in China, and was the son of a poor tailor. He found a magic lamp which changed his life. We are told that Aladdin was idle, but the lamp and its genie brought him a beautiful princess, a fine palace and great wealth; but it is not a morality tale, because his repeated windfalls were without any real justification or merit.

Prior to October 2000, many would have been prepared to draw an

analogy between the European Convention and that lamp. The European Court was there to be summoned up by a motley crew of terrorists, murderers and ne'er-do-wells. I think today, though, that you will find far fewer people of that persuasion, because it has been no bad thing to open up our legal system to the perspective and influence of others.