

*Human Rights: A Sense of Proportion*

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## I. THE STORY SO FAR

The Tanner Lectures are, by their founder's desire, devoted to Human Values. Many, perhaps most, of the Tanner lecturers have approached this broad concept as philosophers, theologians, moralists, historians, or poets. I speak only as an English legal practitioner, and my subject is a narrower one—a single statute of the United Kingdom Parliament<sup>1</sup>—which has incorporated into the law of the United Kingdom the rights and fundamental freedoms set out in the European Convention on Human Rights. My concern will be the effect that this statute has already had on the law of the United Kingdom and its likely future effect. These lectures will have little, if anything, in them that could be called philosophy, even legal philosophy.<sup>2</sup> I shall, indeed, scarcely pause to consider what it is that makes some rights “fundamental.” The rights and freedoms set out in the Convention are fundamental because the Convention itself and the United Kingdom Parliament have described them as fundamental. So I shall be speaking about what is sometimes called positive law. Yet the human values involved should be self-evident.

Some years ago I had the privilege of appearing in the House of Lords in a case in which my client was seeking to cite the Home Secretary for contempt of court. Sir William Wade had described that case as the most important constitutional case to come before English courts in over 200 years. Some three weeks later I appeared in a divisional court on behalf of the Foreign Secretary in order to defend the constitutionality of the United Kingdom's adherence to the Maastricht Treaty. My opponent told the Court that that was the most important constitutional case for 300 years.<sup>3</sup> My comment was that it was at least the most important constitutional case for three weeks. In consequence of that exchange, I am

<sup>1</sup> The Human Rights Act, 1998, which came into full operation in England and Wales on October 2, 2000. It had come into operation in Scotland much earlier, in terms of the Scotland Act, 1998.

<sup>2</sup> There are innumerable writings on the philosophical underpinnings of “human rights.” Among the modern ones Ronald Dworkin, *Taking Rights Seriously* (7th impression, Oxford University Press, 1994), remains preeminent. For a bracingly sceptical view of the dominance of human rights in legal and political discourse, see Mary Ann Glendon, *Rights Talk* (Macmillan, 1991).

<sup>3</sup> The two cases were *M. v. The Home Office* [1994] 1 AC 377, and *R. v. Secretary of State for Foreign and Commonwealth Affairs ex parte Rees-Mogg* [1994] QB 552.

too cautious to say what I would otherwise have been tempted to say, namely that the Human Rights Act, 1998, is the most remarkable development in British constitutional law since the Bill of Rights of 1689. In incorporating the European Convention on Human Rights into domestic law Parliament has not so much created for us hitherto unknown rights, but has rather given to certain individual rights a special status that they had not previously been accorded. Now, any infringement of such rights by any public authority inferior to the United Kingdom Parliament itself may be held to be *per se* unlawful and nullified by the courts of the United Kingdom. What is still more remarkable in a country in which parliamentary supremacy is a legal and constitutional axiom, even acts of Parliament are now subject to the scrutiny and judgment of British courts, applying the norms of the European Convention.

The history of the incorporation of the Convention is too recent to need recapitulation. So are the debates and the issues that surrounded it. For example, would incorporation politicise the English and Scottish judiciaries? Would it have been better to wait until we had a home-grown British Bill of Rights instead of incorporating a fifty-year-old international convention? Would the inescapable doctrine of the supremacy of Parliament make the Act no more than the shadow of a real Bill of Rights? These are still legitimate questions (although I would answer “no” to all of them). But they will now fall to be answered in the light of experience and not, or not entirely, speculatively. How they will be answered depends to a large extent on the performance of our profession (in which I include the judicial, the practising, and the academic branches).

In relation to the supremacy of Parliament I must say a little more about the relationship between the courts and Parliament under the Human Rights Act. A few moments ago I said, speaking with considerable care, that the courts could now scrutinise and pass judgment on acts of Parliament. It is well-known that under the Human Rights Act the courts of this country (unlike those in, e.g., the USA, Canada, South Africa, and Germany) do not have the power to strike down and invalidate acts of Parliaments. A court may do no more than declare that a provision of an act of Parliament is not compatible with a Convention right.<sup>4</sup> But the Human Rights Act nonetheless contains a sophisticated mechanism that will, I believe, effectively outflank the obstacle of par-

<sup>4</sup> Section 4 of the Act.

liamentary supremacy. Section 19, which came into operation at an earlier stage than the rest of the Act, requires Ministers in charge of a bill coming before either House of Parliament to make one of two statements: either that in their opinion the provisions of the bill are compatible with the Convention or that they are unable to express that opinion but nevertheless wish the bill to go forward. I surmise that there will be few occasions on which a government will be willing to justify the second type of statement. As to the former type of statement, to have it contradicted by a judicial declaration of incompatibility would be embarrassing and could be costly in political terms. The Act also provides a fast-track procedure enabling Parliament rapidly to repair an act held to be incompatible with the Convention.<sup>5</sup> That provision was surely intended to be used, and I do not doubt that it will be used. Further, under Section 3 of the Act legislation must now, as far as possible, be read and given effect in a way compatible with Convention rights—a way that may be very different from its ordinary meaning. So we shall in future have the pleasure of hearing Treasury counsel, rather than risk a declaration of incompatibility, argue strenuously that a statutory provision before the court must be interpreted in the way most favourable to the other party in the case.

In the United States the written Constitution, including the Bill of Rights, has been referred to as “the Silent Sentinel,” meaning that the very existence of the Constitution induces legislators (and drafters of legislation) and administrators to respect and give effect to the rights embodied in it—well before any question of judicial review arises. I believe that the Human Rights Act both before and after it came into force in October of last year has been just such a silent sentinel. There is already much evidence that ministries and both Houses of Parliament are sensitive to the requirements of the Act. One piece of evidence is that Professor David Feldman has been appointed to be Special Adviser to the joint committee on Human Rights of both Houses of Parliament. Another is the unexpected (and some would say over-cautious) promotion of all assistant-recorders to the rank of full recorder,<sup>6</sup> to ensure that

<sup>5</sup> Section 10.

<sup>6</sup> A recorder is a part-time judge, exercising limited criminal jurisdiction, usually appointed from the ranks of practising barristers or solicitors. The (rough) Scottish equivalent of an assistant-recorder was a temporary sheriff. A Scottish court had held that temporary sheriffs were not “independent,” because their tenure was at the pleasure of the executive—*Starrs v. Procurator Fiscal, Linlithgow*, *The Times* (London), November 17, 1999.

their independence cannot be questioned under Article 6 of the Convention.<sup>7</sup> The Bill of Rights is no mere shadow.

I have already said that the Human Rights Act is revolutionary in the context of our constitutional law. But it is necessary to consider the extent of that revolution. What changes can we expect it to bring? Or, to put the same question in another way, how are the courts going to read it and apply it? The canon of interpretation most frequently cited in the Privy Council in appeals concerning Commonwealth constitutions is that stated by Lord Wilberforce in *Minister of Home Affairs Bermuda v. Fisher* in 1980,<sup>8</sup> namely, that a constitutional instrument calls for “a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism,’ suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.”<sup>9</sup>

It remains to be seen whether this will be the approach of British courts to the Convention. Of course, as Lord Wilberforce himself emphasised, a constitution is a written instrument. Its language cannot be ignored. The Privy Council has recently cited with approval a statement in a judgment of the South African Constitutional Court: “If the language used by the law giver is ignored in favour of a general resort to values the result is not interpretation but divination.”<sup>10</sup>

So the hard judicial process of interpretation must continue. Section 2 of the Act directs our courts to take into account the judgments of the European Court of Human Rights and the judgments of the now defunct European Commission of Human Rights. But those decisions will not be binding. One may expect our courts to reconsider some of them and to have regard to the judgments of foreign courts. Human rights will be a great field for the comparative lawyer.

In 1993 in an appeal from Hong Kong involving the then colony’s Bill of Rights Lord Woolf in the Privy Council said that issues involving the Bill of Rights “should be approached with realism and good sense, and kept in proportion. If this is not done the Bill will become a

<sup>7</sup> Article 6 requires judges to be “independent” as well as impartial.

<sup>8</sup> [1980] AC 319.

<sup>9</sup> At pages 328–29. (I have not been able to trace the original source of Lord Wilberforce’s reference to “the austerity of tabulated legalism,” nor, indeed, to do more than guess what it means.)

<sup>10</sup> *State v. Zuma* 1995 (4) BCLR 401, para. 18, cited in *Matadeen v. Pointu* [1999] 1 AC 98 at page 108. (BCLR refers to Butterworths Constitutional Law Reports, published by Butterworths, Durban, South Africa.)

source of injustice rather than justice and it will be debased in the eyes of the public.”<sup>11</sup>

That must be equally true of this country. Few of the litigants who invoke their Convention Rights will be village-Hampdens confronting with dauntless breast some executive tyrant. Many “victims,” as the Act calls them, will be distinctly unappealing, and the courts in applying the Act will have to make some decisions that will not be generally popular. Undoubtedly, in the long run the survival of any bill of rights depends on public confidence in the fairness and reasonableness with which the courts apply it. But the courts cannot and will not bow to public opinion, still less to party political opinion, and least of all to the manufactured indignation of sensational journalism. What realism and good sense demand will not always be self-evident.

If I may return to Lord Wilberforce, in the judgment from which I quoted he said that respect must be paid not only to the language that has been used in a written constitution but also “to the traditions and usages which have given meaning to that language.”<sup>12</sup>

Similarly, in the Canadian Supreme Court the great expounder of the Canadian Charter of Rights and Freedoms, Sir Brian Dickson, said that the meaning of a right or freedom guaranteed by the Charter must be ascertained by analysis of the purpose of such guarantee: and that the purpose is to be sought by reference, *inter alia*, to “the historical origins of the concept enshrined.”<sup>13</sup> Although the Convention is an international treaty, the British contribution to its drafting is well known, and it is now part of a British statute. Many of the concepts in the Convention have their origin in this island. So courts can legitimately consider the history in this country of the rights in the Convention. In our expectations of the changes that the Human Rights Act will bring us we must remember the peculiarly British background to the Act.

This background is very different from that of some other twentieth-century constitutional bills of rights. To make two obvious comparisons, the postwar German Constitution can be seen as a direct and radical reaction against the savage and immoral laws of the Nazi dictatorship. The South African Interim Constitution of 1993 and the final

<sup>11</sup> *Attorney-General of Hong Kong v. Lee Kwong-Kut* [1993] AC 951 at page 975.

<sup>12</sup> At page 329.

<sup>13</sup> *R. v. Big M Drug Mart Limited* (1985) 18 DLR (4th) 321 at pages 395–96.

Constitution of 1996 explicitly set out to redress the wrongs of the apartheid era and, indeed, of the decades of white supremacy and black subjection that had preceded it. To bolster the authoritarian regime criminal procedures originally taken over from England had been systematically subverted. Capital punishment had been extended beyond cases of murder. (In the heyday of apartheid there were more persons executed each year in South Africa than in the whole of the United States.) Suspected subversives could be detained indefinitely with no right of *habeas corpus* and indeed no right to see a lawyer. In criminal cases there was no “equality of arms”: the whole of the prosecution docket was regarded as absolutely privileged. The Attorney-General had the overriding power to deny bail to persons awaiting trial. In numerous criminal statutes heavy burdens of proof were placed on the accused, including the burden of proving that a signed confession was *not* voluntary. It was not surprising therefore that judges exercising their powers under the new Bill of Rights felt called on to slash and burn parts of the statute book in order to restore the rule of law.

Our new bill of rights emerges from a very different background, the background of a society in which in our day individual rights have on the whole been respected. The abolition of the death penalty for murder, the measures designed to achieve equality of arms in criminal cases, the measures outlawing sex and race discrimination in employment—none of these had to await the Human Rights Act. What is more, the language of individual rights with the corresponding limitation of executive power has been the staple of English legal discourse at least since Magna Carta. The Bill of Rights of 1689 is the ancestor in content as well as title of the innumerable national and international bills of rights of our time. Sir William Blackstone, in his *Commentaries*, stated that the “principal aim of society” in England was to protect individuals in the enjoyment of what he called the absolute rights of life, liberty, and property.<sup>14</sup> He also described England as perhaps the only land in the universe in which political and civil liberty was the very end and scope of the constitution and contrasted it with other states on the continent of Europe, which, he said, vested an arbitrary and despotic power in the prince or in a few grandees.<sup>15</sup> All this was doubtless over-enthusiastic for Blackstone’s time and for other times too.

<sup>14</sup> *Commentaries on the Law of England*, vol. 1, 124.

<sup>15</sup> *Ibid.*, vol. 1, 127.



It is almost unnecessary to acknowledge that there was no period when Blackstone's absolute rights were absolutely respected. Magna Carta and the Bill of Rights probably helped only a small section of the population and were in any event at the mercy of Parliament. Against the Bill of Rights one can place the Black Acts. Against Lord Mansfield one can set Lord Braxfield. Against *Entick v. Carrington*<sup>16</sup> one can set *Liversidge v. Anderson*.<sup>17</sup> Certainly in the first half of the twentieth century the contribution of the English judiciary to the protection of the individual against executive power was modest indeed. Sir William Wade has called the public law cases of that era "a dreary catalogue of abdication and error."<sup>18</sup> In a recent book Professor K. D. Ewing and Professor Conor Gearty have exposed the judicial failures of the period.<sup>19</sup> Yet the language of individual rights persisted, even if mainly in the resounding statements of Lord Atkin.<sup>20</sup> But, as every student of administrative law knows, all this changed in the 1960s when the boundaries of judicial review were extended by such cases as *Ridge v. Baldwin*,<sup>21</sup> *Anisminic*,<sup>22</sup> and *Padfield*.<sup>23</sup> In the last decade of the last century the courts exercised their powers of review ever more boldly. The concept of a fundamental human right was recognised by courts at the highest level with the corollary that such a right could not be overridden save by a clear enactment of Parliament—all this before the commencement of the Human Rights Act.<sup>24</sup> Lord Hoffmann, still before the commencement of the Act, said in the House of Lords (perhaps with a touch of Blackstonian enthusiasm) that "the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries

<sup>16</sup> (1765) 19 St. Tr. 1030, in which it was held that, absent statutory authority, a Secretary of State had no authority to issue a search warrant.

<sup>17</sup> [1942] AC 206, a wartime case in which the majority of the House of Lords (Lord Atkin dissenting) gave an unduly broad interpretation to the Home Secretary's statutory powers of detention.

<sup>18</sup> H. W. R. Wade and C. F. Forsyth, *Administrative Law* (8th ed., Oxford University Press, 2000), at page 16.

<sup>19</sup> K. D. Ewing and C. A. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914–1945* (Oxford University Press, 2000).

<sup>20</sup> E.g., in *Eshughayi Eleko v. Officer Administering the Government* [1931] AC 662 and in *Liversidge v. Anderson* [1942] AC 206.

<sup>21</sup> [1964] AC 40.

<sup>22</sup> *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147.

<sup>23</sup> *Padfield v. Minister of Agriculture* [1968] AC 997.

<sup>24</sup> *R. v. Lord Chancellor Ex parte Witham* [1998] QB 575, per Laws, J.

where the power of the legislature is expressly limited by a constitutional document.”<sup>25</sup>

Add to this that the United Kingdom has since 1966 accepted the right of individuals to petition the European Court of Human Rights, and one sees that by the time the Act came into force this country already had a lively culture of rights with a panoply of statutory and judicial protections. The revolution, real as it is, has not been an upheaval. The judges here should not feel tempted to slash and burn. That is why I have given these lectures the title “A Sense of Proportion.”

To maintain a sense of proportion we must also bear in mind the limits inherent in the European Convention itself. The Convention is now fifty years old. I assume that this audience is generally acquainted with the rights enumerated in the Convention, so you will know what is missing when compared with the constitutions of, for example, Germany, the United States, Canada, and South Africa. Thus, Article 14 of the Convention prohibits discrimination only in respect of the rights and freedoms actually set out in the Convention. There is no general right of equality before the law, no general prohibition of discrimination. There is no reference to human dignity—a right in the forefront of the German and South African constitutions. The right of citizens to enter, leave, or move freely in their own country is not to be found in the Convention. You must go back to Magna Carta for that. So too with the right to reasonable bail. Nor (understandably in a European Convention) is there any mention of trial by jury—as there is in, for example, Section 11(f) of the Charter of Rights and Freedoms in Canada.

In spite of these limitations there have already been important changes in both criminal and civil law. Others are in the offing. Before mentioning some of these changes I must point to an aspect of the format of the Convention, which can be best explained by a comparison with the Canadian Charter of Rights and Freedoms. Section 1 of the Canadian Charter states that the Charter guarantees the rights and freedoms set out in it, but subject “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

There is a corresponding general limitation clause in the South African Constitution. In the Convention (as in the American Bill of Rights) there is no such general clause. There are clauses of limitation

<sup>25</sup> *R. v. Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115 at page 131.

within some individual articles of the Convention. Thus, Article 10.1 states that everyone has a right to freedom of expression “without interference by public authority.” But Article 10.2 goes on: “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, [and here I summarise] in the interests of national security, for the prevention of disorder or crime, for the protection of the reputation or rights of others, or for maintaining the authority and impartiality of the judiciary.”<sup>26</sup>

Other articles with similar limitation clauses are Article 8 (respect for private and family life) and Article 11 (freedom of assembly and association). Other rights have no stated limitations. There is ample authority in the European Court of Human Rights and, already, in the English and Scottish courts that limitations may be read by implication into at least some of the latter rights. Are any of those rights that are stated in absolute terms really absolute? I suggest that only three of them are:

1. the right not to be tortured or subjected to inhuman or degrading treatment or punishment;
2. the right not be held in slavery or servitude; and
3. the right to a fair hearing in the civil or criminal courts.

Surely there can be no exceptions to those three rights. In particular one cannot envisage an argument that some competing interest requires that someone should have a less than fair hearing. This was cogently stated by Lord Bingham of Cornhill in the *Kebilene* case in the Divisional Court,<sup>27</sup> and by the Privy Council in *Brown v. Stott (Procurator-Fiscal)*,<sup>28</sup> an appeal from the Scottish High Court of Justiciary in which judgment was given last December. In the latter case Lord Hope of Craighead said that “the right to a fair trial is absolute in its terms and the public interest can never be invoked to deny that right to anybody under any circumstances....”<sup>29</sup>

That absolute right to a fair trial is a new right in England. This may

<sup>26</sup> I note in passing that this is the only reference in the Convention to “duties and responsibilities.”

<sup>27</sup> *R. v. Director of Public Prosecutions Ex parte Kebilene* [2000] 2 AC 326.

<sup>28</sup> [2001] 2 WLR 817.

<sup>29</sup> At page 851.

sound heretical, but I do not believe that before the Human Rights Act came into force there was a general right to a fair trial in England. What there was was a right to a trial in accordance with rules and procedures laid down by statute or judicial decision. Those rules and procedures were doubtless aimed at achieving fairness and, at least since extended duties of disclosure have been imposed on or recognised by the prosecution, the great majority of criminal trials in this country have been fair. But that is not the same thing as an overriding general right to a fair trial. Thus, under the present Criminal Appeal Act whatever the irregularities in the trial the Court of Appeal may allow an appeal against a conviction only if it thinks that the conviction is “unsafe.”<sup>30</sup> In any other case the appeal must be dismissed. What this has meant is that the Court of Appeal could in effect say: “It does not matter what went wrong with the trial. The conviction is not unsafe because we are sure that the accused would have been convicted even if he had had a fair trial.” That approach can no longer stand. Now a defendant who has not had a fair trial has by definition been treated unlawfully and must have a remedy. This was the effect of the decision of the European Court of Human Rights in *Condron v. The United Kingdom*.<sup>31</sup>

The appellants had contended in the Court of Appeal in England that their trial had been unfair because the jury had not been given proper directions as to the inferences that could properly be drawn from their silence. Their appeal was dismissed. But they succeeded in the European Court of Human Rights. That court said that

the Court of Appeal was concerned with the safety of the applicants’ conviction, not whether... they had received a fair trial.... The question whether or not the rights... guaranteed to an accused under Article 6 of the Convention were secured cannot be assimilated to a finding that his conviction was safe....<sup>32</sup>

The English Court of Appeal in 2000 endorsed this approach in the case of *The Queen v. Toogher and Others*.<sup>33</sup> Lord Woolf C.J. quoted the judg-

<sup>30</sup> Criminal Appeal Act, 1968, Section 2.

<sup>31</sup> Application No. 35718/97. Judgment given at Strasbourg, May 2, 2000. (Strasbourg is the seat of the European Court of Human Rights.)

<sup>32</sup> Paragraph 65.

<sup>33</sup> *The Times* (London), November 21, 2000, a judgment given within a few weeks of the coming into operation of the Human Rights Act. This judgment has been endorsed by the House of Lords in *R. v. Forbes* [2001] 2 WLR 1, paragraph 24.

ment in *Condron* and said that it would be unfortunate if the approach of the European Court of Human Rights and the approach of the Court of Appeal were to differ. Section 3 of the Human Rights Act now required all acts of the United Kingdom Parliament to be read in a way that was compatible with Convention rights. A broader rather than a narrower meaning must therefore be given to the word “unsafe” in the Criminal Appeals Act and, he said, “if a defendant had been denied a fair trial it would almost be inevitable that the conviction would be regarded as unsafe.” (That “almost” expressed, I suspect, no more than the normal judicial reluctance to give hostages to fortune.) In my respectful opinion Lord Woolf’s is a seminal judgment, both in its result and in its method of interpreting the English statute so as to bring it into accord with the Convention.

There have been two other judgments of great importance in the field of criminal law about which I cannot be so wholehearted. They are both judgments of the Privy Council in appeals from Scotland. The first, *Brown v. The Procurator-Fiscal*,<sup>34</sup> concerned a right not expressed in the Convention but long accepted as a fundamental ingredient of a fair trial—the right not to be compelled to incriminate oneself. *Brown*’s case arose under Section 172 of the Road Traffic Act, 1988. This provides that where the driver of a particular motor car is alleged to be guilty of any of a range of serious driving offences any person (including a person suspected of being the driver) must on request give the police any information in his or her power to give as to the identity of the driver. Failure to comply is an offence. Moreover, although the Road Traffic Act is silent on the point the courts have held that the answer given to the police was admissible in evidence against the person who gave it notwithstanding that it was (usually) incriminating. The defendant *Brown*, who was suspected of driving a particular car after consuming excessive alcohol, and who had the keys of the car in her possession, was asked by the police who had been driving the car. She replied: “It was me.” She was prosecuted for driving the car having consumed excessive alcohol. The High Court of Justiciary in Scotland held that her answer would not be admissible against her at her trial,<sup>35</sup> because her statement was made under compulsion, it was incriminating, and to use it against her

<sup>34</sup> [2001] 2 WLR 817. (The final court of appeal in respect of Convention issues arising in criminal cases in Scotland is, for constitutional reasons, the Privy Council and not the House of Lords.)

<sup>35</sup> 2000 SLT 379.

breached her rights under Article 6 of the Convention. The Scottish court relied particularly on the well-known case of *Ernest Saunders v. The United Kingdom*, in which the European Court of Human Rights had held that the right not to incriminate oneself lay at the heart of, and was a basic principle of, the notion of fair procedure, and had stated further that “[t]he public interest cannot be invoked to justify the use of answers compulsorily obtained in non-judicial investigation to incriminate the accused during trial proceedings.”<sup>36</sup>

The Privy Council reversed the High Court of Justiciary. It criticised the dictum from the *Saunders* judgment as excessively absolute and did not apply it. It held that the right not to incriminate oneself was not unqualified and that the court’s task was to find a fair balance between the rights of the individual and the general interest of the community in the successful prosecution of serious driving offences. The statutory inroad into the rights of the accused was proportionate in the sense that it was not unduly prejudicial or oppressive. Accordingly Brown’s statement could be used against her.

I do not find the result of the *Brown* case alarming. I do not think that the privilege against self-incrimination is or should be absolute. Scottish criminal procedure provides other protections for the accused, such as the need for corroboration of the admission. And, while I confess that as the losing counsel in the *Saunders* case I am particularly receptive to criticisms of that judgment, I believe that the Privy Council’s reservations about the passage quoted above were justified.<sup>37</sup> It is also worth pointing out that JUSTICE,<sup>38</sup> as *amicus curiae*, had supported the admissibility of Brown’s statement. But, with all respect, I find their Lordships’ approach to the issue of self-incrimination in many ways disappointing.

One cannot fault the Judicial Committee’s finding that the privilege

<sup>36</sup> (1996) 23 EHRR 313, paragraph 74.

<sup>37</sup> Section 2 of the Human Rights Act directs all courts to “take account of” the decisions of the European Court of Human Rights and the European Commission on Human Rights. It is to be hoped that these decisions, being of variable quality, will be examined critically rather than simply accepted. A particularly crass example is the unreasoned decision of the Commission on the reverse onus provision in the Dangerous Dogs Act, 1991, in *Bates v. United Kingdom* [1996] EHRLR 312. Such a decision justifies the late Dr. F. A. Mann’s strictures on the (now defunct) Commission in 1994 LQR at pages 529–30. The case was unfortunately cited without criticism by the House of Lords in the *Kebilene* case cited above and by the Privy Council in the *Brown* case.

<sup>38</sup> JUSTICE is an influential independent organization devoted to improving the administration of justice and to the establishment of human rights norms in England.

against self-incrimination is subject to limitations. Lord Bingham said that a limited qualification of this as of other rights is permissible if directed toward a proper public objective and if the qualification of the right is no greater “than the situation calls for.”<sup>39</sup> A balance had to be struck “between the general interests of the community and the personal rights of the individual” in a manner not “unduly prejudicial to the individual.” The Road Traffic Act, he held, struck that balance. Lord Steyn said the question was whether the legislative encroachment on the right not to incriminate oneself was “necessary and proportionate” to the aim of effectively prosecuting serious driving offences.<sup>40</sup> He held that it was. Lord Hope said that the question was “whether a fair balance had been struck between the general interest of the community in the realisation of that aim and the protection of the fundamental rights of the individual.”<sup>41</sup> Their Lordships all held that the fair balance had been achieved.

All this is very well as far as it goes. But what is missing? First, while there is a passing reference to the privilege against self-incrimination as being deep-rooted in English law, there is no emphasis on the fundamental place of that principle in our concept of fair criminal procedure, a principle rightly described in a Canadian case not indeed as absolute but as overreaching. Second, there is no overt recognition that the maintenance of the privilege is in the interest not only of the particular accused but of society as a whole. The weighing of the general interest in the prosecution of crime is obviously relevant, but it has great dangers unless it is accompanied by the consciousness that if a public interest is permitted to prevail over an individual’s fundamental right simply because it is a public interest then the right can hardly be called fundamental.

The approach that I would have hoped for would start with the axiom that an authority seeking to justify a limitation on so fundamental a right has a heavy burden of persuasion. By analogy, the right of free expression under Article 10 of the Convention is subject to restrictions, but only such as are “necessary in a democratic society.” “Necessary” does not mean “indispensable,” but it does connote the existence of a pressing social need. There is no reason why the right not to incriminate

<sup>39</sup> At pages 836–37.

<sup>40</sup> At page 841.

<sup>41</sup> At page 852.

oneself should be vulnerable to any lesser demonstration of need. It is only on the showing of such need that the question of proportionality or “balancing” should arise.

It must be remembered that we have many statutes that compel people to reply to incriminating questions but that provide that the answers cannot be used against them in criminal proceedings.<sup>42</sup> The real question, I suggest, was not whether such evidence was helpful in the prosecution of the crime—it plainly was—but whether in the interests of justice there was a pressing need for answers like Brown’s to be used not merely in investigation but against her in court. That question does not seem to have been asked, and there seems to have been no evidence on the issue. (There was evidence of the high rate of serious road accidents, but that is not the same thing.)

It is possible or even probable that a pressing need could have been shown to exist and the consideration of proportionality would then have led to the same result, but the opportunity was missed, I fear, to lay down a proper framework for the consideration of similar questions, which now come daily before the courts. Flexibility is no substitute for analysis.

There is a feature of one of the judgments that I must mention. Lord Clyde said that the Convention

is not to be applied in ways which run counter to reason and common sense. If the Convention was to be applied by the courts in ways which would seem absurd to ordinary people then the courts would be doing disservice to the aims and purposes of the Convention and the result would simply be to prejudice public respect for an international treaty which seeks to express the basic rights and freedoms of a democratic society.<sup>43</sup>

This illustrates the care that is needed in invoking what Lord Woolf called “realism and good sense” in applying the Convention.<sup>44</sup> There are many rules applied by the courts that to ordinary people may sometimes seem absurd, perhaps even the privilege against self-incrimination itself. The judgment appealed from, a unanimous judgment of the High

<sup>42</sup> E.g., Criminal Justice Act, 1987, Section 2 (Director of Serious Fraud Office may compel suspect to answer questions notwithstanding self-incrimination, but answers not admissible in criminal trial).

<sup>43</sup> At page 859.

<sup>44</sup> See note 11 above.



Court of Justiciary, presided over by the Lord Justice General, Lord Rodger of Earlsferry, was held by their Lordships to be wrong: but Lord Clyde could hardly have meant to say that their judgment was absurd. Even if ordinary people thought so (a doubtful proposition) that is hardly an adequate basis for cutting down a fundamental right.

The second Privy Council case to which I want to refer is *Her Majesty's Advocate v. McIntosh*.<sup>45</sup> It arose from a confiscation order made against McIntosh following his conviction for drug trafficking offences. The legislation providing for confiscation of the assets of convicted dealers contains a number of presumptions that place burdens of proof on the convicted dealer to establish that his assets are not the proceeds of drug trafficking. One of the issues in the case was whether these provisions were in conflict with Article 6(2) of the Convention, which states that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. The High Court of Justiciary, by a majority, had held the presumptions in the legislation to be incompatible with Article 6(2). The Privy Council reversed this decision. In what was, for technical reasons, an extended *obiter dictum* Lord Bingham considered reverse onus provisions in light of the general (but concededly not absolute) presumption of innocence. He said:

In weighing the balance between the general interest of the community and the rights of the individual, it will be relevant to ask... what public threat the provision is directed to address, what the prosecutor must prove to transfer the onus to the defendant and what difficulty the defendant may have in discharging the onus laid upon him.<sup>46</sup>

He found the balance to be on the side of the general interest in combating drug trafficking.

I respectfully agree with the result reached (which also has the support of the English Court of Appeal in *R. v. Benjafield*),<sup>47</sup> but again I doubt whether this general balancing of interests is sufficiently rigorous to protect as fundamental a right as the presumption of innocence.

The vice of reverse onus provisions was succinctly stated by Dickson C.J. in the Canadian Supreme Court: "If an accused bears the burden of

<sup>45</sup> *The Times* (London), February 8, 2001.

<sup>46</sup> Paragraph 31.

<sup>47</sup> Unreported, December 21, 2000.

disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt."<sup>48</sup>

This statement had been endorsed by Lord Bingham himself, sitting in the Divisional Court in *Kebilene* in 1999.<sup>49</sup> If such a conviction can occur there is *prima facie* a serious breach of the presumption of innocence. Reverse onus provisions are a useful prosecutorial resource in combating crime, but again I suggest that justification of the breach of the presumption of innocence must be based on a showing of a real and pressing need for reversing the onus of proof. Such a need could have been, perhaps was, established in the *McIntosh* case. But if so it would have been better had that been expressly stated. Lord Bingham did say that the general interest of the community in suppressing crime would not justify a state in riding roughshod over the rights of a criminal defendant,<sup>50</sup> "as graphically pointed out by Sachs J. in *State v. Coetzee*,"<sup>51</sup> in the South African Constitutional Court. What Sachs J. said is relevant to every exception sought to be made to the presumption of innocence:

There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences massively outweighs the public interest in ensuring that a particular criminal is brought to book. Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption...the list is

<sup>48</sup> *R. v. Oakes* (1986) 26 DLR (4th) 200 at page 222.

<sup>49</sup> See note 27 above.

<sup>50</sup> Paragraph 31.

<sup>51</sup> 1997 (4) BCLR 437.

unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.<sup>52</sup>

It would have been reassuring if the words of Justice Sachs had been quoted and endorsed, for the guidance of other courts.<sup>53</sup>

In reading these and other English cases under the Human Rights Act, I have been struck by an odd omission. What has happened to Lord Wilberforce's golden rule, his call for a generous interpretation suitable to give individuals the full measure of their fundamental rights? It is still invoked by the Privy Council in Commonwealth appeals.<sup>54</sup> Is it not appropriate in the home country?

Keeping a sense of proportion about human rights has two sides to it. The one is that few rights are absolute, and that pressing public needs can sometimes justify encroachment on individual rights. The other side is that the Human Rights Act (unlike some Commonwealth constitutions) should not be read as merely safeguarding our existing rights. It may also extend our rights. In a judgment in the South African Constitutional Court it was said: "Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law."<sup>55</sup>

While our legal traditions explain the origins and purposes of many Convention rights, one should not assume that Convention law is no different from existing English law. Hitherto accepted legal doctrines and practices will have to be reexamined with an open mind. In my next lecture I shall give some encouraging examples of this approach.

## II. HOW WILL IT END?

A fear often expressed when the Human Rights Act was passed was that the courts would be flooded with extravagant claims of infringement of Convention rights. That prophecy has not come true. There has been no

<sup>52</sup> Paragraph 220.

<sup>53</sup> Since the date of this lecture Lord Steyn has repaired this omission in *R. v. Lambert* [2001] 3 WLR 206.

<sup>54</sup> See, e.g., *Darmalingum v. The State* [2000] 1 WLR 2303 at page 2309, an appeal from Mauritius.

<sup>55</sup> *State v. Zuma* (see note 10 above) paragraph 15.

flood. There has, however, been a steady stream of cases in which litigants have raised a human rights point. Some of them have been hopeless. There have been attempts to argue that any restriction on the use of residential property under a town-planning scheme is an infringement of the right (under the First Protocol to the Convention) to the peaceful enjoyment of one's possessions. It has been argued, equally unsuccessfully, that the right of freedom of expression somehow expanded the statutory defences to infringements of copyright. One can safely say that every day an argument under the Human Rights Act is advanced in some court in this country. It is no bad thing that so many human rights points are taken, even if many of them are doomed to fail. Even the bad points will help the courts to define the general boundaries of the Human Rights Act.

Outside the courts there are also over-optimistic expectations of the reach of the Act. The actor Sean Connery is reported to have said that a rule prohibiting donations to British political parties by persons living abroad would be an infringement of his human rights. Suggestions have been made in the press that succession to the throne in the male line can no longer be the rule under the Human Rights Act. In a recent case, the Court of Appeal was compelled by the clear words of a statute to hold that a grandchild could not inherit from his grandparents on their intestacy while his father was still alive, the father being disqualified from inheriting because he had murdered the grandparents. After the judgment a solicitor commented that there "must be a remedy" under the Human Rights Act. Lorry drivers threatened with arrest for obstructing the highway in the course of their demonstration against fuel prices said that they were only exercising their right of free speech. They will find little comfort in the Human Rights Act. This may be disappointing to many people suffering genuine grievances. But, as Lord Bingham said in the *Brown* case,<sup>1</sup> the Convention does not "as is sometimes mistakenly thought offer relief from 'the heart-ache and the thousand natural shocks that flesh is heir to.'"

In due course the Act will be better understood. I would say again that it is no bad thing that members of the public are conscious that they now have rights that may be superior to the ordinary law, even if they are at present mistaken as to the scope and limits of those rights.

Not all the human rights issues that have come before the courts

<sup>1</sup> Note 28 above.

have been ill founded. Far from it. In my first lecture I spoke of the difference that the Act has already made to the idea of a fair criminal trial. Let me give a striking example of the effect of the Act on civil procedure. Article 6 of the Convention provides that for the determination of civil rights and obligations everyone is entitled to an independent and impartial tribunal. There have been many English cases in which the requisite standards of impartiality in English law have been discussed. In 1994 the House of Lords in a definitive judgment held that a judge's impartiality could be impugned only on a showing that the judge's conduct or relationship with the parties or any other circumstance gave rise to "a real danger" of bias. The House of Lords rejected an argument that a judge ought not to sit if the circumstance gave rise merely to a reasonable apprehension or suspicion of bias.<sup>2</sup>

In 1999 the issue was reconsidered by an especially powerful Court of Appeal, consisting of the then Lord Chief Justice, the then Master of the Rolls, and the then Vice-Chancellor. They endorsed the House of Lords decision, which indeed bound them.<sup>3</sup> Then came the Human Rights Act. Last December another Court of Appeal,<sup>4</sup> presided over by the present Master of the Rolls, Lord Phillips of Worth Matravers, reconsidered the issue in light of the jurisprudence of the European Court of Human Rights and made what Lord Phillips modestly called a modest adjustment to the law, and what I would call a good push in the right direction. The court held that "reasonable apprehension" of bias was now the criterion for recusal of a judge and thus brought our law into line with Strasbourg and, incidentally, with Scotland, Australia, and South Africa. Thus recent and formidable English authority was reconsidered in the light of the Convention, with no presumption that the existing English rule was necessarily consistent with what the Convention required.

Another example of a major change brought about by the Human Rights Act is the recent judgment in which a Divisional Court held that the procedures whereby applications for planning permission were determined under the Town and Country Planning Act, 1990, did not accord to the applicants an independent and impartial tribunal as required by the Convention.<sup>5</sup> The vice of the procedure was that, whatever the

<sup>2</sup> *R. v. Gough* [1993] AC 646.

<sup>3</sup> *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.* [2000] QB 451.

<sup>4</sup> *In re Medicaments (No. 2)* [2001] 1 WLR 700.

<sup>5</sup> *R. v. Secretary of State for the Environment Ex parte Holding & Barnes plc*, *The Times* (London), January 24, 2001.

recommendations made by the inspector following an admittedly fair public hearing, the final decision was made by the Secretary of State for the Environment. Because the latter's own policy was in issue, he could not be regarded as independent and impartial. As Lord Justice Tuckey put it, under Convention jurisprudence he could not be both policy maker and decision taker. In a significant passage Lord Justice Tuckey said:

...the question now was not how article 6 [of the Convention] could best be accommodated in the interests of fairness given the existing statutory scheme, but rather whether the scheme itself complied with article 6.

To accept that the possibility of common law bias was inherent in the system and mandated by Parliament was merely to admit that the system involved structural bias and required determinations to be made by a person who was not impartial.

In the event the court made a declaration of incompatibility. In due course we shall see how the Secretary of State and Parliament respond to this declaration, but it is safe to say that it is likely to have far-reaching effects on many existing administrative tribunals.<sup>6</sup>

All in all, it has been a busy five months for the English and Scottish courts. No one will agree with all their judgments, but what is plain is their readiness to grapple with Convention issues and their familiarity with human rights jurisprudence and the decisions of the European Court of Human Rights.

As to the future, one can already make guesses at some developments; some guesses reasonably safe, others highly speculative. I take this as an occasion where I am privileged to make both sorts of guesses. I shall also say what developments I hope to see and what developments I would fear.

A development I foresee, and welcome, is the reappraisal of the immunities from suits for damages hitherto enjoyed by certain public authorities. This reappraisal must follow the case of *Osman v. The United Kingdom* decided by a Grand Chamber of the European Court of Human Rights.<sup>7</sup> The key facts were that over a period school authorities had be-

<sup>6</sup> This judgment has now been reversed by the House of Lords—see [2001] 2 WLR 1389—but it has nonetheless led to reforms in the constitutions of administrative tribunals.

<sup>7</sup> (1998) 29 EHRR 245.

come convinced that one of their teachers who seemed to be disturbed posed a serious threat to the physical safety of one of the pupils at the school, Ahmet Osman. There was good reason to believe that this teacher was responsible for criminal damage to the pupil's home and had made threats to harm the boy. The police were kept informed by the school and the parents, but the police provided no special protection to the boy. The teacher thereafter shot and killed the boy's father and wounded the boy.

The boy and his mother instituted proceedings in the English courts against the Metropolitan Police Commissioner on the ground of negligent failure to provide protection to the boy. The Commissioner applied to strike out the claim as disclosing no reasonable cause of action. The Court of Appeal in due course struck out the claim on the grounds that public policy required that the police, in carrying out their duty of crime prevention, should have immunity from claims for negligence.<sup>8</sup> In this they followed binding House of Lords authority. The Osmans took the case to Strasbourg, asserting *inter alia* that this dismissal of their action on the grounds of police immunity amounted to an unlawful restriction on their right of access to a court for the determination of their civil rights, in breach of Article 6(1) of the Convention. The Grand Chamber of the Strasbourg court, consisting of twenty judges including the British judge, unanimously accepted this argument. This decision had repercussions beyond the police forces. A similar immunity had been held to exclude any suit against a local authority for negligence in carrying out its duties of child protection—*X v. Bedfordshire County Council*;<sup>9</sup> or for negligence in carrying out its powers to repair highways—*Stovin v. Wise*<sup>10</sup>—both decisions of the House of Lords.

The judgment of the European Court of Human Rights in the *Osman* case therefore caused considerable perturbation. Among others, two Law Lords who had respectively given the leading judgments in *X v. Bedfordshire County Council* and in *Stovin v. Wise* penned vigorous responses.<sup>11</sup> They suggested that the European Court had not understood the English striking out procedure. Nor had it understood that the ruling that

<sup>8</sup> *Osman v. Ferguson* [1993] 4 All ER 344.

<sup>9</sup> [1995] 2 AC 633.

<sup>10</sup> [1996] AC 923.

<sup>11</sup> Respectively, Lord Browne-Wilkinson in the course of his judgment in *Barrett v. Enfield London Borough Council* [1999] 3 WLR 79 at pages 84–85; Lord Hoffmann in (1999) 62 *Modern Law Review* 159.

as a matter of public policy it was not fair, just, and reasonable to impose a liability on a class of defendants, however large, for a range of activities, however broad, was simply an aspect of the English law of tort and did not amount to an immunity. For my part I believe that the Strasbourg court understood the English law and procedure perfectly well and knew an immunity when they saw it.<sup>12</sup> At all events, in a case heard after the Osman judgment (*Barrett v. Enfield London Borough Council*),<sup>13</sup> also involving child protection, the House of Lords somehow distinguished *X v. Bedfordshire County Council* and refused to strike out the plaintiff's case against the local authority.<sup>14</sup> I believe that many more cases will be similarly "distinguished," if not overruled.

I must add that *X v. Bedfordshire County Council* was itself taken to the European Court of Human Rights. The hearing took place nine months ago.<sup>15</sup> At the time of writing judgment has not yet been given. So I may yet be shown to be wrong. In the meantime, however, in a very recent House of Lords case (*Phelps v. Hillingdon London Borough Council*),<sup>16</sup> *X v. Bedfordshire County Council* was again either distinguished or ignored; and at least one Law Lord referred to the Strasbourg decision in the *Osman* case with apparent approval.

Now, a guess at a possible development of which there is so far no hint in this country, but which I invite criminal lawyers to take note of. Minimum sentences for criminal offences are disliked by judges, but all governments like to be seen as tough on crime, so parliamentary repeal of minimum sentence laws is not on the cards. I would suggest that some minimum sentences may be vulnerable to declarations of incompatibility with the Convention as constituting inhuman punishment. The Supreme Court of Canada has given a lead here. The test that it applies is whether the minimum penalty is so disproportionate as to be cruel when notionally applied to the least culpable circumstances that could trigger the penalty.<sup>17</sup> It will not be overlooked that the mandatory penalty of life imprisonment for murder is a minimum penalty.

<sup>12</sup> I respectfully suggest that the Eastern European judges in particular would have had a good understanding of police immunities.

<sup>13</sup> See note 11 above.

<sup>14</sup> See note 9 above.

<sup>15</sup> I.e., in the spring of 2000. The judgment of the European Court of Human Rights was handed down on May 10, 2001, under the heading *Z & Others v. the United Kingdom*. The court departed from the reasoning in the *Osman* case but held nonetheless that United Kingdom law did not accord the children concerned an adequate remedy and awarded damages.

<sup>16</sup> [2000] 3 WLR 776.

<sup>17</sup> See, e.g. *R. v. Goltz* [1991] 3 SCR 485.



As a final example of what I would consider a desirable if as yet speculative development under the Human Rights Act I must enter a much more controversial area of law. Under the law of the European Community the European Commission has extensive but rather vaguely defined powers, to be used in furtherance of the objectives of the Treaty of Rome. It has rule-making powers of various kinds and also has the duty and power of policing compliance with European Community legislation. In so doing it may institute proceedings before Community tribunals against individuals in member states and may impose very considerable fines or other penalties for infringements of such legislation. Its measures can be enforced against individuals in their own states.

The European Court of Justice has held that Community law is supreme,<sup>18</sup> in the sense that it renders any conflicting provision of a national law inapplicable.<sup>19</sup> The direct enforceability of Community law in this country is affirmed by Section 2 of the European Communities Act, 1972.

Does this mean that proceedings of the European Commission that lead to fines or other penalties enforceable in the United Kingdom are not subject to scrutiny under the Human Rights Act? My tentative suggestion is that they are subject to the Act.

Decisions of the European Court of Justice as well as the Maastricht Treaty itself have recognised fundamental rights including the rights embodied in the European Convention on Human Rights as part of the law of the European Community.<sup>20</sup> What is not, however, clear is to what extent those rights are actually observed in the practices of the European Commission. Nor is it necessarily the case that Community organs, including the European Court of Justice, would interpret Convention rights the same way as an English or Scottish court or the Strasbourg court would do. Section 6(1) of the Human Rights Act states that it is unlawful for a public authority to act in a way that is incompatible with a Convention right. Any authority that takes action to enforce a Commission decision in the United Kingdom, whether it be the Commission itself or a U.K. surrogate, will presumably be a public authority, and thus on the face of it amenable to scrutiny under Section 6(1) of the Act. There is surely no warrant for reading into the Act an exception in favour of the organs or servants of the European Commission.

<sup>18</sup> This court sits in Luxembourg, not to be confused with the European Court of Human Rights at Strasbourg.

<sup>19</sup> *Costa v. ENEL* [1964] ECR 586; *Simmenthal* [1978] ECR 629.

<sup>20</sup> See, e.g., *P. v. S.* [1996] All ER 397 (EC); *ERT v. DEP* [1994] 4 CMLR 490.

The German Constitutional Court faced a similar question in 1974. In that year the Court held that it had the power to measure provisions of Community law against the fundamental rights entrenched in the German Basic law. It also held that at that time Community law did not adequately protect fundamental rights of Germans. The German court could therefore protect them against Community infringements of those rights.<sup>21</sup> In 1986, however, it decided that protection of basic rights under Community law had developed so that it was substantially equal to that accorded by German law. The Constitutional Court continued to assert its jurisdiction to scrutinize Community measures, but it announced that for the time being it would refrain from exercising that jurisdiction.<sup>22</sup> That, as far as I know, is still its attitude.<sup>23</sup>

The Basic Law is the constitutional foundation of Germany. The Human Rights Act does not have that status, yet it does embody rights that in other countries have constitutional status. In enacting it Parliament gave effect to Article 1 of the Convention, which calls on the High Contracting Parties to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. Moreover, if our courts have jurisdiction over the acts of a public authority then (unlike the German Constitutional Court) they may not simply refrain from exercising it. In a proper case I would hope to see them exercise that jurisdiction.

Now I propose to turn to what I see as some of the dangers that may flow from an over-enthusiastic application of the Human Rights Act. High on the list I put the continuing attempts to give a predominant weight to the right of freedom of expression, as against other rights and interests. As I reminded you in my first lecture, the right to freedom of expression under Article 10 of the Convention is one of those rights that is subject to express limitations. At this stage it is convenient to state those limitations. Article 10.1 says that everyone has the right to freedom of expression, which includes the freedom to receive and impart information without interference by public authority. Article 10.2 reads:

<sup>21</sup> BverfGE 37, 371 (1974), a decision popularly referred to as *Solange I*. There is an English translation in [1974] CMLR 540.

<sup>22</sup> BverfGE 73, 339 (1986), *Solange II*. There is an English translation in [1987] CMLR 225.

<sup>23</sup> For a clear exposition of the German jurisprudence, see Professor Dieter Grimm, "The European Court of Justice and National Courts: The German Constitutional Perspective," 3 *Columbia Journal of European Law* 229 (1997).

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

This is an extensive list of restrictions. It will be seen that it includes restrictions not only in the general interest (national security, prevention of crime) but also in the interest of individuals with competing rights (e.g., the right to reputation). As any restrictions must, however, be prescribed by law, and must be shown to be necessary in a democratic society, there is on the face of it a proper balance between on the one hand free speech, and on the other hand competing public interests and individual rights. Many would say that it is the balance more or less struck in the common law, even if occasionally departed from in some statutes. Nobody denies the vital importance of free speech and a free press to a democratic society. Where then is the danger? In my opinion it lies in the constant and powerful pressure exerted by all branches of the media to extend the boundaries of freedom of expression at the expense of other rights and interests.

An instance of such pressure is to be found in the Human Rights Act itself. No one who followed the debates on the Human Rights Act could be in doubt that Section 12 was inserted into the Act as a response to pressure by the press and other media. The section, in brief, is designed to make it more difficult to obtain injunctions restraining publication of journalistic or literary material. It is right that restraints on publication should be rare. To Milton and to Blackstone freedom from prior restraint was the very essence of freedom of speech. Under the common law injunctions restraining publication are never easy to obtain, and the new section may not make much difference in practice. But the section instructs the court to which application is made for an injunction to have "particular regard" to the importance of the Convention right to freedom of expression and to the extent to which it would be in the public interest for the material to be published. Thus, the section points in one direction only. The court is not instructed to have particular regard to the right to a fair trial, or the right to respect for family life and private life, both of them Convention rights.

We are time and again told by the press that the law of libel bears too hard upon them. They complain that save on occasions that the law recognises as privileged,<sup>24</sup> they have the burden of proving the truth of defamatory allegations. They urge the adoption of the American doctrine stated in *New York Times v. Sullivan*,<sup>25</sup> and developed in later cases, under which any public figure, however grossly defamed, has no redress unless he or she can prove not only that the defamatory obligations are false, but that the publisher had no belief in the truth of the defamatory statement. Those who, encouraged by the Human Rights Act, press for the American rule are apparently impervious to its now widely recognised injustices and inconveniences.

More worrying even than the overt pressure to tilt the law of defamation in favour of the publishers is the insidious loosening of restraints on comment and reports on pending criminal trials. This has become ever freer, especially in high-profile cases. In many instances the reports seem clearly likely to impair the fairness of a pending jury trial, to the prejudice of both the accused and the public, as represented by the Crown. Yet prosecutions for contempt of court are rare and when they are instituted are attacked as attempts to stifle free speech.

More than twenty-five years ago in the *Sunday Times* thalidomide case,<sup>26</sup> Lord Reid said that in England there was a strong feeling that trial by newspaper should be prevented. He said: "If we were to ask the ordinary man or even a lawyer... why he has that feeling I suspect that the first reply would be—well look at what happens in some other countries where that is permitted."<sup>27</sup>

That was a judicial and polite way of referring to the United States. We have observed what to many of us, at least, was the repellent spectacle of completely unrestrained public comment on a murder trial in California. This was not journalistic lawlessness. It flowed from the United States Supreme Court's 1941 decision that comment on a pending case was permissible unless it could be shown to create a "clear and present danger" of unfairness in the trial.<sup>28</sup> That decision was fortified by a Supreme Court ruling in 1976, permitting local newspapers, while the

<sup>24</sup> Occasions of considerable scope under the common law as expounded by the House of Lords in *Reynolds v. Times Newspapers Ltd.* [1999] 3 WLR 1010.

<sup>25</sup> 376 US 254 (1964)

<sup>26</sup> *Attorney-General v. Times Newspapers* [1974] AC 273.

<sup>27</sup> At page 300.

<sup>28</sup> *Bridges v. California*, 314 US 252 (1941).

trial of a murder case was pending, to report a disputed confession alleged to have been made by the accused.<sup>29</sup> Chief Justice Warren Burger said that no restraint on publication was justifiable unless alternative measures to enforce fairness, such as change of venue, were shown to be ineffectual. Why it is the accused and not the press that has to bear the burden of proof is not clear to me. The Chief Justice said that freedom of speech from prior restraint “should have particular force as applied to the reporting of criminal proceedings.” In the case of pending or current criminal proceedings, that is when I should have thought it ought to have the least force. What we saw in the O. J. Simpson case was the direct result of allowing freedom of speech to trump competing rights, including the right to a fair trial.

Another area in which I believe we should be on guard against media encroachments in the name of free speech is electioneering expenditure. In the United Kingdom we have strict limits on the amounts that parliamentary candidates may spend on their own election. And we do not permit political advertising on radio and television. The object of these restrictions is to achieve fairness and equality in the political process. Again, as we know, they do things differently in the United States. The U.S. Congress in 1971 passed a law that sought to limit to \$50,000 the amount that a candidate in a federal election might expend out of his or her own family’s monies. The U.S. Supreme Court held that this was an infringement of the First Amendment because it imposed restrictions on communication with the electorate and, as the majority put it, restricted the voices of those with money to spend.<sup>30</sup> Justice Thurgood Marshall, dissenting, considered that the law was justified to ensure that candidacy did not become the exclusive province of the wealthy,<sup>31</sup> but the majority held this to be an inadequate justification for the interference with the freedom of speech. Similarly, in 1992 the High Court of Australia declared invalid an Act of Parliament that prohibited paid advertising on radio or television during an election period on the ground that it infringed the right of communication on matters relevant to political discussion.<sup>32</sup>

Is it entirely unreal to envisage radio and television companies

<sup>29</sup> *Nebraska Press Association v. Stuart* 427 US 539 (1976).

<sup>30</sup> *Buckley v. Valeo* 424 US 1 (1976) at page 17.

<sup>31</sup> At page 288.

<sup>32</sup> *Australian Capital Television Pty. Ltd. v. The Commonwealth of Australia* (1992) 177 CLR 106.

advancing such arguments under Article 10 of the Convention, invoking freedom of expression in order to open the way to lucrative political advertising?

I have always thought of myself as, for the want of a better term, a civil rights lawyer, and I spent a large part of my professional life under a government whose laws and practices, including stringent censorship of publications, grossly violated the right of free speech. It may seem strange that I should view with apprehension the extension of so great a right, one so vital to a free society. But I do not think that it should overbear other rights and interests equally worthy of regard in a free society, including the right to a fair trial, the right to reputation, or the interest in fair and equal electoral procedures.

How is a reasonable balance to be maintained, given the heavy burden of justifying restrictions on the right of free speech as necessary in a democratic society in terms of Article 10.2? I suggest that a purposive construction should be given to Article 10. What are the purposes of freedom of speech as understood in common law countries? This has been comprehensively considered by Professor David Feldman in his book on *Civil Liberties and Human Rights in England and Wales*.<sup>33</sup> I would, by way of a summary, say that the main purposes are individual self-fulfillment, the attainment of truth through free expression of conflicting views, and, perhaps most important, promoting political debate and informing the electorate about the character and deeds of those who govern us or wish to govern us; in short to maintain effective democratic government. It is thus legitimate when judging claims to freedom of expression at the expense of other rights to ask which of those purposes it furthers. Does the liberty to spend unrestricted amounts of money on political advertising or electioneering assist in maintaining effective democratic government? Does free comment on pending trials help in the search for truth? What would be lost by deferring comment until after the trial? What political or social purpose is served by extending the right of the press to make false and defamatory statements of fact about individuals? I respectfully express the hope that the judges will ask these questions when presented with broad claims under Article 10.<sup>34</sup>

I have one more caveat. Courts are sometimes presented with diffi-

<sup>33</sup> (Oxford University Press, 1993), pages 547ff.

<sup>34</sup> I dealt more fully with these issues in my F. A. Mann Lecture in 1995. See S. Kenridge, "Freedom of Speech: Is It the Primary Right?" (1996) 45 *International and Comparative Law Quarterly* 253.

cult social or moral problems, which may have little legal content but which come to the courts largely because there is no other authority that can be appealed to. I have in mind such cases as *Gillick* (was a doctor entitled to supply contraceptives to a girl under sixteen years of age without parental consent?),<sup>35</sup> the cases on the turning off of life-support systems,<sup>36</sup> or the recent case of the separation of Siamese twins with the known consequence that one would die. Lord Bridge in *Gillick* warned against courts expressing *ex cathedra* opinions in areas of social and ethical controversy in which they have no claim to speak with authority.<sup>37</sup> My caveat is that judicial determination of these controversies will not be made more authoritative by attempts to fit them into the framework of the Convention on Human Rights. The general rights to life, liberty, security of the person, respect for family life, freedom of conscience—these do not answer the ethical questions posed by cases such as I have mentioned. One can read the judgment of Justice Harry Blackmun in the United States Supreme Court in *Roe v. Wade*<sup>38</sup> with some admiration for its humanity and wonder nonetheless whether his and his court's ruling on the regulation of abortions really owed anything to the invocation of the right to personal liberty and due process under the Fourteenth Amendment or to the constitutional right to privacy (a right unstated but said to be implied in the United States Constitution). The European Convention is not adapted to assist the proponents on either side of abortion law reform or to resolve the debate on euthanasia, and I hope it will not be invoked for such purposes in the courts of the United Kingdom.

There are as yet many unsolved conundrums in the Human Rights Act. One that arouses apparently endless controversy is whether, in terms of the Act, Convention rights have horizontal effect (i.e., whether they can be invoked by one individual against another) or whether they have only vertical effect (i.e., whether they are intended only as a protection against governmental power).<sup>39</sup> I have engaged in this controversy myself, on the verticalist side, and I believe that Lord Justice

<sup>35</sup> *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

<sup>36</sup> Such as *Airedale NHS Trust v. Bland* [1993] AC 789.

<sup>37</sup> At page 194.

<sup>38</sup> 410 US 113 (1973).

<sup>39</sup> See, e.g., Murray Hunt in [1998] *Public Law* 423, Lord Justice Buxton in (2000) 116 *Law Quarterly Review* 48, Sir William Wade in (2000) 116 *Law Quarterly Review* 217, and Nicholas Bamforth in (2001) 117 *Law Quarterly Review* 34.

Buxton's arguments in favour of a vertical interpretation are unanswerable even by Sir William Wade. On this occasion I shall content myself with saying that I now believe that the issue is not of major importance and will be solved by the courts with little difficulty.<sup>40</sup>

I should like to end by returning to a question that I mentioned early in my first lecture: will incorporation of the Convention politicise the judiciary? This has been a serious concern. It was raised by the former Lord Chancellor, Lord Mackay of Clashfern, before the Human Rights Act was passed, and has recently been raised again by Lord Kingsland, the Shadow Lord Chancellor. I call it a serious concern because the incorporation of the Convention had undoubtedly introduced a new element into the work of English and Scottish judges. The weighing of the needs of society against an individual's Convention right and consideration of the proportionality of measures that infringe a Convention right are new tasks, which go well beyond even the extensive powers of judicial review now asserted by the courts. As Lord Mackay put it,<sup>41</sup> the measuring of policy against principles has not hitherto been the role of the judiciary in this country. To that extent the new element in adjudication has political connotations. An Act of Parliament that courts may hold to be incompatible with the Convention may embody not merely a technical point of court procedure, but a policy dear to the heart of the government in power.

Nonetheless, I see little reason to fear that such issues, when they arise, will be decided according to the political predilections of the judges. As we know, in the United States when candidates for judicial appointments at the higher levels of the Federal Courts are considered, the candidate's judicial philosophy, political philosophy, and party affiliation are closely scrutinised. These matters have at least in recent times been irrelevant to judicial appointments in this country. I believe they will remain largely irrelevant. In 1992, after ten years of judicial enforcement of the Canadian Charter, the Hon. Brian Dickson, the for-

<sup>40</sup> This belief is based in part on the South African experience. The Bill of Rights in South Africa's Interim Constitution of 1994 was interpreted as having vertical and not horizontal effect—*du Plessis v. de Klerk* 1997 (4) BCLR 562. The final Constitution of 1996 authorises the courts to give horizontal effect to the Bill of Rights where they deem it appropriate. I am aware of no reported case in which any provision of the Bill of Rights has been so applied. Rather, the values embodied in the Bill of Rights have indirectly influenced the development of the common law. I fancy that that is what will happen in the United Kingdom.

<sup>41</sup> In a speech to the Citizenship Foundation on July 8, 1996.



mer Chief Justice of Canada, gave a lecture with the title “Has the Charter Americanized the Canadian Judiciary?”<sup>42</sup> His answer was “no.” He observed that in the United States candidates for the Supreme Court and other federal courts were put forward to satisfy particular political constituencies. That did not happen in Canada. He also said that issues such as abortion and the death penalty did not in Canada arouse the same ferocious debate as in the United States. All that is equally true of this country.

This is not to say that the qualifications for the highest judicial offices must remain unchanged. Experience in public law may now count more heavily. Sensitivity to social issues and an understanding of the importance of individual rights would be good qualifications if, of course, there were some way of detecting them. Perhaps a marked absence of those attributes should be a disqualification. It is, I think, inevitable that the new political element in the judicial function, although not party political, will call for some change in the process of appointing judges to the Court of Appeal and the House of Lords. I see no necessity for appointments to require nomination by a Judicial Services Commission, as is the case in South Africa. (That system was required for historical reasons peculiar to South Africa.) But public confidence in the new role of the senior judges would surely be enhanced by a more formal system of consultation, perhaps with a standing committee, which would include representatives of all parliamentary parties. However that may be, in the end we shall have to rely, as we have always done, on the ability, good sense, and integrity of our judges.

All in all I conclude that the Human Rights Act has given us a real bill of rights and that it will establish a new principle in our constitutional law. In 1942 Justice Robert Jackson of the United States Supreme Court said this:<sup>43</sup>

The very purpose of a bill of rights is to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities...and to establish them as legal principles to be applied by the Courts. One's...fundamental rights may not be submitted to vote, they depend on the outcome of no elections.

The Human Rights Act can and should achieve that purpose.

<sup>42</sup> Published in the *University of British Columbia Law Review*, 1995.

<sup>43</sup> In *West Virginia State Board of Education v. Barnett* 319 US 625 (1942) at page 638.