

ARE BILLS OF RIGHTS NECESSARY IN COMMON LAW SYSTEMS?

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This lecture deals largely with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The most devastating critique of the Convention ever made in English was made in a lecture delivered by Professor Finnis about 30 years ago.² That was well before the *Human Rights Act* 1998 (UK) made its key Articles directly relevant to United Kingdom law. Quite a number of the points to be made this evening were made with incomparably greater force and ability in that speech. The speech was recently republished in Professor Finnis's *Collected Essays*. I recommend the reading of it. Indeed, as an act of kindness bearing in mind the financial interests of an old friend, I recommend that you purchase a complete set of the *Collected Essays*.

The functions of bills of rights

Let me start with some truisms. The whole point of executive government is to govern. Modern societies depend heavily on executive governments which govern decisively, even forcefully. Executive

¹ This is a lecture delivered at the Oxford Law School on 23 January 2013. Similar lectures were delivered at Cambridge Law School and the Inner Temple on 21 January 2013.

² "Human Rights and Their Enforcement" in *Human Rights and Common Good: Collected Essays*, (Oxford, Oxford University Press, 2011) at 42.

governments can, however, move too easily from forcefulness to tyranny. A primary protection against that movement was often thought to be the liberal dream of a democratically elected legislature to which the executive is responsible. But, as James Madison foresaw over two centuries ago,³ and as de Tocqueville predicted nearly two centuries ago in *Democracy in America*, a majority of legislators, and a majority of the electorate which elected those legislators, can behave tyrannically. The great French thinker was a liberal aristocrat. But many who were not liberal aristocrats have since lamented the influence of the "vile multitude" or the "masses" on government. In England they were Robert Lowe and James Fitzjames Stephen. In France, after Napoleon III's displays of cleverness in the exploitation of plebiscites, there was Thiers. And there was the fiercest critic of all, the young Robert Cecil, who opposed any extension of the franchise. He ended up, paradoxically, as the most electorally successfully Conservative Prime Minister of all time on a franchise incomparably wider than that which was in place when he was born. The laments of these prophets of despair was not without reason. The wars of the peoples proved to be more terrible than the wars of the kings. So did the revenge of the peoples after their wars ended. And so did their treatment of minorities. For example, the Hapsburg Empire treated its polyglot citizens much more fairly than the successor states to that Empire treated their minorities after 1918.

³ Letter to Thomas Jefferson, 17 October 1788 in William T Hutchinson et al (eds) *The Papers of James Madison* (University of Chicago Press, London, 1962-1977) vol 1, ch 14, doc 47 and speech in the House of Representatives, 8 June 1789 in op cit, vol 1, ch 14, doc 50.

Many have therefore thought that the main function of a bill of rights is to protect minorities against both executive and legislative tyranny.

The categories of bills of rights

The modern instruments which answer to the description "bill of rights" fall into four groups. They have to be approached with respect. A J P Taylor said that the settlement at Munich "was a triumph for all that was best and most enlightened in British life".⁴ So too, bills of rights reflect the noblest instincts of highly civilised and intelligent people. In rising order of strength the categories are as follows. The first comprises purely aspirational documents, like the Universal Declaration of Rights 1948. It has no binding effect on states or individuals. The second comprises treaties which bind the states which are parties to them in international law, but have no effect in local law until introduced by legislation, at least in countries following the dualist United Kingdom position. In this category is the European Convention. The third comprises statutes which give the courts power to decide what human rights exist and whether other legislation is compatible with those rights. The fourth comprises constitutional bills of rights giving the courts power to strike down legislation inconsistent with them. The oldest example of

⁴ A J P Taylor, *The Origins of the Second World War*, (Harmondsworth, Penguin, 1964) at 235.

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the fourth category exists in the United States. More modern examples are India (1950), Canada (1982) and South Africa (1994). This lecture concerns the third category. The leading instance in it is the *Human Rights Act 1988* (UK), to which there is attached a schedule of key articles of the European Convention.

Before an audience having the expertise of the present one, it would be invidious to debate any point of detail about the Act. The purpose of this lecture is rather to raise some general considerations about the background, structure, virtues and problems of the Act, and to question whether other methods for achieving its goals are not superior.

A preliminary point

There is, however, one preliminary point. It is that there has been a widespread adoption of bills of rights since 1945. This movement was a response to the atrocious behaviour of totalitarian states before and during the Second World War. Many countries have bills of rights which are, as a matter of mere words, impeccable. But the reality does not match the words. The number of countries which have observed even the most basic human rights in practice in the last 68 years is low to miniscule.

The United Kingdom background

Whether a bill of rights is necessary in a particular society depends on the nature of that society. In the United Kingdom life may not be an Arcadian idyll. But it does have the following features. The United Kingdom is ruled by a constitutional monarchy. It is a democracy based on the principles of responsible and representative government. That is, it is ruled by Ministers who are responsible to democratically elected parliaments representative of the electorate and who run the departments of a substantial civil service. Elections to those parliaments are free of corruption and preceded by vigorous campaigns. Those parliaments have enacted a great many statutes. In a practical sense the United Kingdom is or is becoming a federation in which both the component units and the central government have, despite doomsayers, considerable vitality. On most matters there is healthy rancour and asperity between political parties. The parliamentary wings of those parties are subject to considerable, though far from complete, discipline through the role of party whips. But the election of parliamentary representatives who are independent of the major organised parties is common. Thus the likeliest source of oppression – the legislature – is not a monolithic unity. It is fragmented between government and opposition, between front bench members and backbenchers on both sides, between big parties and small parties, between factions within parties whose views can overlap with the views of the factions of other parties, and between parties and independents. It is common now to disparage members of parliament. But they are in close touch not only with debates on national and regional issues, but with competing bodies of grassroots opinion. That is so because of their constituency work,

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their desire to retain preselection, and their desire to be re-elected. Delegated legislation made by the executive pursuant to legislative grants of power to do so is massive in quantity but closely scrutinised by legislative committees. The professional civil service which serves the legislature and the Minister has been envied across the world over several generations for its outstanding ability and probity. There are differences and tensions between civil servants, Ministers, and other members of the legislature, and also between particular members of those three classes. And, though the powers of the House of Lords are less than they once were, it remains a house of review to be considered and handled carefully. Outside these formal structures, there is also a strong tradition of unpaid public service – a contribution by knowledgeable amateurs of great value.

Public affairs are under the scrutiny of critical media outlets, though they are perhaps over-aggressive, certainly tasteless and probably wanting in diversity of ownership. There is a substantial separation of governmental powers. Society is plural, in the sense that there are many political parties, trade unions, trade associations, universities, churches, clubs, pressure groups, social movements, charities, lobbies, campaigns and other bodies or schools interested in public affairs but independent of government. It is also plural in the sense that its peoples come from a great variety of different countries, ethnic backgrounds and traditions. They are diverse in culture and creed. And this variety is a source of energy and innovation. The numbers of minority groups are so great as to deter oppression of

minorities by those who may form an evanescent majority on one issue but not on others. British society is an open society. In particular, it offers careers open to talent. And both the residents and the governmental units of the United Kingdom are subject to the rule of law. A necessary element in the rule of law is an independent judiciary. The judiciaries of the United Kingdom have the reputation of being the finest in the world. Most informed people would, with respect, consider that reputation to be richly deserved. The courts administer complex bodies of substantive law, which confer many rights, including human rights, with great skill and fairness. For many years it has been a commonplace that the common law and its Scottish equivalent recognise and protect rights, including human rights. Sometimes they do so expressly: for example, the possessory and proprietary rights attaching to land and goods. Generally they do so not by expressly granting particular rights, but by abstaining from intervention in particular places. This is the so-called "negative theory of rights". Glanville Williams used the expression "gaps in the criminal law" to characterise it.⁵ One can do whatever one likes unless it is specifically prohibited by non-retrospective laws which are clear and accessible to the governed.

⁵ A W Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford, Oxford University Press, 2001) at 35, n 132.

Professor Brian Simpson, the leading historian of the modern European human rights movement, whose loss one feels daily, summarised the English position in 1945 as follows:⁶

"subject to certain limitations which, for most persons, were of not the least importance, individuals could worship as they pleased, hold whatever meetings they pleased, participate in political activities as they wished, enjoy a very extensive freedom of expression and communication, and be wholly unthreatened by the grosser forms of interference with personal liberty, such as officially sanctioned torture, or prolonged detention without trial."

To that list could be added the benefits to the public flowing from the gradual development of the welfare state from the late 19th century, and its acceleration after 1945 – relief for the unemployed, invalids and aged, workers compensation free health care. Trade unions were protected. Free education was available. Indeed, it was compulsory. There was universal suffrage with no restrictions on grounds of property, gender, religion or race. Slavery had long been abolished, if it had ever existed inside the United Kingdom itself. There were no religious tests for public office (save for the monarch and the monarch's spouse). More recently, since the 1960s, extensive protection against discrimination has been provided. All these achievements were the result of legislation or common law development, not of any bill of rights. Indeed, the imposition of religious tests on the monarchy was actually the result of a

⁶ A W Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, Oxford, 2001) at 51.

Bill of Rights – the famous Bill of Rights 1689. This is a reminder that the expression "bill of rights" does not necessarily mean that everything in a particular bill of rights reflects ideal values. The deeply held values of one generation may seem bigoted or wrong-headed to another.

The main flaw in the 1945 position which Professor Simpson saw was a practical one: "there was harassment and ill treatment of dissenters and outsiders and petty abuse of power in prisons, police cells, schools, and mental institutions, often condoned low in the hierarchy."⁷ What happens low down in hierarchies can, of course, be very difficult to control however generous-seeming a bill of rights may be.

The nature of the Act

The Act, taken with the scheduled Articles, and with the benevolent complications of devolution legislation also enacted in 1998, is a non-constitutional bill of rights. Unlike legislation in the form of the bill of rights clauses of the United States Constitution, for example, primary legislation inconsistent with the Act is not invalid. The Act gives the courts no power to strike down legislation. The act is not entrenched as part of a Constitution. It is simply an Act of Parliament. The Act does not affect the legislative power of the Westminster Parliament to amend

⁷ Ibid.

or repeal it like any other Act of Parliament, though the aura of virtue which surrounds it might make this extremely difficult to do from the political point of view. Some criticise the Act by calling it the "Not-Very-Many-Human-Rights Act".⁸ Another view is that the selection of Articles scheduled to the Act, at least in the meaning they had in 1950, appears to reveal a sensible lack of ambition in dealing not with a wide range of economic and social rights, or attempts at radical social transformation, but with a relatively restricted category of basic civil and political rights. It is true, however, that judicial decisions in Strasbourg in the last 30 years and in London since 2000 have tended to widen them substantially. The rights stated in the Convention already existed in United Kingdom law in 1950 and even in 1998, but it was necessary to state them in order to permit the main functions of the Act to be carried out.

First central function: statutory "construction"

The first of those functions relates to the courts' powers of statutory construction. The English courts and the Scottish courts, operating in their somewhat different tradition, have proved capable of identifying quite precise bodies of law. They have found the facts relating to the dispute between the parties which are relevant to those

⁸ Adam Tomkins, "Introduction: On Being Sceptical about Human Rights" to (eds) Tom Campbell, K D Ewing and Adam Tomkins, *Sceptical Essays on Human Rights* (Oxford University Press, Oxford, 2001) at 10.

bodies of law, fairly and accurately. And they have applied the law to those facts. Outside their achievements in the gradual development of the common law, the courts have not made new law. They have no power to amend legislation. They have concentrated on construing legislation, independently of their personal opinions about what the legislation should have said. They have generally not felt compelled to give statutes a meaning which they do not have on their face. Yet the authorities now hold, and the holding is not disputed, that s 3(1), which requires that "if possible" legislation be read compatibly with the Convention rights, gives the courts power to amend legislation by giving it a meaning different from its actual or intended meaning. The courts can only exercise that power by reference to their personal opinions on the practical, social and moral topics relevant to the Convention rights.

Although the Act lacks the dramatic impact of bills of rights which the judiciary can enforce by striking down legislation, this interpretative function has considerable significance. In part that significance is antidemocratic. The power to substitute a rights-compatible meaning for the statutory meaning constrains legislative power. As Professor Dworkin has said: "Any constraint on the power of a democratically elected legislature decreases the political power of the people who elected that legislature."⁹ It will be necessary to return to that point.

⁹ R M Dworkin, *A Matter of Principle*, (Cambridge MA, Harvard University Press, 1985 at 62.

Second central function: declarations of incompatibility

Section 4(2) confers a second central function on the courts. It provides that the court may declare that a provision of primary legislation is incompatible with a Convention right. This does not affect the validity, continuing operation or enforcement of the provision: s 4(6)(a). But s 10 gives a Minister power to amend legislation speedily and retrospectively to remove the incompatibility. The legislative provision can also be repealed or amended in the ordinary way. Section 4(2) is thus said to reflect the "dialogue model" of a bill of rights. The court speaks to the government, and the government may or may not respond. But political pressure will usually cause the government to comply with the court's view. That makes the expression "dialogue" inapposite. In an ordinary dialogue it is not open to one participant to overrule the other – it is only open to them to keep talking.¹⁰

Third central function: statements of compatibility

A third central function springs from s 19. A Minister in charge of a Bill in either House of Parliament must make a written statement that in the Minister's opinion the Bill is compatible with the Convention rights: s 19(1)(a). A Minister who is unable to make a statement of

¹⁰ Tom Campbell, "Does Anyone Win Under a Bill of Rights? A Response to Hilary Charlesworth's 'Who Wins Under a Bill of Rights?'" (2006) 25 *University of Queensland Law Journal* 55 at 59.

compatibility must state this and also state that the government nevertheless wishes the House to proceed with the Bill: s 19(1)(b). Section 19 plays an important role in ensuring that close attention is paid to human rights consideration by the legislature. That role is also carried out by a special parliamentary committee composed of members of both Houses of Parliament – the Joint Committee on Human Rights.¹¹

Fourth central function: relief against public authorities

A fourth central function is that the courts may grant relief against a public authority which acts in a way incompatible with a Convention right (ss 6-9).

A key characteristic: protection by law

A key characteristic of the Convention is its requirement that many of the rights be protected by law (eg Arts 2, 5, 6, 7, 8, 9, 10, 11 and 12). The Convention requirement of protection by *law* incorporates certain values associated with the name of Friedrich Hayek. They include the importance of government power being exercised in accordance with

¹¹ For its work, see D Feldman, "The Impact of Human Rights on the UK Legislative Process" (2004) 25 *Statute Law Review* 91; Bryan Horrigan, "Improving Legislative Scrutiny of Proposed Laws to Enhance Basic Rights, Parliamentary Democracy and the Quality of Law-Making" in (eds) Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone, *Protecting Rights Without a Bill of Rights* (Ashgate, Aldershot, 2006) at 80-81.

clear, coherent and comprehensible standards capable of being complied with, stipulated in advance and enforceable in courts.¹² The requirement prevents rights being tampered with as a matter of extra-legal executive discretion.¹³ Of course, satisfaction of these criteria alone does not guarantee that human rights will be protected. A particular law can be highly damaging to human rights.

Further key characteristic: interest/necessity analysis

Another key characteristic of the Act is that in relation to the rights conferred by Arts 6.1, 8, 9, 10 and 11 a two-stage process is necessary. The first stage involves defining the rights in a preliminary or prima facie way. The second involves imposing limits on them which are necessary in a democratic society in the light of particular interests. Below that will be called "interest/necessity analysis" for short.

There is a tendency for the statement of rights, whether in those articles or in others, to receive very wide definition.¹⁴ There is also a

¹² For cases stressing the need for Hayekian criteria to be complied with, see Steven Greer, *The exceptions to Articles 8-11 of the European Convention on Human Rights* (Council of Europe Publishing No 15, Strasbourg, 1997) at 9-14.

¹³ For cases stressing the need for Hayekian criteria to be complied with, see Steven Greer, *The exceptions to Articles 8-11 of the European Convention on Human Rights* (Council of Europe Publishing No 15, Strasbourg, 1997) at 9.

¹⁴ For example, *Marcx Belgium*, (1979) 2 EHRR (criticised by Sir Gerald Fitzmaurice at 366 [7]). See also *Golder v United Kingdom* (1975) 1 EHRR 524 (criticised by Sir Gerald Fitzmaurice at 562-567

tendency for exceptions to the rights – whether they are explicitly stated in a particular Article or they are the result of interest/necessity analysis – to be construed narrowly.¹⁵ This in turn means that the more exaggerated of the rights claimed tend to "trade on the higher prestige of properly defined rights, with the consequence that genuine rights ... are put on the same level as exaggerated and unjustifiable claims of right"¹⁶ Thus a core free speech right like the right of a citizen to criticise government may be compared with the alleged free speech right to commit perjury, to say fraudulent things in trade, to make statements with a view to fixing prices, to say misleading things about investments, to publish libels, or to incite or threaten violence. On the one hand, the language in which rights are claimed becomes devalued. On the other hand, the infringement or violation of rights becomes seen as normal and even necessary.¹⁷

[32]-[39] and also in *National Union of Belgian Police v Belgium* (1975) 1 EHRR 578 at 601-606 [1]-[11] and *Ireland v United Kingdom* (1978) 2 EHRR 25 at 125-127 [12]-[18].)

- ¹⁵ (eds) Ben Emmerson, Andrew Ashworth and Alison Macdonald, *Human Rights and Criminal Justice*, (London, Sweet & Maxwell, 3rd ed, 2012) at 85-88 [2-13]-[2-17]. This is based on the view that "'necessary' ... does not have the flexibility as such expressions as 'useful', 'reasonable' or 'desirable', but implies the existence of a 'pressing social need' for the interference in question": *Dudgeon v United Kingdom* (1981) 4 EHRR 149 at 164 [51].
- ¹⁶ Grégoire C N Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, Cambridge, 2009) at 5.
- ¹⁷ See generally "Justification and Rights Limitation" in (ed) Grant Huscroft, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, New York, 2008) 93 at 96-97.

The justification for the Act

So much for the key functions and characteristics of the Act.
What are the justifications for it?

There are three which have significant force.

First, there is merit in setting out some human rights goals as explicit objectives for the legislature and the executive to bear in mind.

Secondly, it was valuable to create the Joint Committee on Human Rights at the time the Act was enacted in order to scrutinise draft legislation with those goals in mind, and to couple that with the Ministerial duty to make a statement of compatibility.

Thirdly, the Act compels the court to focus closely on a particular application of legislation to an individual case. The legislature may not have foreseen that the legislation would apply to that case. It may not have foreseen that in that application the legislation might have adverse human rights consequences.¹⁸ One strength of the common law system of trial is that it permits a detailed measured consideration of the parties'

¹⁸ Jeremy Webber, "A Modest (but Robust) Defence of Statutory Bills of Rights" in (eds) Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone, *Protecting Rights Without a Bill of Rights* (Ashgate, Aldershot, 2006) at 275-284.

circumstances which may affect the application or development of particular rules. The Act takes that facility and uses it to permit judicial suggestions for improvements in legislation by issuing declarations of incompatibility or making criticisms.

It is now necessary to turn to seven potential problems in or questions about the Act.

Problem one: the direct and indirect expense of the Act

Financial expense is not necessarily a critical problem if what is gained by the expense is worthwhile. But it is the case that the clearest consequence of the Act, and bills of rights like it, is expense, and perhaps ill-incurred expense. The expense arising from uncertainty can be put on one side for the moment. There is the direct expense to government of funding the increased costs of the courts. There is the direct expense of supplying a human rights bureaucracy. There is the direct expense to public bodies of having to resist human rights challenges. Governments also often fund pro-human rights advocacy groups which stand behind bills of rights litigation. It has been said that in Canada the bulk of funding for equality programmes is absorbed by the salaries of the rights experts who staff them, and that a

disproportionate number of those experts are lawyers. Thus among "the primary economic beneficiaries of rights policies are rights experts."¹⁹

Then there is the opportunity cost to society of a human rights segment of the legal profession growing up. Lawyers do not belong to that class of humanity which can make two grains of wheat grow where only one grew before. They are a necessary class, but not a productive one. A critic has described the "motivation and the enthusiasm of legal firms for some types of human rights litigation".²⁰ Assembling and deploying evidence and arguments going to social and moral issues may increase the cost of litigation. So may the attempts by persons who are not parties to the litigation to intervene or act as *amici curiae*. Arguments about the Act involve analysis of quite abstract ideas as a means of deciding what human rights exist and what a particular enactment means, together with evidence about its impact. They encourage a trend to consume undue time in court flowing from the massive citation of authorities from many bills of rights jurisdictions, most of which have bills of rights in terms different, sometimes very different, from the Act and the Convention, and many of which have legal systems, social structures and customs which are radically different from

¹⁹ F L Morton, "The Charter Revolution and the Court Party" (1992) 30 *Osgoode Hall Law Journal* 627 at 643-644.

²⁰ Chris Himsworth, "Rights versus Devolution" in (eds) Tom Campbell, K D Ewing and Adam Tomkins, *Sceptical Essays on Human Rights* (Oxford University Press, Oxford 2001) 145 at 158.

those of the United Kingdom.²¹ Many judges have denounced this, but impotently. Simultaneously there has grown up what has been described as a "veritable cottage industry" of books about the Act and Convention²² leading to "metres of books about human rights on law library shelves".²³ Some human rights lawyers devote their energies to invoking rights on behalf of wealthy corporations which were contemplated as being primarily available to not very wealthy human beings.

Convention rights have fallen into the hands of a sort of "human rights club". The members of that club know each other's ways. The members compete in revealing to each other their superior ingenuity and human rights sensitivity. It is a contest of compassion and cleverness. The human rights club is now one of a group of clubs which cluster around the courts in the common law tradition. There are also the constitutional club, the defamation club, the industrial club, the criminal club, the intellectual property club, even the personal injuries club, though that club has come down in the world very sadly and its

²¹ See James Allan and Grant Huscroft, "Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts" (2006) 43 *San Diego Law Review* 1.

²² Richard Rawlings, "Taking Wales Seriously" in (eds) Tom Campbell, K D Ewing and Adam Tomkins, *Sceptical Essays on Human Rights* (Oxford University Press, Oxford 2001) 177 at 187.

²³ John McMillan, "The Ombudsman and the Rule of Law", paper delivered at the Public Law Weekend, 5-6 November 2004 at 15.

membership is now much attenuated. There are these seven. But the greatest of these is the human rights club.

An indirect cost of bills of rights may be that they channel the energy of government officials and private lawyers away from the direct enforcement of human rights into less productive activity. The greater the resources devoted to human rights litigation, the less that can be devoted to other forms of human rights protection.

Problem two: the creation of legislative tasks in defining human rights which are beyond judicial competence

It is to this issue that Professor Finnis's lecture 30 years ago is most central.²⁴

Vagueness. Some of the Convention rights in their primary form, even before express exceptions are considered or interest/necessity analysis is undertaken, are very abstract, vague and unspecific. They are expressed in "vague, amorphous and emotively attractive terms".²⁵ But they do not have a meaning sufficiently concrete to permit a

²⁴ "Human Rights and their Enforcement" in *Human Rights and Common Good: Collected Essays*, vol III (Oxford University Press, Oxford 2011) at 42.

²⁵ James Allan, "The Effect of a Statutory Bill of Rights where Parliament is Sovereign: the Lesson from New Zealand" in (eds) Tom Campbell, K D Ewing and Adam Tomkins, *Sceptical Essays on Human Rights* (Oxford University Press, Oxford, 2001) 375 at 376.

determination of whether some particular enactments or types of conduct violate them. It is therefore necessary for courts to decide what the rights actually are. Those supposedly judicial decisions are legislative in character.

Secondly, the application of interest/necessity analysis to the rights stated in Arts 6.1, 8, 9, 10 and 11 in their primary form to work out the actual, not merely prima facie, content of each right is even more nakedly legislative in character. The factors stated in the Articles as going to interest/necessity analysis are insufficiently specific to control or assist the courts. The results of that analysis are unpredictable. There is thus a sharp contrast between the reasoning of the courts in applying conventional rules of law and the reasoning of the courts in applying the Act.²⁶ The Convention is so vague that it invites judges to pour their views on controversial practical, social and moral questions into the empty vessels of the words. The meaning will thus vary from judge to judge.

European doctrines. The judicial task is not assisted by s 2(1) of the Act. That commands the United Kingdom courts to take account of decisions by the European Court of Human Rights. Those decisions are often reached by narrow margins. They conflict among themselves.

²⁶ Kenneth Minogue, "What is Wrong with Rights" in (ed) Carol Harlow, *Public Law and Politics* (Sweet & Maxwell, London, 1986) 209 at 223.

The decisive reasoning in them is often sparse. They are full of dicta. The decisions have applied to the language complex qualifications undreamed of in 1950. The obscurity of doctrines like proportionality, balancing, the margin of appreciation and subsidiarity²⁷ encourages reasoning so uncontrolled as to put the courts in the position of a legislature. The things to be balanced or weighed or compared are not readily commensurable. The competing considerations cannot be expressed in common defined values.²⁸ The necessary inquiry into whether the challenged legislation is the least restrictive means of achieving the legislative object is a legislative task.

An ideal democratic society. The Convention directs attention to certain interests "in a democratic society". That is not any actual democratic European society. The European Court has held that three hallmarks of a democratic society are tolerance, broadmindedness and pluralism.²⁹ Many actual democratic societies lack these qualities. The search is for an ideal democratic society. The Convention propounds an aspiration. It does not point to an existing reality. The search is bound to encourage judges to examine their own hearts for what characteristics that ideal society might have.

²⁷ See Sir Stephen Sedley, *Guardian*, 14 November 2012.

²⁸ John Finnis, "Commensuration and Public Reason", *Reason and Action, Collected Essays: vol I* (Oxford University Press, Oxford, 2011) 233 at 237-238.

²⁹ *Handyside v United Kingdom* (1976) 1 EHRR 737 at 754 [49]; *Dudgeon v United Kingdom* (1981) 4 EHRR 149 at 165 [53]; *Hirst v United Kingdom* (2005) 42 EHRR 41 at 867 [70].

Impermissible delegation. The Act has impermissibly delegated to the courts legislative decisions which the legislature itself has failed to make.³⁰ Professor J A G Griffith said that the language of the Convention frequently involves "the statement of a political conflict pretending to be a resolution of it".³¹ Professor Finnis called this a "fundamental remission of responsibility".³² It offends the separation of powers in a fundamental respect.

Superior capacity of legislature. The legislature's ability to define rights is superior to that of the courts. The Convention rights turn on matters of practical expediency, social interests and morality. A court may know nothing of the particular factors which are expedient in dealing with the problem in hand. A court may have to engage in dangerous speculation about social interests. Some of these issues may depend on expert opinions, or on aspects of human experience not necessarily shared by judges. Legislators have access to these things through public and private debate, pressure groups, commissions of inquiry, civil servants and staffers. Courts do not. They depend on

³⁰ Grégoire C N Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University of Press, Cambridge, 2009) at 7.

³¹ "The Political Constitution", (1979) 4 *Modern Law Review* 1 at 14.

³² "Human Rights and their Enforcement" in *Human Rights and Common Good: Collected Essays*, vol III (Oxford University Press, Oxford, 2011) at 40.

evidence. It may not suit either party to call the necessary evidence. By whom, then, is it to be called? If it is called, how is it to be evaluated efficiently? Legislators characteristically work towards compromises under the influence of different aspects of public opinion and practical pressures. Courts cannot work in that way.

Cost implications. Decisions under the Act may have cost implications. Legislators are accustomed to choose between courses of action after taking into account their cost and answering questions about how that cost is to be funded. Courts are not. If a court makes a declaration of incompatibility and a legislative response conforming to it would require heavy expenditure, what is the government to do? Does it defend its budget position by ignoring the declaration? Or does it respond, and seek to raise money, from disgruntled taxpayers to support a policy which both the government and the taxpayers oppose? If it responds, the response overlooks the fact that the executive and the legislature are each independent arms of government. They are not arms of the judicial branch of government.³³ Responsible government involves the executive being responsible to the legislature. It does not involve the executive and the legislature being responsible to the judiciary.

³³ Conor Gearty, "Tort Law and the Human Rights Act" in (eds) Tom Campbell, K D Ewing and Adam Tomkins, *Sceptical Essays on Human Rights* (Oxford University Press, Oxford, 2001) 243 at 257.

The superior legitimacy of the legislature's role. Not only does the legislature have greater ability to define human rights than the judiciary; its role in doing so has greater legitimacy than the judiciary's.

On 10 February 1987 in Westminster Abbey, Sir Alec Douglas-Home, to use the name of his many names by which he is best known, delivered an address at the memorial service for Harold Macmillan, his predecessor as Prime Minister. He said: "democracy is all about the relationship of the individual citizen with the law".³⁴ That is, the development of the law in legislation depends on democratic criteria. Democratically elected legislators keep a close eye on the electors and their opinions. Judges do not. Politicians are accountable to the legislature. Judges are not. Politicians are also accountable to the electors. Judges are not. It is inherent in judicial independence that these things should be so. Each individual elector has at least one human right – the right to be treated as an autonomous moral being whose opinion on human rights issues, and others, is taken into account.³⁵ Legislators are accountable to the individual electors who each have that right. It is more legitimate for legislators to decide human rights issues because they have that accountability than it is for courts, which do not.

³⁴ D R Thorpe, *Alec Douglas-Home* (Politico's, London, 2007) 468.

³⁵ Tom Campbell, "Does anyone win under a bill of rights? A response to Hilary Charlesworth's 'Who wins under a bill of rights?'" (2006) 25 *University of Queensland Law Journal* 55 at 57.

Finally, decisions about what human rights exist and whether legislation is compatible with them may excite controversy. The role of the court is to still controversies, not exacerbate them. It is better that the storms of controversy be not only stirred up, but also weathered, by Parliament.

Problem three: granting power to the courts to substitute for an impugned enactment a different enactment

The second problem related to giving the courts power to legislate in deciding what human rights exist. The third problem concerns the power of the courts, granted by s 3(1), to legislate by moulding out of an enactment said to contravene human rights a better and purer enactment which does not. The trouble is that the better and purer enactment is not the enactment which the legislature enacted and does not reflect the legislative will. Indeed the new rights-compliant meaning which the courts select may be some distance from the legislative will. We know the *cy-près* doctrine in charities law – as near as possible. This is a sort of *cy-loin* doctrine, if there can be such an expression – as far away as necessary.

The remoulding function of s 3(1) has been prefigured in particular illegitimate approaches to statutory interpretation. There can be semi-conscious or unconscious abuse of the "mischief" rule of statutory interpretation. The wider the mischief identified, the more the

interpretation of the statute will change. And the easier it is for a judge to shift from a wide mischief to stating as the interpretation what is the best way, in the judge's opinion, of dealing with that wide mischief.

Similarly, there is a principle of statutory construction influencing a court against an interpretation producing irrational or very inconvenient results. This can lead to selecting a statutory model which produces reasonable and convenient results. And as Lord Sumption demonstrated in his F A Mann lecture for 2011,³⁶ that can lead the judges to an illegitimate invention of what are in their opinion the most meritorious policies and the best model which the legislature ought to have followed.

Section 3(1) legitimises a similar approach. But legislative legitimisation of dangerous practices is no anecdote to the bane.

The authorities have construed s 3(1) as meaning that even if there is no doubt about the enacted meaning, no ambiguity and no unreasonableness, the court may, within the loose bounds of "possibility", select a rights-compliant meaning. The court may "read words into" the enactment – words which "change [its] meaning". They may depart from "the intention of the Parliament". They may adopt "strained" meanings. They may engage in the "reading down" of

³⁶ "Judicial and Political Decision-Making: The Uncertain Boundary" [2011] *JR* 301 at 305-307 [13]-[18].

express language. They may engage in the "implication" of provisions.³⁷ The process must admittedly not disturb the repeatedly expressed "settled will" of the legislature.³⁸ It may be less available on issues of social policy than on civil and political rights.³⁹ It may not permit change in "the substance of a provision completely".⁴⁰ It must comply with the "underlying thrust" of a statute.⁴¹ And similar ideas are caught in statements about the need not to remove the pith and substance of the statute,⁴² and not to violate one of its cardinal principles.⁴³ But despite these limitations the courts have large powers which are in substance legislative. The Act was piloted through Parliament by Lord Irvine of Lairg LC and Mr Jack Straw, the Home Secretary. They accepted these outcomes when they said in the debates that findings of incompatibility would be "rare ... as in almost all cases, the courts will be able to

³⁷ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 571 [29]-[30], 571-572 [32] and 574 [44]. The courts have adhered to the *Ghaidan* position even though the subsequent decision in *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718 at 1723 [17] appears to be inconsistent with it.

³⁸ *R v Lichniak* [2003] 1 AC 903 at 911 [14].

³⁹ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 568 [19].

⁴⁰ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 596 [110] per Lord Rodger of Earlsferry.

⁴¹ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at at 572 [33] per Lord Nicholls of Birkenhead.

⁴² *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 597 [111].

⁴³ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 599 [116].

interpret legislation compatibly with the Convention."⁴⁴ These predictions were correct. Only 19 declarations of incompatibility have been made. Lord Irvine and Mr Straw were correct in their predictions because they expected the courts to strive, and strive successfully, to read legislation as rights-compliant. The courts have done this.

Yet from every point of view a change in the meaning of legislation to make it rights-compliant can be a more radical and important outcome than a finding of incompatibility.

In this respect the United Kingdom courts have been given greater power than courts administering constitutional bills of rights. The latter courts, unlike the United Kingdom courts, can strike down legislation. But they cannot avoid striking it down by remoulding it in the way s 3(1) allows. The United States Supreme Court cannot seek to avoid reaching the conclusion that a statute is constitutionally invalid by ignoring its actual meaning and substituting a meaning compatible with the bill of rights merely because it falls within the generous expanse of what is "possible". This suggests that the Act should not be placed in the third of the four categories listed at the outset, but in a new and more extreme fifth category.

⁴⁴ *Commission on a Bill of Rights: A UK Bill of Rights? The Choice Before Us* (2012) vol 1 para 6.41.

Problem law: disabling judges from carrying out their conventional functions

According to one school of thought, there is a risk that the task of defining human rights and rewriting legislation to accord with them will excite some judges unduly. The diet provided by human rights work under the Act is unusual and rich. Its succulence can stimulate an appetite which grows on what it feeds on. But it is a diet which may jade the judicial appetite for conventional work. It may cause that work to be seen as having only a dreary banality.⁴⁵ Worse, it may encourage judges to transfer the practical-social-moral analysis commanded by the Act out of human rights fields into other fields.

As Lord Sumption pointed out in his F A Mann lecture for 2011, there are fields into which traditionally the courts have abstained from moving and which they have left to the executive or the legislature – foreign affairs, national security, issues with budgetary implications, moral questions, policy questions generally.⁴⁶ There is a danger that judicial work in applying the Convention may cause some judges to stray into fields not traditionally trodden whether there are human rights issues

⁴⁵ Sir Gerard Brennan, "The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Perspective" in (ed) Philip Alston, *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, Oxford, 1999) 454 at 460.

⁴⁶ "Judicial and Political Decision-Making: The Uncertain Boundary" [2011] *JR* 301 at 313-314 [31]-[32].

in them or not. As with the American soldiers after the First World War, it may prove hard to get the judges back on the farm once they have seen Gay Paree.

Problem five: increasing uncertainty and retrospectivity

A decision about a rights-compatible meaning based on practical, social or moral criteria is inherently less predictable than a decision about the meaning of words independently of those criteria. This is particularly so where s 2(1) compels United Kingdom courts to apply European Court decisions, and those decisions search not for the original meaning of the Convention, but treated as a "living instrument which ... must be interpreted in the light of present-day conditions."⁴⁷ Hence those decisions rest on an "evolutive", "dynamic" or "living tree" approach to interpretation.

Of all people, Mr Jack Straw, the Home Secretary who piloted the Act through the House of Commons, criticised this. He has recently repented of his work. He attacked the European Court in the House of Commons in 2011 for "judicial activism" and for "widening its role not only beyond anything anticipated in the founding treaties but beyond anything anticipated by the subsequent active consent of all the state

⁴⁷ *Tyler v United Kingdom* (1978) 2 EHHR 1 at 10 [31] (holding that corporal punishment of a juvenile was "degrading", contrary to Art 3). See also *Marckx v Belgium* (1979) 2 EHRR 330 at 346 [41].

parties, including the UK".⁴⁸ In his *Hamlyn Lectures*,⁴⁹ Mr Straw said that the European Court should "pull back from the jurisdictional expansion it has made in recent decades" – not just the last decade. He said that no-one realised in 1951 that the European Court would act on an "ever-widening mandate to determine what shall constitute human rights". Yet what it had done up to 1997 was widely known in 1997, when Mr Straw urged the House of Commons to approve the Bill.

However that may be, European Court developments have made it much harder for the intelligent citizen who is not a lawyer to find out the law. If there are authorities on the words, they must be read, with all their cross-references to arcane European Court cases, to discover whether or not a rights-compliant meaning exists which differs from the ordinary meaning. Even if authorities on the words do not exist, the citizen cannot safely act on the ordinary meaning, because a court may later make a surprising departure from that meaning in order to ensure rights-compliance. In the case of a statute enacted before 2000, the courts may have held before 2000 that it has its ordinary meaning. A citizen may embark on a course of conduct after 2000 in reliance on that meaning. The courts may then overrule the earlier authorities and

⁴⁸ H C Deb, 10 February 2011, cols 501-502 quoted by Lord Faulks QC and Jonathan Fisher QC in "Unfinished Business", *Commission on a Bill of Rights, A UK Bill of Rights? The Choice Before Us* vol I (2012) 182 at 191.

⁴⁹ See Joshua Rozenberg, "Judicial dialogue? Straw and Bratza deliver choice words on Strasbourg", *The Guardian* 14 November 2012.

ascribe to the statute a rights-compliant meaning. The later decision may operate adversely to the citizen. In substance, the legislation involved operates retrospectively. All judicial changes in the law do, of course, subject to any possible doctrine of prospective overruling. That is why judicial development of the *judge-made common law* proceeds with caution. It is much harder to be cautious in complying with the duty created by s 3(1) when construing the enormous quantities of *legislation-made law*. Hence the Act greatly increases the chances that many retrospective judicial changes in the statute law will be made. These problems of uncertainty and retroactivity are compounded when one remembers the innumerable public officers, senior and junior, who are liable to judicial remedy for actions incompatible with a Convention right under ss 6-9. These factors undercut the rule of law values on which the Convention appears to rest.

Problem six: declarations of incompatibility are advisory in character

When a court makes a declaration of incompatibility it reaches a curious result. On the one hand, a declaration that legislation is incompatible with Convention rights is the most adverse outcome possible for the government. That is because as a practical matter it puts pressure on the government to do something about the legislation. On the other hand, a declaration of incompatibility creates no advantages for the plaintiff. That is because it does not affect the validity of the legislation, which continues in its full adverse operation on the plaintiff. Thus Geoffrey Marshall called a declaration of

incompatibility "not a legal remedy but a species of booby prize".⁵⁰

Normally there is a direct relationship between one side's failure and another side's success. Here there is not.

The courts normally abhor giving advisory opinions. The following conditions must be satisfied to prevent a judicial opinion being advisory. The plaintiff must claim a remedy to enforce a right, duty or liability. That remedy must be enforceable by the court. And the plaintiff must have a sufficient interest in enforcing the right, duty or liability to make the controversy justiciable.⁵¹

A declaration of incompatibility is not a "remedy" of that kind. It does not affect any right or obligation *in issue between the parties*. It neither reflects nor creates any duty on the government. The government is under no legal duty to state its attitude, to draw the declaration to the attention of Parliament, or to do anything else. Even if it were, it would not be a duty owed to the plaintiff. There are political pressures on it to do something, but they are not legal pressures. A declaration of incompatibility does no more than give advice on an abstract question. That question is not really even a question of law⁵²

⁵⁰ "Two kinds of compatibility: more about section 3 of the Human Rights Act 1998" [1999] *Public Law* 377 at 382.

⁵¹ *Abebe v The Commonwealth* (1999) 197 CLR 510 at 528.

⁵² Ryan Haddrick, "The Judicature, Bills of Rights, and Chapter III" in (ed) Julian Leaser and Ryan Haddrick, *Don't Live Us with the Bill: The Case Against an Australian Bill of Rights* (The Menzies Research Centre Limited, Barton, ACT, 2009) 145 at 168.

because the incompatibility of legislation with the Convention rights does not make the legislation unlawful.

There is another illustration of the difficulty. The best outcome for the government is that the legislation should be given the meaning for which it contends, and be enforced; but the plaintiff opposes that. The best outcome for the plaintiff is that the legislation be given a rights-compatible meaning which suits the plaintiff's interests; but the government opposes that. On those issues there is a *lis* between the parties. But neither party wants a declaration (or even a statement) of incompatibility. There is no *lis* between them about that.

Statute can authorise the giving of advisory opinions. But it is very rare for this to happen. That is because the courts and the legislature have seen the judicial development of the law as best taking place in consequence of a particular dispute between the parties. The advisory character of declarations of incompatibility is not simply a failure to reach some pure state of nice theoretical perfection. It goes to the heart of the judicial function. The task of a court in deciding a dispute is made easier where there is a concrete controversy between parties whose adverse material interests will be affected by the outcome. The sharpness of the controversy assists the court to clarify its thinking. That assistance is absent when the court decides, against the will of the parties, to consider making a declaration of incompatibility. It is assistance which cannot be supplied by the arguments of interveners or *amici curiae*, with their lofty

and non-material goals. I say that as someone who has heard enough interveners and amici curiae to fulfil the needs of a lifetime.

Problem seven: loss of national sovereignty

It is often said that in signing and ratifying the Convention, accepting the right of individual petition to the European Court, and enacting the Act, the United Kingdom did not give up any part of its national sovereignty.⁵³ Is that so? There are two reasons for doubting that it is so.

First, before the Convention, the House of Lords was the ultimate court of appeal for the United Kingdom in relation to human rights. No foreign court could make binding decisions about United Kingdom compliance with human rights principles. But now the ultimate Court of Appeal for the United Kingdom in relation to human rights is not the Supreme Court (as successor to the House of Lords). It is the European Court. That is a foreign court. Sir Nicolas Bratza, the former President of the European Court, has denied that his Court "is ... a foreign court". He has contended that it is an international court in a structure of which

⁵³ For example, Lord Hoffmann, "The Universality of Human Rights" (Judicial Studies Board Annual Lecture, Inner Temple, 19 March 2009) [38] and [42]; Lord Sumption, "Judicial and Political Decision-making: The Uncertain Boundary" [2011] *JR* 301 at 314 [33]. To the contrary is A W Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, Oxford, 2001) at 740.

the United Kingdom is part.⁵⁴ It is not a structure, however, in which the United Kingdom Supreme Court stands at the peak. Sir Nicholas also rebuked the United Kingdom for not carrying out its legal obligation to comply with the judgments of the European Court.⁵⁵ That legal obligation, however, marks a loss of sovereignty. It may be small. It may have countervailing advantages. But it is real.

Secondary, s 2(1) of the Act requires a United Kingdom court to take into account decisions of the European Court. On one view, which was and is Lord Irvine's view,⁵⁶ a duty to take those decisions into account does not entail a duty to be bound by them. There are certainly examples of the Supreme Court not following the European Court. However, although the position is unsettled, it may be that Lord Irvine's view is not the prevailing view on the authorities. The lamented Lord Rodger, for example, summed up the position in his aphorism: "Strasbourg has spoken, the case is closed."⁵⁷ Sir Nicolas Bratza

⁵⁴ See Joshua Rozenberg, "Judicial dialogue? Straw and Bratza deliver choice words on Strasbourg," *The Guardian*, 14 November 2012.

⁵⁵ See also *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 at 357 [70].

⁵⁶ *Committee Stage of a Bill in the House of Lords*, 583 HL Official Report, 18 November 1997, 5th Series, cols 514-515; *Commission on a Bill of Rights, A UK Bill of Rights? The Choice Before Us?* (2012) at 263, n 13.

⁵⁷ *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 at 366 [1998]. See also Lord Carswell at 368-369 [108] and Lord Brown of Eaton-Under-Heywood at 370 [114].

denied that and said that was not the way the Strasbourg judges saw the respective roles of the European Court and the Supreme Court. But Sir Nicholas did say that where a clear principle was laid down by the Grand Chamber, it is "plainly important that it should be followed and applied by the" United Kingdom courts.⁵⁸ If it is plainly important that this be done, it should be done. And to say "it should be done" is to say that the United Kingdom courts are bound to follow the European Court decision, whether they think it is correct or not. If the highest United Kingdom court must submit to the opinion of a non-United Kingdom court, to that extent United Kingdom sovereignty is diminished.

Has this loss of sovereignty to the European Court brought any valuable countervailing advantage? The answer depends on whether the European Court is a satisfactory court when considered as a source of supposedly binding law. For a final court of appeal, it has far too many judges – 47 potentially. They do not all sit together, but Grand Chambers, to use what the late Lord Atlee would have called their "rather Ruritanian" name, can be large. The judges differ in training. The countries from which they come differ in size, history and society. They do not extend only from the Channel to the Urals or from Stettin in the Baltic to Trieste on the Adriatic. They extend from the Atlantic Ocean to the Bering Sea, and from the North Cape to the Southern Mediterranean. The Convention thus has to regulate the activities of

⁵⁸ "The relationship between the United Kingdom courts and Strasbourg" [2011] EHRLR 505 at 512.

states responsible not only for cultivated Dubliners, but Lapps, those who live in Eastern Siberia, and Mafia gangsters. The judges who sit alone, or on one small panel, often reach conclusions which are different from those of other judges sitting alone, or on other panels. Particular panels are often closely divided. The same is true of the judges when sitting on the Grand Chamber. Inconsistency in reasoning and result is inevitable. Reasoning suitable for the conditions of some members is not suitable for those of others. The judges surrender perhaps too readily to the temptation to give "guidance" on matters which are outside the strict parameters of the dispute between the parties.⁵⁹ With respect, worst of all – and this is a large claim, which would take a long time to justify in detail – the judgments lack reasoning. The judgments are long and earnest, but there often seems to be a gap between the statement of issues and the conclusion. The gap can be seen most sharply by comparing the dissenting opinions of the United Kingdom judge four decades ago, Sir Gerald Fitzmaurice, with the opinions he was dissenting from. One may or may not agree with his dissenting opinions. But they did display tautness and rigour. They had content. The others did not.

Despite what has been said so far, the burden of the argument is not that the judiciary, or indeed the legislature, should abandon the enterprise of securing human rights protection. There are actual

⁵⁹ This is defended by Sir Nicolas Bratza, "The relationship between the UK courts and Strasbourg", [2011] EHRLR 505 at 508.

techniques for protection, some of which can be developed more intensely, which are likely to be more effective than the techniques employed by the Act and the Convention. One concerns the separation of powers and federalism. A second concerns the "principle of legality". And a third is the development by judges of coherent bodies of detailed non-legislated law, and the enactment by legislatures of appropriately detailed and targeted legislation.

First technique: the separation of powers and federalism

The separation of powers is an underrated safeguard for human rights. That is because it diffuses and weakens governmental power. One of the best-known Bills of Rights in history is to be found in the first 10 amendments to the United States Constitution. Yet those amendments were not part of the original Constitution as approved in the Philadelphia Convention in 1787 and operative from 1789. The bill of rights became operative only in 1791. The framers of the original Constitution did not see it as necessary. James Madison regarded the separation of powers and the existence of federalism as "a double security" to protect "the rights of the people".⁶⁰ In other words, human liberties are best protected by keeping the powers of government in check – the powers of the federal government so as not to trespass on

⁶⁰ Quoted in (ed) Kevin A Ring, *Scalia Dissents: Writings of the Supreme Court's Wittiest, Most Outspoken Justice* (Washington DC, Regency Publishing Inc, 2004) at 43.

the field reserved to the other components in the federation, and the powers of the component parts of each level of government by division of them among the three branches of government. Federalism also promotes human rights by reducing uniformity: it permits each component unit to experiment. It is true that in theory governmental tyranny can flourish as much in a non-federal state as in a federation. But in practice the existence of beneficial institutions in one unit of a federation tends to be noticed by those who live in others, and pressure mounts for an imitation or at least adaptation of those beneficial institutions.

Before 1998, there were minor respects in which the United Kingdom offended the principle that the three powers of government be separated. Those respects concerned the role of the Lord Chancellor and the role of the Law Lords sitting as part of the legislature. Those difficulties, if they ever really were difficulties, have ceased. There is now a complete separation of powers, save that the executive is responsible to the legislature. It may be thought that that achieves more beneficial results than complete separation of the executive from the legislature.

Putting aside the small examples of the Isle of Man and the Channel Islands, before 1998 there were federal elements in the United Kingdom – notably in relation to Northern Ireland for eight decades. Since 1988, the course of devolution towards a federal goal has been marked and in considerable measure followed.

In short, James Madison's twin safeguards exist in the United Kingdom to a significant degree.

Second technique: the "principle of legality"

There are principles of statutory interpretation sometimes called "a common law 'Bill of Rights'".⁶¹ One of them is the "principle of legality". In the absence of clear words or necessary implication the courts will not interpret legislation as abrogating or contracting fundamental rights or freedoms. This principle has been well-established for some time. It is a salutary principle for the reasons given by Lord Hoffmann:⁶² "[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process." That last sentence makes a particularly powerful point. Many fundamental rights and freedoms are characterised as "human rights".⁶³ They include property-related rights – vested property interests and freedom from trespass by

⁶¹ J Willis, "Statutory Interpretation in a Nutshell" (1938) 16 *Canadian Bar Review* 1 at 17.

⁶² *R v Secretary of State for the Home Department; ex parte Simms* [2004] 2 AC 115 at 131.

⁶³ See *Momcilovic v R* (2011) 245 CLR 1 at 177-178 [444].

police officers on private property. They include rights to do with access to courts and their remedies: the conferral of jurisdiction on a court, the writ of habeas corpus, the jurisdiction of superior courts to prevent acts by inferior courts and tribunals in excess of jurisdiction. They include aspects of court procedure: procedural fairness, the right to a fair trial, open justice, the criminal burden and standard of proof, legal professional privilege, the privilege against self-incrimination and the non-existence of a prosecution appeal from an acquittal. They include principles against retrospectivity: the non-retrospectivity of statutes extending the criminal law or changing civil rights or obligations. They include mens rea as an element of crimes. They include freedoms: freedom from arbitrary arrest or search, the freedom to depart from and re-enter the country, the freedom of individuals to trade as they wish, the freedom of individuals to use the highways, and freedom of speech.

One view is that s 3(1) is a statutory enactment of the principle of legality. Lord Hoffmann adhered to that view.⁶⁴ The justification for the principle of legality advanced by Lord Hoffmann – that without it there is too great a risk that in the course of the democratic legislative process fundamental rights may be ignored – is certainly consistent with s 19 of the Act, requiring responsible Ministers to state either that the provisions of Bills are or are not compatible with the Convention rights. It is also

⁶⁴ *R v Secretary of State for the Home Department; ex parte Simms* [2004] 2 AC 115 at 132; *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718 at 1723 [17]; [2006] 1 All ER 529 at 535.

consistent with the function of the Joint Committee on Human Rights. However, as we have seen, the main trend of authority holds that s 3(1) of the Act goes much further than the "principle of legality".⁶⁵ The principle of legality, though more limited than s 3(1), can achieve a similar purpose without entailing the drawback of involving the courts in creating new legislative rules.

Third technique: specific rules of the general law

The Convention stands in contrast with many rules of the general law. The Convention is not detailed. The Convention is not directly enforceable in relation to legislation (cf s 3(1)), as distinct from actions (ss 6-9). The Convention is not specifically adapted to particular problems. The Convention is not entirely coherent. In contrast, common law and statutory rules tend to be detailed. They are generally enforceable. They are specifically adapted to the resolution of particular problems. Their makers seek, with some success, to make them generally coherent with each other and with the wider legal system.

⁶⁵ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. See also *Vodafone 2 v Revenue and Customs Commissioners* [2010] Ch 77 at 90-92 [37]-[42]; *Ahmed v Her Majesty's Treasury* [2010] 2 AC 534 at 646 [112]; *Principal Reporter v K* [2011] 1 WLR 18 at 40-41 [60]-[61]. For examples of these principles in operation, see *R v Offen* [2001] 1 WLR 253 at 277; [2001] 2 All ER 154 at 175; *Sheldrake v DPP* [2005] 1 AC 264.

United Kingdom statutes are replete with examples of the type of legislation which vindicates human rights directly and specifically. That legislation does so better than the Convention techniques. One key example concerns the relationship of police officers and suspects. It is far from surprising that human rights considerations arise here, because the circumstances in which investigating officers deal with suspects are inevitably those in which there is a considerable imbalance of power in favour of the former. The Convention has very general provisions about the right to security and liberty in Art 5 and about the right to a fair trial in Art 6. Statutes like the *Police and Criminal Evidence Act 1984* (UK) and the *Criminal Justice Act 2003* (UK) have created detailed and precise rules. So has the common law. The rules to be found in these bodies of law are tough law. Infringement can lead to criminal punishment, damages in tort and evidentiary inadmissibility. Those possible outcomes have a strong deterrent effect against the infringement of human rights. They were worked out over a very long time by judges and legislators who thought deeply about the colliding interests and values involved in the light of practical experience of conditions in society to which the rules were applied. Abstract slogans and general aspirations about human rights played no useful role in their development. The great detail of this type of regime renders it superior to bills of rights. Among other things, it is likely to encourage a gradual change in culture and ethos, which may be stronger influences towards good conduct than the vague aspirations embodied in bills of rights.

The task of dealing with procedural and evidentiary questions, incidentally, is one in relation to which the European Court has underrated the ability of those administering local institutions. An example is Art 6.3(d). It gives a person charged with a criminal offence the right "to examine or have examined witnesses against him". There is no provision permitting interest/necessity analysis. What is now s 116(2) of the *Criminal Justice Act 2003* permits hearsay evidence where the declarant is dead, unfit to testify, outside the United Kingdom, cannot be found or fears to give evidence. In *Al-Khawaja and Tahery v United Kingdom*⁶⁶ the European Court of Human Rights held that a trial in which the evidence of a dead declarant was received contravened Art 6.1 read with Art 6.3(d). Considered from the viewpoint of domestic law, there was no way of using even s 3(1) to read s 116 as meaning anything other than what it said. Considered from the point of view of international law, the European Court's error was not to apply a margin of appreciation. It did hold that Art 6.3(d) would not be contravened by the reception of a hearsay statement which was not the "sole or decisive" evidence against the accused, but that was to twist the meaning of what the Article said. Insufficient attention was given to the analyses of the hearsay rule by English and American judges and scholars over many decades. Insufficient attention was given to the activities of law reform committees in the field since the 1930s, particularly the 11th Report of the Criminal Law Revision Committee in

⁶⁶ (2009) 43 EHRR 1.

1972. Its members included such distinguished criminal lawyers as Professor Glanville Williams, Professor Cross and Lord Justice Lawton. Insufficient attention was given to the long controversies that followed that report, and to the eventual legislative responses. One need not applaud every detail of the modern English statutory law of evidence to accept that it has been closely considered. It is scarcely surprising that in *Horncastle v R*⁶⁷ the Supreme Court, with admirable restraint and courtesy, declined to follow the Strasbourg authorities. The Grand Chamber of the European Court then executed a retreat, though only a limited one.⁶⁸

The United Kingdom legislatures are capable of enacting specific legislation dealing with a particular field in a comprehensive way – as Lord Reid said in *Myers v Director of Public Prosecutions*, "following on a wide survey of the whole field", and avoiding a "policy of make do and mend".⁶⁹ The courts can apply the incremental approach of the common law, deal narrowly with particular problems, observe how the results of that decision develop in other courts, take into account debate about their decisions and consider the lessons of experience as they go along. In each instance the law is being developed by close reference to the particular conditions of the jurisdiction in question. That is not always so with bills of rights.

⁶⁷ [2010] 2 AC 373.

⁶⁸ *Al-Khawaja and Tahery v United Kingdom*.

⁶⁹ [1965] AC 1001 at 1022.

Other techniques

To the three techniques just discussed for vindicating human rights may be added others. One is the role of ombudsmen in investigating complaints about government maladministration relating to human rights. That role may be particularly important in dealing with the problems Professor Simpson identified at the bottom of the governmental pyramid. Another is responsible government and its capacity for the elected representative of a citizen to seek redress of grievances by corresponding with Ministers and, if necessary, publicly questioning them in Parliament. Another is invoking media publicity with the assistance of pressure groups. A fourth is the rigorous examination of legislation before enactment. A fifth is powerfully expressed speeches in the legislature, even if the views are minority views. We may take as an example a politician, much-reviled but nonetheless admired by political opponents, the late Enoch Powell, whose Hola Camp speech on 27 July 1959 at 1.15am in the House of Commons was described by Denis Healey, at the end of his very long career, as "the greatest parliamentary speech I ever heard."⁷⁰ A sixth technique is encouraging among employers, the suppliers of services and the community generally a greater sensitivity to human rights.

⁷⁰ See (ed) Lord Howard of Rising, *Enoch at 100* (Biteback Publishing Ltd, London, 2012) at 54.

Conclusion

Sometimes it is said that to rely on the legislature and the judiciary alone to protect human rights is to risk their steady debasement. It is said that without the Act, the importance of human rights will be forgotten, or human rights will be readily destroyed by the arrival of a dictator, or there will be "a creeping erosion of freedom by a legislature willing to countenance infringement of liberty or simply blind to the effect of an otherwise well intentioned piece of law."⁷¹ Of course the Act, being only an ordinary act of Parliament, is not immune from the attentions of a dictator whose "party" seizes control of the legislature. Now it is a principle of statutory construction, and of constitutional construction, that it is wrong to adopt a construction of the language in its ordinary operation which is controlled by the extraordinary possibility of some extreme but highly unlikely state of affairs – what Justice Scalia calls a "horrible". It is equally wrong to criticise the potential inefficiency of governmental institutions by postulating a failure in them which can only result from some cataclysmic social breakdown which it is almost impossible to prevent or control. It is probable that if a dictator takes power, or a party hostile to human rights in their present manifestations is elected, something will have gone so wrong in the body politic and in society generally that a bill of rights would have been incapable of

⁷¹ Lord Irvine of Lairg, "The Development of Human Rights in Britain Under an Incorporated Convbention on Human Rights" [1998] *Public Law* 221 at 229.

preventing the catastrophe. Some think that bills of rights are neither necessary nor sufficient means by which to achieve many human rights goals. Some contend that a tradition in the particular jurisdiction of adherence to the rule of law is much more important. Some even think that the protection of rights depends more often on factors other than legal rules. One is the social climate, moral traditions, and the ethical sense of the people. Another is the existence among them of a vibrant culture of tolerance and liberty. Another is their desire to maintain civilised standards and manners – what has been called "a framework in which all manner of delicate sensibilities may flower in human relations"⁷² A force for public opinion reflecting these things may be more effective than formal guarantees, of whatever kind, in the law. It is customary to deride this point of view with the supposedly annihilating adjective "Diceyan". But Dicey is not its only supporter. Very different thinkers have agreed with it. John Stuart Mill thought liberty could be protected by "a strong barrier of moral conviction".⁷³ Alexander Hamilton said that the security of a right like press freedom, "whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the

⁷² Kenneth Minogue, "What is Wrong with Rights" in (ed) Carol Harlow, *Public Law and Politics* (Sweet & Maxwell, London, 1986) 209 at 223.

⁷³ *On Liberty*, Ch 1, para 15.

people and of the government. And here, after all ... must we seek for the only solid basis of all our rights."⁷⁴

It is easy to underrate the importance of public opinion. It can be very important where there are people with the will and ability to mobilise it. That has been done even in very adverse circumstances. In 1941, at the height of Hitler's apparent success and popularity, a Nazi programme of compulsory euthanasia for the incurably ill was under way. On 3 August 1941, the Catholic Cardinal Archbishop of Münster, Graf Clemens von Galen, delivered a sermon on the subject. He attacked the programme as "plain murder". He demanded the prosecution for murder of those responsible. He also pointed out that the programme would in due course involve all invalids, cripples and badly wounded soldiers. Copies of that sermon were distributed throughout Germany, and circulated among the soldiers at the front. The Cardinal Archbishop became an admired hero. What was the government reaction? Himmler wanted him to be arrested. Bormann wanted him to be hanged. Goebbels was an unlikely advocate of mercy. But he was the Minister for Propaganda. He did understand public opinion. He advised Hitler not to proceed against the Cardinal Archbishop because it would alienate the whole of Westphalia for the rest of the war. Goebbels's advice led Hitler, reluctantly, not to take vengeance on the Cardinal Archbishop until he was placed in a

⁷⁴ James Madison et al, *The Federalist Papers*, (ed Isaac Krannick) (Penguin Books, Harmondsworth, 1987) No LXXXIV at 476-477.

concentration camp after the bomb plot on 20 July 1944. The euthanasia programme was terminated in 1941 and did not resume.⁷⁵

It is worth noticing something which Sir Julian Elliston said. He was United Kingdom Parliamentary Counsel at a time when many British colonies were given bills of rights on achieving independence. He wrote on 16 January 1961 that in "any country where [a bill of rights] is likely to be respected it is probably not necessary while in any country in which it is really necessary it is not likely to be respected." He also said: "Except possibly in the most extreme totalitarian regimes, the ordinary law usually provides protective provisions for many aspects of basic rights."⁷⁶ In like vein, Charles Parkinson, the historian of colonial bills of rights, has observed:⁷⁷

"A bill of rights cannot guarantee the protection of rights or the continuation of a civil society. In fact, it has never seriously been argued that the presence or absence of a bill of rights in itself is the decisive factor in the maintenance of a civil society. A bill of rights is usually recognised as just one component in a complex matrix of factors that contribute to a stable civil society."

⁷⁵ Guenter Lewy, *The Catholic Church and Nazi Germany* (Weidenfeld and Nicholson, London, 1968) 265-266; (ed) Robert S Wistrich, *Who's Who in Nazi Germany* (Rutledge, London, 2002) at 71.

⁷⁶ Charles O H Parkinson, *Bills of Rights and Decolonisation*, 239.

⁷⁷ *Bills of Rights and Decolonisation*, 273.

These modern lawyers were echoing James Madison's opinion that "experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed".⁷⁸

Five questions now arise. Is a bill of rights even a particularly useful component in the complex matrix of factors that contribute to a stable civil society? Has the Act significantly improved human rights protection? Is there any fundamental right referred to in the Act which was not given reasonable protection in domestic law before 2000? Before 2000, were there any significant instances in which that right has been infringed in circumstances not permitting any recourse to the courts to remedy the infringement? Is there any respect in which the Act will lead to significantly greater protection for that right without raising the risk of limiting other rights? It might take a lot of work to answer those five questions. But if the answer to them is "Yes, and the prices to be paid are thought to be worth it", British citizens should be grateful for the Act and the Convention. If the answer is "No" or "Yes, but the prices to be paid are too high", they should not be. Those latter answers would reveal that it was not necessary either to enter the Convention or to enact the Act.

⁷⁸ Letter to Thomas Jefferson, 17 October 1788 in William T Hutchinson et al (eds), *The Papers of James Madison* (University of Chicago Press, Chicago and London, 1962-1977), vol 1, ch 14, doc 47.