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**THE HUMAN RIGHTS ACT 1998 –
THE NEEDS OF THE MANY AND THE RIGHTS OF THE ONE**
Lord Neuberger of Abbotsbury
Annual Pilgrim Father’s Lecture

I stand before you in a state of some trepidation. A previous lecturer visiting Plymouth complained bitterly about his reception in this city. He fulminated to the Western Daily Mercury about, and I quote, “scurrilous, vulgar and unmanly assertions perpetrated by foul-mouthed detractors” following his talk. His name was Samuel Rowbotham, the year was 1864, and the purpose of his talk was to persuade his audience that the Earth was flat. The subject matter of this talk, Human Rights in the UK, is rather less futile, if rather less fun.



Introductory

The European Convention on Fundamental Rights and Freedoms identifies and protects the freedoms and rights of individuals against the state – e.g. freedom from torture, freedom of speech, right to privacy and family life, access to the courts, freedom from discrimination. It was born in 1951 as a reaction to the Second World War and the various repressive (and worse) dictatorships which had recently held sway in Europe.

It took nearly 50 years for human rights to become part of English law and to enter the public consciousness, as a result of the Human Rights Act 1998 (HRA), which took effect in 2000. Although the UK signed up to the Convention in 1951, our government was only bound by the Convention, and by rulings of the European Court of Human Rights in Strasbourg, under international law. Until the 1998 Act, unlike every other country which signed up (except Eire), the Convention was not part of the domestic law of the UK.

So it was with no exaggeration that, when introducing the Bill in the House of Lords, Lord Irvine proclaimed that the government was “bringing human rights home.” In one sense, I suppose it could just about be said that they had a modest step towards these shores in 1966, when the UK finally recognised that an individual could petition the Strasbourg court directly. However, that was very unsatisfactory. English judges could not apply the Convention, so there had to be a domestic hearing, which would often be a time wasting money eating charade, before any party could then go to Strasbourg to have a human rights point decided.

It is ironic that the UK was later than almost any other country in Europe at incorporating the Convention into domestic law. Not only were we the first country to ratify the Convention, but English lawyers were probably more closely involved than any others in its drafting. And, of course, over the preceding 250 years, no country had a prouder record of liberty both in practice (an unbroken run of Parliamentary democracy) and in theory (e.g. Locke, Bentham, Mill, Bagehot). It was, no doubt, partly because of that record that the UK felt it did not need to incorporate the Convention into its law any more than it needed a written Constitution. In 1998, this perception changed, although it was done in a rather British way. The HRA creates new domestic rights, specifically the right to have our laws consistent with the Convention, and to have public authorities act consistently with the Convention. But the supremacy of Parliament is maintained.

I should like to start by discussing some fundamental features of the Convention and the HRA; I will then deal with the role of the judges; next, I will identify some specific topical issues and will then make some concluding remarks,

Fundamental Points about the Convention and the HRA

First, the Convention is primarily concerned with individual's rights and freedoms against the state. The primary duty imposed by the HRA on Parliament is to ensure that the statutes it passes comply with the Convention. This is achieved by section 19 which requires the responsible Minister to certify that a statute is Convention compliant. The supremacy of Parliament means that it retains the right to enact legislation which does not, or may not, comply with the Convention, but at least it must be made aware of the actual or possible nonconformity. The House of Lords and House of Commons have set up a Joint Committee on Human Rights which monitors the impact of the HRA on all aspects of life in the UK. The Committee produces full and impressive reports to Parliament.

An enormous volume of statutes is passed every year; Lord Steyn has described the present state of affairs as an 'orgy of statutes.' The Government seems to suffer from what might be called the Mikado syndrome. In the final Act of that operetta, Koko explains to the Mikado: "It's like this: When your Majesty says, 'Let a thing be done,' it's as good as done - practically, it *is* done - because your Majesty's will is law," to which the Mikado replies "I see. Nothing could possibly be more satisfactory!"

Many senior politicians appear to believe that, if Parliament passes legislation to deal with a problem, then the problem is thereby dealt with. Contrary to the Mikado's view, nothing could be less satisfactory. Partly because there are so many perceived problems identified in the media, there is a welter of ill-conceived lengthy legislation, poor in quality and voluminous in quantity. The result is an illusion of action without the reality of achievement, which brings the legislature, even the rule of law, into disrepute.

This state of affairs might be said to raise a fundamental question about the very compatibility of our whole legal system with the European Convention. Legislation must be clear and intelligible if it is to be applied effectively by judges. It must also be knowable by ordinary citizens. The judges have recognised this principle – most recently in an extradition case this year decided by the Law Lords, *Norris*.

Secondly, although it is primarily concerned to protect individuals against the state, the Convention nonetheless has relevance as between individuals. This is partly because the laws which govern peoples' rights and obligations as between each other are made by the state. Accordingly, a litigant can argue that, if the law were not as he contends the state would be breaking its obligations under the Convention. Thus, *Gaidan v. Godin-Mendoza* was a property dispute, where a person claimed to succeed to a tenancy of a deceased Rent Act tenant on the ground that the Convention required the statutory succession provisions for an ex-spouse of the tenant to extend to same sex relationships. Legislation is enacted by Parliament, and the argument was that, under the Convention, Parliament must respect the family life of same-sex partners.

The HRA duty to comply with the Convention extends to the courts, as part of the government. Accordingly, the judges must now ensure that the law for which they are responsible complies with the Convention. And it is not just the Government. Section 6 of the HRA extends its remit to individuals against "public bodies," a vague term, as a case called *YL v Birmingham* showed. Residents in care homes run by a local authority can claim the benefit of the Convention against the local authority, as a local authority is a

public body. But can a resident in a privately owned care home claim the benefit of the Convention when his fees are paid or partly paid by a local authority? The Law Lords split 3:2 on this issue, with the majority saying no. Either way, there would be an anomaly. It would be unsatisfactory if people paid for by the local authority in private care homes have no Convention rights against the owners, given that those in local authority run homes do. On the other hand, it would be anomalous if inmates of privately owned care homes had Convention rights only if the local authority paid something towards their charges.

Thirdly, the ultimate court which interprets the Convention is the Strasbourg court. With a judge from each country, Strasbourg enjoys a more global view than any national court. Under the HRA, courts in this country are now bound to “have regard to” Strasbourg decisions on any Convention issue. “Have regard to,” like “public bodies” is a rather imprecise expression. There is obviously room for a degree of leeway, but, where the Strasbourg jurisprudence is clear, authoritative and consistent, UK judges should normally follow it.

However, there has to be a degree of dialogue between national courts and Strasbourg. Earlier this year, in *Animal Defenders v Secretary of State*, the Law Lords had to consider whether legislation which proscribed TV advertising of political and controversial material was inconsistent with the right to freedom of expression in Article 10. In an earlier case, *Vgt Verein*, Strasbourg had held that very similar legislation in Switzerland infringed Article 10. Nonetheless, we effectively, but (I hope) politely, suggested that the right arguments had not been really put forward in that case, and we did not follow the Strasbourg case. It remains to be seen what happens when our decision is tested in Strasbourg.

Fourthly, the Convention is a living organism. In other words, the court can refashion its interpretation of the Convention so as to fit in with modern requirements and standards. While this is sensible, particularly in today’s fast-changing society, it is important that the law is clear and settled as well as being fair, so changes should be rare.

That brings me to a fifth feature, the margin of appreciation. Different countries have different histories, traditions, and consensuses. Accordingly, in applying many aspects of the Convention, Strasbourg accepts that a degree of discretion, known as the margin of appreciation, must be accorded to national governments. Thus, whether unmarried

partners are members of the same family for the purpose of Article 8, respect for family life, is currently a matter for each state.

The margin of appreciation can raise issues on the domestic front. Thus, if the UK government enacts legislation which treats unmarried couples as if they were not members of each other's family, can the domestic court interfere? In a case in 2004, *Ullah*, the Law Lords indicated that, if legislation enacted by the UK Parliament was within the margin of appreciation laid down by Strasbourg, the UK courts should not interfere.

So, when the Northern Ireland legislation ruled that only married couples could adopt and that this would not be held to be unfairly discriminatory to unmarried couples by Strasbourg that may seem to be the end of it. However, this year, in *re P (Northern Ireland)*, the Law Lords concluded that the courts in this country could take a more progressive line than required by Strasbourg. Lord Hoffmann said that it was for the UK courts to decide in a particular case where to "apply the division between the decision-making powers of courts and Parliament in the way which appears to appropriate." As it appeared that the discrimination would be permitted by Strasbourg as being within the margin of appreciation, UK judges could still overrule it if they considered that the basis for such discrimination is "irrational." As Baroness Hale said in a very recent talk to Justice, the thinking of the House of Lords on the HRA must inevitably develop and change, especially in its early years.

Sixthly, the HRA entitles, indeed it requires, the court to overrule decisions of the Executive, including Ministers, and even provisions in subordinate legislation if and in so far as they do not comply with the Convention. However, the court cannot take this course with statutes. In relation to any statutory provision which does not comply with the Convention, the court must declare it to be incompatible with the Convention; in that event, the Government has promised that it will change the law, and, so far it has honoured that commitment.

Seventhly, there is section 3(1) of the HRA which cuts down the need for such a declaration. It states that: "So far as possible, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention Rights." This allows, indeed it requires, the court effectively to bend over backwards to get the words of a statute to achieve compliance, but it is not always possible. Hence the need for the power to issue a declaration of incompatibility. The

decision of the House of Lords in *Gaidan* suggests that the court can go quite far under section 3(1). As already mentioned, this has resulted in the law lords holding that a man living with the tenant in a monogamous same sex relationship, was held to be the tenant's 'wife or husband' for the purposes of succeeding to a protected Rent Act tenancy on the tenant's death.

Finally, I should mention Article 57, under which the UK, like any other country, has the right to derogate from, that is to disapply, many of the articles in the Convention in "time of war or other public emergency threatening the life of the nation".

The Role of the Judiciary

There are three branches of government – the Legislature (Parliament), the Executive (Ministers, civil servants, local authorities etc) and the Judiciary (the judges). They are not equal, at least in the UK. Parliament is supreme, and can overrule any decision of the Executive or of the courts. And the courts rank ahead of the Executive, in the sense that judges can overrule Executive decisions. The HRA does not undermine these principles.

However, it does give the courts new powers in relation to legislation. As explained, judges can "interpret" legislation to make it comply with the Convention, so that it will sometimes not have the meaning Parliament intended when enacting it. And judges can indicate to Parliament that it should amend a statute which is not Convention-compliant. These are big changes, but only up to a point. Judges only have such powers because Parliament has given those powers to them – under a statute, the HRA. And, under our constitution, what Parliament gives it can subsequently take away, modify or overrule.

With regard to the Executive, the courts' powers have also been extended by the HRA. Traditionally, when a decision of the Executive is challenged, a judge normally decides not whether the decision was right, but whether it was properly arrived at. As has been said, the Executive's power to govern was regarded as including the power to govern wrongly. While this approach was already changing by 2000, the HRA requires judges to examine Executive decisions with far more intense scrutiny than before, where a human rights issue is involved. Courts have to decide whether, in their view, a decision complies with HRA, not whether the decider could reasonably have decided that it complied.

The judges' power to overrule the Executive on the basis of their view of the Convention also extends to secondary legislation, that is statutory instruments which are

promulgated by ministers and put before Parliament, but rarely voted on. (For the sake of accuracy, it should be added that the UK courts have had power to disregard or disapply legislation since 1972 if it did not comply with EU law. However, this principle has only come into play within the past 20 years and it only arises in relatively limited areas).

For the first time in our constitutional history, judges have had the power to rule on the lawfulness of legislation, and, in some cases, effectively to overrule the Parliamentary intention when the legislation was enacted. For the first time judges have had to substitute their own decisions for that of Ministers, civil servants, and local government. For the first time, judges can overrule secondary legislation and ministerial and other administrative decisions if they are not Convention-compliant. For the first time, judges have had to rule on fundamental rights, such as freedom of the press and privacy. Indeed, it is normally the judges who ultimately decide human rights issues.

But the remedies available to judges in this country can still be said to be weak compared to those in many other countries, where judges can strike down noncompliant legislation. Nonetheless, partly because of this increased power and partly because of the nature of the issues involved under the HRA, the role of judges has become more political, more in the public eye, and more activist.

In a speech earlier this week to the Society of Editors, Paul Dacre, the Chairman of Associated Newspapers plc, complained about the fact that it was unelected unaccountable judges who made and developed human rights law, when, he said, law-making should be for the democratically elected legislature. The short answer to this point is that the judges' powers in this connection were bestowed upon them by Parliament. In any event, Parliament is monitoring the position carefully through the regular full and impressive reports of the Joint Committee, and Parliament can act if it has concerns about the way the law is being developed by the courts.

Further, one of the proud features of England, which it has exported to so many other countries, is the common law, the much envied and well established tradition of judge-made law. Indeed, no less a person than Mr Dacre has referred to it as "the collective wisdom of many different judges over the ages." So it can be said to be peculiarly apt for the Judiciary in this country to be developing legal principles.

But there are three more subtle reasons why it is generally appropriate for Human Rights law to be developed by the Judiciary. First, the Convention is ultimately interpreted by the Strasbourg court. That has relevance for two reasons. First, where the UK is in breach of the Convention, it is better for our internal cohesion and our international reputation if it is a UK court, rather than an international court, which says so. Secondly, Strasbourg is more likely to accept that the UK is not in breach if UK judges have considered the matter.

Secondly, the nature of the judicial process is well adapted to determining human rights issues. Judges have to justify their decisions rationally, publicly and objectively, and by reference to well established principles. That is certainly not to say that Parliamentary or Ministerial decisions are irrational, secretive, subjective or arbitrarily based. However, as Lord Hope recently said in his FA Mann lecture, Parliamentary legislation is, almost by its very nature, static and monolithic. Judges can adopt a far more nuanced approach, and decide cases by reference to their specific facts as well as general principles.

The Convention frequently raises issues which require the courts to weigh competing rights, both of which are legitimate, even compelling, but only one of which can prevail. This is, of course, not an unknown dilemma for a judge. The law in this field has to develop incrementally over time by reference to cases. Besides, it is scarcely realistic for Parliament to legislate, other than in very broad terms, as to how the balancing should be done. Indeed, it has done this in section 12 of the HRA by requiring courts to give particular importance to freedom of expression, particularly when it comes to the press.

Thirdly, there are pressures, from the press, from constituents, from the give-and-take of the political process, to which Parliament and Ministers are naturally and properly sensitive. Experience shows that such pressures are not always well considered or even justifiable in the event – or even mutually consistent. Accordingly, provided that it does not over-reach itself, the Judiciary, which finds it much easier to resist such pressures, or at least to keep them in perspective, performs an essential balancing role. As the recently retired President of the Israeli Supreme Court said extra-curially in 2002, the very “unaccountability” of the Judiciary “strengthens us against the fluctuations of public opinion.”

However, judges should never lose sight of the fact that the Legislature and (indirectly) the Executive enjoy democratic legitimacy, and have democratic accountability, which the Judiciary do not. Accordingly, judges should avoid over-reaching themselves, and

rightly defer in many instances to the judgment and decisions of Parliament and of Ministers. Another criticism made by Mr Dacre was that a single judge can impose his or her personal view of morality or freedom on the country. First, any judge worth the name will try very hard, above all when it comes to human rights questions, to keep his own private views out of the assessment he has to make. Of course, it is impossible to be completely neutral, and I doubt the public would expect or want its judges to be so. Secondly, most decisions in this area can be taken to the Court of Appeal, with three more senior judges – or even to the House of Lords, with five senior judges.

Topical Issues

I turn now to three issues which involve balancing questions. The first is national security, which involves balancing the roles of the Judiciary and the Executive. Secondly, there is asylum law, which involves balancing the rights of the few against those of the many. Finally, the tension between press freedom and privacy rights which involves balancing two competing human rights.

There has been a change in the extent to which judges defer to the Executive when it comes to national security. Traditionally, courts in this country have been inclined to accept the government's decisions. In 1985 in the *CCSU* case, Lord Diplock said that, if a Minister said a decision was based on national security, the courts could not interfere unless bad faith could be established. Even since the HRA came into force, one can see traces of this approach. In 2001 in *Rehmann*, Lord Hoffmann said that the courts should be very slow indeed to doubt a decision of the Home Secretary as to what constituted a risk to national security, as this was pre-eminently a matter for an arm of government "responsible to the community through the democratic process."

A subsequent case in 2004 demonstrated that, at least in the wake of 9/11, this marked judicial deference was still very much alive, at least in relation to cases involving asylum seekers who were possible threats to security. The Court of Appeal was prepared to uphold the use by the Home Secretary in court of evidence obtained by torture (albeit not where the torture was the responsibility of the government). This decision was justified partly on the basis of the Home Secretary's "duty to safeguard national security." The House of Lords emphatically disagreed.

However, while the courts could not accept evidence obtained by torture, this did not mean that the Home Secretary was similarly so constricted. On the contrary, it would be a dereliction of duty if he or she failed to act on a threat to national security simply

because the evidence of the threat was obtained by torture. This highlights an important difference between the Judiciary and the Executive. They are both concerned with the rule of law, but it is the judges who are responsible for the administration of justice, whereas ministers are responsible for running the country.

On the topic of national security, there is plainly a role for the courts. As Mr Blair said, when he was still Prime Minister, in 2005, the political process “tends to invite ... a show of certainty, when the idiom is entirely inappropriate for discussing fine-grained risks.” The fine grain is, if I may mix my metaphors, grist to the judicial mill. Mr Blair went on to say “Bodies set up to guard the public interest have one-way pressures. ... They will always err on the side of caution.” In other words, the Executive tends to focus on the risk at the expense of the wider libertarian considerations. So the courts, which do not suffer from these disadvantages, have an important part to play in protecting freedoms.

In Israel, a country with far greater security problems than the UK, the President of the Supreme Court said in 1999 that a “democracy must sometimes fight with one hand tied behind its back,” but that “even so, a democracy has the upper hand” as “the rule of law and liberty of an individual constitute important elements in its understanding of security”, as they “strengthen its spirit and this strength allows it to overcome its difficulties.”

It is also worth emphasising that that it is when our fundamental liberties give rise to difficulties and controversy, as now when we are so concerned about terrorism and crime, that they must be most vigorously defended. As Lord Hoffmann suggested in *A v Secretary of State*, repressive legislation designed to meet terrorism can be more of a threat to our society and its values than the terrorism itself.

Asylum seekers' claims can raise the question of the rights of the one against the many. Consider the case of a suspected terrorist, who, if sent back to his country, would be tortured or executed. It is tempting to say he should be sent back as he is a threat to law-abiding UK citizens, but is it really right for us, a civilised country to force someone to be tortured or murdered? The Convention says we cannot do so. The Convention also says that, unless the suspected terrorist is convicted of a crime, he cannot be imprisoned. But the Convention is not so unrealistic as to require the Government to let him roam free and potentially endanger the lives of many people. The Law Lords held that house arrest for most of the day coupled with tagging is permissible in appropriate cases. Of course, that cannot be regarded as a perfect answer, not least in terms of the cost, but some

questions are incapable of producing a perfect answer, and living in a civilised society involves some sacrifices.

There is obvious force in the notion that the moral health of a society is measured by how it treats the unfortunate and the undesirable. Asylum seekers, who may be fanatics or terrorists, test our decency and tolerance to the limit. For the Government to send them home to be killed or to imprison them without convicting them of a crime would be wrong and inhumane, and history would rightly condemn us for such behaviour. However, to permit such people to indulge in dangerous activities would be an abnegation of responsibility to the citizens of this country: tolerance and decency should not be confused with irresponsible complacency. And, of course, in a real national emergency, there is always the power to derogate from the Convention.

The tension between privacy and freedom of the press is inevitable in any civilised society. But it is an area into which most fair minded people in this country would accept, indeed, welcome the arrival of the Convention. Until the HRA, the conventional wisdom was that English law did not recognise a right to privacy. In one notorious case in 1990, nothing could be done to stop the publication of unauthorised photographs, taken by a trespassing paparazzo, of Gordon Kaye, the actor of *'Allo 'Allo* fame, lying unconscious and bandaged and badly injured in hospital. Equally, freedom of the press was not recognised in our law, as Lord Bridge explained in the *Spycatcher* case in 1987. Now the two rights are enshrined in the law of the land, through Article 8 and Article 10 of the Convention.

In particular cases, it is often difficult to work out whether the right of privacy should outweigh the right to publish. As Mr Dacre fairly acknowledged, there can be a wide divergence of view as to whether, or in what circumstances, a public figure should be exposed for his (and it is almost always his) philandering. The law has to strike a balance which is principled and clear. Easy to say, but hard to do. The Law Lords split 3:2 on whether the *Daily Mirror* was entitled to publish photos of Naomi Campbell entering a drug rehabilitation unit, even though they agreed on the principles. In the *Max Moseley* case, Mr Dacre complains that the judge took into account the effect that publication would have on his wife. But that complaint demonstrates a misunderstanding of the balancing exercise for the judge. It is a perfectly sensible factor to take into account, with many others, such as the position and importance of the person involved, his expectation of privacy, the extent to which his actions were relevant to his public position and

persona, to mention but some. However, the effect of publication on the man's wife is scarcely likely to be decisive on its own

But sometimes the conflicts are between the same type of right claimed by two people. A recent example which went all the way to Strasbourg is in *Evans*. Because she was diagnosed with pre-cancerous ovaries, a woman and her partner each provided gametes for the creation of embryos which were then stored. After the parties separated, the woman wanted to take up the embryos, and the man wanted them destroyed. Under our domestic law, his will should prevail as the consent of both parties is required for the storage and use of embryos. But the woman relied on her rights to a family life. Her argument failed here and in Strasbourg. The man's private and family life rights were also engaged. The court decided that the dilemma should be resolved on the basis that the UK domestic law requirement for continuing joint consent in this field served a number of wider public interests, and was rational, based as it was on the importance of consent, legal clarity.

Conclusion

No fair minded person could quarrel with the rights enshrined in the Convention, and the fact that they are now embodied in our domestic law should be a matter of pride rather than sorrow. The Convention was born out of the miserable regimes and events in Europe between 1914 and 1945. The need for such rights may have seemed less significant in the ensuing five decades. But, more recently, with the growing power of the state financially and intrusively, and the threats of terrorism, and the reactions they produce, proper protection of individual's rights against the state is as necessary as it ever was. Fundamentally important and valuable principles, such as those enshrined in the Convention, are often taken for granted and not appreciated until they are lost.

The public perception, and much of the press perception, is often negative. This is understandable. The application of the Convention does sometimes produce surprising, even wrong, decisions, and the responsibility for this can have different causes. Sometimes the fault is that of the Convention. Even with the broad discretion given to the courts, some oddities will inevitably occur. Sometimes the fault is Strasbourg's, whose decisions are sometimes based more on theory than practicality, or, occasionally, on a misunderstanding of a particular UK law or its reasons. Sometimes the fault is that of UK judges. All laws will inevitably lead to some questionable decisions, sometimes because a generally fair law will produce the odd unfair result, and sometimes because the courts misinterpret the law. Laws are drafted by lawyers, enacted by politicians, implemented

by civil servants and interpreted by judges, and draftsmen, politicians, civil servants and judges are human. So mistakes get made from time to time. And this is particularly likely in the case of legislation which is as sweeping and important as the Convention. However, all people in Government, and particularly the judges, have a duty to ensure that the Convention is implemented in a way which retains public confidence.

A few bad decisions and a few unfortunate results make news; the many good decisions and the many beneficial results very rarely hit the newspapers. I do not say that in criticism of the press. It merely reflects human nature. And it is human nature I want to end with. Governments reflect human nature; they can be decent, benevolent and admirable, and they can also be cruel repressive and corrupt. The history of Plymouth demonstrates this well. It was from here that Francis Drake sailed in 1588 to keep England free from religious persecution and foreign invasion. The Pilgrim Fathers set out from here in 1620 to enjoy freedom of speech and the right to worship. In 1940, Plymouth suffered terrible bombing from that most repressive of regimes, Nazi Germany. The price of liberty is eternal vigilance. Treaties and Constitutions which embed fundamental principles of decency into the public consciousness and the public conscience, and in particular into all branches of Government at all levels, can therefore only do good, provided those principles are implemented in a way that ensures that they retain public respect.

Thank you very much.

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