UNIVERSITE JEAN MONNET 2024

THE EUROPEAN CONVENTION ON HUMAN RIGHTS – DOES IT HAVE A FUTURE IN THE UK?

Lady Brenda Hale, Baroness Hale of Richmond

It is a great honour and a great pleasure to be with you today in the University named after Jean Monnet, that great European. I know that he worked closely with both the British and the Americans during the Second World War and that Winston Churchill shared some of his enthusiasm for unity between the democracies in Europe. On 5 March 1946, Churchill delivered his famous 'Sinews of Peace' speech in Westminster College, Fulton, Missouri. He memorably declared that 'From Stettin in the Baltic to Trieste in the Adriatic an iron curtain has descended across the continent' of Europe. His solution was that 'The safety of the world requires a new unity in Europe from which no nation should be permanently outcast.' Later that year he threw his considerable weight behind the idea of a Council of Europe, which came to pass in the Treaty of London in 1949. And in the following year the Council adopted the European Convention on Human Rights, in which another British Conservative politician, Sir David Maxwell Fyfe, had played a considerable part. I mention this, because many of today's British Conservative politicians have either forgotten the original enthusiasm of revered figures such as Winston

Churchill and David Maxwell Fyfe, or have concluded that the project has not turned out as originally envisaged.

The Preamble to the Convention reaffirms the Council's 'profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights on which they depend'. This is debatable. Professor Conor Gearty of the London School of Economics has pointed out that there is an inherent tension between the human rights project and political democracy. To many, democracy means that the will of the majority, as expressed through their democratically elected representatives, must prevail. The human rights project means that there are certain rights which are protected against violation even if the majority wills it. My own view, expressed in a judgment in the House of Lords, is that 'democracy values each person equally, even if the majority do not'.[1] This must that each person has certain fundamental rights even if the majority do not like it. Or, dare I say it, even if the elected government of the day finds it inconvenient.

[1] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, para 132.

Despite its early enthusiasm for the Convention, the UK soon began to find the decisions of the European Court of Human Rights inconvenient. One of the earliest cases against the UK was brought by Ireland in 1971. Ireland complained, among other things, that the 'five techniques' used by the British in interrogations in Northern Ireland violated the article 3 prohibition of 'torture' or 'inhuman or degrading treatment or punishment'. In 1978, the Court held that the techniques did not amount to torture but they did amount to inhuman or degrading treatment.[2] The British judge, Sir Gerald Fitzmaurice, dissented. It was his 'emphatic opinion that if a commendable zeal for the observance and implementation of the Convention is allowed to drive out common sense then the whole system will end by becoming discredited'. His particular concern was enlarging the terms of the Convention 'so as to include concepts and notions that lie outside their just and normal scope'. That is a complaint which is frequently heard today.

The target was – and still is - the notion, established in *Tyrer v United Kingdom*,[3] that the Convention is a 'living instrument' which must develop to keep pace with

[2] *Ireland v United Kingdom* (1979-80) 2 EHRR 25. The Irish asked the Court to revise its judgment after new evidence came to light in 2014, but the Court declined to do so: (2018) 67 EHRR SE1.

[3] (1979-80) 2 EHRR 1.

changing social attitudes and conditions. This should have been nothing new to UK eyes. As long ago as 1929, in *Edwards v Attorney General of Canada*, the Judicial Committee of the Privy Council had held that the British North America Act of 1867 had 'planted in Canada a living tree capable of growth and expansion within its natural limits' and their Lordships did not wish 'to cut down its provisions by a narrow and technical construction but rather to give it a large and liberal interpretation . . . '.[4] Hence, while the word 'persons' might not have included women in 1867, by 1929 it did.

The same large and liberal approach was adopted in 1980, in *Ministry of Home Affairs (Bermuda) v Fisher*, where the Judicial Committee held that the word 'child' in the Constitution of Bermuda included a child born to unmarried parents, although it would not then have done so if contained in an ordinary Act of Parliament. But a Constitution was different: its interpretation should be 'guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.' [5]

4 *Edwards v Attorney General of Canada* [1930] AC 124, 136.

5 [1980] AC 319, 329.

This was a firm rejection of the American doctrine of originalism – that the text must read either in accordance with the original intention of the drafters or as the original readers would have understood it. So the UK should not have been surprised or dismayed when the European Court of Human Rights adopted a similar approach.

But the British drafters of the European Convention had fondly assumed that the rights it contained were already part of UK law. So it came as quite a shock when the United Kingdom began to lose cases in Strasbourg, quite soon after it had accepted the right of individuals, as well as Member States, to petition the Strasbourg court. To take just a few examples from a long list: the right to a fair trial in article 6 implied the right to go to court in the first place;[6] judicially ordered corporal punishment of juveniles violated the prohibition of torture and inhuman or degrading treatment or punishment in article 3;[7] prohibiting publication of articles about the thalidomide scandal because of the risk of prejudicing court proceedings violated the protection of freedom of speech in article 10; [8] the continued criminalisation of homosexual acts between adult men in Northern

6 *Golder v United Kingdom* (1979-80) 1 EHRR 524.
7 *Tyrer v United Kingdom* (1979-80) 2 EHRR 1.
8 *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245.

Ireland violated the right to respect for private life in article 8;[9] dismissal of a British Rail employee for refusing to join a trades union violated the protection of freedom of association in article 11;[10] censoring prisoners' letters to MPs and solicitors (but not to others) violated the right to respect for correspondence in article 8;[11] and the unregulated common law power of the police to tap private telephone lines violated article 8.[12]

I could go on – these cases showed that UK law was not always able to protect the Convention rights and that the UK judges were not always able to develop the common law to do so. The UK has a dualist system – treaties create obligations between states in international law but they do not change the domestic law unless and until Parliament incorporates them. And the rights contained in the Convention had not been converted into rights contained in UK law.

9 *Dudgeon v United Kingdom* (1980) 3 EHRR 40.

10 *Young v United Kingdom* (1981) 4 EHRR 38. Thus establishing that the right to do something might also imply the right not to do it – a feature which helped us to decide the so-called 'gay cake' case in Northern Ireland: *Lee v Ashers Baking Co Ltd* [2018] UKSC 49, [2020] AC 143.

11 *Silver v United Kingdom* (1983) 5 EHRR

12 *Malone v United Kingdom* (1985) 7 EHRR 14.

Calls to do this began even before these shocks and came from all shades of political opinion. There was a Tract from the left-wing Fabian Society in 1968.[13] There was a lecture series by Sir Leslie Scarman, a distinguished Judge, in 1974.[14] Between 1969 and 1997 there no less than 11 Bills introduced in the House of Lords. In 1987, a private member's Bill was introduced in the House of Commons. In 1996, the newly appointed Lord Chief Justice, Lord Bingham, later to become the senior Law Lord, used his maiden speech in the House of Lords to argue for incorporation.

It then became Labour Party policy. A Consultation Paper published in December 1996[15] argued that because their rights were not protected in the UK courts, British people had to undergo the lengthy and costly process of applying to the Strasbourg court. British judges were denied the opportunity of building a body of case law which was properly sensitive to British legal and constitutional traditions. The European Court of Human Rights had not been able to benefit from experience of

[13] Anthony Lester, *Democracy and Individual Rights*. Quintin Hogg MP had also argued for incorporation at a Pressure for Economic and Social Conservatism meeting in October 1968 and in a pamphlet, *New Charter*, Conservative Political Centre, CPC Number 430, April 1969 (my thanks to Sir Michael Tugendhat for these references).

[14] Hamlyn Lectures, *English Law – the New Dimension.*

[15] Jack Straw and Paul Boateng, *Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into United Kingdom Law.*

the UK legal system and was neither sufficiently familiar with, or sensitive to, British legal and constitutional traditions.

Labour won the General Election in May 1997 and I was privileged to be among the judges sitting on the woolsack in the House of Lords to hear the Queen's Speech. I well remember the excitement when we were heard Her Majesty announce that 'A Bill will be introduced to incorporate in United Kingdom law the main provisions of the European Convention on Human Rights'. The Bill was introduced in December, along with a white paper.[16] This explained that it had been thought when we ratified the Convention that the Convention rights and freedoms were already protected in British law. But it turned out that they were not. The rights originally developed with major help from the UK government were no longer seen as the British rights which they actually were. The fact that UK judges did not deal in the same concepts as the European Court of Human Rights limited the extent to which their judgments could be drawn upon and followed. With incorporation, we would be speaking the same language.

16 *Rights Brought Home: The Human Rights Bill*, 1997, Cm 3782.

The White Paper considered whether the UK courts should be given power to strike down or ignore provisions in Acts of the UK Parliament which were incompatible with the Convention rights. The Government decided not to do this. Allowing the courts to strike down provisions in Acts of the UK Parliament would be likely on occasions to draw the judges into serious conflict with Parliament. The judges did not want this and the Government had no mandate for such a change. Instead, the High Court and above would be able to make a declaration of incompatibility, which would not affect the validity of the provision but leave it to Parliament to decide whether and how to correct it. It was – and still is - quite right that the judges did not want a strike down power, but it was perhaps naïve to think that politicians and the public could distinguish between a conflict with Parliament and a conflict with the government.

So the Human Rights Act 1998 converted the Convention rights into rights in UK law and gave remedies to victims of actions of public authorities which were incompatible with their rights. This meant that the courts now had to ask themselves whether a convention right had actually been violated ,[17] although we

[17] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323. *R (Begum) v Denbigh High School Governors* [2006] UKHL 15, [2007] 1 AC 100. *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420.

recognised that, in assessing whether restrictions were justified, we should sometimes respect policy judgments which Parliament or government where better qualified to make. The courts also had a new principle of statutory interpretation, a duty to 'read and give effect' to legislation 'so far as possible' in a way which was compatible with the convention rights.[18] In *Ghaidan v Godin-Mendoza*,[19] for example, the Law Lords decided that the words 'living with the deceased as his or her wife or husband' could include a same sex partner. It soon emerged that the government preferred the courts to solve an incompatibility through interpretation rather than leave them to face the political flak after a declaration of incompatibility. Nevertheless, the Government's record of acting upon declarations of incompatibility has been impressive, although sometimes they have done so through gritted teeth.[20] The only example of prolonged resistance has been the blanket ban on sentenced prisoners' voting, where the Government held out for so long that the Council of Europe eventually gave in and accepted that some minor administrative changes would suffice.

---

18 The limits were established early on in *Re S (Children) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291.

19 [2004] UKHL 30, [2004] 2 AC 557.

20 When introducing the Sexual Offences Act 2003 (Remedial) Order 2012/1883, the Prime Minister questioned the sanity of our decision in *R (F (A Child)) v Secretary of State for the Home Department* [2010] UKSC 17, [2011] 1 AC 331.

After the Conservative-led coalition came to power in 2010, criticism of both the Strasbourg and the UK courts began to mount. Some of this came from the media. There was no common law right to privacy. Our newspapers had got used to publishing all sorts of scurrilous or intrusive private information, about celebrities or about ordinary people. But the courts are public authorities and have to act compatibly with the Convention rights, even in cases between private persons. So they began to develop a tort of misuse of private information, balancing a newspaper's right to freedom of expression against an individual's right to respect for her private life.[21] Sections of the media began to refer to the 'hated Human Rights Act'.

They were not alone. For example, in a lecture in 2011,[22] Jonathan Sumption QC, soon to be a Justice of the Supreme Court of the United Kingdom, attacked the Strasbourg court for its detailed development of the general principles in the Convention, for deciding not only whether the member states had proper institutional safeguards for those rights but also whether it agreed with the findings

[21] *Campbell v MGN Ltd* [2002] UKHL 22, [2004] 2 AC 457. It is good to see Sir Michael Tugendhat, then the Judge in charge of the media list, who was at the forefront of this development, with us here today.

[22] FA Mann Lecture 2011, *Judicial and Political Decision-making: The Uncertain Boundary.* See also Michael Howard, Kingsland Memorial Lecture, *The Human Rights Act: Bastion of Freedom or Bane of Good Government?* Policy Exchange, 2012.

of those institutions, and for attempting to apply the rights in a uniform manner throughout the 47 member states, despite the fact that 'the consensus necessary to support it at this level of detail does not exist'.[23]

Fixing the Human Rights Act became a recurring theme of Conservative party Manifestoes. The 2010 Manifesto announced that 'to protect our freedoms from state encroachment and encourage greater social responsibility, we will replace the Human Rights Act with a UK Bill of Rights'. But from 2010 until 2015 the Conservatives were in coalition with the Liberal Democrats, and this didn't happen. In 2015, they promised to 'scrap the Human Rights Act and curtail the role of the European Court of Human Rights so that foreign criminals can be more easily deported from Britain' – a more radical proposal but for a more limited purpose. Theresa May's 2017 Manifesto declared that 'we will not repeal or replace the Human Rights Act while the process of Brexit is under way but we will consider our human rights legal framework when the process of leaving the European Union concludes. We will remain signatories to the European Convention on Human

[23] After retiring from the Court, he expanded upon those views in his 2019 Reith Lectures.*Law and the Decline of Politics*, BBC, published as *Trials of the State: Law and the Decline of Politics*, Profile Books, 2019. For my riposte, see *Law and Politics: A Reply to Reith, Frances Patterson Memorial Lecture,* Middle Temple, 2019, 24(3) *Judicial Review* 205-216.

Rights for the duration of the next Parliament.' Understandably, most of Boris Johnson's 2019 Manifesto was devoted to getting Brexit done, but the promise was to 'update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government'. The plan was to 'set up a Constitution, Democracy and Rights Commission' in their first year.

That didn't happen. But the Government set up an Independent Human Rights Act Review under Sir Peter Gross, a retired Court of Appeal Judge,[24] to look at the relationships between the UK courts and the Strasbourg court and between the various branches of government in the UK. This conducted extensive research and consultation and concluded that nothing much was wrong. The House of Commons and House of Lords' Joint Committee on Human Rights produced a Report[25] which noted that the Human Rights Act had had a wide impact outside the courtroom, Whitehall and Westminster. The duty of public authorities to act compatibly with the Convention rights had embedded human rights amongst public authorities and reduced the need for litigation to enforce them.

[24] *The Independent Human Rights Act Review*, 2021 CP 586.

[25] 2021 HC 89, HL Paper 31.

The Government promptly ignored most of this careful work and published proposals to replace the Human Rights Act with a 'modern Bill of Rights'. [26] On the plus side, the Government declared that it was still committed to remaining a party to the Convention, to retaining all the substantive rights protected under the Human Rights Act, and to fulfilling its international obligations. These include the duty to provide an effective domestic remedy for violations, the right of individuals to go to Strasburg and the duty to abide by Strasbourg's decisions. But the detailed proposals would have seriously curtailed the protection of human rights in the UK. Despite a generally negative response to their proposals, the Government went ahead and introduced the Bill of Rights Bill.

The duty to take into account of Strasbourg jurisprudence was to be repealed, as was the duty to read and give effect to legislation compatibly with the Convention rights. The courts were to be told they should pay particular attention to the text of the Convention and could look at the *travaux preparatoires* – a nudge towards the American style originalism which Strasbourg had rejected long ago. The courts would only be able to develop the Convention rights further than Strasbourg if they

[26] *Human Rights Act Reform: A Modern Bill of Rights*, 2021 CP 588.

had no reasonable doubt that that was what Strasbourg would do. There were to be no new positive obligations. Worse still, the courts would be given a discretion whether or not to apply even those positive obligations which were already established.[27] People alleging breaches of their fundamental rights would have to get permission to bring a claim (although people alleging breaches of their ordinary everyday rights do not). All in all, the Bill was likely to mean that more claimants would be denied an effective remedy in the UK, more would have to go to Strasbourg, and the UK would lose more cases there.

The Bill had its first reading in the House of Commons on 22 June 2022 but there was no enthusiasm for it after Dominic Raab resigned as Lord Chancellor in April 2023 and it was withdrawn on 23 June. So should we breathe a sigh of relief that the Bill has been abandoned? I fear not. The government may have drawn back from wholesale replacement. But it has shown itself willing to promote legislation in particular contexts which means that individuals cannot bring human rights claims in the UK courts and requires Ministers and officials to ignore human rights when making their decisions. The Illegal Migration Act 2023 has already done this

[27] So victims of the 'black cab rapist', John Worboys, might be denied a remedy for the police failure to catch him earlier. Cf *Commissioner of Police for the Metropolis v DSD* [2018] UKSC 11, [2019] AC 196.

in relation to the deportation and detention of people arriving in the UK without the permission they need – as most refugees do. The Safety of Rwanda (Asylum and Immigration) Bill is seeking to do this in relation to decisions to remove people to Rwanda, as well as requiring officials, courts and tribunals to presume that Rwanda is a safe country irrespective of any evidence to the contrary. It has been heavily amended in the House of Lords, but the Commons will probably reject our amendments and the Lords will eventually back down.[28]

So while I very much hope that the European Convention does have a future in the UK, this 'drip drip' erosion of its rights is very troubling. And it is part of a wider tendency to disregard the UK's obligations in international law in the context of asylum and immigration, while loudly trumpeting the importance of the rules-based international order in other contexts – such as Ukraine, Gaza and the Red Sea. We might add to this a willingness amongst some in government unjustly to pour scorn on lawyers and even judges who are only doing their job. I cannot resist recalling that, on 18 July 2022, Prime Minister Boris Johnson moved a motion in the House of Commons that 'this House has confidence in Her Majesty's Government'.

[28] The to-ing and fro-ing between the Commons and the Lords, known as 'ping pong', is due to start on 20 March 2024.

Listing his government's achievements, he declared that 'With grim determination we saw off Brenda Hale and we got Brexit done'[29]- a pretty jaw-dropping thing for a British Prime Minister to say – and inaccurate. So I am even more grateful that this University has seen fit to ignore him and present me with this accolade.

[29] *Hansard*, vol 718, col 726.