Incorporation Of The European Convention On Human Rights: The Opportunity And The Challenge [1]

Lord Bingham of Cornhill

In its manifesto before the General Election just over a year ago, the Labour Party promised if elected to incorporate the European Convention on Human Rights into UK law "to bring these rights home and allow our people access to them in their national courts". The Government has honoured that pledge. The new Human Rights Bill has almost completed its parliamentary passage. It will shortly become law and will become effective on a date not yet known but probably early in the year 2000. So, 48 years after the United Kingdom became the first state to ratify the Convention and 34 years after the right of individual petition was first conceded, citizens on the mainland of Britain will, for the first time, be entitled to enforce these human rights and fundamental freedoms directly in our own courts.

I understand that the Convention was extended to Jersey in 1954, and that Jersey has followed the UK in having quinquennial extensions of the right of individual petition and acceptance of the jurisdiction of the court. A few years ago, as I gather, the Home Office in London was not at all keen on Jersey going it alone by incorporating the Convention into its own domestic law when the UK had not done so and was not proposing to do so. But now the Home Office is keen that Jersey should follow suit, and the Island authorities are in principle willing. So I hope the issues are of interest to us all.

The Human Rights Bill marks the ultimate success of those who favour incorporation in securing public acceptance of their ideas. The success comes after many years of apparently fruitless effort. Bills have been introduced into Parliament time and again, sometimes enjoying a brief flicker of success before withering away on the stony ground of unyielding governmental hostility. And it was not the hostility of one party only: until the late John Smith, as leader of the Labour Party, gave support to incorporation in a speech in March 1993, the Labour Party was as much opposed to incorporation as the Conservative Party, perhaps even more so.

Since there are still those who continue to oppose incorporation of the Convention into UK law, and since opponents are to be found across the political spectrum, it is perhaps worth considering the reasons for this opposition.

It seems safe to infer that in 1950-1951 when the Convention was born many in Britain regarded the Convention as a valuable medicine, but one of which we ourselves had no need. Such complacency may fairly be castigated as objectionable, and for that matter unbiblical, but it was, at the time, understandable. The Convention was, after all, a response to the institutionalised denial of human rights and fundamental freedoms which had been tragically witnessed, before and during the War years, in so much of continental Europe. The Convention was born of a shared, deep-seated determination to ensure that these horrors
did not recur. In the mainland of Britain, for reasons too familiar to rehearse, we had been spared most of these horrors, and our democratic institutions were widely thought, not only in Britain, to have coped well with the challenge of war. It was not generally felt that human rights or fundamental freedoms had been infringed to an extent greater than the exigencies of total war demanded. Thus I think it was probably felt that a long and cherished tradition of freedom, forged by Parliament and protected in the courts, would give the British citizen all the rights he or she needed, without the need to rely on an international body of rules such as that found in the Convention.

However understandable such a view may have been in 1950-1951, it became increasingly difficult to adhere to it when, following acceptance of the right of individual petition, the number of violations upheld by the Court against the United Kingdom steadily mounted, and even that total - disturbing enough in itself - does not reveal the number of applications amicably compromised to avert the certainty or likelihood of defeat. We have, over the years, been held to have violated article 2 (the right to life) on one occasion, article 3 (the right not to be subjected to torture or to inhuman or degrading treatment or punishment) on five occasions, article 5 (the right to liberty and security of the person) on five occasions, article 6 (the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law) on fifteen occasions, article 7 (the prohibition of retroactive criminal laws) on one occasion, article 8 (the right to privacy) on fourteen occasions, article 10 (the right to free expression) on three occasions, article 11 (the right to freedom of association) on one occasion, article 13 (the right to an effective remedy) on five occasions, article 14 (forbidding discrimination) on one occasion and article 2 of the First Protocol (the right to have one’s children taught in conformity with one’s own religious and philosophical convictions) on one occasion. I do not consider this a shameful record, as is sometimes suggested; and the United Kingdom is in my view a state in which human rights and fundamental freedoms are on the whole respected and safeguarded. I think I am right in saying - but I shall be corrected if I am wrong - that proceedings in Jersey - unlike the Isle of Man - have never been held to violate the Convention. But the record must, whatever else, destroy any lingering complacency, any belief that we are not as other men are. The need for an objective standard by which to measure compliance with generally accepted international principles is shown to be as great in the United Kingdom as anywhere.

A quite different ground of opposition to incorporation relied on the argument that it was alien to the legal, constitutional and parliamentary tradition of the United Kingdom to attempt to guarantee rights rather than simply proscribing or penalising certain infringements of human rights and freedoms. Historically this point was, and remains, correct. Lacking an entrenched constitution, we have very largely eschewed legislative guarantees of rights and freedoms; both statutes and legal judgments have tended to proceed by identifying what may not be done rather than by declaring what may. Thus the rights and freedoms of a person depend largely on the things which the state and his fellow citizens are not allowed to do to him. His rights are negative, not positive, in origin. And protection of these rights has depended in large measure not on any body of human rights law but on the law of delict, which has, subject to some exceptions, proscribed adverse interference with the person’s property, reputation and beliefs of others.

This is, up to a point, a valid argument. The adoption of the Convention will indeed require of judicial decision-makers a change of outlook, a shift of cultural perspective, an adaptation of established habits of thought. This is one of the practical challenges we shall face. But it is not, as is now widely accepted, a persuasive argument against incorporation. For the rights
and freedoms embodied in the Convention are in truth basic and fundamental. They should earn respect in any modern plural democracy governed by the rule of law. Traditional habits of thought, no matter how venerable, should not stand in the way of recognising them and giving practical effect to them in our domestic courts.

I strongly suspect that part of the opposition to incorporation has always derived, not only from distrust of grand declarations of high-sounding principle as in some way un-British, but also from a nationalistic, chauvinist distrust of predominantly foreign, supra-national bodies with the power to make decisions binding upon us - often, such opponents would fear, with inadequate understanding of our insular idiosyncrasies. I imagine, without knowing, that there have been some in other countries who have felt rather the same. This might have been a ground (not in my view a good ground, but a ground) for declining to ratify the Convention in the first place, or for withholding a right of individual petition; but having bound ourselves to observe the Convention, having given our citizens a direct right to seek redress in Strasbourg, and having loyally given effect to decisions of the Court where violations against the United Kingdom have been found, it has become increasingly anomalous to subject citizens to the delay and expense of exhausting their often non-existent remedies at home before resorting to the authorities in Strasbourg.

Opposition to incorporation has undoubtedly been fuelled by the belief, shared by some on the Left and the Right of the political spectrum, that it would involve a transfer of power from democratically elected accountable politicians to unelected, unrepresentative, unaccountable judges. The Convention is concerned, so the argument runs, with important features of social life and democratic practice: the right to life, to liberty, to privacy, to free expression, and so on. These, it is argued, are matters to be resolved in Parliament not in the courts.

Proponents of this view see incorporation at best as an undermining of democratic authority and legitimacy, at worst as a self-aggrandising bid for power by the judges. I have some sympathy for this viewpoint. It is true that in Britain, unlike (for example) the United States, issues like abortion and civil rights have been parliamentary and political, not primarily legal, questions. The Convention will undoubtedly involve British judges in deciding questions they have never had to decide before, as to whether some restriction in issue in a case is necessary in a democratic society. To decide a question of that sort is, I would accept, a form of power. But it is an exercise of power that was conceded to judges by ratifying the Convention and accepting a right of individual petition. As is recognised by the title of the Government’s recent consultation paper - "Rights Brought Home" - no power is being granted to judges which they did not already have: the difference is that British judges, for the first time, will be admitted to the charmed circle of those by whom these important powers may, subject always to the supremacy of the European Court of Human Rights, be exercised.

The recent debates in Parliament have given prominence to one prize variant of this argument. It relates to privacy. The press and their parliamentary surrogates have voiced the fear that incorporation of the Convention will enable judges to curb the legitimate activities of the press, suppress brave and honest investigative journalism and inaugurate a new dark age of censorship. It is far from clear that this is a fear harboured by anyone other than the press. It is even less clear why the judges should wish to do this, nor how, given the guarantee of free expression in Article 10, they could achieve these ends even if they did. Experience gives no substance to this fear, since none of the violations of the privacy
established against the United Kingdom has had anything to do with invasions of personal privacy by the press; by contrast, the press have relied successfully on the Convention right to free speech. I do not myself think there is any foundation for these fears, but they have enjoyed a brief and colourful flowering. It has been suggested that the Convention should be incorporated with the omission of Article 8, and that a law of privacy should be independently enacted to supersede (in some mysterious way) the Convention right. Happily, as I think, the Government have almost entirely resisted this rather particular pressure.

While I accept these fears as genuine I do not for my part acknowledge them as soundly based. The rights and freedoms embodied in the Convention are, as already suggested, so basic and fundamental to the proper functioning of a modern democracy that I do not see why their recognition should become a matter of political controversy. In any event, the judges’ task would remain a judicial one, of applying to the facts of the case before them the principles of the Convention according to their true meaning and intent. It is not my understanding that judges have become embroiled in political controversy or lost their reputation for political independence in those member states of the Council of Europe - the great majority - which have either incorporated the Convention or embodied its terms in their constitutions, and I see no reason why the predicted evils should afflict the United Kingdom alone.

To secure public acceptance of its proposal to incorporate was of course the first and inescapable challenge which this Government had to overcome. It has successfully done so; and it is curious how muted the opponents, vociferous until recently, have now become. But it was only a beginning. For it led immediately to a further challenge: how to incorporate? This would not in most countries, I think, have been a problem. It would no doubt have involved an amendment to the constitution, but that would not, given sufficient public support, have been difficult. But in the United Kingdom, lacking an entrenched constitution and recognising the sovereignty of Parliament, there was a problem. For if a Human Rights Act were simply enacted to incorporate the Convention it would rank equally with any other statute; and if a later statute were enacted containing provisions clearly inconsistent with the Convention the courts would be bound, applying ordinary principles of interpretation, to give effect to the later statute as representing the will of Parliament. In this way the practical impact of the Convention would be eroded and, ultimately, destroyed. If, on the other hand, Parliament were to authorise the courts to set aside, disapply or strike down any statutory provision inconsistent with the Convention, thus seeking to give the Convention a higher status than other statutes, this would be an almost novel constitutional departure and (at any rate in the eyes of many) an unacceptable surrender of parliamentary sovereignty. How, then, could the Convention be incorporated into British law in a way which would give effective protection to Convention rights without challenging or undermining the sovereignty of Parliament?

The solution in fact adopted is widely acknowledged, even by opponents of the Bill, to be skilful. The Bill provides that

"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".
In other words, Acts of Parliament and subordinate instruments made under the statutory authority of Parliament must, so far as possible and whenever enacted or made, be construed consistently with the Convention. But the Bill recognises that there may, however exceptionally, be Acts or subordinate instruments where this cannot be done: hence the qualifying words "So far as it is possible to do so". Where it is not possible to do so, the validity, continuing operation and enforcement of incompatible Acts of Parliament are in the first instance unaffected. So are the validity, continuing operation and enforcement of incompatible subordinate instruments if - but only if - an Act of Parliament prevents removal of the incompatibility. So the overriding duty of the courts is to read Acts of Parliament and subordinate instruments conformably with the Convention wherever possible, but where it is impossible the courts cannot strike down Acts of Parliament or such parts of subordinate instrument as are expressly required by an Act of Parliament.

So far, so good. But this qualification plainly gives inadequate protection to the citizen in any case where an Act of Parliament, or an expressly required provision of subordinate legislation, cannot plausibly be construed consistently with the Convention. The Bill provides a two fold remedy. First, if the court is satisfied that the Act or the subordinate provision is incompatible with one or more of the Convention rights, it may make a declaration of that incompatibility. This is a power which may only be exercised by the higher courts, and it is of course subject to appeal, like any other judicial decision. Where the court is considering whether to make a declaration of incompatibility the government is entitled to be joined as a party, no doubt to enable it to resist the making of such a declaration. If, however, a declaration of incompatibility is made, and if the government accept (as, in the absence of a successful appeal, one would expect) that the Act of Parliament or the subordinate instrument is incompatible with the obligations of the United Kingdom arising from the Convention, then the second part of the remedy comes into effect. The government may then, through the appropriate minister, make a remedial order by laying before Parliament an instrument which will have the effect of rectifying the declared incompatibility. It is not at all clear that this procedure will avail the litigant whose complaint led to the making of the declaration of incompatibility; and if Parliament failed to approve the remedial order laid before it the United Kingdom would, presumably, remain in breach of its Convention obligations. But this scheme perhaps does as much as could be done to give effective domestic protection to Convention rights while respecting the sovereign power of Parliament to amend Acts of Parliament and subordinate instruments made in express compliance with Acts of Parliament. The Bill contains another safeguard, of a preventative nature. New Bills are to be formally scrutinised before submission to Parliament to ensure that they conform with the Convention; and spokesmen introducing new government bills are to inform Parliament of the Government’s view that the Bill conforms, or is thought to conform, with the Convention.

If, as now seems almost certain, the challenge of securing parliamentary approval of incorporation in constitutionally acceptable form has been overcome, we then face the practical challenges. The first of these is related to education, or training as we like to call it in relation to the judiciary. In England and Wales well over 90% of criminal cases begin and end in the magistrates’ court, decided by unqualified (and unpaid) members of the public acting in a part-time judicial capacity. There are some 30,000 of these unqualified (or lay) justices. They are advised on questions of law by clerks, of whom there are considerable numbers and whose legal qualifications vary. Because, up to now, none of these lay justices or their clerks has had any need whatever to acquire any knowledge or understanding of the Convention and its provisions, it seems likely that many of them will have no more than a
nodding acquaintance with the subject, if that. No doubt the more serious problems will be raised in, or appealed to, the higher courts, who alone have power to make a declaration of incompatibility, and the number of judges potentially involved at those levels is markedly smaller, about 120 or so. But we do, on any showing, face a formidable educational task in attempting, within a limited period of time, to introduce a substantial number of judicial decision-makers to a new way of thinking and to the rudiments of a body of law which is at present very largely unfamiliar to us.

The second practical problem is managerial: how to handle what is expected to be a considerable volume of cases in the immediate aftermath of incorporation becoming effective? We have looked for guidance to Canada and New Zealand, both of which countries have in recent years adopted a bill of rights, starting from very much the same position as ourselves. In both countries the adoption of the bill provoked a flood of cases raising different points on it, and the flood remained at a high level for two to three years before the flow of cases slackened. It seems likely that our own experience will be rather the same; there is at any rate no reason why it should not; and estimates have circulated suggesting that a significant number of judges are likely to be engaged on this work, full-time, during the initial period. The obvious way of responding to this problem, appointing additional judges, seems most unlikely to be adopted, for a number of reasons. But we have begun to make arrangements to ensure, so far as possible, that when cases raising Convention points reach the main court offices they are scrutinised to see what the points are, with a view to deciding at once, by an expedited procedure, cases which are likely to be determinative of a large number of other cases. It is hoped by this means to recognise and decide at an early stage the Convention points most widely raised, so that these are decided once and for all, and as quickly as possible, to prevent the same points being litigated time and again in different court, perhaps with different results.

The first and most momentous task confronting British lawyers in the immediate aftermath of incorporation will be to decide the scope of the Convention in British law. This has already been the subject of political, professional and academic debate. The most illuminating discussion of the topic known to me is to be found in a paper contributed by Murray Hunt, a practising barrister, to a conference held last November under the auspices of Clifford Chance and the Oxford Centre for the Advanced Study of European and Comparative Law, a paper which will shortly be published in the third volume of the Clifford Chance lectures. The question, put very shortly, is: are the rights guaranteed by the Convention, under the mode of incorporation adopted, enforceable by the citizen only against the state and emanations of the state? Or are they enforceable against other private citizens? Or has some compromise solution been found, lying somewhere between these two extremes?

Theoretically, as Hunt points out, any of these answers is possible:

"At the extreme vertical end of the spectrum, fundamental rights law is of no relevance whatsoever in litigation between private parties. One of the parties before the court must be a public authority, and even then it is not bound by human rights law in so far as it acts in a private capacity, for example as an employer or a landowner. At the opposite, horizontal end of the spectrum, a private party is entitled to bring an action against another private party purely on the basis of an alleged breach of fundamental rights. On this approach, there is an independent cause of action against private parties in respect of
breach of such rights. Between these two extremes, there is a wide range of possible positions”.

Hunt instances the United States constitution as the classical example of the extreme vertical approach:

"As is well known, US constitutional law requires there to be "state action" in order for the constitutional protections in the Bill of Rights to apply. The text of the Constitution itself make clear that those protections apply only to the activities of either the state or federal governments, and where a constitutional right is relied on in litigation between private parties the Supreme Court has made clear that courts must determine whether the activities of the private party alleged to have infringed the protected right are sufficiently connected to the government to constitute state action to which the Constitution applies”.

A similar approach appears to have been adopted in the Bill of Rights Ordinance made in Hong Kong in 1991.

At the other extreme end of the spectrum Hunt points to the practice in Ireland, where the rights guaranteed by the Irish Constitution have been held to be directly enforceable in an action brought by one private party against another without any public or governmental dimension. The effect has been to create a new cause of action, resting solely on breach of a right guaranteed by the Constitution.

It is quite plain that the present Bill has not adopted the Irish model. The obligation to act compatibly with the Convention is expressed to be binding only on public authorities, and the meaning of "public authority" is carefully defined. The meaning of the definition has been the subject of much discussion. But these provisions would have been unnecessary had the rights in question been enforceable by anyone against anyone. The clear implication from the terms of the Bill is that there are persons who are not bound to act conformably with the Convention at all; and the Bill makes clear that even public authorities are not so bound when exercising a private function. The Lord Chancellor has made the Government’s intentions fairly clear:

"a provision of this kind should apply only to public authorities, however defined, and not to private individuals. This reflects the arrangements for taking cases to the Convention institutions in Strasbourg. The Convention had its origins in a desire to protect people from the misuse of power by the state, rather than from the actions of private individuals. Clause 6 does not impose a liability on organisations which have no public functions at all”.

It would, however, seem, although somewhat less clearly, that a purely vertical effect is not intended either. The courts are expressly included among the public authorities upon whom a duty to act conformably with the Convention lies. And when an amendment was proposed, on behalf of newspaper interests, to ensure that the convention was not to be applied in proceedings which did not involve any public authority, the Government successfully opposed it. The Lord Chancellor said:
"We believe that it is right as a matter of principle for the courts to have the duty of acting compatibly with the Convention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals. Why should they not? In preparing this Bill, we have taken the view that it is the other course, that of excluding Convention considerations altogether from cases between individuals, which would have to be justified. We do not think that that would be justifiable; nor, indeed, do we think it would be practicable".

Another minister, in response to another 20 amendments, expressed the view that courts and tribunals

"are in a very similar position to obvious public authorities, such as government departments, in that all their acts are to be treated as being of such a public nature as to engage the Convention".

Whatever ambiguity may lurk in these statements, it seems clear that some midway position is intended. This, I feel sure, accords with the professional instincts of the judges and with discernible trends in recent decision-making. For although the Convention has up to now formed no part of English law it has increasingly come to influence judicial thinking and to provide a standard against which common law solutions may be judged. Even in cases where no public authority is involved, the court will, I think, be bound to give weight to rights and values which Parliament has specifically endorsed and respected by incorporating the Convention. But I would expect the courts to proceed on a traditional, incremental, case by case basis, in the manner of one venturing cautiously onto the ice and waiting, step by step, to see if the ice holds before venturing further. As potential injustices emerge, the courts will cautiously develop new or extended remedies. Much will no doubt turn on the response of the courts to Convention challenges, which as this stage remains a matter of conjecture. It may be that they will respond in a grudging and parsimonious spirit, conceding what the terms of the Convention and the jurisprudence of the Strasbourg court plainly require, but otherwise restricting the scope of the Convention to the greatest extent possible.

Or it may be that a more expansive view will be taken, treating the Convention as a series of aspirations to be translated into reality and treating the Strasbourg jurisprudence as marking no more than the minimum which the Convention requires. Professor Harry Arthur observed some years ago:

"Only when [a] Bill [of Rights] begins to command the loyalty of individuals - will its aspirations be translated into reality".

So the public mood may be important. But so too will be the judicial response. The undoubted success of the New Zealand Bill has been attributed to the fact that its enactment -

"coincided with a spring tide of judicial enthusiasm for the enforcement of fundamental rights and control of governmental power".

In one respect at least I think that those who hope for a surge of judicial activism may be disappointed. This is in relation to the margin of appreciation which the Strasbourg court has usually been willing to accord to national authorities, particularly in areas where no clear consensus appeared to exist among the member states. This practice of the Court reflected,
as I understand, a realistic recognition by a supra-national court that national authorities would very often be better placed than it could be to decide whether there was a pressing social need for a particular restriction in the circumstances prevailing in different member states. To some extent this ground for judicial reticence is undoubtedly weakened when the Convention is to be enforced in the first instance by national judges, who may reasonably be supposed to be general familiar with political, social and economic conditions prevailing in their country. But I think that British judges will continue to accord a very considerable margin of appreciation to political and official decision makers. In deciding applications for judicial review which raise no Convention issue the judges have been very careful to distinguish between the propriety of the decision-making process, with which they have been willing to interfere, and the substantial merits of the decision itself, which they have not been willing to review unless the decision is so plainly wrong as to be irrational. I think, particularly to begin with, that judges will tend to approach restrictions challenged under the Convention in a somewhat similar way. To do so would certainly help to allay the fears of those who see incorporation as an objectionable judicial usurpation of democratic authority. It does, however, seem likely that these issues will involve the courts in a new and unfamiliar comparative exercise: for it must plainly be harder for a national authority to justify a restriction as necessary in a democratic society to meet a pressing social need if other countries, even those whose history, culture and traditions are most clearly analogous, have no need of any such restriction. In anticipation of the Bill coming into force, considerable thought has been given, particularly by academic commentators, to identifying the points which may give rise to successful Convention challenges. In the field of criminal law there are certain obvious candidates: the rule, recently introduced, which permits a jury in certain circumstances to draw inferences, adverse to an accused, from his failure to answer questions at a police station or to give evidence in court; legislation which permits reliance to be placed by the prosecutor on answers given by a suspect who is liable to a criminal penalty if he fails to answer; the development of common law offences by judicial decision, a particular problem in Scotland where very little of the criminal law is statutory and it has been the practice to define certain common law criminal offences in a very broad and imprecise way; recent rules limiting the duty of the prosecutor to disclose materials to the accused; and the substance of some criminal offences, such as blasphemy, which makes it a criminal offence to insult the Christian religion but not any other religion. Our current procedures for deciding the term of imprisonment to be served by those convicted of murder seem certain to attract further challenges. It seems very likely that our laws on free speech will come under scrutiny: for example, the rule that a plaintiff complaining of a defamatory publication need not prove its untruth, certain existing restrictions on commercial advertising and the current rules which restrain political activity by more senior civil servants. I would be surprised if the Convention were not relied on to seek to establish the rights of employees to resist enquiry by their employers into their private lives and social and sexual habits. In some respects the present law on surveillance and interception would appear to be plainly contrary to the Convention. While no doubt very many bad, and some execrable, points on the Convention will be argued, there is no reason to doubt that some of the points argued will be sound and will succeed. But at least it seems, from a recent note contributed by the Bailiff to the Jersey Law Review, that our equivalent of your saisie procedure may be safe from successful attack.

So the challenge is undoubtedly there, and we should welcome it. Professor Ronald Dworkin very recently wrote:
"Great Britain was once a fortress for freedom. It claimed the great philosophers of liberty - Milton and Locke and Paine and Mill. Its legal tradition is irradiated with liberal ideas: that people accused of crime are presumed to be innocent, that no one owns another’s conscience, that a man’s home is his castle, that speech is the first liberty because it is central to all the rest”.

Scarcely less important than the existence of freedom is popular confidence that freedom is respected and protected by the courts. It is this confidence which our failure for so long to incorporate the Convention has weakened. No longer, we hope, will every disappointed litigant complain, however wrongly, that it is necessary to go to Strasbourg to obtain true justice. That is a belief which no national legal system worth the name should willingly tolerate. The changes now in train will, I think, change the climate of public opinion; and enable British judges once again to contribute to what must surely be regarded as the most important, as it is the most fundamental, of legal endeavours.


Footnotes - [1] - This is the text of an address delivered by the Lord Chief Justice of England and Wales, the Rt. Hon. Lord Bingham of Cornhill, to members of the Royal Court and of the States of Jersey on 10th July 1998, in the Royal Court House, St Helier.