

## **The impact of human rights: Speech by Lord Woolf, Lord Chief Justice of England and Wales:Speech at The Oxford Lyceum**

I am delighted to be sharing this Athenian Garden with you this evening. I am an enthusiast for the Lyceum initiative because of its international dimension. I know it is not solely concerned with lawyers or the law and certainly its primary interest is not the judiciary. You may, therefore, wonder why I have chosen a title which focuses on human rights. At first sight, viewed with the lofty objectives of the Lyceum, my subject may seem parochial. I hope to try and persuade you that it is not. I hope to persuade you that, if this country is to be true to its heritage, it has to be, and has to be seen to be, a champion of human rights.

It is increasingly recognised around the world that the observance of the rule of law is the key to progress in the developing world. The problems confronting the different nations in Africa, Asia and the new democracies are far from identical. However, it is generally accepted that, if progress is to be achieved, it is necessary to improve the observance of the rule of law in every part of the globe. This requires an effective system of justice. Assisting countries to establish effective systems of justice is very much a responsibility of the developed nations, including the judiciary of these nations. It is also very much in the interests of the developed nations that such systems should be established. They would make a permanent contribution to the fight against terrorism. It is not countries which are subject to the rule of law which are the breeding ground of terrorism. It is where the rule of law has broken down that terrorism takes root. There is also no need for citizens of countries which observe the rule of law to seek asylum, an ever increasing problem in the developed world.

Last month I attended an *All Africa Conference on Law, Justice and Development* in Abuja, Nigeria. Kofi Annan, Secretary General of the United Nations and James Wolfensohn, President of the World Bank, were both due to attend. Not surprisingly, in view of what was happening in other areas of the world, they did not do so, but papers were delivered on their behalf. Both recognised the importance of establishing effective justice systems in the developing world. I was particularly impressed by comments of James Wolfensohn. Amongst the things he said were: "[What] we know is absolutely critical - absolutely critical - is that there should exist a legal and judicial system which functions equitably, transparently and honestly. If these forms of legal and judicial systems do not exist in Africa, there is no way that you can have equitable development."

Again "A steady neglect or decline in the rule of law in most countries in Africa has been a major reason for the decline in the development prospects for the continent."

He illustrated his point by saying: "Over 14 countries have faced one form of conflict or another on the continent in the last decade. Many of Africa's wars, armed conflicts and civil disturbances emanate directly from the hopelessness of people trying to find in their countries a suitable framework to have access to power, to exercise their political rights or to share in the equitable distribution of the national revenue; when citizens have difficulty understanding and seeing how governments use and sometimes abuse national resources, it makes it even more difficult for many African governments to raise fiscal revenues. Corruption at several levels permeates the political and economic life in many countries. Trust of people that governments would redistribute revenues equally, is very low, breeding situations of non-payment of taxes by the citizenry; "

He added: "Take the steady flight of capital out of the continent and the slow inflow of foreign and direct investment because both domestic and foreign investors alike have lost faith in the ability of the legal and judicial systems to ensure the protection of property rights or to adjudicate disputes timely and in a fair and predictable manner without undue or improper influences."

And finally: "Africa needs strong, well-established rule of law regimes to enable it to trade itself into prosperity and out of poverty."

It is because this country recognises the importance of the rule of law to the developing world that a

substantial proportion of our overseas aid goes to helping the nations concerned to develop their systems. Part of this aid is a steady flow of judges and practitioners overseas and visits to this country of judges and practitioners from overseas.

The European Union makes it clear to countries seeking to join the Union that they will need to have achieved systems of justice that adhere to the rule of law in order to qualify for membership. Similarly, the World Bank uses the leverage provided by its loans to encourage such improvements. They are not easy to achieve, particularly if corruption is endemic and the resources available modest. Although it may not be easy, it is without doubt worthwhile.

In what I have said so far I have been focussing on the rule of law, but the rule of law is intimately linked with the observance of human rights.

I was in China two years ago. When I finished giving a talk, a member of the audience asked me, whether there was any distinction between what I had said about the importance of being governed in accordance with the "rule of law" and being "ruled **by** law". "Ruled by law" being the expression the authorities in China were in the habit of using.

There is a fundamental distinction between the two approaches. Both require compliance with the law irrespective of its content, but the rule of law also requires that the laws should accord with the democratic values which are reflected in a code of human rights such as the ECHR.

In China there is no tradition of government in accordance with either rule by law or rule of law. But their present government is committed, and I believe genuinely committed, at least to achieving a situation where the country is ruled by law and, probably, observing the rule of law as well. They are certainly anxious to learn and that is why I made my visit as head of a small British delegation of jurists, practitioners and academics. A country the size of China is confronted by an enormous task, but they are making very rapid progress indeed. I made a visit 15 years earlier and the contrast in the legal scene between my two visits was striking.

What is true of China is also true of Russia. Shortly after my visit to China, I was asked to attend a conference being organised in St. Petersburg. Like the conference in Abuja, the conference in St. Petersburg was intended to promote the rule of law. Again, I detected a great enthusiasm for change.

An example of the importance of a country at least being ruled by law is provided by South Africa. The transition of that country from an apartheid regime to its present status as a country governed in accordance with human rights under a comprehensive constitution and a distinguished constitutional court, would not have been so remarkably uneventful if it had not already had a judiciary and a legal system which fairly applied the laws of that country, however obnoxious those laws were prior to the period of transition. Confirmation of this is provided by the fact that the white Chief Justice at the time of the transition was encouraged to postpone his date of retirement by President Mandela.

Because of its colonial history, this country is in a particularly strong position to promote human rights in the developing world. It is looked upon as the mother, not only of Parliament, but of the common law system of justice. It is important that we remember this because, if do not adhere to our traditional standards of democracy and justice, those who are not well-disposed to democracy or justice will use our failures as a license for theirs. As will already be clear, it is very much part of the responsibility of the senior judiciary now to have close relations with the judiciary of other countries. I attach particular importance to links between the judiciary of this country and other common law jurisdictions. I also believe that our growing connections with civil jurisdictions in Europe are important. They mean that we are peculiarly well placed to act as a bridge between the common law and civil justice systems.

However, in relation to the common law world, we are still the beneficiaries of a huge reservoir of respect and good will because we were the source of their present legal systems. Why this is so, is brought home vividly if you visit the High Court in Bombay or the Supreme Court in Abuja. In the Bombay High Court there is a magnificent gothic hall reminiscent of the hall to the Royal Courts in London. Around the walls are portraits of the successive Chief Justices in their robes. It is not possible by looking at the portraits to

identify when independence took place. In Abuja Supreme Court, in a magnificent modern building, the walls are decorated by photographs of judges wearing robes and wigs which are the same as those worn in London. Of course robes are only symbolic, what is perhaps more important is that 14 of the 18 Supreme Court judges of Nigeria are members of our Inns of Court. The links of both the new and the old commonwealth with the legal system of this country are still very strong indeed.

The regard for the legal system of this country is not confined to the common law world. It is true also of the civil systems in Europe. There has been a process of harmonisation taking place, but of course there are still significant differences between our respective approaches. However, the quality of our judicial decisions are recognised throughout Europe. Although it is only just over two years ago that the Human Rights Act came into force and the ECHR became part of our law, this country, despite its rather unhappy record at Strasbourg, is still regarded as a country which champions the rights of the individual and the rule of law. It was in part because I was conscious that, prior to the Human Rights Act coming into force, the judiciary in this country could not play its proper role in the development of human rights, that I welcomed the implementation of the HRA.

After two years of the HRA being in force, I recognise that the fact that human rights could not be directly enforced as part of English law in the past meant that our form of democratic government was more vulnerable than it is now to the contravention of those rights. As Lord Hoffman has explained, the HRA was intended to strengthen the rule of law without inaugurating the rule of lawyers [[Endnote 1](#)]. The HRA has strengthened our democracy by giving each member of the public the right to seek the help of the courts to protect his or her human rights in a manner that was not previously available.

In the case of almost all the articles of the ECHR, the values equivalent to human rights were recognised as part of English law prior to the HRA coming into force. It was part of the long-established culture of this country that what could loosely be regarded as human rights values were observed both by government and Parliament. Furthermore human rights were recognised by the courts as part of the common law, "the birthright of the people" and part of the compact between the monarch and Parliament. [[Endnote 2](#)]

The articles that have probably been the subject of most litigation since the HRA are article 6, the right to a fair procedure, and article 10, freedom of speech, but both rights were long recognised by the courts prior to the HRA. As was pointed out in a letter to the *Times* from Francis Bennion on the 28 Feb 2003: "Exactly 200 years ago the English town of Eastbourne occasioned the laying down of the definitive law on this point. In the case of *Rex v The Inhabitants of Eastbourne* (1803) the Chief Justice, Lord Ellenborough, ruled that our law required relief to be afforded to all starving paupers, whether statutorily entitled or not, who were found wandering abroad and lodging in the open air in the Duke of Devonshire's salubrious town of Eastbourne. Lord Ellenborough said: the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving. What he meant was that in this respect, as in many others, the common law of England embraces the natural law and serves humanity."

Despite this, in more recent years it had become increasingly apparent that the citizens in this country, by comparison with their European neighbours, were at a significant disadvantage in having to rely primarily on the self-restraint of the government of the day for the protection of human rights values.

Prior to the HRA, a member of the public could not go before the courts and secure a remedy based on a human right. Prior to the HRA you could not, as you can now, go before the courts and say my right to life is threatened: it is the State's duty and the Court's duty to protect me. Instead, a member of the public had to complain that a public body had failed to comply with some legal duty or otherwise acted unlawfully. Then, if the complaint was established, the courts, usually on an application for judicial review, would take the necessary action to ensure that a public body complied with the law. Otherwise, the only recourse was to make a complaint to the ECtHR at Strasbourg and possibly obtain a remedy of damages from that Court that our own courts could not provide. This was the consequence of this country not having a document which could appropriately be described as a written constitution or any other legislation which provided protection for its citizens' human rights. This change from enforcing public duties to protecting the public rights of an individual, constituted a dramatic change in the role of the courts. It meant the focus of the courts moved 180 degrees from the public body to the individual.

Some would no doubt say that, if we have managed without a written constitution for hundreds of years, why now do we need a statute which contains the fundamental rights that would appear in a written constitution? This argument ignores the fact that the needs of society are continuously evolving. The only two other developed countries which did not have a written constitution, namely New Zealand and Israel, now have basic law provisions protecting human rights.

It is interesting to remember that, while it is possible to find cases like the Eastbourne case to which we can look back with pride for the manner in which they uphold human rights values, there have been periods of our history in which the record has been more fragile. During the last war, for example, it was Lord Atkin alone who spoke up in *Liversidge v Anderson* for the rights of the individual.

While there was considerable nervousness in the United Kingdom prior to the implementation of the Human Rights Act, the informed view is that making the European Convention part of our domestic law has proved to be a great success. Furthermore, that process of implementation has gone extremely smoothly.

There are at least five reasons why, notwithstanding the scale of the change involved, the smooth transition has been achieved.

1. The first reason is one to which I have already referred. Perhaps it is the most important. It is that the values to which the European Convention on Human Rights gives effect are very much the same values that have been recognised by the common law for hundreds of years. Although, prior to the present administration, no Government of the United Kingdom had been prepared to give its citizens the right to enforce human rights directly, it was wrongly assumed that United Kingdom citizens were just as well off under the common law as if they had such a right. This assumption was surprising since, while those rights were not expressly conferred on our citizens, when former colonies were about to become independent from Britain it was thought that their citizens did need such rights. Thus, many of the nations which now make up the British Commonwealth were given, on independence, a written constitution containing such rights. Furthermore, while our citizens, if they wished to enforce their human rights, had to go to Strasbourg to enforce them, for many years the new independent members of the British Commonwealth still had to come to a United Kingdom court, the Privy Council, in order to have their rights finally adjudicated upon. This was fortunate because it meant that our most senior judiciary were very familiar with the different techniques which a final court of appeal has to employ in order to give effect to human rights.
2. This brings me to the second reason. Every judge from the magistrate to the law lord has now to apply the ECHR. While the Privy Council had given the most senior judges a taste of what is involved in applying human rights, for the great majority of the judiciary this was a totally new experience. For this reason, before the Human Rights Act was brought into force, there was a breathing space of two years during which intensive training took place. Preparation for legislation on this scale was unprecedented in the United Kingdom. The training for the judiciary was accompanied by public bodies conducting an audit of their activities with the intention of identifying any practices which were not human rights compatible so that they could be changed before the Act came into force. This preparation in itself was very worthwhile since it meant not only judges, but also officials, Ministers and advocates were immersed in a human rights culture. Change of culture is the most important aspect of the introduction of the Human Rights Act.
3. Thirdly the process of change was facilitated by the fact that English lawyers and our judiciary, as common lawyers, felt instinctively at home with the manner in which the Strasbourg jurisprudence had been developed. On the framework provided by the Articles of the Convention, the judges of the Strasbourg Court have developed their jurisprudence in very much a common law manner: developing the law by giving pragmatic decisions on the facts of the cases that came before them.
4. Fourthly, the fact that the United Kingdom had already for many years been a member of the European Union, applying the Luxembourg jurisprudence, also assisted.
5. Finally, the very sophisticated approach adopted by the legislature when making the European Convention on Human Rights part of our domestic law assisted. The legislature, instead of giving the United Kingdom courts power to strike down domestic legislation, limited the court's power to declaring that the legislation was incompatible with the Convention. The Act then provided a fast track enabling Parliament to remedy the situation.

Despite these advantages, the scale of the change should not be underestimated. The values to which the European Convention gives effect are, as I have indicated, shared by all western democracies. However, for a country which has a long tradition of regarding the sovereignty of the democratic parliament as being the cornerstone of its constitution, the fact that the convention is enforceable in our own courts has created additional tension. Administrators and Ministers are used to our judges reviewing their actions, but under the HRA the scrutiny can be more intense. It is entirely novel for our courts to have the power to grant a declaration of incompatibility.

In practice, the occasions on which the courts have had to resort to making a declaration of incompatibility can be comfortably accommodated by the fingers of two hands. Even then, in at least two cases the declaration has been set aside on appeal. The reason the number of cases has been so small is partly due to section 3 of the Human Rights Act which is one of the most important provisions of the Act. Legislation, whenever it was enacted, becomes subject to the duty of the judiciary to read and give effect to it so that it accords rather than conflicts with Convention rights. If you consider that interference with human rights should be restricted, then surely section 3 is a thoroughly desirable, if novel, provision. It involves a new approach to the interpretation of statutes. I emphasise interpretation because as I have made clear in a judgment which benefits from the endorsement of Lord Hope, interpretation does not include legislation [[Endnote 3](#)].

I believe strongly that it is important that the different arms of government work in partnership together. The application of section 3 can be an example of that partnership in action. Section 19 requires the minister in charge of a Bill before Parliament to make a statement as to the compatibility of the Bill with Convention rights. Where a positive statement of compatibility is made, it can be assumed that Parliament intended the legislation to comply with the Convention. If it does not do so on a literal interpretation, then using section 3 to achieve a compatible interpretation is indeed fulfilling Parliament's intentions.

In addition, the courts are required to take into account, though not necessarily follow, the decisions of the Strasbourg Court. A happy consequence of this is that, while previously a few experts in the United Kingdom were aware of the rich jurisprudence of this Court, now that jurisprudence is familiar to every judge and competent lawyer in the country. In the cases that I hear, it is rare for a decision from Strasbourg not to be cited at some stage of the hearing. The remarkable thing is that although the Strasbourg cases are persuasive, and not binding, authority, I cannot recall it being suggested that our courts should not follow a Strasbourg precedent because it did not accurately reflect the law. Without exception practitioners regard the Strasbourg decisions as being of the highest authority. The Strasbourg jurisprudence, however, is a base and should not be regarded as creating a cap on our recognition of human rights in the English courts.

A reason for this acceptance of the Strasbourg jurisprudence is the fact that that Court has wisely developed the practice of allowing the Signatory States a margin of appreciation as to how they give effect to the Convention rights. This practice is not directly transposable to the domestic situation. This is because domestic courts do not have to determine the relationship between an international body and a national body. Domestic courts are concerned with the different relationship, the relationship between the national court and the national authorities.

Fortunately, although this is controversial, the British courts have developed a parallel doctrine to the margin of appreciation to deal with the relations between the domestic courts and our Parliament and our executive. This in many situations avoids an overt clash between our courts and Parliament and the executive.

The parallel doctrine that has been developed is the doctrine of deference, or as I prefer to say the doctrine of respect. This requires the United Kingdom courts to recognise that there are situations where the national legislature or the executive are better placed to make the difficult choices between competing considerations than the national courts.

The courts recognise an area "within which the judiciary defer on democratic grounds to the considered opinion of the elected body or person whose actual decision is said to be incompatible with the Convention". Such an area of deference is more readily found where the Convention requires a balance to

be struck, or where the case raises issues of social and economic policy. It is less likely to be applied in situations where the Convention right is unqualified or where the rights are of a nature which the domestic courts are well placed to assess.

In addition, in general the courts have exercised the additional responsibilities which the HRA has given to them conservatively. This has meant that vocal criticism of the manner in which the judiciary are exercising their new jurisdiction under the HRA has been confined to a limited number of cases. The fact that, despite these criticisms, the judiciary have also been criticised for not being sufficiently proactive, perhaps indicates that usually the judges have got the balance right.

In relation to the criticism, what is overlooked is that judges are only doing what they have to swear to do on appointment and that is to give a judgement according to law. The law now includes the HRA. By upholding the HRA the courts are not interfering with the will of Parliament. On the contrary, when they interfere, the judges are protecting the public by ensuring that the Government complies with the laws made by Parliament. The courts are therefore acting in support of Parliament and not otherwise.

It is of the greatest importance to make clear that, by recognising the need for deference when scrutinising the actions of public bodies, the judges are not slipping backward and reverting to their pre-Human Rights Act approach, the *Wednesbury* approach.

I accept that the Convention cannot be described as a contemporary document. It is not drafted in the terms which would be used in a document created for the first time today. For example, unlike the South African constitution it does not deal with language, cultural, religious, social and economic rights. Importantly it also does not deal with environmental rights. Here it is to be noted that the Indian Constitution does not either, but this has not prevented the Indian Supreme Court extending the constitutional protection of the right to life so as to do so. However, half a loaf is better than no loaf and at the present time there is little political support for a more far-reaching replacement in this jurisdiction.

But while the ECHR has the shortcomings to be expected of a 50 year-old Convention, it has already been subject during its life to considerable development by the Court at Strasbourg. It is a living instrument. The Court in accordance with the best common-law traditions has extended the reach of the articles so that they make a significant contribution to achieving a society which is more just and more tolerant than it would be if we did not have the Convention.

Now our courts can take up the baton and make their contribution to international human rights jurisprudence. To give an example at random: article 2, which protects the right to life, is being used as a justification for granting a lifelong injunction to protect the identity of Thompson and Venables now they have served their punishment for their terrible crime; the same article has also been used to improve coroners' inquests. Again article 8 and the protection it provides for privacy and the right to family life is being used to ensure that mothers who are in prison are not, when this is practical, parted from their young babies.

After September 11, the United Kingdom passed the Anti-Terrorism, Crime and Security Act 2001. In order to bring the legislation into force, the United Kingdom Government felt compelled to enter into a formal derogation from Article 5 (1) of the Convention. It has been pointed out that, despite the international nature of the present war on terrorism, the United Kingdom stands alone among European states in deeming it necessary to derogate from the terms of the Convention. Already, I have been a member of a court that had to hear an appeal under that Act. I do not intend to detain you by referring to my judgment. While we did not uphold the challenge and did recognise the situation was one where respect was required to be appropriately extended to the Government, we made clear that the manner in which the issues had been considered by the Court was wholly different as a consequence of the European Convention being part of our domestic law. We did not apply the *Wednesbury* test.

The problem with emergency legislation is that it is inevitably amongst the most controversial legislation from the point of view of human rights. It is usually passed into law with a great urgency at a time when Parliament has least time to consider dispassionately its intrusive effect on individual citizens. A distinguished American professor, Bruce Ackerman has suggested, and I agree with him, that we should

devise our emergency legislation at a time when we are not as a nation subject to pressure of an emergency (though he fears that breathing spaces between emergencies are going to be of increasingly reduced duration).

This should avoid the danger that might otherwise arise, that, because legislation has not been the subject of mature deliberation, it creates the impression that we are not, when an emergency exists, attaching the significance to human rights that we expect of other countries.

So far as human rights are concerned we can never afford to be complacent. A salutary consequence of human rights becoming enforceable is that the risk of us scoring an 'own goal' is substantially reduced.

Thanks to the HRA we are now in a position to play a full role in promoting the observance of human rights around the globe. At the beginning of this talk I attempted to explain why I regarded this role as being important. I believe it can make a small contribution to making this a safer world. As to whether this is in fact possible, I can only recite Aristotle, with whom the Lyceum is associated, "a likely impossibility is always preferable to an unconvincing possibility" (Politics 24/1460).

## Endnotes

1. New Law Journal 18 May 2001, 713
2. See Halsbury's Laws of England, 4th ed. Vol 8{2} para.101 and e.g. *Derbyshire County Council v Times Newspapers Ltd* [1993] A C 534.
3. *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] 3 WLR 183 (CA); *Donoghue v Poplar Housing and Regeneration Community Association Ltd (2001)* and *In Re S (FC) and others (Con joined Appeals)* [2000] UKHL 10 (HL)

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