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Distinguished Lectures of the Law Department

**The Effects of the Jurisdiction of the
German Federal Constitutional Court**

(Translated by Iain Fraser)

PROF. DR. JUTTA LIMBACH

President of the German Federal Constitutional Court

**The British Legal System and Incorporation of the
European Convention on Human Rights:
The Opportunity and the Challenge**

THE RT HON LORD BINGHAM OF CORNHILL

Lord Chief Justice of England

BADIA FIESOLANA, SAN DOMENICO (FI)

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Distinguished Lectures of the Law Department

Preface by Silvana Sciarra

The idea of launching a series of distinguished lectures as part of the academic and teaching activities of the Law Department came about whilst discussing the reform of the Department's seminars for the academic year 1995-6. The envisaged perspective was to provide research students coming from different legal training and academic backgrounds with information on the main contemporary legal systems. This was to be done by bringing to the European University Institute highly distinguished scholars or lawyers active in the legal professions with the aim of offering an overview of their own legal systems and of putting them in contact with the essential developments of the law through critical and original evaluations of the legal systems in question.

The Institute is the ideal setting for projects of this kind, not only because it brings together lawyers from different countries but also because it assumes comparative methods to be a main research orientation of its academic programme. In this cultural context, this series of lectures has provided research students in the law department with an important core of comparative knowledge. It is my belief that this comparative exercise may also help researchers to put specific research topics in the context of

broader questions to be addressed by the law. The EUI provides the ideal base from which views of the law in different legal systems can be challenged and discussed in a context of differing legal cultures. The merging of a highly qualified group of lawyers from different legal systems brings about a unique comparative methodology which helps in identifying the core questions to be addressed by the law. One can think of contemporary issues under discussion such as the role of legal sources and the regulatory function of the law, legitimacy, the relation of the law to other social systems and the state, and the private versus public law distinction.

The distinguished lectures were given by highly representative scholars from different countries. The focus was on Western legal systems: it would be even more challenging to broaden the selection of future lecturers to include a still wider range.

Each lecturer was given the task of describing some essential lines of his/her own legal system while addressing what he/she considered to be essential questions raised by the law. This was not done with the intention of being exhaustive but simply to select issues considered stimulating for a comparative discussion.

Two lectures were delivered during the academic year 1995-96. They were given by Professors Paolo Grossi of the University of Florence, "Legal Culture in Modern Italy", and Professor Morton Horwitz from Harvard Law School, "Three Legal Revolutions: Authority, Property and the State". In 1997 Professor Garcia de Enterría, Professor Emeritus of the Faculty of Law, Universidad

Complutense (Madrid), delivered a lecture on “Democracia y lugar de la ley”. The lectures published jointly in this Working Paper for convenience, pending the preparation of the other texts in their final and revised versions, were delivered on 18 March and 27 May 1998 respectively. My thanks to Susan Garvin for her assistance in organising the lectures and following the working papers through to publication.

A “gallery of portraits” such as that offered by lawyers with different personalities, specialists in different legal fields, chosen mainly from among academics and judges, has been an opportunity to experiment and revitalise the lessons of legal pluralism in a lively and active way. I am grateful to the Research Council of the European University Institute which supported this initiative and to Dr. Patrick Masterson, President of the EUI for his encouragement and his lively and incisive presence at each lecture. This, and the attentive and participatory presence of colleagues and researchers at the distinguished lectures made us all feel part of a large academic community which shares the values of rigour and objectivity, beyond differences in legal culture and personal beliefs.

President of the German Constitutional Court, Prof Dr Jutta Limbach

Jutta Limbach was born on March 27 1934 in Berlin. She is the first woman to be elected President of the German Constitutional Court.

Dr. Limbach studied law in Berlin and Freiburg She passed the first state law examination in 1958 and the second state examination in 1962. From 1963 to 1966 she worked as an assistant at the Free University of Berlin and achieved her doctorate with a thesis in legal sociology. From 1966 to 1969 she had a scholarship of the German Research Foundation and completed her 'Habilitation' thesis in 1971. In the same year she received a chair of law at the Free University of Berlin and worked there as professor of civil law, commercial law and legal sociology until 1989. In 1989 Dr Limbach became Senator of Justice in the City of Berlin. Subsequently she was elected Vice-President of the German Constitutional Court in March 1994 and then President of the Court in September 1994

***The Effects of the Jurisdiction of the German Federal
Constitutional Court***

Prof. Dr. Jutta Limbach

President of the German Federal Constitutional Court

Translated by Iain L. Fraser

Opinion Surveys and Statistics

Citizens of the old Federal Republic have repeatedly been asked which things they are most proud of. The choice has included welfare-state benefits, economic success, the Bundestag, scientific or sporting achievements, art/literature and the Basic Law. This last, i.e. our constitution, has taken first place in recent years. Only in 1991 and 1992 was the constitution put in second place. Germans' pride in their economic successes won out then. The most recent survey ranked welfare-state benefits in second place after the Basic Law, followed by the economic successes¹.

The Federal Constitutional Court has for many years enjoyed notable respect. On a question about citizens' trust in twelve institutions of public life in the Federal Republic of Germany, the Court has for many years ranked top. Despite strong public criticism in recent years, it currently shares first place with the

¹ Bundesverband Deutscher Banken (ed.), INTER/ESSE, Wirtschaft und Politik in Daten und Zusammenhängen, 9/97, p.2.

police. The government and the political parties, by contrast, take the bottom places on the scale of trust².

The frequency with which citizens invoke the Court seems to confirm these opinion-research findings. Using the constitutional complaint, anyone claiming to have had a fundamental right infringed by an act of the authorities may seek protection through the Federal Constitutional Court. The constitutional complaint may be directed against an executive, judicial or (less commonly) legislative action. In only a few years the constitutional complaint became an extraordinarily popular legal remedy. This popularity continues. Since reunification some 5.000 constitutional complaints have been lodged annually. Admittedly, only around 2% of the constitutional complaints are successful. But the low success rate ought not to make one underestimate this right of appeal. For the paradigmatic effect of the decisions is important for the future conduct of politicians, officials and judges. The case law on fundamental rights has not only helped to flesh out the Basic Law and let it take root in our body politic. Additionally, this judicial relief has created a sense among the population of not being exposed defencelessly to government measures. And not least, the decisions have sharpened the awareness of both public actors and the citizens that the fundamental rights constitute directly applicable law.

² Bundesverband Deutscher Banken (ed.), INTER/ESSE, Wirtschaft und Politik in Daten und Zusammenhängen, 11/97, p.2.

Impact analysis

Do these survey data and court statistics suffice, though, to draw conclusions as to the Federal Constitutional Court's central role in constitutional practice? Does the Germans' pride in the Basic Law already show they are patriots of the constitution? Do the repeated acts of violence against aliens not raise doubts as to the Germans' sensitivity to human rights? What about the Court's influence on the ordinary courts and on political practice? Has the Federal Constitutional Court managed to bring politics under the law? What does it achieve in the context of political culture in the Federal Republic? All these questions can be answered only through careful analysis of research into its impact. This means legal sociological studies of the effectiveness of the Court's decisions. But legal sociological analysis of the impact of court decisions is something still in its infancy³.

Initial theoretical studies deal with questions of the effectiveness, implementation and evaluation of the Federal Constitutional Court's case law. They have developed parameters or dimensions whereby the effects of decisions can be described and analysed. Among things treated as such parameters are, for instance, knowledge of the case law, how far addressees of decisions conform with the Court's objectives, and the influence of the

³ Thomas Gawron/Ralf Rogowski: Effektivität, Implementation und Evaluation - Wirkungsanalyse am Beispiel von Entscheidungen des Bundesverfassungsgerichts, in: Zeitschrift für Rechtssoziologie, 2/96, 177-220, 178.

decisions on social values and political culture⁴. Empirical studies are to date only occasional, especially on the questions of knowledge of the law, political culture and change in values. The preferred field for this sort of research is mainly criminal law, sometimes labour law, but only very rarely the Federal Constitutional Court, which has remained in the main an object for sociology of justice only.

Accordingly, I cannot base what I have to say about the effects of the Federal Constitutional Court's decisions on empirical studies. In accordance with the state of research, I shall therefore merely pick out a few aspects of the history of the Federal Constitutional Court's impact and illustrate them. In doing so I shall distinguish between the legal, social and political effects of the decisions.

The Federal Constitutional Court as legal force

What can best be shown is how the Federal Constitutional Court acts as a legal force, for its interpretation of the constitution affects the parliament's lawmaking and the ordinary courts' legal practice. One constitutional norm explicitly stipulates that decisions of the Federal Constitutional Court are binding on all constitutional bodies, courts and authorities.

Allow me to make things specific, by showing the effect, reaching far beyond the individual case, of one early decision of the Federal

⁴ Cf. Gawron/Rogowski, loc. cit. fn. 3, p. 179-185.

Constitutional Court: the Lüth decision⁵. This decision articulated the standards and methods for protecting fundamental rights. It set the course for the "radiative effect" of fundamental rights in all other areas of law.

Let me start with the facts of the Lüth case⁶: Veit Harlan was a popular film director under the Nazi regime and the producer of the notoriously anti-semitic film *Jud Süß*. In 1950 he directed a new movie entitled "Immortal lover". Erich Lüth, Hamburg's director of information and an active member of a group seeking to heal the wounds between Christians and Jews, was outraged by Harlan's reemergence as a film director. Speaking before an audience of motion picture producers and distributors, he urged his listeners to boycott the movie "Immortal lover". In his view, the boycott was necessary because of Harlan's Nazi past: he was one of the ***important exponents of antisemitism***. And Lüth was concerned that Harlan's reemergence would terribly renew the distrust against Germany. The film's producer and distributor secured an order from the Superior Court of Hamburg forbidding Lüth to call for a boycott. The Court regarded Lüth's action as an incitement to inviolate the law of torts. Lüth ***successfully*** filed a constitutional complaint asserting a violation of his basic right to free speech by the Superior Court of Hamburg.

⁵ BverfGE 7, 198.

⁶ The presentation of the facts and the grounds of judgment below draws on the translation by Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed., 1997, p. 361 ff.

In deciding this case, the Federal Constitutional Court laid down for the first time the ***doctrine of an objective order of values*** and clarified the relationship between fundamental rights and private law. We are used to understanding human rights as ***negative entitlements*** which enable the individual ***to defend himself against government intrusions*** into his sphere of freedom. In its groundbreaking Lüth judgement, the Federal Constitutional Court understood basic rights in our constitution ***not only*** as subjective rights, ***but also*** as objective principles. And in a capacity as an objective order of values ***the basic rights penetrate the whole legal and social order.***

The Court said in the Lüth decision:

"The primary purpose of the basic rights is to safeguard the liberties of the individual against interferences by public authority. They are defensive rights of the individual against the state... It is equally true, however, that the Basic Law is not a value-neutral document. Its section on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights. This value system, which centres upon dignity of the human personality developing freely within the social community, must be looked upon as a fundamental constitutional decision affecting all spheres of law (public and private). It serves as a yardstick for measuring and assessing all actions in the areas of legislation, public administration, and adjudication. Thus it is clear that basic rights also influence the development of private Law. Every provision of private law must be compatible with this system of values, and every such provision must be interpreted in its spirit."⁷

The decision focused attention on the so-called ***radiative effect*** of fundamental rights. The Court thus developed a variety of

⁷ BVerfGE 7, 198 <204 f.>; Kommers, aa0., Fn.6, p. 363

affirmative or protective duties, which oblige the State, especially the legislature ***to protect human rights against threats from private individuals or groups***. In the course of more than forty-five years of jurisprudence, the Court has drawn several conclusions from the premise that human rights are also objective principles.

This decision leads to an "omnipresence of the fundamental rights in the process of interpreting and applying ordinary statute law"⁸. This has proved enormously rich in consequences, especially for civil law. For the thinking in private law has changed fundamentally since the beginning of the century. Certainly, private autonomy continues to be the guiding principle of the civil law. But alongside this principle, the principle of the Social State is termed one of the main pillars of the civil law. Under the influence of the fundamental rights and the Social-State clauses, a social law of obligations has been developed by an interaction between case law and legislation. That is to say a kind of law that takes the power gap or power imbalance between contractual partners into account and protects the economically inferior, the socially weak. Examples of this are socially just tenancy law and consumer protection law.

The Court's most recent decision concerns the law of suretyship. The case concerned a young woman who had rendered herself hopelessly overindebted through a surety bond. She had stood surety for a high bank credit to her father, although she had only a

⁸ Thus Ossenbühl, *Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit*, in: Hamburg, Deutschland, Europa, Festschrift für H.P. Ipsen, 1977, p. 129-141, 138.

small income (DM 1.150 per month). The Federal Constitutional Court decided that the civil courts ought to monitor the content of such contracts and where necessary declare them void, provided always that there be a structural inferiority of the guarantor and that the suretyship be an unusually heavy burden on him or her⁹.

The Federal Constitutional Court's case law on the radiative effect of the fundamental rights has not only met with approval. Especially recently, it has been heavily criticized. This is connected on the one hand with the crisis of the Social State and the desire to set bounds on a case law seen as paternalistic. On the other hand, the case law on the radiative effect of the fundamental rights favours a great breadth and intensity of supervision by the Federal Constitutional Court, thus curteiling the competencies of the ordinary courts.

The social impact of the case law

Let us now turn our attention to the social impact of the Federal Constitutional Court's case law. An example is family law, an area repeatedly developed further in the Federal Constitutional Court's decisions. The Court's actions have largely been provoked by changed family structures. Particularly since the seventies, the social reality of the family in the Federal Republic has decisively altered: the inclination to marry has decreased, the divorce rate has risen, and the frequency of extramarital cohabitation steadily grown. Stepfamilies and adoptive families have become more

⁹ BVerfGE 89, 214.

common. The two-career marriage and family has become firmly established alongside the housewife marriage.

The Court has responded to this social change in the most varied fashion. Sometimes it has proved to be the pacemaker of social change. For instance, it has cut back the legal predominance of the husband and father. In the majority of cases it has adjusted the law to new social developments. In particular occasions though - as in the case of families without marriage - it has adapted to new forms of life only after long hesitation. Let me portray this concretely on the basis of three legal questions.

Let us start with the Court's tendency to inertia. This was displayed in connection with the question whether there could be a family in the legal sense where father and mother lived together unmarried with their child. The Federal Constitutional Court took the view that the child born out of wedlock had a constitutionally protected relationship with both its father and with its mother. It was, however, not willing to treat extramarital cohabitation with a child as a family within the meaning of the constitution¹⁰. This distinction, which seems odd, not to say grotesque, could hardly be made comprehensible to the legal layman.

Gradually the insight dawned on the Court that the constitutionally required protection of the family could not be made dependent on whether the parents had found their way to the registry office. For what deserves protection is the fact that people live together and

¹⁰ BVerfGE 56, 363 <386>.

collaborate in order to raise and bring up children. The Court gradually adjusted its legal concept of the family to the social reality. The legislator too then renewed family law accordingly. Among other things, parents living together unmarried today have the possibility of joint custody.

Let us now come to the law's function as pacemaker. The German Civil Code of 1900 was typified by a patriarchal structure. The husband had right of decision in all matters of the marriage. As father, he was at the same time holder of the patria potestas. The mother was entitled and obliged merely to look after the child and bring it up. Should the parents' opinions differ, the father's prevailed.

The husband's right of decision in matrimonial matters was removed by the Equal Rights Act in 1958. The Act also followed the case law that parental care and custody go to both father and mother. But for the case where the parents were unable to agree, the father was to have the last word. Only this paternal casting vote was held suitable to safeguard family peace and marriage in its Christian, Western form.

This Act was interpreted by legal sociologists as an attempt to intervene, with conservative intent, in the forthcoming shift in family power relationships¹¹. Survey findings from the fifties show that at the time there were no clear majorities on the question among the population yet. The paternal right of final decision still had

¹¹ Voegeli/Willenbacher, Die Ausgestaltung des Gleichberechtigungssatzes im Eherecht, Zeitschrift für Rechtssoziologie 2/84, 235-259, 247 f.

numerous supporters - especially among men¹². The Federal Constitutional Court, however, repealed the paternal right of final decision as unconstitutional, a year after the Act came into force. It did so irrespective of the fact that the model of an equal footing for man and woman had not yet fully taken over in the legal reality. The Court was unable to see how far objective biological or functional differences or the special nature of woman could justify the paternal prerogative¹³. For the young generations today the catchword of the paternal casting vote is now quite beyond their knowledge. They are at best amused, and young women often indignant, when one tells them about this male privilege, now history.

There is a third body of law where the Federal Constitutional Court has acted as pacemaker. In several decisions the Federal Constitutional Court was engaged in the legal position of the illegitimate child (child born outside marriage). The Court has repeatedly brought about reforms by the legislator. In the meantime, Parliament has largely set the rights of illegitimate children as equal to those of legitimate ones. In particular, the provision whereby father and child were not regarded as related was repealed. Today both the child and the father are entitled to inherit. Paternity may be recognized by a simplified procedure. The child's entitlement to maintenance has been expanded. It can sue for the amount necessary for a simple living by simplified

¹² R. König, *Familie und Autorität: Der deutsche Vater im Jahre 1955*, in: idem, *Materialien zur Soziologie der Familie*, 2nd ed. Köln 1974, 214-230, 224 ff., and Fröhner/Stackelberg/Eser, *Familie und Ehe*, Bielefeld 1956.

¹³ BVerfGE 10, 59 <74 f.>.

procedure using officially set standard rates. Compulsory official guardianship has been set aside. The mother obtains parental custody by law.

It is interesting to find out whether the reformed law has also brought about a social change. After all, at the start of our century the illegitimate child was the poorest of the poor. Has the changed legal position gone hand in hand with improved conditions of life for illegitimate children and unmarried mothers? The question is hard to answer. For how are such improvements in life chances to be measured? Among the starting points might be the social valuation of mother and child, the frequency of births out of wedlock, and the health and welfare of illegitimate children.

Social ostracism of mother and child is something scarcely known today. But we are unable to say exactly how far the changed social views have been influenced by the case law. Assuredly there is a mutual interaction here between law and reality that does not run with one-dimensional goal-directness. As far as the other parameters, or starting points are concerned one might say the following: the number of births out of wedlock has risen steadily since 1970 (5.4%), running in the old Länder of the Federal Republic at around 10% since the mid eighties. Since the eighties, illegitimate children have no longer been over-represented among the stillborn or deaths in infancy¹⁴. This would suggest that today an illegitimate child is expected largely without mental pressure, social fears or existential worries. The figures regarding support

¹⁴ Statistisches Jahrbuch 1997 für die Bundesrepublik Deutschland, 1997, 69.

payments are less pleasing. In the group of all one-parent families, it is the illegitimate children that most often receive no, or only irregular, or only incomplete support payments¹⁵. This fact shows that favourable maintenance regulations are not enough by themselves to improve the material position of illegitimate children substantially. It remains to be seen whether the improvement in the legal position of fathers of illegitimate children will also raise their payment ethics. The Bundestag passed an Act late last year to reform childhood law. In the explanatory statement introducing the Act the parliament states the occasion for the reform. The first paragraph of the statement refers six times to various decisions of the highest German court, which have called into being these manifold changes in the law relating to children¹⁶.

Political influence

That brings me to the political impact of the Federal Constitutional Court's case law. There is no doubt that the Federal Constitutional Court is an outstanding factor in the political process. The Court adjudicates in the name of the Basic Law. Its operation extends into the political sphere because its criterion is the constitution of a political community. As we all know, the checking of power is necessarily itself power¹⁷.

¹⁵ S. Behr, Junge Kinder in Einelternfamilien. Auswirkungen der sozialen und wirtschaftlichen Lage von Einelternfamilien auf die Aufstiegschancen der Kinder. Ed. Bundesfamilienministerium, 1981, p. 24 f.; Bien (ed.), Familie an der Schwelle zum neuen Jahrtausend, Wandel und Entwicklung familialer Lebensformen, 1996, p. 147.

¹⁶ BTDrucks 13/4899, 13 June 1996, p. 29.

¹⁷ As Adolf Arndt tellingly puts it in relation to judging in general: Das Bild des Richters, Karlsruhe 1957, p. 15.

What I am interested in here is the question of the influence the decisions have on political debate and decision-making. Let us take a look at the political debates inside and outside parliament. Here it becomes apparent that already during the legislative procedure participants in the debate orient themselves on future and likely forthcoming decisions of the Federal Constitutional Court. MPs mostly engage lawyers to interpret the relevant decisions right down into the details. The experts then sometimes play the part of the Delphi oracle, if they have to foresee coming decisions of the Court. Especially in the political debate on parity codetermination (equal representation for management and labour on supervisory boards of firms), politicians and lawyers alike referred not just to the Basic Law, but primarily to the Federal Constitutional Court's case law. Rarely has a threatened, or intimidatingly aired, action before the Federal Constitutional Court had such far-reaching pre-emptive effects, in terms of anticipated reactions and adjustments, on the legislative process¹⁸.

When Federal Chancellor Helmut Schmidt was asked by workers in 1974 when the Codetermination Act was finally going to be passed, he answered: "The question is whether that damned pettifogging Christian Social Union Party (CSU) isn't going to bring the matter before the Federal Constitutional Court again"¹⁹.

¹⁸ On the "pre-emptive effect" of Federal Constitutional Court decisions, cf. Christine Landfried, *Bundesverfassungsgericht als Gesetzgeber, Wirkungen der Verfassungsrechtsprechung auf parlamentarische Willensbildung und soziale Realität*, Baden-Baden 1984, p. 52 ff.

¹⁹ Cited from the *Frankfurter Rundschau* for 21 October 1974, p. 2.

This tendency towards anticipatory obedience has become stronger over the years. We judges could be proud if this omnipresence of the Federal Constitutional Court if the political debate indicated a sensitivity towards fundamental rights on the part of politicians. But that is only true to a limited extent. In the upper and lower House and among the public, political argument is daily spiced up by using the accusation of the alleged unconstitutionality of a planned decision. The threat of taking the road to Karlsruhe is now part of the ritual stock-in-trade of politics in Germany. This anticipation of a constitutional risk leads to risk-aversion and lack of innovation. Anticipatory obedience is harmful to the social imagination and tends to cripple the legislator's delight in deciding.

A negative aspect of reputation

The history of the Federal Constitutional Court's impact is a successful one. This is true irrespective of the fact that its decisions have repeatedly unleashed a barrage of criticism. That has never managed lastingly to shake the people's trust in the Court. It may be said without exaggerating that the Federal Constitutional Court has become a citizens' court par excellence²⁰. Such popularity however does not raise it above all doubt. This is true especially when the other institutions that guarantee pluralism (the variety of opinion) suffer from a falling-off of trust. For instance, the press, the trade unions, employer associations, the

²⁰ Häberle, Verfassungsgerichtsbarkeit als politische Kraft, in: idem, Verfassungsgerichtsbarkeit zwischen Politik und Rechtswissenschaft, 1980, p. 54-79, 61.

churches, the federal government and the parties are all mainly in the negative zone of the scale of trust in public institutions in the Federal Republic of Germany.

Does the unbroken great trust in the authority of constitutional jurisdiction indicate a political mistrust of democracy? As Häberle rightly warns, "The German faith in constitutional jurisdiction must not be allowed to turn into lack of faith in democracy"²¹.

²¹ Ibid. p. 79.

The Lord Chief Justice of England, the Right Honourable the Lord Bingham of Cornhill

Thomas Henry Bingham was born on 13 October 1933 in London. He studied modern history at Balliol College Oxford from 1954-57, graduating with first class honours. He was called to the Bar by Gray's Inn in 1959, having obtained a Certificate of Honour in the Bar finals. From 1968-72 he was standing junior counsel to the Ministry of Labour (later the Department of Employment). He became a QC in 1972 and a recorder in 1975. He was a member of the Lord Chancellor's Law Reform Committee. In 1980 he was appointed a judge of the Queen's Bench Division of the High Court, and in 1986 was promoted to the Court of Appeal. In 1992 he was appointed Master of the Rolls and in June 1996 became Lord Chief Justice of England (his duties extending to England and Wales)

***The British Legal System and Incorporation of the
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The Rt Hon Lord Bingham of Cornhill, Lord Chief Justice of
England

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”¹. The Government has honoured that pledge. The new Human Rights Bill has almost completed its parliamentary passage. [See *Human Rights Act 1998 - ed*]. 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, British citizens will, for the first time, be entitled to enforce these human rights and fundamental freedoms directly in their own courts.

This result 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

¹ Labour Party Manifesto, 1997, The Labour Party, London, p.35

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.²

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 we 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 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

² See M Zander, "A Bill of Rights?" Sweet & Maxwell, London 4th edn.1997, pp 32-33

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 occasion³. I do not consider this a shameful record, as is sometimes suggested, and the United

³ See generally "The Three Pillars of Liberty", ed. Klug, Starmer & Weir Routledge, London, 1996.

Kingdom is in my view a state in which human rights and fundamental freedoms are on the whole respected and safeguarded. 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 judgements 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 persons, property, reputation and beliefs of others.⁴

⁴ See “Tort and Human Rights” and “Human Rights and the Law of Torts” in “The Law of Obligations: Essays in Celebration of John Fleming”, Cane & Stapleton (eds), Clarendon Press, Oxford, 1998.

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 a 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 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 which 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"⁵ - 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 right to 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,

⁵ Cm. 3782 October 1997

the Government have almost entirely resisted this rather particular pressure.⁶

But perhaps the strongest, and certainly the most persistent, of all the objections to incorporation has been that which I mention last: the fear that incorporation will involve the judges in making politically sensitive decisions and so embroil them in political controversy and undermine their reputation for political neutrality. This result, if realised, would indeed be a formidable objection to incorporation for today, in contrast with even quite recent times, the judiciary is at pains to preserve a position of complete political neutrality. This it largely succeeds in doing, despite making many decisions unpalatable to the government of the day. But it would be hard to preserve the present, entirely unpartisan, approach to making judicial appointments if judges were perceived to be engaged not simply in resolving legal questions but in making decisions which reflected their own social value judgements.

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 the judges have become

⁶ But see Hansard, HC Deb. Vol.306, No.120, 16 February 1998, Col. 777.

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 could 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”⁷.

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

⁷ Clause 3(1)

subordinate instruments 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 twofold 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 incompatibility⁸. This is a power which may only be exercised by the higher courts⁹, 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 party¹⁰, 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 incompatibility¹¹. It is not at all clear that this procedure will avail the litigant whose

⁸ Clause 4(2), (4)

⁹ Clause 4(5)

¹⁰ Clause 5(2)

¹¹ Clause 10

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.¹²

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

¹² Clause 19

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 them.

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 courts, 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 Lectures¹³. 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?

¹³ „The Impact of the Human Rights Bill on English Law“₁. Markesinis (ed), OUP 1998.

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”¹⁴.

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 makes 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”.¹⁵

¹⁴ Op.cit., chapter 12, “The Effect of the Convention on the Law of Obligations”, at p.162.

¹⁵ Op. cit., at p.163

A similar approach appears to have been adopted in the Bill of Rights Ordinance made in Hong Kong in 1991.¹⁶

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.¹⁷

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 defined¹⁸. 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 function¹⁹. 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

¹⁶ Hong Kong Bill of Rights Ordinance, Ordinance No.59 of 1991

¹⁷ Op. cit., at p.165

¹⁸ Clause 6

¹⁹ Clause 6(5)

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”.²⁰

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 lies²¹. 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 also 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.”²²

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

²⁰ Hansard, HL Deb., vol. 582 No.56, 3 November 1997, col.1231-2

²¹ Clause 6(3)

²² Hansard, HL Deb., vol 583 No.68, 24 November 1997, col.783

“...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.”²³

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 courts 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 at 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

²³ Ibid., col 759, Lord Williams of Mostyn.

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. As Professor Harry Arthurs observed some years ago, a Bill of Rights' aspirations will be translated into reality only when it begins to command the loyalty of individuals. 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, again by Arthurs, to the fact that its enactment coincided with a rise 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 generally 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 closely 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, the arguably excessive protection given by the law of defamation to political and public figures, 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.²⁴

So the challenge is undoubtedly there, and we should welcome it. In 1990 Professor Ronald Dworkin wrote:

²⁴ Many of these issues are discussed in "The Impact of the Human Rights Bill on English Law", above, fn 14.

“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.”²⁵

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.

²⁵ Dworkin, "A Bill of Rights for Britain", Chatto and Windus, London, 1990.