

Introductory note by Francis Bennion

I was asked to write the following article by the Editor of the *University of New South Wales Law Journal* Thematic Issue for 2003. He explained that the Thematic Issue is devoted to a single topic of legal (and, indeed, general) interest, and that previous Thematic Issues have focused on, for example, *The Centenary of the Australian Constitution*, *Evidence and Procedure* and *Freedom of Property*. He said that the topic for the 2003 Thematic Issue was *The Common Law*, adding: 'The issue will consider the function of the common law today, with articles structured around tensions existing at the three "levels" of the common law:

1. The common law as opposed to equity;
2. The common law as opposed to statute;
3. The common law as opposed to the civil law and other legal systems.'

The Editor went on:

'Given your eminence and expertise in the area, I was hoping you would contribute a piece on human rights protected by courts and human rights protected by statute. After the advent of the European Union, Australia has been described (admittedly only, to my knowledge, by Australian judges) as one of the few remaining "pure common law" jurisdictions. I had in mind an article by you on whether (and how) the European Union and the Human Rights Act 1998 (UK) have brought about a qualitative change in the way human rights are protected in UK law.'

That envisaged an article favouring human rights law, but the result below did not quite turn out that way. Philip Davies MP, who does not favour human rights law, wrote to me in 2006:

'I am delighted to read that you are a lawyer who is not focused on "human rights". If only you were in Parliament! Your article should be compulsory reading for anyone at law school!'

HUMAN RIGHTS: A THREAT TO LAW?

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What is the best sort of law for a common law country? It is often thought nowadays to be one that protects what are known as 'human rights'. This much-used concept may however threaten law itself. It may therefore endanger the rule of law, a principle which protects the supremacy of regular as opposed to arbitrary power. It may also threaten the vital concept of law and order. In the present article I examine these questions with particular reference to the common law, since that is the subject of this Thematic Issue.

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I THE NATURE OF HUMAN RIGHTS

Human rights are now, in the language of legal educators, ‘a pervasive’.¹ The concept has been called ‘the great idea of our time’.² On the other hand a commentator has referred pejoratively to the fatal moment when ‘the human rights juggernaut came roaring down the road’.³ I for one prefer to be governed by the law rather than by a populist juggernaut. If it crashes into the law and damages it, that must be a matter of grave concern.

Human rights as now known are a worthy product of muddled thinking. They postulate that every human being living on the face of the planet is in possession of a comprehensive bundle of supportive personal rights applying directly to themselves. Whether this is true or not partly depends on what is meant by a right here. It must either be a legal right or a moral right, for there is no other kind. The human rights concept, as usually proclaimed, does not make clear which of these two meanings is intended or indeed whether either is intended, the thinking of its promoters perhaps not having got that far. Possibly they do not really view them as rights at all. Edward Rothstein said that here the language of rights is just the

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language of policy: a list of beliefs about an ideal society.⁴ If a legal right is intended there is no more to be said or done – except look for it in the law books. It seems however that what is intended is more likely to be a moral right leading on to a legal right.

The human rights concept goes at least as far back as the natural law theories of the ancient Greeks. Nature to them signified the primordial element from which the universe was constructed. The earliest Greek philosophers explained the fabric of creation as the manifestation of some single principle which they variously asserted to be movement, force, fire, moisture or generation.⁵ Later Greek philosophers introduced a moral element. The Greek Stoics sought to live according to nature. This required them ‘to rise above the disorderly habits and gross indulgences of the vulgar to higher laws of action which nothing but self denial and self-command would enable the aspirant to observe’.⁶ The ancient Romans agreed that *natura vis maxima* (the highest force is that of nature).⁷ Later, Judaism and Christianity substituted for the old Greek and Roman fabric of creation what might be called the Genesis version: ‘In the beginning God created the heaven and the earth’.⁸

Sir William Blackstone said that this meant that man, considered as a *creature* (one who has been created), must necessarily be subject to the laws of God his Creator, ‘for he is entirely a dependent being’.⁹ Blackstone went on to say that, as man depends absolutely upon his Maker for everything, it is necessary that he should at all points conform to his Maker’s will, which is called the law of nature.¹⁰ St Paul had said that this was made necessary because God himself wrote this law in men’s hearts. He even wrote it in the hearts of non-Jews (known as Gentiles), who were outside the Jewish law:

for when the Gentiles, which have not the law, do by nature the things contained in the law, these, having not the law, are a law unto themselves; which show the work of the law written in their hearts.¹¹

But how are people to discover what the law of nature requires? How else but by using their God-given reasoning powers. These will tell them that the foremost requirement is *justice*. St Augustine said: ‘What are states without justice but robber-bands enlarged?’¹² St Thomas Aquinas held that natural law has a twofold application. First that there are principles of justice which are discoverable by human reason without the aid of divine revelation, even

¹ Roger Smith, director of *Justice*: see *Counsel*, July 2003, 11.

² See P R Gandhi, *Blackstone’s Human Rights Documents* (1st ed, 1995) vii.

³ John Humphrys, ‘No Human Right Can Compete with the Right to Cheap Flights’, *Sunday Times* (UK), 13 July 2003, 17.

⁴ Edward Rothstein, ‘Connections; Europe’s Constitution: All Hail the Democracy’, *New York Times* (USA), 5 July 2003, 9.

⁵ Sir Henry Maine, *Ancient Law* (1931) 44.

⁶ *Ibid.*, 45.

⁷ *Latin for Lawyers* (2nd ed, 1937) 195 (Maxim 608).

⁸ *Holy Bible, Old Testament*, Genesis i 1.

⁹ William Blackstone, *Commentaries on the Laws of England*, R M Kerr (ed), (4th ed, 1876) ii 22.

¹⁰ *Ibid.*

¹¹ *Holy Bible, New Testament*, Romans ii 14, 15.

¹² Cited H L A Hart, *The Concept of Law* (1961) 152.

though they have a divine origin; second, that man-made laws which conflict with these principles are invalid. *Lex injusta non est lex* (unjust law is not law).¹³

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In England the 18th century Enlightenment empathised with this. David Hume said that people could not live without associating, and that such association could not work ‘were no regard paid to the laws of equity and justice’.¹⁴ Hart’s comment on this was that it could be disentangled from ‘more disreputable parts’ of the general teleological outlook in which the end or good for mankind appears as a specific way of life about which, in fact, people may profoundly disagree.¹⁵ John Locke advanced ideas of natural rights as part of a revival of belief in a pristine ‘state of nature’. Heralded by Rousseau, these ideas

echoed round the world in the French Revolution ... [they] rendered considerable services to civilization; we must not forget these, in the offence which the myth of a primitive golden age may offer to our historic sense.¹⁶

The golden age is but one of the myths that infest this subject. The truth, long recognised by people not inhibited by religious dogma, is that the only real thing about so-called natural law lies in the nature of human beings with their powers of reasoning and countervailing emotions.

Hart suggested that former notions of natural law concentrated on the need for survival in adverse conditions, and that this was still relevant:

We are committed to it as something presupposed by the terms of the discussion; for our concern is with social arrangements for continued existence, not with those of a suicide club. We wish to know whether, among these social arrangements, there are some which may illuminatingly be ranked as natural laws discoverable by reason, and what their relation is to human law and morality. To raise this or any other question concerning *how* men should live together, we must assume that their aim, generally speaking, is to live. From this point the argument is a simple one. Reflection on some very obvious generalizations – indeed truisms – concerning human nature and the world in which men live, show that as long as these hold good, there are certain rules of conduct which any social organization must contain if it is to be viable. Such rules do in fact constitute a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control. With them are found, both in law and morals, much that is peculiar to a particular society and much that may seem arbitrary or a mere matter of choice. Such universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims, may be considered the *minimum content* of Natural Law, in contrast with the more grandiose and more challengeable constructions which have often been proffered under that name.¹⁷

Hart said that, although people differ from one another in physical strength and intellectual ability,

it is a fact of quite major importance for the understanding of different forms of law and morality that no individual is so much more powerful than others that he is able, without cooperation, to dominate or subdue them for more than a short period.

In this individuals are crucially different from nations. It is one of the facts of international life that there are vast disparities in strength and vulnerability

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between states. In an observation whose importance can scarcely be exaggerated Hart goes on to point out that this inequality between the units of international law has imparted to that system a character very different from municipal law and limited the extent to which it is capable of operating as an organized coercive system.¹⁸

In the passage quoted at length above Hart states that our concern is with social arrangements for continued existence, ‘not with those of a suicide club’. Later he says that our

13 Ibid.

14 Ibid 187.

15 Ibid. The reference to ‘more disreputable parts’ was a forward look to what we now know as human rights.

16 *Encyclopædia Britannica*, (11th ed, 1911) vol XXVI, 745.

17 Hart, above n 12, 188–9 (emphasis in original).

18 Ibid 190–1.

view of law and morality is conditioned by the fact that ‘men are not devils dominated by a wish to exterminate each other’. He continues:

But if men are not devils, neither are they angels; and the fact that they are a mean between these two extremes is something which makes a system of mutual forbearances both necessary and possible. With angels, never tempted to harm others, requiring forbearances would not be necessary. With devils prepared to destroy, reckless of the cost to themselves, they would be impossible.¹⁹

Hart, writing in the mid-20th century, did not foresee the worldwide rise of Islamist suicide bombers – even though they had been foreshadowed by Japanese kamikaze bombers in World War II. Nor did he notice that, out of the long-derided idea of natural law, there was emerging the powerful concept or juggernaut of human rights – which is only another term for natural rights. If there is a system of natural law it must provide for natural rights – as well, of course, as natural duties.²⁰ But is there in reality such a system?

A moral right is conferred or recognised by a system of ethics. Such systems currently prevailing across the planet are either religious or secular, and are wide in their variety. So an identical bundle of moral rights cannot be possessed by all. If you want to know whether a particular moral right applies to you, look in the book that sets out the system of ethics to which you have chosen to subscribe. Clearly this has nothing to do with universal, indistinguishable human rights, though many formulations currently accepted, such as the *Universal Declaration of Human Rights* (*UDHR*),²¹ pretend otherwise. That document states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.²²

That is presented as a pronouncement of fact: ‘Everyone is entitled ...’ It could be honestly promulgated only by a body empowered to confer such entitlements, which the United Nations is not. The *UDHR* does not represent the truth; and indeed is a lie. It has no binding force, and in fact confers no rights on anyone. Many formulations widely thought to confer human rights on individuals are

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instead directed to *cutting down* the powers of rulers, whether monarchs,²³ federal authorities²⁴ or other constitutional entities. The *UDHR* does not even perform this limited function.

The *UDHR* was produced in the aftermath of World War II. The similar declaration produced after the end of what was then known as the Great War, or War To End All Wars, was more honest – and also more realistic. It remarked that to those colonies and territories which, as a consequence of the late war, had ceased to be under the sovereignty of the states which formerly governed them, but were inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that their wellbeing and development ‘form a sacred trust of civilisation’.²⁵ The best method of giving practical effect to this principle was stated to be that

the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League [of Nations].²⁶

19 Ibid 191–2.

20 See John Finnis, *Natural Law and Natural Rights* (1979); Richard Tuck, *Natural Rights Theories: Their Origin and Development* (1981).

21 Adopted and proclaimed by United Nations General Assembly resolution 217 A (III) of 10 December 1948.

22 *Universal Declaration of Human Rights* art 2.

23 For example, *Magna Carta* 1225 (Eng) 9 Hen 3, c 30 or the *Bill of Rights* 1689.

24 For example, the *Bill of Rights, Amendments 1–10 of the Constitution of the United States of America*.

25 *Covenant of the League of Nations* (1919), art 22.1.

26 Ibid art 22.2. I have personal experience that this system was both useful and realistic for I served in Palestine when that territory was under a League of Nations mandate.

Regardless of its truth, such language is now regarded as old-fashioned if not racist, and accordingly dismissed.

The supposed universal bundle of personal 'human rights' does not in fact exist at any level, whether one assumes they are moral rights or legal rights. The content of any such hypothetical bundle is a collection of propositions dreamt up and subscribed to by a particular group of people of our era. What those who constructed that bundle, as comprised in documents like the *UDHR* or the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) ('*ECHR*')²⁷ which followed it, really meant to say was: We clever Western people of this group have the presumption to think that the laws governing every human being on the face of our planet should in all cases accord them the rights we here choose to specify. It is a staggering claim, not fulfilled. End of story.

But it is not the end of the story because this notion of universal human rights has legs. On those muscular legs it has trotted around all over the place, and deluded many people. It has done a great deal of harm, while purporting to do a great deal of good. That is not an uncommon outcome when earnest people get to work on the natural aspirations of human beings. As I have said, in its present form it is a Western concept. Above all it is an Anglo-Saxon concept in the sense that it is the people whom the French nowadays dismiss as Anglo-Saxons who fathered it. Well I am an Anglo-Saxon myself, so why should I complain about that? I do it because I am not so deluded as to imagine that what I and my fellows think right or wrong all the world must think right or wrong. I and my Western group think it morally wrong that a woman taken in adultery should be stoned to

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death judicially. Other groups (say in Iran) think the contrary. I and my Western group think it morally wrong that the law should permit a person to be held in slavery. Other groups (say in Ethiopia or Somaliland) think the contrary. I and my Western group think it morally wrong that a young woman should be subjected to ritual genital mutilation. Other groups (say in parts of West Africa) think the contrary. I and my Western group think it morally wrong that the law should allow polygamy. Other groups (say those of Islamic faith) think the contrary. I and my Western group think it morally wrong that the law should ban women teachers from teaching girls in their homes. Other groups (say the Orakzai in Pakistan) think the contrary.²⁸ And so on.²⁹ Moral tenets are of all varieties.

The conclusion from this is that it is a piece of impudence for any group of people to lay down so-called human rights propositions to which all people on the planet are required or expected to subscribe. Would this apply if Australia elected to adopt a Bill of Rights? It could be argued that Australia is a mighty continent, the world's biggest island, and its people can surely ordain what is to be done in that vast territory. Yes of course, one is bound to agree. Yet are we not forgetting that 'White Australia' is a thing of the past, and reviled at that? Australia is now proudly multicultural, and what does that mean? Obviously it means that there are many different cultures in Australia and that these would put forward different, sometimes conflicting, principles that they reasonably feel should have a place. I have not room to pursue that aspect further, even were I qualified to do so.³⁰

²⁷ Opened for signature on 4 November 1950, 213 UNTS 221 (entered into force on 3 September 1953).

²⁸ See *The Times* (UK), 16 July 2003.

²⁹ In 2003 a proposed UN resolution recognising homosexual human rights was blocked by a homophobic alliance of Muslim countries (Pakistan, Egypt, Libya, Saudi Arabia and Malaysia): Ellen Ramsey, 'Bigots Mobilise Over Same-Sex Unions in Canada' (2003) 6 *The Freethinker* 11. Similar homophobia was displayed by the Pope in 'Considerations Regarding Proposals to Give Recognition to Unions Between Homosexual Persons' 31 July 2003 <http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html> at 24 November 2003.

³⁰ On opposition to an Australian Bill of Rights see, eg, Ken Parish, *On rights and duties: Australians already have them both protected*, (2001) Northern Territory University Law School <<http://www.ntu.edu.au/lba/law.html>> at 26 November 2003. See also Daryl Williams, 'Recognising Universal Rights in Australia' (2001) 24(3) *University of New South Wales Law Journal* 771; George Williams, 'Human Rights and the Second Century of the *Australian Constitution*' (2001) 24(3) *University of New South Wales Law Journal* 782; George Winterton, 'An Australian Rights Council' (2001) 24(3) *University of New South Wales Law Journal* 792.

Before leaving it for a moment I will say one more thing about the human rights concept. Those who dislike the concept as currently understood are not of course arguing that there should be unbridled slavery, or military torture, or cruel punishments by courts, or other such horrors. Very far from it. The sincere people who, in the shadow of World War II and its horrors, such as the German anti-Jewish Holocaust and the Japanese death camps, put together the articles of the *UDHR* or the *ECHR* had in mind preventing a repetition of those horrors in future wars. They did not foresee that this noble and important aim would be trivialised and degraded by people who have since abused it in ways discussed later in this article.³¹ It now seems that the original aims should be tackled in a different and more rational way. That leads me to the common law.

31 See below 431–2, 435–7.

II THE COMMON LAW

What is the common law? The American academic Bryan A Garner identifies seven different meanings of the expression.³² Another American scholar, Melvin Aron Eisenberg, defines it as that part of the law that is within the province of the courts to establish.³³ In another passage³⁴ he says that it consists of the rules that would be generated at the present moment by application of the institutional principles of adjudication. This is saying that for Americans at least the common law is simply judge-made law.³⁵ Is that correct?³⁶ If it is correct for America is it correct for other common law countries, such as Australia?³⁷ It is certainly not correct for England, as I shall now explain.

In England the common law is a concept going back a thousand years or more. What it means today obviously has a lot to do with what it meant at the start. The story seems to have begun with the Norman conquest of England in 1066. This impinged on Anglo-Saxon laws based on local custom or folk-right³⁸ and decrees of petty kings such as Ine or Ina of Wessex or Offa of Mercia. It brought into England the Norman feudal system based on central kingship, which treated, or sought to treat, the whole conquered territory of England in much the same way. The new king's new law was called the 'common' law because it applied the same rules to every citizen. It was common to all, not varying according to locality or rank. It was not basically new law, because that is not how things work with human settlements – especially when communications are poor. Even though it gradually became known that a new king of England had arrived from Normandy, the doings in Moreton-in-Marsh or Manchester proceeded for years on end in much the same old Anglo-Saxon way, following on from the Roman way and mediated by the Danish incursion. But eventually they changed, often under the compulsion of military force.

In time the central rule of William the Conqueror began to be felt throughout the realm of what we now know as England.³⁹ The king's justices in eyre travelled on circuit applying the king's central law. The king himself made constant horse-powered progresses throughout the land, finding out at first hand what was going on among his new subjects. He needed men he could trust as close advisers (they

were always men in those days). Over time these became known as the king's court or Curia Regis. Out of this single body there grew over centuries what later became regarded as the threefold power: executive, legislative and judicial. We need always to remember that it all began as one unplanned body surrounding the king and drawing on his regal powers. We may equate that regal body with our modern state. The executive, legislature and judiciary are but arms or branches of the state, whether the state is unitary or federal. They are and must be inter-connected, not operating in isolation. Each of them must always be aware of what the other two are doing. They must march forward together, supporting each other. Otherwise the state will be divided and weakened – and may even collapse into anarchy.

What has this to do with today's common law? It gets rather technical, but one mustn't mind that. In order to work, law often does have to be technical. It really does have to use

32 Bryan A Garner, *A Dictionary of Modern Legal Usage* (2nd ed, 1995) 177–8.

33 Melvin Aron Eisenberg, *The Nature of the Common Law* (1988) 1.

34 *Ibid* 154.

35 See further F A R Bennion, *Understanding Common Law Legislation* (2001) ch 17.

36 Reinsch says the common law was regarded by the early New England colonists as 'not at all binding *per se*, but in as far as expressive of the law of God to be used for purposes of illustration and guidance': Paul Samuel Reinsch, *English Common Law in the Early American Colonies* (1899) 16. See also below nn 41, 54.

37 It seems that each common law country should be regarded as having its own version of the common law. Thus the Commonwealth Attorney General said: 'The common law of Australia is constantly evolving and has proved an important element in Australia's system of rights protection': Daryl Williams, 'Recognising Universal Rights in Australia' (2001) 24(3) *University of New South Wales Law Journal* 771, 773.

38 Folk-right was the '*jus commune*, or common law, mentioned in the laws of Edward the Elder, declaring the same equal right, law or justice to be due to persons of all degrees': Jowitt, *The Dictionary of English Law* (1st ed, 1959) 815.

39 The compiling of the Domesday Book within the first 20 years of his reign gives evidence of that.

terms of art, and have skilled professionals to apply them. Law is, and always has been, an expertise – which is why we need trained lawyers. Lawyers should use plain English, especially when communicating with non-lawyers. When communicating with each other they must in addition employ the appropriate technical terms when necessary. Without these their communication will not be exact and accurate, and may therefore fail in its purpose. By that society would be the loser.⁴⁰

Let us go back to the beginnings. The Curia Regis was there to help the king govern his realm of England. The idea then was that the entire country, with all its inhabitants and property, was but a fiefdom or possession of this new Norman king. That did not mean it was his plaything, to sell off as he pleased. He could not do with it whatever he fancied. Even then there were many constraining forces. At that time England comprised two or three million people, most of whom lived in the place where their forbears had always lived. They observed long-standing customs applying in that place. Drastic change was not on offer. Neither the native Anglo-Saxons and Danes nor the parvenu Normans would have expected drastic change – nor indeed any change of substance in what was a very basic system of law. That was not how things were in that static era.

It is very different today, when we live in times where constant change is constantly expected. That difference is the key to what I will now try to explain about the nature and extent of the common law as it applies to us now. The common law is an important legal concept, of great value to any community where it applies. But the community needs to understand it. The community, failing to understand it, may not value this concept, or indeed may not value law at all. That might perhaps be because they have not been taught its importance, and so do not appreciate what is at stake. Lawyers should help in this; it is their duty. As well as teaching their own students, they are responsible for teaching the populace the social importance of law. If the people labour under the impression, as many do,

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that lawyers are chiefly concerned with lining their own pockets whose fault is that, and what harm will it do over time?⁴¹

The idea behind the common law is interesting and important. The concept goes back to rough English life in medieval times. The thought then, as always in primitive conditions, was that might is right – or has to be treated as right because there is no realistic alternative. The peasants looked for protection against brigands and outlaws, and found it in the neighbouring lord.⁴² In time the king asserted overall power, and then the people were given royal law. The hitherto powerful barons found themselves bound to obey the royal law, and the kingdom of England was born.

This king's law was administered in the king's name. If, rarely, there was a relevant royal charter or statute applicable the itinerant judges applied it. Otherwise they naturally looked to such previous judgments of their judicial brethren as the advocates in their courts brought to their attention, by reference to the Year Books or other reports of decided cases. Hence arose the idea that the common law was a conglomerate of binding rules and principles that had existed since time immemorial.⁴³ These might even derive from *statutes* enacted before that time:

And therefore it is, that those Statutes or Acts of Parliament that were made before the Beginning of the Reign of King Richard I and have not since been repealed or altered, either by contrary Usage, or by subsequent Acts of Parliament, are now accounted Part of the Lex non Scripta, being as it were incorporated thereinto, and become a Part of the Common Law; and in truth, such Statutes are not now pleadable as Acts of Parliament, (because what is before Time of Memory is supposed without a Beginning, or at least such a Beginning as the Law takes Notice of) but they obtain their Strength by meer immemorial Usage or Custom.

40 In 2003 I asked the Master of the Rolls, Lord Phillips of Worth Matravers, whether he thought the law was still a learned profession. After some hesitation he said he did.

41 In the early American colonies prejudice against lawyers was so strong that in some states they were not allowed to practise: see Reinsch, above n 36, 21.

42 Even today areas within lawless countries such as Afghanistan or Liberia are ruled in a similar way by what are called warlords.

43 This was arbitrarily fixed by the *Statute of Westminster* I 1275 c 8 as the date of the accession of Richard I (6 July 1189).

And doubtless, many of those things that now obtain as Common Law, had their Original by Parliamentary Acts or Constitutions, made in Writing by the King, Lords and Commons; though those Acts are now either not extant, or if extant, were made before Time of Memory; and the Evidence of the Truth hereof will easily appear, for that in many of these old Acts of Parliament that were made before Time of Memory, and are yet extant, we may find many of those Laws enacted which now obtain merely as Common Law, or the General Custom of the Realm ...⁴⁴

The basic object, as the common law developed, was not to innovate but to follow in the old tried paths. *Via trita via tuta* (the old way is the safe way). If possible no new untried way was to be trod, because it might prove an unsafe way. The duty of a judge, when laying down the basis for his judgment, was merely to *find and declare* the relevant legal principle, then apply it. It was lying there

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below in the substratum, or above in the sky,⁴⁵ and the judge trying a case just fished it up or pulled it down. He would never do such a bold thing as enunciate a new law. That would be presumptuous. It was for the king to do or (later) the king in Parliament.

Over centuries, this theory placed great burdens on the judges. In practice it seemed that they could decide on whatever principle they fancied, though rights of appeal meant senior judges might reverse them. Nevertheless great power was placed in the hands of the judiciary as a whole. To their credit English judges did not exploit that power, at least in early times (they are exploiting it now). Humbly they regarded themselves as entrusted with a judicial authority they must exercise circumspectly and with due regard to precedent. They must decide any case before them by applying legal principles former judges had laid down as comprised in the common law. Where this did not suffice in answering the question before them they must extrapolate with great care, and to the smallest extent necessary. This practice survived to modern times. Glanville Williams put it this way:

Judges do not generally admit that they make law; they cherish the 'fairy tale' (as Lord Reid once termed it) that the common law is a miraculous something existing from eternity and not made by anyone.⁴⁶

In England this salutary principle finally gave way in the late 20th century. The spirit of constant change was afoot in politics, and communicated itself to the judiciary. If politicians were no longer respecting the past, why should judges? Here the innovating English judges overlooked a vital difference. The politicians were elected; they were not.

So what nowadays do we mean by the common law? I suggest that in any other country it broadly means what it means in England, save that its later authoritative development must be traced through judicial decisions in the country in question, though those of judges in other common law jurisdictions will be granted persuasive force.⁴⁷ Originally enshrined in the memory of judges and legal practitioners, the common law is now located in the pages of law reports and textbooks. Nevertheless it is still called unwritten law or *lex non scripta*, whereas legislation (with which common law is nowadays contrasted) is called written law or *lex scripta*.⁴⁸

I said above that in any other country the common law broadly means what it means in England. This now needs a qualification additional to that stated above. The flavour is given by a quotation from Jack Beatson in relation to the common law of contract:

44 Matthew Hale, *The History of the Common Law of England* (1713) III. *Magna Carta* (1215) 'is based substantially upon the Saxon common law, which flourished in [England] until the Norman invasion consolidated the system of feudality': Jowitt, above n 38, 1123.

45 Under this view the common law was said to exist *in nubibus* (in the clouds).

46 Glanville Williams, *Learning the Law* (11th ed, 1982) 92.

47 Lord Bingham of Cornhill appears to suggest that the differences may be greater. He says that the civil law as found in (say) France, Germany, Italy, Spain or the Netherlands 'is no more uniform than the common law as found in (say) England, the United States, Canada and Australia': 'A New Common Law for Europe' in Basil S Markesinis (ed), *The Coming Together of the Common Law and the Civil Law (The Clifford Chance Memorial Lectures)* (2000) 27, 27. The US Supreme Court now adopts legal policy prevailing in other jurisdictions: see eg *Lawrence v Texas*, 539 US 3 (2003) (legal policy laid down by European Court of Human Rights).

48 The distinction is adopted from the Romans, who borrowed it from the Greeks: Coke, *Institutes* I, 1, t 2, ss 3, 9, 10.

The long term result is likely to be that the influence of the civil law concepts (good faith, significant imbalance) are likely to extend beyond the consumer transactions covered by [the relevant EU Directive and Regulations] and to percolate throughout our law of contract.⁴⁹

So in England the pure spring of the common law is now admixed with civil law influences, though as we shall see it is not wholly a one-way process. There are also human rights influences ...

III HUMAN RIGHTS AND THE COMMON LAW

In developed form, what are today thought of as human rights largely derive from rules of the common law. These in turn, as I have said, are often traceable to natural law concepts or principles of the Christian religion.⁵⁰ In an early 19th century English case, where a slave owner's rights under American law were not upheld, Best J said that 'proceedings in our courts are founded upon the law of England, and that law is again founded upon the law of nature and the revealed law of God'.⁵¹ He said that English judges, 'standing upon the high ground of natural right' had declared that slavery was inconsistent with the genius of the English constitution.⁵² At around the same time Lord Ellenborough CJ ruled that the common law required relief to be afforded to 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 seaside town of Eastbourne. He said 'the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving'.⁵³ These examples could be multiplied.⁵⁴

Before the human rights idea became established in its present form, the concepts it embodies were attributed specifically to the branch of the common law known as *legal policy*.⁵⁵ In the latest edition of my textbook *Statutory Interpretation* I devote 82 pages to interpretative principles derived from this.⁵⁶

The treatment begins with the following propositions, which form s 263 of the book, entitled 'Nature of Legal Policy':

A principle of statutory interpretation embodies the policy of the law, which is in turn based on public policy. So far as concerns statutory interpretation by the courts, the content of public policy (and therefore of legal policy) is what the court thinks and says it is. However in this the court may be guided by Acts of Parliament, even though not directly applicable in the instant case, as indicating Parliament's view of the content of relevant public policy. As a matter of juridical coherence, the two views ought not to be allowed by the court to get out of line, which means that ultimately Parliament's view of policy, where it has been declared in legislation, must be allowed to prevail.

49 Jack Beatson, 'Has the Common Law a Future?' (1997) 56 *Cambridge Law Journal* 291.

50 This means that by way of the ECHR common law principles have been adopted in Europe: see Lord Bingham of Cornhill, above n 47, 35. Lord Bingham also there discusses the development of unified common law and European law rules in contract law, tort law and public law.

51 *Forbes v Cochrane* (1824) 2 B & C 448, 471; 107 ER 450, 459.

52 *Ibid* 470; 458.

53 *Rex v The Inhabitants of Eastbourne* (1803) 4 East 107; 102 ER 769.

54 Discussing the British colonies in America towards the end of the seventeenth century, Paul Reinsch said that arbitrary government in Massachusetts was what introduced a state of knowledge of the common law

against [the governor's] despotic rule the colonists now began to assert rights protected by English law, such as the right of Habeas Corpus. Thus when we hereafter find expressions of admiration for or adherence to the common law, such as are very common in the succeeding century and especially at the beginning of the Revolutionary War, they refer rather to *the general principles of personal liberty* than to the vast body of rules regulating the rights of contract and property and the ordinary proceedings in court.'

See Reinsch, above n 36, 23–4 (emphasis added).

55 See Bennion, above n 35, ch 10.

56 See F A R Bennion, *Statutory Interpretation* (4th ed, 2002), div 4.

The court presumes, unless the contrary intention appears, that the legislator intended to conform to this legal policy. A principle of statutory interpretation can therefore be described as a principle of legal policy formulated as a guide to legislative intention.⁵⁷

Parliament is taken to intend the content of its Acts to conform to the broad principles of legal policy prevailing in the territory to which the Act extends, and the same applies to delegated legislation.⁵⁸ So in a 1940 case Viscount Simon construed a statutory transfer of 'property' as not including employers' rights under contracts of service because it is the policy of the common law not to permit assignment of such rights without the employee's consent. Treating 'property' as a broad term the application of which was on the facts of the instant case ambiguous, he concluded that Parliament intended this term to bear a meaning which did not 'disregard fundamental principles'.⁵⁹

Within the field of public law the judges have in recent times greatly developed the common law remedies formerly provided by the prerogative writs of mandamus, certiorari, prohibition and quo warranto.⁶⁰ On judicial review of a matter concerned with public law, the High Court in England may make a mandatory order (formerly an order for mandamus), a quashing order (formerly an order of certiorari), or a prohibiting order (formerly an order for prohibition); or may, in lieu of such an order, make a declaration or grant an injunction. The remedy will be granted if the decision in question is vitiated by illegality, irrationality or procedural impropriety.⁶¹

With the advent of human rights declarations the British courts began to treat them as in some instances modifying or at least influencing the content of legal policy. On the question whether a local valuation court was an 'inferior court' within the meaning of provisions dealing with contempt of court in Rules of the Supreme Court Ord 52 r 1(2), Lord Scarman said:

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If the issue should ultimately be, as in this case I think it is, a question of legal policy, we must have regard to the country's international obligation to observe the [ECHR] as interpreted by the European Court of Human Rights.⁶²

This marked a highly significant departure. There is nothing new in the idea that, in construing an enactment giving effect to a treaty provision, the court should endeavour to further the aims of the treaty so far as it legitimately can.⁶³ The ECHR is however a special sort of treaty in that it records international agreement on widespread policy or value judgments which hitherto it had been for the courts to make in discharge of their function of declaring common law rules. One such rule was described by Glanville Williams as follows:

The ancient rule was that penal statutes are to be construed strictly – that is, in favour of the defendant and against the prosecution – on the theory that the legislature must make its intention clear if it proposes to have people punished.⁶⁴

It adds nothing to its effectiveness to say that this salutary rule is to be numbered among human rights. In fact it is not strictly a rule but a *principle* derived from legal policy. In my book I expressed it as follows:

It is a principle of legal policy that a person should not be penalised except under clear law (in this Code called the principle against doubtful penalisation). The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which penalises a person where the legislator's intention to do so is doubtful, or penalises him or her in a way which was not made clear.⁶⁵

57 The two propositions are followed by a 13 page commentary explaining legal policy.

58 The term 'principle' here is contrasted with the other three criteria applicable in statutory interpretation, namely rules, presumptions and linguistic canons: see Bennion, above n 56, s 180.

59 *Nokes v Doncaster Amalgamated Collieries* [1940] AC 1014, 1022.

60 The jurisdiction dates from about 1662: *Linnett v Coles* [1987] QB 555, 561.

61 For details of judicial review as currently applying in England see Bennion, above n 56, s 24.

62 *A-G v BBC* [1981] AC 303, 354. This was well before the passing of the *Human Rights Act 1998* (UK).

63 See *Samick Lines Co v Antonis P Lemos (Owners), The Antonis P Lemos* [1985] AC 711, 731.

64 Glanville Williams, 'Statute Interpretation, Prostitution and the Rule of Law' in C F H Tapper (ed), *Crime, Proof and Punishment, Essays in memory of Sir Rupert Cross* (1981), 71.

65 Bennion, above n 56, 705.

Under another name, this is the old principle that a person is not to be put in peril upon an ambiguity.⁶⁶ It has also been judicially stated that ‘Plain words are necessary to establish an intention to interfere with ... common-law rights.’⁶⁷ In this context the term ‘penal’ has been treated by the courts as a term of art, and yet given differing meanings.⁶⁸ This is misconceived, because any law that inflicts hardship or deprivation of any kind is in essence penal. Some types of damage may be regarded in modern terms as contravening human rights, but that as I have said adds nothing of any substance. By reference to the principle against doubtful penalisation (whether so-called or not) English courts have over years constructed a complex edifice of what we now call human rights.⁶⁹

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Judges sometimes rule that criteria favouring the public good outweigh the principle against doubtful penalisation, particularly where the conduct in question is regarded as *malum in se* (wicked in itself). Glanville Williams said:

[P]aradoxically, the courts seem frequently to feel a greater urge to extend the criminal law than the civil, apparently on the ground that a comprehensive criminal law is the greater public need. In defence of the judges, it may be said not only that we have an inadequate legislature but that people who chance their arms must take the consequences.⁷⁰

This recognition that a personal right may be outweighed by the public interest is recognised by human rights declarations. Thus art 5 of the *ECHR* says that everyone has the right to liberty and security of person, and that no one shall be deprived of his liberty except in specified cases and in accordance with a procedure prescribed by law. Then follow six detailed paragraphs spelling out the exceptions. Although these paragraphs are complex, they are not complex enough to cover the multifarious circumstances that on a case-by-case basis the courts have grappled with in declaring the common law.⁷¹ Nor are they kept up to date as Parliament changes the law and circumstances alter. This is one way in which the concept of static human rights is a threat to law.

Under some dispensations human rights formulations may negate or override law. Which brings me to the *Human Rights Act 1998* (UK) (*‘HRA’*).

IV THE HUMAN RIGHTS ACT 1998 (UK)

Despairingly, Tom Campbell has described the *HRA*, which ‘incorporates’ the *ECHR* into the law of the United Kingdom, as a useful development in the process of seeing human rights as a vital part of a culture of controversy in which neither parliaments, courts nor the people are to be trusted, and in which the core of politics must be oriented to reaching a series of legally enforceable but temporary agreements as to the rights which best protect and enhance the equal interests of all citizens.⁷²

One might add ‘and as to the machinery for enforcing those rights’. With that addition the Act may be a helpful (if vague) way of embodying the little that may be found of use in the human rights concept.

It may be gathered from what I have said so far that I was against incorporation of the *ECHR* into British law. I have been against it for many years. Back in 1978 I said that we could avoid the serious objections levelled against incorporation and still gain the advantages

66 *Tuck & Sons v Priester* (1887) 19 QBD 629, 638.

67 *Deeble v Robinson* [1954] 1 QB 77.

68 Craies says that the term is ambiguous and discusses some of its possible meanings: *Statute Law* (7th ed, 1971) 525 ff.

69 This is discussed extensively in Bennion, above n 56. See s 272 (interference with human life or health), s 273 (restraint of the person), s 274 (interference with family rights), s 275 (interference with religious freedom), s 276 (interference with free assembly and association), s 277 (interference with free speech), s 278 (interference with economic interests), s 279 (interference with status or reputation) s 280 (interference with privacy), s 281 (interference with rights of legal process) and s 282 (other interference with rights as a citizen).

70 Williams, above n 64, 80.

71 See Bennion, above n 56, s 273.

72 Tom Campbell, ‘Human Rights: A Culture of Controversy’ in Luke Clements and James Young (eds), *Human Rights: Changing the Culture* (1999), 26. The article exposes the flaws in the human rights concept while appearing ruefully to accept that we are lumbered with it.

for civil liberty afforded by it if we first identified the areas where our domestic law fell short of the requirements of the *ECHR*, and then remedied the omissions by detailed legislation dovetailing into our existing law.⁷³

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In 2000 I said that the *HRA* would prove a cause for concern in ‘bringing confusion to our laws with little corresponding benefit – except to legal practitioners in the field’.⁷⁴ Legal practitioners have indeed exploited the *HRA*. They can plead that it is their duty to take every available point on behalf of their clients, and also that the *HRA* leaves the law in a very uncertain state. Nevertheless the way in which, since its commencement on 2 October 2000, the *HRA* has, with the approval of the judiciary, been invoked in almost every case brought to court has added immeasurably to legal costs and delays. That is another way in which the human rights concept has proved a threat to law.

My own view is that the rights which best protect and enhance the equal interests of all citizens are ordinary legal rights, as developed, and being capable of being further developed, by the common law aided by Parliament. Tom Campbell suggests that the *HRA* gives increased impetus to develop the common law without the sense of illegitimacy that at present accompanies significant changes unapproved by Parliament.⁷⁵ This harks back to the remark by Glanville Williams cited above.⁷⁶ As indicated there, I do not think this illegitimacy is still a serious problem, even though in the past I have myself expressed concern about it.⁷⁷ The question, apart altogether from the subject of human rights, is precisely where one draws the line between legitimate judicial development of the common law and judicial usurping of legislative power. We need to trust the judges here. However I believe that the advent of the *ECHR* began a popularising and distorting process that has gradually infected the judges’ power to develop the common law on sound juridical lines.

This distorting process became more severe with the passing of the *HRA*.⁷⁸ It is described in its long title as an Act to give further effect to rights and freedoms guaranteed under the *ECHR*.⁷⁹ It does not render invalid legislation of the UK Parliament which is inconsistent with the *ECHR*. Instead, it gives the courts power to make a declaration of incompatibility.⁸⁰ Where this has been done it provides a ‘fast-track’ procedure whereby a government minister may amend the offending

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enactment to bring it into line.⁸¹ It is expected that ministers will use this power in practically every case, just as they have for years been expected to comply in every case with a ruling of the European Court of Human Rights at Strasbourg even though not formally binding on them.⁸²

73 F A R Bennion *The Times* (UK), 5 April 1978.

74 F A R Bennion, *The Times* (UK), 29 August 2000. Internet searches show that more than one law school has set an essay on this sentence.

75 Campbell, above n 72, 24.

76 Above n 46.

77 See F A R Bennion, ‘A Naked Usurpation?’ (1999) 149 *New Law Journal* 421; F A R Bennion, ‘Statute Law: Judges as Legislators’ (2000) 9 *Judicial Studies Board Journal*. See also Bennion, above n 56, s 26.

78 A number of judges and other commentators have long resisted the passing of such an Act: see, eg, Lord Browne-Wilkinson, ‘The Infiltration of a Bill of Rights’ [1992] *Public Law* 397; Sir John Laws, ‘Is the High Court the Guardian of Fundamental Constitutional Rights?’ [1993] *Public Law* 59; M Hunt, *Using Human Rights Law in English Courts* (1997). Lord Irvine of Lairg dismisses such voices on the dubious ground that, until the *HRA*, judges declined to go beyond the *Wednesbury* standard of review, adding ‘Incorporation will mark the inception of a more rigorous system of rights protection, given that the emphasis will then shift, in human rights cases, from rationality to proportionality’: Lord Irvine of Lairg, ‘The Influence of Europe on Public Law in the United Kingdom’ in Markesinis, above n 47, 11, 14. Back in 1978 Lord Scarman, a Lord of Appeal, called for a British Bill of Rights with the character of common law rather than statute law, so that judges could develop it case by case: see *The Times* (UK), 26 January 1978.

79 The text of the Act is given in Bennion, above n 56, 1203–34. It does not in fact quite do what its long title proclaims: see F A R Bennion, ‘Which Sort of Human Rights Act?’ (1998) 148 *New Law Journal* 488.

80 *HRA* s 4.

81 *HRA* s 10.

82 Possible rare exceptions to this practice are noted by Luke Clements in ‘The Human Rights Act – A New Equity or a New Opiate: Reinventing Justice or Repackaging State Control?’ in Luke Clements and James Young (eds), *Human Rights: Changing the Culture* (1999) 72, 82.

I will describe in detail only two of the explicit distorting factors introduced by the *HRA*. The first arises from the obscure drafting of s 6, which says that it is unlawful for a 'public authority' to act in a way incompatible with the *ECHR*. The wide term 'public authority' is defined by s 6 in a most unsatisfactory fashion. It suggests, without stating definitely one way or the other, that under the *HRA* an applicant will probably not be able, as can be done at Strasbourg, to proceed against the United Kingdom on the ground that there is a lacuna in some aspect of British law. Many articles of the *ECHR* require a state's law to include certain provisions. British courts should be able to make a declaration (akin to a declaration of incompatibility under s 4) where a required law is absent. Because the term 'public authority' in s 6 is essentially undefined it would be possible to argue that it includes the United Kingdom, or at least the Crown, and proceed in that way where British law is deficient. One cannot sue either House of Parliament under the *HRA* but the court might possibly hold that one can sue the Crown and at least obtain a declaration. Then, in line with existing practice regarding Strasbourg rulings, the government would be expected to promote the necessary legislative change.

The other distorting factor, s 3(1) of the *HRA*, is more serious. It reads: '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'.⁸³ I have criticised this provision at length in various publications.⁸⁴ It is offensive to the very idea of law because it instructs the courts to falsify the linguistic meaning of other Acts of Parliament, which hitherto has depended on legislative intention at the time of enactment.⁸⁵ In regard to existing Acts, it is an objectionable example of *ex post facto* legislation. In regard to subsequent Acts it is either an illicit attempt to bind future Parliaments or a statement of the obvious, since it repeats what is already an interpretative presumption.⁸⁶ Strangely, it does not apply in terms to rules of the common law and other *lex non scripta*. Perhaps, for reasons I have given, such an express provision was considered unnecessary to achieve the object of distorting the development of the common law for the furtherance of so-called human rights. I shall not repeat here what I have said at length elsewhere about s 3(1), except that I cannot resist reproducing the following:

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The fad has developed⁸⁷ of saying that, when the *Human Rights Act 1998* s 3(1) is applied to an enactment, the enactment is 'read down' in arriving at its legal meaning. This solecism is not helpful, especially in view of the fact that s 3(1) applies only where the reading it imposes is 'possible'. As Lord Steyn makes clear in a lengthy obiter dictum on the effect of s 3(1)⁸⁸ 'reading down' is nothing but a euphemism for strained construction.⁸⁹ It would surely be better for the courts to avoid this euphemism and employ the more accurate and illuminating term 'strained construction'.⁹⁰

In fact I have argued that the compatible construction rule imposed by s 3(1) goes further than strained construction and requires the use of the European procedure which is called Developmental construction 'because in advancing the "spirit" it is always ready to depart from the text'.⁹¹

83 Broadly 'the Convention rights' equate to the rights conferred by the *ECHR*, but there are some exclusions: see *HRA* s 1.

84 See F A R Bennion, 'What Interpretation is "Possible" Under Section 3(1) of the *Human Rights Act 1998*?' [2000] *Public Law* 77; Bennion, above n 35, ch 15; Bennion, above n 56, s 421.

85 See Bennion, above n 56, pt VIII.

86 Ibid s 221.

87 See eg *R v A* [2001] 3 All ER 1, 8.

88 See *ibid*, 17–18.

89 Lord Clyde confirms this, *ibid* 45.

90 For the nature of strained construction see Bennion, above n 56, ss 157–62.

91 See below 439–40.

V PROPOSED NEW EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS

On top of the distortions introduced by the *ECHR* and the *HRA*, the common law as applying in the United Kingdom now faces a new hazard. Noting that the European Union was coming to a turning point in its existence with the proposed addition of ten further countries, the European Council which met at Laeken, Belgium, on 14 and 15 December 2001 convened the European Convention on the future of Europe. This drew up a draft constitution for Europe which achieved a broad consensus at the plenary session on 13 June 2003. As I write on 13 October 2003, the draft is being considered at an Intergovernmental Conference. It is not expected that this will make any substantial changes.

The draft Constitution states that the Union 'is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for [sic] human rights'.⁹² It adds that the Union shall recognise the rights, freedoms and principles stated in the *Charter of Fundamental Rights* ('*CFR*') set out in Part II of the draft, that it shall seek accession to the *ECHR*, and that fundamental rights as guaranteed by the *ECHR* 'and as they result from the constitutional traditions common to the Member States' shall constitute general principles of the Union's Law.⁹³ The *CFR* contains a set of rights which is very similar, but not identical, to those set out in the *ECHR*. As one member of the Convention has said, this dual system of human rights will create duplication.⁹⁴ The only reason given for this duplication is that the rights should be made 'more visible in a charter'.⁹⁵

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Conflict is bound to arise between the *ECHR* and *CFR* because they will be administered by different courts: the *ECHR* by the European Court of Human Rights in Strasbourg and the *CFR* by the Court of Justice of the European Communities at Luxembourg. The results of this conflict will be disastrous for the rule of law. Rules carefully and precisely drafted by the Parliamentary Counsel Office in Whitehall (which drafts all British Government bills) will be 'read down' in unpredictable and contrary ways. Appeal courts will reverse lower courts, and the law will be in disarray. The idea that law should be ascertainable and certain will suffer grave damage.

VI THE HUMAN RIGHTS JUGGERNAUT

The British have now reached a position where, while in practically every area of life the government has an 'incessant urge to intervene',⁹⁶ almost anything that might be done officially towards a person is claimed to be a breach of their human rights.⁹⁷ We are faced with what has been called 'the ever enlarging scope of human rights'.⁹⁸ Thus is a powerful concept diluted by over-familiarity and misuse. At the same time, because it has been developed piecemeal there are gaps in human rights protection – for example in the area of human sexuality.⁹⁹ Here are some examples of misuse of the concept of human rights.

The journalist Jonathan Miller is running a campaign for the abolition of the British Broadcasting Corporation licence fee lawfully payable by television viewers. Summoned for

92 Draft Treaty establishing a Constitution for Europe CONV 850/03, Brussels 18 July 2003, art 2.

93 Ibid art 7.

94 David Heathcote-Amory, *The European Constitution and What It Means for Britain* (2003) 19.

95 Preamble to *CFR*.

96 'Grey Abandon', *Daily Telegraph* (UK), 3 July 2003 (editorial).

97 A former UK Chancellor of the Exchequer, Lord Lamont, said that the *ECHR* 'has gone way beyond the intentions of its original authors and has been exploited for purposes for which it was never intended': *Daily Telegraph* (UK), 2 August 2000.

98 Campbell, above n 72, 21.

99 See F A R Bennion, *Sexual Ethics and Criminal Law* (2003) 16:

These Government proposals [in the Sexual Offences Bill 2003] raise the question what lawful sexual outlets is it supposed that pubescents in the age range eleven to fifteen should have? If these borderline creatures are, as must be admitted, 'highly sexual beings', they obviously require suitable opportunities to fulfil their sexuality. This could be called one of their human rights, if that topic had been fully developed in the region of sexuality.

the non-payment of this fee (which is a criminal offence) he intends to plead that the lawfulness of the fee has expired thanks to the *HRA*.¹⁰⁰

Oliver Wright, health correspondent of *The Times*, complains that the problem of treating AIDS in Africa is being complicated by the fact that Western aid agencies are distorting the issue:

Rather than treating HIV as a public health emergency to be talked about openly, they treat it as a human rights issue, as if it were the terrible flipside of a lifestyle choice. Astonishingly, though up to 30 per cent of the population of sub-Saharan states are infected, it is still not politically correct to talk about AIDS patients. Instead they are called PLWA – people living with AIDS.¹⁰¹

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Here are four more examples, taken at random from British newspapers published on a single day in July 2003.

- (a) John Leslie, a TV 'star' was sent for trial on two charges of indecent assault. His lawyers indicated that they are planning 'a ground-breaking attempt under the Human Rights Act' to have the charges quashed on the ground that Leslie cannot get a fair trial because of prejudicial publicity.¹⁰²
- (b) A British Medical Association speaker said that because alcohol is a poison, advertising it should be banned. He admitted that some would say this infringed people's basic human rights.¹⁰³
- (c) Brendan Fearon, a convicted burglar, sued the householder who shot him for damages. His claim was struck out because his lawyers missed a deadline. On appeal the claim was restored because District Judge Brian Oliver ruled that 'Fearon's human rights might be infringed if his case was dismissed on such grounds'.¹⁰⁴
- (d) A gay man suggested that for a newspaper to attack an equalising law 'demeans any intelligent debate about fundamental human rights'.¹⁰⁵

These examples suggest that a difference is developing between basic or fundamental human rights and others considered more superficial. Such sophistry is an indication of the harm being done by the degeneration of what has now become scarcely more than a vogue term or buzzword. This diminishes genuine wrongs. British people are beginning to realise that to make an allegation that a person's human rights have been abused may nowadays mean no more than that he is not permitted to read advertisements issued by brewers or that a newspaper has criticised something he thinks important. So they shrug away a general allegation of human rights abuse because it is probably something trivial. But what if in a particular case it turns out that a person has been gravely abused by holding them in slave conditions or subjecting them to people-trafficking or torture? We need to be able to tell the difference. The nature of the offence should be specified, not concealed under the blanket description 'human rights'.

With this degeneration of meaning, the concept of human rights becomes an easy weapon to brandish whenever you have a grievance. It is one other tool in the armoury, and is often used as such. The same applies to related concepts such as sex discrimination. A woman seldom brings a claim today for wrongful dismissal to an employment tribunal without routinely including an allegation of sex discrimination. But at least such a claim is specific, and by its terminology indicates its nature. If a person has been subjected to torture we should say that that is what has been done to him. We should not say his human rights have been abused; for that adds nothing to the extreme gravity of the charge. In a 2003 case an Oxford Professor, Andrew Wilkie, rejected the application of an Israeli Jew, Amit Dushvani, to conduct research in his laboratory in the following words, which became notorious:

100 Jonathan Miller, 'I May Be Standing in the Dock, but It Is the BBC That is on Trial', *Daily Telegraph* (UK) 16 July 2003.

101 Oliver Wright, 'Africa is Dying of This Western Madness', *The Times* (UK), 7 July 2003, 16.

102 *Daily Mail* (UK), 3 July 2003.

103 'Ban on Alcohol Adverts Backed', *The Times* (UK), 3 July 2003, 9.

104 *Daily Mail* (UK), 3 July 2003.

105 Marc Russell, 'Equalising Law', *Daily Telegraph* (UK), 3 July 2003.

I have a huge problem with the way the Israelis take the moral high ground from their appalling treatment in the Holocaust, and then inflict gross human rights abuses on the Palestinians because they wish to live in their own country. I am sure you are perfectly nice at a personal level, but no way would I take on somebody who has served in the Israeli army.¹⁰⁶

This passage has exactly the same sense if one omits from it the words ‘human rights’. That has become a mere pejorative phrase, which adds nothing of significance. When a term becomes all-enveloping, it also becomes meaningless. The concept it denotes is devalued, and finally becomes just a noise.

VII THE THREAT TO LAW

At the beginning of this article I identified the human rights juggernaut as a threat to law, and in particular to the twin concepts known as ‘the rule of law’ and ‘law and order’.

Respect for the rule of law founds jurisdiction.¹⁰⁷ There have long been complaints about its fragility. As long ago as 1969 the American Stephen M Nagler said, ‘Many jurists now complain that there has been a breakdown in respect for “the *rule of law*”’.¹⁰⁸ But the concept continues to be regarded as vital to democracy. In 2003 James Wolfensohn, President of the World Bank, said ‘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’.¹⁰⁹ Also in 2003 the English Lord Chief Justice Lord Woolf said:

[I]t 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.¹¹⁰

One could not disagree with that, but later in his speech Lord Woolf took what it is submitted was a wrong turning for an English judge. He said:

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*.¹¹¹

This is to licence disobedience to a law on the dangerous ground that it does not accord with the said values. It gives the concept of the rule of law an unhistorical meaning which pays too much regard to the human rights juggernaut, of which pressure groups (whether lawful or not) form part of the driving force. The danger of this was expressed by Simon Brown LJ:

106 Amit Dushvani, ‘I Didn’t Expect to be Rejected by Oxford Because I Was an Israeli’, *Sunday Times* (UK), 6 July 2003, 8. Professor Wilkie later withdrew these remarks.

107 In *R v Inland Revenue Commissioners, ex parte Kingston-Smith* [1996] STC 1210, the English High Court proceeded of its own motion, ‘acting under its duty to uphold the rule of law’.

108 Stephen M Nagler, ‘The Language of the Law’ in Charles Weingartner (ed), *Language of America* (1969) 218, 227–8.

109 *All Africa Conference on Law, Justice and Development* in Abuja, Nigeria, February 2003.

110 Lord Woolf, ‘The Impact of Human Rights’ (speech delivered at the Oxford Lyceum, Oxford, UK, 6 March 2003).

111 *Ibid.*

One thread runs consistently throughout all the case law: the recognition that public authorities must beware of surrendering to the dictates of unlawful pressure groups. The implications of such surrender for the rule of law can hardly be exaggerated.¹¹²

The concept of the rule of law grew up and was nurtured in a common law context. It is complied with where common law principles are observed. However it is not truly dependent on the nature of the law in question, since it contrasts a condition where there is law, and it is generally obeyed, with one where there is no law, or the law is not generally obeyed. In the second case anarchy prevails, and that is what the rule of law is to be contrasted with. One sees that the Chinese authorities were not far out, though obviously the quality and nature of the law in question are of supreme importance.

The concept known as 'law and order' is the essence of secure living. As was said by Daniele Manin, Venetian patriot in the year of revolutions 1848: 'Do not forget that there can be no true liberty, and that liberty cannot last, where there is no order'.¹¹³ Ferdinand Mount, writing on the need for strong countries to protect weak ones, said in 2003:

When law and order have broken down into looting, casual violence and the beginnings of civil war, only timely, robust intervention by superior force can avert slaughter on a terrible scale.¹¹⁴

Such interventions are now often challenged by human rights proponents.

There are other threats to law presented by human rights formulations. For example it becomes difficult to rely on a codification of unwritten law if its precise phrases are always likely to be overthrown by an appeal to the vague provisions of an instrument such as the *ECHR*.¹¹⁵ A *Times* leader said in 2003:

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It is ... unacceptable for this country to create laws and then be incapable of enforcing them. Such behaviour rapidly undermines respect for the law and the ability to make regulations stick.¹¹⁶

Enforcement of a law may become difficult when it has to pass inspection by a higher court perhaps operating in a different jurisdiction. The British have suffered from this for over thirty years, following entry to the European Economic Community.¹¹⁷ The Court of Justice of the Economic Communities¹¹⁸ (CJEC) operates a highly expansive system of statutory interpretation which often results in striking departures from the literal meaning:

The CJEC method may be called Developmental construction because in advancing the 'spirit' it is always ready to depart from the text, if the court deems this necessary. It uses the text merely as a starting point, with the aim of developing the particular piece of Community law in the way the nations of the EU are presumed to intend within the context of the grand design. ... As Lisbeth Campbell has pointed out, by a clever analogy with computer science terminology the product of the former method, when expressed (as it often is, but by no means invariably) in broad general principles, has been called *fuzzy law*. By contrast the elaborate, detailed product of common law drafting can be called *fussy law*.¹¹⁹

By the double impact of the EU and the *HRA*, a precise law made by the UK Parliament (usually a fussy law in Campbell terminology) is now subject to oversight in its application by courts applying principles expressed as fuzzy law. These are foreign courts except insofar as under the *HRA* British courts have jurisdiction, but applying the foreign formulations of the *ECHR* mediated by the foreign jurisprudence laid down by the European Court of Human Rights at Strasbourg. Not only is that a foreign court as far as the UK is concerned (except for its solitary British member) but the appointments to it have been subjected to severe criticism. In a paper titled 'Judicial Independence: Law and Practice of Appointments to the European

112 *R v Coventry City Council, ex parte Phoenix Aviation* [1995] 3 All ER 37, 62 (non-performance of duty to operate air and sea ports because of unlawful action by animal rights protesters).

113 Cited John Julius Norwich, *Paradise of Cities* (2003) 132.

114 Ferdinand Mount, 'Troops Might be the Best Aid for Africa', *Sunday Times* (UK), 13 July 2003, 16.

115 For the nature of codification see Bennion, above n 56, s 212.

116 'Home Truths: Illegal Immigrants are as Vulnerable as they are Numerous', *The Times* (UK), 25 July 2003, 21.

117 Now the European Union.

118 This is still the court's official name, despite the European Communities' change of name to the European Union.

119 Bennion, above n 35, 155 (footnotes omitted). Developmental construction is to be used by British courts where EU directives, etc, have to be construed and also under the compatible construction rule laid down by s 3(1) of the *HRA* (see Bennion, above n 35, 164).

Court of Human Rights'¹²⁰ a group of eminent jurists chaired by Professor Dr Jutta Limbach, former president of the Federal Constitutional Court of Germany,¹²¹ asserts that the credibility and authority of the Court 'risk being undermined by the ad hoc and often politicised processes currently adopted in the appointment of its judges' and that this is 'anomalous and unacceptable'.¹²² The group considers that appointments to the Court fail to meet

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the international human rights standards the Court is charged with implementing, including those relating to the independence and impartiality of judges.¹²³ Flawed appointment procedures mean that judges are likely to lack the skills and abilities required to discharge their duties, which inevitably undermines the standing of the Court.¹²⁴ There is much more in this vein, for it is a lengthy and detailed report. For the British, who pride themselves on the high standard and scrupulous impartiality of their judges, it is a bitter pill that the decisions of those judges should be subjected to the arbitration of such an inadequate body as the European Court of Human Rights. It shows conclusively how the human rights concept can work to the prejudice of effective law.

VIII CONCLUSION

It may be thought that the concept of human rights is so deeply entrenched worldwide that it cannot be eradicated. Possibly this is so, but it does not mean the message of this article must be delivered in vain. The article began by asking the question: What is the best sort of law for a common law country? In my submission the best sort of law for a common law country is, unsurprisingly, the common law – as moderated by the decisions of a democratic Parliament. Coke said that the common law is nothing but reason

which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of every man's natural reason, for *nemo nascitur artifex* (no one is born an expert).¹²⁵

Perhaps, bearing this in mind, we can slow down the human rights juggernaut and hold it in check. It should never be regarded as a substitute for formal law, but must always work through that in a controlled fashion. Then it can serve the law, and perhaps enhance rather than impede law's social purpose.

Francis Bennion, 'Human Rights: A Threat to Law?' (2003) 26 *University of New South Wales Law Journal* 418.

120 Published by Interights, the International Centre for the Legal Protection of Human Rights, May 2003. See <<http://www.interights.org/news/English%20Report.pdf>> at 24 November 2003.

121 The other members were Professor Dr Pedro Cruz Villalón (former president of the Constitutional Court of Spain), Roger Errera (former member of the Conseil d'État in France), Lord Lester of Herne Hill QC (president of Interights), Professor Dr Tamara Morshchakova (former vice-president of the Constitutional High Court of the Russian Federation), Lord Justice Sedley (of the UK Court of Appeal) and Professor Dr Andrzej Zoll (former president of the Constitutional High Court of Poland).

122 Above n 120, 4.

123 Ibid.

124 Ibid.

125 Sir Edward Coke, *Commentary upon Littleton* 97b.