

Human Rights Law and Practice

Third Edition

General Editors

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For the ICCL and its
members

With admiration and
best wishes for the
future of liberty and
democracy.

Anthony Lester

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"TAKING HUMAN RIGHTS SERIOUSLY AS A LAWYER"
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It is a special pleasure and particular privilege to have been invited by the Irish Council of Civil Liberties to address you at this annual gathering of lawyers. I salute the work of your Council and hope that it has the material support of the Irish legal profession that it deserves.

We have enjoyed our holiday home in West Cork for some 37 years, but I am and will always be only a "blow-in". I am also a junior member of the Irish Bar, though I am not so foolhardy as to seek to argue in your courts. Some years ago, I mentioned to a former Attorney-General of the Republic that I am a Junior in Dublin and a Queen's Counsel in Belfast. Sir Peter Sutherland replied: "now you know how valuable it is to be a junior member of the Irish Bar!"

We meet at a time of bleak austerity for both our countries, when the effective protection of human rights and freedoms may come to be eclipsed by the need to recover from the wanton profligacy and worse that has created such misery on both sides of the Irish Sea. That would be a tragic error. Our islands and their peoples are interdependent, not sufficient unto themselves; we welcome the wide recognition of our common interests and the need for transnational solutions to our problems, rejecting narrow appeals to national sovereignty. The need for transnational perspectives

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and solutions applies as much to the effective protection of human rights as to the restoration of sound economic and financial governance.

I am aware of the risk involved in accepting your kind invitation that I may inadvertently cause offence. I once acted for my country against yours before the European Court of Human Rights in the Northern Ireland inter-state case. When that unhappy case was over, my publicised role meant that I was not popular among some in West Cork, and a staunch republican came to my good neighbour asking questions about me. "Robert", he said, I've come to check on Lester. He seems all right, but what's he doing defending British torture in the north." I had of course done no such thing, but happily my neighbour's reply saved us from having our status withdrawn as guests of the nation. "The thing about liars", he explained, "the thing about liars (for that is how they refer to lawyers in West Cork) is that they'll do anything for the money." And so we were spared by the wit of our good neighbour, the republican not knowing how little one earns when acting for the government.

I shall speak this evening of my own system, hoping that something of what I say has relevance to yours.

When I recall what life was like in Britain in the early 60s, I am amazed at the changes we have made in the UK the past half century. There have been major reforms in legal practice since I came to the English Bar. The Scottish Lord Chancellor in the Thatcher government, Lord Mackay of Clashfern, swept away English restrictive practices which were in the interests of the legal profession, but not in the public interest: the two-counsel rule, the two-thirds rule, our monopoly of legal advocacy in the senior courts, and so on. Equal opportunity and treatment without discrimination is required by our Equality Act 2010, and sex and race discrimination, so prevalent when I joined the profession, has been eliminated in well-managed sets of chambers, thanks to leadership from Bench and Bar.

Modern successful chambers like mine have a large and well trained staff and efficient systems of management and information technology, though we are not run by accountants and do not live under the curse of billable hours. So one of my colleagues regularly goes to Afghanistan to train local judges in the rule of law and respect for human rights, and many of us work pro bono or under conditional fee agreements in human rights and other public interest cases, and work abroad to promote human rights.

We have introduced generous pupillage awards, in addition to the scholarships provided by the Inns of Court, for pupils. At present we give four a year, and in 2012 each will be for £52,500, and the first 6 months of the payment is tax free. That is not typical of many chambers and the severe cuts in legal aid are driving many to leave the Bar. But it is a welcome change from the time when there were no chambers scholarships and we paid a hundred guineas to become poorly trained pupils and devilled and did outside jobs for years until we could make a decent living at the Bar.

Judges are trained in case management; and the time allowed for oral argument is rightly controlled, as is the length of written submissions. To give you the current flavour of judicial control, I quote from a recent Practice Note [2010] 1 WLR 2873, reporting the President of the Court of Appeal, Sir Anthony May as follows:

"The appellant's skeleton argument for this appeal runs to 86 paragraphs occupying 22 closely typed pages. There was little of real use to the court before paragraph 70, although it is fair to say that the preceding section on the law, although again of excessive length for a skeleton, was structurally reasonably sound. The respondent's skeleton was of similarly over-fleshed proportions, although it is not fair to be over-critical when this skeleton was responding to one which was itself grossly excessive. The appellant then thought fit to serve a further skeleton in reply which ran to a further 74 paragraphs occupying a further 27 closely typed pages. Not content with this, the parties ... produced for the court 5 well filled lever arch files of documents, very few of which were referred to; and 6 files of largely unread authorities – all this in an appeal whose hearing time Waller LJ fixed as 3 hours (later

enlarged to one day) and where one of the first instance judge's reasons for striking out the claim was that it was not worth the candle."

We take great trouble in chambers like mine to ensure as fair a system as we can devise in selecting pupils and tenants, and make sure that they are trained with pupil supervisors in different areas of practice. And we train ourselves and our clerks to avoid discrimination. Our practice director, who is a former practising solicitor, and our senior clerk supervise the operation, under the overall direction of the (elected) co-heads of chambers, and the other barristers responsible are also elected by the rest of us.

There have also been profound changes in the nature of the law and in its practice. When I came to the Bar, our courts tended to interpret legislation according to its letter rather than its object and purpose, without taking account of the context of the law. It was considered an interference with judicial independence for judges to be trained, or for their sentences to be reviewed by a Sentencing Council. There was no strict separation of powers between the Lord Chancellor and other Law Lords, or between them and Parliament.

We lacked the benefit and burdens of a supreme written constitution. For us, it was the supremacy of Parliament which came first, and Parliament was normally under the control of the Executive. Fundamental rights, like the right to free speech or to equality of treatment, were not guaranteed as positive rights but were residual freedoms in the breathing spaces left by common law and statute law. Absurdly, the Law Lords could not over-rule previous bad decisions, and the courts refused to use legislative history as an extrinsic aid to interpret opaque legislation.

The substance of our law mainly involved matters concerning crime, property, town and country planning, commercial and matrimonial disputes, taxation. At Trinity College Cambridge, a Victorian don explained to me that the teaching of law should be confined to the common law.

There was no developed system of public law, and the legal system was ethically aimless; we had no constitutional code protecting basic rights and freedoms to limit the powers of the Executive, or to guide lawmakers and administrators, or the courts. There was no modern procedure for judicial review, and we had to use the old prerogative writs, described in Latin. Our civil procedures were archaic and encouraged prolixity and wastefully excessive costs. We were permitted to double-book in court, settling cases and bobbing in and out of hearings. Those were the days – bad days for the public and the public interest.

Although the UK was the first country to ratify the European Human Rights Convention, and British lawyers played a major role in its drafting, the UK had not accepted the jurisdiction of the European Commission or Court of Human Rights; and the legal positivism of Bentham, AV Dicey and Sir Ivor Jennings rejected the constitutional Bills of Rights developed during the American, French and of course Irish revolutions as nonsense on stilts.

Harold Wilson's government accepted the right of individual petition, as it was called, in January 1966 without any public or parliamentary consultation, believing that it would not make much practical difference. I was fortunate in arguing the first British case before the Strasbourg Commission for a Pakistani mill worker based in Bradford, Mohammed Alam who was seeking to be joined by his son, and to have a proper right of appeal against the Home Office's refusal of entry.

In 1968, in a Fabian Society lecture on "Democracy and Individual Rights", I called for the introduction of legislation to make the Convention rights part of our legal system. Most people thought I was a naïve radical utopian. And it took thirty years of persistent campaigning in the teeth of opposition from Ministers and civil servants.

When I worked as special adviser to Roy Jenkins at the Home Office, in 1974-76, the most senior civil servants attempted to prevent publication of a Green Paper on incorporation of the Convention. Between 1975 and 1977 I was a Special Adviser to the Northern Ireland Standing Advisory Commission on Human Rights which was deciding whether to recommend the incorporation of the Convention in the UK or via a Bill of Rights for Northern Ireland. When it became clear to the Northern Ireland Office that the Commission was likely to recommend incorporation, I was summarily removed from my post, only to be reinstated at the Commission's insistence to complete our work. The report was published in November 1977, with three Commissioners peremptorily removed by the NIO, but the report was never debated, and an unsuccessful attempt was made to persuade a Lords Select Committee to reject incorporation.

Meanwhile, in the 70s, 80s and 90s, in the absence of effective domestic remedies, I used the Convention again and again in British cases before the European Commission and Court, and in our own courts. I was accused by Enoch Powell of treason in suing the Queen outside her Realm! I argued cases in Strasbourg challenging decisions of the Law Lords on freedom of expression and the disgraceful Commonwealth Immigrants Act 1968 which excluded British citizens of East African Asian descent from entering and living in their only country of citizenship, free of immigration control. Their treatment was held by the European Commission of Human Rights to have been racist and inherently degrading. It was our frequent use of the Convention and the way we argued cases in Strasbourg that brought the Convention system alive.

I also sought to rely upon Convention rights in our own courts, even though they had not been incorporated into our law, and succeeded in using the Convention right to free expression to prevent government bodies from using libel law to vindicate their so-called governing reputations, but failed in the *Brind* case to persuade the Law Lords to use

Convention rights to limit administrative discretion where public powers were conferred using general words.

In the mid 90s, John Smith, the leader of the Labour Party, was persuaded to support incorporation, and after his death Tony Blair decided, against his worst instincts, to do so. And so the Human Rights Act was at last enacted in 1998, coming into force ten years ago.

During the two year gap between enactment and coming into force, every judge and every magistrate and tribunal chair took part in a training programme run by the Judicial Studies Boards across the UK, so that the judiciary and the legal profession were much better prepared to use Convention law than they were when we became members of the Common Market in 1972. And thanks to the enlightened leadership of the late Lord Bingham and other jurists, our courts and tribunals have developed an impressive jurisprudence in the past decade.

The Human Rights Act requires public authorities to act in ways compatible with the Convention rights. It requires our courts, where possible, to read and give effect to legislation in accordance with the Convention rights. And, unlike your European Convention on Human Rights Act – which provides for the weakest form of incorporation and does not permit your courts to develop unwritten law to comply with the Convention – the Human Rights Act also requires our courts and tribunals to develop the common law in accordance with the Convention rights.

Because the Human Rights Act requires our courts to have regard to Strasbourg jurisprudence – without being slavishly bound by it – and to interpret and apply statute and common law in ways compatible with the Convention rights, our courts and the legal profession – academic as well as practising – have become cosmopolitan and thoroughly European, and their commitment to the effective protection of human rights has been

remarkable. At a time when we face a serious and continuing threat of atrocious terrorist murders, our courts have upheld the need to respect the human rights of alleged terrorists, not to be held arbitrarily without a fair trial, not to be ill-treated, and not to have the poisoned fruits from torture abroad used as admissible evidence.

And because our courts pay such attention to Strasbourg jurisprudence, their judgments carry great weight in Strasbourg.

During the Thatcher and Major administrations, there was little constitutional renewal, but when New Labour won power in 1997, they and the Liberal Democrats worked together to make radical and far reaching changes to our system of government, and I have been privileged to play a part in designing and securing these reforms: the Human Rights Act; the devolution legislation; the Freedom of Information Act; the creation of a Supreme Court of the United Kingdom housed away from Parliament; a Judicial Appointments Commission so that appointments are made on merit free from political bias or interference; a single Equality Act and Equality and Human Rights Commission; and a Joint Parliamentary Committee on Human Rights on which I serve to scrutinise proposed legislation for its compatibility with human rights, and the Government's compliance with judgments of the European Court of Human Rights in British cases.

Our continuing cultural, political and legal revolution could not have happened without the leadership and support of NGOs like yours: in no particular order, Amnesty International, Interights, Human Rights Watch, Liberty, Justice, the Human Rights Lawyers Association, the Howard League, the Prison Reform Trust, English PEN, Index on Censorship, Article 19, the Campaign for Freedom of Expression, Sense about Science, the Medical Foundation for Victims of Torture, the Joint Council for the Welfare of Immigrants, the Runnymede Trust, the Southall Black Sisters, the Fawcett Society, the International Bar Association Human Rights

Institute, law centres, trade unions, the Northern Irish, Scottish and Welsh NGOs, and many more. They are partners with the Joint Committee on Human Rights and other Parliamentary committees, and the Equality and Human Rights Commission, in their work, in calling government to account and promoting human rights and freedoms.

Backbenchers like me are able to use their position as members of the House of Lords to act as a catalyst for reform. We have much greater powers than Irish Senators even though we have no democratic mandate. In my case I have been able to do so with the Human Rights Act, the Equality Act, the Civil Partnership Act, the Forced Marriage (Civil Protection) Act, and the Constitutional Reform Act. But my Cohabitation Bill was not supported by the Labour Government, and in that area we have much to learn from you.

The Westminster Parliament and the Executive are much better informed about the human rights implications of proposed legislation because of the work of our Parliamentary Committee, and the duty placed on Ministers to be satisfied that the Bills they introduce are Convention compatible.

Members of the Joint Committee on Human Rights came to Dublin some years ago to discuss our work with the Minister of Justice and Equality, Michael McDowell, and with members of the Dàil from all parties, but at the time there was no interest in creating a similar specialist Parliamentary Committee in Ireland, and the Minister even suggested that it would be unconstitutional to do so since it would usurp the Attorney-General's role.

Like you we have abolished the common law offences of defamatory libel, seditious libel and obscene libel, but unlike you we have also abolished blasphemous libel (except in Northern Ireland), and have not created a new offence, as does section 36 of your Defamation Act 2009, of publishing or utterance of blasphemous matter, defined as "matter that is grossly abusive or insulting in relation to matters held sacred by *any* religion" which intentionally causes outrage among a substantial number of the adherents

of that religion. Section 36 was introduced to avoid a constitutional referendum, but I doubt it would survive a legal challenge.

I hope and believe that the Defamation Bill now being prepared by the Coalition Government, building on my own Private Member's Bill, will be much more comprehensive than yours in rebalancing the right to free expression and the protection of a good reputation, and in encouraging the settlement of disputes without recourse to costly litigation.

Your Constitution gives stronger protection to reputation than to freedom of expression, as the majority decision of your Supreme Court in *Ardagh v Maguire* [2002] IESC 21 vividly illustrates in requiring only judges to conduct tribunal of inquiry, in place of committees of the Oireachtas, where someone's reputation is at stake. I know of no other common law country whose legislature is so fettered; and I persuaded the High Court of Hong Kong to follow Chief Justice Keane's dissenting judgment in *Maguire*.

There is much that needs to be done to strengthen the protection of human rights in both our countries; and it is especially difficult to do so during a period of financial austerity and very harsh reductions in legal aid and advice to the poor and the not so poor.

The Coalition Government's programme includes "measures to reverse the substantial erosion of civil liberties and roll back state intrusion"; and setting up a Commission "to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, [and] ensures that these rights continue to be enshrined in British law".

The parties to the Good Friday Agreement in 1998 affirmed their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. The British Government's undertaking to complete the incorporation into Northern Ireland law of the Convention has been fulfilled, as has the undertaking to create equality

obligations on public authorities. There has been the promised consultation and advice by the Northern Ireland Human Rights Commission on whether there should also be a Bill of Rights for Northern Ireland containing additional rights reflecting the particular circumstances of Northern Ireland. But the issues remain politically controversial as between Republicans and Unionists in the North; and are complicated by the prospect of a possible British Bill of Rights.

The Irish Government also pledged itself in the Good Friday Agreement to "take steps to further strengthen the protection of human rights in its jurisdiction"; and "to bring forward measures to strengthen and underpin the constitutional protection of human rights" to "ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland." But a fair reading of your Constitution and European Convention on Human Rights Act compared with our Human Rights Act and Northern Ireland Act does not seem to me to ensure an equivalent level of protection. The *Irish Independent* gave mischievous prominence last Thursday to an ironic letter which began "Dear Your Majesty, On behalf of the people of Ireland I beseech you to take our little country back into the bosom of your realm and provide us with succour in our most dire hour of need." But you may agree that it is the words of Finton O'Toole that should resonate at this terrible time for the Irish people. He wrote in Saturday's *Irish Times*: "our political culture and institutions are still ours to reshape, and the urgent need to reshape them is blindingly clear. Our values and our goals as a society are still ours to decide. The huge vacuum where a public morality ought to be can be filled only by ourselves. The citizenship that has been made so much smaller this week can be expanded by reclaiming it. The sovereignty of the Irish people can be restored if we do something we have failed so disastrously to do: use it."

That must be the hope; and, with the necessary political will, I believe that the present crisis may result in much needed reshaping in the Irish and

British isles. The time is surely over-ripe for further constitutional, political and institutional reform in both our countries. We need to work together for the benefit of all our fellow citizens whom we serve as lawyers and the makers of our laws.

You will all know by heart Daniel O'Connell's rousing cry in the long struggle for Irish independence: "Ireland Awake".

"And thus, from across the Irish sea, a cry arises amongst the people of Ireland for land, for freedom, for bread. In gaelic tongue, these people cry, to what avail. Ireland shall rise from the sea, Ireland shall rise from oblivion, Ireland shall master the ways of the world. Hear me, Ireland! Hear me! Ireland. Awake!"

Seamus Heaney may have had Dan O'Connell's call in mind in his first poem in "The Human Chain", "Had I not been awake".

"Had I not been awake, I would have missed it,
A wind that rose and whirled under the roof
Pattered with quick leaves off the sycamore

"And got me up, the whole of me a patter,
Alive and ticking like an electric fence;
Had I not been awake I would have missed it.

"It came and it went so unexpectedly
And almost it seemed dangerously,
Returning like an animal to the house,

"A courier blast that there and then
Lapsed ordinary. But not ever
After. And not now."

We are wide awake and we must not miss the opportunities that knock.