UNITED KINGDOM PRACTICE ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS

by

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In recent months the imposition of a 15 % surcharge upon imports has revived interest in the problem, perennially raised and often by theorists the record of whose own countries might merit examination in the same context, whether the United Kingdom can be relied upon to support the rules of public international law. « The United Kingdom has broken some treaty » it will be said by one commentator, in surprise. « But what » it will be answered by another less favourably inclined « did you expect of l'Albion perfide » !

My object is to examine in this context and that only in short and practical terms one particular convention which is of interest in Europe and of importance to the world. But before doing so, perhaps I may make a brief comment on the recent action of the United Kingdom Government in regard to the surcharge on imports. In so doing, as indeed in the rest of this paper, I speak entirely in a personal capacity with no special knowledge of the motives underlying the Government's action. I certainly would not wish to argue that the measures taken by the United Kingdom Government did not constitute a clear breach of the Stockholm Treaty between the EFTA Powers and also of the General Agreement on Tariffs and Trade. Nor would I contend for one moment that the question whether there was a breach or not is a mere matter of pedantry. I regret to think that there was a breach of my country's strict treaty obligations and I fully understand the feeling to which this has given rise amongst international lawyers, politicians and industrialists on the Continent. How is what occurred to be explained ?

Surprising as it may seem, I believe by sheer inadvertence. The incoming Socialist Government found itself faced by an immediate economic crisis of very grave proportions. Owing to the increasingly adverse balance of payments immediate steps had to be taken. One measure obviously at hand, if treaty obligations were not in question, was a surcharge upon imports. It was immediately adopted without a full appreciation by the new Government of its international implications. To say this is not to justify, but at the most to

excuse it. It certainly does not indicate any general disinterest by the United Kingdom in international law. No country has been more active in promoting the rule of law in international affairs, more loyal in its submission to the jurisdiction of the International Court, more sincere in its support of the League and now of the United Nations. If unfortunately owing to the stress of economic difficulty we have erred in this matter of EFTA and the GATT, it may be expected that the United Kingdom will, as soon as it possibly can, bring itself back into conformity with these particular obligations and be the more jealous in supporting the rule of law in general. Having said that I leave it to turn to a totally different problem, which had its origin very many years ago.

Before the World War the Nazi and Fascist regimes were able to build up their strength at first by an almost imperceptible encroachment upon the liberties of individuals and later by the most odious violations of private rights which they sought to justify in the so-called interest of the State or the community at large. It is not surprising that since the war which we fought in the hope that the individual would once again transcend the State, we in the free democracies of Western Europe should be much pre-occupied now with the legal protection of those rights and liberties, which we are united in regarding as basic to our way of life.

It is, however, not unimportant to observe that those, who are in truth seeking to undermine our democratic institutions in a way which would destroy our basic freedoms, sometimes attempt to divide or distract us by promoting campaigns allegedly in support of civil liberties on the specious pretext that these are not fully recognised in our own countries. It is not only the devil who can quote the Scriptures and those who framed the European Convention on Human Rights knew what they were about when they included Article 17.

But however proud, or however complacent, we may be about the recognition of human rights in our own countries — in Western Europe, no one can doubt that the Convention and the Protocol did make a great step forward in the process of defining and safeguarding the position of the individual as such in international law. Whether its practical achievement in this sense is as a pact between likeminded nations to ensure collective action against totalitarian trends or as a constitutional charter guaranteeing particular rights to particular individuals is perhaps a matter on which opinions may legitimately differ. Certainly no Government which has acceded to the Convention could lightly disregard its terms in its own national arrangements. Nor should any Government fail to call attention to any disregard of the spirit of the Convention which it thought it discerned elsewhere. In recent answers to questions in Parliament about Fisheries protection, the United Kingdom Government expressly said that if they felt strongly enough that any particular case had infringed the Convention on Human Rights, they would take action under the Convention.

This then is certainly the position of the United Kingdom although the status of international treaties as such, whilst by no means unique, differs somewhat from that accorded to them in other countries.

One of what we like to consider the inestimable advantages of the English law and constitution is its unwritten character. As de Tocqueville said of the latter « il n'existe point ». The constitution is in effect composed of an amalgam of customary rules from the common law, of a large number of statutes passed without any special constitutional formality and often not with direct reference to constitutional matters, and finally of a large body of conventions and usages which although without force of law have strong political sanctions behind them. In this system there is no special place for international treaties. The still traditional rule in English law is that the power to make a treaty or having made it to ratify it is vested exclusively in the Crown, independently of Parliamentary approval. But treaties so made do not per se become part of the law of the land for the very reason that it is Parliament and not the Crown alone which can alter that law. Whilst, therefore, the rules of customary international law are deemed to be part of the common law of England, on the hypothesis that they could hardly have become accepted customary rules if the practice of the United Kingdom had not accorded with them, and will be directly applied by the Courts, this is not the case with conventional rules. This does not at all mean that English law recognises two different categories of international obligation of which one is more weighty than another. The obligations arising under a treaty are neither more nor less binding upon the United Kingdom than those arising from customary international law. The distinction lies in the operation and effectiveness of the obligations at the municipal level. The English courts can and will give effect to the customary rules of international law as part of the English common law, and they may also pay regard to treaties as evidence in support of the existence of these rules. A treaty as such has, however, no effect at the municipal level, and if a treaty obligation involves a change in English law it requires to be clothed by Parliamentary authority. In recent years, treaties have fallen increasingly into this category, for example treaties which affect the rights of the private subject, or impose a financial charge or involve cession of territory — to take the most commonly cited instances.

This being the position the United Kingdom Government invariably considers before ratifying, and indeed before entering into any international treaty whether the obligations imposed by it are already satisfied by the law as it exists or whether statutory amendment would be necessary. This consideration was, of course, given to the European Convention on Human Rights and I had, at the time, no hesitation in informing the Parliament of the United Kingdom that our law already accorded all the human rights and liberties which the Convention protected. Experience in the actual operation of the Treaty since then does not lead one to doubt the correctness of that opinion. Indeed I hope

that it is neither arrogant nor complacent, to say that for a long time past the protection given to individual rights and liberties in England although unwritten, has been most jealously protected by Parliament and Judges alike and has never compared unfavourably with that accorded under other, even if more formal and rigid systems of law. I believe it to be true also that like other colonial powers, and in spite of our reservation to the European Convention, we sought to establish standards of human rights and liberties in our colonies far higher than some of them have been able to maintain since gaining independence [1]. The plain legal fact is that for the United Kingdom the European Convention only served to define, sometimes more narrowly, rights which were already fully recognised under English law. This is not at all to say that the Convention was valueless so far as the citizen of the United Kingdom is concerned. It is not inconceivable that some future Government might wish to curtail the freedoms we now enjoy. Thus there have from time to time been suggestions which might interfere with freedom of speech or the Press. The proposals by a section of the Socialist Party to abolish the independent schools on grounds not of economic but which are variously described as social, political or jealously doctrinaire, is another case in point. The Convention would constitute an international obligation inhibiting any such action and this neither more nor less than had the Convention been embodied in a Statute.

The circumstances necessitating statutory embodiment of conventional obligations may perhaps be illustrated by one example. Had — to take an extreme case — English law recognised the institution of slavery, which in fact it never did, both Article 4 of the European Convention and Article 1 of the Protocol would at once have necessitated legislation. Firstly, for the abolition of the institution to comply with Article 4. Secondly, since this measure would have destroyed the private proprietary rights in slaves, which on this fanciful supposition would have existed — legislation providing for compensation would have had to have been enacted to meet the obligation arising from Article 1 of the Protocol, certainly at least where foreign ownership was involved. But to proceed from the institution of slavery to the actual and more troublesome problem of racial discrimination, it is not hard to see how a change in the economic and social circumstances and manners of a country might necessitate legislation to enforce the obligations under Article 14 although at the time the Convention was concluded no such necessity arose. English law in no way permits or recognises racial discrimination and in various spheres, as for instance, licensed inns, public transport and other services, such discrimination would be positively illegal. But English law does recognise, to take one obvious example, freedom of contract. A citizen enjoys the liberty of deciding with whom he will or will

[1] It should be noted that the United Kingdom has found it necessary to derogate from the Convention, pursuant to Article 15, chiefly in respect of the obligations contained in Articles 5 and 6, in regard to various Colonial territories on a number of occasions. (See WEIL : *The European Convention on Human Rights* (1963) at p. 75.)

not contract, to whom he will let a house or apartment — just as whom he will accept as a friend or a guest. The avoidance of racial feeling as a factor influencing discrimination in these matters is a matter more for social conscience and manners than for legal sanction. In the United Kingdom during the period since the ratification of the Convention there has been a very large immigration of coloured people from ex-colonies and elsewhere. Iit cannot be denied thet both races have occasionally had difficulty in adapting themselves to each other and assimilating the immigrants into the whole population. In consequence it may well be thought necessary to pass some statute which will ensure more explicit prohibitions against discrimination and perhaps facilitate the integration of immigrant populations. But whatever legislation may be devised, in the end the matter largely rests on individual action outside the reach of the law. Subject to this point in which there has been a real change of circumstances since the ratification of the Convention, there is in my firm opinion no branch of English law or practice which is not in accord with, if not far in advance of its requirements. This is not to say, of course, that there are not in Britain those who will exercise with the utmost enthusiasm their unquestioned right of decrying the legal and other institutional arrangements under which the liberties of others are protected. As the poet Dryden said :

« More liberty begets desire of more
The hunger still increases with the store. »

It is in the nature of things impossible to define liberty in any abstract sense but in any organised state, whether or not it has a written constitution or any formal declaration of rights, a citizen's personal freedom in fact consists in that residue of activity in which he is able to engage unfettered by legal or conventional regulation. Man's liberty ends, as it ought to end, at that point where it interferes with the liberty of his neighbours. The point was well put by Edmund Burke, a great British statesman and parliamentarian in words which are as true today as when spoken in the eighteenth century. « The only liberty I mean is a liberty connected with order : that not only exists along with order and virtue but which cannot exist at all without them. » In examining the degree of liberty enjoyed by the citizens of a particular country one must therefore examine the legal and other restrictions which exist upon liberty in its absolute sense. Nor is such examination less of the national scene in England than in other countries, although perhaps sometimes we absorb ourselves so much in minutiae that we lose sight of principles. There is of course as in other countries a Council of Civil Liberties. This Council recently published a booklet stressing, for instance, the things which the police must not do in suppressing crime, without saying a word as to the duty of the public to assist the police in its suppression. Much space was devoted to a judicial decision [2] thought to fetter the very remarkable freedoms extended to

[2] *Rookes v. Barnard* (1964) A.C. 1129.

trade unions under English law; not a word as to the position of individuals who may be deprived of their right to a livelihood by the actions of trade unions. Similarly, a Professor at the University of Manchester, has published what is probably the most comprehensive work on freedom, the individual and the law [3]. He seems to consider that the law relating to stage plays, books and other publications imposes too much restriction upon those seeking to advertise their views in ways which some might regard as pornographic, and too little restriction on commercial advertisers seeking to sell their goods. « *Quae in aliis libertas est, in aliis licentia vocatur* ». It is nonetheless a most healthy and necessary thing that in all the free democracies there are those who are vigilant in watching the legal regulations which are calculated to encroach upon absolute liberty or the practices which may restrict its exercise, and of alarming the indolent when these regulations or practices go further than is required for protecting the liberty of others. In most of our countries the activities of the State are extending into wider spheres and increasingly powerful bureaucracies may trespass upon the rights of individuals : the field of legislative activity constantly extends. Different countries may establish different methods for safeguarding individual liberties; it is hoped that in Britain we may soon have a Parliamentary Commissioner acting as an Ombudsman in protecting the rights of private citizens.

Yet it may safely be said that the criticisms which can be made against the British practice in the field of human rights and fundamental freedoms are domestic, relating to matters of national law and practice rather to any breach of the European Convention. Thus, in the field covered by Article 7 of the Convention which prohibits the creation of offences with retroactive effect, there has been some criticism of a recent decision of the English Criminal Courts [4] by which a man who had published a so called « Ladies Directory » containing advertisements for prostitutes and photographs of nudes was held guilty of the common law offence of conspiring to corrupt public morals. This criticism seems to have rested on the ground that such facts had never given rise to such an offence before and that in any event the decision was contrary to a recent statute giving greater freedom in the matter of obscenity. The latter criticism can for our purposes be dismissed, since it concerns a purely English question of law, decided in the same sense by the Court of Trial, the Court of Criminal Appeal, and the highest of all our tribunals, the House of Lords, and has no bearing on the application of Article 7. The only possible relevance of the case to the European Convention is in relation to retroactivity. But the suggestion as to this misconceives the function of the English common law. The English judge faced with a case for the facts of which there is no

[3] STREET, *Freedom, the Individual and the Law* (Pelican, 1963).

[4] *Shaw v. D.P.P.* (1962) A.C. 220.

exact earlier example is not forced to abdicate the responsability for giving a decision. He must draw upon the principles established by the customs and precedents of the common law. And so through the centuries in which the common law has developed, judges have on innumerable occasions protected and promoted the rights of the subject against the inroads of bureaucratic power or, as in this case the denigrations of licentious behaviour. Unless, which is hardly to be thought, the Convention was intended to destroy the Anglo-Saxon system of interpreting the common law to apply to instant cases, Britain will, one hopes, be permitted to remain as Tennyson described « A land... where freedom slowly broadens down, from precedent to precedent ».

More difficult (and perhaps in all countries) is the right to privacy, dealt with in Article 8 of the Convention. Two problems arise here. There is no doubt that in the past certain organs of the press have been guilty of unwarrantable invasions of the privacy to which ordinary citizens, whether in public life or not, are reasonably entitled, and it is no excuse at all to say that the behaviour of some foreign newspapers has been even worse.

The right to privacy protected by Article 8 is, however, to be contrasted with the right to speak contained in Article 10. Although it may be easy enough in a particular case to say that a newspaper has gone too far, it is not easy as a matter of legal definition to draw a line between natural, and up to a point legitimate interest in the lives of public men and women, and an improper violation of their privacy. These again are largely matters of taste and manners, which is no doubt why Article 8 is directed against interference by « public authorities ». In Britain, the Press Council, a voluntary body recently reconstituted under the chairmanship of a retired but very distinguished judge, Lord Devlin, will, it is hoped, be able to exercise an effective control in this sphere. The second problem is of a more concrete kind and does indeed concern a public authority. It is said that the police and security authorities are guilty of grave invasions of privacy by the practice of « telephone tapping » and of intercepting letters in the mail. This is a gross exaggeration of the matter. I have indeed myself always found it difficult to understand why it is permissible for a police officer to conceal himself, let us say, in a wardrobe in order to overhear the conversations between a blackmailer and his victim, but an outrageous invasion of private rights for him to listen in to a conversation on the telephone having the same illegal purpose. However that may be, there is in fact the strictest prohibition against eavesdropping on the telephone except with the express authority of the Secretary of State for the Home Department, given in each particular case. Far less than one hunderd such authorisations are given each year. The practice is similar in regard to any interception of letters in the post. Although practices of this kind are instinctively disliked, Ministers of all parties with actual experience in the matter have found them to be in practice and in the highly exceptional case, absolutely essential for the detection of grave crime. The innocent do not suffer from them.

Neither of these matters, however, can be said to involve any breach of Article 8 of the Convention, the second paragraph of which expressly excludes action in accordance with the law necessary in the interest of security and for the prevention of crime.

It can hardly be doubted that absolute freedom of thought, conscience and religion, the concern of Article 9, exists in Britain. All that is forbidden under the laws relating to these matters, is the expression of opinion in such intemperate and scurrilous terms as to cause grave offence to the thoughts, consciences and religions of others. Serious and thoughtful discussion of views, however distateful to some and even to the majority, is entirely free.

Article 10 deals with the right to express opinions, and so with the freedom of the press. There is no kind of censorship in the United Kingdom, no index of published books; anyone may publish anything provided it is not libellous, obscene, seditious or a breach of somebody else's copy right. These are some of the conditions contemplated by Article 10 (2) of the Convention and whilst the law of libel has been criticised, as constituting in practice an undue limitation on the freedom of the press, it may confidently be asserted that in these matters and having regard to the individual's rights not to be defamed, the law is extremely favourable to freedom of expression.

It is beyond the scope of this paper to examine the law and practice in the United Kingdom under every Article of the Convention. I have mentioned those under which, as it has appeared to me, any possible question might arise and I end this part of my commentary on the matter as I did when I commenced it, by saying that although in conformity with our normal practice the European Convention has not been made part of the statute law of the United Kingdom, it is clear that the law and practice of the country in the matter of human rights in fact goes far beyond anything required by the letter of the Convention.

« But » it may plausibly be said, « that is simply the opinion of one English lawyer : how can it be established as correct since the British are denied the right of individual petition to the European Commission ? »

Article 25 does of course expressly provide for an optional procedure in regard to the right of individual petition. The United Kingdom was amongst the first to accept the principle of compulsory jurisdiction to international tribunals in matters of international law : we were early adherents to the optional clause under the Statute of the International Court as we had been regarding the Permanent Court of International Justice before it. What may arise here, however, is a complaint as to the administration or as to the substance of the national law. It was never the intention of the European Convention that either the Commission or the European Court should act as a supreme court of appeal on the national law of the member countries. Certainly the United Kingdom would be quite unwilling to agree in present circumstances that her own

independent courts, accessible under a system of legal aid to the poorest litigant, should be subject to over-rule by outside tribunals largely guided by the different traditions of the civil law. And indeed the European Commission has made it perfectly clear that it will not act as a court of fourth instance. The question which may properly be considered under the Convention is not whether the national laws have been correctly interpreted by the national courts but whether those laws are in conformity with the requirements of the Convention. This is not a pure matter of international law but, for example, because of the exceptions, involving international politics as well. Both major political parties in Britain have preferred to maintain the traditional practice that international law, involving all sorts of implications and consequences in international politics is a matter between States, not normally to be set in motion by private citizens. In the absence of any supra-national political organisation in Europe to which this country is a party, and in a matter so charged with emotional and political considerations, the United Kingdom would not be prepared to have the sovereignty of its Parliament and the independance of its courts challenged before a politically constituted international body, however eminent, by private individuals with no responsability for the course of international relations. Other States acting with a full sense of responsibility, may of course, make a reference to the Commission under Article 24. It may be true that save in a matter of gravity going beyond an individual case, other nations would find it embarrassing to complain of alleged breaches of the Convention in this way. But such embarrassment need not attend the requests for explanation which the Secretary General is entitled to make under Article 57. It is my view that in my country, having regard to the traditional independence and power of the courts in the United Kingdom, to the jealous interest of all politicians in regard to the matter, and to the vigilance of outside bodies, the rights of individuals arising from the Convention are fully protected under our existing arrangements. But justice must not only be done but it must manifestly appear to be done. There is a body of opinion in Britain which has urged successive British Governments to accept the right of individual petition to the Commission. The present Attorney-General made a powerful and well-argued plea for this course of action in a debate in Parliament when he was an Opposition M.P. His argument was that there is a fundamental inconsistency between the position taken by the United Kingdom, in common with the United States of America and France, at the Nuremberg trials, when the direct application of international law to the individual was a crucial element in the prosecution case, and the British position in regard to the right of individual petition under the European Convention.

It remains to be seen whether the present Government will follow the rather rigid line of their predecessors, or whether, particularly in view of the approaching end of the process of decolonisation, they will feel able to reconsider their position.