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“Rights – Why Bother? A View from Europe”

To deliver a public lecture under the title "Rights - why bother?" in this distinguished university, with its strong traditions in the field of human rights law as well as of European law, could be seen as a provocative act. To do so just weeks after the Lord Chancellor has delivered the inaugural Irvine Human Rights Lecture could even be regarded as verging on judicial lèse-majesté.

Now however seems to me to be a particularly suitable time to reflect on the role of individual rights in our society. The Human Rights Act of 1998 has now been in force throughout the United Kingdom for two years, though the Scots, of course, were a little ahead of the rest of us. The consequences of incorporating the provisions of the European Convention in domestic law are therefore already to be seen.

No less importantly, the Convention on the Future of Europe is currently in the middle of its work to produce a draft constitutional Treaty for the European Union. Among the more prominent of the many issues being discussed is whether, and in what ways, a constitutional treaty for the EU should deal with questions of fundamental rights. Should the draft Treaty incorporate all, or any, of the rights set out in the European Convention on Human Rights, and/or those in the Charter of Fundamental Rights proclaimed at Nice at the end of 2000? Where there are differences in the formulation of these rights, which version should be preferred? What about the additional protocols to the European Convention, not all of which have been ratified by all the contracting states? Should the European Union as such accede to the European Convention, and if so should this be in addition to, or a substitute for, a formal incorporation of the Convention rights in an EU constitutional treaty? Is there a need within the legal order of the European Union for better legal protection of fundamental rights - whatever these may comprise - than the protection that currently exists for "ordinary" rights, and if so what form should this better legal protection take? In short, why is there, just at this time, so much "bother" about rights?

Over the past few years observers might at times be forgiven for believing that we are being submerged in rights. One commentator in 1999 described human rights as the new "global religion". Certainly, the variety of terms used in connection with human rights is as varied as the terminologies and orthodoxies that are associated with religious beliefs. There are "human rights and fundamental freedoms" - to use
the term in the English version of the European Convention on Human Rights. The French text of the Convention manages simply with "droits de l'homme", the very same expression as was used in the declaration adopted by the French National Assembly on 27 August 1789 and accepted in December that same year by the then King Louis XVI.

When just two years later in 1791, Thomas Paine published his famous work "The Rights of Man", a work that was to lead him to be prosecuted for sedition, he translated the expression "droits de l'homme" from the French declaration as "human rights", a usage thought to be one of the first occasions this phrase appeared in the English language. Paine himself generally preferred to use other, more specific expressions such as "natural rights" and "civil rights" to describe, respectively, the rights which he believed all men acquired by virtue of their mere existence, and those which derived from their membership of society.

Then we have "fundamental rights" - to use the term in the Charter of Fundamental Rights proclaimed at Nice. Other constitutional traditions speak of basic rights or constitutionally protected rights.

Common to all these adjectives is, however, the idea that some rights are qualitatively different from, and more important than, other legal rights. In other words, whatever their distinguishing characteristics may be, it is important that the existence, and distinctiveness, of such rights should be expressly acknowledged in some form. It is also generally, if not universally, accepted that such rights should benefit from some higher level of protection than is accorded to "ordinary" rights.

In countries that have a written constitution that protects certain rights as fundamental rights, one method by which this higher level of protection is accorded is that the fundamental right may be invoked to oppose the application of an ordinary law, and even a law adopted by the national parliament, to the extent that it is inconsistent with the fundamental right. Some countries establish special constitutional courts to which individuals may have recourse in the event of infringement of a constitutionally protected fundamental right, either immediately or only after the issue has been fully litigated in the ordinary courts. Other states have no special system of constitutional courts, but instead allow the ordinary courts to resolve such questions, and to give precedence where necessary to the fundamental right over ordinary law.

The position in the United Kingdom following the implementation of the Human Rights Act 1998 is, in this last respect, somewhat different. If a national court considers that primary legislation, that is to say an act of the Westminster Parliament, appears to be inconsistent with a provision of the European Convention, and if the court cannot resolve the
inconsistency by interpreting the act so as to be compatible with the Convention, then that court cannot refuse to apply the national legislation. However it may issue a declaration of incompatibility which, in effect, provides the Westminster Parliament with the occasion, and incentive, to re-examine the legislation and, if it considers fit, make it "human rights compatible".

One way or another, therefore, the normal consequence of recognition of a basic or fundamental right is that some form of privileged legal status is given to such rights, in order to ensure that they are effectively protected within the relevant judicial system.

There is, however, a particular problem which all too frequently arises when declarations of basic or fundamental rights are made, not at national level, but at a supra-national level. This phenomenon is an apparent reluctance of those states and bodies that make such declarations, at least when they do so collectively at a supra-national level, to provide the means whereby those rights can be effectively protected and enforced by the beneficiaries of those rights.

This is not a new problem.

The Universal Declaration of Human Rights, when proclaimed by the United Nations (General Assembly) in 1948, was deliberately promulgated in a form that would not create obligations enforceable under general international law, as might have been the case had it been adopted by an international treaty or Convention. Nor did the Universal Declaration contain its own enforcement mechanism. It is true that the Universal Declaration has, over the years, been regarded as having a certain legal value, both as a statement of binding customary international law, and as a list of the rights intended to be covered by the expression "human rights" whenever used in the Charter or other acts of the United Nations. But it is difficult to dispute that, at the time of its adoption, the declaration was intended to be little more than a set of noble aspirations, with minimal legal consequence.

The European Convention on Human Rights and Fundamental Freedoms, adopted in 1950 and coming into force after ratification in 1953, was significant since it was the first time anywhere in the world that a number of independent states had together not only assented to a common set of principles in relation to basic or fundamental rights, but also agreed on some form of mechanism to ensure their protection. Even then, the agreed mechanism was by no means one that could be regarded as providing comprehensive protection of the rights proclaimed by the Convention. It is true that a European Commission for the Protection of Human Rights was established, with power to investigate cases of apparent infringement, to seek to achieve an amicable settlement with the state concerned in the event
that an infringement was found, and only in the last resort to bring the issue before the European Court of Human Rights. But *individuals* who considered their rights to have been infringed had no right of direct access to the Court. Nor did they even have, at least initially, an automatic right to petition the Commission to take up their case. While a large majority of states had been in favour of incorporating a mandatory right of petition in the Convention, the United Kingdom was vehemently opposed. As a result, the right of petition was made optional. And in fact, it was only in 1967 that the United Kingdom finally signed up to the so-called "optional" clauses in the Convention giving individuals the right to petition the Commission to investigate their cases.

While the European Community Treaties were silent on questions of human rights, at least until 1992, the Court of Justice, in cases such as *Nold* and *Hauer*, had long recognised the need to protect certain fundamental rights, as forming part of the general principles of law the observance of which was required by Article 164 EEC (220 EC). It was this case law of the Court that was effectively codified in 1992 by Article F(2) of the Maastricht Treaty (now Article 6(2) of the TEU as revised and renumbered after Amsterdam), which expressly required the Union to respect fundamental rights as guaranteed in the Convention and as they result from the constitutional traditions of the Member States. However, even here there was a certain unwillingness to make this commitment fully effective. As Advocate General Francis Jacobs pointed out in his 1994 Lecture to this Institute, the Member States inserted this new provision in a part of the Maastricht Treaty that was expressly excluded from the jurisdiction of the European Court of Justice, thereby throwing doubt upon the extent to which the obligation created by Article F(2), in the event of a breach, could form the explicit basis of a challenge before the Court.

An even more serious gap in legal protection, resulting from the Maastricht Treaty, was the fact that measures taken by the European Union and its institutions under the CFSP and JHA pillars were excluded entirely from the possibility of any legal review by the Court of Justice. While this position was only partially modified by the Amsterdam Treaty five years later, the role of the Court of Justice in these fields is still today extremely limited.

This, therefore, is the background against which the Cologne European Council decided in June 1999 to establish a Convention charged with preparing a draft Charter of Fundamental Rights in the EU. From the outset, however, the question of what would be the legal status of the resulting document has been a matter of heated controversy. Several Member States, including the United Kingdom, went on record as firmly opposing the idea that the Charter should have any direct legal significance. The then Minister for Europe, Keith Vaz, had perhaps an unwelcome five minutes of fame when,
after the text of the Charter had been agreed but before it had been formally adopted at Nice, he sought to dismiss the future legal relevance of the Charter as having no greater legal standing before EU judges than a copy of the Beano or the Sun. A government spokesman was reported to have said that it was "no more than a political declaration" and a mere "showcase" of existing rights.

Since then, however, the debate has moved on. Within the framework of the Convention on the Future of Europe, the detailed discussion that is taking place within the relevant working group is not whether the Charter should be incorporated into a new treaty, but how this should be done. While the final decision will be taken by the full Convention towards the middle of next year, all the members of the working group have either expressed the firm view that the Charter should be integrated into the legal order in a legally binding form or, at the least, accept that possibility.

However, even if the Convention does endorse incorporation, the text of any resulting Treaty will have to be approved by all the Member States at an Inter-governmental conference ("IGC"), probably to be held in late 2003, and then be followed by ratification. A further element in the equation is that, on the current timetable, the IGC will probably have to involve the new applicant states, who in turn have already indicated that they expect to be fully involved in the process.

But incorporation on its own will not be enough.

There is also a further important problem, recognised by the Convention Working Group, which is whether existing legal procedures and remedies, as currently provided in the treaties, will be sufficient to provide effective protection of these new legal rights.

The question of whether the procedural remedies provided by the existing Treaties are fully effective to protect the rights created by Community law, including but not limited to fundamental rights, is a long-standing one.

The problem arises principally, though not exclusively, in the limitations contained in Article 230(4) EC. In short, this article provides that normative measures, which by their nature are not addressed specifically to any one individual, may only be challenged by him directly in the Community courts if they are of "direct and individual" concern to him. However, the practical effect of the Court of Justice's case law on the interpretation of these concepts is to preclude any direct challenge to measures of a normative or general nature, including most regulations and directives.

As long ago as 1995 the Court of Justice, in its submissions to Member States in preparation for the Amsterdam IGC, drew
attention to the fact that these limitations in Article 230(4) could result in a situation in which fundamental rights were inadequately protected in the Community legal order. In its recent judgment in the UPA case, whilst recognising the existence of this problem, the Court emphasised that it was for the Member States themselves to take the appropriate measures, if necessary by amending the treaties, to ensure that rights created by the law of the European Union were adequately protected.

In the light of the fact that the Charter itself recognises, at Article 47, that the right of access to a competent court is at the heart of the principle of effective legal protection, it is perhaps unsurprising that the Convention Working Group has felt it necessary to draw attention to this "lacuna" in the general system of legal protection in the EU, the effects of which will become more serious as new rights are recognised.

What, however, should be done to restore effective legal protection in this area? The first important point to note is that the Working Group has expressly rejected the idea that a new special judicial procedure should be created solely for the purpose of protecting fundamental rights, whether these rights are derived from the Charter or from other sources. On the contrary, the group has stressed that the advantage of incorporating the Charter into the legal order of the Union would be that it would allow the use of the same system of legal remedies as for other Community rights.

I believe that this approach is right, though perhaps for different reasons. The first is a purely pragmatic one. In many situations it will be difficult to distinguish, in a given case, between fundamental rights issues, and other legal questions. Even where it is possible to make such distinctions, individual cases are likely to raise issues in both categories. The position would be even more complex if the categories of fundamental rights that would benefit from this different procedure are not limited to those exhaustively set out in the Charter, but can also be found in the European Convention and in the "constitutional traditions" of the Member States.

But there is another, perhaps more important reason why I believe that the right solution is not to create some new scheme of legal protection just for fundamental rights, but to improve the legal protection available for all rights which individuals derive from the Community and Union treaties.

Rights, in the sense that lawyers use the term, normally presuppose some form of legal recognition. Whether one is talking of a right of way, of contractual or consumer rights, or even the phrase "I know my rights"…, the use of the word "rights" immediately suggests more than an expectation or even a mere moral obligation on someone's part towards the putative holder of the right. Rights presuppose a legal relationship, that
is, a relationship governed by law, and which has as its necessary corollary the idea that, in the event of dispute as to the existence of the relationship or its performance, the parties can have recourse to a court that is in a position to ensure that the right is protected. Indeed, a so-called right without any effective remedy will generally cease to have the essential characteristics of a right. As Dicey observed, referring to the contrast between the declarations of rights and freedoms in the French constitution of 1791, and the sordid realities of post-revolutionary France

"There never was a period in the recorded annals of mankind when each and all of these rights were so insecure, one might say so completely non-existent, as at the height of the French revolution . . . . On the other hand, there runs through the English constitution that inseparable connection between the means of enforcing a right and the right to be enforced which is the strength of judicial legislation."

Why is it then that, when states collectively discuss at the supra-national level the granting or acknowledgement of rights, the idea that a right necessarily presupposes access to a court that can ensure effective protection of the right starts for some reason to break down.

The need for a special set of legal principles governing the relationship between individuals and state is a relatively recent idea in English law. The constitutional theory of English law, at least as expressed in Diceyan terms, was that the legal rights and obligations as between state and individual were - and should be - the same as those applying as between individuals. It was this attitude that led to the strong opposition in England, at least until the latter half of the 20th century, to the recognition of administrative law as a distinct body of law and to the creation of separate administrative courts.

It is also understandable that, in the gradually evolving relationship between citizen and the state, i.e. what the citizen is entitled to expect from the state and the state from the citizen, there was a hesitation to reduce these expectations to so-called rights, with all the characteristics of ordinary rights, in particular access to courts and effective protection.

Indeed, as the Lord Chancellor recognised in his speech here, earlier this month, the approach taken was that the primary, and some times in practice the only, mechanism for ensuring respect for this category of "rights" was through political accountability. However, as Lord Irvine also recognised, the experience over the last 50 years has, sadly, led to the inevitable conclusion that the idea that political accountability can provide an adequate protection of the individual in his relationship with the state is simply naïve, and "outdated".
Against this background, what does the case law of the Court of Justice contribute to the discussion about the place of legally enforceable rights in our society, in particular as to the role of rights and obligations as between individuals and the public powers, whether these be national governments and agencies, or the institutions of the European Community.

The first, and arguably the most important lesson to be learned, I believe, is that the main successes of the EC - to the extent that these are perceived by the ordinary person - have been closely linked to the creation of legal rights for the individual, which those individuals could enforce not only as between one another, but against Member States and the Community institutions themselves. One needs only think of the four freedoms, the internal market, the removal of exchange control restrictions, the right to obtain social security and hospital benefits in other countries, and so on. The origin of this extensive approach to protecting individual rights can be traced back to the famous Van Gend & Loos judgment in 1963, a case more commonly discussed by professors and students as establishing the principle of direct effect of Treaty articles.

The Van Gend & Loos case concerned Article 12 of the EECT, requiring Member States not to introduce new custom duties and not to increase the rate of existing custom duties during the so-called transitional period of 5 years from 1 January 1958. When the Dutch custom authorities sought to apply a rate of 8% instead of the previous 3% rate to a shipment of Ureaformaldehyde, the Tarifcommissie asked whether Article 12, which clearly imposed an obligation on the Dutch Government, also created a corresponding right for individual to rely on that obligation before a national court so as to resist the claim for payment of duty at the higher rate.

Having pointed out that the Treaty expressly created rights for individuals in certain circumstances, as well as imposing obligations on them, the Court observed:

"These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals, as well as upon Member States and upon the institutions of the Community." (Van Gend & Loos, p. 12)

The Court however went further. It explicitly rejected the argument of Belgium, the Netherlands and Germany that sufficient protection of these rights resulted from the fact that the Commission and Member States could, if they considered fit, bring the Netherlands before ECJ under Articles 169/170 (now 226/227 EC). Not only, said the Court, was it doubtful that such supervision would be fully effective, particularly since only brought about after national decisions implemented, but
"The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and the Member States."

This part of the Court's reasoning contained, therefore, a clear policy choice, to the effect that the individual has an important role in ensuring that Member States respect their obligations under the Treaty. Rights granted to individuals were therefore important, not merely because they provided him or her with the means to protect their own position, but also because, albeit within limits, they enabled individuals collectively to play an important role - through proceedings in the national courts - in controlling the actions of states, and in particular ensuring that they fulfilled their international obligations under the Community treaties.

It is not surprising therefore that the importance of individual rights, and their effective protection, has been a constant theme of the Court's subsequent case law.

In San Georgio, the Court stressed that national courts must at all times be in a position to protect Community rights in cases that come before them, and that national rules that might interfere with that obligation, or even render it impossible, must be set aside.

In Francovich, the Court established the principle that a Member State that breaches its Community law obligations - in that case by failing to implement a directive protecting the rights of employees to redundancy benefits when their employers become bankrupt - were in principle liable to pay damages for having failed to protect those rights.

In Factortame 1, the Court of Justice held that the obligation to protect Community rights required that national courts be able to grant interim relief, even if to do so involved the setting aside of primary national legislation.

While these cases were primarily concerned with relations between individuals and the state, the Court, in two recent and important judgments, has stressed that the role of individual rights, and the need for their fully effective enforcement through access to a court, are just as important when the obligation in question is imposed not on a state or public body but on a private citizen.

The first is the Courage and Creehan case, which held that a party to an unlawful anti-competitive is not precluded from claiming damages from the other parties to the agreement for the losses that he has suffered as a result of the agreement, at least in a situation where he was the weaker party and was effectively compelled to enter into the agreement. The need to protect the rights of the weaker party prevailed over the long
standing rule of English law *ex turpi causa non oritur actio*, i.e. that a party to an illegal agreement cannot sue other parties to the agreement for damages that he himself suffers from the agreement.

Of even more importance, because of its wide-ranging implications, is the Court's recent judgment in the *Antonio Munoz* case. Community regulations require that fruit and vegetables, when sold or offered for sale, shall bear the variety-name of the fruit or vegetable in question as well as other information, such as the category and the country of origin. One UK trader made a regular practice of offering table grapes for sale without applying the correct varietal name, which was "superior seedless" but instead applying a number of different descriptions or names - "white seedless", "Sult" and "Coryn". These descriptions however were not in themselves false or misleading. Munoz and Fruiticola, two Spanish companies who grew grapes of the "superior seedless" variety and sold them under this description, complained on several occasions to the Horticultural Marketing Inspectorate, but this body took no action. Accordingly Munoz and Fruiticola brought a civil claim, in the High Court, seeking an injunction preventing the trader from selling such grapes without applying the correct varietal name. During the hearing the defendants admitted that the grapes in question were indeed of the superior seedless variety. The High Court however rejected the claim for an injunction, on the basis that it considered the Community regulation did not create rights for producers to bring civil claims in the ordinary courts in order to enforce the regulations. The Court of Appeal referred this question to Luxembourg.

The Court of Justice, in a judgment that strongly echoes the judgment in *Van Gend & Loos* some 40 years earlier, held that, in order to achieve "full effectiveness" of the rules in question, which were designed to ensure fair trading and transparency of the relevant markets, it must be possible to enforce the rules in the national courts by means of civil proceedings instituted by one trader against a competitor.

While the Court left open the further question of whether this right to bring proceedings necessarily also implied the right, in such civil proceedings, to recover damages, its Advocate General had held that this right also was inherent in the regulation, at least where there was a link between the interest of the plaintiff and the protection intended to be afforded by the regulation.

In short, the guiding philosophy of the Court's case law over the fifty years since its creation has consistently been that the rights of individuals to enforce obligations which Community imposes, whether on other individuals or on Member States, have a vital - indeed even a central - role to play in the establishment and development of the European Community. The willingness of the Court both to recognise the existence of
enforceable legal rights whenever individuals are adversely affected by breaches of binding obligations, and to insist that effective remedies must be made available, if necessary by national courts, so as to enforce those rights, reflect, I believe, the Court's recognition of this principle.

As mentioned earlier, the idea that "rights" of any type, but in particular fundamental rights, can be adequately protected by concepts of political accountability is already outdated even within the United Kingdom.

At the European level, the problem is of an altogether different order, in that the preconditions for such accountability do not even begin to exist, and are unlikely to do so in the foreseeable future. Political accountability is dependent on the possibility of creating a sufficient commonality of political viewpoint among the "people" to whom the politicians are accountable. While that commonality clearly exists within the United Kingdom - so that it is not unrealistic to envisage a lively and heated discussion between a resident of Inverness-shire and a resident of Cornwall as to the performance of the Prime Minister and the Westminster Parliament - a similar debate between a Greek and a Scot, of a Portuguese and a Finn, on the performance of the Council of Ministers or of President Prodi is almost unimaginable - even leaving language issues on one side.

For this reason, I strongly believe that the political success of the European Union, now of fifteen but soon of twenty-five or more states, will for some time continue to be dependent on the extent to which individuals can see that the Union offers them real benefits, in the form of legally enforceable rights that are not subject to the whims and political expediency of states, government departments, officials or even of economically powerful companies.

This is why, from the European perspective at least, rights do matter. And it is also why the current discussions about whether to make the fundamental rights in the Charter legally enforceable, and how better to enforce all Community rights, are so important.

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2 Simpson, p.11.
3 Case C-50/00 P UPA [2002] ECR I-6677.