NOTTINGHAM SEMINAR

"The Convention, the Common Law and the Strasbourg Court – Apocalypse Now?"

I am very pleased to have been asked to lead this seminar on what has become a particularly topical issue because of the fact that four senior judges or former judges in the United Kingdom have recently chosen to address it, or aspects of it, in public lectures delivered in London, Kuala Lumpur and Monaco within a very short space of time. Copies of these lectures have I think been made available, as well as a lecture I gave at the end of November last year.

May I say two things by way of introduction. First, the publicity material for the seminar suggests that my lecture may have been a response to the judicial lectures or some of them. It was not. I did not know that the lectures were to be delivered and all but one, that of Laws LJ, were delivered or at least reported on after I had spoken. Three of the lectures, which were delivered within a week of each other, came as a complete and unwelcome surprise to me. Whether or not their subject-matter and timing were coordinated, I do not know. But their significance at a sensitive time for the Convention and for the cause of human rights in this country is beyond doubt.

Up until now the Convention system and the Strasbourg Court has had to contend principally with attacks – often strong and concerted attacks - from senior politicians and the tabloid Press. True it is that Lord Hoffman delivered a lecture to the Judicial Studies Board, shortly after he had retired from the Bench, which was entitled "The Universality of Rights" but was in fact the vehicle for an undisguised attack on the Strasbourg Court, its judges and its jurisprudence. It caused a great stir at the time and meant that Lord Hoffman was seen as the champion of those calling for the abandonment of the Strasbourg system by the United Kingdom. It is true, also, that two QC members of the Commission on a Bill of Rights rued the fact that the terms of reference of the Commission did not allow them to express their strong views against the Strasbourg Court – and then proceeded to do just that in a separate opinion. But this apart, the running against the Court has been left principally to the media and politicians, including the most senior Government Ministers. Hence the shock of the flurry of judicial lectures, which inevitably attracted, and were intended to attract, widespread media coverage. Their importance is that, whether right or wrong, they give an air of legal respectability to what had until then been essentially a political campaign to denigrate the Court and the Convention system as a whole - and this at a sensitive time when the general election is looming.

The second thing I want to say is that I do not offer anything new in this seminar. I have already said my piece on the main topic. Although it was not intended to respond to the judicial lectures, my talk did address many of the points covered by the judges, including the thorny topic of the "living instrument" concept. What I have to say now is only intended to provide a general framework for what will I hope be a free exchange of ideas among all present on what are undoubtedly important issues. My views are already known; it is more important to hear what others have to say. But I hope that the various lectures which have been very recently delivered may provide some focus for the discussion.

Since the four judicial lectures, there has been a fifth – the Cambridge Freshfields Annual Lecture delivered last month by Lord Neuberger. It is an interesting and amusing lecture. It is different from the others in that he does not as such criticise the Courts in Strasbourg or Luxembourg, but instead tries to explain their unpopularity in this country as well as the unpopularity of the European Union and European Convention, in historical and cultural terms.

He gives many possible reasons for such unpopularity:

- first, the fact that unlike other parts of Europe, Great Britain has seen no changes in its national boundaries, has never been successfully invaded by a foreign power and has never experienced any sort of revolution since the 17th century. All this has meant in his view that, with their more turbulent histories, mainland European countries are more aware of the fragility of the rule of law and less jealous of national sovereignty and that they are more ready to join and support institutions involving the trading of a degree of national sovereignty for closer mutual cooperation and supra-national dispensation of justice.
- secondly, the fact of the loss of status of the United Kingdom as a world power to become just one among many member States has required in his view "an almost superhuman adjustment" in this country, an adjustment which one gathers is not yet complete.
- thirdly, the fact that the United Kingdom has its own national religion, which may serve in his view to emphasise its difference or exclusiveness.
- fourthly, the fact that the United Kingdom has no written constitution and no history of courts overruling Parliament, which has meant in his view that the Convention has much greater prominence in judicial decisions here than in other countries, with written constitutions; such decisions therefore receive in his view much more media attention when they are controversial.
- fifthly, the fact that the United Kingdom, virtually alone among member States, has a common law system with rather a different cast of mind and approach - a pragmatic approach, as opposed to the more logical approach followed in civil law countries. This leads to the risk that lawyers, including judges, in other countries misunderstand how we work.
- and finally, the fact that this country sees itself as closer to the United States and Commonwealth countries and feels more at home with judges from those countries rather than from Europe. Whereas Lord Neuberger says that he would feel at home in the Final Court of Appeal in Hong Kong, he could not say this of any European court. As an aside, I have to say that, as a common lawyer, I did not feel any discomfort in sitting in a European Court for some 14 years; nor I believe did the many judges from the courts of first instance and courts of appeal of the United Kingdom who, over the years, have sat as *ad hoc* judges in the Strasbourg Court.

What Lord Neuberger says may explain, at least in part, the essential isolationism felt in this country and the current negativity to all things European. What is less easy to explain is why, even though cases adverse to the United Kingdom have been decided by the Strasbourg Court for 50 years since the 1960s, including many judgments in

which primary legislation was found to be in breach of the Convention, it is only relatively recently that we find the current degree of deep-seated negativity and outright hostility to the Convention and Court.

While this negativity does not emerge clearly from Lord Neuberger's lecture - which rightly draws attention to the great benefits to the common law which have resulted from the mutual flow of legal concepts between the UK and mainland Europe - the same is not true of three of the other judicial lectures which, in varying degrees, are critical of the Convention system and of its effect.

Even though I describe the contents of the lectures in very summary form to facilitate the discussion, I hope that I do so fairly and without distorting what was there said.

The burden of the message of Laws LJ is that the effect of "laws made in Europe" on the domestic system may undermine the virtues of the common law – what he calls its catholicity and restraint. Like Lord Neuberger he accepts that the common law has drawn inspiration from many European legal sources - its catholicity. But he explains that the balance and confidence in the catholicity of the common law is threatened by the fear that human rights law has got too big and that courts here have become too subservient to jurisprudence from Strasbourg which has undercut the national courts' powers of judgment.

The answer he suggests essentially lies in the domestic courts' hands. What he seeks is the reinstatement of the primacy of the common law protection of human rights, by revisiting domestic case-law under section 2(1) of the HRA. He is critical of oft-quoted dictum of Lord Bingham in *Ullah* that Strasbourg case-law is authoritative in the interpretation of the Convention and that the courts here should keep pace with Strasbourg jurisprudence, 'no more but certainly no less".

I am not sure whether it would be helpful to enter into the long-standing debate within the judiciary here as to whether Lord Bingham was right or wrong in his interpretation of section 2 or whether what Laws LJ describes as a "different approach" should be taken to the words "shall take into account" in that section. I would agree that it does not in general mean that the courts here are bound by the jurisprudence and I do not think Lord Bingham ever suggested that they were. But what is clear and is not I think disputed by Laws LJ is that:

(i) if a final judgment of the Grand Chamber in Strasbourg takes a different view of precisely the same case against the United Kingdom, Article 46 of the Convention bites and the United Kingdom authorities, including the courts here, are bound under international law to give effect to the decision; and

(ii) while judgments against other States do not bind our courts, there is an obvious wisdom in following the interpretation adopted by the Grand Chamber in Strasbourg in a case raising a similar issue, since otherwise there is a risk of an adverse finding in a future case against this country.

To this extent the rulings of Strasbourg may be regarded as "authoritative" or "definitive". But I would agree with Laws LJ that courts here should not see themselves

as subservient to Strasbourg and should not be deterred from taking a different view. My main problem is in finding evidence that the courts here have been so discouraged, True it is that sometimes, as in *AF* or *McCaughey* , the courts here followed Strasbourg with some obvious reluctance, even hostility. But sometimes, as in the cases of *Limbuela* (concerning the treatment of asylum seekers), *Re G*, (concerning discrimination against unmarried couples), and *EM*, (concerning the expulsion of a mother and child whose Article 8 rights would be violated), they have leapt ahead of Strasbourg in the protection of human rights; and on other occasions, they have refused to follow Strasbourg where they considered that the Court had misunderstood English law - as in the court-martial case of *Spear* - or had not given sufficient weight to the national law safeguards, as in the *Horncastle*/*Al-Khawaja* dialogue, concerning the use of hearsay evidence. Certainly, looking at it from the perspective of Strasbourg, I did not see any sign that the important contribution to human right law made by the common law courts here had been stifled or that the United Kingdom courts had been cowed into submission in the way they had treated the Court's case-law. On the contrary.

But there is a further underlying message, reflected in Laws LJ's implied criticism of the judgment in the *Hirst* case, that the Strasbourg Court has trespassed in areas of State policy and is too ready to make marginal choices about issues on which reasonable persons may disagree. The boundary between proper policy and the vindication of rights is, he acknowledges, a difficult one. But there are limits to how far the law on human rights can go and it is apparent that he considers that those limits have been exceeded and that in a debate on Convention issues the balance struck between policy and rights and between the judiciary and government is essentially a matter for national constitutions and not for an international court..

The same theme is taken up by Lord Judge. With great respect, I find his a slightly curious lecture, which seems to be in two parts. The first is devoted to the issue of judicial independence and contains a plea that the views of the judiciary should be sought, and the concurrence of the Lord Chief Justice obtained, wherever major changes are made which affect the funding or functioning of the administration of justice. But the second half is devoted to what he calls the "highly problematic" bestowal of judicial authority from Europe and the impact on the domestic arrangements of the role of the ECHR.

Like Laws LJ, he questions what is meant by "taking into account" Strasbourg case-law in section 2. Like Laws LJ he considers that the "*stare decisis*" principle has too often been applied to that case-law by domestic courts. He argues that section 2 should be amended to make clear

(i) that courts here are not required to follow or apply Strasbourg decisions and
(ii) that the Supreme Court is of equal standing with the Strasbourg Court in the area of human rights.

I have no problem with either proposition, though I strongly doubt whether such an amendment is necessary.

But I do have problems with two related points which follow in the lecture.

(i) The first is Lord Judge's suggestion that the "living instrument" concept shows that the Strasbourg Court assumes that it has the same mantle as the United States Supreme Court. He cites the *Del Rio Prada* judgment against Spain as an example and is especially critical of the fact that the Court in that case specified general measures to be taken to comply with the Court' s judgment. I do not share this view. Under Article 46 States have agreed to abide by final judgments of the Court in cases to which they are parties. The Court has now for many years – and quite properly in my view - seen its role in cases in which it finds that a law or systemic practice violates the Convention not merely to declare this fact but to indicate what measures are necessary for proper compliance with its judgment. Where, as in the *Del Rio Prada* case, there can be no doubt that effective compliance with the judgment clearly requires a change in the law, the Court will sometimes say this in the operative part of the judgment. There is an argument, which still sometimes divides the judges of the Court, as to whether this is necessary or whether it could and should be left as a mere recommendation in the body of the judgment. But I personally find nothing shocking about the fact that this may be expressed as a requirement, especially where the State is left free to choose the precise form that the change of legislation would take.

(ii) Lord Judge complains of a democratic deficiency in Strasbourg Court judgments, which are not appealable, and deplores the emergence of a court with equivalent jurisdiction to the United States Supreme Court. Once again, the judgments relied on to establish this proposition are those relating to prisoners' voting rights and whole life prison terms, to which I will return and which do not in my view make out the case which he argues. He ends on what I find a disturbing note, having regard to the present debate on compliance with the Strasbourg Court's judgment, by expressing the view that "we should beware of even an indirect importation of the slightest obligation on Parliament to comply with the order and directions of any court, let alone a foreign court". It is true that in *Hirst* the Court did not directly order or direct a change in the law on prisoners' voting rights but such a change is the inevitable consequence if the United Kingdom is to comply with its international obligations, as the Joint Parliamentary Committee recently accepted that it must.

Lord Sumption's lecture, which is the most hostile to the Strasbourg Court, has distinct echoes of Lord Hoffman's lecture. The question he poses at the outset is what kind of social tasks should be assigned to judges and courts as opposed to other agencies of social control, administrators or legislators.

The Convention is in his view a "monument of the tendency to convert political questions into legal ones". Like Lord Hoffman, he considers the text of the Convention to be "wholly admirable" but accuses the Strasbourg Court of being the "flag-bearer for judge-made fundamental law extending well beyond the text which it is charged with applying". Once again the Court's "living instrument" concept is seized on as the principal culprit, it being said that by the use of this metaphor the Court has transformed the Convention from the safeguard against despotism which was intended by the draftsmen, into a template for many aspects of the domestic legal order." Particular complaint is made of the fact that

the Court has recognised a large number of new rights, which it is claimed are not expressly found in, and are not warranted by the express language of, the treaty. Article 8 is singled out as demonstrating this, Lord Sumption apparently being of the view that it was extravagant to interpret respect for private or family life or for the home as covering such matters as illegitimate children, homosexuality, abortion, deportation or landlord and tenant.

The Court's way of making law is attacked on three familiar grounds:

- It is not consistent with ordinary principles governing the interpretation of written law and goes well beyond the language and object and purpose of the Convention.
- It is not easy to reconcile with the rule of law because it is subjective, unpredictable and unclear.
- There is a significant democratic deficit of the Court in important areas of social policy

Curiously, having said that the Convention was wholly admirable, Lord Sumption appears to criticise the terms of Articles 8-11 for transferring, in the second paragraphs, matters of legitimate public debate into questions for judges to decide.

His very restrictive view of the reach of the Convention as guaranteeing only rights that are "truly fundamental " (whatever that might mean) is shown by his attack on the *Hirst* judgment as "having nothing to do with the oppression of vulnerable minorities".

As to the answer that Parliament has impliedly authorised what has occurred by passing the Human Rights Act, his response is that the treatment of the Convention by the Court as a living instrument allowed it to make new law in respects not foreshadowed by the language of the Convention and which Parliament would not necessarily have anticipated when it passed the Act. Lord Sumption's conclusion is that, in practice, this situation is incapable of being reversed by legislation short of withdrawing from the Convention altogether.

He ended his lecture with what Lord Mance described as an apocalyptic view that the judge-making of law which we have witnessed in Strasbourg slowly drains democracies of what makes them democratic by a gradual process of internal decay.

As will be apparent from what I said in my lecture, I take a fundamentally different view. I will not repeat in detail what I have there said. But, in summary, I believe

- first, that the idea of the Convention as a "living instrument" is both entirely natural and one which accords with the Vienna Convention and with the object and purpose of the European Convention as a treaty

designed for the protection and collective international enforcement of human rights.

- secondly, that there is no evidence that the living instrument metaphor has been used to develop Convention rights far beyond what the language of the Convention permits, still less to include rights which have been specifically excluded by the draftsmen.
- thirdly, that the Court has taken pains to ensure that the living instrument concept has been confined within reasonable bounds and does not lead, as Lord Sumption has claimed, to subjectivity, unpredictability and lack of clarity.
- and finally that, while I accept that judgments of the Court might sometimes be open to criticism, I profoundly disagree with the theme that runs through all the three lectures that the Court has abrogated to itself the right to decide matters of social policy in disregard of its proper judicial function under the Convention.

In this regard, my views are much closer to the more balanced views of Lord Mance, who while doubting the wisdom of some more extended interpretations of the Convention, was unable to accept Lord Sumption's restrictive view of the proper reach of the Convention and paid tribute to the weight given by the Strasbourg Court in recent decisions to the margin of appreciation and to the member States' evaluation of local circumstances, citing the cases of *Taxquet v. Belgium*, *Lautsi v. Italy, von Hannover v. Germany* and *Austin v .the United Kingdom.* Lord Mance accepted that the domestic effect of decisions reached in some of the cases "may sometimes pinch", but found it difficult to regard it as unforeseeable that a Court, established by consent of European states to give effect to the Convention, should reach them.

I have sufficiently expressed in my lecture my view on the two cases that seem to have evoked particular fury among politicians, the media and certain judges – incidentally, two out of the thousands decided against the UK each year, which pass unnoticed. I would only re-emphasise that, contrary to the impression given, the *Hirst* judgment was not the first time that legislation or lack of it has been found to violate the Convention - and this without the repeated claim that the Court's judgment had improperly trespassed on Parliamentary sovereignty. I also find curious Lord Sumption's suggestion that Parliament would not necessarily have anticipated what the Court might do when passing the HRA – something which is difficult to reconcile with the fact that that there had, by 1998, been 40 years of Strasbourg jurisprudence to draw on, including the concept of the Convention as a "living instrument' which was already 20 years old.

I did not say anything in the lecture about the *Vinter* case, which has evoked similar fury, the Court being variously described by politicians as "disreputable", as "having a warped moral compass" and as being responsible for an "offensive attack on civilised principles". I voted the other way in the Chamber in *Vinter* but I find these descriptions of the Grand Chamber's judgment as being grossly excessive. The Court made clear that its finding was based exclusively on the lack of clarity in the powers of the Justice Secretary and the absence of a dedicated

review mechanism such as had existed in the UK prior to 2003. It further emphasised that its finding should not be understood as giving the applicants any prospect of imminent release and that any such release would depend on whether there were legitimate penological grounds for their continued detention and whether they should continue to be detained on grounds of their dangerousness. The Court of Appeal has said that the Court misunderstood the nature and extent of the safeguards which currently existed in the case of whole life sentences. Whether the Strasbourg Court will accept this remains to be seen in some future case.

Whether or not clamour against the Strasbourg Court is justified, there is no doubt that the future of the Human Rights Act and the United Kingdom's continued membership of the Convention system is precarious. The antagonism against both is stirred up by the press and by politicians, using intemperate language, every time a decision emerges from the courts here or from the Strasbourg Court that is considered to be likely to prove unpopular with the public. The situation will become even worse if Parliament steadfastly refuses to give effect to the *Hirst* judgment, as senior politicians threaten will happen. The hostility against the Strasbourg Court has also been fuelled by the spreading of myths about the Court – the myth that the judges of the court are unelected and have no prior judicial or other experience; the myth that the Court is inefficient because of the size of its case-load, ignoring the fact that it managed in 2012 to decide 88,000 cases, and this despite having to cope with cases coming from 47 different legal systems and in 39 different languages; the myth that the Court is constantly interfering with the way the country is governed and the particularly toxic myth that the Court finds a violation of the Convention in 75% of the cases brought against the United Kingdom, when the true figure is well under 1%.

What then of the future? What is likely to happen? Certainly, depending on the result of the general election, there is a real risk that the Human Rights Act will be repealed. What, if anything, would replace it remains to be seen. One should perhaps be encouraged to believe that any United Kingdom Bill would, to use the words of the terms of reference of the Commission on a Bill of Rights, "build on and strengthen the obligations under the Convention and protect and extend our liberties" But I am not. I fear, on the contrary, that any Bill of Rights would not only diminish the rights enjoyed, at least by those who are not British citizens, but that it would, as the minority members of the Commission feared, be the slippery path towards decoupling the United Kingdom from the Convention and from the jurisdiction of the Strasbourg Court.

How real is the risk of withdrawal? My own view is that it is a serious risk, once again, depending on the outcome of the election. Certainly there has been a great deal of sabre-rattling, which should not perhaps be taken too seriously. But equally certainly, the threats to withdraw, which have come from the Home Secretary and the Justice Secretary, have been consistent and are ominous. And the pressure for withdrawal from the tabloid press has been intense and will no doubt grow stronger as the election approaches.

In my lecture, I have already expressed my own view of the effect of such a withdrawal. The consequences of the withdrawal of the United Kingdom would in my view not only be potentially serious for the protection of human rights here but disastrous for the future of the Convention system as a whole, to which it would do incalculable damage.

This is where I will conclude. I hope that what I have said may spark some discussion on some of the issues raised: Has human rights law grown too big and placed a straitjacket on the development of the common law? Has the "living instrument" doctrine been used by the Strasbourg Court to extend its jurisdiction beyond what the Convention was designed to protect and beyond what the language of the instrument can support? Are the other charges against the Strasbourg Court justified? Has the Human Rights Act achieved its purpose of securing the effective protection of human rights in this country? Would the replacement of the Human Rights Act by a home-grown Bill of Rights be desirable and, if so, should it be decoupled from the Convention? Would the withdrawal of the United Kingdom from the Convention system be advantageous to this country, if not to the Convention system as a whole? I look forward to hearing your views on these or any other questions.