

2012

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Recommended Citation

Burton, The Honourable Mr. Justice M. (2012) "The Rule of Law: A Help or Hindrance to International Business," *South Carolina Journal of International Law and Business*: Vol. 9 : Iss. 1 , Article 4.

Available at: <https://scholarcommons.sc.edu/scjilb/vol9/iss1/4>

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THE RULE OF LAW: A HELP OR HINDRANCE TO INTERNATIONAL BUSINESS?*

*The Honourable Mr. Justice Michael Burton***

INTRODUCTION

Chief Justice, ladies and gentlemen, I am very honoured to be invited to the University of South Carolina and to speak to you this evening, and to reinforce as Treasurer of Gray's Inn the continuing relationship between the Inn and the University by another visit. We were delighted to welcome Professor McWilliams and his team of enthusiastic and able students to the Inn earlier in the year and very grateful for your hospitality to Mr Justice Coulson and our mooters¹ last year. Now I am here again, and delighted to be so. I was asked by Professor McWilliams to give a keynote speech. I am not sure what a keynote speech is at the best of times. It sounds musical. It reminds me of Jimmy Durante, who told the story of the man who found the Lost Chord when sitting at the piano. "They said Mozart was mad: they said Beethoven was mad: they said Louie was mad: who's Louie? My uncle, he was mad." My speech tonight is to be on the impact of the Human Rights Act² and the European Convention of Human Rights³ on the carrying on of business in the United Kingdom, and in particular any impact on American companies and firms establishing and carrying on business in the United Kingdom. I have studied the agenda for tomorrow's conference and noted that the subject is the impact of the rule of law on global business, including in particular its effect on U.S. companies carrying on business in China. Tonight's talk, billed as a keynote speech,

* A transcript of the keynote address for the South Carolina Journal of International Law & Business 2012 Symposium, University of South Carolina School of Law (Sept. 20, 2012).

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¹ Participant in a moot competition.

² Human Rights Act, 1998, c. 42 (U.K.).

³ European Convention on Human Rights, Nov. 4, 1953, 213 U.N.T.S. 221 [hereinafter European Convention].

suggests that in some way I hold the key to unlock the delights of tomorrow.

However, the bad news for me as a speaker on such a topic—although it is not at all bad news for U.S. business—is that research into the impact of the Human Rights Act on business in the U.K. need not be high on the “to-do” list for U.S. companies. I sit as a High Court Judge in the Commercial Court⁴, dealing with a constant stream of high profile commercial disputes and they very often involve American companies litigating in London or being sued in London. I also sit in other divisions of the High Court—including the Administrative Court, in which Public Law claims are brought against the Government and governmental and other public bodies.⁵ While I regularly deal with claims in the latter division involving the Human Rights Act, I can say that in the last three years in the Commercial Court I have heard no case in which there has been any reference at all to the Human Rights Act.⁶

In 1999, Blackstone’s Guide to the Human Rights Act 1998 was brought out, with a foreword by Jack Straw MP, then Home Secretary and later the first Secretary Of State for Justice sitting in the House of Commons.⁷ In his foreword he described the Act as “the most significant statement of human rights in domestic law since the 1689 Bill of Rights ... Bringing these rights home [by which he referred to incorporating the Convention into English law] will mean that people can rely on their rights in our domestic courts rather than having to incur the costs and delay of taking a case to Strasbourg.”⁸

⁴ The Commercial Court is a specialized court of the Queen’s Bench Division of the High Court of England and Wales that specializes in business or commercial disputes. See generally *Admiralty, Commercial and London Mercantile court*, MINISTRY OF JUSTICE, <http://www.justice.gov.uk/courts/rcj-rolls-building/admiralty-commercial-mercantile-courts> (last visited Nov. 24 2012), for more information on this Court.

⁵ The Administrative Court is a specialized court within the Queen’s Bench Division of the High Court of England and Wales. This court handles administrative issues and has supervisory jurisdiction over inferior courts. See generally *Administrative Court*, MINISTRY OF JUSTICE, <http://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court> (last visited Nov. 24 2012), for more information on this Court.

⁶ Human Rights Act, 1998, c. 42 (U.K.).

⁷ JOHN WADMAN & HELEN MOUNTFIELD, BLACKSTONE’S GUIDE TO THE HUMAN RIGHTS ACT OF 1998 (2000).

⁸ *Id.*, at ix.

Not even in the index of that book is there any reference to business, trade, or commerce. In the seminal book by Lord Bingham, one of Gray's Inn's most famous judges, on *The Rule of Law*, "Business" appears in the Index, but only cross-referring to the context of the universal requirement that "the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations. No one would choose to do business, perhaps involving large sums of money, in a country where the parties' rights and obligations were vague or undecided."⁹ Not exactly controversial for those who share the common law traditions.

The most significant provisions of the European Convention of Human Rights [ECHR] (and those most frequently invoked in civil or public law cases in the English Courts)—are Article 3 (prohibition of torture—most regularly invoked in relation to deportation and removal of illegal immigrants), Article 6 (right to a fair trial), Article 8 (protection of privacy), Article 10 (freedom of expression), and Article 11 (freedom of assembly).¹⁰ None of these sit easily (provided of course that the trial is fair) in a civil or commercial context. Most significantly, the obligation by section 6(1) of the 1998 Act not to act incompatibly with a Convention right is placed upon a "public authority" and hence would not apply to an American business or trading entity in the U.K.¹¹

What problems could there be for U.S. companies in the U.K.?

I. EMPLOYMENT LAW

Employment Law in the U.K. creates a number of problems and pitfalls for U.S. businesses. Unlike the law in the U.S., which is more flexible about facilitating dismissals and short term employment, employees in companies subject to U.K. law have statutory protection from what is called 'unfair dismissal', quite independent from and additional to any protection given to them by contract.¹²

⁹ TOM BINGHAM, *RULE OF LAW* 38 (2010).

¹⁰ European Convention, *supra* note 3.

¹¹ *Id.* § 6(1).

¹² See Employment Rights Act, 1996, c. 18, § 94 (U.K.).

Whereas there is a number of statutory protections in the U.S. in respect of alleged acts of discrimination against employees by their employers or by their fellow employees, discrimination law in the U.K. is broader and tighter—extending now, after development in recent years, to age discrimination, sexual orientation discrimination and religious discrimination, as well as sex and race discrimination.¹³ I can say as a former President of the Employment Appeal Tribunal (from 2002 to 2005), that much of discrimination law in the U.K. is counter-intuitive and, particularly where what is complained of is discrimination by fellow employees, difficult for an employer to control or moderate—and once there has been discrimination against an employee who remains in employment, the laws controlling the victimisation of such an employee mean that he or she must be thereafter treated with kid gloves, or he or she will complain of being victimised for having made a previous complaint.¹⁴

I can also say, as one who has been Chairman of what is effectively our trade union court (called the Central Arbitration Committee)¹⁵ for the last twelve years, that there is an active, and I believe rather sensible, process of facilitating and compelling recognition of trade unions for collective bargaining by employers, if sufficient support for the trade union is shown in a particular part of the employers' business. This is not popular with American companies or with American parent companies of English businesses. Turning from employment law, the second area is competition law.

II. COMPETITION LAW

In this regard European law, the provisions of the Treaty of Rome and judge-made law as enunciated by the European Court in

¹³ See generally Equality Act, 2010, c. 15 (U.K.).

¹⁴ The Employment Appeal Tribunal hears appeals from the Employment Tribunal, which deals with unfair dismissal, discrimination, and other employment related matters. See generally *Employment Appeal Tribunal*, MINISTRY OF JUSTICE <http://www.justice.gov.uk/tribunals/employment-appeals> (last visited Nov. 24 2012), for more information on this tribunal.

¹⁵ See generally CENTRAL ARBITRATION COMMITTEE, <http://www.cac.gov.uk/> (last visited Nov. 25, 2012), for more information on this organization.

Luxembourg, can impose further challenges for U.S. companies carrying on business in the U.K. (and other parts of Europe). In the United States you will be very familiar with anti-competition rules, including the very stringent provisions against cartels—I myself had a fascinating involvement thirty-five years ago in such a dispute between Rio Tinto Zinc Corporation Ltd. (RTZ) and Westinghouse, where Letters Rogatory were sought in the U.K. by Westinghouse to seek to examine the directors of RTZ, in support of their claim for triple damages against RTZ.¹⁶ All the directors appeared in the U.S. Embassy in London and took the Fifth Amendment, and a Federal Judge, Judge Merhige, travelled to London and upheld the privilege. This led to my flying over on Concorde and appearing before Judge Merhige in court in the Federal District Court in Richmond, Virginia, in answer to an application by the U.S. Attorney General to grant immunity from prosecution to my clients, the directors of RTZ, who had successfully claimed the Fifth Amendment, and opposing such application! The Judge came into court with the eagles and the flags, and “Oyez, Oyez”, and announced: “Good morning you guys, this morning we are sitting in London, England.” My opposition was inevitably unsuccessful, but we were able to return to the U.K. and complain successfully in the House of Lords that the U.S. Attorney General had interfered in the civil proceedings, causing the Letters Rogatory to be set aside!¹⁷

But the European rules are wider and very often counter-intuitive. The rules encouraging freedom of establishment and freedom of cross border competition can arguably lead to some very odd results. I recently had to judge a case in which an English company was challenging in the Administrative Court in London the legality under European law of a provision which prevented any taxis other than black taxis from using the London bus lanes, on the basis that European taxi drivers might be inhibited from coming to London to set up business—a piece of “Euro law” by which I was not persuaded.¹⁸

¹⁶ See generally Robert R. Merhige, Jr., *The Westinghouse Uranium Case: Problems Encountered in Seeking Foreign Discovery and Evidence*, 13 INT’L L. 19 (1979), for a discussion on this particular case.

¹⁷ See *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.* [1978] 1 All E.R. 434, [1978] 2 W.L.R. 81 (H.L. 1977).

¹⁸ See *Eventech Ltd. v. Parking Adjudicator* [2012] EWHC 1903 (Admin).

III. BRIBERY

Then there are some problems of carrying on business subject to U.K. law which can perhaps be described as your fault rather than ours. We have recently inherited from the USA the very stringent provisions of your Corrupt Practices legislation.¹⁹ The recent Bribery Act has left U.K. businesses at a loss to know how to carry on business by offering commissions and discounts, in accordance with practices that they have carried on for decades.²⁰

However, and it is a very big however, none of these problems have anything whatever to do with the Human Rights Act. So what am I to do? It reminds me of the would-be huntsman and archer who went for a walk in the forest, and was astonished each time he came into a clearing to find on a tree a target with an arrow absolutely slap bang in the middle of the bulls-eye, and as he walked on and found more such trees, on each occasion there was an arrow slap bang in the bulls-eye. He eventually found the champion archer who had been responsible for leaving this evidence of egregious performance, putting his bow and arrows away, and he asked him how on earth he had developed a skill to be so accurate. The archer replied that after a time it had become very easy, but what was necessary was to fire the arrow first and draw the target round afterwards!

So I shall create my own bulls-eye, and I want to address three topics. First, the possible use that American companies can make of the Human Rights Act. Second, insofar as there is—and in my view ought to be—some consideration in the United States as to implementing or incorporating something similar to the European Convention of Human Rights, a brief addressing of recent developments in the U.K., in which there has been consideration of a retreat from, or at any rate a watering down of, the provisions of the Human Rights Act. Third, the impact for some trials in the U.K.—not commercial trials—of the clash between the provisions of Article 6 and Article 8 of the ECHR and the needs of international security. I am particularly interested in this by virtue of yet another of my

¹⁹ See Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (2006).

²⁰ See Bribery Act, 2010, c. 23 (U.K.).

judicial jobs, namely as Vice President of the Investigatory Powers Tribunal [IPT].²¹

IV. THE USE OF THE HUMAN RIGHTS ACT BY U.S. COMPANIES AS A TOOL OR WEAPON

The Human Rights Act can be and is regularly used in the U.K. courts, ordinarily the Administrative Court, against the Government and other similar governmental, administrative, and regulatory bodies, in bringing and resolving public law claims. This is in addition to the traditional challenges on the basis of abuse of power or unreasonable executive or administrative decision or by reference to the well-established test of unreasonableness, known as “Wednesbury unreasonableness”, as a result of the decision of the Court of Appeal in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation Ltd*.²²

This basis of challenge by using the ECHR is of course available not simply to U.K. nationals or companies but to foreign companies. A party challenging such a decision must show that it is directly affected by the decision, but that is not a difficult task.²³ Provided that the claim can be brought within the ambit of one of the Articles of the Convention, such as Article 8, Article 10, or Article 11, those Articles can then be supplemented by the provisions of Article 14, which has been described as providing that “every time a public body makes a distinction between individuals or categories of individuals (or companies), or chooses not to make one, it must have, and be able to articulate good reasons.”²⁴ U.S. companies may thus be in a position to challenge such decisions in the Administrative Court.

²¹ See generally INVESTIGATORY POWERS TRIBUNAL, <http://www.ipt-uk.com/default.asp> (last visited Nov. 26, 2012), for more information on this tribunal.

²² *Assoc. Provincial Picture House v. Wednesbury Corp. Ltd.*, [1948] 1 KB 223.

²³ *See Klass v. Germany*, 2 Eur. H. R. Rep. 214 (1978).

²⁴ *Carson v. U.K.* [2010] 51 Eur. H. R. Rep. 13 (H.L.) [15–17].

V. THE RETHINK

There has been a good deal of discomfort in the U.K. press, and in particular in the U.K. Conservative Party element of the Government coalition, as to the extent of the powers of the European Court of Human Rights and its effect on national decisions, including decisions of national parliaments. Indeed, the very recently appointed Secretary of State for Justice, the first non-lawyer to be so appointed, appears to have been selected as a Conservative politician particularly to strengthen the U.K.'s position in opposition to the present ambit and effect of the ECHR. Most recently this has been illustrated by a consistent parliamentary decision in the U.K. that prisoners should be not be entitled to the vote, a conclusion which has been criticised on Human Rights grounds by the European Court of Human Rights in two recent actions brought by U.K. prisoners against the Government.²⁵ The debate has been described by Baroness Hale in a Gray's Inn lecture as follows:

The Strasbourg decision in *Hirst* [was] that a blanket ban on all prisoners serving a sentence of imprisonment breached article 3 of the First Protocol. The government, apparently on legal advice, [then] proposed a ban on all prisoners serving a sentence of four years' imprisonment or more. This proved unacceptable to their own back-benchers. But a compromise proposal of one year or more is also proving unacceptable. The whole debate raises a fundamental question about the purpose and scope of human rights instruments. Is it the right of the democratically elected Parliament to decide who their electorate should be? Or is the whole point of the Convention to protect certain values independently of the will of the majority? Does democracy value each person equally even if the majority does not? And, in any event, who represents the majority? To what extent should any court be sensitive to the strongly held views of the current majority?²⁶

²⁵ *Hirst v. U.K.* 42 Eur. H. R. Rep. 41 (2006).

²⁶ Baroness Hale of Richmond, Justice of the Supreme Court of the U.K., Barnard's Inn Lecture sponsored by the Honourable Society of Gray's

There are those who would wish to extricate the U.K. from the ECHR. In my judgment even if this were possible it would be most undesirable, not least because in most respects the ECHR only reflects traditions which are well established in the U.K. traditions of fairness and natural justice.

But there are others who simply wish to put a brake on the influence of the European Court. This is a movement which is gathering support not only in the U.K. There has been a number of recent high level conferences between the members of the Council of Europe, and most recently in April of this year a “High Level Conference on the Future of the European of Court Human Rights”, at the initiative of the United Kingdom as chairman of the Committee of Ministers of the Council of Europe, which resulted this year in the so-called Brighton Declaration.²⁷ While emphasising the importance of the European Court of Human Rights as a “cornerstone of the system for protecting the rights and freedoms set forth in the Convention” and as having made an “extraordinary contribution to the protection of human rights in Europe for over 50 years” certain recommendations are made by the Brighton Declaration, aimed at increasing the reputation and acceptability of decisions of the European Court of Human Rights.²⁸

It has been accepted, since a previous such High Level Conference held at Interlaken in 2010, that the European Court of Human Rights is flooded with cases, leading to a massive backlog, and that steps had to be taken to address such backlog: recommendations are made to shorten the time limits in which applications can be brought and facilitating the striking out, at an early stage, of hopeless applications.

More significantly there is to be greater emphasis upon the fact that the national states enjoy “a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged.”²⁹ Paragraph 11 of the Brighton Declaration, published as a result of the 2012 Conference, records that “National authorities are in principle

Inn: Beanstalk or Living Instrument? How tall can the European Convention on Human Rights grow? (June 16, 2011).

²⁷ Brighton Declaration, Council of Europe, (April 20, 2012), *available at* <http://hub.coe.int/20120419-brighton-declaration>.

²⁸ *Id.* ¶ 2.

²⁹ *Id.* ¶ 11.

better placed than an International Court to evaluate local needs and conditions.”³⁰ This is particularly important, and the emphasis upon this margin of appreciation is the more significant, because the President of the ECHR, as it happens an English High Court Judge (Sir Nicolas Bratza), had in his speech prior to the Brighton Declaration sought to play down this margin of appreciation as “a variable notion which is not susceptible of precise definition.”³¹ For the purposes of our consideration, it is worth emphasising that the European Convention of Human Rights has transformed the European picture from the disastrous scenario of lack of human rights in most European countries between 1935 and 1945 and in many until 1995, but that its ambit is now being constructively reconsidered.

VI. SECRET TRIALS

I turn finally to the third of my revamped topics. Those of you who attended just earlier this afternoon at the Walker Institute will have heard my son-in-law, a senior lawyer at the American Civil Liberties Union, giving an exposition of the present state of things with regard to Guantanamo and civil claims in U.S. courts against the U.S. Government for infringement of human rights. As I understand it, those who consider that their civil rights have been infringed by the United States Government are simply unable to bring a civil suit if the United States Government concludes that disclosure would be harmful to U.S. security.

That is not the way such matters have been approached in the U.K., indeed very much the reverse. In a recent case, a number of former Guantanamo detainees sued the United Kingdom for participating in their deprivation of human rights, not by taking any active steps but by allegedly co-operating with the United States to do so, and the claimants sought discovery within those U.K. proceedings of communications between the United States and the U.K., which would plainly have been very sensitive.

³⁰ *Id.*

³¹ Sir Nicolas Bratza, former President Eur. Ct. H.R., remarks at the High Level Conference on the Future of the European Court of Human Rights (April 19, 2012).

Whereas in a criminal case in the U.K., there is always the option for the prosecution to obtain permission from the court not to bring forward sensitive information and disclose it to the defense if they agree not to rely on it before the jury, there is no such option in a civil case for the Government as a defendant in the action to withhold discovery from the claimants, since the ordinary principles of discovery against both parties apply. Faced with the prospect of having to make discovery of such sensitive documentation, the U.K. government caved in, and settled the action, after the House of Lords concluded that a civil trial which did not involve disclosure of documents to both parties would be in breach of the provisions of Article 6 of the ECHR providing for a fair trial and of natural justice. The U.K. Government, rather than give such discovery, paid a substantial sum to the claimants to settle the proceedings.³² The result now is that legislation is being brought forward to provide that where civil proceedings involve the disclosure of sensitive security information, special “closed material procedures” can be introduced. This is causing a great deal of controversy. I have a particular interest in this as Vice President of the IPT, which is a tribunal to which people can complain if they feel they have been bugged or followed or subjected to surveillance or otherwise interfered with, by among others, the Security Services. We have our own procedures. Our tribunal can deal with claims against the Security Services by a procedure which permits the tribunal to look at the sensitive documents, but not necessary to disclose it to the complaining party. As and when legal issues arise we can make a decision, after hearing argument by both sides, on the basis of hypothetical facts, i.e. assuming facts in the claimant’s favour. This is certainly an area in which the ECHR is equipped to hold the balance between freedom of speech and privacy and protection of the public.

CONCLUSION

As for my other public law roles, probably my most enjoyable (and certainly my most internationally publicised) role—again, nothing to do with the ECHR—was adjudicating on whether copies of former Vice President Gore’s film on the dangers of global warming could be supplied free by the U.K. government to all state

³² *Compensation to Guantanamo Detainees ‘was necessary’*, BBC (Nov. 16, 2010), www.bbc.co.uk/news/uk-11769509.

schools.³³ I had to hear argument as to whether the content of the film amounted to the provision of information or to “the promotion of partisan political views” contrary to the Education Acts.³⁴ I had to hear argument as to whether polar bears were or were not losing their footing as the ice melted. As it happens I very much enjoyed watching the film, and especially the opening in which Mr. Gore introduced himself as the man who used to be the next President of the United States. In my case I can only say that I am the next ex-Treasurer of Gray’s Inn.

³³ *Dimmock v. Sec. of State for Educ. and Skills*, [2007] EWHC (Admin) 2288 (Eng.).

³⁴ Education Act, 1996, c. 56, § 406 (Eng.).