The Changing Basis of Human Rights Law

Professor Conor Gearty

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When I applied for the post of Director of the *Centre for the Study of Human Rights* I was asked a question right at the start of my interview by a distinguished Oxford professor who was acting as external adviser. Given that I was an extreme opponent of Human Rights law, why I had I thought I would be suitable for the post of Director of the Centre? My answer was that it was a centre for the *study* of Human Rights law, not a centre for its propagation, or the defence of Human Rights, but also that I was a great proponent of Human Rights as an idea. Who would not be? It is rather *certain means* towards the achievement of Human Rights that I think doubtful, and what I had in mind, specifically, were Human Rights laws.

I have come on an intellectual journey. I was educated in Dublin to believe that democracy was defined by the power of a supreme court to overturn elected representatives' judgments of right and wrong. The Irish, of course, have a Supreme Court and I was taught in an Irish law department. When a democracy is so arranged that elected representatives must depend upon permission of the judiciary to proceed with their policies, such a democracy tends to prioritise lawyers. It is, therefore, not at all surprising that lawyers tend to favour such types of democracy and to call them true democracies.

I then arrived in England and began to teach in Cambridge. I taught what most lawyers taught at the time, which was that there was something terribly wrong with the English system because it lacked a constitution which could be looked up anywhere. The effect of this was that there was no clause in the non-existing constitution which said that the judges rule the country. We all thought that to be a terrible thing, and I taught that for some time. In particular during the period in office of Margaret Thatcher we thought there was tremendous executive excess and exploitation of the unwritten nature of the constitution. We were terribly excited by the Public Order Act of 1986 and, in those days, the proposition that the police should be allowed to detain without charge for *four days* struck us as monstrous. We marched against Leon Brittan whom we thought authoritarian by instinct. We were easily alarmed in those days, and one of my first and most embarrassing articles had the title: 'Is Britain Becoming a Police State?'. I often observe to my colleagues on the civil libertarian left that the UK is always about to become a police state but never quite becomes one. With a colleague, Keith Ewing, I wrote a book called *Freedom Under Thatcher* describing how dreadful life was. Such

articles and books might be reprocessed today by simply changing the clauses and the Bills on the computer screen.

During the 1980s, however, I began to notice that the popular liberal solution, namely that all we needed was a written constitution with a decent constitutional court, setting up a few white men well-educated in law to protect the country from the erosion of liberty brought in by Mrs. Thatcher and her crowd, was no solution at all. It was, in fact, a cure worse than the disease. Keith Ewing and I became sceptical because we were reading the cases. All the alleged heroic defenders of civil liberties seemed to us to be colluding in the oppression we reported in our inflammatory, civil-libertarian, language of the day. For example, during the miners strike the courts did not have to uphold police restrictions on lawful pickets (as we called them), or to uphold the imposition of bail conditions preventing people demonstrating in the vicinity of collieries, but uphold them they did. During the 'Spycatcher' saga, which so marked the end of the 1980s, it was the courts which provided the injunctions, and all the executive had to do was to ask for them.

Most extraordinary of all was something which came home in a particular way to me as an Irishman in Britain at the time, namely miscarriage of justice in cases like those of the 'Birmingham Six'. That demonstrated to us the unreliability of the judicial branch as a guarantor of freedom and of civil liberties. My particular change of heart came when I read a judgement of Lord Lane purporting to show that the Birmingham Six were guilty beyond reasonable doubt and that their convictions were not unsafe. The effect of the long judgment, published in full only in Ireland and not over here, was to convince me of exactly the opposite.

By the end of the 1980s I had developed a strong antagonism to the whole concept of human rights law because it seemed to me another way of saying that general principles overseen by judges determine what is right and wrong in the political arena. People say they want it because they think it will protect their civil liberties when the reality is that judges will in fact care little about civil liberties. It will, in fact, come with many other principles inimical to a properly functioning democratic system – for example, protections of property rights, protections of certain types of educational rights, guarantees of due process, and so on and so forth – which the judges will support quite strongly.

We argued, first of all, that judges will not in fact protect civil liberties and, secondly, that they will protect quite a lot of things with which democrats should be allowed to interfere. In respect of the latter argument, we pointed out that the Duke of Westminster had been taking to the European Court of Human Rights in Strasbourg cases relating to his property rights insofar as they were affected by leasehold enfranchisement law. He lost. We would now point, for example, to a case decided at the end of last year which held that squatters' rights that flow out of exclusive possession for a period of five years are

an infringement of the right to property of a corporate entity that owns the property and has not noticed the said squatters. We would have pointed to that as the kind of judicial activism which comes from human rights laws, and the kind of judicial activism we do not want. Another piece of potential law over which we made a great fuss was a legal opinion for the *Independent Schools Information Service* by two very distinguished liberal barristers, with a forward by the late Lord Scarman, that even to remove the VAT exemption on independent schools would be to infringe the rights of those attending, or of the parents of those attending, such schools. We were taking a radical leftist position along the lines that this was a trick, selling itself as a guarantee of civil liberties and political freedom. It would not be that, but rather a way of protecting privilege.

I had a very strong point of view about these matters, primarily on empirical grounds. It was based upon observations about sets of cases, and upon deductions from the record that English judges, in particular, had provided, pointing to outcomes which I suggested would occur.

Having, as it were, developed a critique of human rights law from that point of view, I then generalised. When thinking about democracy it seemed – and still seems – to me quite extraordinary that anybody should define it in a way that permits unelected and unrepresentative professionals, men largely, to determine whether or not decisions by the elected legislative branch are correct. To make that argument, we need to recognise that the whole concept of human rights is, in fact, begging a question. Human rights are not clear dictates about specific entitlements we all have, because they cannot exist in the real world. A guarantee of freedom of expression has to be subject to some restrictions or I would not now be able to communicate. Consider the famous remark that no one should be allowed to shout ‘Fire’ in a cinema unless there is one. There must be some constraints on freedom of expression, and likewise on freedom of assembly and very many other rights. The idea of human rights sounds unequivocal and clear, but when these are transformed into law they must necessarily be connected to the real world of practice which requires them, in their applications, to be subject to various exceptions. In the European Convention on Human Rights the exceptions are regarded as almost necessary in a democratic society.

So what you have is judges determining what is necessary in a democratic society. Even rights that are apparently unequivocal depend upon judges for their interpretation. The most outstanding example it the right to life, where there are huge debates about what life actually means. Having, as it were, laid to one side the record and turned to the argument from principle, what you see is a democratic system badly affected by the judicial oversight surrounding the democratic framework. This deprives legislators of true responsibility for decisions by introducing into politics an unfortunate legalistic dimension, and by politicising a legal process which could well do without it.

All of these issues are in play with regard to the question of abortion. A very interesting contrast exists between those countries with Bills of Rights which stand above the legislature and countries which have no such supra-document imposing its sense of right and wrong on the legislative body. In respect of the former, the obvious outstanding example is the United States of America where not only is the decision as to whether there is to be a right to terminate a pregnancy determined by the judicial branch of unelected judges in the Supreme Court – by a vote of seven to two in the case of Roe v Wade – but also the same body laying down term limits and behaving really as super legislators. I did a radio programme for the BBC some years ago and was able to talk to Mr. Justice Blackman, the judge who in 1973 wrote the opinion in Roe v Wade, finding the implied right to terminate a pregnancy in the margins, or the penumbra, of the United States Constitution. He talked about the way he had laboured on it, visited the Mayo clinic, and studied the matter. He was behaving like a super-legislator. I had a couple of observations to make. First, I asked him where he found this right to terminate a pregnancy in the Constitution. He said it was in the penumbra of the Constitution, although nowhere explicitly stated. Then I asked him if these penumbra were only available to be seen by judges, at which point he turned to the producer and said I was getting political on him. I am not trying to make a cheap anti-abortion point here. He was a terribly nice man. I have also talked with Lewis Powell, a very distinguished judge who concurred with Blackman in the same case. I asked him why he decided as he did. He told me about his experiences as chief lawyer in a law firm before he had become a judge. There had been a tragic event in which a bell-boy, who had acted as his chief clerk, had killed his girlfriend trying to induce an abortion in a state where it was banned. That had stuck in Powell's mind and had led to his concurrence in the judgement. This is an odd way to run a democracy, and to use the language of rights in this way is inflammatory. Talking to the National Right to Life people at the time, specifically a man called Bork Balsh, I think, who ran the New York side of things, I was told that what really inflamed Pro-Lifers was that the language of rights, which they believed their own, had been taken away, completely confiscated. The foetus was held to have no rights, and the rights were relocated in the mother. Rights language had a tremendously absolutist and polarising effect on the debate.

I use the abortion example because it is the best one, but there are many similar examples on offer. In my view, the effect on the American constitutional system has been nothing short of catastrophic. It has completely distorted the role of the United States Supreme Court. Initially some people sought an amendment to the Constitution which would have guaranteed a right to life for the unborn, but it soon became apparent that this was going to be a non-starter. Almost no such amendments were likely to be successful. Then they sought judges who might locate in the penumbra of the Constitution a right to life for the unborn, and they could not find them. Finally, Ed Mees, in the Ronald Reagan era, hit upon the ruse of 'original intent', a new approach to interpretation of the American Constitution which focuses upon the original intent of the founding fathers. The argument was that the original intent of the founding fathers did

not include a commitment to a right to termination of pregnancy. That has now become the litmus test for selections to the judiciary.

Men and women in the American Supreme Court whose job it is to oversee the American Constitution found themselves being cross-examined – one prospective member is undergoing interrogation right now – on their position in relation to Roe v Wade. That state of affairs is, in my view, very bad for law, because whilst it is always a bit of a joke to claim that law stands outside politics, it is nonetheless a claim that has served us well. The doctrine of the separation of powers has to some extent protected us from the ill-effects of executive and legislative power, and to have law reduced in that way to a political phenomenon – to an offshoot of the political – is to damage the system of law as a whole in the United States of America.

It has, moreover, done worse than that, because it has also freed up political space for irresponsible political actions. I remember talking to a woman who ran the National Organisation of Women in New York, a body campaigning for extension of rights to abortion across America state by state, which is what such people were seeking pre-Roe v Wade – namely a slow development of the liberal pro-choice perspective. She told me that when the Roe v Wade decision was handed down, the National Organisation of Women put a note on its door saying, 'We have won, gone to lunch'. They thought law would do their work for them, so they withdrew from politics. Many strongly liberal, strongly feminist, elements within the United States, who believed in a perspective which would permit abortion in certain set of ways gave up. What happened was that legislators and governors right across the states passed pro-life laws because they knew the ACLU would go to the Supreme Court to stop them. This became a reckless legislative act without consequences. That is very bad for politics. The political system has lost out, too.

I said I would offer a contrast. It is with the United Kingdom where, until recently, there was no rights talk interfering. There is what is essentially a crime, that of damaging the unborn. Then there have come about exceptions to that crime which are discussed in Parliament, initially in the Abortion Act of 1967, and thereafter amendments relating to time-limits and so on. These make it possible for the criminal law not to kick-in in certain situations. It is not actually claiming right and wrong – the moral high-ground – but quite tentative in its interpretation, and constantly capable of being further argued over. The legislators involved in making decisions answer directly to their own consciences for the consequences of their actions, and their actions are real: if legislation is enacted, abortions will, or will not, occur that would otherwise have occurred, or not occurred, as the case may be. There is a reality to the debate. I remember debating this, and on my side was John Biffen, then Leader of the House of Commons. He said that he received more letters in his post-bag about abortion than about any other issue, and that he would have it no other way. He said he was an elected representative and that one of his jobs was to bring his judgement to bear on such a matter.

Now it seems to me that of these two paradigms, the latter is preferable. You might not always win, but you can campaign to fight another day, and the campaign is fought where it belongs, on the door step and in the legislative branch of government, rather than, as happens in the United State, by mustering massive protests to march past the window of a judge in the hope that he or her can hear the shouts.

This, then, became part of the critique of human rights I was mustering, namely that the democratic system should not surrender power to the judicial branch even if the judicial branch appears to have the kind of members with whom you can live. I still hold very strongly that it ought not to matter if the members of the judiciary, the role of which is enforcement of democratically enacted law, are or are not representative of our community. If the judicial branch is in the right place, it cannot do too much damage, and if it does any, that can be overturned by the legislature. If judges are given the amazing power which rights talk grants them, you *do* have to worry about who these people are. An additional point – a type of socialist point – might be made here about the tiny pool from which the judges of England and Wales are drawn.

Here then are the three objections I had developed: the empirical, the democratic and the, so to speak, sub-socialist. How on earth was I to answer the Oxford professor interviewing me for the job? It is necessary, I believe, to distinguish human rights as an *idea* from human rights *in law*, and to try to work out a proper relationship between the two. I am going to suggest, as a second strand to my argument here, that the idea of human rights is a very strong, emancipatory, radical notion, that it is potent, progressive and liberal. If you are a progressive liberal, as I am, then it is to be applauded. The problem with transforming it into law is that it then encounters all of the difficulties I have just mentioned.

Every political idea wants, of course, to be transformed into law because law is evidence of success, law shows seriousness, law brings the police and the courts and the government onto your side. A political idea achieves adulthood when turned into law. There is here a kind of paradox. Human rights work effectively on the margins, and on behalf of the margins. What happens when success is achieved with transformation into law? Does that very success destroy the mission as such?

Why do I say that human rights are emancipatory, reformist, and so on? At the end of last year, I gave the Hamlyn Lectures, and the first concerned what human right were all about. Essentially, I said – and I *do* believe – that human rights as an idea is all about compassion. It is about an *active* sense of compassion. Compassion is not only about feeling for another person, but also about acting to help that person. It is not just pity and philanthropy, but it is rather about making the world a better place through helping individuals to flourish. It has negative and positive aspects. The negative aspect is that it involves an absolute prohibition on cruelty. It is clear that human rights as an idea

demands that you do not do certain things: you do not torture, you do not engage in inhuman and degrading treatment of others, you do not enslave, you do not impose forced labour, you do not unjustifiably discriminate on the grounds of some extraneous detail, and you do not engage in genocide or ethnic cleansing. In human rights there are a lot of 'don'ts' rooted in the demand that we show compassion for our fellow man without requiring that fellow man to be a member of our family, of our community, or of our nation. The universality of human rights is derived from the requirement that we do not restrict compassion to our immediate circle. But there is more to it than that. There is much 'we can do better' as well as things we must not do, and that is reflected in the *Universal Declaration of Human Rights*, and in the international. It is about ensuring decent living standards, about everyone having food and being able to work, about human flourishing. There is a large part of the human rights story which is about flourishing, succeeding, and making the best of things.

Now those two sides of the human rights story are perhaps not in themselves exceptional. What makes the story particular, and constitutes its unique selling point, is its universality. In practice that means we do not spend a lot of time trying to stop those who are already powerful from being treated cruelly, or to ensure that they flourish, because in reality such people are normally able to flourish very well on their own and they usually have plenty of assistance to make sure that they are not treated cruelly. The universality of human rights actually becomes a guarantee representing the disadvantaged, a guarantee of provision for those we do not usually see. I have a stated somewhere else that human rights is a *visibility* project, that it is about getting us to see people like asylum seekers and the homeless. A famous pragmatist philosopher, Richard Rorty, says that the oppressed have no language. I disagree with him. The oppressed *have* a language and it is the language of human rights. It is the job of those who believe in human rights both to speak for them and to enable them to speak for themselves. So it is a very egalitarian movement, a very progressive movement rooted in respect for human dignity and in equality of esteem. These are quite radical ideas and they drive the human rights agenda.

You will have noticed that I have not spent much time talking about specific human rights, about what are they and where they come from. What the rights of the marginal are is actually determined by how the times demand that we articulate their needs. I am not wedded to any *foundational* concept of human rights which would specify what they are, what must be defended, and for what we should push. It seems to me quite consistent with this human rights story that there is, for example, quite a lively debate at the moment about trying to ensure rights for people with disabilities. I should be equally open to the rights of the old. It is a moving subject. People can use the language of rights to say, 'Look at me, here I am, I matter'.

Now for the law! It seems to me that the movement I have described fits very well with democracy because democracy is essentially human rights in action. You could not

have a more human rights approach to government than to say that everybody, regardless of intelligence, good-looks, etc., should be entitled to vote. It is a most extraordinary human rights statement and, insofar as this human rights idea is manifest in specific legislation, then I think it is a tremendous way of realising its aims.

Let me offer some examples. To flourish we need an education. The laws that produced compulsory primary-school education for English people, following the model introduced in Ireland in 1839, are, in my view, an instance of human rights law, as is the later Education Act 1944. Again, the notion that you go to doctors and get treatment without being asked to pay, which still dumbfounds many of my foreign students in the United Kingdom, is a classic piece of human rights legislation. Another example is the Housing of Homeless Persons Act. Parliament decided in 1977 that it needed to ensure that homeless people actually had a right to shelter.

For me that is still is the proper human rights model, one wherein the political community argues about how best to protect those who are on the margins and bring them in, and then seeks to realise that in legislation. There are, however, defects in the model, most obviously the problem situation in which a majority does not care about a minority. I have rather assumed that a properly functioning democratic system will provide the kind of progressive laws that I like, and it is in fact the case that in this country we have been rather lucky with our quasi-socialist/quasi-Methodist Labour Party which has been inclined to produce quite a lot of progressive legislation along the line – and has generally, if we leave aside recent events, not wished to invade the countries of others! Another potential problem: what happens if we get appalling and egregious breaches of human rights which are democratically mandated? Fortunately, we have not yet had to experience that here, but it has happened in other countries. What *has* happened is that, since the end of the Cold War and a relative triumph for capitalism and relative quiescence for socialism, quite a lot of the incentives – fear of communism, fear of socialism, fear of alternative models more radical than those we have – for countries like the United Kingdom to conceive the social-democratic goals I like have disappeared. There has been a more confident capitalistic approach which has not been unnerved by the prospect of taking back some of social concessions given when there were genuine anxieties about alternative socialist models. The socialists, meanwhile, have no real language with which to fight back. Socialism has gone into a sort of eclipse. In this situation general human rights talk and human rights law structured around general human rights positions have become a very important way of responding to globalisation and capitalism. These approaches are shared by many people who might previously have chosen other routes. Human rights, general human rights, have become very attractive to a wide range of people. Liberals have always believed in them. Socialists, much more than in the past, and trades unionists, who feel they cannot any more obtain social and economic rights through the political system, are pleased to see in judicially enforceable economic and social rights a short-cut to achieving their goals via the legal

system. Moderate conservatives are also interested. Indeed the Conservative party has just recently set up a working party under Liam Fox to look at human rights.

General human rights laws, then, have really taken off. Not so long ago the United States was quite unusual in having a Supreme Court with a judicial power to strike down legislation. Now almost every country has one. After the World War II it was put in place in most of the defeated Axis powers. Power was accorded the judicial branch to enforce, human, civil and constitutional rights. That then became the pattern for a lot of former colonies after independence. More recently, Canada has adopted a Charter of Rights, New Zealand has had a Bill of Rights since 1981. Most of the post-Soviet states that have embraced freedom since the end of the Cold War in 1989 have joined the Council of Europe which requires a commitment to the European Convention on Human Rights, and that commitment usually takes the form of a judicial power to strike down legislation. Even the Irish have recently seen a Human Rights Bill enacted into law.

It still worries me that the emancipatory, radical potential of the language is destroyed by its translation into legal documents which deprive the language of a capacity for growth, and repose development of the language in a judicial branch ill-fitted to reflect the radicalism of the age. The judiciary is not, let us face it, famous for giving voice to the voiceless! If it becomes necessary to rely on lawyers there cannot be much political energy left in the culture, for they are usually a generation behind everybody else.

Now this takes me back, by way of conclusion, to the United Kingdom, which is where I came in. I identified my anxieties about human rights law here. They were the empirical record, the nature of the democracy, and the unrepresentative nature of the judicial branch. After a great deal of agitation, and after an eventual decision by Mr. Blair that embracing quite liberal rather than socialist ideas like human rights was part of what progressive New Labour was all about, we got the Human Rights Act 1998. It almost never came into force. It came into force only on 2 October 2000 because the executive began to realise what it had done and became quite anxious. It incorporates into British law the terms of the European Convention on Human Rights. Those rights are broadly speaking the non-cruelty rights – prohibitions on torture, slavery, a right to life – and civil-liberty type rights – freedom of expression, of assembly, of association –, with some human-flourishing ones – education, property, etc. – that might be called social and economic.

The document is the kind of thing of which I said paradigmatically I disapproved. I was very strongly opposed to it, as you can imagine from what I said earlier on. In the late 1980s, the ‘strong view’ was that we should have a Bill of Rights with a judicial capacity to strike down legislation. Labour drew the line at that. That represents a kind of residual commitment to Parliamentary Sovereignty which lawyers think outrageous, but which reflects ancient suspicion of the judicial branch. The Human Rights Act we actually have, and this is fundamental to my clear support for the measure, does not empower

judges to strike down legislation. The judges *can* interpret legislation reasonably robustly to ensure compatibility with the Human Rights Act, and ensure that the executive acts compatibly with it, but it cannot strike down legislation, so that the power of Parliament both to repeal the Act itself, and more specifically to contradict it, remains. That is, even though I am a fan of human rights, an excellent result.

It was quite right that David Davies should have been able to argue, in his manifesto speech seeking the leadership of the Conservative Party, that he would repeal the Human Rights Act, because that is part and parcel of democracy. Furthermore, if Parliament passes a law which is specifically contradictory to the Human Rights Act, or does so even in a merely implicit manner, it is absolutely right that it should be allowed to do so. We have, therefore, kept the language of rights in the political domain. Parliament may take a different view of what human rights involves than do the courts. This closes down the division between law and politics to which I earlier referred.

There have been eleven or twelve 'declarations of incompatibility', which are what the courts are allowed make when they do not like an Act of Parliament but can do nothing about it. The most famous example was the *Belmarsh Detention Case* decided by the House of Lords on 16 December 2004. The courts said unequivocally that there was no justification for locking up non-national suspected terrorists and not locking up national suspected terrorists, seeing it as discrimination which infringes the Convention. However, the House could not, and did not, strike the law in question down, but instead referred it back to the executive and legislature as per the terms of the Human Rights Act. This was absolutely right. The legislative and executive branches then had to decide whether to heed the judgement, and change the law accordingly, or to ignore it. There have been other such examples on life-term prisoners, on same-sex or on transsexuals, and so on.

I wish to make another two points, and with them I shall end. The empirical record is now much better from the civil-libertarian point of view than it used to be. There has been a significant strengthening of the Appellate bench of the House of Lords in the post-Cold War period in terms of its readiness to stand up to the executive. Secondly, the bench has also become marginally more representative: Brenda Hale is finally on the bench as the first woman Law Lord. We may, at some stage, have a member of an ethnic minority. South Africans, Irishmen, and Scotsmen are well-represented on that bench where there are only three Englishmen to be found! I end, therefore, on a positive note as a slight fan of United Kingdom human rights law.