

HUMAN RIGHTS AND CITIZENSHIP*

*The Rt Hon Sir John Laws, Lord Justice of Appeal,
England and Wales.*

I propose to use my paper today to argue for a position which some will think self-evident. Others may think there is some truth in it, but regard it with a good deal of circumspection. What I have to say will be unsatisfactory, because it will leave unanswered questions, and for that I apologise in advance. The argument is that you cannot have a stable and vigorous jurisprudence of individual rights, that is, of rights enjoyed by the citizen against the State, without an equally vigorous jurisprudence of individual duties, that is, of duties owed by the citizen to the State. I have previously¹ been at pains to argue that rights are a poor basis for inter-personal morals, whose foundation is rather the concept of duty; and that rights should primarily be seen as a *legal* rather than a *moral* construct. In what I have to say here, I am not going to revisit that territory, which belongs in the field of moral philosophy more obviously than anywhere else. My theme here, rather, is to see where in terms of rights our law should be going. First I must establish some background.

After the vile tyrannies of the mid 20th century, constitutionalists, treaty-makers and others had to find a language in which to express the idealism of “never-again”: the determination of civilized nations to repudiate altogether the malign usurpation of government which Hitler and Stalin had perpetrated. The language they found was the language of rights: the European Convention on Human Rights, the International Covenant, the Refugee Convention, and other texts. And the language of rights has permeated the national legal systems and constitutions of such civilized nations themselves. The incorporation of the Convention is the present apex of this process in the law of the United Kingdom. I do not of course suggest that the establishment of rights in our constitutional firmament has been no more than a matter of language: obviously not. But the word is often father of the act. We have become accustomed to speaking of constitutional positions in terms of rights, and our concrete expectations have been adjusted accordingly. In particular there is, I think, a perception, not always recognized, but still very powerfully present, that the relation between people and State is that the people have rights against the State, and the State has duties towards the people, and that is pretty well the whole of it.

I think this perception is wrong and dangerous. It is wrong because it implies a view of the individual as owing duties at most upon an individual level – to his wife and his children and his friends – and not to the community at large. It is dangerous because it leads in the end to the people becoming the mob, more and more demanding their fill of rights; and eventually their very sense of duty to other individuals will struggle to

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¹ ‘Beyond Rights’ (2003) *OJLS* 265.

survive their greed against the State. It leads also to governments becoming more and more desperate and cynical, more and more inclined to despise the people they are supposed to serve. Here is Machiavelli²:

“. . . a prudent ruler cannot, and should not, honour his word when it places him at a disadvantage and when the reasons for which he made his promise no longer exist. If all men were good, this precept would not be good; but because men are wretched creatures who would not keep their word to you, you need not keep your word to them.”

Compare Pericles' funeral speech for the Athenian dead early in the Peloponnesian War, as Thucydides fashioned it³:

“Our public men have, besides politics, their private affairs to attend to, and our ordinary citizens, though occupied with the pursuits of industry, are still fair judges of public matters. Unlike any other nation, we regard the man who takes no part in these duties not as unambitious but as useless. We are able to ponder and judge affairs accurately, and instead of looking on discussion as a stumbling-block in the way of action, we think it an indispensable preliminary to any wise action at all.”

A constitution whose central perception of the relation between people and State is that the people have rights against the State, and the State has duties towards the people, and that is pretty well the whole of it, is unstable, weak, and liable to be corrupted, as the rulers or governors come to share in the urgent selfishness of the governed.

In my opinion we are at an immature stage in the development of a free and liberal constitution. We will only reach a kind of maturity when we come to recognize – as our law must recognize – that the citizen owes duties to the State no less than the State to the citizen. Not merely duties of good behaviour to his neighbour; duties to the community at large, represented, not by the government, but by the State. The distinction here between government and State is critical to my position, and I will return to it shortly. First, however, let me introduce Sir Kenneth Dover, one of our finest classical scholars of the last fifty years or so⁴, who said this:

“As states grow larger and their structure and way of life increase in complexity at a rate faster than we can adjust to, individuals, associations and areas resist integration even to the point of treating ‘I have a right to. . .’ as a synonym of ‘I would like. . .’. The Greek did not regard himself as having more rights at any given time than the laws of the city into which he was born gave him at that time; these rights could be reduced, for the community was sovereign, and no rights were inalienable. The idea that parents have a right to educate (or fail to educate) their children in whatever way they please, or

² *The Prince* (1961, tr George Bull), pp. 99-100.

³ Thucydides, *Peloponnesian War*, 2.40. I took this translation (which I have adapted) from the excellent *Perseus* website <<http://www.perseus.tufts.edu/Texts.html>>. But note that the website does not identify the translator.

⁴ *Greek Popular Morality* (1974) pp 157-158.

that the individual has a right to take drugs which may adversely affect his health and so diminish his usefulness, or a right to take up the time of doctors and nurses in consequence of not wearing a seat-belt, would have seemed to a Greek too laughable to be discussed. No Greek community would have recognized 'conscientious objection' to war, or to anything else."

I do not suggest that this model of State supremacy can or should be translated lock, stock and barrel into our own constitutional framework. While we would agree that the community – in the United Kingdom, the Queen in Parliament – is sovereign, we would not, I think, accept that no rights are inalienable: we would say at least that even though the sovereign Parliament possesses the theoretical power to abrogate any right, there is a category of fundamental rights which could only be abrogated by a Parliament which turned its back on democratic values. We would certainly regard as alien to any desirable constitutional arrangements for today what was said by Jacob Burckhardt, the great nineteenth century historian of Greek culture⁵:

"Culture [in ancient Greece] was to a high degree determined and dominated by the State, both in the positive and in the negative sense, since it demanded first and foremost of every man that he should be a citizen. Every individual felt that the polis lived in him. This supremacy of the polis, however, is fundamentally different from the supreme power of the modern State, which seeks only to keep its material hold on every individual, while the polis required of every man that he should serve it, and hence intervened in many concerns which are now left to individual and private judgment."

These perceptions from the ancient world illustrate in striking fashion a view of rights much more restricted than our modern full-blown perceptions. Now, it is a backdrop to my thesis that the conception of a duty to the State should no longer be burdened or corrupted by nightmare visions of secret police, brainwashing, or any of the apparatus of totalitarianism. Those horrors are both the conditions and the consequences of something quite different from a duty to the State, and that is, a duty to the government. In a free society the citizen as citizen owes no duty whatsoever to the government. On the face of it the civil servant owes such a duty, and it is a highly honourable duty, freely undertaken, not imposed. But the civil servant would not accept that his duty is to the government *simpliciter*. His duty, of course, is to the Queen's ministers of whatever political colour. Ultimately it is a duty to the State over and above the government. It is a duty which can only be understood in the context of a democratic constitution in which the government may and does change according to the dictates of the ballot-box.

We may ask, what is the true importance of rights, that is, rights in the form of enforceable laws. I think there are two dimensions to it. The first is that

⁵ Quoted in O. Murray's 'Introduction' to his edition of Burckhardt's, *The Greeks and Greek Civilisation* (1998) p xxxvi.

rights minimize the possibility of arbitrary and capricious government. The second is that they maximize the possibility of individual freedom of thought and action. This second value, individual freedom, is diminished in Dover's picture of the Greeks. It is the first of these two values, the avoidance of arbitrary and capricious government that is the primary response to the horrors of tyranny. And the danger of our present constitutional immaturity is that the second value, individual freedom, should so far overtake the common good that the common good is itself corrupted to become nothing more nor better than the provider of the mob's demands: Juvenal's bread and circuses⁶.

Now a duty to the State, whose acceptance is the antidote to Juvenal's dismal vision, is quite distinct not only from a duty to the government, but also from the duties we would all accept to other individuals: to family, friends, neighbours, fellow-workers. These duties are the stuff of inter-personal morals. But the duty to the State is a duty to the community at large. In part it may be fulfilled by charitable works, activities having nothing directly to do with the apparatus of the State. But the paradigm of a duty to the community, or at least a central instance of it, consists in obligations towards interests which are largely, sometimes entirely, in one form or other in the hands of the State. There are laws which obviously enough exemplify the citizen's duty to the State. The laws requiring payment of taxes are the plainest instance. A little while ago I saw a report in the press of a survey or opinion poll suggesting that a third of the adult population thought it legitimate to cheat the taxman. The restrictions imposed by the planning laws are another instance; and so are smaller things, like fines for illegal parking or dropping litter. I wonder how many people, who would have a bad conscience on some point of purely personal misconduct, would think nothing of putting up a back extension to their house without telling the council, disobeying the traffic laws if they would get away with it, or a dozen other laws, great and small, whose shared characteristic is that they are there for the general good and do not in the particular case seem to have much to do with the interests or well being of your mother, brother or best friend.

We may draw some conclusions from these reflections. First, my argument is not only that disobedience of these laws is morally contemptible, though that is certainly so. It is rather that the acceptance by society of duties to the State, and their transformation into law, is itself a condition of rights against the State, and their transformation into law. This is so, first and foremost, because the ideal that all the citizens enjoy such rights can only be fulfilled if the rights of each are curtailed to make room for the rights of everyone else; and that can only be done, in a community whose inhabitants are not angels, by the imposition of laws which force the citizen to recognize the community interest. This is reflected in the text of the European Convention on Human Rights and the Convention jurisprudence, and also in the common law. But this is a regime which will only possess a secure and tranquil existence if the people generally recognize the need of it; and I gravely doubt whether, generally, they do.

As for the Convention's text, the clearest instance is perhaps to be found in the second paragraph of each of Articles 8 – 11, which of course confer what

⁶ *Satires*, x, 80.

are sometimes rather broadly referred to as the political rights: the right to respect for home and private life, freedom of expression and religion and so forth. As is well known, the second paragraph in each case permits (I summarise) curtailment of the right on public interest grounds subject to the principle of proportionality. Thus the Convention text recognizes the need to draw a balance between the rights of the individual and the interests of the community. And this, as I have indicated, is reflected in the Strasbourg jurisprudence: I will refer only to the oft-repeated dictum from *Sporrong*⁷:

“ . . . the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The search for this balance is inherent in the whole of the Convention . . . ”

The common law reveals a like balance. In private law, inhibitions of individual rights imposed by force of the general community interest are for example to be found in the defences to a claim for defamation, in the public interest restrictions on the freedom of contract, and in the limitations (though they are far from a brightline rule) which the law of negligence places upon the scope of the notion of duty of care, and in other areas. In public law, the balance is struck by the extent to which judicial review remains remote from the case’s factual merits: this reflects the political imperative that government must be left to govern, so long as it does not transgress the law, and government in the interests of all will inevitably mean curtailments of the individual’s freedom of action.

There is a practical agenda here, for the improvement of our human rights jurisprudence. All too often there is, even three years on after the coming into force of the Human Rights Act, still something of a tendency for human rights points taken in litigation to be treated as an alien “add-on”, something strange to the common law, a different blood group; and sometimes as a last ditch, to be appealed to if all else fails. The consequence is that the human rights argument is likely to suffer from an artificial rigidity: if the general law gives you nothing, the European Convention on Human Rights may still give you something, but it is likely to be something farther away from the unruly merits of the case – some strict rule of which you may take advantage even if it goes against the merits.

This is very undesirable. The Convention and the common law have to march together, both recognising the balance to be struck between individual rights and public interest. We have to treat the Convention rights as lying upon a *continuum* with the common law. This is made good by the very balance between the rights of the individual and the interests of the community, recognised alike in Strasbourg and the United Kingdom, which I have just described. I hope it is not overly controversial to suggest that the Human Rights Act is a constitutional statute, in the sense I ventured to put forward in *Thoburn*, where I said⁸:

“ . . . a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general,

⁷ *Sporrong and Lonroth v Sweden* (1982) 5 EHRR 35, 52 (para 69).

⁸ *Thoburn v Sunderland City Council* [2002] 3 WLR 247, 281.

overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b).”

The Human Rights Act, plainly, falls into both of these categories, (a) and (b). And if it is right to regard it as a constitutional statute, then its provisions are at the centre of our perception of the relation between citizen and State: since a constitution, as I would have the term understood, consists in that set of laws, or laws and conventions, which in a sovereign State define the relationship between the ruler and the ruled. The Convention rights are within this class. Thus they are part of our constitution. They cannot, then, be regarded as an alien “add-on”, separate and apart from the common law which, as the very source of the legislative power, is the constitution’s cornerstone: at least the Convention rights cannot be so regarded without our suffering from what could only be described as a form of legal and political schizophrenia. No doubt a constitution may play different tunes, but they need to be written in the same key.

The next conclusion I would draw recalls the separation of government from State, about which I have already had something to say. This separation is a condition of any acceptable theory of the citizen’s duty to the State; the notion of the citizen’s duty to the *government* is a slippery slope to tyranny. But this same separation is therefore a condition of the citizen’s rights, since as I have argued the acceptance by society of duties to the State, and their transformation into law, is itself a condition of rights against the State, and their transformation into law.

In consequence, if we are to have a viable, healthy rights jurisprudence, recognising that a jurisprudence of duties to the State is a condition of such a thing, we will find that we need to have a coherent theory of the State as something separate from government. The idea of rights implies such a theory. What would this theory amount to?

This is a bigger question than can sensibly be answered in a short talk at the beginning of a one-day conference. But I will suggest some ideas for further reflection. First, as I have foreshadowed, the State in this context is to be taken as the embodiment of the community, including therefore the community’s unpopular minorities and more inconvenient elements: the *whole* community. Here the State’s symbols and traditions are important to give concrete form to an entity whose *servant* is the government. But secondly, the government’s subservience to the law is critical to its separation from the State: it is not the State; if it were, there would be no place for a law above it, which it is required to obey.

Any deeper discussion of theories of the State would involve questions of nationhood, national identity, the focus of the citizens’ loyalties, and matters of that kind. This is not the occasion for any extended reflection upon such matters. I merely say that the elaboration of a sound theory of rights, through the need to elaborate a theory of the State, necessarily confronts us, in the end, with these challenges.

Our social tranquillity will be fragile, and increasingly so, unless and until we can accept and do so comfortably that duties to the State must march with rights against the State. But it is not merely a matter of social tranquillity.

We have the good fortune to live in a State where public power is conducted subject to the rule of law. It is a function of the rule of law that our governors hold their power on trust for the people. The principle of the common law is that for the citizen, everything that is not forbidden is allowed; but for the public official, from the highest to the lowest, everything that is not allowed is forbidden. By this principle the freedoms of our people enjoy substantial guarantees. By the same principle the law subjects every act of public power to a strict requirement that it be justified in law. If the beneficiaries of this enlightened state of affairs look to the State only for their rights, or – worse – only for the handouts of Juvenal’s bread and circuses, at length as I have suggested our governors may struggle to keep the whole of their democratic conscience. At length we may get increasingly repressive laws, as the legislature perceives, with whatever reluctance, that the citizen is unrestrained: he is only prepared to look after himself and his own, and not his fellow citizens. There are ominous signs around us. Very low election turnouts. Cavalier statements of an intention to break a law, a democratically made law, because it is costly or difficult to fulfil. Reactions to difficult social problems – reactions which have more to do with “Not in my Back Yard” than with the duties of good citizenship.

These are random reflections: now you may get down to the real business of the Conference.