**‘This House Believes**

**The Courtroom Should Not Be the Forum for Advancing Social Justice’**

**Proposed by Lord Hoffman and Jeffrey Dudgeon**

**Opposed by Jolyon Maugham QC, Helen Mountfield QC and Yasmine Ahmed**

**Oxford Union speech by Jeff Dudgeon**

**4 November 2021**

**Mr President**

I speak here in favour of the proposal, following Lord Hoffman, in both senses of the word, but I will deal with different points, coming as I do from a Northern Ireland experience.

I personify a dilemma around the proposal: I was happy to achieve personal freedom in the European Court of Human Rights but am increasingly opposed to what predominates in Northern Ireland courts today.

Law there has turned to Lawfare.

This may make me a poacher turned gamekeeper, given my famous victory at Strasbourg, which was judged 40 years ago this October.

Indeed, Belfast City Hall, where I was a councillor until the DUP revenged itself by taking my seat, was lit up in Rainbow colours on the anniversary. Times have certainly changed.

But first, what’s meant by the phrase ‘social justice’ in the motion?

It once encompassed a set of views, like German Christian or Social Democracy, but is now about advancing socio-economic policies through human rights, and thus the courts.

And I don’t mean challenges to administrative decisions as happens in many judicial reviews.

Such social justice needs a Bill of Rights or a Convention to move from a mode of individual freedom to a collective, justiciable one.

I have never believed in doing politics through human rights so I resist that collective outlook.

In my Strasbourg case, the Court found the UK in breach of my Convention rights for continuing to criminalise male homosexuality in Northern Ireland. It was held to be a breach of Article 8, the right to a private life.

I and 25 others had been arrested in Belfast in 1976 during a round-up of the committee of the two gay groups. We were to be prosecuted, essentially for conspiracy - being both campaigners and criminals.

London, in the form of the Attorney General, Sam Silkin, after a year, reluctantly intervened, just in time to stop the charges going further.

A note on my file said: “The DPP decides to prosecute, but the relevant papers are retrieved from the out-tray at the last moment.”

Labour’s meandering process of law reform was shelved in 1978, and a year later ditched by Margaret Thatcher’s new government.

The Rev Ian Paisley’s *Save Ulster from Sodomy* campaign against the reform proposals had therefore triumphed.

The distinction between being liable to life imprisonment in Belfast but not in England was judged indefensible by Strasbourg.

This was despite the high powered team ranged against me. It included Brian Kerr, later Northern Ireland’s Lord Chief Justice and, as Lord Kerr, a Supreme Court Judge, and Sir Nicolas Bratza, later President of the same Court. One, at least, later said he was ashamed of his brief.

Previous gay cases had been rejected using Imperial German and Nazi sociology. We overturned those precedents. And Sodomy was saved for Ulster.

Mine was the first successful gay case at Strasbourg, and only the fourth that the UK had lost.

It was the fifteenth where a violation was found, and just the thirty-fifth judged by the Court.

The judgment has become a powerful precedent, followed even at the US Supreme Court in the Texas Sodomy case.

Ireland and Cyprus bent the knee in later years, and duly decriminalised.

My case is being used by campaigners in those many Commonwealth countries, like Jamaica, that inherited British statutes, outlawing homosexuality.

A hundred thousand more claimants have followed me into Strasbourg, many from Russia and Turkey.

Things may be changing there since the advent of Protocol 15 to the Convention which was effected by Ken Clarke, as Lord Chancellor, in 2012. This happened when, for six months, the UK was President of the Council of Europe.

The Protocol came into effect a decade later on 1 August this year, after a tardy Italy ratified.

It adds a reference to the Preamble of the Convention on the principle of subsidiarity and the doctrine of the margin of appreciation, giving states ‘the primary responsibility’ on rights.

[Protocol 15 - “Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights.”]

Its effect remains to be seen. There are however counter-forces at work, notably Catholic groups in Europe, concerned at the Strasbourg judges coming too often from one source, and lacking judicial experience. Only this month, their campaign obliged the Court to issue stern new rules around judges, their selection and conduct.

In time, Ireland went even further on moral issues, joyously legalising equal marriage after a referendum. Abortion soon followed, exactly reversing the 1983 result. It had recognised ‘the equal right to life of the mother and the unborn’. These referenda have turned Ireland into a post-Catholic country.

We don’t do referendums often, perhaps wisely, as many do not vote on the set of words in front of them, rather on a mood of resentment or on different issues.

The UK lost a squad of follow-up gay cases at Strasbourg on the armed forces and the age of consent. However it is notable the ECHR has held out against judging gay marriage or abortion as human rights.

The European consensus is still some way off adopting those as rights, especially as its centre of gravity has moved from, say Frankfurt, to Budapest, with the admission of many more countries to the Council of Europe. Indeed 47 states are now members – all save Belarus.

Of course a human right today was not one yesterday. When the European Convention on Human Rights was drafted, by amongst others, Sir David Maxwell Fyfe, later Lord Kilmuir and Lord Chancellor, he would have dropped the project at speed had he known that homosexuality was going to be legalised because of it.

[In 1965 Lord Kilmuir had warned over Lord Arran’s decriminalising effort:

“If this Bill goes through, so that buggery is no longer a criminal offence provided it is done in private and with no boys concerned, then it will be a charter for these buggers' clubs.

They will be able to spring up all over the place. I can assure your Lordships that it is a very real risk.

I remember once, when I was on circuit in Suffolk, that I had 16 people in the dock at the same time. None of these men would have been guilty of a criminal offence at all if this Bill had gone through. If you had seen them, perhaps your Lordships would have agreed that they ought to have been put out of circulation.”]

Trans rights were inconceivable then to all the drafters.

If, however, Parliament abdicates its responsibility to ensure at least minimum compatibility with the most basic of human rights then the courts, and especially the Strasbourg Court, has a justifiable role, indeed a duty, to intervene.

This could not be more true in my case and is well-illustrated by what I discovered, after an FOI request:

Hugh Rossi, the Northern Ireland Office Minister having inherited the stalled process in 1979, wrote this telling note on the papers:

“Leave it to Strasbourg to find against us”.

Which it did, two years later, after, for me, a needless seven year court battle.

Parliament had failed in its primary legislative responsibility. This was the most dangerous of abdications.

The Convention, as Strasbourg says, is a living nstrument, while also superior to our Supreme Court.

But that Court says otherwise, at least on its website: “The Human Rights Act also requires UK courts, including the Supreme Court, to ‘take account’ of decisions of the European Court of Human Rights (which sits in Strasbourg). UK courts are not required, however, always to follow the decisions of that Court. Indeed, they can decline to do so particularly if they consider that the Strasbourg Court has not sufficiently appreciated or accommodated particular aspects of our domestic constitutional position.”

To paraphrase one learned Judge: Strasbourg can’t micromanage 47 different justice systems.

Northern Ireland however is, and will be, peculiar, by virtue of having a devolved legislature since 1921. That was desired by no party then, but insisted on by London to get Ireland out of its parliamentary hair. It has corrupted politics, the courts and human rights ever since, and taken up too much of my political life.

Devolution worked there for fifty years but didn’t for the next fifty, at immense cost in blood and treasure.

Now no significant change can be agreed in our mandatory power sharing government where each community has a veto – that is apart from divvying up the London money.

The Stormont Assembly simply can’t legislate reform so exports the task to Westminster, as it did with abortion and gay marriage in 2019.

The curse of devolution, I would suggest.

The one Assembly exception was gay pardons which Arlene Foster of the DUP uniquely allowed Westminster to legislate for. However failure to vote on banning gay conversion therapy saw Mrs Foster defenestrated and a three-week reign by Edwin Poots. The Paisley family had revenged itself, briefly.

The Belfast courts are now clogged with Troubles legacy cases – judicial reviews, civil suits, reopened inquests and private prosecutions, all supported by limitless legal aid.

Lawfare has indeed replaced warfare – it is preferable – so we have a new breed of lawyers now known as ‘legacy practitioners’.

I convene the Malone House Group in Belfast which is trying to resist that academic and increasingly judicial consensus in inquiry after inquiry. The power of ECHR Article 2-procedural, not the substantive right to life itself is immeasurable. London has failed to challenge Strasbourg, let alone the judiciary and is paying a huge price.

The government, in its July Command Paper says it intends to stop Troubles criminal investigations, also inquests and civil suits. This amnesty or statute of limitations came after enormous pressure from army veterans organising via social media.

They had never been politically powerful, as in the US, but are no longer happy to be diverted into the British Legion.

The legislation is yet to be published but the parliamentary battles will be titanic.

Perhaps it is a mark of age, moving from young radical to a conservative, or, more precisely, an incrementalist position and a gradualist approach. I remain a social liberal if not a social justice warrior.

The existence of the Human Rights Act, since its commencement in 2000, has of course changed matters. But has the Act by its relationship with the living instrument that is Strasbourg gone too far?

Dominic Raab is running a beady eye over the Act so we will soon learn of future changes.

I would argue recent experience tells me Strasbourg may have over-reached itself. Indeed that its judgments can be poor. I example a Slovakian case last month which made libelling the dead illegal, and the earlier foolish one over crucifixes in Italian schools which was reversed at unseemly speed when the Orthodox countries piled in in protest.

The liberal hegemony in Europe may have reached its peak.

The opposition vista tonight is politics through rights; the collective versus the individual, plus growing lawfare – often by the elite.

Or this side’s option:– democratic elections; parliamentary debate; and timely law-making.

The greatest, almost insoluble, impediment to judge-made law remains who selects the judges?

So it has to be the Commons over the Courts, with Strasbourg as a last resort, admitting only cases where there is gross disadvantage.

It is your choice – for the present.

END

[Vote lost by 130 to 80.]