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WHOSE HUMAN RIGHTS?

The idea of human rights and the concept of a legal system are sometimes very uneasy bedfellows. The latter implies a set of principles and axioms in terms of which answers can be found (generally 'yes' or 'no') to defined questions. The former is a loose, open-textured set of generalisations owing much to the ingenuity of philosophers and political theorists, the opportunism of politicians and the moral fervour of activists campaigning against oppression. When we think 'human rights' our mindset is immediately formed by such global shorthand terms as apartheid South Africa, Allende's Chile, jackboots and so on. When we think of the stuff of a legal system, we visualise enforceable contracts, accidents at work and so on.

Yet despite the strongly positivist approach of British judges, the legal system shows clearly the influence of the thinking behind the concept of human rights. The judges themselves developed the right of silence and the writ of habeas corpus to protect the citizen against the oppression of the state, and the rhetoric of human rights can be heard from time to time in the courts of the realm. There will be much interest and fascination in the years to come in seeing how the courts react to the section in the *Human Rights Act 1998* which has legislated to make it 'unlawful for a public authority [defined to include a court] to act in a way that is incompatible with a [European] Convention [on Human Rights] right'. And what will the judges make of the section which provides that 'so far as is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention Rights'? What will happen to our 'golden rule' and our other canons of statutory construction?

Aside from the interest and fascination, watch out for the paradoxes. We think of human rights as the protection of the poor and oppressed against the mighty and powerful and corrupt, David against Goliath. Our laws are the province of all, however, and the rich and the powerful are as likely to seek the protection of the Convention as the poor and oppressed – possibly even more likely given the ready availability to them of the resources needed to be a consumer of our legal system. Is a right to privacy equivalent to a right to say freely what one thinks? And aside from such perennial philosophical conundra, watch out for the paradox of human rights as an effective principle in commercial disputes.

Our courts have long taken the position that the ancient right of silence does not protect a bankrupt who refuses to answer questions put to him or her by the trustee in bankruptcy acting under statutory authority, even where to answer may incriminate the bankrupt. The House of Lords and the Court of Appeal (in Robert Maxwell related litigation) affirmed this principle in relation to erstwhile company directors of failed companies. This principle emerged from the judicial interpretation of the statute conferring the right on the trustee (or liquidator or administrator). How will this principle fare when attacked by the argument that such statutory powers must now be re-interpreted so as to be made compatible with the ancient right of silence? One thing is certain. There will be no shortage of money to ensure that such arguments are heard loud and clear.

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