



THE BENTHAM CLUB

Presidential Address 2001

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Lord Hoffmann*



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To hold the position of President of the Bentham Club in any year is honour enough. But I am particularly conscious of the responsibility which, for two reasons, rests upon the holder of the office at the end of the millennium. In the first place, Mr Bentham was regarded in his time as something of a millennarian; the architect of fantastic Utopian societies designed down to the most minute details, in the way that a few years later Pugin, another obsessive, was to design every desk, doorknob and keyplate in the Houses of Parliament. Secondly, Hazlitt tells us¹ that Bentham, in his old age, used to say that he "would like to live the remaining years of his life, a year at a time at the end of the next six or eight centuries, to see the effect which his writings would by that time have had upon the world."

Hazlitt was unkind enough to go on to say "Alas! his name will hardly live so long!" but I think we owe it to Bentham, at the second century ending after his death and in particular at the end of the millennium, to allow him to take a look at what is going on. The general rule is that the Bentham lecturer is allowed to ride his own hobbyhorse, whatever it may be. Most of the lectures have therefore had little or no connection with the patron of the Club. It is true

that in his lecture in this series in 1986, Lord Goff of Chieveley invited Bentham to his flat in the Temple and interviewed him on various matters of current concern.² But Lord Goff thought it would be too provocative to ask Bentham for his views on what he (Lord Goff) called "the current agitation for a Bill of Rights"³ and this is to be the main theme of my address tonight. In any case, as this tactful omission on the part of Lord Goff will suggest, his lecture was characteristically gentle and learned, whereas I would like in principle to allow Bentham to give full rein to his views. I say "in principle" because my intentions are subject to two very important qualifications. The first is that, as will rapidly become obvious, I am no Bentham scholar and my acquaintance with his writing is limited and superficial. I can only say that in this respect I seem to be in the same position as almost everyone else. Secondly, Bentham wrote about so much, from the philosophy of language to the kind of bedding which should be used in a workhouse ("stretching the undersheet on hooks pins or buttons will save the quantity usually added for tucking in")⁴, from evidence to international law, that any choice of subject is bound to reveal one's own preoccupations.

I would also like to allow Bentham some opportunity to speak in his own voice. For the last two centuries, this has generally been thought a foolhardy thing to do. Bentham's style, at least in his later years, is notoriously

difficult: involved, repetitious, full of difficult neologisms, extended subordinate clauses and pedantic qualifications. Hazlitt noted that his works had been translated into French and said that they ought to be translated into English.⁵ But not all Bentham is like that. Herbert Hart, after quoting some extremely rude things which Karl Marx said about Bentham ("insipid, pedantic, leather-tongued oracle of the ordinary bourgeois intelligence"), remarked that "Bentham himself was no mean hand at invective".⁶ So he was, and I would like you to sample some of his style.

The three distinctively British contributions to mark the millennium have been the Dome at Greenwich, the great wheel on the south bank opposite Westminster and the coming into force of the Human Rights Act 1998. Of the first two, I think that Bentham would have thoroughly approved. He would have regarded the Dome as a practical experiment in determining what would give the greatest pleasure to the greatest number which, whether it succeeded or failed, was in the true spirit of the eighteenth century enlightenment. He would have examined the diminishing box office receipts in the way in which the frock-coated gentlemen in Wright of Derby's painting watch the bird dying in the glass vacuum jar. As for the wheel, which would have overshadowed his house at Westminster, he would have rubbed his eyes and thought that a giant mobile Panopticon had been erected on his doorstep. All the persons

temporarily imprisoned in the glass gondolas would be visible from almost any vantage point. What is more, they would have entered voluntarily, on the calculation that the pleasure of looking down on the river, London and Bentham in his garden outweighed the pain of paying for the ride and the nausea and vertigo of being carried 135 metres into the air.

But what of the Human Rights Act? Bentham lived a long life and was not unacquainted with human rights instruments. He was born in 1748 and went up to The Queen's College, Oxford at the age of 12 in 1760. As it happens, it was also my own college nearly 200 years later and, I would like to add, it may be said to have a human rights tradition of its own. It is named for Queen Philippa, the wife of Edward III, who in 1347 persuaded her husband that the summary execution of the six burgers of Calais would be a cruel, if regrettably not an unusual, punishment. Bentham was keenly interested in the American War of Independence and the French Revolution and had a good deal to say, to which I shall return, about the Declaration of the Rights of Man. He became an admirer of American democracy, though whether his admiration included the adoption of the Bill of Rights and the principle of judicial review of legislation proclaimed in *Marbury v. Madison*⁷ is hard to tell. But Bentham would not have lacked for opinions about the European Convention and its incorporation into United Kingdom law.

Our main source for Bentham's views is the pamphlet which he wrote on the 1791 Declaration of the Rights of Man, which was published in his Collected Works under the title of *Anarchical Fallacies*.⁸ The title gives you a good idea of what Bentham thought of the Declaration. He was against it. It was misconceived both in principle and in detail. As to the principle, he said:⁹

“What I mean to attack is...all anti-legal rights of man, all declarations of such rights. What I mean to attack is not the execution of such a design in this or that instance, but the design itself...*Ex uno, disce omnes* - from this declaration of rights, learn what all other declarations of rights - of rights asserted as against government in general, must ever be - the rights of anarchy, the order of chaos.”

But of course, being Bentham, he also analysed the text of the declaration in relentless detail to show that it was badly drafted and that many of the rights it purported to declare were, taken literally, inconsistent with any form of government or even with each other:

“The logic of it is of a piece with its morality: a perpetual vein of nonsense, flowing from a perpetual abuse of words, - words having a variety of meanings, where words with single meanings were equally at hand - the same words used in a variety of meanings in the same page, - words used in meanings not their own, where proper words were equally at hand, - words and propositions of the most unbounded signification, turned loose without any of those exceptions or modifications

which are so necessary on every occasion to reduce their import within the compass, not only of right reason, but even of the design in hand, of whatever nature it may be; -the same inaccuracy, the same inattention to the penning of this cluster of truths on which the fate of nations was to hang as if it had been an oriental tale or an allegory for a magazine: -stale epigrams, instead of necessary distinctions; -figurative expressions preferred to simple ones, -sentimental conceits, as trite as they are unmeaning, preferred to apt and precise expressions, -frippery ornament compared to the majestic simplicity of good sound sense - and the acts of the senate loaded and disfigured by the tinsel of the playhouse."¹⁰

Bentham's reasons for launching this passionate attack are varied and some are better than others. Herbert Hart has perceptively suggested that one reason why Bentham was so strident in denouncing what would now be called a rights-based jurisprudence was that he realised that it would undermine the principle of utility as the sovereign criterion for all political decisions. It would mean that individuals had certain rights which could not be overridden even if doing so would promote the greatest happiness of the greatest number. Bentham would of course have offered a utilitarian justification for human rights as John Stuart Mill afterwards did for liberty. Professor Twining had shown¹¹ that one can offer a utilitarian case, which will serve in most weathers, even for rights so basic and unqualified as the right not to be tortured. But acceptance of human rights must involve at least a theoretical

acknowledgement that there are parts of the political decision-making process which the principle of utility cannot reach.

A good deal of Bentham's invective is directed against the notion that people can have natural rights which exist independently of law and government. As a fully paid-up positivist, Bentham believed that only the law could create rights and that to speak of natural rights in opposition to the law was absurd. It was this idea which provoked the famous phrase about "nonsense on stilts". It might be desirable on utilitarian grounds that people should have certain rights but that did not mean that they existed: "Reasons for wishing there were such things as rights, are not rights; - a reason for wishing a certain right were established is not that right - want is not supply - hunger is not bread."

This controversy is of course still alive in a very much more sophisticated form but I am not going to enter into it here. Nor am I going to say much about the question, which is for practical purposes dead, about whether a human rights instrument can be given legal effect by judicial review of legislation. Unlike Austin, who seems to have held a rigid belief that a legal system required an unrestricted sovereign authority, Bentham was willing in principle to accept that the powers of the legislature might be limited by

"express convention", which would give the courts "a controlling power over the acts of the legislature."¹² But he thought, on democratic grounds, that this would not be a very good idea: "Give the judges a power of annulling [Parliament's] acts; and you transfer a portion of the supreme power from an assembly which the people have had *some* share, at least, in choosing, to a set of men in the choice of whom they have not had the least imaginable share."¹³

Bentham made this relatively restrained comment in 1776, when Parliament was unreformed and decidedly undemocratic and at a time when his detestation of the English judiciary as corrupt and motivated by sinister interest had not reached the feverish levels of his later years. He even went so far as to accept, tucked away in a footnote in the *Fragment on Government*,¹⁴ that a judicial review of legislation might promote a useful debate of the issues: "A public and authorised debate on the propriety of the law is by this means brought on. The artillery of the tongue is played off against the law, under cover of the law itself. An opportunity is gained of expressing sentiments unfavourable to it, upon a numerous and attentive audience."

This is very like Ronald Dworkin's view that judicial review in the United States improves the quality of public argument about constitutional issues.¹⁵ Important Supreme Court decisions give rise to an informed national debate in

newspapers and law schools, around dinner tables and in Manhattan taxis. But there is reason to believe that Bentham's mature attitude to the prospect of a Human Rights Act enforceable by judicial review of legislation would have been the same as that of Old Labour. It would in his view have given unelected judges power to block social reform in their personal and class interests. None of this was, however, relevant to his criticisms of the French Declaration because nothing could have been further from the minds of the French Constituent Assembly than the notion that its acts should be subject to review by a bench of judges. So one of Bentham's main criticisms of the Declaration was that it contained no mechanism for its enforcement except insurrection. If a citizen thought that a law violated one of his fundamental rights, the only thing that he could do was refuse to obey it. That was an invitation to anarchy.

I shall touch upon the question of judicial review again later but for the moment I want to identify four strands in Bentham's criticisms of the 1791 Declaration which are, I think, relevant to human rights instruments today. First, he thought that it was wrong to start with a high-level abstract declaration of principles and then attempting to deduce from them what should be the laws in detail. One should proceed the other way round. The merits of each detailed law should be separately considered and tested against the principle of utility. And then it may be possible to deduce more general principles from what the

individual laws have in common: "The proper order is: first, to digest the laws of detail, and when they are settled and found to be fit for use, then, and not till then, to select and frame by abstraction, such propositions as may be capable of being given without contradiction as fundamental laws."¹⁶

This, of course, has been the traditional method of English law. We did not need to wait for the enactment of Article 10 of the European Convention on Human Rights to have freedom of expression in this country. But the proposition that we have such freedom is a generalisation drawn from a complex set of rules which have been evolved over time. The rules have not been deduced from an abstract proposition.

A second strand is Bentham's insistence that the grand propositions of the Declaration are incoherent; inconsistent with each other and with the notion of government itself. Article II, for example, declared: "The end in view of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security and resistance to oppression."¹⁷

This, said Bentham, was self-contradictory nonsense:

“What these instructors as well as governors of mankind appear not to know is that all rights are made at the expense of liberty - all laws by which rights are created or confirmed. No right without a corresponding obligation...Laws creative of rights of property are also struck at by the same anathema. How is property given? By restraining liberty...How is your house made yours? By debarring everyone else from the liberty of entering it without your leave.”¹⁸

Some people may feel that these criticisms are somewhat pedantic. Of course these declarations were not intended to be taken literally. They were to be capable of restriction so far as was necessary to enable other rights to co-exist and similar rights to be conferred upon others. Or, as the European Convention says, so far as is necessary in a democratic society. Bentham anticipated this argument and said that it missed the point:

“In vain would it be said, that though no bounds are here assigned to any of these rights, yet it is to be understood as taken for granted and tacitly admitted and assumed that they are to have bounds; viz. such bounds as it is understood will be set them by the laws. Vain, I say, would be this apology...it would be inconsistent with the declared and sole object of the declaration, if it did not exclude the interference of the laws. It is against the laws themselves, and the laws only, that this declaration is levelled. It is for the hands of the legislator and all legislators and none but legislators, that the shackles it provides are intended. It is against the apprehended encroachments of legislators that the rights in question, the liberty and property and so forth, are intended to be made secure...Precious security for unbounded rights against legislators, if the extent of those rights in every direction were purposely left to depend upon the will and pleasure of those very

legislators. Nonsensical or nugatory, and in both cases mischievous: such is the alternative."¹⁹

Bentham, it seems to me, is on to a very important point here. Writing grand human rights instruments is easy in the sense that everyone is in favour of liberty, security, property, resistance to oppression, motherhood, apple pie and so on. Everyone can enjoy framing such declarations and toast each other over the signing ceremony. The real difficulty is working out the consequences in detail; in devising accommodations between the different rights which will be acceptable to society. This is the point at which difficult choices have to be made. And then of course, there is the question of who will make them? If, as the French contemplated, the whole affair is to be left to the legislature, there is, as Bentham said, little point in the Declaration. But who else? Should it be a court and if so, how should the court be composed? Or should the decision-making power be shared between a court and the legislature?

A third strand in Bentham's critique, which follows from the last, is that in principle it is ill-advised to try to tie the hands of future legislators. As I said earlier, I do not think that Bentham had a conceptual difficulty about the idea of a legislature with limited powers. He just thought it was not a very good idea. "What a curse to any country a legislator may be, who, with the purest intentions, should set about settling the business to all eternity by inflexible and

adamantine rules, drawn from the sacred and inviolable and imprescriptible rights of man and the primeval and everlasting laws of nature!"²⁰

Finally, the fourth theme is Bentham's vehement objection to the pretensions of the French. The Declaration was not content to declare the rights of Frenchman but claimed to declare the rights of man, which Bentham read to include women, irrespective of nationality. This, he said, gave the authors, in addition to self-satisfaction, an additional pleasure: "the sort of titillation so exquisite to the nerve of vanity in a French heart - the satisfaction...of teaching grandmothers to suck eggs. Hark! ye citizens of the other side of the water! Can you tell us what rights you have belonging to you? No, that you can't. It's *we* that understand rights; not our own only, but yours into the bargain; while you, poor simple souls! know nothing about the matter."²¹

Article XVI of the Declaration drove Bentham nearly apoplectic. It said: "Every society in which the guarantee of rights is not assured nor the separation of powers determined has no constitution."²²

This, said Bentham, showed - "self-conceit inflamed to insanity - legislators turned into turkey-cocks - the less important operation of constitution-making interrupted for the more important operation of bragging."²³

And he ended by saying:

"It is in England, rather than in France, that the discovery of the *rights of man* ought naturally to have taken its rise: it is we- we English, that have the better right to it...Right, the substantive right, is the child of the law: from real laws come real rights; but from imaginary laws, laws of nature, fancied and invented by poets, rhetoricians and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of monsters, 'gorgons and chimæras dire.'"

So much for Bentham on the Declaration of the Rights of Man. Let us now consider what inferences one might draw about his views on the Human Rights Act 1998. Let us take the first theme which I have identified: the proposition that general propositions about rights and freedoms should not be proclaimed *ex cathedra* but rather induced from the laws in detail. Although he might on a first reading think that the European Convention had in some respects an uncomfortable resemblance to the French Declaration, he would probably be somewhat relieved to learn of its legislative history. He would

discover that it had been drafted with the intention of stating at a higher level of abstraction those principles that were thought to be already embodied in the English common law. He may have been surprised that such an exercise was thought either necessary or acceptable to the Parliament of the United Kingdom, which he congratulated in the *Anarchical Fallacies* for its "well-known...repugnance to the voting of abstract propositions."²⁴ But I think he would have understood when he was told that the idea was to confer the benefit of these principles upon the Member States of the European Union, who liked that kind of thing, and most of whose members had recently experienced regimes which, though this might be hard to credit, were even more repressive than the government of Lord Liverpool. He would certainly have been reassured by the robust statement of Lord Keith of Kinkel in *Derbyshire County Council v Times Newspapers Ltd*²⁵ that the Convention was by no means intended to teach grandmothers to suck eggs and that, at any rate in relation to freedom of speech, did no more than restate the principles already contained in the common law.

This reconciliation of the apparent tension between the abstract phrases of the convention and the mundane detail of our domestic law may have important consequences for the interpretation of the Convention when it becomes part of English law. If it is treated simply as a new statute like any

other, a new set of rules superimposed upon the mass of existing law, the problems of construction are likely to be formidable. Even when read subject to the express qualifications which a number of the Convention articles contain, the language of the Convention is extremely open-textured and widely differing views could be held upon its proper scope. In some cases the arguments could be narrowed by reference to the jurisprudence of the European Court of Human Rights but in other cases that would only make things worse. On the other hand, the position becomes more manageable if the Convention is regarded as being, not a codification, because that supposes more detail than is actually there, but a sort of epitome or series of headlines which summarise the principles of the common law. One would then start with a fairly strong presumption that there was no divergence between the common law and the Convention. As for statutes, we would approach these, as common law judges have done for many years, on the assumption that they were not intended to override the human rights which exist at common law. If these Convention rights are the same as those which exist at common law, the provision that statutes should, if possible, be construed in conformity with the Convention will make little practical difference.

These considerations are reinforced by the second of my Benthamite themes, which is that the devil lies in the detail. So much of the practical

application of the principles of human rights instruments, expressed in grand and sweeping terms, involves trade-offs of one goal against another, sometimes in the form of utilitarian calculation, sometimes in the form of a ranking of moral values. These trade-offs are always unsatisfactory in the sense that they require a sacrifice of the full attainment of goals which in themselves are good. This is a theme which has been brilliantly expounded by the late Sir Isaiah Berlin and Bentham, like Berlin, saw that the reason why a declaration of human rights in unqualified terms was bound to be incoherent was not because of the fallibility of mortal institutions, not because of the grit in the machine, but because such rights were often conceptually inconsistent with each other: "all laws creative of liberty are" he said "so far as they go, abrogative of liberty."²⁶ Or, as Berlin said: "That we cannot have everything is a necessary, not a contingent truth...[T]he knowledge that it is not merely in practice but in principle impossible to reach clear-cut and certain answers, even in an ideal world of wholly good and rational men and wholly clear ideas, may madden those who seek for final solutions and single, all-embracing systems. Nevertheless, it is a conclusion that cannot be escaped..."²⁷

So, in a world in which it is impossible to reach clear-cut and certain answers, who should give those answers? Let us assume, and I realise that this is a large assumption, that the passage of the years would have softened

Bentham's antipathy to Judge & Co; that he would have allowed that we were no longer corrupt in the sense of being motivated by sinister financial interest but merely mortal and fallible like anyone else. Would he have regarded the judges as the appropriate body to decide upon these adjustments and trade-offs, the ranking and prioritising of values which the practical and day-to-day application of a human rights instrument requires? I think that he might, but only to a limited extent. He would, I should guess, have accepted the orthodox judicial role in the construction of statutes. In such case, in which the courts construe legislation so as to be consistent with human rights, they are in effect acting as a second revising chamber. They are doing no more than make clear what they consider that Parliament intended and would have said expressly if the matter had been drawn to its attention. Parliament is at liberty to say that the courts were wrong and that it did indeed intend to legislate inconsistently with what the court conceives to be the principles of human rights. But then, as I said in a recent case,²⁸ Parliament must say so expressly and accept the political cost.

But when Parliament has faced the question and declared its choice; its calculation of advantage and disadvantage, its ranking of the moral values at stake, should a court interfere? Despite his admiration for the constitution of the United States and all things American, I think that Bentham would have

said no. I doubt whether he would even have accepted, as did Learned Hand, who was no friend of judicial review of Acts of Congress, that there were occasions when the intervention of the court was needed to safeguard unpopular free speech. Bentham believed in the decisions of the elected representatives of the people and thought, as I have illustrated in my third theme from the *Anarchical Fallacies*, that one should not restrict the powers of Parliament. "My persuasion is" he said "that there is not a single point with relation to which it can answer any good purpose to attempt to tie the hands of future legislators"

And in case anyone should cynically comment that he thought that the performance of Parliament in the past had been so bad that there was nothing which a future Parliament could do to make things worse, he went on: "there is not a single point , not even of my own choosing, in relation to which I would endeavour to give any such perpetuity to a regulation, even of my own framing."

In the jurisprudence of the European Court of Human Rights it is occasionally said (though, in my opinion, far too infrequently) that Member States should be allowed what is called in French a margin of appreciation in the interpretation of the Convention. This is an acknowledgement both of Isaiah Berlin's proposition that there are no "clear-cut and certain answers" and also of the fact, to which I shall in a moment return, that differences in legal

and political history and culture can require different answers in different countries. But in allowing this scope for national choice, the European Court expresses no view as to whether it should be exercised in the Member State by the legislature or the judiciary. That, too, is a matter which will largely depend upon the national legal tradition.

It is therefore a great mistake to suppose that the incorporation of the Convention in the Human Rights Act 1998 means that those matters in respect of which the Strasbourg court has allowed or would allow the United Kingdom a margin of appreciation will now be decided by the courts of this country. The constitutional tradition of this country is that such choices are a matter for Parliament and there is nothing in the Human Rights Act which requires the courts to assume a power to make them instead. In saying this, I am not referring only to the technical rule that, under the Act, the courts cannot declare an Act of Parliament void but can make only a declaration that it does not comply with the Convention. I mean that the very question of whether a law complies with the Convention will often involve a recognition that there are no clear-cut and certain answers, that difficult choices are at stake and that the proper body to make these choices is Parliament.

The tradition by which the courts recognise that Parliament should make such choices is not based upon some abstract theory of the sovereignty of Parliament which English lawyers have taken from Austin and Dicey. It has a much more pragmatic foundation. In practice, it has served us well. It seems to me far more satisfactory that the rules under which women may have abortions, whatever they are, should have been enacted by Parliament, as they have been in this country, than that they should have been deduced by judges from some obscure and abstract proposition in the constitution. Professor Dworkin may enjoy the high level of debate about *Roe v. Wade* over the dinner table and with his taxi driver but I can do without it. And the same goes for many other issues such as capital punishment, sex and race equality, and homosexual rights, which for better or for worse have in this country been the subject of comprehensive legislation. It seems to me unlikely that any court would disturb the national settlement on these issues on the grounds that it preferred to give different priorities to the values contained in the European Convention.

This contrast between Britain and the United States brings me to my last Bentham theme, which was his objection to the presumption of the French Constituent Assembly in seeking the legislature on human rights for the world. "Shallow and reckless vanity", he said. Can there be an international law of

human rights or are human rights nationally and culturally determined? That is a lively issue at the moment. I think it is necessary to distinguish between two kinds of international human rights. The first are those which are infringed by war crimes, extra-judicial executions, torture and the like. A society in which these things happen is, generally speaking, beyond the help of lawyers. There is no country in which the government contends that they are lawful. Instead, they are denied. The problem is not one of adjudication but enforcement. The punishment of the perpetrators may involve plucking them out of the society in which they have been operating or catching them while abroad and then trying them elsewhere. Or there may be no remedy except to leave enforcement to a new regime which could simultaneously be committing similar acts against its own enemies. None of this has anything to do with the problems of the French Declarations or the European Convention, where the difficulty lies in determining the scope of the rights rather than the crude question of enforcement. That is a matter for lawyers and legislators whereas enforcement is the concern of policemen and soldiers.

I think that this distinction is of some importance because there is a tendency to treat the recent trend towards a greater internationalisation of the enforcement of the most basic human rights as if it was part of a movement towards the internationalisation of the contents of human rights. It might

appear, from the various international human rights instruments which have come into existence over the past fifty years or so, that much progress has been made towards a law of human rights which transcends national boundaries. I have even attended lectures with titles like "The Common Law of the World". Of course it has been possible to devise an instrument such as the International Covenant on Civil and Political Rights which has commanded the adherence and ratification of countries from Afganistan and Angola to Zambia and Zimbabwe. But to suggest that the acceptance of the general propositions in such instruments has created an international law of human rights would be described by Bentham as nonsense on stilts. In saying that I am not making the cheap point that there is often a certain amount of backsliding and hypocrisy on the part of governments which sign up to such instruments. I am concerned with the more fundamental question of whether "any such design should have been attempted".²⁹ Because, as I have already said, the formulation of the general propositions in such instruments is the easy part. It is in reconciling these propositions with each other and with the business of government that the difficulties come: difficulties which have to be solved by applying a mixture of morality, pragmatism and common sense. Of the draftsmen of the French Declaration, who seemed oblivious to these difficulties, Bentham said: "But plain unsophisticated truth and common sense do not answer the purpose of poetry or rhetoric; and it is from poetry and rhetoric that these tutors of

mankind and governors of the futurity take their law. A clap from the galleries is their object, not the welfare of the state."³⁰

The answer given by the advocates of international human rights is to have international courts of human rights which will solve these problems of interpretation and reconciliation to everyone's satisfaction. And so we have a Human Rights Committee of the United Nations and a Human Rights Commission and Court of the Organisation of American States. And we have our own European Court of Human Rights in Strasbourg.

Again, I do not propose to concern myself with the way in which this latter court has operated in practice. I have had occasion recently to make some comments upon its lack of understanding of English law and procedure³¹ and will not revisit these questions here. I want to discuss the principle of "whether any such design should have been attempted." If, as I think, the serious business of any court attempting to apply principles of human rights lies in the finely judged detail of trading off one right against another or individual rights against the practicalities of government, then it seems to me wrong in principle to try to make such decisions at an international level. It is of the essence of such decisions that they should have what Professor Dworkin calls "fit" with the rest of the legal system, its history and the social and

political culture in which it is embedded.³² It is true that the Strasbourg court sometimes recognises this truth by according to Member States a margin of appreciation. But Bentham, I think, would have said that the doctrine of the margin of appreciation really undermines the legitimacy of the whole enterprise. It means that where no clear-cut and certain answers exist, each society must settle for the answer which suits it best. In those cases in which the answer does appear clear and certain - in which there have been gross violations of what everyone would recognise to be human rights - courts, lawyers and professors seldom have an effective role to play.

I would not deny that there have been occasions in the past fifty years in which, looking at the matter purely as a question of English law, the Strasbourg court has been right and the House of Lords has been wrong. *Harman v Secretary of State for the Home Department*³³, in which the House divided three to two, was such a case. With all respect to the distinguished judges in the majority, I think that the minority and the European Court of Human Rights were right. The same is true of *Attorney-General v Times Newspapers Ltd*³⁴. But all that shows is that occasionally we get the law wrong; when one regrets that there is not a further Court of Appeal from the House of Lords. The same thing happens in cases which have nothing to do with human rights. These failures of the system do not justify the attempt to impose a uniform law of

human rights, in a detailed, serious and not merely rhetorical sense, on the widely differing political and legal cultures of the ever-increasing number of Member States of the Council of Europe.

I am glad to have had the honour of sharing the platform with Bentham tonight and I am sure that he will not mind if I try to summarise the points on which I think we agree. First, we would both be in favour of democracy and human rights. Secondly, although Bentham would no doubt have had a number of linguistic criticisms, we would neither of us have any serious objection to any of the propositions in the European Convention which are now to be incorporated into English law. We would accept that the institution of judicial review has drawn the teeth of the charge that the French Declaration was merely a recipe for anarchy. It allows questions of human rights to be decided in an ordered and sometimes imaginative way. But we would not expect our courts to approach the generalities of the Convention as if they were a new revelation of the year zero zero zero, free from any intellectual influence from the past. They should be interpreted as headings or epitomes over the several chapters of the law, so that the task of interpretation is to make the contents of each chapter not only reflect the heading but also be self-consistent and faithful to the history and traditions of the society from which it has evolved. Finally, I think we would both be rather doubtful about the continued role of the court

in Strasbourg. I do not expect to see more than the first clues as to how the adventure of the Human Rights Act is going to develop, but perhaps Bentham, when he returns again at the end of the present century, will be able to keep me informed.

¹ *The Spirit of the Age*, in the *Collected Works of William Hazlitt*, (London, 1902) Volume 4, 191.

² (1986) 39 *Current Legal Problems*, 1.

³ *Ibid*, 7.

⁴ *Outline of Pauper Management Improved*, quoted in H.L.A. Hart, *Essays on Bentham* (Oxford, 1982), 5.

⁵ N. 1 above, 199.

⁶ Hart, n. 4 above, 24.

⁷ 5 U.S. 137 (1803).

⁸ *Works*, (Bowring ed.) Vol. II, pp. 491-524.

⁹ *Ibid*, 522.

¹⁰ *Ibid*, 497.

- ¹¹ In 'The Contemporary Significance of Bentham's Anarchical Fallacies' *Jeremy Bentham, Critical Assessments* (ed. Bhiku Parekh) Vol. III (), p. 716-720.
- ¹² *Fragment on Government* (Cambridge, 1988) Chapter IV, para. 31.
- ¹³ *Op. cit.*, Chapter IV, para. 32.
- ¹⁴ Chapter IV, para. 33, n.l.
- ¹⁵ *Freedom's Law* (Oxford, 1996), 30-31; 344-345.
- ¹⁶ N. 8 above, 493-494.
- ¹⁷ *Ibid*, 500.
- ¹⁸ *Ibid*, 503.
- ¹⁹ *Ibid*, 502.
- ²⁰ *Ibid*, 515.
- ²¹ *Ibid*, 497.
- ²² *Ibid*, 520
- ²³ *Ibid*.
- ²⁴ *Ibid*, 497.
- ²⁵ [1993] A.C. 534, 551.
- ²⁶ N. 8 above, 503.
- ²⁷ "Two Concepts of Liberty" in *Four Essays on Liberty* (Oxford, 1969), 170.
- ²⁸ *R. v. Secretary of State for the Home Department, ex parte Simms* [1999] 3 W.L.R. 328.
- ²⁹ N. 8 above, 514.
- ³⁰ *Ibid*, 513.
- ³¹ "Human Rights and the House of Lords" (1999) 62 M.L.R. 159.
- ³² *Law's Empire* (London, 1986).
- ³³ [1983] 1 A.C.280.
- ³⁴ [1974] A.C. 273.