© F A R Bennion Website: www.francisbennion.com
Site Map: Documents List: 1999.024
For full version of abbreviations click 'Abbreviations' on FB's website.

Too big for some of us to grasp

Television news constantly shows unfortunates in places like Florida and the Caribbean overwhelmed by gales and floods proceeding from hurricanes with bizarre names. On a psychic rather than physical plane, I suffer in much the same way from the effluvium issuing from human rights enthusiasts, of whom the exemplar is Lord Lester of Herne Hill. Do they realise the significance of what they are about? I refer not merely to Algerian terrorists and other threats to public safety, who thereby sleep more easily.

As Janet Jones says in her new book *Labour of Love*, (page 18), these sea-changes can be too big for some of us to grasp. Ms Jones is the wife of the extinct Labour volcano Lord (Ivor) Richard, who was leader of the House of Lords until Tony Blair sacked him for not being on message. Janet's book is her diary of events behind the scenes of the youthful Blair Government. I may draw on it again.

Nowadays every Government Bill has a statutory mantra headed EUROPEAN CONVENTION ON HUMAN RIGHTS. This is followed by-

> Mr Secretary Blank has made the following statement under section 19(1)(a) of the Human Rights Act 1998: In my view the provisions of the So-and-So Bill are compatible with the Convention rights.

The vagueness of the Convention articles means this is more pious aspiration than firm conviction. Much rests on "In my view".

Through three editions and fifteen years the opening sentence of my 1,000 page textbook *Statutory Interpretation* has announced that the search is for order. That search is being made increasingly difficult. Formerly we had single-level law, where for a particular case there is one text (say an Act of Parliament) or a series of same-type texts which need to be conflated (say a group of Acts on the same topic). That was difficult enough to construe, but now we have other levels also. Typically, the provisions of the Act of Parliament have first to be tentatively construed, perhaps with difficulty. Now the (provisional) result has to be tested against an "upper" text such as a European Community directive or an article of the European Convention on Human Rights. The position is even more difficult in devolved territories like Scotland, where one must also juggle with a lower level of *vires*. Whatever values are served by this, order is not one of them. Legal certainty, and ability to find out what the law is, inevitably suffer. If starting from scratch, who would design such a crazy system? Order, coupled of course with justice, is the prime object of law.

The Bar is now given over to human rights cavortings. The latest issue of its journal *Counsel* revels in the new dispensation. One would think the holy grail had been discovered. Sir Lancelot is of course played by the aforesaid Lord Lester. For some reason he here disguises himself under his pre-honorific name of Anthony Lester. Is this mock modesty, or something more sinister? One cannot tell. I look back to the time when as a Home Office adviser he plagued me while I was drafting the Sex Discrimination Act 1975, and afterwards roundly criticised the product.

This Lord Lester recently attempted to refute the argument of Michael Gove that the new human rights dispensation gives too much power to the judges.[1] Finding his refutation unconvincing, I said why in a letter the Times published on November 26. I pointed out that his Lordship gave the game away by saying that these judicial powers are needed in case Parliament acts oppressively. What is oppressive is often a matter of opinion. In future it will be judicial, not parliamentary, opinion that prevails.

Lord Lester correctly says that under the Human Rights Act courts must construe our statutes compatibly with the Convention only where this is "possible". Again that is deceptive as a safeguard. European courts frequently stretch the meaning of statutes to give a "creative" result. The Lord Chancellor recently stated that under the Human Rights Act our courts are likely to follow these expansive European methods. He added that "the strong interpretative techniques" that can be expected to be applied by our courts to British statutes in Convention cases include "straining the meaning of words or reading in words which are not there". We have been warned.

Back to Janet Jones, who is a teacher. I have reached May 4 1997 in her diary. Of the Mayday general election result she writes: "New Labour have a majority of 254 over the Conservatives. If New Labour lose 100 seats in the election of 2002 they will have a majority of 154 to take them to 2007". I only hope she doesn't teach arithmetic.

Francis Bennion

1999.024 149 NLJ 1903 (17 December).

[1] The Times, 22 November ("2nd opinion").