The House of Lords in the 90s—

A new Supreme Court?

The U.S. Supreme Court is the most powerful court in the world. Every week it decides another Olympian dispute between state and federal govenments, between law-makers and presidents. Yet in its own eyes, nothing the Court does is as important as protecting the constitutional rights of the individual American citizen. The American Supreme Court stands up for John Doe.

The court's approach to those constitutional rights is written in the 14th Amendment to the constitution. That amendment was hard-won fruit of the Civil War and it makes three promises to the American people: that each of them will have benefit of the rights set out in the Consitution; that those rights will not be abridged without due process of law; and that all citizens shall be equal before the law.

The cases which have come out of those promises have shaken and also shaped America. In some, the Court's judgments drove like a steamroller over wrongs which many thought were inevitable: racial segregation in schools; restrictions on the rights of women to seek an abortion; even discrimination against women in the provision of places at military college. In the other cases, the court has gone on the offensive, creating a hatful of positive rights: rights to demonstrate in public places; rights to legal representation in criminal trial regardless of means; rights to criticise the government freely without fear of civil sanction.

The record of the Supreme Court is one of a long, determined and resourceful vindication of the rights of the individual American. That record throws down a challenge to our highest court which our judges have not met in the past and probably will not meet in the future. The question therefore is not

whether the House of Lords is looking its American equivalent in the eye as an equal. It is rather to ask whether our Court deserves to be compared to theirs at all.

At one time, our judges tended to look with complacency at the American example. A written constitution was alright over there, but in the country which gave birth to *habeas corpus*, 'fundamental rights' seemed surplus to requirement. Possibly, with rights as with railways, our pride at having invented the things made us blind to the fact that our system was out of date.

Today the compass needle has swung through one hundred and eighty degrees. Why? Perhaps it is because of the new generation of law lords, who cut their teeth as lawyers in the heyday of the radical Lord Denning. Or perhaps we are seeing the influence of the European Court of Human Rights, which has become a standing rebuke to the British legal system. To our shame, the U.K. has more often been ruled to be in breach of its treaty obligations than any other signatory, including such stalwart abusers as Greece and Turkey. Whatever the cause, the undeniable fact is that British judges have woken up to fundamental rights. These days, their Lordships' language has a Yankee twang.

A dramatic example of this change—and of the American influence behind it—is the case of *Times v Derbyshire County Council*. The newspaper had sharply criticised the management of the council. The council wished to sue in libel to defend its 'governing reputation'. The question was whether English law allowed the Coucil to sue. The way that Law Lords answered that question was remarkable. Instead of judging either on the basis of precedent, or by general principles of libel, they tried simply to weigh the Council's interest in its reputation against the newspaper's right to free speech.

Their Lordship's judgment, explaining their new approach, drew heavily on foreign sources. Their Lordships considered first the requirements of Article 10 of the European Convention on Human

Rights, and afterwards the famous U.S. 1st amendment case, *City of Chicago v Tribune*. In the end, they found against the council. Their reasoning was simply and forcefully expressed by Lord Keith: "it is of the highest importance that a governmental body should be open to uninhibited criticism. The threat of civil action has an inhibiting effect on the freedom of speech".

The *Derbyshire* case was not simply a blip. In the last few years, the language of human rights have figured in judgments again and again. In *Doody*, the courts ruled that a bureaucrat has a duty to give reasons when he makes a prisoner serve more years under a life sentence than the judge had originally recommended. Why? Because a prisoner's right to liberty was in question, and important rights demand to be protected. Likewise in the notorious case of *Brown*, in which a group of homosexuals were prosecuted for self-mutilation, Lord Mustill (unsuccessfully) tried to persuade the House to formulate the common law in accordance with the right to privacy extended by Article 8 of the European Convention.

It is not enough however that the judges exercise their own discretion to mould the common law so that it reflects our fundamental rights. If the House of Lords is to succeed (as it should) in walking in the footprints of the Supreme Court, then it needs to be able to enforce those fundamental rights against the executive, and ultimately perhaps against Parliament itself. The judges need to be able say, "No; that decision, or that law, is inconsistent with the rights which belong to every citizen of this kingdom".

But *Brind*—the case which unsuccessfully challenged the government's ban on broadcasting IRA spokesmen—demonstrated how painfully far away from that goal we still are. There we saw that as long as an adminstrative decision does not cut a procedural corner, nor is manifestly the decision of a lunatic, then a bureaucrat remains entitled to walk all over those very rights which have had such a good airing in the courts recently.

The reason is simple: our fundamental rights are not yet enacted and nailed to the gate as part of our U.K. law. We cannot hope for a remedy from the judges. In *Brind*, they set their faces against making those rights law "by the back door" (that is, by judicial legislation). We can however hope for the Government courageous enough to pass a Bill of Rights Act. Labour has certainly promised as much. If that is what we get, then, but only then, will our judges be able to stand as equals with those supreme Justices across the Atlantic.

Richard Wald,