

## THE HUMAN RIGHTS ACT 1998 - FIVE YEARS ON

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It is a great pleasure as well as a privilege to give the Third Annual Lecture under the auspices of the Law Reform Committee of the Bar Council. You will not wish me to catalogue the case law under the Human Rights Act, though I shall refer to a few significant cases. I shall describe the principles upon which the Human Rights Act is based, its impact and potential for law reform, and something of what is needed by way of further a coherent constitutional resettlement.

These are still early days in the life of the Human Rights Act - far too early to be able to unravel all the enigmas in the legislative scheme. It is only five years since the Act received Royal Assent, and only three years since it was brought fully into force. But it is thirty-five years ago that I first called for the incorporation of the European Convention rights into UK law. When I did so, in a lecture entitled "Democracy and Individual Rights", few judges, lawyers or politicians supported the proposal, still fewer believed it would ever come to pass.

I was determined to campaign the Convention rights to be brought home. My experience of arguing cases before the European Commission and Court of Human Rights, notably the *East African Asians Case*, had convinced me of the need to weave the Convention rights into the fabric of our legal system and to provide speedy and effective remedies for breaches of what should be regarded as our constitutional rights. I did not anticipate that it would take thirty years to achieve this reform. I under-estimated the strength of opposition within the governing class, Ministers as well as civil servants. When I grew older, advancing from the age of innocence to the age of experience, within and outside government, I came to appreciate that while power is delightful; absolute power is absolutely delightful in Whitehall and Westminster as elsewhere.

What is remarkable is not that the making of the Human Rights Act took so long but that it happened at all. There was a brief period of *glasnost* in the aftermath of the election in May 1997 of Tony Blair's young Government, ushering in a period of hectic changes to our constitutional system of government. Most of the work on a Human Rights Bill had been done in opposition, in preparing my two Private Members Bills, under Jack Straw's supervision, as Shadow Home Secretary, and in preparing Labour's consultation paper, *Bringing Rights Home*, published in December 1996.

Designing the Bill was relatively simple and straight-forward compared with the political and legal problems of growing what became a tangled thicket of devolution measures for the government of Scotland, Wales and Northern Ireland.

The inter-party Cook-Maclennan political agreement between Labour and the Liberal Democrats, and Labour's 1997 Election manifesto, envisaged that a Labour Government would introduce radical constitutional reform to bridle the powers of the state and protect the citizen against abuse, as well as devolving power from the central state, promoting freedom of information about the workings and activities of Government and public authorities, and removing the right of hereditary peers to sit and vote in the Lords as "the first stage in a process to make the House of Lords more democratic and representative."

"Bliss was it in that dawn to be alive,  
But to be young was very heaven."

Six years on, the Government's attitude towards the Human Rights Act is at best ambivalent. On the one hand it professes parental pride in its awkward and demanding child. On the other hand, we may be sure that the Government which takes credit for the Act would not have given birth to such a measure today; and there is no certainty that the Act will remain secure from abridgement or outright repeal by a future Government. There is always a risk, even in countries with entrenched written constitutional charters of fundamental rights of future emasculation or worse. In the case of the Human Rights Act that risk is both increased by the relative ease with which the executive can persuade an executive-controlled House of Commons to pass legislation, yet also diminished by the fact that the Convention rights contained in the Act are internationally protected by the two European Courts. We should not place too much faith in supra-national legal mechanisms to deter a future Government hell-bent on weakening or destroying the Human Rights Act. The best safeguard is surely the nurturing of a deep-rooted culture of respect for human rights among governors and governed.

What are the main characteristics of the Human Rights Act? It is a beautifully drafted and subtle measure, expressed in the open-textured language appropriate to a constitutional charter. It declares basic rights and freedoms inherent in our common humanity, and the ethical values of a modern democratic society governed under the rule of law - a society in which individual and minority rights must be protected against the tyranny of majorities and the abuse of public powers, especially where excessive means are used to pursue legitimate ends. The Act provides an ethical framework to guide law-makers, judges, and individual men and women. Its language contains studied and

necessary ambiguities giving the courts leeway in developing and applying its concepts to changing social needs and values without usurping executive or legislative powers. It respects the jurisprudence of the European Court of Human Rights but it does not fetter the ability of British courts to develop a home-grown jurisprudence that suits our own system of government and law. Convention case law gives guidance but does not fetter the progressive development of British law.

The Act does not challenge the doctrine of parliamentary supremacy by empowering the courts to strike down Acts of Parliament. Instead it uses the device of judicial declarations of incompatibility where it is impossible to read and give effect to statutes in harmony with the Convention rights. That subtle compromise enables the executive and legislative branches to choose an appropriate remedy for the injustice identified by the courts; and, if they fail to do so, it provides an incentive for the Strasbourg Court to do so.

Although the Act respects the legislative supremacy of Parliament, it is no ordinary law. As part of its object and purpose, it enables the courts to breathe new life into fossilized old statutes by applying the dynamic values and standards prescribed by the Human Rights Act. It also speaks to young statutes and to new statutes. In the absence of a clear and unequivocal legislative intention to the contrary, the rights it declares and protects must where possible prevail over latent or apparent inconsistencies in future as well as existing legislation.

The Act commands public bodies and officials to exercise their powers in accordance with the Convention rights, including the principles of legal certainty and proportionality. Where they fail to do so, they are made directly liable to their victims for their breaches of duty, and the courts are empowered to fashion effective remedies.

For good constitutional reasons, based upon the democratic imperative and the separation of powers, the courts must and do take care not to act in place of the legislative or executive branches, or to reach decisions for which they lack sufficient authority or expertise. Equally, as Lord Steyn explained in a landmark and luminous judgment of a majority of the Privy Council last Thursday (*Balkissoon Roodal v The State*), the independent, neutral and impartial judiciary have a duty to protect fundamental rights, where necessary. "It is not a responsibility which the courts may shirk or attempt to shift to Parliament."

The Act envisages that the courts will strive by a process of constitutional interpretation familiar in other common law jurisdictions to imply safeguards of human rights into legislation and to give a restrictive meaning to broadly

delegated public powers where they interfere excessively with basic rights and freedoms: the technique of reading in and reading down. Again in Lord Steyn's well-chosen words in *Roodal's* case, "It is a benign and workable technique to give a reasonable measure of protection to fundamental rights in a practical world where there are inevitably tensions between individual rights and good democratic government." This "allows the constitutional power to modify in cases of non conformity to play a dynamic but not an extravagant role."

The Act also envisages that the courts will interpret and apply the common law and equity compatibly with the Convention rights, reconciling the demands of legal certainty with the need to provide effective legal remedies for breaches by those endowed with public powers. In *Roodal*, where a majority of the Privy Council decided that the penalty for murder is discretionary rather than mandatory under the Constitution of Trinidad and Tobago - Lord Steyn (in company with Lord Bingham of Cornhill and Lord Walker of Gestingthorpe, but accompanied by a robust and indignant dissenting judgment by Lord Millett and Lord Roger of Earlsferry) described that Constitution as having a "direct effect on statute law and common law as well as an indirect radiating effect on both." Exactly the same is true as regards the direct and indirect effects of the Human Rights Act on statute law and common law, in both public law and private law. It adds strength to the traditional role of our courts in developing the common law and equity to suit contemporary conditions of life. In that way it allows the courts to play a complementary role in reforming the law. Convention law is to be approached through and not round statute law and common law.

The Act does not depend only upon the judiciary to secure and protect human rights, nor does it create a government of unelected judges. It is holistic in its organising principles, engaging the responsibility of all three branches of government to act in a way compatible with fundamental civil and political rights. It is based upon a mature theory of the nature of parliamentary democracy and the role of the judiciary. The notion of sovereignty, which it reflects, is neither a metaphysical dogma nor a rigid mechanical rule. It is a flexible notion rooted in the political reality of the sharing of power needed in meeting the changing needs of a complex post-industrial society.

The Act is also an essential element in the constitutional re-settlement of the different nations and regions, limiting the powers of the devolved institutions by applying common standards of protection of human rights - a species of what in other countries would be federal constitutional law. It ensures that our basic rights do not alter according to the particular part of the United Kingdom in which we live or work, or according to whether we are or are not British citizens.

One provision that attracted little interest during the passage of the Act was section 19. That provision requires a Minister in charge of a Government Bill to make a statement before Second Reading as to whether the Minister considers the Bill to be compatible with the Convention rights. The device was originally borrowed, in my second Human Rights Bill, from the New Zealand Bill of Rights Act 1990. But neither I nor the makers of the Human Rights Act appreciated that it would become one of the most potent provisions in the statutory scheme.

It is the Joint Parliamentary Select Committee on Human Rights - set up in January 2001 - which gives the section 19 procedure such potency. I have the privilege of serving as a member of that Committee of six MPs and six peers. We have the great benefit of a full-time independent and expert legal adviser, Professor David Feldman, who will soon, alas, be leaving us to become Rouse Ball Professor of English law at Cambridge University. It is vital for his successor to be equally independent, expert and practical. Professor Feldman has played a key role in enabling the Committee to scrutinise legislative proposals with real authority and with sufficient speed to keep pace with the legislative process. Armed with his critical analysis of complex measures, we are able to probe the Government's arguments and to give Parliament the benefit of our views. Our scrutiny covers not only the Convention but all the international human rights treaties by which the UK is bound. Thanks to our legal adviser's fine scholarship, the Committee's reports contain a wealth of international and comparative human rights case law.

Increasingly our reports are read and used by advocates and taken into account by the courts. Human rights scrutiny is now systematic, influencing the preparation of legislation in Whitehall, and the legislative process itself. I do not have time to give examples of our work. For those who are keen to now more about our work, I have devoted a chapter to the subject in the new edition of Butterworth's Human Rights Law and Practice that will be published in February.

During its passage the Human Rights Bill was opposed by the Conservative Front Bench and, even more stridently, by right-wing sections of the media. It was and remains a target of the tabloids which fear that it will result in judicial restraints upon their intrusions on personal privacy, and which continue to attack the Act - as a charter of rights for criminals, terrorists and bogus asylum-seekers, and as a licence for unelected judges to frustrate the will of the majority and to undermine the effectiveness of necessary state powers. Their attacks are ignorant and ill-informed. They are as misguided as was the unsuccessful attempt to obtain a blanket media immunity against the effects of the Human Rights Act. Instead of attacking the Act, the media should support it, for, by making Article 10 of the Convention directly enforceable in UK law, the Act

gives legal protection to the right to freedom of expression for the media and the public. By bringing Article 10 home, the Act strengthens the constitutional right to freedom of speech and of the press.

Most regrettably, senior Ministers add their own attacks on courts which decide that they have acted in breach of human rights, and even threaten to curb judicial review, or to cut down the protection given by the Act. The fact that they are members of the very Government responsible for the Act undermines the legitimacy of the Act, and is damaging to the protection of human rights and to the rule of law.

It was a decision of Mr Justice Collins<sup>1</sup> about the Home Secretary's duty to support asylum-seekers which provoked one of the worst of the Ministerial attacks. The facts of the test cases were extreme, and it was not surprising to human rights lawyers that Mr Justice Collins decided that the Home Office were in breach of Article 6 of the European Convention in refusing the applicants the right to have their individual circumstances examined and to appeal if denied such benefits.

In a hasty and ill-considered response the Home Secretary, David Blunkett, said: "Frankly, I am personally fed up with having to deal with a situation where parliament debates issues and the judges then overturn them. We were aware of the circumstances, we did mean what we said and, on behalf of the British people, we are going to implement it"<sup>2</sup>. In an interview with the *Daily Telegraph* the next day, Mr Blunkett went on to say: "If public policy can be always overridden by individual challenge through the courts, then democracy itself is under threat".

The *Daily Mail* then began a vitriolic campaign against Mr Justice Collins personally, and Melanie Phillips opined that "Ideally we should stay out of the Convention and tear up our Human Rights Act altogether. For this culture of rights has not expanded freedom. Instead, it has given power to make questionable decisions on issues which properly belong to Parliament. The only things that have expanded exponentially are judicial hubris and the parasitical industry of human rights lawyers".

In the same week the Prime Minister spoke on *Breakfast with Frost* about the problems with asylum. After outlining further measures designed to stop immigrants entering the country illegally he added "if the measures don't work, then we will have to consider further measures, including fundamentally looking at the obligations we have under the Convention on Human Rights". Mr Blair

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<sup>1</sup> *R (Q and others) v Secretary of State for the Home Department*, 20 February 2003, Times Law Reports

<sup>2</sup> Speaking on Radio Four 'World at One' on 19 February 2003

did not explain what he meant by this 'fundamental look' and it is difficult to imagine how exactly this might have been achieved. When asked by the chair of the Joint Select Committee on Human Rights, the Rt Hon Jean Corston MP, to clarify his comments, the Prime Minister replied: "My comments regarding the UK's obligations under international law should not be read as suggesting that we are planning to pull out of the ECHR. We have no current plans to withdraw from our international obligations relating to asylum of the ECHR. However, I am clear that we should not be afraid to look at our international obligations if current measures to tackle asylum are not effective .... [A]s I said on *Breakfast with Frost*, I am not prepared to discount possible measures to reform the asylum system in the future if they create problems of compatibility with the ECHR." We have been warned.

I hope and believe that behind the scenes Lord Chancellor Irvine would have protested at these misguided statements. The fact that he had become a thorn in the flesh of a Home Secretary backed by the Prime Minister probably contributed to the Lord Chancellor's abrupt removal from office and the effective abolition of his office.

I recall these Ministerial utterances because they illustrate the fragility of the Government's commitment to the culture of human rights which their own admirable legislation was intended to promote. It cannot be left to the judiciary and the legal profession, together with some future Equality and Human Rights Commission, to promote and protect human rights. There is a pressing need for Ministers to set a good example, especially when they are found to have misused their powers and have to swallow bitter medicine administered by the courts.

We will be able to measure the true extent of the Government's commitment - or lack of it - not only in the new legislative programme to be announced tomorrow but also when we learn the outcome of a Government review. That will reveal whether the UK, like most comparable European countries, will at last sign and ratify Additional Protocols to the Convention, and accept the competence of the UN Human Rights Committee, the UN Committee for the Elimination of Racial Discrimination and the Committee Against Torture to deal with individual complaints in British cases. We will also be able to measure the Government's deeds as well as their words when we learn whether they will reform the incoherent and incomplete mess of equality legislation - in accordance with the promise in Labour's 1997 manifesto to "seek to end unjustifiable discrimination wherever it exists", and whether the proposed Commission for Equality and Human Rights will strengthen, rather than weaken, the effective enforcement of legislation against discrimination, and whether the proposed Commission will have sufficient independence from government, sufficient resources, and

sufficient powers to be able to tackle not only invidious discrimination but human rights violations generally.

When the threatened asylum and immigration legislation is introduced, we will also be better able to measure the extent of the Government's commitment - or lack of it - to human rights. We shall then discover whether the rumours are correct about the threats to deprive failed asylum-seekers and their children of some of their basic human rights to family life and liberty and to the necessities of life, as well as the Government's intention not only to replace the two-tier system of asylum appeals with a single system but also to oust judicial review of the abuse of Home Office powers.

The auguries are not favourable. The Prime Minister has warned of harsh measures, and Home Secretary has complained that the asylum system is "unworkable" because of the availability of judicial review. There is a powerful case for reforming the appeal system, and I fully accept that judicial review applications on behalf of asylum seekers may be abused; but that is not a sufficient reason to seek to remove the powers of the courts to review the abuse of power and to provide effective redress. I hope that Parliament and, if necessary, the courts will not accept an attempt to curb those vital powers by ousting judicial review.

Another indicator of the Government's approach will be what happens when the draft Civil Contingencies Bill is introduced as an actual Bill. It was published as part of what was described as "the government's wider resilience agenda". The Bill would confer a sweepingly broad power to make emergency regulations, including requirements to violate human rights, and to do so in some circumstances without making an Order in Council. Clause 25 of the draft Bill provides that, for the purposes of the Human Rights Act, an instrument containing emergency regulations "shall be treated as if it were an Act of Parliament". The consultation document explained that, in addition to the power to derogate from the European Convention, the government "has considered whether any further flexibility is necessary.... The government is considering whether regulations introduced as emergency measures should be considered as primary legislation made by Parliament. That way, emergency regulations are not slowed up by or prevented by injunctions."

The Joint Select Committee on Human Rights observed that "the scope of the power to make regulations is so wide as to make it virtually impossible for any regulation to fall outside the scope of the delegated legislative power, and there is little likelihood of a court holding irrational a regulation made by a Minister in

response to a properly declared emergency”<sup>3</sup>. Our report goes on to warn that “It provides a way of allowing the executive to legislate, before seeking parliamentary approval, in ways which are known or believed to be incompatible with Convention rights, while denying victims of violations the right to obtain an effective remedy from a court or tribunal. In our view, regardless of the context, the effect of this legislative technique is objectionable on human rights grounds”. It will be important to discover whether the Government have decided to accept this criticism or to introduce legislation that will undermine the ability of the courts to grant effective remedies for the abuse of human rights through the exercise of these sometimes necessary but always dangerous powers.

I hope that concern for human rights will inform the “national conversation” that we are promised after the forthcoming publication of the Government’s prospectus for the remainder of its term of office.

I turn to the way the courts have performed the pivotal role given to them under the Human Rights Act. During the past three years, and even before, the principles of the legislation have been developed by the judiciary. The time and resources used for judicial training were well spent during the two years before it was brought fully into force. The courts and the legal profession have done their best to ensure that effective domestic remedies are provided for breaches of the Convention rights. The fact that the recently founded Human Rights Lawyers’ Association already has some 650 members is an indication of the interest in human rights among legal practitioners as well as scholars.

Inevitably, at this early stage, the courts’ record is patchy and uneven, especially in the absence of a single supreme judicial authority sitting *en banc* in important constitutional and human rights appeals to develop a consistent body of jurisprudence. Inevitably, some judges are more executive-minded or more human rights-minded than others; some are more influenced by language than by purpose; or by precedent than by principle; some are more active and creative, others more passive and legalistic.

I undertook at the outset to refrain from presenting a catalogue of the case law under the Human Rights Act. Instead, without any attempt at scholarly analysis, I shall briefly refer to a few of the important areas of judicial development.

The key principle of proportionality was given practical content by the House of Lords in *Daly*<sup>4</sup>. Its legal force depends upon the context in which it is applied.

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<sup>3</sup> Fifteenth Report of Session 2002/03 of the Joint Committee on Human Rights (HL Paper 149, HC 1005), available from [www.publications.parliament.uk](http://www.publications.parliament.uk).

<sup>4</sup> *R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 AC 532 (HL).

Crucially, what matters is what David Pannick and I inappropriately described as “deference by the court”, in the first edition of Butterworths’ *Human Rights Law and Practice*. We have corrected that in the new edition and refer instead to “the discretionary area of judgment in a national court”. Lord Hoffmann was surely right to observe, in the *Pro-Life Alliance* case<sup>5</sup>, that the concept of ‘deference’ by the court is inappropriate because of its ‘overtones of servility, or perhaps gratuitous concession’, although, as I shall later explain, I respectfully disagree with the way in which he and a majority of the Law Lords (unlike the Court of Appeal and Lord Scott of Foscote) did in fact defer in that case to an unjustifiable form of political censorship during an election campaign.

Beyond questions of nomenclature, what matters is the extent to which the courts accept that there are circumstances in which it is appropriate for the legislature or the executive to determine how to strike a balance between competing policy considerations. Recognition of such a latitude may be appropriate in a specific case, because judges may lack the information or expertise to form primary judgments on the relevant considerations. A second and more problematic reason given by some judges is that, when questions of policy and balance arise, the legislature and the executive are democratically accountable to the electorate, unlike the judiciary. Lord Hoffmann observed in *Alconbury*<sup>6</sup>, that “The Human Rights Act 1998 was no doubt intended to strengthen the rule of law but not to inaugurate the rule of lawyers”.

True enough, but we should recognise that the argument based on the democratic imperative may slide into a form of majoritarianism or moral populism. The judiciary should not readily accept what is claimed on behalf of the state, nor of course should the courts decide cases on the basis of opinion polls or the outcome of elections. As Lord Bingham of Cornhill has observed in a landmark Privy Council decision<sup>7</sup>, “In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion.” Lord Bingham cited with approval the observations of the President of the Constitutional Court of South Africa<sup>8</sup>: “The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected.”

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<sup>5</sup> *R (ProLife Alliance) v British Broadcasting Corporation* [2003] 2 WLR 1403, at 1422, paras. 75-78.

<sup>6</sup> *Alconbury Limited v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, at 1427C.

<sup>7</sup> *Reyes v The Queen* [2002] 2 AC 235 (PC), at 246, paragraph 26.

<sup>8</sup> In *State v Makwanyane* [1995] 1 LRC 269, at 311.

It is one thing to recognise the institutional limits of the courts, and the need to respect the constitutional separation of powers. It is quite another to abstain from deciding that legislation or administrative action is incompatible with human rights because of the legislative supremacy of Parliament or the fact that Ministers may be removed at election time.

Lord Hoffmann has argued, in his speeches in *Pro-Life Alliance*, that there are *legal* limits to the courts' inherent decision-making powers of review that confine their jurisdiction according to the subject-matter of the case. However, I submit that the better view has been expressed by Lord Steyn<sup>9</sup> and Professor Jeffrey Jowell QC<sup>10</sup>. It is not a question of legal limits to jurisdiction but of the wise exercise of judicial discretion, having regard to the shortcomings of the courts' institutional capacity and the constitutional separation of powers; the courts must not abdicate their responsibilities by developing self-denying constitutional limitations on their powers.

We cite in our human rights textbook a number of factors which the courts may take into account in deciding what area of discretionary judgment to accord to the legislature or the executive, and I shall not repeat them now. Clearly, these factors may be applied by different judges in different ways. For example, Lord Hoffmann has tended to accord a significantly wider area of discretionary judgment to the executive and legislative branches than, say, Lord Bingham or Lord Steyn<sup>11</sup>. This significant difference of approach is also reflected in their decisions on constitutional appeals to the Judicial Committee of the Privy Council in death penalty cases<sup>12</sup>. And it is reflected in the jurisprudence of differently composed Courts of Appeal.

Another important area in which the relevant legal principles are being developed in different ways by different judges concerns the interpretive obligation, under section 3 of the Human Rights Act, to interpret legislation wherever possible in a way that is compatible with the Convention rights. If not, the only remedy is a declaration of incompatibility under section 4. A strained interpretation may be necessary because, as Lord Steyn pointed out<sup>13</sup> "A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. If a *clear* limitation on Convention rights

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<sup>9</sup> Johan Steyn, *Dynamic Interpretation Amidst an Orgy of Statute*, The Brian Dickson Memorial Lecture, Ottawa, 2 October 2003.

<sup>10</sup> J. Jowell, *Judicial deference: servility, civility or institutional capacity* [2003] PL 592, at 601.

<sup>11</sup> See e.g., *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 (HL), *per* Lord Steyn, at 187 (paragraph 31), and *per* Lord Hoffmann, at 195 (paragraph 62).

<sup>12</sup> For example, see *Lewis v. A-G of Jamaica* [2001] 2 AC 50

<sup>13</sup> *R v A (No.2)* [2002] 1 AC 45 (HL), at 68.

is stated in *terms*, such an impossibility will arise.” But the process of judicial interpretation must not, as Lord Bingham of Cornhill has warned<sup>14</sup>, become “judicial vandalism”, that is, giving a statutory provision “an effect quite different from that which Parliament intended”. The difficulty is that there is no bright line to be drawn between robust interpretation and judicial vandalism, as the continuing controversy over the Law Lords’ majority decision in the rape shield case illustrates.

To take a different example, in *Mendoza v Ghaidan*<sup>15</sup>, the Court of Appeal had to decide whether, on the death of a protected Rent Act tenant, it was lawful to make a distinction between claims to succession by the surviving partners of unmarried heterosexual and same-sex couples. It decided that it was not lawful because it constituted a form of unjustifiable discrimination. The Court interpreted the relevant statutory language robustly to remove what would otherwise have involved a discriminatory difference of treatment in the enjoyment of Convention rights. The words “as his or her wife or husband” are now to be read and given effect “as if they were his or her husband or wife”. The Court was not deterred from making this decision so by arguments based upon deference to Parliament, affirming instead the primacy of rights of a “high constitutional importance.” Nor did it matter that the decision concerned a dispute between purely private parties.

This enlightened decision chimes well with similar enlightened constitutional jurisprudence in Canada and South Africa<sup>16</sup>, and, most recently, in the Supreme Court of Massachusetts<sup>17</sup>. I very much hope that it will survive on appeal to the House of Lords<sup>18</sup>.

*Mendoza* illustrates the key role of the courts in using the Human Rights Act to bring legislation into harmony with the constitutional right to equal treatment without discrimination. The Human Rights Act has also enabled the courts to bring statute law and common law into harmony with the constitutional right to freedom of expression, by treating it as “the primary right”<sup>19</sup>, subject only to

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<sup>14</sup> *R(Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 (HL), at 882-83, paragraph 30.

<sup>15</sup> [2003] 2 WLR 478.

<sup>16</sup> See *Vriend v. Alberta* [1998] 1 SCR; *Halpern v. A-G of Canada* [2003] 14 BHRC 687; *Du Toit and de Vos v. Minister for Welfare and Population Development and others* [2002] 13 BHRC 187.

<sup>17</sup> *Hillary Goodridge & others vs. Department of Public Health & another*, 18 November 2003

<sup>18</sup> For recent discussion, see David Mead, *Swallowing the Camel, Straining at the Gnat: The Implications of Mendoza v Ghaidan* [2003] E.H.R.Lr 501.

<sup>19</sup> *R v Secretary of State for the Home Department, ex parte Simms* [2002] 2 AC 115, at 125G, *per* Lord Steyn; *Reynolds v Times Newspapers* [2001] 2 AC 127 (HL), at 200D-E, *per* Lord Nicholls of Birkenhead. Both cases were decided before the coming into force of the Human Rights Act, but were significantly influenced by the Convention right to freedom of expression.

necessary exceptions construed strictly so as not to undermine the very substance of the right. This is not the occasion to undertake a detailed review of the free speech case law. That will be covered in the next edition of our textbook in a chapter which I have written together with my colleague, Pushpinder Saini. We are critical of some of the Strasbourg and British case law on free speech, especially because of the way in which the Strasbourg Court has used the margin of appreciation doctrine, and our courts have been unduly deferential to public authorities.

I have time to mention only one example, the majority decision of the House of Lords in the *Pro-Life Alliance*<sup>20</sup> case. I am able to do so briefly because I gratefully adopt the powerful criticism of that decision made by Professor Eric Barendt<sup>21</sup>. As the Court of Appeal stated, the case was about the censorship of political speech at election time. There was nothing gratuitous or sensational or untrue about the intended broadcast of graphic images of abortion and aborted fetuses. The BBC refused to permit the material to be broadcast on grounds of taste and decency. A unanimous Court of Appeal held that the decision involved an unjustified prior restraint on freedom of political expression.

A majority of the House of Lords interpreted the case as involving a challenge to the BBC's responsibility to ensure that programmes do not infringe taste and decency. In fact, however, the Pro-Life Alliance had argued that the taste and decency rule as applied in a party election broadcast infringed freedom of political speech. Professor Barendt points out, in my view correctly, that the House of Lords failed to comply with the obligation imposed by section 3 of the Human Rights Act to interpret the broadcasting legislation compatibly with the Convention rights of the Pro-Life Alliance and the public. It was, as Professor Barendt observes, "a bad day for free speech".

Another area in which the courts have yet to develop a consistent body of human rights jurisprudence involves the Convention right to respect for private life, exemplified by the recent decision of the House of Lords in *Wainwright*<sup>22</sup>. Ten years ago, in an article about the role of English judges as law makers<sup>23</sup>, I argued that "The 'right to be let alone' was derived by American jurists from the English common law. The existing common law principles could be developed to protect personal privacy. The courts could do so interstitially and by molecular rather than molar motions, case by case, without usurping the functions of Parliament,

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<sup>20</sup> Note 5 above.

<sup>21</sup> Eric Barendt, *Free Speech and Abortion* [2003] P.L. 580.

<sup>22</sup> *Wainwright and another v Home Office* [2003] UKHL 53.

<sup>23</sup> Anthony Lester, *English Judges as Law Makers* [1993] P.L. 269, at 284-86.

and avoiding the dangers of broad legislative generalisations in this complex and sensitive area.”

With the coming into force of the Human Rights Act, it seemed likely that the courts would be encouraged to do so by their duty to develop both statute law and common law compatibly with the Convention right to respect for private life. There were some promising green shoots in the recent case law<sup>24</sup>.

*Wainwright* provided the Law Lords with an opportunity to develop the law, at least by way of dicta. The case did not raise sensitive issues about the balance between free speech and personal privacy. It concerned an intrusive strip search of the claimants conducted in breach of the relevant prison rules and without statutory authority. The issue before the House of Lords was whether Mrs Wainwright and her son were entitled to claim compensation for the distress suffered. They could do so only if the prison officers’ unlawful conduct was a tort or breach of a statutory duty. Unfortunately for the claimants, the Human Rights Act was not in force at the relevant time. This meant that they could not rely upon a breach of the duty imposed by section 6 of that Act read with the Convention right to respect for private life. They therefore had to fall back on convincing the Law Lords of the existence of a common law tort.

Lord Hoffmann, who gave the lead speech, rejected the invitation to declare the existence of a tort of invasion of privacy. He also went on, obiter, to consider what would have been the position if the Human Rights Act had been in force, and suggested that there would have been no remedy in damages, under section 7 of the Act, for distress occasioned by the breach of Article 8, unless the invasion of privacy had been intentional rather than negligent. I am unaware of any Convention case law which limits compensation for distress caused by breaches of Article 8 or of any other Convention right, to intentional, as distinct from negligent, breaches. Under Convention case law on just satisfaction, to which our courts are required to have regard<sup>25</sup>, an improper purpose plainly makes the infringement more serious<sup>26</sup>, but the claimant is not disqualified from obtaining compensation because of the breach is unintentional<sup>27</sup>.

I would respectfully submit that Lord Hoffmann’s approach is also inconsistent with common law principle, as stated by Lord Camden CJ sitting in the Court of

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<sup>24</sup> See e.g., *Douglas v Hello* [2001] QB 967 (CA); *A v B and C* [2002] EWCA Civ. 317; *Campbell v MGN* [2002] EWCA 1373; *Peck v United Kingdom* [2003] BHRC 669; and R.Singh and J.Strachan, *Privacy Postponed?* [2003] EHRLR 12 (Special Issue on Privacy).

<sup>25</sup> Human Rights Act, section 8 (4).

<sup>26</sup> As in *Halford v United Kingdom* (1997) 24 EHRR 523, at 550, paragraph 76.

<sup>27</sup> See e.g., *Darnell v United Kingdom* (1993) 18 EHRR 205, at 212, paragraph 24; *McMichael v United Kingdom* (1995) 20 EHRR 205, at 243, paragraph 103.

Common Pleas in 1765 in the celebrated search-and-seizure case of *Entick v Carrington*<sup>28</sup>. The case was brought in trespass as an invasion of private property by the King's Messengers. One question that arose was as to the proper measure of damages not for trespass to goods but for what would be regarded today as an unlawful invasion of privacy arising from the unlawful search and seizure of papers. Lord Camden noted that "Papers are the owner's goods and chattels: they are his dearest property; and so far from enduring a seizure, they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect." I submit that the same is true of unlawful personal searches involving a lack of respect for the individual's private life and bodily integrity. I hope that in this area of the law, as elsewhere, our courts will not follow the narrowly restrictive approach in *Wainwright* but will develop the law on a principled basis.

I said at the outset that I would say something of what needs to be done, in the context of wider constitutional reform. One significant proposed reform that would not have occurred but for the Human Rights Act is the creation of a Supreme Court, together with a new way of appointing and promoting judges free from political interference. We must ensure that the Government's proposals really will enhance the independence and authority of the judiciary. What is essential is not the preservation of the ancient offices of Lord Chancellor, or the Judicial Committee of the House of Lords, or the ability of Law Lords to chair a Lords committee, but practical safeguards of judicial independence, excellence and constitutional legitimacy.

In the interests of democracy, good governance and respect for human rights, we also need to resist any proposals that will enable the executive to dominate the Upper House or sap its vital independence<sup>29</sup>.

Ten years ago, the Labour Party conference adopted a policy supporting a two-stage process on human rights: the first stage included the incorporation of the Convention; the second stage was for a Labour Government to set up an all-party commission to consider and draft a home-grown Bill of Rights. The second stage has not yet happened.

I submit that the time has come for something more ambitious: an all-party and beyond-party commission to consider and draft a British constitution defining

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<sup>28</sup> (1765) 19 St. Tr. 1030

<sup>29</sup> See generally, Meg Russell and Robert Hazell, *Next Steps in Lords Reform: Response to the September 2003 White Paper*, The Constitution Unit, November 2003.

the separate functions of each branch of government and the constitutional rights and freedoms of the citizen. There are many reasons to support such a proposal. One reason is that our constitutional arrangements - set out in a multiplicity of verbose, over-prescriptive, and inconsistent devolution and Greater London Assembly statutes, and in other legislation, including the Human Rights Act itself - need to be turned into a coherent, accessible, user-friendly constitutional charter of the kind to be found in all other European democratic countries and in most Commonwealth democracies.

Another reason arises from our continuing national identity crisis both as a member state of the European Union and as a multi-cultural society. Surely it would be helpful to have our own constitutional charter emblematic of national identity, defining the limits of the powers of the State, and British political and civil values, rights and freedoms, both in the context of the European Union and in defining the rights and duties of British citizenship. Such a constitutional charter would be valuable in promoting the essential concepts of citizenship and a culture of respect for human rights.

The current controversy over the Government's proposal to create a Supreme Court of the United Kingdom independent of the legislature, and a new system, of judicial appointments, illustrates the need for something more than ordinary legislation. The separation of judicial powers from the legislative and executive branches is surely not, as the Judges' Council suggest<sup>30</sup>, "an unhealthy genuflexion to constitutional fundamentalism". In the well-chosen words of Lord Bingham of Cornhill<sup>31</sup>, for a minority of Law Lords that will soon, I hope, be the view of the majority: "the functional separation of the judiciary at all levels from the legislature and the executive [is] a cardinal feature of a modern, liberal democratic state governed by the rule of law."

At present the legal source for that principle is Article 6 of the European Convention. I submit that it should be enshrined in a British written constitution. I hope that it will not take another thirty years to accomplish.

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<sup>30</sup> Judges' Council Response to the Consultation Papers on Constitutional Reform, November 2003, paragraph 159.

<sup>31</sup> Law Lords' Response to Consultation Papers, November 2003.