

COMMON TRACK SIX

This is adapted from an essay on the first ten years of the UK Human Rights Act which appeared last week in a special issue of the [European Human Rights Law Review](#)

The Human Rights Act – an academic sceptic changes his mind but not his heart

REFLECTING ON MY PAST

I strongly opposed the introduction of human rights legislation in the 1990s but am convinced now that the measure that we eventually got, in 1998, should be protected from repeal. At the time my concern was with the importance of preserving parliament as the main source of human rights protection in this country, and because of this I emphasised traditional civil libertarian principle (promoting and protecting political freedom) over what I thought of as the vaguer language of human rights, talk that belonged in politics maybe but law definitely not.

That is not my view today.

For a while I reconciled my past opposition with my growing support for the move to human rights law by explaining that the measure enacted in the UK was very different from that for which the human rights enthusiasts had been agitating. There was no judicial override of parliament, no invitation to the courts to stray into policy arenas and little space therefore for ill-disposed judges to do their reactionary worst. Recently I have come to see that there is a bad grace to this position, that the Human Rights Act (HRA) deserves (and these days surely needs) more than such merely lukewarm expressions of solidarity.

WHY THE ACT MATTERS

The Human Rights Act stands for something greater than the mere bringing home of the 1950 European Convention that its legislative promoters at the time (with shrewd modesty) declared it to be. These days it is at the very centre of what it means to be progressive in Britain, in politics as much as in law. It is the flagship for a way of thinking, a bold assertion of an international identity that is rooted in a shared belief

in the dignity of all. To attack the HRA is not just to assault the rights set out within it: it is to challenge a set of beliefs that all those committed to human progress now find best expressed in the language of human rights.

This last point explains the change of mind.

Perhaps I was slower than most, or more nostalgic for past years of political ideology, but it took me a while to see that with the (temporary?) eclipse of the socialist perspective on truth, the poor, the disenfranchised, indeed all the victims of capitalism's post 1989 march to global oblivion, now had precious few ethical barriers with which to protect themselves from impoverishment and exploitation, or worse. 'Respect my human rights' is one such potential impediment, a slogan which empowers and ennobles at the same time: 'We may be poor and on the outside but we are human like you and therefore we are not to be trifled with. Here is what you are now obliged to do so that our rights are realised, and we will struggle to make you do it.' It is not a bad claim, and it comes with much history and tradition on its side – but more importantly, in this age of capitalist hegemony it is now pretty well all we have.

Of course the HRA does not remotely deliver in this kind of comprehensive way, but it heads in the right direction.

Its template of a rights charter which must be adhered to by the other branches of government, but which the judges cannot use to destroy the will of the people, does not need to stop at the civil and political rights that are there set out: it could expand to embrace social and cultural rights, and economic and labour rights as well. In fact there is a whole world of human rights out there, applied decency in a legal shape, waiting to be discovered by a society adventurous enough to find it and then brave enough to hold the market to its ethical account¹ If we are all instrumentalists in search of a better life, then human rights is the best route for those who care that no one should be left behind.

SOVEREIGNTY AND HUMAN RIGHTS

¹ The International Covenant on Social, Economic and Cultural Rights for example, and much else besides.

If this is the big picture, then the HRA can be said also to have worked well in its series of smaller vignettes within this broader canvass.

The compromise between parliamentary sovereignty and human rights to be found within sections 3 and 4 of the HRA has been highly effective, with section 3's insistence that all legislation be interpreted consistently with the rights set out in schedule one of the Act so far as this is 'possible' being tempered by section 4's respect for parliament (in the form of legally unenforceable declarations of incompatibility) where this is not. Early attempts to misuse section 3 to achieve judicial supremacy were quickly seen off² and in their place came intelligently nuanced efforts to synthesise the moral imperative of rights with the exigencies of the political moment.

The judges became confident in their reworking of laws to fit with human rights where they judged that the changes they were imposing went 'with the grain' of the underlying purpose of the law under scrutiny³ rather than subjected it to what Lord Bingham described as 'judicial vandalism'.⁴ The courts have insisted that judicially-inspired human rights changes have to fit within the broader aims of the law being subject to them.⁵ This has worked well where the possibility has been left open by the statute under scrutiny, either expressly⁶ or by implication⁷ and it has also been made to apply where the wording of a statute has been reasonably open. If such an interpretation is not possible the higher courts' power to issue a declaration of incompatibility (D of I) stands ready as a consolation for the disappointed litigant and an important pointer towards the need for change.

² Eg by Lord Steyn in *R v A (no 2)* [2001] UKHL 25, [2002] 1 AC 45.

³ E.g. *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 at para [121] per Lord Fraser which addressed discrimination on grounds of sexual orientation in housing law.

⁴ *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837 at para [30] per Lord Bingham.

⁵ *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291.

⁶ *R (Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396.

⁷ *R v Offen* [2000] EWCA Crim 96, [2001] 1 WLR 253.

Of all the features of the HRA, the D of I is probably the most ingenious and perhaps also the most effective. When the bill was going through, no one seemed quite sure whether there should be very many of these or hardly any at all: traditionalists wedded to the standard account of parliamentary sovereignty consoled themselves that a torrent of such declarations, duly ignored by government, would mean that the HRA quickly became little more than an ethical weapon which might make lots of noise but which was in reality merely firing moral blanks. Human rights enthusiasts hoped that with section 3 doing the impossible to the possible there would never be a need to turn to section 4 at all.

Neither prophecy has proved accurate. There have been D of I's when they have been needed, in the famous *Belmarsh* case on indefinite detention without trial, for example,⁸ where the clarity of the detention law left no room for ambiguity and when even if it had, it was surely right that a matter as important as national security in a democracy should not be subject to a casual, perhaps even under-informed judicial strike down power. Other cases (*Bellinger* is one⁹) have acknowledged that there are some rights issues (often on points of great ethical importance on which many views are held) which judges are equipped to identify but not to resolve. There have not been many cases where a D of I has been wrongly awarded (when a section 3 interpretation would have been better) or where a section 3 interpretation has inappropriately pre-empted what ought to have been a section 4 declaration.¹⁰

Precisely because the courts have been nuanced, the government has invariably been able to be generous. The D of I's have on the whole been taken seriously, the detention powers in the Anti-terrorism, Crime and Security Act 2001 being replaced by a control order scheme potentially applicable to all, the *Bellinger* criticisms being recognised in the subsequent legislative response, and much else besides. Of 26 D of I's that have been made at the time of writing 18 of them are still standing and Parliament has responded to remove the incompatibility in all but three cases. The modelling of the implementation procedure on that of the Council of Europe's

⁸ *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

⁹ *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 on marital certificates following gender reassignment.

¹⁰ *R v A*, n 2 above, being such a case.

scheme for oversight of Strasbourg decisions has reduced the novelty of section 4 interventions and this has been another factor in the successful reception of the Act into domestic law.

Of course at least part of the second decade of the HRA's life will be under a government not responsible for its enactment, so if the Act does survive at all (an open question upon which more shortly), it remains to be seen whether it will find so receptive (albeit sometimes grudgingly receptive) a Whitehall as in these early years. There will also be the fast-evolving and increasingly divergent constitutional traditions in Scotland, Northern Ireland and (even) Wales to take into account.

AND THOSE REACTIONARY JUDGES?

The biggest surprise to sceptics has been the performance of the judiciary. For those radical lawyers who started work in the 1980s, when the Dennings and the Diplocks and the Widgerys were being succeeded by the Donaldsons, the Lanes and so forth, in what seemed at the time an endless conveyor belt of class warriors in ermine, it seemed certain that giving more power to judges was bound to be wrong, not just as a matter of democratic theory but also because of the damage they would be sure to do on the ground.

There have been three factors in the confounding of this expectation.

First the state under Labour has been less divisive – there have been fewer indefensible excesses for the courts indefensibly to defend, no miners' strike, poll tax or Wapping riots, so cases like *Austin v Metropolitan Police Commissioner* (justifying police extremism against May Day protestors)¹¹ and *R (Gillan) v Metropolitan Police Commissioner* (upholding police powers of stop and search)¹² have not come along with a frequency disconcerting to supporters of the Act.

Second, old socialist critics of the HRA had little reactionary judicial law-making to get their teeth into because, simply put, there has been hardly any challengingly

¹¹ [2009] UKHL 5, [2009] 1 AC 564.

¹² [2006] UKHL 12, [2006] 2 AC 307. See now *Gillan v United Kingdom* European Court of Human Rights 12 January 2010.

progressive legislation about the place for the judges to be tempted into judicialised emasculation. Even the much vaunted equality legislation was largely mandated by EU law rather than being the product of domestic legislators, and in any event built upon the statutory initiatives of the 1970s (which had indeed met with hostile judicial reactions in that era before eventually bedding down). Banning hunting with dogs was about as close as we got to a social revolution directly initiated by the Blair and Brown administrations and a few of our senior judges succumbed to the excitement of even that modestly revolutionary occasion to the point of laying down some quite anti-democratic dicta about their role as ultimate guardians of the British constitution – remarks that may return to cause trouble if ever we were to have a parliament which was truly prepared to challenge privilege and injustice.¹³

The substance of the challenge to the Hunting Act was easily seen off though,¹⁴ and it has been the commitment of the judges to the liberal values lying behind the HRA that has been the **third** and main factor behind the generally favourable reviews that their performance on the HRA stage has received. This may simply be a matter of the judges being out-of-date as usual, a generation behind culture – still progressive in a 1960s kind of way while society at large has tacked sharply to the right, just as their predecessors were conservative in a culture that had become distinctly liberal around them. Or it may be down to the training which took place on a large scale after enactment of the HRA but before its full introduction into law. Another possibility is that the performance of the judges reflects the extraordinary influence of Lord Bingham, the most important judicial figure of the first ten years of the HRA, whose instincts for the individual and grasp of the broader dimension to rights litigation have been shared by sufficient numbers of his colleagues (Baroness Hale, Lord Nicholls and Lord Steyn preeminent among them) for his views to have seemed more mainstream than eccentric (as was Lord Scarman's faith in the same set of values in the more brutal 1970s).

Whatever the reason, I think it is undeniable that the HRA has been deployed by the judges in a way that has done tangible social good.

¹³ *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

¹⁴ *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] AC 719.

THE CASES

- The reach of a coroner's inquest has been greatly expanded to give relatives a much better chance than ever before of finding out how it came about that a loved one has died (or nearly died) while in the custody or care of the authorities – this has usually been the prison service¹⁵ and the police¹⁶ but has also reached the health service¹⁷ and more recently the armed forces.¹⁸
- The prohibition of torture and degrading treatment has continued to protect non-citizens from being removed to dangerous places and it has also been the basis for a strong restatement by our most senior judges of the distaste in which the common law holds any evidence tainted by allegations of torture.¹⁹
- The expansion of the jurisdiction of the HRA to reach British military bases in far-flung places has exposed the authorities to human rights scrutiny in a wholly unexpected fashion, with the Gage inquiry into the death of Baha Musa in Iraq being an example of the kind of effect that this sort of principled judicial engagement can produce.²⁰
- In the field of public protest the record has been patchier, but even here there have been substantial outcomes, foremost amongst them the ruling against the Gloucestershire police for too ready a reliance on that catch-all of common law crowd control, the reasonably apprehended breach of the peace.²¹

¹⁵ See most recently *R (JL) v Secretary of State for Justice* [2008] UKHL 68, [2009] AC 588.

¹⁶ *R (Saunders and Tucker) v Independent Police Complaints Commission and others* [2008] EWHC 2372 (Admin), [2009] 1 All ER 379.

¹⁷ *R (Takhoushis) v Inner London North Coroner* [2005] EWCA Civ 1440, [2006] 1 WLR 461.

¹⁸ *R (Smith) v Secretary of State for Defence* [2010] UKSC 29.

¹⁹ *A v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221.

²⁰ *Al-Skeini and others v Secretary of State for Defence* [2007] UKHL 26, [2008] AC 153. But cf *R (Smith) v Secretary of State for Defence* n 18 above.

²¹ *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55, [2007] 2 AC 105.

- The press partly despise the Act for the judges' reliance on it to develop a much-needed privacy jurisdiction with which it has become possible to tackle the media's commercial interest in the needless ruination of people's lives. Impressively the courts have managed to do this while also expanding the public interest aspect of our defamation laws, albeit the latter improvements have been lost in the noise generated by concern (probably justified) over 'libel tourism'.²²

MOST OF ALL THERE HAVE BEEN THE TERRORISM CASES

Few would have predicted that the first decade of the HRA's life would generate such a frontal challenge to its principles and values from the very government that had just shortly before proudly steered the measure through both Houses. But that is to reckon without the cataclysmic events of 11 September 2001 and the lesser but still horrific incidents of 7 July 2005. In assessing the impact of the HRA in this sphere it is necessary to reflect not only on the shortcomings of the cases from a purist human rights/civil libertarian point of view but also on how the law here might have developed had we not had the HRA to hand.

It is evident, for example, that the very existence of the Act inhibited the government in what it felt able to put before parliament as legislative proposals in both 2001 and 2005. In the first of these years, the Anti-terrorism, Crime and Security Act assumed the shape of a human rights measure the moment it was decided to include the fact of a derogation from the Convention within its terms, since by doing this Parliament was acknowledging that the emergency it believed it was dealing with needed to be managed within the parameters of human rights law and not outside them..

It was this that opened the door to the Belmarsh decision three years later²³ – no scheme of internment in British law (for this is what in truth this was or would quickly have become for many detainees had it been expanded) has lasted less long on the statute books. So far as 2005 is concerned, the Terrorism Act of the following year

²² See *Campbell v MGN Limited* [2004] UKHL 22, [2004] 2 AC 457; *Reynolds v Times Newspapers Ltd* [1999] UKHL 45, [2001] 2 AC 127.

²³ *A v Secretary of State for the Home Department* n 8 above.

may be thought to be unsatisfactory from a liberal point of view but it is very different from what the then prime minister Tony Blair had originally proposed²⁴ and its civil libertarian dilution owes at least something to the HRA peg upon which parliamentarians could hang their arguments and advisers their legal doubts.

The control order regime which replaced executive detention in 2005 still survives and to that extent it is true to say that it has not been brought down by the HRA.²⁵ But the courts have done their best to draw the repressive sting from the scheme, with successive cases having insisted on ever more demanding levels of procedural fairness.²⁶

It is unfair to criticise the courts in these cases for failing to declare immediate opposition to all the laws before them: Lord Hoffmann's ringing phrases in the Belmarsh case disavowing the existence of an emergency altogether played well in the press but also into the hands of government who were easily able to accuse him of being out of his depth.

The majority's careful emphasis on proportionality and rationality was in contrast less easy to rebut.

When the whole story of human rights protection in the UK in the ten years after 11 September is reviewed, it will of course be clear that Strasbourg has helped, not least in correcting the error of the House of Lords in relation to stop and search²⁷ and also in emboldening the British judges to push hard for disclosure in control order cases,²⁸ and that the civil libertarian traditions of British politics has also been strongly influential, particularly when embraced by the Tories in opposition. But only

²⁴ For a report on Mr Blair's press conference of 5 August 2005 see 'Blair vows to root out extremism' *Guardian* 6 August 2005 : accessible at <http://www.guardian.co.uk/politics/2005/aug/06/terrorism.july7> (last visited 28 July 2010).

²⁵ Albeit it is now under review by the Home Office, overseen by the former DPP Lord MacDonal: *Guardian* 13 July 2010.

²⁶ Most recently *Secretary of State for the Home Department v AP* [2010] UKSC 24.

²⁷ *Gillan v United Kingdom* n 12 above.

²⁸ *Secretary of State for the Home Department v AF, AE, AN* [2009] UKHL 28; [2009] 3 WLR 74 relying on *A v United Kingdom* European Court of Human Rights, 19 February 2009.

devoted antagonists would deride the HRA's effect as negative and the fair-minded would surely say that it has not been an altogether minor weapon in the defence of freedom at what has been a very difficult time.

SO WHERE HAVE THE ERRORS BEEN?

So far as the judges are concerned, there have not been many.

- An early decision on the effect of article 6(1) protection embraced a procedural/substantive distinction in the Strasbourg case-law which both lacks coherence and (no doubt as a result) has the potential to do confusing work,²⁹ but the issue (which it is irrelevant to probe more deeply into here) seems to have drifted into one of those cul-de-sacs in which judicial errors are slowly starved of impact by the benign neglect of the legal profession.
- The churlishly restrictive approach to the meaning of a public authority under section 6(1) and (more to the point) 6(3)³⁰ has already provoked parliament into one remedial intervention and in a perfect world would now be entirely undone. Their effect has been unduly to restrict the range of bodies against which human rights proceedings can be launched. The error has been to draw too much from the pre-HRA public law cases to limit the application of the Convention far more than the parliamentary debate which introduced the Act suggested. It has also meant that defendants have been tempted into seeking to avoid the Act by asserting not that they have not breached the human rights of the claimant but rather that as they were not a public body or exercising public functions it didn't matter in the least whether they had or not. This is the kind of argument that lawyers are very good at and which (rightly) gives law a bad name.
- The line of cases which has caused most trouble has been in the field of housing where a mistaken attempt by the narrowest of majorities in *Qazi v*

²⁹ *Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 1 AC 1163.

³⁰ *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95.

*Harrow LBC*³¹ to close off the courts to article 8 arguments concerning the 'right to a home,' has spectacularly backfired. With Strasbourg becoming increasingly involved, the British judges have retaliated by plumping the depths of pedantry to try to show how between this gateway and that exception, and this court and that judicial review, there is nothing whatsoever the matter with the law: for aficionados of futile complexity there is nothing to beat *Doherty v Birmingham Corporation*.³² The whole mess has been revisited by the Supreme Court sitting as a bench of nine and has now been largely resolved.³³ Like the Strasbourg court when it backtracked on *Osman* in *Z v United Kingdom*,³⁴ the judges here have shown a gratifying awareness of when it is right to stop digging themselves deeper into a hole.

WHAT DOES THE FUTURE HOLD?

Of course the Conservative Party would like in their ideal world to repeal the HRA, albeit even the Tories would stick with the Strasbourg system (to the displeasure of some of their backbenchers).

This position is likely to be affected by the reception Strasbourg gives to the rebellion against some of its decisions that we are increasingly seeing in the new Supreme Court. Sometimes this takes the shape of a kind of 'look-Strasbourg-you-do-not-know-what-you-are-talking-about-let-us-explain' jurisprudence (on article 6 for example³⁵), but it can also sometimes amount to a frontal rejection, as in a recent case on the reception of written statements in criminal trials where Lord Philips led six of his colleagues in a reasoned rejection of a Strasbourg Chamber's ruling on

³¹ [2003] UKHL 43, [2004] 1 AC 983.

³² [2008] UKHL 57, [2009] 1 AC 637.

³³ *Manchester City Council v Pinnock* [2010] UKSC 45, on appeal from [2009] EWCA Civ 852, [2010] 1 WLR 713.

³⁴ (2001) 34 EHRR 97. *Osman v United Kingdom* is at (2000) 29 EHRR 245.

³⁵ *Tomlinson, Ali and Ibrahim v Birmingham City Council* [2010] UKSC 8, [2010] 2 WLR 471. Lord Collins magnificently comprehensive judgment is particularly impressive on this immensely tricky (because nearly incomprehensible) question of what is the 'determination of a civil right' for article 6 purposes.

exactly the same point.³⁶ It will be interesting to see what the European Court makes of this – the original ruling has now gone to the Grand Chamber with the case having been heard on 19 May 2010.³⁷

If Strasbourg does buckle then the Tories will have obtained what they have long said they have wanted, a bill of rights (albeit still the HRA) which does not take instruction from Strasbourg and the meaning of which will lie in the hands of ‘our’ judges. Of course the HRA will still do ‘annoying’ things from time to time from their point of view, like stopping people from being removed to places where they will be tortured³⁸ and forcing the authorities to feed asylum seekers and the like,³⁹ but then Strasbourg would insist on exactly the same as well so what would be the point in removing the British element while keeping the Strasbourg control firmly in place?

In truth the Conservative objection to the HRA has been largely opportunistic and presentational. It has both nurtured and fed off a growing hostility to the outsider in British society, The underlying idea, or ‘dog whistle’ as a former Tory strategist Lynton Crosby would put it,⁴⁰ has been that a specifically *British* bill of rights would be less orientated to protecting ‘others’ and the ‘undeserving’ than the universally applicable HRA. For these reasons, what guided the Party in opposition may well continue to do so in power.

If this does prove to be the case, the fate of the HRA may well depend on events, such as a concerted media campaign against it to which the government chooses to listen, some mad-cap momentum generated by the capital punishment lobby which uses Nick Clegg’s new initiative laws to get the matter debated in the House of Commons, or (perhaps most dangerous because most likely) some rushed

³⁶ *R v Horncastle* [2009] UKSC 14, [2010] 2 WLR 47.

³⁷ *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1.

³⁸ See *A v Secretary of State for the Home Department* n 19 above. But cf *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 9, [2009] 2 WLR 512.

³⁹ *R (Limbuella) v Secretary of State for the Home Department* n 6 above.

⁴⁰ See http://www.doubletongued.org/index.php/dictionary/dog_whistle_politics/ (last visited 28 July 2010).

legislative response to a terrorist or asylum atrocity to which the HRA is perceived to stand in the way of a more effective because hard-headed response.

Human rights purists may wring their hands at the prospect of all this but they should roll up their sleeves, stop assuming they are always right, and get down to the difficult and challenging business of persuading public opinion of why they are right instead of simply telling them they are.

The HRA is worth defending not only because of who its enemies are but also because it stands for an ideal at a time when there are few ideals about – a belief in the importance of us all regardless of our status, our background, our wealth or our mental capacities.

Our parents (even some of us) might have called this socialism, our great grandparents might have thought of it as their religious faith in action. What it will be called in a hundred years no one knows, perhaps still human rights. But whatever it is called this 'it' – ethical, empathetic, progressive – must be guarded against extinction.