The Human Rights Act Three Years On

Lord Justice Latham

“The Human Rights Act has been an unqualified success”: so said Lord Falconer in the autumn when celebrating the third anniversary of its coming into force. One is tempted to say “He would say so wouldn’t he?”. Article 6 of the European Convention on Human Rights with its insistence on the independence of the judiciary from the executive was a significant factor, if not the significant factor in the Government’s decision to abolish the position of the Lord Chancellor in July which resulted in Lord Falconer replacing Lord Irvine. But I am sure that that is not what Lord Falconer was referring to when he made his remark because I suspect that Lord Irvine would also say that the Human Rights Act has been an unqualified success. Whether David Blunkett would agree is another matter.

The Act should have been an unqualified success. In making the provisions of the European Convention on Human Rights part of domestic law, Parliament was in one sense merely, but belatedly, encapsulating in statute form principles upon which British judges believed that they had always acted. The drafting of the European Convention was based significantly on the work of English lawyers and was thought chauvinistically at the time to distil principles which were self evidently the principles underpinning the common law and the rights and freedoms enjoyed by us in our Parliamentary democracy. When the then Lord Chancellor advised the government that it was appropriate to ratify the convention, he therefore did so on the basis that it merely reflected the common law, had no real relevance to us, and was there for the guidance and edification of the legal systems of those continental countries who had not had the benefits of the rule of law as we knew it.

As has been pointed out before, the Convention is, however, a document which is in principle the antithesis to common law and Parliamentary democracy. The common law is a fluid, and malleable instrument which has been moulded over the years both by the mores and the practicalities of contemporary society. Parliamentary democracy operates on the premise that the opinion of the majority expressed through the ballot box is supreme, that is that parliament is entitled to pass whatever law it sees fit and to abrogate any previous law or legal principle whether statutory or common law. The Convention, on the other hand is intended to provide a constitutional structure within which and subject to which the law should operate be it based upon custom such as the common law, or statute. It imposes limits on the ambit of those laws, and on the powers that the state, be it the legislature, the executive, or the courts, seeks to exercise. Laws LJ has expressed the view, in his dissenting judgment in *R (International Transport Roth) –v- Secretary of State for the Home Department* (2002) 3WLR 344 that the consequence of the enactment of the Human Rights Act is that the United Kingdom has moved along the path from a parliamentary to a constitutional democracy. That has produced much academic controversy. In his lecture “The Human Rights Act Two Years on: Analysis” delivered on the 1st November 2002, Lord Irvine commented on this view as follows:
“It may be that Sir John’s description of “an intermediate stage” is a prediction that we are only half way on a constitutional journey and that, in the fullness of time, we will leave Parliamentary supremacy behind altogether. If so I do not join in that prediction. The present arrangements were crafted as a settlement. They do not call for, or imply, further legislation, and I do not predict any. They represent our reconciliation of effective rights protection with Parliamentary sovereignty.”

That of course was said by Lord Irvine before the Human Rights Act provided the catalyst for the abolition of the post of Lord Chancellor, and the associated reforms proposed to the position of the members of the House of Lords Judicial Committee as the ultimate Court of Appeal. There is no doubt that those who support those measures do so on the basis that the principles which underpin Article 6 of the Convention presuppose the existence of a judiciary and judicial system which is entirely divorced from influence by the executive or the legislature. The Act has, accordingly, already had a profound constitutional effect. And it will require legislation to give it effect. The consequences of these changes and proposals have yet to be fully worked out. I hope that the arrangements recently announced between the Lord Chief Justice and Lord Falconer will secure the independence both assert that they strive for. I have to say that they do not achieve the complete divorce from political influence many wished. But perhaps it would be naive to expect that that could have been achieved. It would equally be naive to pretend that the proposals do not represent a quantum leap towards independence when confronted with the clear intention of this government that the successor to the Lord Chancellor is to be a political animal. But it is no part of my purpose in this talk to debate the wisdom or otherwise of what has happened. There is no doubt that the changes will have profound effects the extent of which is difficult to predict.

I do not therefore know if Lord Irvine is as confident now as he was a year ago that what he described as “a settlement” has been made which will last. There are two areas of potential conflict in particular where the “settlement” has yet to be fully tested. The Act entitles Courts to declare incompatibility, but not to strike down the legislation. The court is required to have regard to the decisions of ECHR, but is not required to follow them. Both represent a pragmatic compromise but each has the feel of an uncomfortable fudge.

What are the problems? The first is where a declaration of incompatibility has been made by the courts in a contentious political issue where the legislative provision has overwhelming public support. God forbid that such a situation should develop; but develop it might. There are ample siren voices in the press who would be only too happy to stir up public opinion in a way which might be inimicable to the right of minorities or to some other provision in the Convention. We have already seen the way in which the press have responded on occasions to the court’s interventions in asylum matters to be able to see the dangers. It will be interesting to see how the Government’s assurance that it would be inconceivable for Parliament not to act on a declaration of incompatibility by amending or abrogating the offending provision holds up in such circumstances.

The second is the potential conflict between decision of the Courts of this Country, and decisions of the European Court of Human Rights in cases which are taken

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hereafter to Strasbourg. There have been a number of murmurs of disagreement so far. There may be an indication of the extent to which Strasbourg considers that the United Kingdom courts are correct in their approach to the Convention when the Grand Chamber gives its verdict in relation to Heathrow night flights, where, it will be remembered, the first verdict in Strasbourg went against the Government on the basis that interference with sleep was capable of amounting to a breach of Article 8 as being an interference with personal life, an extension of that concept which raises a number of uncomfortably subjective issues. I shall return to that later.

When Lord Falconer said that the Human Rights Act had been an unqualified success, I think that he meant that its provisions had been assimilated into the jurisprudence of this country without undue stresses or strains. And to some extent he is right. It is perhaps worth while looking at the background to the passing of the Act. From the 1960’s when the first applications were made to the European Court of Human Rights against the United Kingdom Government until the passing of the Act of 1998, the score card of success in those applications were starting to make it look as through the Convention, rather like football and cricket, was a British invention in which losing was becoming a habit. There were a number of reasons for that which were nothing to do with any fundamental deficiencies in our system. To some extent it reflected more the healthy vigilance of United Kingdom human rights campaigners and lawyers than anything else. Nonetheless the success of those applications seems to me to have justified the decision of the Government to “bring Human Rights home”, which was the slogan which you may well remember was used by those who were its protagonists. There were two good reasons. The first one was that the Convention, if enshrined in statute, would provide a healthy reminder to the executive, the legislature, and the judiciary of the need to respect the rights which we had asserted to be part of our heritage; the second, it was to be hoped the product of the first, was to reduce the number of successful applications to the European Court. It was clearly hoped that the requirement that the English courts should determine conformity with the Convention would deter all but the most persistent taking their cases to Strasbourg.

In the light of those aims, has the Act been an unqualified success? Has it resulted in the Executive, the Legislature and the Courts producing principled decision making based upon the Convention? As far as we in the Courts are concerned, we have a privileged position. All decisions at first instance are right unless overturned on appeal by the Court of Appeal; and all decisions of the Court of Appeal are right unless overturned by the House of Lords which is always right. This rather flippant description is, of course, subject always to the fact that the decisions of the United Kingdom Courts are still subject to scrutiny by the European Court of Human Rights, as I have already said. And the question that we will have to face is the extent to which any divergence develops between the approach of the Courts here, and the Courts in Strasbourg; and how such divergence will be dealt with; that remains a real matter of uncertainty.

Unlike issues of European Community Law, in which the European Court of Justice is the ultimate Court of Appeal, and which pronounces definitively on issues within its jurisdiction, the Strasbourg court is not a court of appeal. It is a court to which complaint is made against a state essentially as a court of first instance, and where a remedy can be given for any breach of the Convention identified by the Court. That
decision has no effect in the United Kingdom save for the Treaty obligation on the state to make the reparation required by the court. As I have said United Kingdom Courts are only required under the Act to “have regard” to decisions of the Strasbourg Courts when coming to conclusions as to the proper meaning or application of the provisions of the Convention. I cannot believe that it will be long before real conflict arises. Our Courts have already prepared the ground by making it clear that our perspective may be different from Strasbourg.

As far as the legislature is concerned, there has so far been no declaration of incompatibility in respect of a statutory provision passed after the commencement of the Human Rights Act in October 2000. There was, however, a close shave. In R –v- A (No 2) 2002 1AC 45, the House of Lords had to consider the provision in the Criminal Evidence Act 1999 (in other words an Act passed before the commencement date, but after the passing of the Act itself) which precluded a defendant from asking any questions of a complainant in the case of sexual assault or rape about her sexual history in any way. The complaint was that this would preclude a defendant from asking questions particularly about the complainants sexual activity with the defendant which could result in substantial unfairness. The House of Lords held that the provision was capable of being construed so as to enable a court to ask such questions as would ensure a fair trial. Perhaps not surprisingly, this conclusion, which apparently flew in the face of the express statutory prohibition was arrived at by a number of different routes by their Lordships. And this is perhaps the paradigm example of the reluctance of courts to conclude that a statutory provision is incompatible with the Convention.

Indeed the House of Lords has now overturned the case in which the first declaration of incompatibility was made, which was in relation to the Consumer Credit Act 1964. It is ironic that one of the first cases to raise the issue was in relation to the rights of a substantial commercial concern. That was whether a finance company was to be deprived of its rights to the goods owed under a finance agreement because the appropriate formalities had not been complied with. It has echoes of the surprise that people expressed when amongst the first to take advantage of the opportunity to take their cases to the European Court of Human Rights in the 1960’s were the landlords of London, including the Duke of Westminster, who objected to the Leasehold Reform Act as a amounting to expropriation of property. But there are a number of cases in the pipeline which are challenging post October 2000 statutory provisions; and it will be interesting to see the fate of the latest change to the Immigration Appellate system which seeks to remove recourse to the courts.

As far as the executive is concerned, there have been a number of cases in which executive acts since October 2000 have been held to have been in breach of the Convention. Significant among these was the way in which Immigration officials processed applications by asylum seekers for the purposes of determining the extent to which they were entitled to any benefits. It will be remembered that Collins J incurred the wrath of David Blunkett and significant parts of the press for holding that the way the asylum seekers had been dealt with was unlawful. It is a matter of regret that, typically, the press continues to refer back to the decision of Collins J when commenting on judicial attitudes to Government action when as we all know his decision was unanimously upheld by the Court of Appeal presided over by the Master of the Rolls who set out clearly why it was that the decision had been correct.

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Officials had quite simply failed to administer the law properly. And there are, and will continue to be, a number of cases where individual executive decisions and actions will be held to be in breach of the Convention; that is inevitable. But the fact that all public bodies are now aware of their obligations under the Convention is bound to have an effect on decision making. I am not aware at the moment of any material which enables one to say whether or not this has resulted in significantly better and more principled decision making; that may be a difficult exercise to carry out.

My experience of the effect of the Human Rights Act has resulted in both despair and hope. I have to confess that despair is uppermost at the moment. But that is because I have been sitting for the last three weeks in the Criminal Division of the Court of Appeal where case after case is infected by half baked submissions by applicants with a distinctly fuzzy idea of the principles enshrined in the Convention. It has become one more dud shot to seek to fire in the game of obfuscation and misinformation which is the game played by some of the more over enthusiastic members of the legal profession. The lecture tonight is dedicated to someone to whom such an approach to advocacy was anathema, both as advocate and as judge. I suspect that he would have felt that he could probably do without the Act, the principles are self evidence. But given that it is now in force, I suspect that he would have considered it, on the whole, a tool which is more likely to promote justice than injustice, provided that we apply common sense and are able to ensure that we do not become in thrall to the dogma which elevates theory above practice and operates from a premise of malpractice which is simply not borne out by practical experience.

Those thoughts arise from one of the very real difficulties with which the courts have struggled over the last three years in relation to the structures devised for administrative decision making. As originally conceived, it is apparent from Strasbourg jurisprudence that the Convention had not envisaged that decisions relating for example to the distribution of benefit, social control of land use, the approach to housing allocation and equivalent administrative decisions which were essentially to do with social welfare matters and the regulation of land use, as opposed to the appropriation of property, where any concern of the Convention. Gradually, however, the Strasbourg court has determined that such decisions and actions can properly be described as having an effect on the civil rights of people so affected so as to engage Article 6 and the right to an independent tribunal, and a fair trial.

This development is well described in the Alconbury case (R (Alconbury Developments Ltd) –v- Secretary of State for the Environment [2003] 2AC 295). It will be remembered that this was the case that caused consternation when the Court of Appeal made a declaration of incompatibility on the grounds that the planning system did not have an adequate element of independent judicial control because the facts were found and planning judgments were made by the planning inspectorate who were part of the Department itself; and the limited ambit of judicial review did not provide a sufficient mechanism for courts to be said to have full jurisdiction. The House of Lords unanimously overruled that decision. It held that the inspectorate was sufficiently independent to be able to make decisions of fact which did not require anymore control by the courts than those provided by judicial review. As far as policy matters were concerned, those were not justiciable. They were properly a matter for the Department provided that it acted lawfully, which could clearly be
determined within the ambit of judicial review. This pragmatic approach to administrative decision making has been taken one step further in housing matters in *Runa Begum v Tower Hamlets Borough Council* [2003] 2AC 430 where the question at issue related to the procedures put in place by a local authority for dealing with applications by homeless persons. The issue was the extent to which the procedures for resolving factual issues which preceded the policy decisions in relation to the councils duties to the homeless required independent scrutiny. The House of Lords accepted that the procedures in place involved decision making by council officers who were clearly not in one sense independent; but nonetheless their Lordships considered that the detailed statutory rules to ensure fair decision making were such as to obviate the necessity for a full fact finding jurisdiction in the appellate court. The court’s powers in such cases, exercised in this instance by the County Court, which were essentially judicial review powers, were therefore sufficient. The House of Lords has therefore turned a deaf ear to the purists and sided with the pragmatists. And indeed that has been the general picture across the broad canvas of human rights cases since October 2000.

That does not, however, mean that there have not been significant effects both in relation to procedure and substance. As far as procedure is concerned, the courts have now established in a number of landmark cases significant benefits for the mentally ill. The procedures both for admission and discharge have been subjected to scrutiny and, I hope, put on a sound and fair footing. In the criminal law field, the most significant ruling was the long anticipated decision of the House of Lords in *Anderson (R –v- Anderson and the Secretary of State for the Home Department)* [2002] 2WLR 1143.) that the Secretary of State’s role in fixing the tariff for mandatory life prisoners was a breach of Article 6. The Criminal Justice Act 2002 has removed the Secretary of State’s function in this regard. It is for the trial judge to determine the appropriate level to set as the minimum term to be served. However, as you may remember, the Secretary of State has inserted in a Schedule to the Act what are described as starting points for various categories of murder, whole life for example, sexual and sadistic murders, thirty years for murders of police officers and those involving the use of firearms and fifteen years for the remainder. It will be interesting to see how prescriptive these starting points prove to be.

Another area where procedure has been affected is, perhaps surprisingly, the result of consideration of Article 2, which is the right to life. Strasbourg jurisprudence over the years has developed what have been described as adjectival rights based upon the particular expressed right. The adjectival right is the obligation on the state to carry out all necessary investigations into the loss of life, which is of particular significance where the loss of life has involved state agents or agencies in any way. This has thrown into sharp focus the jurisdiction of the Coroner and the relatively restricted nature hitherto of Coroners inquiries. In *Amin (R Amin –v- Secretary of State for the Home Department)* [2002] 3WLR 505) the court of appeal held that where the question was whether or not a death had been occasioned by any fault on the part of state authorities, the jury must be entitled to bring in a verdict of neglect, otherwise the inquiry would be incomplete. The House of Lords in the same case ([2003] 3 WLR 1169) has now gone further and said that the form of inquiry normally contemplated by a coroner would not sufficiently involve the family. It will be interesting to see what happens.
I could run through a series of cases in which the Human Rights Act has been a useful tool in ensuring that there has been procedural fairness. And the hope that I have expressed is that it will continue to do so on a sensible pragmatic basis. In particular in relation to administrative decision making, a careful balance has to be struck between the need for fairness on the one hand and the need to take sensible decisions on the other. It is not always easy to get that balance right and the process is not helped by the often indiscriminate arguments of those whose devotion to the principles of human rights reminds me of the true meaning of the Latin phrase “fiat justicia, sit ruat coelum”; it means, literally let justice be done even if the skies fall in. It was said by a judge when it was pointed out that the letter of the law produced manifest injustice. Not in my view a precept to be followed! The law has a bad enough press as it is.

There has been much debate about the way that the Human Rights Act might affect the development of the common law. In other words what effect it would have on substantive law. Many predicted that the first development was likely to be in the area of privacy as a result of the application of Article 8. The House of Lords has firmly rejected that in *Wainwright (Wainwright –v- Home Office* [2003] 3WLR 1137). However, it is not clear that this will necessarily be the end of the debate. There remains the opportunity for the development of the tort of breach of confidence which, of course, been the jurisprudential basis of the more high profile cases, such as the Michael Douglas, Catherine Zeta Jones spat with *Hello?*

Curiously, the clearest effect on the development of substantive law has been the indirect result of the application of Article 6, the right to a fair trial. This article has been held to include the right of access to the courts. And this article has been used to question the way the courts have approached the scope of the duty of care owed by public authorities. In the 1990’s in a number of cases, the courts so circumscribed those duties as to enable the critics to say that effectively the courts had granted immunity to public authorities in some circumstances from suit. In *Hill’s case (Hill –v- Chief Constable of West Yorkshire* [1953]) the Court of Appeal struck out claims against the police on the grounds that the police owed no duty of care to individual citizens in relation to the way in which they carried out their duties of prevention and detection of crime. Perhaps the high water mark was the decision of the House of Lords in the *Bedfordshire County Council* case (*A Minor –v- Bedfordshire County Council*) [1995 2AC 633). The House of Lords held that claims made by children against a local authority for failing to exercise statutory powers and duties to protect them from parental abuse and neglect and claims by a child and a mother for damages for failing to identify the identity of a man who had sexually abused the child were properly struck out on the basis that they disclosed no reasonable cause of action, in that it was not fair, just and reasonable to impose on the local authority a duty of care.

Shortly after the House of Lords decision in *X*, the European Court of Human rights heard an application arising out of the case of *Hill*. And in a decision, under the title *Osman –v- The United Kingdom* [1998] 29 EHRR 245, held that the immunity of the police amounted to a restriction on the claimants access to the courts. This was clearly a controversial decision and in *Barrett (Barrett –v- Enfield London Borough Council* [2001] 2AC 550) The House of Lords expressed its concern that the Strasbourg court had misunderstood the nature of the decision in *Hill*. The
application of the criterion that it be fair, just and reasonable to impose a duty of care was a matter of substantive law. And if as a result there was no duty of care, that was not a procedural matter which was what Article 6 was concerned with, but went simply to the substance of the law which was of no business of Strasbourg. In the case of Z –v- United Kingdom [2001] 34 EHRR 97, Strasbourg recanted although on a narrow majority, and accepted that it had been wrong in Osman. But that has not been the end of the story. The case of Osman albeit criticised, caused the English Courts to look again and with some care at the way in which they should approach the determination of the scope of the duty of care owed by public authorities in individual cases. And in a series of cases, the courts held that it would usually be inappropriate to strike out a claim made against a public authority until such time as all the facts could be examined. The Court of Appeal has considered this issue again in the case of D [2004] 2WLR 58 which is a decision to which I was a party. We there considered with some care the extent to which it would be appropriate to impose a duty of care where there had been allegations of abuse to a child, and to whom any duties should be owed. X suggested that the nature of the relationship between the Local Authority as the protector of the child, the doctors who were examining on behalf of the local authority, the parents, and the child was so complex that it would be inappropriate to impose a duty of care which could distort the decision making process. One of the reasons given for rejecting a duty of care was that the need to enquire into the decision making process would be inappropriate and not justiciable. But we concluded that such claims could undoubtedly now be mounted under for example Article 8 and in abuse cases possibly Article 3, for which damages could be claimed under Section 6 of the Human Rights Act. In those circumstances, since local authorities were in any way exposed to such claims, the rationale behind the decision in X fell away. We accordingly concluded that a local authority could owe a duty of care to a child in such circumstances; however we considered that there were good policy reasons for saying that there could be no concurrent duty to a parent where there was the possibility of conflict.

I have not attempted in this talk to do more than give a general overview of the last three years. Has the Human Rights Act been an unqualified success? I think it is too early to say and it depends on your point of view. There is no doubt that the previous regime was uncomfortable. The courts applied the Convention as a guide to determining a broad range of procedural and substantive issues. But as it was merely a Treaty obligation; it was no part of the fabric of domestic law and was therefore an uncertain tool for the courts to use. And because many applications to Strasbourg were made in cases where the Convention had not formed part of the decision making process, uncomfortable decisions were made. We cannot, however, conclude that the incorporation of the Convention into domestic law has been an unqualified success until we see how our Court’s decisions on Convention issues are treated by Strasbourg. We may find that the solutions which we adopt are not accepted. If that happens on a significant scale, serious questions will arise as to our relationship with Strasbourg and the extent to which the Convention is capable of remaining a coherent constitutional document throughout the jurisdiction of its adherents. As I have said, the Act only requires us to have regard to the Strasbourg jurisprudence, we are not bound by it. And the story of the Osman case indicates how serious schism is possible.