THE IMPACT OF THE HUMAN RIGHTS ACT 1998 ON ENGLISH PUBLIC LAW

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1. In order to gain an overview of the impact of the Human Rights Act 1998 in its first five years of operation I want to broaden the focus beyond the courts, and to look at developments occurring in public law in all the settings in which it operates. To this end I will first consider the relationship between the Act and some basic principles of public law, and then think about the effect of the Act on institutional locations in which public law operates, including but not limited to the courts.

2. One can distinguish between the effect of the Act in the courts, its effect on Parliament, its effect on public authorities, and its effect on people and groups in society. These are related but distinct areas. All are important, having regard to three factors. **First**, the Government intended the Act to do more than provide legal remedies for violations of Convention rights. It hoped that the Act would introduce a culture of human rights in the public service, as the rights were 'mainstreamed' and became an intrinsic part of

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decision-making and planning in all parts of the public sector. **Secondly**, the Act provided only limited remedies for violations of Convention rights. The rights can be enforced principally against public authorities only. There has been little horizontal effect, although section 3 of the Act applies generally and has had some beneficial effects, for example in relation to discrimination in succession to tenancies (*Ghaidan v. Godin-Mendoza* [2004] 2 AC 557). The omission of the right to an effective remedy for violations of Convention rights (Article 13 ECHR) from the list of Convention rights which the Act made part of municipal law militated against the development of innovative remedies. So did the careful preservation of the principle of the legislative sovereignty of the Queen in Parliament, making it impossible to strike down primary legislation which is held to be incompatible with a Convention right. (As Professor Paul Craig pointed out in his presentation this morning, the remedial regime would be much enhanced if the EU Charter of Fundamental Rights becomes legally enforceable through the implementation of the EU Constitution: parliamentary legislation which is incompatible with the Charter rights would then be ineffective to the extent of the incompatibility.) Under section 4 of the Human Rights Act 1998, the higher courts can make a declaration of incompatibility, but that does not affect the validity or effectiveness of the incompatible legislation. **Thirdly**, on the other hand, the political process has proved to be responsive to the injection of human rights standards. To give but one example, so far the Government has responded to every declaration of

incompatibility by introducing amending legislation, albeit sometimes somewhat grudgingly (for instance in relation to terrorism).

3. *The Act and principles of public law.* We can briefly consider the relationship between the Act and five principles: parliamentary sovereignty; the rule of law; the separation of powers; deference; and the distribution of powers within the devolution settlement.

4. The Act carefully preserved parliamentary sovereignty in the sense that courts are unable to disapply or strike down legislation on the ground of an incompatibility with a Convention right under the Act. Nevertheless, two provisions affect the finality of the power of the Queen in Parliament.

5. First, section 3 requires everyone (not only courts and tribunals, but also administrative and other bodies which have to interpret legislation) to read and give effect to legislation, so far as possible, in a manner compatible with Convention rights. This means that the ultimate interpretative principle does not now turn on the literal meaning or objective purpose of the legislative text but on the effect which will be best calculated to secure compatibility with Convention rights, subject to the constraint of the 'possibility' of a reading or effect in the light of the legislative text. There are important questions as to the point at which a reading or effectuation of legislation that is legitimate for a decision-maker in his or her institutional position in the state shades into illegitimate legislative action. However, subject to this it is clear that the literal reading of legislation, the intention of the legislature, and the mischief which the legislation was designed to address no longer offer a final answer (separately or collectively) to questions as to the meaning and application of legislation. To some extent

this restricts the practical ability of Parliament to give effect to legislative purposes, at least in so far as the mode of expression leads to a result that is incompatible with Convention rights.

6. Unlike the duty under section 3 of the Act, the power of one of the higher courts under section 4 to make a declaration of incompatibility in relation to legislation does not formally limit the capacity of the Queen in Parliament to give effect to Her legislative goals or the means by which Her Majesty can do so. However, a declaration under section 4 has some odd characteristics in the perspective of accepted constitutional principles. The Queen in Parliament has authorised judges to declare that parliamentary legislation is in some sense wrongful by reference to the objective, legal standards set by Convention rights. Admittedly such a declaration does not affect the validity or effectiveness of the legislation in question. Nevertheless, it is to say the least odd to see judges formally declaring that the Queen in Parliament has acted in some sense improperly as a matter of law.

7. It is true that no effective legal remedy can be granted. For example, after *A. v. Secretary of State for the Home Department* [2005] 2 WLR 87 the suspected international terrorists had to remain in Belmarsh prison to await new legislation despite the decision that their detention violated Articles 5 and 14 of the European Convention on Human Rights; and after the declaration of incompatibility in *Bellinger v. Bellinger* [2003] 2 AC 467 the amending legislation (the Gender Recognition Act 2004) did nothing to validate retrospectively the marriages of the successful litigants who had

established that the legal invalidity of their earlier marriages had been incompatible with their rights under Articles 8 and 12 of the Convention.

8. On the other hand, the political impact of declarations of incompatibility goes some way to compensate for their legal weakness as remedies. In every case so far where a court has made a declaration of incompatibility, the government has introduced and Parliament has enacted or approved amending legislation to address the incompatibility. Sometimes this has been done very grudgingly, as in the Prevention of Terrorism Act 2005, but it indicates that a new constitutional convention may be emerging that established incompatibilities will not be left to lie on the statute book indefinitely. If so, it goes some way to mitigate the weakness flowing from the limited legal consequences of an incompatibility, and to reduce the gap between a system which has full judicial review of legislation (including a power to strike down incompatible legislation) and the UK's compromise solution to preserve the legislative sovereignty of the Queen in Parliament.

9. Despite the absence of an effective remedy for breach of the legal standards of the Convention, the capacity of judges to pass judgment on the legal propriety of parliamentary legislation marks a major move away from the Diceyan principle of parliamentary sovereignty and from Article IX of the Bill of Rights 1689.

10. This inevitably has an impact on the separation of powers between the judiciary and the legislature. The Act has also had an effect on the separation between the judiciary and the executive. In the light of pressure from members of the executive (including, most recently, the Prime Minister) for judges to submit to the wishes of the executive on the basis

that the Government has some democratic legitimacy, some judges and commentators have responded to the realignment of power between the organs of the state by arguing for a principle of deference: in some matters (for example, when the primary decision-maker, whether a legislator or a member of the executive, is making policy or public risk assessments) the judiciary should give particular weight to the primary decision-maker's assessment and should not apply an intensive standard of review to it.

11. However, this has the potential to undermine the protection given by the Human Rights Act 1998 to Convention rights as a matter of law. It also fails to appreciate that there may be several different sources of constitutional legitimacy, and judicial action is legitimised in accordance with principles of the rule of law by the reasoning supporting the decision, not by any democratic pedigree for the judges or their decisions. When Lord Bingham of Cornhill in *A. v. Secretary of State for the Home Department* [2005] 2 WLR 87 at paragraph [42] delivered what Lord Steyn, extra-judicially, has described as an 'eloquent and magisterial judicial rebuke' to the Attorney General for pushing forward the idea of deference (Lord Steyn, '2000-2005: Laying the foundations of human rights law in the United Kingdom' [2005] EHRLR 349, 350), it provided a welcome reminder that the interpretation and application of Convention rights (including the justifications for interfering with them) are matters of law. They are to be determined by judges in accordance with the principles of the rule of law, not by politicians, particularly when the determination has the capacity to affect fundamental rights. When he further pointed out that the work of the judges in protecting the rule of law in this context is

not anti-democratic, but instead serves to bolster the rule of law without which democracy would be impossible, Lord Bingham articulated a great constitutional truth concerning the separation of powers, and one which could not have been easily asserted without the Human Rights Act 1998.

12. The last constitutional principle to which I will refer is that of distribution of powers between Westminster and the devolved legislatures and executives under the devolution settlement of 1998. The Convention rights have different effects under the devolution legislation from their impact under the Human Rights Act 1998. In the Scotland Act 1998, for example, the Convention rights operate as a limitation on the constitutional competencies of the devolved authorities. The Human Rights Act 1998 does not affect the competence of public authorities, but only limits the manner in which they can give effect to their competencies. We also know that the European Convention on Human Rights and the transformation of the Convention rights into municipal law are intended to operate as a floor, not a ceiling: authorities are free to adopt a higher standard of human rights protection than that required by the Strasbourg court as long as they do not fall below the Strasbourg standard. One would expect a similar approach to operate in respect of the relationship between levels of human rights protection offered at UK level and in the devolved jurisdictions: for instance, Scotland should be free to offer greater (but not lesser) protection to Convention rights in relation to devolved matters under the Scotland Act 1998 than is available at UK-wide level under the Human Rights Act 1998.

13. However, the logic of the devolution settlement was denied in *Attorney General's Reference (No. 2 of 2001)* [2004] 2 AC 72, when the House of Lords assembled a special nine-judge Appellate Committee to hold (*obiter*, but none the less persuasively) that the Judicial Committee of the Privy Council had been in error (in *HM Advocate and another v. R.* [2004] 1 AC 462) when it decided that a breach of criminal procedure time limits in Scotland (where a more rigorous attitude has always obtained to timeliness of criminal trials than in England and Wales) violated the guarantee of a trial within a reasonable time under Article 6.1 of the European Convention on Human Rights. Of the nine judges in the House of Lords, seven were English (if one includes those from South Africa who practised in England in that category) and two were Scots. It will surprise nobody that the decision of the House of Lords was reached by a seven-to-two majority, or that the two dissentients were, very properly, the two Scots. This is a sign that the House of Lords has failed fully to grasp the proper constitutional relationship between the devolution settlement, including devolved responsibility for protecting Convention rights, and the Human Rights Act 1998. If the House of Lords decision rather than the Judicial Committee decision comes to be followed in Scotland (although in my view it would be unconstitutional to follow it in Scotland, as it was probably unconstitutional for the Appellate Committee to express the views it did in relation to rights under the Scotland Act 1998), it would be within the competence of the Scottish prosecuting authorities to proceed against defendants notwithstanding breaches of time limits.

14. *The Act in the courts.* It is true to say that the remedial scheme under the Act is not particularly powerful. The Act limits the availability of damages on principles which are at best obscure. It denies any judicial remedy (short of a trip to Strasbourg) for people who are the victims of violations of their rights inflicted pursuant to primary legislation. For example, as noted earlier, when the House of Lords made a declaration of incompatibility in *Bellinger v. Bellinger* [2003] 2 AC 467 after holding that refusing to recognise for legal purposes the reassigned gender of people who have been treated for gender dysphoria, the victims whose marriages had been on that account treated as invalid achieved no remedy from that decision, and their marriages were not retrospectively validated by the Gender Recognition Act 2004.

15. Nevertheless, there have been some areas where the Act has made a discernible difference to the law. It has been directly or indirectly of benefit to a number of groups whose interests are not adequately represented in the political process, such as asylum-seekers, foreign suspected international terrorists, life-sentence prisoners and those serving indeterminate sentences (including children and young persons), prisoners subject to disciplinary proceedings, homeless people, incompetent patients, victims of violent crimes and their families who want to establish what happened to them, overseas victims of violations of Convention rights by agents of the state undertaking duties abroad, and (potentially at least, once an inconsistency between decisions of the House of Lords and the European Court of Human Rights is resolved: see *Leeds City Council v.*

Price [2005] 1 WLR 1825) people whose homes are subject to repossession by a landlord.

16. It has also begun to chip away at the irresponsible power of the media, offering some solace to people who were concerned about invasion of privacy, stimulating an extension of the protection given by the principles of breach of confidence to cover a somewhat wider range of privacy-related interests. In doing so, it has helped to make up for the weakness of the remedial scheme provided by the Press Complaints Commission. There has been little or no vindication of the fears of those who regarded the Act as a villain's or crackpot's charter.

17. *The Act in Parliament.* The Act has had a significant but unquantifiable effect on the work of Parliament in relation to legislation. Section 19 statements made by Ministers on introducing Bills to either House of Parliament, to the effect that the Minister considers that the Bill at that stage is compatible with Convention rights (section 19(1)(a)) or, alternatively, that the Minister cannot say so but that he or she none the less wants the House to consider the Bill (section 19(1)(b)), have been largely useless in helping the two Houses to test proposed legislation against human rights standards. There have been only three occasions since late 1998 (when section 19 came into force) on which a Bill has been introduced to a House with a section 19(1)(b) statement to the effect that the Minister cannot state that in his or her view the legislation is compatible with Convention rights, and in only one of those cases (the Communications Bill in 2002) was it properly used. However, human rights standards have played a part in debate and scrutiny of legislation,

largely thanks to dedicated and expert Members of each House (including notably Lord Lester of Herne Hill QC) and to the work of the Joint Committee on Human Rights, which began its work at the end of January 2001 and developed a practice of examining all Bills introduced to either House for compatibility with both Convention rights and rights under other human rights instruments.

18. The work of the JCHR has had an effect on government Departments responsible for Bills. They now recognise that they have to be ready to face incisive questioning about the impact of the Bill on both Convention rights and other rights. Departments have begun to respond to this by giving full answers to questions and by including in the Explanatory Notes to Bills, published by the House, a much fuller account of their reasons for thinking that the Bill is compatible with Convention rights than was offered before. The government's Guidance to Ministers on the Act has been slightly amended to consolidate that change.

19. The JCHR has also conducted thematic inquiries (such as that into the need for a Human Rights Commission) and has published reviews of areas of practice and law, notably its report on *The Meaning of Public Authority under the Human Rights Act* (JCHR, Seventh Report of 2003-04, HL Paper 39, HC 382). As well as guiding the two Houses of Parliament in their legislative capacities, this has had some effect on the courts. For example, the Committee's reports on the Anti-terrorism, Crime and Security Act 2001 were extensively cited by their Lordships in *A. v. Secretary of State for the Home Department* [2005] 2 WLR 87 (the Belmarsh detainees case), and Lord Steyn, in the article mentioned earlier

reviewing the first five years of the Act (*loc. cit.* at 357), has paid tribute to the report on the meaning of public authority as showing that it would be desirable for the House of Lords to revisit the hallmarks of a 'hybrid' public authority following *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v. Wallbank* [2004] 1 AC 546.

20. At the same time, other Committees in the two Houses are increasingly grappling with human rights issues, and the Members of each House are reading their reports on these matters with increasing interest. It does not always affect the way Members vote (the party whip is a powerful constraint), but it affects the way some of them think and speak, and can lead them to regard certain positions (for example the proposal to continue to deny same-sex couples the opportunity to adopt children in the Adoption and Children Bill) as untenable.

21. The JCHR has also helped to make Members of both Houses and Ministers and their advisers aware of the significance for law reform and policy-making of international instruments such as the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights. It is performing an educational as well as a watchdog role in relation to Government, and putting pressure on Government to enact a wider range of rights into UK municipal law, arguing that such rights are not mere aspirations but are both politically valuable and capable of judicial enforcement.

22. *The Act in public authorities.* The way the Act is affecting public authorities is variable. The effect depends on three factors.

23. **First**, it depends on the authority being aware that it is a public authority within the meaning of section 6 of the Act. The JCHR found that some core public authorities (such as the late lamented Railtrack) did not realise that they were public authorities, and so took little if any account of the rights. The lack of clarity as to the scope of 'hybrid' public authorities also tended to make bodies less aware of their responsibilities under the Act.

24. **Secondly**, it depends on the extent to which the authority has resources to train relevant staff in the requirements of the Act and the principles of human rights law and practice.

25. **Thirdly**, it depends on the implementation ethos of the public authority. Some authorities regard the Act essentially as a threat, giving rise to a risk of legal challenge. These authorities tend to leave the main responsibility with their legal departments, and to act defensively by drafting and promulgating to staff a detailed set of practices designed to safeguard the authority against successful legal challenges rather than instilling an understanding of the principles of the ECHR in their key front-line staff. This results in government by detailed circulars, a form of organisation particularly prevalent in (for instance) the Department for Education and Skills. Other authorities encourage their staff to understand and internalise the principles of human rights as a guide to good practice in their fields, and to use them as a way of enhancing the quality of the service or facilities they provide to the public. In these authorities, the principles can be genuinely 'mainstreamed' and the Act can change attitudes for the better.

26. We want more of the latter approach, but it is not easy to establish from scratch, and requires both enlightened management and sufficient resources to produce the effect. Pursuing this will be a long-term project.

27. *The Act in society.* It would be wrong to suppose that the Act has won a lot of supporters among middle-of-the-road people in the country. The Conservative Party has always been sceptical about it. The Labour Party is increasingly concerned that it might have spawned a monster that is turning to bite the hand that moulded it. Newspapers tend to give publicity to strange claims made in the name of the Act, without subsequently noting that in virtually every case the claim has failed. In Northern Ireland the human rights agenda has been dangerously factionalised.

28. So far as ordinary people are concerned, the success of the Act depends on three factors which to some extent mirror those which control the usefulness of Convention rights within public authorities.

29. **First**, the rights will be most useful if people are dealing with public authorities within which the rights have been 'mainstreamed'.

30. **Secondly**, people need to know what their Convention rights are and how to assert them. That knowledge depends on public education. When the Act first came into force in October 2000 it was accompanied by a high-profiled media campaign and an information pack which made some impact on public consciousness. There was also an effort to include human rights in citizenship education in schools, and a 'roadshow' organised by the government's Human Rights Unit (originally in the Home Office and more recently in the Lord Chancellor's Department and the Department for

Constitutional Affairs) made a real effort to bring the rights to the attention of ordinary people. Since then, the priorities have changed, and other issues have come to the fore and captured the government's interest in public education. We need a new drive to remind people of the scope and benefits of the Act, but sadly the government is unlikely to foster such an initiative. The government is no longer as keen as it was on human rights. As a result, the matter is likely to be left in the hands of NGOs and the voluntary sector which is overstretched and short of resources.

31. **Thirdly**, if people are to make use of those judicial remedies that are available they need to have access to legal advice and assistance from people who understand the law. Cut-backs in legal aid have restricted the availability of such advice. Research by Professor Phil Thomas of the Cardiff Law School (*The Human Rights Act 1998: An Impact Study in South Wales*, Cardiff Law School, Cardiff, 2004) in South Wales showed that few solicitors in the region were really aware of the potential of the Act or able to offer the requisite expertise to potential clients. The task of giving advice on human rights issues is being left more and more to Citizens' Advice Bureaux and other parts of the severely underfunded voluntary sector. If the Act is to be an effective tool in the hands of those under-empowered people and groups who could benefit from it, the structure of legal aid and assistance, especially outside the metropolis, needs to be rethought, and expert help extended.

32. *Conclusion.* Despite all these problems, a growing number of groups benefit from the Act and know that they do. It is good to see the

achievements, and even more the potential for the future. If the Act survives another ten years, we will wonder how we managed without it.

33. The Act is having two further effects on public law which seem to me to be beneficial. **First**, it gives the judges a base from which to launch a robust defence of rule of law standards against a largely unaccountable executive. Even Parliament cannot always force the executive to account for itself. For instance, in relation to security decisions the Government refuses to reveal to Parliament the information on which its decisions are based. In this respect, the judiciary (often with the Special Immigration Appeals Commission in the van) are in a better position than Parliament to secure real and rational accountability. **Secondly**, the new principle of interpretation of legislation in section 3 of the Human Rights Act, the interesting declaration of incompatibility in section 4, and the political freedom that Parliament retains to fashion a response, combine to create a politico-legal space in which rationality can confront populism and, sometimes, win, despite our strange attachment to our electoral system and the sovereignty of the Queen in Parliament.

34. For these reasons, if no others, the Act is valuable, and its value may perhaps be further enhanced in due course once the Equalities and Human Rights Commission starts its work. It is, and will continue for some time to be, a testing and important time to be a human rights academic, practitioner or judge as we contribute to an increasingly tense debate about the value of human rights in society. Let us hope that we prove to be up to the challenge.