

ALBA SUMMER CONFERENCE 2010

THE HUMAN RIGHTS ACT: THE GOOD, THE BAD AND THE UGLY

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Introduction

1. It is instructive when assessing the HRA ten years after it came into force, to remind ourselves of the atmosphere which prevailed in October 2000 when it was implemented. As Lord Bingham observed in the preface to the *Law of Human Rights*,² its implementation:

has assumed something of the character of a religious event: an event eagerly-sought and long-awaited but arousing feelings of apprehension as well as expectation

2. Remarkably, the waiting list of the Administrative Court had been eliminated by October 2002, by additional judges sitting to hear cases in the run up to implementation. The then Lord Chancellor, Lord Irvine, and Lord Woolf CJ delivered strictures about the need to act responsibly when bringing HRA cases. A great deal of judicial comment about future developments under the HRA was canvassed in numerous lectures and essays. There were rumours that the Head of Chambers in one claimant set had to authorise one of its members instituting proceedings.
3. It would be difficult for any legal event to match these expectations.
4. So in trying to evaluate where we have got to in 2010, it is important to establish some sort of criteria by which to assess developments.
5. Despite the expectations of some, the HRA has not revolutionised the legal framework- or even added value in every case. The number of cases where HRA points have been taken where they have proved decisive is not huge.
6. Its impact has been important, but limited. Those consequences mean, for example, that legal authors on the HRA find that sales figures for a second edition have not matched the very large figures achieved by the first edition.
7. Nevertheless, as a template the significance of the HRA cannot be underrated. Even as the debate over a new bill of rights gathers force, Francesca Klug is surely right to remind us that the HRA itself may constitute our bill of rights.³ Its significance was described by Lord Bingham in the *Belmarsh* case, under the HRA:⁴

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² OUP, 2002.

³ F Klug "A Bill of Rights: do we need one or do we have one already" [2007] PL 701.

⁴ *A v Secretary of State for the Home Department* [2005] 2 AC 68 para 42.

The courts are charged by Parliament with delineating the boundaries of a rights-based democracy

The good

8. It seems to me that the HRA has required the articulation of substantive values in judicial opinions (which may be regarded as a fundamental aspect of the Rule of Law);⁵ and has fundamentally changed the way in which cases should be approached.
9. That style of opinion writing is epitomised by the opinions in the Belmarsh case, a decision of the first magnitude, bearing comparison with *Anisminic*,⁶ *Ridge v Baldwin*⁷ and *Conway v Rimmer*.⁸
10. It is also strongly argued that the HRA has profoundly affected governmental decision making, resulting in a critical sea change: requiring the development of a public law “culture of justification”, an obligation rationally to support their decisions which the courts subject to careful scrutiny to decide whether or not that decision is justifiable on the basis of the evidence and reasoning. In other words, a “culture of justification” has now supplanted a “culture of authority”.⁹ Issues of policy are now scrutinised more closely.
11. Many have also claimed that the discipline on Government to make declarations of compatibility when enacting legislation has been wholly beneficial.

The bad

12. On the debit side, a fundamental difficulty affecting the development of HRA jurisprudence was that the rationale for enacting it has been difficult to identify.
13. In Canada or South Africa the enactment of human rights instruments was prompted by broad based campaigns for constitutional reform. The distinctive feature of a constitutional instrument, as the American jurist, Benjamin Cardozo¹⁰ stressed, is that:

Statutes are designed to meet the fugitive exigencies of the hour. Amendment is easy as the exigencies change. In such cases, the meaning once construed tends legitimately to stereotype itself in the form first cast. A constitution states or ought to state not rules for the passing hour, but principles for an expanding future. In so far as it deviates from that standard and descends into details and particulars, it loses its flexibility, the scope of interpretation contracts, the meaning

⁵ See the Sir David Williams lecture given in Cambridge by Lord Bingham on *The Rule of Law* on 16 November 2006; and, see generally, Lord Bingham *The Rule of Law* (Allan Lane, 2010)

⁶ [1969] 2 AC 147

⁷ [1964] AC 40

⁸ [1968] AC 910

⁹⁹ See Professor Mureinik, ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 S.A. J of Human Rights 31; Mureinik and Dyzenhaus ‘Law as Justification: Etienne Mureinik’s Conception of Legal Culture’ (1998) SAHR 11; and Hunt ‘Why Public Law needs ‘Due Deference’ in Bamforth and Leyland (ed) *Public Law in a Multi Layered Constitution* at 351.

¹⁰ B Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1991) 83–85.

hardens. While it is true to its function, it maintains its power of adaptation, its suppleness, its play ...

14. This approach has given rise to the doctrine of ‘progressive interpretation’, in which a constitutional instrument is seen as a ‘*living tree capable of growth and expansion within its natural limits*’.¹¹ It is a perspective that has contributed to the constitutional approach taken by the Privy Council to rights instruments in the well-known case of ***Minister of Home Affairs v Fisher***,¹² which concerned the determination of the status of an illegitimate child under the Constitution of Bermuda. Lord Wilberforce said that international conventions on human rights required:

a generous interpretation, avoiding what has been called ‘the austerity of tabulated legalism’,¹³ suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.

15. By contrast, the impetus for the HRA was rather prosaic. The Government presented its case for incorporating the Convention law in very practical terms in its White Paper, ***Rights brought Home: the Human Rights Bill***¹⁴ (which was published when the Human Rights Bill was introduced in October 1997): the cost¹⁵ and time¹⁶ taken in waiting for an adjudication from the ECtHR was unjustified, particularly because the UK has been one of the states most frequently charged with Convention violations.
16. The upshot is that neither the legal profession nor the judiciary had a clear lead about the purpose and objective of the legislation.
17. This obscurity was further complicated by the Government’s response to the War on Terror when it seemed that it was repudiating the HRA itself.
18. In that atmosphere it is hardly surprising that the courts seized on the idea that the HRA was designed to mirror the Strasbourg case law. That perspective provided an acceptable political answer to those who argued that the HRA had transferred too much power to unaccountable judges; it was Strasbourg rather than the Courts themselves who were responsible for the decisions being made.
19. Nevertheless, the absence of any broader context stunted the way in which the case law under the HRA developed.

¹¹ The most quoted use of this phrase is in ***Edwards v A-G of Canada*** [1930] AC 114, 136, *per* Lord Sankey; see also ***British Coal Corporation v The King*** [1935] AC 500, 518 and ***(A-G) of Ontario v (A-G) of Canada*** [1947] AC 127, 154; see also ***Matthew v Trinidad*** [2005] 1 AC 433, para 39 a similar approach has been taken to the construction of the Convention as a ‘living instrument’.

¹² [1980] AC 319.

¹³ The unattributed quotation appears is from S de Smith, *The New Commonwealth and its Constitutions* (Stevens & Sons, 1964), p.194.

¹⁴ In ***Rights brought Home: The Human Rights Bill*** (1997) Cm 3782 it is estimated that the average case costs £30,000: see para 1.14. The text is reproduced at App B in Vol 2.

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¹⁶ The Council of Europe said that it takes five years before a case is finally decided before the European Court or Council of Ministers: see Council of Europe ***Protocol 11 to the European Convention on Human Rights and Explanatory Report*** May 1994 (H (94 5) 19 para 21).

20. Instead it focused attention on the idea of bringing rights back home, sometimes to the extent of requiring the courts to strain unduly. Thus, in ***R(Al-Jedda) v Secretary of Defence***¹⁷ the House of Lords accepted that an HRA claim for breach of Article 5 by an individual who was detained at a detention centre operated by British forces in Iraq did not breach Article 5 because those rights were qualified by UN Security Council Resolution 1546 which had been made under Article 42 of the United Nations Charter—even though it is a fundamental principle of English constitutional law that rights conferred by international treaties cannot take effect in domestic law unless incorporated into English law by legislation .

The Ugly

21. The effectiveness of the HRA depends on how its key principles are understood. It seems to me that there are a number of basic concepts which the Courts have adopted which justify close scrutiny.
22. I first want to deal with the mirror principle¹⁸ which requires the English courts to follow Strasbourg case law. In ***R (Ullah) v Secretary of State for the Home Department*** Lord Bingham said:¹⁹

*by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: R(Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions.*²⁰ This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.

23. As a result of this approach to the Strasbourg jurisprudence, Lord Steyn has rejected the idea that the scope of Convention rights should be determined by domestic cultural traditions in ***R (S) v Chief Constable of Yorkshire*** (although he indicated that domestic cultural traditions were relevant to the issue of proving justification is for interfering with qualified rights).²¹ He therefore disagreed with the views of Lord Woolf in ***S*** in the Court of Appeal where he said that he did not necessarily expect the English courts to apply the Commission decision in relation to identity cards.²²

¹⁷ [2008] 1 AC 332

¹⁸ J Lewis “The European Ceiling on Human Rights” [2007] PL 720.

¹⁹ [2004] 2 AC 323 para 20.

²⁰ Ibid, para 26.

²¹ [2004] 1 WLR 2196 at para 27.

²² ***Reytjens v Belgium*** (1992) 73 DR 136, 152.

24. Although it is a well established principle of English law that there is only one true interpretation of a treaty²³ and its provisions must be given the same interpretation in all the countries who were parties to it,²⁴ there are some fundamental problems inherent to the *Ullah* principle which has concerned the House of Lords in subsequent cases.
25. In particular, in *R (Animal Defenders International) v Secretary of State for Culture* the claimant was a non profit making company whose aims included the suppression by all lawful means of cruelty to animals; it was prevented from placing an advertisement about the threat to the survival of primates on the ground that this would breach the ban on political advertising in section 321(2) of the Communications Act 2003.²⁵ The claimant alleged that Article 10 had been breached and relied strongly on a decision of the ECtHR, *VgT Verein v Switzerland*²⁶ which Lord Bingham described as being ‘very similar to those in the present case’.²⁷ As a result, when the 2003 Act was been passed, the Secretary of State felt unable to make a statement of compatibility under section 19(1)(a) of the HRA; instead, she made a statement under section 19(1)(b) that, although unable to make a statement under section 19(1)(a), the Government wished the House of Commons to proceed with the Bill. The Government’s position was that it believed and had been advised that the ban on political advertising in what became sections 319 and 321 was compatible with Article 10, but because of the Court’s decision in *VgT* it could not be sure. Nevertheless, in *Animal Defenders* the House of Lords declined to follow *VgT* and held that the ban did not violate Article 10. The rationale for the decision and its relationship with the *Ullah* principle were not convincing.
26. On the other hand, there appear to be several cases where the English courts consciously decided to go beyond the Strasbourg case law: *R(Limbuela) v Secretary of State for the Home Department* where the House of Lords held that that deliberately reducing certain asylum seekers to destitution was held to be inhuman and degrading treatment contrary to article 3;²⁸ in *Re G (Adoption: Unmarried Couple)* the House of Lords struck down a provision of the Northern Ireland Adoption Order on the ground that it discriminated against unmarried couples by not allowing them to adopt jointly, even if this would be in the best interests of the child involved;²⁹ and *EM(Lebanon)* where the House of Lords decided that it would be a breach by the United Kingdom government to expel a mother and child to another country, where their article 8 rights would inevitably be breached.³⁰
27. The *Ullah* principles is open to question on a number of grounds and there are powerful reasons for suggesting that the English courts are entitled to interpret Convention rights beyond the limits prescribed by the ECtHR cases:
- The principle is not justified by the terms of section 2(1) itself.
 - The parliamentary history of its enactment does not support that view.
 - As Lady Hale has recently observed, the stated reason for restraint does not make much sense – that the interpretation of the Convention should be uniform

²³ *R v Secretary of State for the Home Department ex p Adan* [2001] 2 AC 477 *per* Lord Steyn at 516, 517.

²⁴ See eg *James Buchanan v Babco Forwarding* [1977] QB 208, 213 *per* Lawton LJ

²⁵ [2009] 2 AC 445

²⁶ (2001) 34 EHRR 159

²⁷ Above, para 9

²⁸ [2006] 1 AC 396

²⁹ [2009] 1 AC 173

³⁰ [2009] 1 AC 1198

throughout the member states. We cannot commit other Member States or the ECtHR to our interpretation of the rights – so why should they mind what we do, as long as we do at least keep pace with the rights as they develop over time.³¹

- The ECtHR does not develop its principles and reasoning in the more discursive analytical style of the common law tradition and Convention principles are often extended- even if the reasoning for doing so is sometimes exiguous.³² The current approach taken by the domestic courts therefore means that there is a real danger of the HRA will develop in a significantly more restrictive way than the EctHR itself.
- The principle that the English courts must apply the Convention strictly in line with Strasbourg case law is not the approach of other signatories to the Convention such as France or Germany.³³
- The focus on Strasbourg case law could distract the English courts from benefiting the views expressed in cases from other jurisdictions when wrestling with universal human rights problems - unlike the South African Constitutional Court which has shaped its decisions by reference to the wisdom to be derived from all jurisdictions.
- The concentration on Strasbourg decisions has prevented the English courts from developing indigenous human rights jurisprudence.

28. Another area of difficulty is the Court's approach to the proportionality principle- which is fundamental to the effectiveness of the HRA.

29. One of the most difficult and important problem which has faced the courts in giving effect to the HRA has been to develop a coherent and defensible jurisprudence of proportionality.³⁴ However, in *R v A (No 2)*³⁵ Lord Steyn expressed that it was not necessary for the English courts to re-invent the wheel when developing principles under the HRA; and elaborated an analysis in *R v Secretary of State for the Home Department, ex p Daly*,³⁶ in terms which, as Lord Bingham observed, have never been questioned.³⁷

³¹ Lady Hale's Lecture to Salford Human Rights Conference 2010.

³² For example, the principle from *Z v Finland* (1997) 25 EHRR 371 para 103 that Art 8 interferences with confidential medical information must be subject to important limitations and accompanied by effective and adequate safeguards against abuse has been applied in the **rather different contexts of the broadcast of a CCTV film showing the claimant's suicide attempt** (*Peck v United Kingdom* (2003) 36 EHRR 719, para 78) and to the release of telephone taps into the public domain concerning the well known Italian politician (*Craxi v Italy (No 2)* (2003) Judgment of 17 July 2003, para 74) - although the Court has not provide detailed reasoning for that extension.

³³ See eg Orucu (ed) *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law, 2003)

³⁴ S Kentridge 'The incorporation of the European Convention' in J Beatson, C Forsyth & I Hare (ed) *Constitutional Reform in the United Kingdom* (Oxford, Hart Publishing, 1998)

³⁵ [2002] 1 AC 45, para 38

³⁶ [2001] 2 AC 532; and see also *Huang v the Secretary of State for the Home Department* [2007] 2 AC 167. The court should now consider: (i) whether the objective justifying the interference is sufficiently important to justify limiting the right; (ii) whether the measures designed to meet the objective of the interference are rationally connected to it; (iii) whether the means used to impair the Convention right are no more than is necessary to accomplish that objective; and (iv) whether interference strikes a fair balance between the rights of the individual and the interests of the community which requires carefully assessing the severity and consequences of the interference.

³⁷ *R(SB) v Denbigh High School* above para 30.

30. Although the elements of the structured proportionality test are well known, they are often honoured in the breach.
31. The way the courts have applied the proportionality principle under the HRA was usefully analysed by a paper published by the Ministry of Justice in September 2007 which also looked at human rights cases at the ECtHR and in Germany, France and Spain.³⁸ The paper pointed out that proportionality (as it is most rigorously applied) requires the well known four stage *Daly* analysis; and distinguished proportionality as a legal concept from the concept of balancing, a broad brush approach which does not operate from a presumption that public interest goals must be restricted by rights or that rights take precedence over public interest goals which are not suitable and necessary to their purpose. The paper concluded the various jurisdictions it examined varied considerably in the level of scrutiny it applied to Government assertions through the proportionality lens. In Germany and Spain proportionality almost always involved the rigorous four stage inquiry. The picture was less consistent at the ECtHR, France and the House of Lords. In the England the courts are more prone to adopt the broad brush balancing approach. Even where proportionality is applied, the English courts appear to be more forgiving of government assertions than in other countries except France.
32. I suspect that the MoJ's study reflects many practitioners' experience.
33. The problems about the application of proportionality are made more difficult because of the court's approach to the idea of judicial deference.³⁹ In *Daly* Lord Steyn stressed in his discussion of the proportionality principle that in the law context was everything. However, *Huang v Secretary of State for the Home Office*⁴⁰ Lord Bingham considered detailed submissions on the question of judicial deference and essentially concluded that the principle was easier to apply in practice than to identify in theory.
34. Nevertheless, I would respectfully suggest that the approach taken by the House of Lords is not entirely helpful. To say that it is easy to recognise the elephant in the room (however it difficult it is to describe that elephant) does not meet the challenge of working out how to apply a structured proportionality test to very different contexts. This issue is critical because of the principle of legal certainty, the idea that decision makers should have some confidence in their ability to predict with accuracy whether or not a decision is vulnerable to legal challenge. This problem cannot be answered by the mantra of appealing to a number of general (but undefined) criteria or asserting that the Courts should take a hard look at the facts. I would argue that the Courts need to provide much more specific guidance in order to resolve these fundamental questions.

³⁸ B Gould, L Lazarus and G Swiney *Public Protection, Proportionality and the Search for Balance* Ministry of Justice (2007).

³⁹ See eg D Pannick "Principles of interpretation of Convention rights under the Human Rights Act and the discretionary area of judgment" [1998] PL 545; M Edwards, "Judicial Deference under the Human Rights Act" (2002) 65 MLR 859 ; M Hunt, "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'" in N Bamforth and P Leyland, *Public Law in a Multi-Layered Constitution* (Hart Publishing, 2003), 337; J Jowell "Judicial deference: servility, civility or institutional capacity" [2003] PL 592; R Clayton, 'Judicial deference and 'democratic dialogue': the legitimacy of judicial intervention under the Human Rights Act 1998' [2004] PL 33; T Hickman 'Constitutional Dialogue: constitutional theory and the Human Rights Act 1998' [2005] PL 306; R Clayton 'Principles of Deference' [2006] JR 109.

⁴⁰ [2007] 2 AC 167, paras 16 to 18

Conclusion

35. To talk about the good, the bad and the ugly implies that the HRA is like a curate's egg-good in parts.
36. I would, however, respectfully disagree. I believe that the HRA has fundamentally altered the perspectives of practitioners and lawyers by requiring all of us to focus more on broad principles and fundamental values.
37. It has produced a culture change which means that the values of the HRA are now firmly rooted in our judicial system, from top to bottom.

16 July 2010