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

Hugh Tomlinson QC
Matrix Chambers

Introduction

1. The Human Rights Act was enacted less than 12 years ago and has not yet been in force for 10. The "human rights era" in English law has been an extremely short one – particularly when measured against the long history of the common law. Someone asked to make an assessment of the Act might be tempted to reply quoting Chou En Lai's assessment of the French Revolution, "too soon to tell".

2. But it is already difficult to recall the heady atmosphere of the late 1990s, when implementation of the Act was the subject of expectant anxiety among judges and practitioners alike. In January 2000, Lord Bingham described the implementation of the Human Rights Act 1998 as having 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, the uncertainty that accompanies any new and testing experience".[1]

The promise of those early – now almost forgotten – days was not fulfilled. Over what already seems a brief decade, this small group of evangelists might be thought to have become increasingly depleted. The Act has had more "re-assessments" than Peter Mandelson has had political comebacks.

3. At the new dawn, in 2000, many predicted far reaching changes in the English law as a result of coming into force of the Act. My own view was more cautious. It seems to me that the 'rights based' reasoning required by the Act would, over time, produce a fundamental shift of attitude on the part of English judges in cases where human rights are in play. In other common law jurisdictions the impact of bills of rights has taken very different forms: from the activist approaches of the Canadian and South African courts, through the more cautious approach of the Courts in New Zealand, to the extremely limited impact of the Hong Kong Bill of Rights Ordinance.

4. At risk of prematurity, it might be suggested that overall, the impact in England has been somewhere between Canada and New Zealand. There have been quite a lot of small tremors but relatively few earthquakes.

---

[1] Foreword to R Clayton and H Tomlinson, *Law of Human Rights,* 1st Edn, 2000.

5. This is not the place to attempt a full analysis of the impact of the Act on English law and administrative practice. I am not going to analyse the decisions made or the trends in the case law. Baroness Hale has recently identified her own "high points" and "low points"[2] – an interesting list which, perhaps surprisingly, does not include the *Belmarsh* case. I am not going to attempt another one. Instead I want to look at the Human Rights Act from three points of view: in three different contexts. These are, loosely, ugly bad and good.

The Ugly: the political context

6. The first is the political context and public reception of the Act. This has, without doubt, been "ugly". It is not what the Act has done but what the Act is believed to have done or rather what the press tells us that it has done. The "urban myths" of the Human Rights Act are too well known to require rehearsal but what is clear is that over the past decade the Act became the subject of acute political controversy.

7. In part, this has without doubt been linked to a particular type of cultural xenophobia – the same attitudes which have led substantial sections of the popular press and public opinion to attack the European Union over the whole period of nearly 40 years of British membership. The EU and the Council of Europe are often seen as part of the same foreign invasion force – from a legal perspective, the flowing tide of Community law, breaking the dykes and banks has been joined by the surging waters of human rights law to submerge the common law itself. "Euro-scepticism" has made a strong contribution to distrust of the Human Rights Act.

8. Of even greater importance was the impact of what we can now stop calling "the war on terror". The Labour Government's initial enthusiasm for the Act ebbed away after the terrorist attacks in New York and London. As Tony Blair put it in 2005 "the rules of the game are changing".[3] Mr Blair himself challenged the value of the Convention and the Act: focusing attention on the problems involved in deporting terrorists regardless of the danger they face in their home countries.[4]

9. The conflict between the perceived demands of the "war on terror" and the HRA arose in perhaps their sharpest form in the seminal Belmarsh case, *A v Secretary of State for the Home Department.*[5] A panel of nine Law Lords was convened to examine the proportionality of the control order regime for terrorist suspects under section 23 of

---

2 Lady Hale, Speech at Salford Human Rights Conference, 4 June 2010, available at http://www.supremecourt.gov.uk/docs/speech_100604.pdf.

3 PM's Press Conference 5 August 2005 www.pm.gov.uk/output/Page 8041.asp

4 BBC News, 17 May 2006

5 [2005] 2 AC 68

the Anti-Terrorism Crime and Security Act 2001. Lord Bingham delivered the leading speech. He rejected the Government's argument that the court should not conduct a proportionality review because this was a matter for the democratic institutions and not the courts. In rejecting this distinction he said

> "It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true ... that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. ... The [HRA] gives the courts a very specific, wholly democratic, mandate. As Professor Jowell has put it 'The courts are charged by Parliament with delineating the boundaries of a rights-based democracy'"[6]

10. The House of Lords, went on to hold by a majority of 8:1 that the detention of suspected terrorists which was confined to detaining non nationals was a disproportionate response, not strictly required by the exigencies of the situation for derogating from the Convention under Article 15 and was also discriminatory in breach of Article 14 of the Convention. This seminal decision showed that, where fundamental rights were in directly in issue, the Courts were prepared to take a strict view of proportionality and justification, however politically unpopular the stance taken.

11. But the fall out from this decision – and from decisions in the area of media law which I will deal with shortly – has been decidedly ugly. The Sun described the Human Rights Act as a "barmy law" which the undeserving "have used to gain perks and pay-outs".[7] In 2005, Michael Howard told the Scottish Conservative Party conference that

> "The Human Rights Act has become a charter for chancers and makes a mockery of justice".

The Daily Mail called it a "wretched Act"[8]. Jack Straw, as Lord Chancellor, confirmed to that newspaper's readers that he was "greatly frustrated" by the way judges interpreted the Act and that he could understand why the act was seen as a "villains' charter" by its critics.[9]

---

6 Ibid, para 42

7 http://www.thesun.co.uk/sol/homepage/news/article48194.ece

8 http://www.guardian.co.uk/media/2008/nov/11/dacre-eady-privacy-sienna-mosley

9 http://www.dailymail.co.uk/news/article-1092764/MAIL-COMMENT-Human-rights-villains-charter.html

12. The Labour Government mooted the replacement of the Act. In June 2006 the then Conservative opposition announced that they would scrap the Act. The new Leader of the Opposition, David Cameron MP, proposed a "British Bill of Rights" to replace the Act, to 'strengthen our hand in the fight against crime and counter-terrorism'.[10] This eventually led, in 2010, to a manifesto commitment in the following terms:

> "To protect our freedoms from state encroachment and encourage greater social responsibility, we will replace the Human Rights Act with a UK Bill of Rights"

The matter is presently to be considered by a "Commission".

13. This sustained political opposition has, without doubt, placed supporters of the Act on the defensive. In a number of publications, great stress has been placed on its "Britishness" and its Conservative roots. What is important here is not whether these claims are accurate but the fact that they are made at all. The ugly political reaction to the Act over most of the past decade has led supporters – both political and judicial – to adopt an essentially defensive posture.

The Bad: Strasbourg and the Judiciary

14. Central to the operation of the Human Rights Act in the higher courts is the relationship between the English judiciary and Strasbourg. This has not been an entirely happy one.

15. First, there is the operation of the so-called *Ullah* principle: "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less".[11] This has generated a number of problems for the House of Lords[12] and more, importantly has held the courts back from developing a distinctively "English" law of human rights.

16. Second, there have been the occasions on which Strasbourg has reached conclusions which the English courts have regarded as positively misconceived. The most obvious example is the decision in *R v Horncastle*[13] where the Supreme Court declined to follow a decision of the Fourth Section of the Court of Human Rights[14] on the

---

10 Speech to the Centre for Policy Studies, 26 June 2006, http://www.guardian.co.uk/politics/2006/jun/26/conservatives.constitution

11 *R (Ullah) v Secretary of State for the Home Department* [2004] 2 AC 323 para 20 (Lord Bingham)

12 See generally, R Clayton and H Tomlinson, *The Law of Human Rights,* (2nd Edn, 2009), para 3.41ff.

13 [2010] 2 WLR 47

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

basis that it had insufficiently appreciated or accommodated particular aspects of the domestic process. The matter has been considered by the Grand Chamber and a decision is awaited. A second example is the bizarre series of cases concerning proceedings for the possession of residential properties – the decisions of the House of Lords in *Qazi,*[15] *Kay v Lambeth*[16] and *Doherty v Birmingham City Council.*[17] These cases grapple with an issue which is perfectly clear in the Strasbourg case law: the courts must be able to consider proportionality in every case. The issue will not go away: it was considered only last week by a 9 justice panel of the Supreme Court in *Manchester City Council v Pinnock.*

17. The more general Strasbourg context should not be forgotten. The English courts have not been required to apply an established set out of rules and principles, but have been required to consider, interpret and absorb an ever growing and rapidly evolving body of case law. The figures are startling.

18. In the first 20 years of the existence of the European Court of Human Rights, 1961 to 1981, it determined an average of just over two cases a year. In the next decade, the annual figure rose to an average of nearly 23. By the end of 1999, the total number of cases decided by the Court had reached one thousand, with 177 admissible cases being disposed of in 1999. The Court is now producing something like 2,000 judgments a year.[18] A large number are short, uninteresting and fact specific. But hidden among them are a surprising number of points of principle.

19. The court's practical difficulties are notorious. The number of new applications rose from 12,500 in 1997 to 29,400 in the first 6 months of 2010. As at the 1 July 2010 there were 129,650 applications pending before the court. Furthermore, contrary to some predictions, the Human Rights Act has not led to a decline in applications to Strasbourg: the 626 applications against the United Kingdom registered in 2000 had increased to 1,133 by 2009. There are 1,620 United Kingdom cases pending although only 103 of these have been communicated to the government.

20. This large and amorphous body of case law and the perceived difficulties which it generates has, I believe, gradually, led to a change in attitude of the senior judiciary. The judiciary was, for many years, at the forefront of the campaign to incorporate the European Convention on Human Rights into English law. Lord Scarman argued

---

15 *London Borough Council v Qazi* [2004] 1 AC 983

16 [2006] 2 AC 465

17 [2009] 1 AC 367.

18 In the last 6 months of 2009 it produced 1075, in the first 6 months of 2010, 900.

for a bill of rights in his 1973 Hamlyn lectures.[19] In the 1990s Lord Browne-Wilkinson suggested a bill of rights should be formulated as a rule of construction[20] and Lord Woolf favoured a form of incorporation which did not threaten parliamentary sovereignty.[21] In his March 1993 Denning Lecture, Lord Bingham called for the incorporation of the European Convention on Human Rights into domestic law.[22] In the later 1990s and early 2000s, the senior judiciary generally welcomed the Human Rights Act and were actively involved in the preparation for its implementation. Early decisions showed active engagement with Convention and international jurisprudence.

21. If we fast forward 10 years, there are clear signs of a different attitude. In his 2009 JSB Lecture, "The Universality of Human Rights"[23] a recently retired Lord Hoffmann drew attention to what he described as a 'basic flaw in the concept of having an international court of human rights to deal with the concrete application of those rights in different countries"[24]. He called into question the whole "Strasbourg system" and in particular the "constititutional competence" of the Court of Human Rights

> "Even if the Strasbourg judges were omniscient, knowing the true interests of the people of the United Kingdom better than we do ourselves, it would still be constitutionally inappropriate for decisions of the kind which I have been discussing to be made by a foreign court".[25]

22. Although, perhaps unsurprisingly, such forthright views have not been expressed by any serving judge two of the most senior English judges have recently expressed concern about the role of the Strasbourg Court in the system of English law.

23. In a lecture given in Dublin on 20 November 2009 under the title "The Conversation between Strasbourg and the National Courts – Dialogue or Dictation?" Lord Kerr disagreed with Lord Hoffmann on pragmatic grounds and because of the "invaluable and irreplaceable vein of

---

19 Sir Leslie Scarman, *English Law - The New Dimension* (Stevens, 1974).

20 Lord Browne-Wilkinson 'The Infiltration of a Bill of Rights' [1992] PL 397; See also Lord Browne-Wilkinson, 'The Impact on Judicial Reasoning' in B Markesinis (ed), *The Impact of the Human Rights Bill on English Law* (Clarendon Press, 1998).

21 Lord Woolf 'Droit Public - English Style' [1995] PL 57.

22 T Bingham, "The European Convention on Human Rights: Time to Incorporate" in *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, 2000), p.140

23 19 March 2009, http://www.jsboard.co.uk/downloads/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.doc

24 Ibid, para 25

25 Ibid, para 43

jurisprudence" that we can draw on in Strasbourg. He nevertheless goes on to say that we need to make Strasbourg aware of the differences between our legal tradition and those of civil law jurisdictions suggesting that such awareness might stimulate a more generous approach to the margin of appreciation doctrine and might lead to reconsideration of the setting of an absolute standard for the disparate jurisdictions in the Council of Europe.

24. In his own, 2010, JSB Lecture[26], the Lord Chief Justice, Lord Judge asked the question:

> "Are we becoming so focussed on Strasbourg and the Convention that instead of incorporating Convention principles within and developing the common law accordingly as a single coherent unit, we are allowing the Convention to assume an unspoken priority over the common law. Or is it that we are just still on honeymoon with the Convention?"

25. Lord Neuberger takes up the theme in his recent lecture "The Incoming Tide: the Civil Law, the Common Law, Referees and Advocates"[27] He emphasises the need for a dialogue between the English courts and the Strasbourg court which

> "will require from Strasbourg a more acute appreciation of the validity of the differential approaches taken by Convention states to the implementation of rights. This is not to suggest a weakening of standards or that Strasbourg should adopt an inconsistent approach to determining minimum standards. It is to suggest that Strasbourg might well benefit from developing the margin of appreciation to take greater account of practical differences which arise between Convention states and their implementation of high level principles. Just as there are many streams which flow from a well-spring, there are many ways to protect the rule of law of fundamental rights. A court which looks at the concrete application of high principle in different states, with different traditions should hold that firmly in mind when it approaches the width of the margin of appreciation to be applied in each case that comes before it".[28]

26. In short, the senior judiciary have, in recent times become more cautious and sceptical about the value of Strasbourg case law and about "common European standards" of human rights. The model of a "dialogue" between Strasbourg and the national courts is a difficult

---

[26] 17 March 2010, http://www.judiciary.gov.uk/docs/speeches/lcj-jsb-lecture-2010.pdf

[27] 24 June 2010, http://www.judiciary.gov.uk/docs/speeches/mr-euro-circuit-lecture-june-20102.pdf

[28] Ibid, para 42.

one – Strasbourg can, and does, look at the views of the national courts but, in the end, reaches its own conclusions: it is, in substance, a fourth instance court of appeal. The "Convention" model will, inevitably, generate tension. The English courts have, as a result of the operation of the *Ullah* principle, failed to generate a coherent and distinctive "domestic human rights" jurisprudence and, as a result, the tensions have been exacerbated.

The Good: Article 8, privacy and anonymity

27. The final area I want to consider is one in which the English Courts have taken used the Human Rights Act, have engaged with the Strasbourg case law and have, as a result, developed the law in a new direction. This new direction shows a sensitivity to human rights concerns and to the common law. This is the new law concerning privacy and the closely related area of "anonymity".

28. This area of law is a development of the common law based on a line of cases going back to the mid nineteenth century. But the pace of development has recently accelerated and the Human Rights Act has been the decisive factor. It has enabled the courts to develop the law in an important area where parliament fears to tread. In this area the Act has had "horizontal effect" – it operates in cases between two private parties. The action for breach of confidence has been transformed.

29. By a complex legal process – which has never fully analysed in the cases – Articles 8 and 10 of the European Convention on Human Rights have been "absorbed" into breach of confidence. This was confirmed by the House of Lords in *Campbell v MGN.*[29] What has been created is a new claim – for "misuse of private information".[30] In the words of Lord Phillips, it is the "cause of action formerly known as confidence".[31] We now know that "in order to find the rules of the English law of breach of confidence we now have to look in the jurisprudence of articles 8 and 10".[32]

30. The new law of privacy has been developed through a series of cases in the Court of Appeal and the House of Lords: *Douglas v Hello!,*[33] *Campbell,*[34] *McKennitt v Ash,*[35] *Lord Browne of Madingley v Associated*

---

29 [2004] 2 AC 457.

30 Ibid, 465, paras 14 and 17, (Lord Nicholls).

31 *Douglas v Hello! (No.3)* [2006] QB 125, §53.

32 *McKennitt v Ash* [2008] QB 73, para 11.

33 [2001] QB 967; [2006] QB 125 and [2008] 1 AC 1.

34 [2004] 2 AC 457.

35 [2008] QB 73.

Newspapers,[36] *Murray v Express Newspapers*.[37] As the law presently stands, when considering a claim for actual or threatened misuse of private information the Court must decide two things:

> "First, is the information private in the sense that it is in principle protected by article 8? If "no", that is the end of the case. If "yes", the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by article 10?"[38]

31. I have already mentioned that this "new law of privacy" was not entirely popular. With characteristic understatement the commentator Melanie Phillips has described the process in these terms:

> "Driven by a deep loathing of the popular press, the judges have long been itching to bring in a privacy law by the back door. Thus free speech is to be made conditional on the prejudices of the judiciary ..."[39]

Her editor at the Mail, Paul Dacre, was equally firm in his views:

> "insidiously, the British Press is having a privacy law imposed on it, which – apart from allowing the corrupt and the crooked to sleep easily in their beds – is, I would argue, undermining the ability of mass-circulation newspapers to sell newspapers in an ever more difficult market".[40]

He went on to say

> "This law is not coming from Parliament – no, that would smack of democracy – but from the arrogant and amoral judgements – words I use very deliberately – of one man. I am referring, of course, to Justice David Eady who has, again and again, under the privacy clause of the Human Rights Act, found against newspapers and their age-old freedom to expose the moral shortcomings of those in high places".[41]

32. The same approach – involving the balancing of Articles 8 and 10 has been applied in a series of cases involving issues of "reporting restrictions" and anonymity. In the case of *In re S (A Child)(Identification: Restrictions on Publication)*[42] the old rules concerning the inherent jurisdiction of the court in relation to wardship proceedings were swept away on the basis that the foundation of the

---

36 [2008] QB 103.

37 [2009] Ch 481.

38 *McKennitt v Ash* [2008] QB 73, para 11.

39 Melanie Phillips, "The law of human wrongs", *Daily Mail*, 6 December 2006.

40 Paul Dacre, Speech to Society of Editors, 9 November 2008, p.5.

41 Ibid.

42 [2005] 1 AC 593.

jurisdiction to restrain publicity to protect a child's private and family life was now derived from the Convention rights rather than the inherent jurisdiction of the High Court. As a result, where the right to private and family life under article 8 of the Convention was in conflict with another's right to freedom of expression under Article 10 of the Convention, neither article as such had precedence over the other, the correct approach being to focus on the comparative importance of the specific rights claimed in the individual case, with the justifications for interfering or restricting each right being taken into account and the proportionality test applied to each.

33. In the case of *In Re British Broadcasting Corporation*[43] the House of Lords approached the issue as to whether an anonymity order which it had made some years earlier should be lifted on the basis of balancing the defendant's Article 8 rights and the Article 10 rights of the press. A similar approach was taken by the Supreme Court earlier this year in the case of *Re Guardian News and Media*[44] where the Court put into the balance the Article 8 right to reputation of the defendant.

34. The integration of the Strasbourg case law into the common law is all the more striking because that case law is, itself, developing at a rapid pace and being "integrated" into the new law of privacy. Let me give three examples. First, the Court of Human Rights has, consistently, over recent years held that the publication of photographs taken in public places is an interference with Article 8 rights which requires "public interest" justification. Although in *Von Hannover*[45] there was an element of harassment, a series of subsequent cases have found violations resulting from the publication of single photographs, often in the context of criminal investigations or charges.[46] The fact that a photograph has been previously published will not, of itself, justify its republication.[47] Second, the Court has recently extended the protection of Article 8 to the mere taking of photographs – without their publication.[48] Third, it is now clear that the positive obligation to protect private life under Article 8 includes an obligation to provide appropriate levels of compensation for "outrageous abuses of press freedom" in publishing private information such that the victim's distress is properly compensated and the press are deterred from

---

43 [2010] 1 AC 145.

44 [2010] 2 WLR 325; see also *Secretary of State v. AP (No.2)* [2010] 1 WLR 1652.

45 (2004) 40 EHRR 1.

46 See, eg *Sciacca v Italy* (2006) 43 EHRR 20; *Gourguenidze v Georgia* Judgment of 17 October 2006; see generally R Clayton and H Tomlinson, *The Law of Human Rights* (2nd Edn, OUP, 2009), para 12.285ff.

47 *Hachette Filipacchi v France* Judgment of 14 June 2007 (previously published photograph of the body of the assassinated Prefect of Corsica).

48 *Reklos v Greece* Judgment of 15 January 2009.

future breaches.[49]

35. In this area, the domestic courts have used the Human Rights Act to develop the common law. Human rights principles have been integrated into common law causes of action. A double proportionality exercise – sometimes called "parallel analysis" – has been brought into the common law to produce a sophisticated balancing of Convention rights. I have mentioned that this has not been popular – it goes a long way to explaining the venom of the popular press towards the Act. This provides an illustration of how the Human Rights Act could operate in the future. It is both distinctively English and sensitive to "human rights principles" derived from the Strasbourg case law. The courts have not, in practice, been constrained by the *Ullah* principle but have sought to develop a privacy and anonymity law which works in the English context. This can properly be described as "the good".

Conclusions

36. There are many other perspectives on the first ten years of the Human Rights Act. The Act has, in Lady Hale's words

> "enabled a type of legal debate, both in and out of court, which could not have taken place before it was passed".[50]

She laments the fact that Act has given rise to "so many difficult constitutional issues" which have occupied so much of the time of the Courts. However, I do not agree that this is the result of "previous mindset of practitioners and the courts". The problem that the Act requires a new set of human rights principles to be woven into the conservative fabric of the common law. This will, inevitably, be a slow process. It has barely begun.

HUGH TOMLINSON QC

Matrix Chambers
Griffin Buildings
Gray's Inn
London WC1R 5LN

16 July 2010

---

49 *Armonienė v. Lithuania*, Judgment of 25 November 2008.

50 Lady Hale, Speech at Salford Human Rights Conference, 4 June 2010