



Can human rights survive the war on terror and the war on crime?

Carol Harlow

**Law, London School of Economics
and Political Science**

Discussion Paper 21/08 (August 2006)

Democratic Audit of Australia
Australian National University
Canberra, ACT 0200
Australia
<http://democratic.audit.anu.edu.au>

The views expressed are the authors and do not necessarily reflect those of the Democratic Audit of Australia.

Australia is the only Westminster country that still lacks a Bill of Rights at the national level. Elsewhere compromises have been between upholding international human rights guarantees and the Westminster doctrine of parliamentary sovereignty. Examples include the New Zealand *Human Rights Act 1993* and the UK *Human Rights Act 1998* as well as the ACT *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities Act 2006*. The relevant international guarantees are those of the European Convention on Human Rights for the UK and the International Covenant on Civil and Political Rights for Australia and New Zealand. This article looks at how effective this kind of compromise between international norms and parliamentary sovereignty has been in the UK.

The British *Human Rights Act 1998* is well known to be a ‘halfway house’ model of a Bill of Rights, deliberately designed to be consistent with the constitutional doctrine of parliamentary sovereignty. It does not authorise judges to invalidate Acts of Parliament; instead they issue a ‘declaration of incompatibility’ with those articles of the European Convention on Human Rights that furnish the Act’s substantive rights. The onus then falls on the government to take action. Section 9 of the Human Rights Act sets up a ‘fast track’ procedure, authorising a minister to amend statute law found incompatible with human rights law by recourse to subordinate legislation. It is, in other words, a ‘dialogue’ model of human rights review, assuming cooperation of legislature and judiciary.¹

Cooperation has generally speaking been the order of the day. The judges have taken very seriously their section 3 obligation to ‘read down’ legislation to make it compliant with the European Convention and only a handful of declarations of incompatibility has been made.² Co-operation has been facilitated by the judge-made doctrine of ‘deference’, according to which the judiciary will defer, where it seems appropriate, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the European Convention.³ The amount of deference depends, as we shall see, on whether an area is seen as the special responsibility of the executive or of the judiciary. At one end of the spectrum, security of the state’s borders has long been acknowledged to fall within the special responsibility of the executive; at the other, sentencing and criminal justice are ‘a paradigm of the judiciary’s special responsibility’.⁴ For those familiar with the classical rules of judicial review, little here seems new.

But this division of functions is not universally accepted and dialogue has not always proved possible. Crime and punishment are particularly controversial topics on which elections are fought and British Home Secretaries possess important discretionary powers in the sentencing of serious criminals, for which they fight hard. Long before the Human Rights Act, these powers had brought them into conflict both with domestic courts and

¹ Francesca Klug, 2003, ‘Judicial deference under the HRA’, *European Human Rights Law Review* 2, p.125.

² Francesca Klug, 2006, ‘The Long Road to Human Rights Compliance’ *Northern Ireland Legal Quarterly*, p.57.

³ *R v DPP ex parte Kebilene* [2000] AC 326, 381 (Lord Hope).

⁴ *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 (Laws, L.J).

with the Strasbourg Court of Human Rights, which interprets Article 6 of the European Convention as imposing a right to an independent and impartial tribunal in deciding individual sentences. The battle for supremacy has been hard-fought, with the Home Secretary, supported by the Prime Minister,⁵ expressing his determination to retain these powers, 'given his accountability to Parliament'. The stripping away of the vestiges of executive power when a declaration of incompatibility was issued in respect of the most recent statutory provisions, was therefore controversial.⁶

This festering dispute over criminal justice came to a head when the popular press took up the case of Anthony Rice, convicted of murder following release on parole. The link with human rights came from an internal review, which stated that the responsible body had 'started to allow its public protection considerations to be undermined by its human rights considerations... especially as the prisoner was legally represented.'⁷ Fuel was poured on the flames by a case where a judge sentenced a convicted paedophile to a minimum tariff of five years. This result had in fact more to do with guidelines established by the new Sentencing Council and imposed on judges by recent legislation than with the Human Rights Act. Nonetheless a public impression, fostered by the media, was created that human rights 'ran counter to the public interest'.

Long before the Human Rights Act, judicial review in immigration cases was a bone of contention between executive and judiciary. Home Secretaries have not been reticent; David Blunkett once exhorted judges to 'learn their place; they do not have the right to override the will of the House, our democracy or the role of Members of Parliament in deciding the rules.'⁸ The Act has, however, undoubtedly encouraged creative lawyers and expanded the obligations of government: Articles 2 (right to life) and 6 (family life) have, for example, been used to ground claims to housing, health care and social assistance. The fact that the cases have largely failed, with judges showing a high degree of deference to decisions involving resource allocation, seems to have been overlooked by the strong anti-migration lobby and the Act is widely (if unfairly) blamed for pressure on public housing and other social assistance systems. The reverse is probably true; under-privileged groups, such as gypsies, migrants and prisoners, have not notably benefited. Indeed, radical lawyers have said that 'hopes that the Human Rights Act would redress the balance of rights for individuals have not been borne out. It has raised new intellectual debates for lawyers but whether it makes much difference is debatable.'⁹

⁵ *BBC News*, 8 July 2002.

⁶ The Crime (Sentences) Act, 1997 was declared incompatible in *R(Anderson) v Secretary of State for the Home Department* [2002] UKHL 46. The relevant legislation is now the Criminal Justice Act 2003. For the full list of ECtHR cases, starting with *Weeks v United Kingdom* (1987)10 ECHR 293, see *Anderson* para. 15. And see Danny Nicol, 2004, 'Statutory interpretation and human rights after Anderson' *Public Law* 274.

⁷ Home Office Inspectorate, *An Independent Review of a Serious Further Offence Case*, www.inspectorate.homeoffice.gov.uk.

⁸ *Daily Telegraph* 21 February 2003; *News of the World*, 23 February 2003; HC Deb col. 8 (24 February 2004). And see Richard Rawlings, 2005, 'Review, revenge and retreat' *Modern Law Review* 68(3).

⁹ Ruth Costigan and Philip A. Thomas, 2005, 'The Human Rights Act: A View from Below' *Journal of Law and Society* 32(1), p.66 citing Stein, 'Comment' in *Law Society Gazette*, 16 April 2004. See also Luke Clements, 2005, 'Winners and Losers' *Journal of Law and Society*, 32(1).

'Human rights' have also unfairly attracted blame for inability to deport failed asylum-seekers, after *Chahal*, where the British government sought to deport to India a Sikh suspected by the Indian government of terrorist activity.¹⁰ A significant element in the Strasbourg ruling was that there can be no deportation to a destination where torture or inhuman treatment is likely. This lay behind the significant decision in *A (No 2)*,¹¹ where it was held that evidence likely to have been obtained by torture in overseas countries was not admissible in a British court or tribunal. (That a majority was willing to place the burden of proving this on the applicant was less well publicised than the victory.)

In *A (No 1)*,¹² a group of foreign nationals suspected of terrorism challenged the legality of their detention under the *Anti-Terrorism, Crime and Security Act 2001*. To legislate, the government had very publicly derogated from the fair trial provisions of European Convention Art 5, claiming a situation of 'war or other public emergency threatening the life of the nation.' The only recourse under the Act was an attenuated hearing by SIAC, a statutory tribunal presided over by a judicial officer with the status of the High Court. Hearings are in secret, the detainee is represented only by a Special Advocate appointed by the tribunal, and he may not see the evidence or hear the accusations against him. Despite the derogation, in *A (No 1)*, a specially enlarged House of Lords issued a declaration of incompatibility. For the majority, the claim of emergency fell within the margin of appreciation allowed to government in the area of security and defence. The House went on to rule, however, that detention was both a disproportionate response to the actual situation and that it discriminated against foreign nationals.

The government response was not in terms of section 9 and it led to a stand off between government and opposition. As drafted, its bill also attracted unfavourable opinions from the Joint Committee on Human Rights, set up after the Human Rights Act and charged with scrutinising legislation for potential non-compliance with the Convention.¹³ With some difficulty, the government nevertheless passed through Parliament the *Prevention of Terrorism Act 2005*. The Act, which applies to British nationals, introduced 'control orders' of two types: 'non-derogating control orders' are made by the Home Secretary but must first be reviewed by a High Court judge; 'derogating control orders' require European Convention derogation by ministerial order and must be made by a judge.

In a further challenge, the 'Belmarsh detainees' now contested non-derogating control orders made to authorise their further detention.¹⁴ In a two-stage judgment, Sullivan J. ruled that the attenuated procedures used in the court hearing violated the requirements of the European Convention Art 6 and made a declaration of incompatibility. He moved on to rule that the regime imposed by the orders was too stringent to be imposed without

¹⁰ *Chahal v United Kingdom* [1996] ECHR 54

¹¹ *A and Others v Home Secretary* [2005] UKHL 7. By the majority, the burden of proof was placed on the applicant to show the likelihood of torture, a contestable ruling: see David Feldman, 2006, 'Human Rights, terrorism and risk: the role of judges and politicians' *Public Law* 364.

¹² *A and Others v Home Secretary* [2004] UKHL 56. The chairman of the tribunal, SIAC or the Special Immigration Appeals Commission, is and has the status of a High Court judge.

¹³ The work of the Committee is discussed by its academic adviser, David Feldman, 2004, 'The impact of human rights on the legislative process' *Statute Law Review* 25(2).

¹⁴ *Re MB* [2006] EWHC Admin 1000; *JJ and others v Home Secretary* [2006] EWHC 1623.

derogation and refused to make derogating control orders—a 'double whammy against the government in its attempts to fight terror'.¹⁵ Whether these twin judgments will survive appeal is uncertain.

Sullivan J. now administered a further blow to the government by ruling that Afghan asylum seekers, who had hijacked an airplane and landed at Stansted, could not be returned to Afghanistan.¹⁶ This was one ruling too far. The Prime Minister labelled it 'an abuse of common sense', calling on his Home Secretary to change the law 'to ensure the law-abiding majority can live without fear'. Legislation might be necessary to amend the Human Rights Act to require judges to balance the rights of the individual with public safety, which they 'do not always do'. His Lord Chancellor weakly defended the Act, suggesting that it could be amended so as 'not to distract officials'. The Leader of the Opposition poured oil on the promising split by calling for a 'British Bill of Rights' but as he made it clear that he would not wish the country to withdraw from the European Convention, his unwieldy proposal was derided by the Attorney General, Lord Goldsmith, as 'muddled, misconceived and dangerous'.¹⁷ A few days later, the Home Secretary backed down, telling the Commons that the Act was 'not at fault'; the problem lay with the way it was interpreted. Announcing sweeping changes to the prisons and sentencing regimes, he also publicized the setting up of a Home Office 'hotline' to give 'robust, practical myth-busting advice on how rights should be balanced between offenders and the wider community'.¹⁸ There matters rest for the time being.

What should we deduce from these political spats? The most important lesson concerns the cultural environment of the 'British Bill of Rights'. Majoritarian democracy is, as Jeremy Waldron once observed,¹⁹ 'the theory with which most of us are familiar', a cultural preference shared by judges, politicians and public. The 'dialogue model' builds on this allegiance without seeking to displace it. It may sometimes diminish 'rights', reducing them to the level of 'claims' made against the political community²⁰ but it also leaves space for 'democratic participation on matters of principle by ordinary men and women'.²¹ It has not, as proponents of the Human Rights Act undoubtedly hoped, sparked off fundamental change to the constitutional context.

Ours is a culture of controversy',²² where the dialogue model functions by stimulating public debate over human rights. What we must now do is to strengthen the parliamentary machinery for the scrutiny and support of human rights—as sections 9 and 19 of the Act (which obliges ministers to make a statement that proposed legislation

¹⁵ *The Independent*, 1 August 2006.

¹⁶ *R(S,M,S and others) v SSHD* [2006] EWHC 1111.

¹⁷ *BBC News*, 13 July 2006.

¹⁸ *The Telegraph*, 21 July 2006.

¹⁹ Jeremy Waldron, 1993, 'A right-based critique of constitutional rights', *Oxford Journal of Legal Studies*, Vol. 13(1), p.32.

²⁰ The celebrated formulation of Griffith: See J.A.G. Griffith, 1979, 'The political constitution', *Modern Law Review* 42(1)

²¹ Waldron, 'A right-based critique of constitutional rights', p.42.

²² Tom Campbell, 1999, 'Human rights: Culture of controversy', *Journal of Law and Society*, 26(1). And see Danny Nicol, 2004, 'The Human rights act and the politicians' *Legal Studies* Vol.24.

complies with the European Convention) are designed to do. An extensive academic literature now covers the way in which the judiciary has used its new powers; this needs to be extended to the new parliamentary machinery for human rights enforcement.²³

As Lord Hoffmann, in a much-cited passage, has explained

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The *Human Rights Act 1998* will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal.²⁴

All that courts can do is to ensure that 'Parliament must squarely confront what it is doing and accept the political cost'.

There is of course a danger that, in a dialogue model, courts will not be able to withstand the power of the executive. But the danger is surely much greater in a system where people do not participate and representative institutions have been disabled.

²³ As it is being: see, e.g. Janet L. Hiebert, 2006, 'Parliamentary bills of rights; An alternative model?' *Modern Law Review* 69(1) and, 2006, 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?', *International Journal of Constitutional Law* 4(1)
²⁴ *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, (Lord Hoffmann)