



CHANGING THE RULES

The judiciary, human rights and the constitution



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ALLEN & OVERY

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Dear Reader

Changing the rules: the judiciary, human rights and the constitution

'The rules have changed', the Prime Minister famously stated as he announced a package of measures to deal with terrorism in the wake of the London bombings in July 2005. In relation to deportations, he warned the judiciary not to interfere with proposals to negotiate agreements with states that have, until now, been regarded as unable to give guarantees that deportees will not be tortured and will be given a fair trial.

The Prime Minister has kick-started a debate for which JUSTICE had been preparing and one which emerges in a range of different contexts. Elements of this discussion, particularly those dealing with terrorism, are fast-moving and the government's pronouncements are likely to mirror that fact. But there is an underlying fundamental question: what are the appropriate relative powers of the judiciary, the executive and the legislature within a democracy that commits itself to international standards of human rights?

This discussion paper is the prelude to a longer examination. JUSTICE's objectives are:

- to chart the changing balance of power between the judiciary, executive and legislature;
- to identify where problems and uncertainties are located; and
- to articulate a re-balancing of powers within the constitution to meet contemporary pressures.

We live, of course, in a parliamentary democracy, the consequences of which were very clear to its greatest advocate, Professor Dicey:

Parliament has, under the English constitution, the right to make any law whatever, and further, no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.¹

At the most obvious level, membership of the European Union and adherence to the European Convention on Human Rights challenge too simplistic a contemporary assertion of Dicey's views. More subtly, the courts have developed over the last 30 years an administrative law jurisdiction that has given them more confidence in challenging both legislature and executive. The Human Rights Act 1998 has accelerated that process of empowerment. The government has recently modified its relationship with the judiciary in the Constitutional Reform Act 2005.

This paper seeks to raise questions that must be seen in a much wider context than the laws against terrorism. We need to question the relationship of the government to the legislature as well as that with the judiciary. To what extent, for example, should a government be able to drive its legislation through parliament without allowing amendment or discussion?

These issues will be the subject of a debate, to be chaired by Lord Steyn, on 18 October 2005.² If you would like to contribute as we develop our work on these important issues, then email me at rsmith@justice.org.uk. We intend to publish a final report in the year of our 50th anniversary, 2007.



Roger Smith
Director, JUSTICE

Introduction

The government has implemented an impressive raft of constitutional reform since its election in 1997. JUSTICE has very much welcomed the essentials. We have argued since 1992 for a judicial appointments commission and reform of the Lord Chancellor's role. Thus, we largely supported the provisions of what became the Constitutional Reform Act 2005. Previously, we supported the Human Rights Act 1998. Anne Owers, as Director of JUSTICE, served on the task force that saw to its implementation. It was this Act that was proudly described by Lord Irvine, its architect, as occupying 'a central place in our integrated programme of constitutional change'.³ Central, yes; programme, yes; constitutional, yes; but integrated – hardly. In any event, so bold a set of measures was bound to leave loose ends: those relating to the judiciary are not all resolved by the Constitutional Reform Act.

Not only has the government expressly implemented constitutional reform, it has also sought to extend the boundary of the constitutionally acceptable. In areas like asylum and criminal justice, it has taken populist political positions sometimes at odds with its international human rights obligations. Ministers have even wondered aloud about unilaterally withdrawing the United Kingdom from those requirements. In January 2003, the Prime Minister held out the prospect of withdrawing from the relevant Geneva Convention on refugees.⁴ Jack Straw, as Home Secretary, had earlier speculated on ways to rewrite the same convention.⁵ A leaked Home Office/Cabinet Office document pointed to the trail of consequent constitutional tensions that would arise:

*'Asylum is an ancient right that the UK used to honour prior to the Geneva Convention and the ECHR (European Convention on Human Rights),' the report says. 'Even if we withdrew from these instruments, the courts may decide that the UK retains its obligations not to return anyone to a place of torture or persecution under the common law.'*⁶

The government's proposal to oust the jurisdiction of the courts in relation to certain asylum appeals provided a major constitutional battleground – precipitating a debate about whether parliament had such a power. Lord Donaldson, with the freedom and authority of a former Master of the Rolls, took an uncompromising position:

*Had they [the government] successfully pursued the ouster clause then we certainly would have been in a very interesting constitutional crisis. If they [the government] really did that ... we would have to say: 'We [the judges] are an independent estate of the realm and it's not open to the legislature to put us out of business. And so we shall simply ignore your ouster clause.'*⁷

The government's failure to obtain backing in the House of Lords for a full ouster clause led it to settle for a restricted form of statutory review. Skirmishing has continued in other legislation. The Prevention of Terrorism Act 2005 introduces a jurisdiction for the court in relation to some forms of control orders only in circumstances where the government's case might be 'obviously flawed'.⁸ Thus, the executive continues its battle to push back the judiciary.

Politicians have not been shy in setting out their positions in the media. Indeed, the public nature of the confrontation is an important element: this is a battle for the hearts and minds of the populace as much as anything else. Mr Blunkett, as Home Secretary, provided a ready supply of examples of democratic intemperance in his battle with Mr Justice Collins over the fate of section 55 of the Nationality, Immigration and Asylum Act 2002:



*Frankly, I'm personally fed up with having to deal with a situation where parliament debates issues and the judges then overturn them ... I don't want any mixed messages going out so I am making it absolutely clear today that we don't accept [this court decision]. We will seek to overturn it. We will continue operating a policy which we think is perfectly reasonable and fair.*⁹

Remarks of this kind have stirred up elements of the media in a singularly unpleasant way. The *Daily Express* ran the headline: 'Who is running Britain, Prime Minister? (You should ask Mr Justice Collins)' and the *Daily Mail* attacked 'bogus asylum and the judges who have it in for Britain' and asserted that:

*... unaccountable and unelected judges are openly, and with increasing arrogance and perversity, usurping the role of Parliament, setting the wishes of the people at nought and pursuing a liberal, politically correct agenda of their own ...*¹⁰

This kind of tension is not unique to Britain and may well, in proper proportions, be the sign of a healthy democracy. Mr Blunkett has his US counterpart in Congressman DeLay, the House Majority Leader. Incensed by the US courts' refusal to get involved in the case of Terri Schiavo, he asserted:

*We will look at an arrogant, out-of-control, unaccountable judiciary that thumbed their nose at Congress and the president.*¹¹

Mr DeLay's problems arise from the successful assertion of the US Supreme Court of constitutional supremacy dating back to 1803.¹² This may have been unpopular to many an administration ever since but it does, at least, have the virtue of constitutional clarity. The UK position is rather less evident. The official orthodoxy is parliamentary supremacy. However, recent developments have encouraged a lively discussion about the relative powers of the judiciary and parliament. Lord Hoffman was not alone in foreseeing this as a likely consequence of the Human Rights Act:

*The courts of the United Kingdom, though acknowledging the sovereignty of Parliament, [will] apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.*¹³

As simplified for a newspaper and communication to the public, an academic constitutional expert articulated one of the startling consequences of judicial assertion of relative power – in this case in relation to the debate on the ouster clause rather than human rights:

*Sovereignty of parliament is a common law rule and therefore there's nothing in our constitutional theory to stop the judges saying another common law rule which is of equal importance – perhaps of more importance these days – is that the citizen should have access to the courts and the judges.*¹⁴

The Human Rights Act, coming after other developments in administrative law and judicial review, has undoubtedly made the relative power of judiciary and executive very much of a work in progress. There is lively contemporary judicial and academic debate over the extent to which courts must have regard to decisions of the executive on matters within 'the discretionary area of judgment', as for example in situations where they must decide whether the actions of the government were proportionate to the human rights requirements of the situation.¹⁵ Traditionally, the judiciary showed particular 'deference' to decisions of the executive, at least within areas like national security, which were to be assumed as within its (the executive's) sphere of power.¹⁶ However, the language of 'deference' has become distinctly unfashionable. Judges are



being encouraged by the deployment of human rights methodology to consider the proportionality of decision-making – taking them much closer than previously to the considerations of the decision-taker. The courts are still adjusting to this and it is unsurprising that there are different formulations of the current position. We need to debate what would be the optimum balance.

At a press conference in August 2005, the Prime Minister gave his celebrated ‘rules of the game are changing’ speech. He reported ‘a new approach to deportation orders’, stating that:

The circumstances of our national security have self evidently changed, and we believe that we can get the necessary assurances from the countries to which we will return the deportees, against their being tortured or ill-treated contrary to Article 3 [of the European Convention]. We have now concluded a Memorandum of Understanding with Jordan ... I have had constructive conversations with the leaders of Algeria and Lebanon ... Should legal obstacles arise, we will legislate further including, if necessary, amending the Human Rights Act in respect of the interpretation of the European Convention on Human Rights.¹⁷

This needs to be considered in the light of assessments of the human rights situation in the countries mentioned by the Prime Minister. In relation to Algeria, the Foreign and Commonwealth Office reported earlier this year:

Algeria still suffers the aftermath of a decade of civil war and insurgency in the 1990s ... there are many documented allegations of human rights abuses by the security forces and state-armed militias, including the enforced disappearances of at least 6,000 people, abductions, torture and extra-judicial killings ... We urge the Algerian authorities to grant access to the UN Special Rapporteur on Torture.¹⁸

The problem, therefore, is how credible assurances can be given by a regime which our own government accepts has an appalling human rights record. This should not be portrayed as something where domestic judiciary take an inexplicably hard line. Professor Manfred Nowak is the UN Special Rapporteur on Torture. He said:

In the situation that there's a country where there's systematic practice of torture, no such assurances [not to torture] would be possible, because that is absolutely prohibited by international law ... the government would deny that torture is actually systematic in that country and could easily actually give these diplomatic assurances, but the practice then shows that they are not complied with.¹⁹

Accordingly, it is not clear how the government could legislate to bind the judiciary to a particular finding in relation to the credibility of any representations. Although this could be presented as judicial obstruction of the democratic will, it could equally be seen as judicial defence of a principle that all states who are members of the Council of Europe accept in principle: torture and ill-treatment are never acceptable. It would seem regrettable that the condoning of torture and terrorism should be presented as a zero sum game in which it is necessary to choose one or the other. Neither is surely acceptable. How we address this issue is again a core concern of this enquiry.

The relative powers of judiciary and executive are at the centre of this examination. There are, however, other questions implicit from the above, some of which are addressed further in this paper. They include:



- (i) Has erosion of the principles of the rule of law been particularly severe since 1997? And, if so, why?
- (ii) What, if any, should be accepted as the desirable limitations of parliamentary power in terms of access to the courts?
- (iii) What understanding of human rights obligations in general and the Human Rights Act in particular should ministers display?
- (iv) How should the appropriate degree of judicial deference or judicial discretion be identified in any particular legal proceedings?
- (v) What is the proper role of the judiciary in the defence of human rights and how much can the exercise of its discretion properly be restricted by government?

The Human Rights Act

The Human Rights Act 1998 (HRA) is both the location and a symbol of the current malaise between the judiciary and the government. This paper can give only the briefest of appreciations of its effect. It was intended as a carefully crafted compromise between the constitutional entrenchment of human rights and the preservation of parliamentary supremacy. At the heart of the HRA is a well publicised triumvirate of provisions: section 6 which makes it unlawful for a public authority to act in a way incompatible with a right enshrined in the European Convention on Human Rights (ECHR); section 4 which provides for the court to make a declaration of incompatibility where it is satisfied that a statutory provision is incompatible with an ECHR right; and section 3 in which parliament authorises the judiciary to take the initiative in the construction of legislation:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

Thus, the HRA creates a delicate dance between parliamentary supremacy and judicial intervention – with the former retained through the procedure of the declaration. It may be, however, that this turns out to be more spin than dance. The European Court of Human Rights appears unconvinced that such a declaration amounts to the ‘effective remedy’ required by the ECHR.²⁰

Three cases illustrate that the HRA is beginning to have major implications for the role of the judiciary. *Ghaidan v Godin Mendoza*²¹ demonstrates the latitude which the courts are willing to deploy in relation to construction of a statute. In this case, the House of Lords held that the effect of the HRA was that the survivor of a homosexual couple could succeed to his partner’s tenancy, even though the statutory provisions clearly limited such succession to the survivor of a marriage or a cohabitation between a man and a woman. Helen Mountfield described the various approaches taken by different members of the court:

Lord Nicholls ... dismissed one understanding: that it was only ‘possible’ to impose a Convention-compliant meaning where the words under consideration fairly admit of more than one meaning ... Lord Roger pointed out s3 will no longer be at the mercy of the linguistic choice of the individual who happened to draft the statutory provision in question but is liberated to concentrate on the substance of the challenge ... Lord Steyn ... commented that there had been excessive concentration on the linguistic features of statutes and roundly rejected the literalist approach to the interpretation of human rights, recommending rather a ‘broad approach’ concentrating ‘in a purposive way on the importance of the fundamental right involved’.²²



In other words, these judges were saying that parliament requires them to consider interpretations of a statute that go well beyond the resolution of ambiguity. On occasion, the House of Lords has intervened to mitigate the deliberate intention of provisions that it regarded would otherwise give rise to injustice. A celebrated early casualty was section 41 of the Youth Justice and Criminal Justice Act 1999 which restricted the admissibility of a victim's previous sexual history. The House of Lords held that this could not apply if it deprived the accused of a fair trial.²³

The intention of the drafters of the HRA was that parliamentary sovereignty would be retained by the procedure of a declaration of incompatibility. The judiciary could not overturn legislation that it thought incompatible: it had to leave remedy to parliament after issuing such a declaration. However, the successful challenge of the government's flagship 2001 anti-terrorism legislation showed how, practically, the judiciary can win the day. It is hard to think of a more important case in which a declaration might be granted with more of the government's prestige at stake. The government fought for its interpretation in the courts but, in the face of a hostile judgment, it accepted the primacy of the ruling. As a result, parliamentary sovereignty was honoured more in form than substance. To be fair, the government had always anticipated that a declaration would require it to accept the verdict. But the consequence is that, in perhaps the most important possible type of case, the judiciary carried the day. The House of Lords found by an 8-1 majority that:

*Section 23 of the Anti-terrorism, Crime and Security Act 2001 is incompatible with Articles 5 and 14 of the European Convention ... insofar as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status.*²⁴

The form was a declaration of incompatibility. But, the substance was such that the government had, politically, little option but to re-legislate. The option of holding out against the inevitable application to the European Court of Human Rights proved predictably unattractive. Accordingly, ministers raced through the Prevention of Terrorism Act 2005 which not only constructed a whole new edifice of anti-terrorism legislation but, very practically, led to the release from prison of some dozen detainees whom the government had previously insisted could not safely be released.

One of the most significant judgments in the longer term may have been the minority decision of Lord Justice Neuberger on the admission of evidence that might have been obtained by the use of torture. The majority found against him and its judgment has been appealed to the House of Lords where JUSTICE has joined a consortium of domestic and international organisations as interveners. Lord Justice Neuberger summed up his argument thus:

*The common law of England ... does not exclude evidence obtained by torture [in civil cases] whereas the law of Europe ... would exclude such evidence. This does not lead me to doubt my conclusions [that this is wrong]. First, the effect of the ECHR on the common law has, perhaps somewhat artificially, been excluded. Second ... the common law lays somewhat more emphasis on pragmatism, whereas the approach under the ECHR is perhaps rather more influenced by moral principle. Thirdly, the very fact that countries in mainland Europe have had a more chequered history over the past 300 years may render their courts more sensitive on issues such as torture ...*²⁵

This assertion of continental and human rights influence is remarkable even in a dissenting judgment. It indicates how vulnerable the long traditions of the common law have become to international conventions. It illustrates how far we have travelled.

A whole series of questions arise over a fuller analysis of the Human Rights Act. They include:

- (i) Should we reconsider the whole mechanism of declarations of incompatibility?
- (ii) Were the courts initially too cautious in their interpretation of the Act?
- (iii) Are there signs that judges are now using their interpretative powers with more creativity and, if so, is this desirable?
- (iv) Can any valid distinction be made between rights in terms of the desirability of judicial protection – for example, Article 6 (fair trial) over Article 10 (freedom of expression)?
- (v) Should we now regard international human rights provisions, other than those in the ECHR, as incorporated into domestic law and, in particular, do we think that there should be a ban on evidence obtained by torture?

‘Home alone’: the judge, the principle and the breach

The government has deliberately taken a tough position on law and order. This has gone into constitutional territory – the Prime Minister has wanted to:

... emphasise our central principle: that above all, the time has come to rebalance the system so that we restore the faith of victims and witnesses that the court hearing will be fair to all participants.²⁶

As a result, the government has been prepared to challenge certain safeguards, previously seen as accepted rights. The Criminal Justice Act 2003 (CJA) provides no less than three examples where recent legislation breaches long-held principles previously seen as civil liberties so fundamental that they might well have been articulated as emanations of the rule of law: the rule against double jeopardy (protected by Article 4 of Protocol 7 to the European Convention on Human Rights and Article 50 of the EU Charter of Fundamental Rights – reflecting the fifth amendment to the US constitution); the rule against citing previous convictions against a defendant contesting a criminal charge (arguably impinging on the presumption of innocence); and the right to jury trial for serious offences (which can trace a credible lineage back to Magna Carta’s protection of a right to trial by peers).

The CJA did not escape unscathed as it proceeded through parliament. These three provisions were highly controversial even though the first two had been prompted by reports from the Law Commission recommending reform. All three provide examples of how a fundamental principle was breached but application left to the decision of an individual judge. This, to a considerable extent, reflected the strength of those fighting an extensive rearguard action in defence of what they saw as fundamental civil liberties. The principle against double jeopardy, for example, can trace itself back to the Norman French expression of the bar of ‘autrefois acquit’. This is not to argue that a reasonable case did not exist for its restriction, particularly where new evidence became available as the result of new scientific discoveries such as DNA analysis.

The important point for this purpose is the form of the material provisions. These are respectively Parts 10, 11 and 7 of the CJA (and, in relation to the latter, particularly section 43 which is currently unimplemented; requires a resolution of both houses of parliament; but which the Attorney-General has announced that the government will seek to implement in the autumn of 2005). Each leaves the final decision in an individual case to judges.



In the case of breach of the principle of double jeopardy, the Court of Appeal must consider whether there is 'new and compelling' evidence²⁷ and whether 'the interests of justice' are met.²⁸ In doing so, it is directed to make a judgment on a specified set of matters that give it considerable scope:

- (a) *whether existing circumstances make a fair trial unlikely;*
- (b) *... the length of time since the qualifying offence was allegedly committed;*
- (c) *whether it was likely that the new evidence would have been adduced in the earlier proceedings ... but for the failure by an officer or by the prosecutor to act with due diligence or expedition;*
- (d) *whether ... any officer or prosecutor has failed to act with due diligence or expedition.*²⁹

The same structure occurs in relation to evidence of bad character. There have traditionally been common law exceptions to the acceptance that evidence of previous convictions disturbs the presumption of innocence. However, section 101 greatly extends the circumstances in which they can be presented to the court. If a prosecution application is made to admit previous convictions then the court must consider whether it will 'have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'.³⁰ This goes significantly beyond the proposals of the Law Commission which published a carefully crafted set of proposals in a draft bill which emphasised the importance that 'in all the circumstances of the case, the evidence carries no risk of prejudice to the defendant', thereby re-asserting the principle behind exclusion.³¹ The CJA now requires a judge who wishes to exclude bad character evidence to do so 'in open court' and to state 'reasons for [that] ruling'.³² Thus, the CJA provisions are designed effectively to override the principle that formerly excluded bad character evidence and leave the judge required to explain publicly why an exception to the reversed rule should be applied.

Judicial support for this provision was not helped by the sudden announcement by the Prime Minister that its start date would be brought forward. The section was to have been implemented in March 2005 and the Judicial Studies Board set up a training programme which was to be completed on 23 March as a two-day residential course for 2,212 key judges. However, on 25 October 2004, apparently to obtain an immediate headline in relation to being tough on sex offenders, Mr Blair and Mr Blunkett announced it would be implemented on 15 December 2004, at which time not a single judge had been trained in section 101's complicated provisions relating to the disclosure of convictions. This appeared too much like the surrender of sensible policy-making to a political media agenda.

Finally, section 43 would allow the prosecution to apply for trial without a jury to a Crown Court judge in serious or complex fraud cases. The wording of the section reflects the political battle in the upper house over its drafting. To order a juryless trial, the judge needs the approval of the Lord Chief Justice.³³ There is discretion.³⁴ In making his decision, the judge considers whether:

- (a) *... the complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome to the members of the jury that the interests of justice require that serious consideration should be given to the question of whether the trial should be conducted without a jury.*
- (b) *In deciding whether or not he is satisfied that the [above] condition is fulfilled, the judge must have regard to any steps which might reasonably be taken to reduce the complexity or length of the trial.*
- (c) *But a step is not to be regarded as reasonable if it would significantly disadvantage the prosecution.*³⁵



These are not, in themselves, unreasonable – or, indeed, unusual – considerations for a statute to give the judiciary. The point is that they illustrate provisions that place judges in a lonely position. The judges become the last potential defenders of a longstanding principle of civil liberties with their discretion to act tied to a set of statutory and procedural criteria – including public explanation of any exercise of that discretion in upholding a principle hitherto seen as fundamentally constitutional. In relation to section 101, the tone is almost punitive towards any judge who wishes to maintain what has been the traditional position.

Here, major questions over government policy include:

- (i) How are the provisions that now relate to double jeopardy and the use of previous convictions working in practice?
- (ii) Should we proceed to cut back on jury trial (an issue on which JUSTICE has taken a lead in opposing, as will be seen from the 2005 annual report)?
- (iii) Did the criminal justice system really need ‘rebalancing’ and, if not, what amendments should now be introduced?
- (iv) Are judges unduly exposed to inappropriate political and media criticism in the exercise of discretionary powers in relation to the breach of key civil rights?

The Constitutional Reform Act

Into existing unease between judiciary and executive dropped what became the Constitutional Reform Act 2005 (CRA). Unfortunately for its parliamentary progress, this also impinged on a completely different political warzone – the battle over the role of the House of Lords. Thus, the CRA managed to unite conservative constitutionalists, die-hard defenders of a hereditary upper house, and those offended by the somewhat off-hand way in which its fundamental reforms were announced. The last thing that this contentious bill needed at birth was the antagonism of a Lord Chief Justice left out of the loop:

The government did not appreciate [the Bill’s] significance because, if they had, it would have been announced in a different way. It was apparently seen by government as a reform capable of being achieved by a press release.³⁶

What is more, Lord Woolf saw this as more than a single regrettable act: he detected a somewhat undesirable course of conduct:

The first event that made the need for more statutory protection clear was an attempt to transfer, without consultation, responsibility for the Court Service from the Lord Chancellor’s Department to the Home Office as part of government reshuffle. The attempt was only frustrated at the last minute with the help of the judiciary. It was disturbing that – at that time – it was not appreciated within government that it was inappropriate for the department that most frequently had to defend proceedings for judicial review in the courts and had lead responsibility for criminal justice policy to be in charge of what should be seen as an impartial court service.³⁷

The transfer of the court service to the Home Office would surely have been constitutionally incorrect and reflected the government’s somewhat cavalier understanding of any separation of powers.

The CRA was one of the most contested pieces of legislation in modern times, at least within the House of Lords. It became almost as contentious as the ban on fox-hunting. In the event, Lord Falconer, the Lord Chancellor, should be greatly indebted to Lord Woolf for throwing himself behind it: otherwise, it might not



have been passed. After all these battles, the CRA now begins with express commitment to the rule of law – albeit stated in negative terms:

This Act does not adversely affect –

- (a) the existing constitutional principle of the rule of law, or*
- (b) the Lord Chancellor’s existing constitutional role in relation to that principle.³⁸*

The latter statement might, in particular, be doubted. The CRA requires all ministers of the Crown, including the Lord Chancellor, with responsibility for relevant matters to ‘uphold the continued independence of the judiciary’;³⁹ ‘have regard to the need to defend that independence’;⁴⁰ and take an oath to:

Respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts ...⁴¹

Specifically, the Lord Chancellor and all ministers of the Crown:

Must not seek to influence particular decisions through any special access to the judiciary.⁴²

These statutory guarantees represent, however, somewhat of a faint shadow of previous roles of the Lord Chancellor as accepted – and extolled – by recent incumbents like Lords Hailsham, Mackay and Irvine. All of these provided eloquent defences of the office’s well-known mix of roles: judge, legislator and minister of the Crown. And behind the Lord Chancellor stood his Office, latterly known as his Department. Its permanent civil servants gloried in managing the relationship between the judiciary and the executive. Lord Schuster, permanent secretary in the inter-war years, called it ‘some kind of link or buffer’; his successor, Sir Albert Napier, thought of it as a form of constitutional ‘hinge’.⁴³

The CRA broke the hinge, link or buffer between government and the judges. Yet, there needs to be some way of mediating the relationship. The Act expands the role of the Lord Chief Justice, holding the posts of President of the Courts, and Head of the Judiciary, of England and Wales.⁴⁴ As the former, he is

... responsible for representing the views of the judiciary of England and Wales to Parliament, to the Lord Chancellor and to Ministers of the Crown generally.⁴⁵

He is also responsible for ‘making appropriate arrangements for the welfare, training and guidance of the judiciary’; allocation of work; and plays a role in senior appointments.⁴⁶ To assist in carrying out his functions, the Lord Chief Justice has special access to parliament and:

May lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary or otherwise to the administration of justice.⁴⁷

This expansion of the role of the Lord Chief Justice is in danger of growing out into a vacuum. There seems to be little to meet it on the government’s side of the divide. The Department for Constitutional Affairs shows itself to have become little more than an offshoot of the Home Office. Its post-election statement prioritises ‘Fighting crime and anti-social behaviour’; it shares with the Home Office an objective of increasing the number of ‘offenders brought to justice’; and its selection of objectives relating to the judiciary is listed as anti-crime measures and is little short of bizarre – ‘support for magistrates’, ‘respect for the authority of the courts’ and ‘a diverse judiciary’.⁴⁸ Yet, this department is responsible for implementing all the provisions of the CRA and ensuring that the independence and quality of the judiciary is not lessened. A secondary



objective of ‘respect for the courts’ under the primary objective of fighting crime does not get near the mark. The Secretary of State should be responsible for respect for the rule of law within government.

A large degree of responsibility is being placed on the Lord Chief Justice. He will assume a representational role, both internal to government and external to parliament, part of which would previously have been undertaken by the Lord Chancellor. In the modern world, this unavoidably means increased public and media exposure – beyond that which the post already attracts. This, in turn, provides another element in any putative job description. The postholder must be politically astute and media-aware. In general, Lord Woolf is both. His determination to avoid a political crisis over the Constitutional Reform Bill led to the concordat with which he and Lord Falconer managed to salvage the government’s disastrous early handling of its proposals. His office is expanding. *The Daily Telegraph* reported:

*Lord Woolf, the Lord Chief Justice, announced this week that he was setting up a judicial communications office. From next month, two experienced press officers will ‘provide the public with a sound understanding of how judges operate’.*⁴⁹

This is just the start. It seems as if, in the event, the Lord Chief Justice will head an administration of some size. Current plans are that the judicial office for England and Wales will have around 60 staff, roughly double those in comparable posts before the CRA reforms. The first two members of the communications department – the director and assistant director – are likely to be joined by others at a later date.

Unavoidably, a Lord Chief Justice’s public utterances can attract considerable attention and, in some cases, criticism.⁵⁰ Lord Woolf could not safely insert one questionable phrase (the celebrated ‘cheeky chappie’) in a speech welcoming a new law library without it becoming a matter of public debate and, indeed, subsequent parliamentary apology.⁵¹ For all the media officers that might be appointed in time to come, Lord Woolf’s successor, Lord Phillips, will do well to escape further controversy. With the judiciary subject to pressures which include those described above, this is absolutely foreseeable and unavoidable. To some extent, such debates may increase transparency and be desirable. However, there is the obvious danger that the head of the judiciary is being set up in a way which will invite denigrating comment of a postholder who is not, and cannot be, democratically accountable and who may well be presented as resisting such accountability – exactly the charge made by David Blunkett against the judiciary.

We surely need to address – before they happen – potential conflicts which may be destructive of individual office-holders, sound constitutional principle and public trust of the arrangements of government. This will be a difficult area and the Secretary of State for Constitutional Affairs must make it one of his major functions. Who now warns cabinet ministers when they overstep the mark? That was the function of the Lord Chancellor within government. Without such a figure, how would a Lord Chief Justice in future prevent the transfer of the Court Service to the Home Office? Lord Phillips may well prove a worthy successor to Lord Woolf but the role calls for almost superhuman skills: he will have to arm himself with the charm of Circe, the patience of Job and the wisdom of Solomon.

By default, some part of the former role of the Lord Chancellor may be falling to the Attorney-General. This role is notably expanding – moving beyond the confines of being legal adviser to the government and having responsibility for prosecutions. The Attorney-General is now proclaimed as one of the triumvirate of ministers responsible for the criminal justice system (with the Home Secretary and the Lord Chancellor) and has personally been involved in negotiations over, for example, the possible reduction of jury trial by way of implementation of section 43 of the CJA discussed above. He has, thus, been unavoidably engaged in mediating between the government and the judiciary.



Furthermore, there is a wider problem about the absorption of the HRA within government. The responsible minister is the Lord Chancellor, Lord Falconer. Yet, in the aftermath of the election in May 2005, he launched a document setting out the priorities for his department.⁵² This reports on 'what we've done' and includes an assertion that the department 'is at the forefront of creating a culture of human rights in the delivery of public services at a national and local level'. There is a heading 'rights' under 'priorities: what we will do'. The section, however, deals with legal aid reform, in part to 'create a fairer deal for the taxpayer' – nothing about human rights. There is another section on 'respect for the authority of the court' but this covers tightening up on the enforcement of court orders and tackling absenteeism by defendants which 'breeds disrespect for the courts and the rule of law and order'. However, the document contains no other mention of human rights and no mention at all, therefore, of leading the adaptation of government to the emerging role of the judiciary following the HRA.

Points to be discussed include:

- (i) **Do any amendments need to be made to the role of the Lord Chief Justice?**
- (ii) **Should we formalise arrangements by which the Lord Chief Justice determines and reflects the views of the judiciary?**
- (iii) **Should we have a Parliamentary Joint Committee on the Judiciary to provide, in part, a link between the judiciary and the legislature?**
- (iv) **How should the press department of the Lord Chief Justice operate? How does it avoid inappropriate political controversy?**
- (v) **Does the Department for Constitutional Affairs indicate a correct appreciation of its role within government and, if not, how should it be articulated?**
- (vi) **Which government minister speaks for the rule of law within the executive and which one should?**

Judicial unease

Underlying some of the distance between judiciary and government is something qualitatively different from the issues discussed above: a widespread – if not universal – feeling among the judges that government policy on criminal justice has become too populist, punitive and publicly linked to a campaign of vilification against anyone who says so. For a time, this conflict became personified in the attacks on Lord Woolf by Mr Blunkett. The *Sunday Times* reported that

A senior government minister, thought to be Blunkett, was quoted as calling Woolf 'a muddled and confused old codger' with an 'out-of-touch way'.⁵³

The CRA, as we have seen, invites the Lord Chief Justice to advance his public role. This spat is, therefore, of more than limited significance. It is an indication of what might well happen when democratically elected politicians feel frustrated by appointed senior judiciary. Lord Woolf was not alone in feeling the lash of the former Home Secretary's tongue.

The accusation by ministers is that the judiciary is too liberal and frustrates legislation. Many judges feel that the politicians simply do not know what they are talking about; are posturing; and their policies effect individuals in a way that can be disproportionate. Only in the extreme case does this result in a court overturning legislation. More widely, it may add to a sense of unease and frustration among judges who, with some justification, feel surprise at being publicly portrayed as woolly liberals. The *Guardian's* anonymous Court of Appeal judge expressed regret, in which he was surely not alone, at restrictions on a judge's freedom to sentence on individual circumstances and requirements to lengthen sentences:



You can see in the Criminal Justice Act 2003 the whole shift towards life sentences in many more cases. That means that the courts are losing some of their control over the period of time for which someone serves a sentence ... The mandatory sentences are part of a longer-term trend. I think it is regrettable that the government doesn't seem to be prepared to trust the judges to exercise their powers responsibly.⁵⁴

This lack of trust may not matter in crude power terms: when the government is acting within its powers, the judiciary will just have to get on with it. However, a wise government whose policies attract so much dissent – if not contempt – from those at the sharp end (and whom few others see as particularly right wing) might wish to reconsider.

The issue of government policy on criminal justice is obviously political rather than constitutional. However, we might beneficially ask whether the current trend for reducing judicial involvement in sentencing is correct and whether it should be reversed.

Defective legislation

A very basic point needs to be made: it is not new and it applies to many a government before the current one. Unnecessary conflict between the judiciary and the executive could be avoided if legislative scrutiny was improved and the technical quality of legislation improved. This raises a number of issues, the force of which is not diminished by the fact that they have been repeatedly made and result from over-domination of the legislature by the executive.

First, there is undue length. The Criminal Justice Act 2003 has 38 schedules and 339 sections. The Serious Organised Crime and Police Act 2005, introduced in November 2004 and passed through both houses of parliament by April 2005, was one of 37 bills announced in the Queen's Speech for a session known to be likely to be truncated by an election. It has 179 sections and 17 schedules. Section 55 was added to the Nationality, Immigration and Asylum Act 2002 only after it had completed its initial passage through the House of Commons and, indeed, its committee stage in the Lords. The Parliamentary Joint Committee on Human Rights warned of its potential non-compliance with the ECHR.⁵⁵ The executive needs to allow the legislature more time and power to do its job properly. We need a very public debate to counter the predictable reluctance which every executive will feel to take this necessary step.

Second, there is undue speed. The Prevention of Terrorism Act 2005 provides another example of what is, effectively, abuse by the executive of the legislature. This important bill which, on any account, vitally affects civil liberties, was passed through parliament in a total of 18 days. The government published on 22 February; arranged its second reading the next day; its Commons stages were completed on 28 February in chaos as ministers promised amendments that were not forthcoming; these were not available for the House of Lords second reading on 1 March and precious moments of the first day of the committee stage on 3 March were taken up by the consequent mess.

Such undue haste and undue length of legislation can make a mockery of appropriate legislative scrutiny. They are ways in which the 'elective dictatorship' of the executive in our model of democracy with a doctrine of parliamentary supremacy can be abused. There must be a strengthening of the role of the legislature in relation to the executive.

There is an increasing disparity between the bland assertions of ministers that legislation is compatible with the provisions of the HRA (as required by section 19) and the result of the analysis of the excellent Parliamentary Joint Committee on Human Rights. It suggests that ministers see certification as simply an administrative



process – a ticking of the box. It is not clear from the face of the record what analysis has been made of the position. In the short term, ministers might find it tiresome – and perhaps exposing – to provide a more detailed summary of the advice that they have received on compatibility. In the longer term, they might be spared reverses in which they suffer the humiliation of judicial rebuff. We need to examine how longer and fuller explanations could be released with each bill. JUSTICE argued for this in *Auditing for Rights* in 2002. Ministers need to be convinced that more transparency would assist them to attain their objectives in the longer run.

We should discuss:

- (i) **Whether the executive should cede greater powers to the legislature and improve on the scrutiny of legislation.**
- (ii) **Whether we can improve ministerial scrutiny of legislation for compliance with human rights standards through publication of a longer analysis.**

Conclusion

Issues about human rights, the judiciary and the government keep bubbling up in political debate. At the end of July 2005, apparent differences on these matters emerged between the Prime Minister, announcing new anti-terrorist legislation, and his wife, contemporaneously lecturing on human rights in Malaysia. The *Sun* weighed in to support a characteristically assertive and somewhat personalised view:

While her husband battles to tighten Britain's terror laws, his wife bleats about remembering terrorists' human rights. While her husband blames judges for blocking curbs on fanatical preachers, his wife defends them ... Does she ever think how damaging her interventions are for her husband – our democratically elected prime minister?⁷⁵⁶

This illustrates two critical points. First, there must be a debate about the respective powers within the constitution. Second, that debate must lead to greater public and media understanding of the value both of the assertion of human rights and the assertiveness of a judiciary in defending them in what can be a somewhat hostile environment.

There is a third and final issue: how consideration of the first two relates to other constitutional issues. These include some which we have consciously not considered above, such as the role of the House of Lords as a second parliamentary chamber. More directly related to our consideration has been the list of questions set out below, which brings together those distributed in the text above. We welcome your response on any or all of these.

- (a) **Has erosion of the principles of the rule of law been particularly severe since 1997? And, if so, why?**
- (b) **What, if any, should be accepted as the desirable limitations of parliamentary power in terms of access to the courts?**
- (c) **What understanding of human rights obligations in general and the Human Rights Act in particular should ministers display?**
- (d) **How should the appropriate degree of judicial deference or discretionary judgment be identified in any particular legal proceedings?**
- (e) **What is the proper role of the judiciary in the defence of human rights and how much can the exercise of its discretion properly be restricted by government?**
- (f) **Should we reconsider the whole mechanism of declarations of incompatibility?**
- (g) **Were the courts initially too cautious in their interpretation of the Human Rights Act?**



- (h) Are there signs that judges are now using their interpretative powers with more creativity and, if so, is this desirable?
- (i) Can any valid distinction be made between rights in terms of the desirability of judicial protection – for example, Article 6 (fair trial) over Article 10 (freedom of expression)?
- (j) Should we now regard international human rights provisions, other than those in the ECHR, as incorporated into domestic law and, in particular, do we think that there should be a ban on evidence obtained by torture?
- (k) How are the provisions that now relate to double jeopardy and the use of previous convictions working in practice?
- (l) Should we proceed to cut back on jury trial?
- (m) Did the criminal justice system really need ‘rebalancing’ and, if not, what amendments should now be introduced?
- (n) Are judges unduly exposed to inappropriate political and media criticism in the exercise of discretionary powers in relation to the breach of key civil rights?
- (o) Do any amendments need to be made to the role of the Lord Chief Justice?
- (p) Should we formalise arrangements by which the Lord Chief Justice determines and reflects the views of the judiciary?
- (q) Should we have a Parliamentary Joint Committee on the Judiciary to provide, in part, a link between the judiciary and the legislature?
- (r) How should the press department of the Lord Chief Justice operate? How does it avoid inappropriate political controversy?
- (s) Does the Department of Constitutional Affairs indicate a correct appreciation of its role within government and, if not, how should it be articulated?
- (t) Which government minister speaks for the rule of law within the executive and which one should?
- (u) Is the current trend for reducing judicial involvement in sentencing correct or should it be reversed?
- (v) Should the executive cede greater powers to the legislature and improve on the scrutiny of legislation?
- (w) Can ministerial scrutiny of legislation for compliance with human rights standards be improved through publication of a longer analysis?



Notes

- 1 A V Dicey *Introduction to the Study of the Law of the Constitution* (10th edition), Macmillan, 1959, p70
- 2 See www.justice.org.uk
- 3 Lord Irvine of Lairg *Human Rights, Constitutional Law and the Development of the English Legal System* Hart, 2003, p7
- 4 See, for example, Alan Travis 'You can't quit treaties, Blair warned', *Guardian*, 6 February 2003
- 5 See 'Straw proposes asylum blacklist', *Guardian*, 6 February 2001
- 6 See 'You can't quit treaties, Blair told', as above
- 7 Clare Dyer, 'Judges speak out against erosion of independence by government', *Guardian*, 26 April 2005
- 8 Prevention of Terrorism Act 2005, s3(2)(b)
- 9 *Daily Telegraph* 21 February 2003, see A Bradley 'Judicial Independence under Attack', *Public Law*, Autumn 2003, pp397- 407
- 10 All quoted in A Bradley above
- 11 BBC News website, 1 April 2005
- 12 *Marbury v Madison*
- 13 *R v Secretary of State for the Home Department ex p Simms* [1999] 3 WLR 328
- 14 Professor Jowell, quoted by Clare Dyer, *Guardian*, 26 April 2005
- 15 For example, *A and others v Secretary of State for the Home Department* [2004] UKHL 30
- 16 See, for example, Lord Steyn 'Deference: a tangled story', *Public Law*, Summer 2005, pp346-359
- 17 Press statement, 5 August 2005
- 18 Foreign and Commonwealth Office *Human Rights Annual Report 2005*, p117-8
- 19 Interview, BBC Radio 4, 4 March 2005
- 20 See, for example, *Pearson v UK* 27 April 2004, application no 8374/03
- 21 [2004]UKHL 30
- 22 *JUSTICE Journal*, vol2 no1 [2005], p27
- 23 *Re A* [2001] UKHL 25
- 24 *A and others v Secretary of State for the Home Department* [2004] UKHL, 56, para 73
- 25 *A and others v Secretary of State for the Home Department* [2004] EWCA 1123 at para 474
- 26 Speech, 10 Downing Street, 18 June 2002, www.number-10.gov.uk/output/Page1717.asp
- 27 Criminal Justice Act 2003 (CJA) s78
- 28 CJA s79
- 29 CJA s79(2)
- 30 CJA s101(3)
- 31 Law Commission, *Evidence of Bad Character in Criminal Proceedings*, Cm 5257, 2001
- 32 CJA s110(1)
- 33 CJA s43(4)
- 34 CJA s43(3) *If an application under subsection (2) is made and the judge is satisfied that the condition in subsection (5) is fulfilled, he may make an order that the trial is to be conducted without a jury; but if he is not so satisfied he must refuse the application. ...*
- 35 CJA s43 (5)-(7)
- 36 Lord Woolf, 'The Rule of Law and a Change in the Constitution' (Squire Centenary Lecture, University of Cambridge), 3 March 2004
- 37 *ibidem*
- 38 CRA s1
- 39 CRA s3(1)
- 40 CRA s3(4)
- 41 CRA s17
- 42 CRA s3(5)
- 43 As quoted in G Drewry 'Thatcherism catches up with the judiciary' http://www.fu.uni-lj.si/egpa2004/html/sg5/SG5_Drewry.pdf
- 44 CRA s7(1)
- 45 CRA s7(2)(a)
- 46 CRA s7(2)(b)(c)
- 47 CRA s5(1)
- 48 Department for Constitutional Affairs, *Making a Difference*, May 2005
- 49 25 March 2005
- 50 See, for example, 'The Woolf at the gates', Melanie Phillips, 6 March 2004, www.melaniephillips.com
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- 52 Department for Constitutional Affairs, *Making a difference: taking forward our priorities*, 2005
- 53 'Chief Justice to quit in Blunkett row', *The Sunday Times*, 31 October 2004
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- 55 See A Bradley above
- 56 *Sun*, 28 July 2005

