

WHAT DIFFERENCE CAN A HUMAN RIGHTS CHARTER MAKE?

Robert Walker

Introduction

The introduction of human rights legislation naturally provokes a good deal of scepticism and discussion about citizens' human rights being put into the hands of unelected judges. Discussion of that sort must be welcomed, even if it is sometimes expressed in quite vigorous language. The enactment of human rights legislation is, after all, a change with far-reaching constitutional implications, even in a country like Britain which is said not to have a written constitution. Once it is enacted it is the judges' task to give effect to it in accordance with the spirit of legislation, reminding themselves that this task has been allotted to them by a democratic legislature.

I would not therefore regard a sceptical attitude as inappropriate. Speaking entirely for myself, and at a very general level, I am inclined to think that in a reasonably liberal democracy the promotion of freedom, equality and civility in human societies depends not only on the text of laws enacted by the legislature, and enforced (as best they can) by the courts, but also on the way we have been brought up to behave towards each other, and the way we bring up our children to behave towards each other. In practice, for instance, the way that mentally and physically disabled geriatric patients are cared for depends not on the wording of statutes and official circulars but on the morale, dedication and humanity of low-paid care workers and the quality of training, motivation and leadership which they get from their line managers.¹

The notion that human rights need not depend on legislation or on law enforcement has been developed by Amartya Sen, a recent Nobel Laureate for economics.² But at the same time he acknowledged the powerful and beneficent influence which the Supreme Court of India had exerted in upholding fundamental rights under Part III of the Constitution of India.

So my starting point is inclined to be sceptical, or at least agnostic. My career as a judge happens to have coincided with the introduction of our human rights legislation. There was a good deal of discussion about it in the mid-90s, and this intensified with the arrival of Mr Blair's first government in 1997. Our Human Rights Act ("the UK Act") was enacted in 1998 but its coming into force was postponed until 2 October 2000, mainly in order for the judiciary, the executive and other public bodies to prepare for it – in the case of the judiciary by a strenuous programme organised by our Judicial Studies Board. I hope that an account of our experience over the past seven years may be of interest as you prepare for the full entry into force of the Charter of Human Rights and Responsibilities Act. It will indicate why I would, after the first seven years, give at least two cheers, but not perhaps the full three cheers, for the UK Act. May I emphasise that these are simply my personal views: I have absolutely no authority to express any sort of collegiate or official view.

¹ See Lady Hale's speech in *YL v Birmingham City Council* 2007 UKHL 27, especially paras 58 and 59.

The UK Human Rights Act 1998

The UK Act is intended to reproduce in the domestic law of the United Kingdom provisions corresponding to its international obligations under the European Convention on Human Rights and Fundamental Freedoms, to which the United Kingdom has been a party since 1950. The Convention was intended to protect the peoples of Western Europe from any recurrence of the horrors of Hitler's Germany or any extension of the horrors of Stalin's iron curtain empire. The Convention (interpreted and applied by the European Court of Human Rights at Strasbourg) is now more than 50 years old, and in places it is showing its age, especially in the fields of equality and non-discrimination. Section 32 (2) of the Charter permits reference to (among other sources) United Kingdom and Strasbourg authority, but sometimes there will be some sort of contextual misfit. I mention at this stage, without enlarging on, three significant respects in which the UK Act differs from the Charter: first (paradoxically) a company or other artificial person can enjoy some (but not all) human rights³; second, there is a new free-standing right of action against a public authority which infringes human rights, including a possible claim for damages, but only if the claimant is a victim⁴; and third, a court is a public authority⁵.

The UK Act was intended to bring home these rights (defined as "Convention rights") by making them enforceable in our domestic courts rather than only in Strasbourg. Its coming into force has had a profound effect on the work of almost every part of the criminal and civil justice systems. I say "almost" with lawyerly caution as I do not think that the work of the Patents Court has been significantly

² Law and Human Rights, 2005 Seighart Memorial Lecture to BIHR.

³ See eg *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885

⁴ s 6 (3) and (4) of the UK Act

⁵ s 7 of the UK Act

affected, and there may be some other specialist havens which remain undisturbed. But most of the public law issues coming before the House of Lords (and at present public law makes up, I would estimate, at least two-thirds of our work) have some human rights element in them. Criminal courts at every level may have to consider whether recent amendments to the law of criminal evidence (intended, we are told, to rebalance the scales of justice) offend against the Convention requirement of a fair trial. District judges in county courts (the fifth and most “coalface” level of our civil judicial system) may have to decide whether a peremptory order against a tenant for possession of a house or flat let by a local authority might offend against the tenant’s right to respect for his home. Official predictions of the UK Act’s impact on the judiciary’s workload were for a tsunami of human rights litigation which would break on the shores of the House of Lords in about three years, and would then begin to ebb away. In the event it took much less than three years to get to the Lords, and my impression is that after seven years there are still some big breakers coming in.

The UK Act has also had a very significant effect on our other arms of government – the legislature and the executive – and on entities which are not part of central government but are public authorities for its purposes. Rather than try to analyse its operation in terms of numbered articles of the Convention (article 6 fair trial, article 8 respect for home and private and family life, article 10 freedom of expression, and so on) I want to look at how the UK Act has affected these different estates of the nation under four heads: Head 1, Parliament; Head 2, the central government executive in its various functions, Head 3, other public authorities apart from the Court and Head 4, the Court itself. The Court never leaves the stage throughout, since under the first three heads it is (as some Canadian human rights

commentators like to put it) engaged in a continuing dialogue with the other estates involved in the business of government.

The effect on Parliament

As to the legislature the UK Act has three important effects, replicated in relation to your Parliament by sections 28, 32 and 36 of the Charter.⁶ The first is the requirement for proposed government legislation to be certified by the responsible minister as compatible with Convention rights. The certificate has no legal force, but it ensures that the government is, from the inception of any legislation, alive to possible human rights implications.

The second effect is that every enactment must be interpreted by the Court, so far as possible, in a way that is compatible with Convention rights. The third is the power of superior courts to make a declaration of incompatibility (under the Charter, a declaration of inconsistent interpretation) to the effect that a statutory provision, even when mediated through the Court's interpretative obligation, cannot be reconciled with Convention rights. A declaration of that sort does not affect the validity of the statutory provision, but it sends to Parliament the clearest possible message that it should think again: and in Britain Parliament has never failed to think and legislate again, even if it has sometimes done so through audibly gritted teeth.

But a declaration of incompatibility is a last resort. Logically and functionally the Court's first task is to see whether an apparently inconsistent enactment can be

⁶ The relevant provisions in the UK Act are sections 19, 3 and 4.

interpreted in a way that is compatible with Convention rights. Within the first year of the UK Act coming into force Lord Steyn said in *R v A (No. 2)*⁷

“The interpretative obligation under s 3...is a strong one. It applies even when there is no ambiguity in the sense of the language being capable of two different meanings. It is an emphatic adjuration by the legislature...”

That case was concerned with a classic problem under human rights legislation: whether a restriction in a statute on criminal evidence,⁸ designed to prevent traumatising cross-examination of complainants in rape cases, threatened the fair trial rights of the defendant. The House of Lords restricted the statutory provision so that it did not exclude evidence so relevant to the issue of consent that its exclusion would endanger the fairness of the criminal trial. This interpretation confers a case-management discretion on the trial judge while preserving the central purpose of the enactment.

The interpretative obligation is not however a licence for the Court to rewrite statutes. That was made clear in a family law case⁹ decided in 2002. The case needs to be put in context. In the United Kingdom the Children Act 1989 was a revolution in child law. It put onto a new, clear, footing the circumstances in which the state may, in the interest of children at risk, take them away from their parent and assume parental responsibility for them. The making or revocation of a care order is for the court; but during the currency of a care order, decisions about a child’s welfare are for the social services of the relevant local authority, and not for the court. Two cardinal

⁷ [2002] 1 A 45, para 44

⁸ s 41 of the Youth Justice and Criminal Evidence Act 1999

⁹ *Re S (Care Order: Implementation of Care Plan)* [2002] 2 AC 308.

principles of the legislation are the high threshold before a care order can be made, and the exercise of parental powers by the local authority while it remains in force.

The Children Act was regarded as a major step forward. But inevitably its aims were not always achieved. Local authorities, short of human and financial resources, often failed to achieve the targets set out in the care plan which had been put before the court when the care order was made. Sometimes the failure was prolonged, inexcusable, and very damaging to the child. In two cases of particularly egregious failure the Court of Appeal (constituted by three very experienced judges including Hale LJ, who had at the Law Commission been one of the chief architects of the Children Act) decided to interpret that Act so as to permit the court, in making a care order, to lay down “starred milestones” which, if not achieved, would lead to the care order being reviewed by the court. The intention was to ensure respect for the children’s private and family life, under article 8 of the European Convention.

The Lords, while entirely sympathetic to the Court of Appeal’s intentions, thought that this was going too far. Lord Nicholls said,¹⁰

“In applying s 3 courts must be ever mindful of this outer limit [possibility]. The Human Rights Act reserves the amendment of legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary....a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate.”

¹⁰ [2002] 2 AC 308, paras 39-40

In a case about mandatory life sentences¹¹ the Lords were faced with legislation¹² which on its face gave the Home Secretary the power to fix the minimum term of imprisonment to be served by a convicted murderer. This offends against the principle that sentencing is a judicial function. The Court of Appeal read in the proviso that the Home Secretary could not exceed the term recommended by the trial judge. Lord Bingham roundly rejected this:¹³

“To read s 29 as precluding participation by the Home Secretary, if it were possible to do so, would not be judicial interpretation but judicial vandalism: it would give the section an effect quite different from what Parliament intended.”

A few months later, in *Bellinger v Attorney General*¹⁴, the Lords declined to interpret the words “a man and a woman” in the Marriage Act 1950 so as to include a transsexual, even though the Strasbourg court had declared the United Kingdom in breach of the European Convention in not providing for the marriage of transsexuals. It was for Parliament, and not the court, to decide how the law should be changed (for instance, whether gender reassignment must include some surgical intervention.¹⁵) In both these cases the appropriate remedy was a declaration of incompatibility, the equivalent of a declaration of inconsistent interpretation under section 36 of the Charter.

Since then the Lords have continued to refine their views as to the court’s true function. Various striking phrases have been used, but I think that the court must

¹¹ *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837

¹² s 29 of the Crime (Sentences) Act 1997

¹³ [2003] 1 AC 837, para 30

¹⁴ [2003] 2 AC 467

¹⁵ Under the Gender Recognition Act 2004 it is not mandatory, but information about any such intervention must be provided to the Gender Recognition Panel.

ultimately depend on its own intuitive judgment. If you were going to read only one British case in detail I would recommend *Ghaidan v Godin-Mendoza*, decided in June 2004.¹⁶ The issue was whether, in housing legislation,¹⁷ the words “a person who is living with the original tenant as his or her wife or husband” - words naturally directed at an unmarried heterosexual cohabitant – include a partner in a homosexual relationship. The Lords decided, four to one, that they do. All the speeches of the majority – Lord Nicholls, Lord Steyn, Lord Rodger and Lady Hale – merit attention. I find the speech of Lord Rodger particularly helpful. At one point¹⁸ he invoked A E Housman, whose standing as a classical scholar remains high, even if his reputation as a poet has had its ups and downs:

“When Housman addressed the meeting of the Classical Association at Cambridge in 1921, he reminded them that the key to the sound emendation of a corrupt text does not lie in altering the text by one letter rather than by supplying half a dozen words. The key is that the emendation must start from a careful consideration of the writer’s thought. Similarly, the key to what is possible for the courts to imply into legislation without crossing the border from interpretation into amendment does not lie in the number of words that have to be read in. The key lies in a careful consideration of the essential principles and scope of the legislation being interpreted.”

The effect on the executive

I move on to Head 2, the situation in which unelected judges may interfere with decisions taken by ministers with democratic legitimacy. That is the constitutional theory, though in practice all but the most high-profile executive decisions are taken by civil servants. In Britain judges have been criticised both as excessively activist and as excessively deferential to the executive. This is not a new

¹⁶ [2004] 2 AC 557

¹⁷ Rent Act 1977 Schedule 1 para 2

¹⁸ Para 122

problem¹⁹ but the new Act has certainly exacerbated it. Perhaps I can start with an important case,²⁰ decided in 1995, about the official policy of excluding gay men and lesbian women from the British armed forces. Although the UK Act was not then even a Bill, there was at that time much political pressure for the domestic enactment of the European Convention, and a lot of Strasbourg authority was cited in the case.

The judgments reveal two emerging principles – two contradictory principles – which now dominate this part of the law. One is that where fundamental human rights are involved, executive decision-making must be scrutinised with particular care. One of the seminal pronouncements on this point was Lord Bridge in *Bugdaycay*²¹ (an asylum case decided in 1987):

“The most fundamental of all human rights is the individual’s right to life and when an administrative decision under challenge is said to be one which may put an applicant’s life at risk, the basis of the decision must surely call for the most anxious scrutiny.”

The other emerging principle is that courts should be particularly slow to interfere in executive decisions concerned with foreign policy, national defence and security, macroeconomic policy and the allocation of resources. Simon Brown LJ referred to this (in the case about homosexuals in the armed forces) as “super-*Wednesbury*” – that is, a category of political decisions on matters of high policy on which the court would set an even higher threshold from the traditional *Wednesbury*²² test of

¹⁹ See for instance, *Attacks on Judges*, Justice Michael Kirby’s memorable address to the American Bar Association in 1998.

²⁰ *R v Ministry of Defence ex parte Smith* [1996] QB 517

²¹ *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, 531

²² *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223

irrationality. Again, Lord Bridge has provided one of the seminal pronouncements of this principle²³

“The decisions which shape them are for politicians to take and it is in the political forum of the House of Commons that they are properly to be debated and approved or disapproved on their merits. If the decisions have been taken in good faith within the four corners of the Act, the merits of the policy underlying the decisions are not susceptible to judicial review by the courts and the courts would be exceeding their proper function if they presumed to condemn the policy as unreasonable.”

That is a quick snapshot of how matters stood when the UK Act came into force. The first landmark pronouncement as to the effect of the Act was by Lord Steyn in *Daly*.²⁴ It was a case about reconciling the public interest in prison security with prisoners’ individual rights to privileged correspondence with their lawyers. As regards the intensity of review by the court, Lord Steyn identified three important points:

“First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence ex parte Smith* is not necessarily appropriate to the protection of human rights.”

The potential conflict between the two principles – “anxious scrutiny” and “super-*Wednesbury*” – becomes most acute where some of the most fundamental human

²³ *R v Secretary of State for the Environment ex parte Hammersmith & Fulham LBC* [1991] 1 AC 521, 597.

²⁴ *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 547

rights – liberty from arbitrary arrest and imprisonment – collide with questions of national security against international terrorism.

Personal liberty

I want to spend some time on the topic of personal liberty, because it is so important in Britain at the moment. It cuts across what I have called Head 1 and Head 2, because there are often two issues. Is Parliament's conferment on the Home Secretary of a statutory power to curtail civil liberties an infringement of Convention rights, however moderately and responsibly the power is exercised? If so, there is a problem under Head 1. If not, there is a question under Head 2: Has the power been exercised, in the particular circumstances of the case, so as to infringe the claimant's Convention rights?

For the last six years Britain has, like many other democracies, been struggling with the dilemma of how to guard against terrorism without destroying the civil liberties which are the hallmark of a liberal democracy. It is not an entirely new problem, and Britain already had anti-terrorism legislation. But in the wake of 9/11 the British Parliament enacted the Anti-Terrorism, Crime and Security Act 2001, which went further in providing for the internment without trial of suspected terrorists who were not British subjects. This provision was used against a small number of suspected terrorists who could not be deported because of the risk of torture²⁵ in their home states (including Morocco, Libya and Egypt).

In order to pass the 2001 Act the British Government had to make a formal

²⁵ See *Chahal v United Kingdom* (1996) 23 EHRR 413.

derogation from its obligations under the European Convention.²⁶ Article 15 provides for a derogation “in time of war or other public emergency threatening the life of the nation” but only “to the extent strictly required by the exigencies of the situation.” In the so-called *Belmarsh* case²⁷ (Belmarsh is a new high-security prison in southeast London) nine Law Lords considered the legality of the derogation and decided by a large majority that although there was a public emergency of the requisite gravity, measures under which foreign nationals, but not British nationals, could be imprisoned without trial were irrational, disproportionate and discriminatory. The equal treatment of nationals and non-nationals is indeed a point of high principle, on which Lord Bingham cited the well-known judgment of Jackson J in the *Railway Express* case²⁸

“The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.”

The recent sequel²⁹ to the *Belmarsh* case raised another point of high principle, that is the admission of evidence that may have been obtained, directly or indirectly, by torture. Nine Law Lords unanimously ruled it out, although unfortunately they were split as to where the burden of proof should fall in such cases.

²⁶ As it had when internment was used in Northern Ireland in 1971-2. See *Ireland v United Kingdom* (1978) 2 EHRR 25 and also Simpson, In the Highest Degree Odious: Detention Without Trial in Wartime Britain (1992).

²⁷ *A v Secretary of State for the Home Department* [2005] 2 AC 68.

²⁸ *Railway Express Agency Inc v New York* (1949) 336 US 106, 112-113; the decision of the US Supreme Court in *United States v Verdugo-Urquidez* (1990) 494 US 259 makes an unhappy contrast

²⁹ *A v Secretary of State for the Home Department (No 2)* [2006] 1 All ER 575

Parliament's response to the first *Belmarsh* case was to introduce a system of control orders – in effect a sort of limited house arrest. This measure also has been successfully challenged. The courts had to decide whether it was a “deprivation of liberty” or a mere “restriction on movement” (the distinction which emerges from the European Court of Human Rights at Strasbourg³⁰) for a single man to be required to remain in a small flat except from 10.00 am to 4.00 pm, with all visitors vetted, electronic communications monitored, and trips outside the flat (during the 6-hour window) restricted to defined urban areas. The judge had no doubt that it amounted to deprivation of liberty and the Court of Appeal agreed. An appeal to the House of Lords is pending.

On the other hand all the English courts up to and including the Lords³¹ have concluded that there was no deprivation of liberty in very brief detention for questioning and search under random “stop and search” powers (exercisable without reasonable grounds for suspicion) under the Terrorism Act 2000. Both these cases ultimately turn, in the lawyers' phrase, on questions of fact and degree. It is simply not possible, in cases of this sort, to say precisely what balance between national security and civil liberty is the right one. It is impossible even with hindsight. But if ministers and their advisers are inclined to err on what they see as the side of caution, judges may need to lean the other way.

The saga of litigation about suspected terrorists is far from over. Last April the Divisional Court³² blocked the deportation to Libya of two suspected terrorists on

³⁰ See especially *Guzzardi v Italy* (1980) 3 EHRR 333

³¹ *R (Gillan) v Commissioner of Police for the Metropolis* [2006] 2 AC 307

³² [insert ref. once reported]

the ground that it was not safe to rely on a memorandum of understanding between the United Kingdom and Libya giving assurances that the deported men would not be ill-treated. An appeal is likely.

Relations between the executive and the judiciary have been fairly frosty, at times, over the past fifteen years or so, under both Conservative and Labour Governments. But that may be inevitable. Indeed, it may even be something we should welcome. I end this part of my talk with some remarks which Lord Bingham made last November in a lecture at Cambridge:

“Some sections of the press, with their gift for understatement, have spoken of open war between the government and the judiciary. This is not in my view an accurate analysis. But there is an inevitable, and in my view entirely proper, tension between the two. There are countries in the world where all judicial decisions find favour with the government, but they are not places where one would wish to live.”

The effect on other public authorities

I come to Head 3. This group includes local authorities, hospital authorities, mental health authorities, governors of schools within the public sector, and statutory corporations of all sorts, from the BBC to the Human Fertilisation and Embryology Authority. I will not go into British case-law on the meaning of “public authority” as section 4 of the Charter seems to define the boundaries very clearly for its purposes. Your Parliament may have taken a wise decision, if I may say so, not to include the Court (acting judicially) as a public authority. The Court is a public authority under the UK Act, and that has given rise to some puzzling problems, especially in connection with what is sometimes called “horizontal effect.”

I can set out the basic position of Head 3 authorities fairly shortly, and time constraints require me to do so. Local authorities differ from most others in the group in that they have the democratic legitimacy of being elected bodies. Almost all the authorities in this group have a statutory framework and statutory functions and are amenable to judicial review. The UK Act, like the Charter, extends the grounds of judicial review that may be available so as to include human rights issues. These bodies differ from the central executive in that their functions tend not to be concerned with the core activities of central government, “super-Wednesbury” matters such as national security and foreign policy. But some of them are very much concerned with the allocation of resources to housing, social services, children with special educational needs, and other pressing problems which come within the wide scope of Article 8 of the Convention.³³ Others (especially broadcasters and broadcasting regulators) are concerned with freedom of expression and with balancing that right against the rights of others. Some (such as the HFEA) have special expertise in the discharge of their functions, which the Court must recognise. Subject to these differences the same sort of problems arise, and the same principles apply, as under Head 2.

Human Rights adjudication as a balancing exercise

Most human rights adjudication is ultimately a balancing exercise. In a leading case decided as long ago as 1982 the Strasbourg Court observed,³⁴

“The Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The search for this balance is inherent in the whole of the Convention . . .”

³³ For its width see *Pretty v United Kingdom* (2002) 35 EHRR 1, para 61

³⁴ *Sporrong & Lönnroth v Sweden* (1982) 5 EHRR 35, para 69

In the Charter the key provision defining the balancing exercise is section 7(2), which sends a clear message to all the arms of government – legislature, courts and executive (and other public authorities). It is already well known to you but I will set it out:

“A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including – ”

and then follows a list of five relevant factors. The carefully crafted language of section 7(2) is, I think, of absolutely central importance to the Charter. It reflects, though with an added reference to human dignity, equality and freedom, language found in some articles of the European Convention. But in the European Convention the legislative pattern is for some articles to set out (in the first paragraph) a particular right and then (in the second paragraph) to qualify it. The freedoms given by these articles are sometimes called ‘qualified rights.’ An example is Article 8:

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The same pattern is followed, with small variations in language, in Article 9 (Freedom of thought, conscience and religion), Article 10 (Freedom of expression) and Article 11 (Freedom of assembly and association).

If you were going to look at only two British cases on the balancing exercise to be performed by Head 3 bodies, I would suggest the *Pro-Life Alliance* case,³⁵ concerned with a television party election broadcast on behalf of a group which campaigned against abortion, and the *Denbigh High School* case,³⁶ concerned with whether a teenage Muslim girl should be allowed to wear a garment contrary to her school's policy on uniform dress. I regret that I do not have time to go into these very interesting cases.

Under human rights legislation the Court is not only engaged in a dialogue with the other estates or arms of government. It may also, when an issue of fair trial arises, have to be introspective. When such an issue arises, there may again be a cutting across Head 1 and Head 4. The first issue may be: Has Parliament enacted a rule of criminal evidence which is an infringement of the accused's Convention rights, however moderately and responsibly it is applied? If so, there is a problem under Head 1. If not, there may be an issue under Head 4: Has a trial, now completed, been fair? That is a familiar issue for any court of criminal appeal, though it is now enriched by Convention jurisprudence. There is a wealth of recent British case-law on this and the associated issue of trial within a reasonable time.

³⁵ *R (Pro-Life Alliance) v BBC* [2004] 1 AC 85.

³⁶ *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100.

Conclusion

So can a Human Rights Charter make a difference? Undoubtedly it can. It can and does focus the legislature on the human rights implications of every single piece of proposed legislation. It gives the Court far-reaching powers to remedy defects in legislation if possible, and if not to identify the defects and declare them incompatible with human rights values. It can and does require official decision-makers to exercise their powers and discretions so as to respect human rights, which often involves balancing one individual's rights against those of another, or against the general public interest. It focuses the Court's attention on the fairness of its own procedures.

It has to be said, however, that in Britain the UK Act has not had a particularly warm welcome. Prominent members of both the Labour Party and the Conservative Party have recently spoken in favour of repealing it or drastically amending it. The popular press, dominated by Murdoch's Sun and Rothermere's Daily Mail, regularly deride it. The reasons for this are no doubt complex, but I suspect that they include genuine and natural public concern about terrorism and immigration; a distrust in some sections of the British public of any political interference perceived as coming from continental Europe, without much discrimination between Brussels, Luxembourg and Strasbourg; and a sort of unfocused libertarian discontent encapsulated in the overworked expressions "political correctness" and "nanny state". Does this matter? I think it does, because the effective promotion of human rights depends on winning hearts and minds, as well as on legislation and law enforcement. It does matter that so many British citizens are inclined to feel that the UK Act is threatening, rather than protecting, their liberties.

This is, I think, in striking contrast to experience in other parts of the world, including Canada, South Africa and India. So only two cheers for what has been achieved in Britain so far: but in Victoria you will, I hope and trust, have three rousing cheers for your new Charter when it is fully in force.