

The British Academy

“Human Rights: Have the Public Benefited?”

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It is an immense privilege, responsibility and honour to be invited to give the 21st lecture in this series. I have a number of reasons for saying that. First, because of the distinction of those who have previously given this lecture. Secondly, because it is being given under the auspices of the British Academy, who have generously and surprisingly made me one of their Honorary Fellows. Thirdly, and most importantly, because of the way in which this series of lectures came to be established.

They were established because Jewish refugees who fled to Britain in order to obtain refuge from the oppression of the Nazis felt a deep sense of gratitude to this country for the way in which they were received. To demonstrate their gratitude, the Association of Jewish Refugees made a donation to the British Academy and it is from that donation that the expenses of these lecturers are met.

My own forebears came to this country from Central Europe during a prior wave of immigration. They were undoubtedly also fleeing from the persecution and were allowed to make this country their home. I feel personally, therefore, the same sense of gratitude for the way they were received and the way they were able to prosper after they had arrived in this country.

In addition, the subject of this lecture is closely associated with the conduct which resulted in large numbers of Jews having to leave their homes on the continent and seek refuge here. The lecture is about the European Convention of Human Rights (ECHR). It was 50 years ago, because of the atrocities for which the Nazis were responsible, that the ECHR was established. Now it is almost exactly two years since the Human Rights Act 1998 came into force with the result that the majority of the articles of the ECHR became part of our domestic law for the first time.

Already, even after a mere two years, it is possible to form a reasonably clear impression as to what are likely be the ultimate consequences of the ECHR being made part of our domestic law. It is already obvious that the result will be changes, significant changes, to our constitutional arrangements. It is to both the scale of those changes and the fact that they have been achieved without damaging the underlying constitutional arrangements and traditions of this country that I devote this lecture. I will also consider whether the changes will benefit the public. In the course of this, it will be necessary to look at some of the arguments both in favour of and against the ECHR becoming part of our law.

A frequently repeated argument against domesticating the ECHR was that it would increase the already excessive interest in recovering compensation, no matter how unjustified, for any and every perceived wrong. Already it is suggested that no mishap is too small not to give rise to a claim for damages. The HRA, it was argued, would generate even more litigation.

It is true that the ECHR, as its title makes clear, is about rights. But it is important to appreciate that the rights are of a special kind. They are not your ordinary everyday rights. They are not personal rights; and they are not the type of rights that provide an individual with a right to damages from another individual if they are infringed.¹

Compensation for the infringement of our human rights can be awarded as a result of the ECHR becoming part of our law, but normally this is not the primary objective of the proceedings. Usually the litigation will be concerned with vindicating human rights, and human rights can be vindicated by the courts without any compensation being payable. A judgment may be all that is required to vindicate a right which is breached. Alternatively, some other benefit apart from damages may provide the necessary compensation. For example, undue delay in a criminal trial can constitute a breach of the right to a fair trial within a reasonable time under article 6. However, delay can be adequately met by the sentence the court would have imposed being reduced on account of the delay. The important point is that the defendant has no *right* to damages nor any *right* not to be convicted because of delay. So, any contribution which the HRA makes to the compensation culture is, and is likely to continue to be, small. It is my belief that we can and should ensure that this remains the situation.

In assessing the benefit of making the ECHR part of our domestic law it is critical to appreciate another aspect of the nature of the rights which its articles are supposed to protect. What *is* the primary concern of the HRA is not so much rights in the ordinary common law sense, but values. These are the values which are increasingly being recognised around the developed world as being at the heart of the rule of law. They are the values which the Nazis ignored. Hitler may have obtained power as a result of a democratic process, but he forfeited the right to be regarded as a democratic leader of his people because he treated the rule of law with contempt. The recognition of the need to adhere to the rule of law by protecting human rights is essential to the proper functioning of democracy. The observance of human rights is a hallmark of a democratic society because it demonstrates that that society values each member as an individual. Just as it is of the essence of democracy that every individual has an equal right to vote, so each individual has the right to expect that a democratically elected government will regard it as its responsibility to protect his or her human rights. Human rights come with true democracy whether the government wants them or not.

I was in China 12 months ago. When I finished giving a talk, a member of the audience asked me whether there was any distinction between what I had said about the importance of being governed in accordance with the 'rule of law' and being 'ruled *by* law' - 'ruled by law' being the expression the authorities in China were in the habit of using.

¹ Compensation for a breach of human rights is in the court's discretion under s 8 of the HRA (see Clayton and Tomlinson, "The Law of Human Rights", para 21.34).

I suspect the person who asked the question was well aware of the fundamental nature of the distinction between the two approaches. Both require compliance with the law irrespective of its content, but the rule of law also requires that the laws should accord with the democratic values which are reflected in the ECHR.

After two years of the HRA being in force, I recognise that the fact that human rights could not be directly enforced as part of English law in the past meant that our form of democratic government was more vulnerable than it is now to the contravention of those rights. As Lord Hoffman has explained the HRA was intended to strengthen the rule of law without inaugurating the rule of lawyers.² The HRA has strengthened our democracy by giving each member of the public the right to seek the help of the courts to protect his or her human rights in a manner that was not previously available. I am not ignoring the fact that values equivalent to human rights were recognised and part of English law prior to the HRA coming into force. On the contrary, it was part of the long established culture of this country that what could loosely be regarded as human rights values should be observed both by government and Parliament. Furthermore human rights were being increasingly recognised by the courts as part of the common law, 'the birthright of the people' and part of the compact between the monarch and Parliament.³

Despite this, in more recent years it had become increasingly apparent that the citizens in this country, by comparison with their European neighbours, were at a significant disadvantage in having to rely primarily on the self restraint of the government of the day for the protection of human rights values.

Prior to the HRA a member of the public could not go before the courts and secure a remedy based on a human right. You could not, before the HRA, as you can now, go before the courts and say my right to life is threatened: it is the State's duty and the Court's duty to protect me. Instead the member of the public had to complain that a public body had failed to comply with some legal duty or otherwise acted unlawfully. Then, if the complaint was established, the courts, usually on an application for judicial review, would take the necessary action to ensure that a public body complied with the law. Otherwise, the only recourse was to make a complaint to the European Court of Human Rights at Strasbourg and possibly obtain a remedy from that Court that our own courts could not provide. This was the consequence of this country's not having a document which could appropriately be described as a written constitution or any other legislation which provided protection for its citizens' human rights. This change from enforcing public duties to protecting the public rights of an individual constituted a dramatic change in the role of the courts. It meant the focus of the courts moved 180 degrees from the public body to the individual.

Some would no doubt say that, if we have managed without a written constitution for hundreds of years, why now do we need a statute which contains the fundamental rights that would appear in a written constitution? This argument ignores the fact that the needs of society are continuously evolving. The only two other developed

² New Law Journal 18 May 2001, 713

³ see Halsbury's Laws of England, 4th ed. Vol 8{2} para.101 and e.g. *Derbyshire County Council v Times Newspapers Ltd* [1993] A C 534.

countries which did not have a written constitution, namely New Zealand and Israel, now have basic law provisions protecting human rights. It is interesting to remember that this is not the only dramatic change there has been in our public law. Until the Seventies, we had only very limited review by the courts of administrative action. Lord Reid famously said in 1964 'we do not have a developed system of administrative law - perhaps because until recently we did not need it.' However, in a remarkably short period the courts reacted to the changes in society so, by 1971, Lord Denning was able to say 'it may truly now be said that we have a developed system of administrative law'.⁴

The HRA is also criticised because it is suggested that it interferes with the sovereignty of Parliament and transfers undue power to the judges. The doctrine of the sovereignty of Parliament is a reference to the proposition that there should not be any impediment to Parliament enacting such legislation as it wishes. This involves Parliament not enacting any statutory entrenched provision that binds its successors.⁵

The great strength of the HRA is that, thanks to the skilful way in which it has been crafted (for which the Lord Chancellor and Lord Lester deserve particular credit), it provides very substantial protection for human rights without undermining those fundamental constitutional principles. Furthermore, the HRA has not affected the role of the judiciary, though it has affected the way that role is performed. So there has occurred a substantial change, but that change has been achieved without detracting from the sovereignty of Parliament.

Another undesirable consequence that was feared was that the courts would be flooded with unmeritorious applications based on the HRA. The fear was particularly acute because the HRA gives all courts, including magistrates, jurisdiction to determine HRA issues. In fact, the applications based on the HRA have been moderate in number and usually fully justified. So much so that, in relation to the lower courts, the impact has been described as a 'damp squib'. Prudently, the Lord Chancellor's Department has commissioned research to monitor the implementation of the HRA. The report based on that research has just been published. It is based primarily on a survey of Crown Courts, County Courts and Magistrates Courts in three areas of the country.⁶ At these courts, the impact was so modest that the question was raised as to whether the intensive training which took place across government, the police, the courts service, the Crown Prosecution Service and the judiciary and the profession was justified. By contrast to this picture, in the High Court, the Court of Appeal and in the House of Lords the impact has been significant, but still readily accommodated.

Another fear was that the HRA would politicise the judiciary. Undoubtedly, highly sensitive issues have had to be determined by the courts under the HRA. Some of these issues would not have had to be decided by courts prior to the HRA. But the

⁴ *Ridge v Baldwin* [1964] AC 40 at p 72 and *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 at 189

⁵ Section 2 (4) of the European Communities Act 1972 provides that community law shall prevail over British law including "any enactment passed or to be passed". Professor Wade in *Administrative Law* suggests this interferes with the principle of the sovereignty of Parliament. (See eighth edition, page 27)

⁶ in Guildford, Liverpool and Chester

developments which have taken place in society have meant that, independently of the HRA, the courts have had to decide very sensitive issues, so the difference has been one of degree. In addition, in general the courts have exercised the additional responsibilities which the HRA has given to them conservatively. This has meant that, as yet, there has been no vocal criticism of the manner in which the judiciary are exercising their new jurisdiction under the HRA. Indeed, the principal ground of criticism of which I am aware is that the judiciary are not being sufficiently proactive. It is, however, right to recognise that the HRA has altered the manner in which the judiciary perform two of their most important roles, the first being developing and interpreting the law and the second being reviewing decisions of public authorities, subjects to which I will return later.

For some the HRA is intrinsically objectionable but their numbers are I believe limited. Presumably they object to the values which the European Convention protects. If they do find these values objectionable then they are rejecting the standards now accepted across Western society. They are entitled to hold their views. Article 10 of the European Convention, provides protection for freedom of speech. But I am also entitled to freedom of speech and to be candid I find their attitude unacceptable in the 21st century.

If the source of the complaint is that long established practices in this country have had to be modified to comply with the ECHR then the blame for this cannot be placed at the door of the HRA. The HRA only makes part of domestic law the articles of the ECHR. The ECHR has been ratified by this country and enforceable by the European Court of Human Rights in Strasbourg for approximately 50 years. While decisions of the ECtHR were not directly enforceable prior to the HRA, in practice the government was meticulous in modifying our practices to comply with a decision of the Strasbourg court. While, pre-HRA, the changes were the result of decisions at Strasbourg, now it is likely to be decisions by our courts which are the catalyst for change. Surely this is preferable. Therefore, at least one benefit which the HRA can be said to have undoubtedly provided for members of the public is that they no longer have to travel to Strasbourg to obtain a remedy that their own courts are powerless to provide.

However, this is far from being the only improvement brought about by the provisions of the HRA. Its importance goes far beyond reducing the need for litigation tourism. This country made a substantial contribution to the drafting of the European Convention. This country was the first to ratify the Convention. It was then ratified by other members of the Council of Europe. Now there are now 44 signatories.

I accept that the Convention cannot be described as a contemporary document. It is not drafted in the terms which would be used in a document created for the first time today. For example, unlike the South African constitution it does not deal with social and economic rights. Importantly it does not deal with environmental rights. However, half a loaf is better than no loaf and at the present time there is little political support for a more far-reaching replacement.

But while the ECHR has the shortcomings to be expected of a 50-year-old Convention it has been subject during its life to considerable development by the Court at Strasbourg. It is a living instrument. The Court in accordance with the best

common-law traditions has extended the reach of the articles so that they make a significant contribution to achieving a society which is more just and more tolerant than it would be if we did not have the Convention. Now our courts can take up the baton and make their contribution. To give examples at random: article 2 which protects the right to life, is being used as a justification for granting a lifelong injunction to protect the identity of Thompson and Venables; the same article has also been used to improve coroners' inquests. Article 8 and the protection it provides for privacy and the right to family life is being used to ensure that mothers who are in prison are not, when this is practical, parted from their young babies.

The case involving a coroner inquest neatly demonstrates the process of development. At first sight, it is not apparent that there is any link between the right to life and the subject of an inquest who I hope will be someone who is already dead. However, the Court at Strasbourg, followed by our courts, has recognised that a full investigation into a death may prevent the repetition of the circumstances giving rise to that death and so, because of article 2, a more thorough investigation is now required than was previously the case.⁷

The creative decisions of the ECtHR have, on occasions, been controversial. I have in mind, as an example, the case involving the shooting of suspected terrorists in Gibraltar. There is also the recent decision restricting prison governors' disciplinary powers. But the controversial decisions are a minority. In general I am an admirer of the Strasbourg jurisprudence. In the case of some decisions, I have also to acknowledge that, while my original reaction was sceptical, after reflection I came to appreciate that they had substantial merits.⁸ The reason for my change of heart was that I came to realise that my familiarity with a particular practice had blinded me to its shortcomings. It required the decision of the ECtHR to establish that our traditional approach was unacceptable.

Another benefit that flows from the HRA is the fact that the English courts can now have a direct influence upon the development of the jurisprudence of the ECtHR. It is possible that some of the cases decided by Strasbourg against the United Kingdom would have been decided differently if the Court at Strasbourg had had the benefit of a decision of the English courts which dealt with the human rights aspect of the case. This could not happen prior to the HRA coming into force. The inability of our courts, prior to the HRA, to deal directly with the human rights issues meant that the judgments given by our judiciary had limited influence on the ECtHR.

If the Strasbourg Court had had the benefit of carefully reasoned English judgments I am confident that it would have treated those judgments with the greatest respect and only differed from them rarely. Many decisions involve striking a balance between competing values and, if the ECtHR knows how the domestic judge has drawn that balance, they extend what is called a margin of appreciation in the domestic court's favour.

⁷ *McCann v United Kingdom* (1995) 21 EHRR 97; *Jordan v United Kingdom*, Judgment of 4 May 2001.

⁸ See the case of *Osman v United Kingdom* (1999) 29 EHRR 245.

Another feature of the HRA of which I approve, is that it has been drafted in a manner which does not require our courts to slavishly follow Strasbourg precedents. In accordance with section 2 HRA, we are required to 'take account of any' judgment or decision of Strasbourg but, having done this, the court is not bound to follow the decision. Of course in the great majority of situations our courts will gratefully apply the Strasbourg decision. If we did not, an undesirable gap would develop between our approach and that of Strasbourg.

However, if we are satisfied that the Strasbourg jurisprudence is wrong we should be bold and either not follow or distinguish the Strasbourg decision. If this is what happens, we should take particular care to make clear why we have rejected the Strasbourg authority. Decisions in Strasbourg tend to be fact-specific and there is always a prospect that Strasbourg in a later case will distinguish its earlier decision.

Fortunately, now our courts can apply the ECHR directly, the occasions on which there will be a conflict between the House of Lords and Strasbourg are likely to be few and far between. This is because Strasbourg recognises that the domestic courts are often in a better position to evaluate the conflicting considerations which many disputes as to human rights involve. This is the margin of appreciation to which I have already referred. Again, this is the reason why those concerned to protect our national customs from interference should welcome the HRA.

A related objection to the HRA is not that it interferes with the independence of our courts but that it interferes with the sovereignty of Parliament. But here again, the HRA strikes a subtle balance between the traditional sovereignty of the democratically elected legislature and the executive and the courts. This is the result of the relationship between sections 3 and 4 of the HRA. As is well known, section 3 requires the courts 'so far as it is possible to do so' to read and give effect to legislation 'in a way which is compatible with the Convention rights'. It is only if this is not possible that section 4 enables the Court, if it is 'satisfied that the provision is incompatible with a Convention right', not to strike down the legislation but to make a declaration of incompatibility. It is then for Parliament to remedy the situation if it chooses to do so.

Section 3 is undoubtedly a powerful new tool in the hands of the judiciary. Legislation whenever it was enacted becomes subject to the duty of the judiciary to reinterpret it so that it does not conflict but accords with human rights. If you consider that interference with human rights should be restricted then surely section 3 is a thoroughly desirable, if novel, provision. It involves a new approach to the interpretation of statutes. I emphasise interpretation because as I have made clear in a judgment which benefits from the endorsement of Lord Hope, interpretation does not include legislation.⁹

This new role of the courts under sections 3 and 4 of the HRA should result in a more mature relationship between the three arms of government: Parliament, the executive and the judiciary. Focusing initially on Parliament, the HRA accords due respect to

⁹ *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] 3 WLR 183 (CA); *Donoghue v Poplar Housing and Regeneration Community Association Ltd (2001) and In Re S (FC) and others (Con joined Appeals)* [2000] UKHL 10 (HL)

the traditional sovereignty of Parliament. As Lord Hoffmann said in *R v Secretary of State for the Home Department*, ex parte Simms:¹⁰

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The HRA will not detract from this power. ... But the principle of legality means that Parliament has to squarely confront what it is doing and accept the political cost.¹¹

To adopt comments made by Lord Bingham, human rights as defined in the Convention 'are not a substitute for the processes of democratic government but a compliment to them'.¹²

Turning to the executive, it is not appropriate to talk of the domestic courts extending a margin of appreciation to the public authorities who are required by the HRA to comply with human rights. However, very much the same result is achieved because the courts show particular deference to the decisions of public authorities if they are better qualified than the courts to make a decision on an issue on which the courts are required to adjudicate. Situations for deference are ones with high political, economic, social or security content.¹³

Let's turn now to the courts. Traditionally, the supervision by our courts of the activities of government was confined to the *Wednesbury* approach. Under *Wednesbury*, the courts do not intervene with a statutory discretion unless broadly speaking it can be said that the decision was not made in accordance with the law or the person who made the decision did not consider the issue appropriately or the decision was wholly unreasonable. Even before the HRA came into force the courts when reviewing the decision would adapt the intensity of their scrutiny to reflect the gravity of the issue involved. If the action could result in an individual's life being threatened (as for example could happen if a person claiming to be a refugee was challenging the decision to deport him on the grounds that if removed his life would be at risk), the scrutiny by the Court would be particularly intense.

¹⁰ [2000] 2 AC 115 at page 131

¹¹ He goes on "The fundamental rights cannot be overridden by general or ambiguous words. This is because there is the greater risk that the full implications of their unqualified meaning may go unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts in the United Kingdom, though acknowledging the sovereignty of Parliament, applied principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

¹² *Brown v Stott* [2001] 2 W LR 817, at pp 834/5

¹³ Let me give an example based on a recent decision of the Court of Appeal. When a person is being investigated as to a criminal offence, the police are entitled to take the suspect's fingerprints and DNA. The position used to be that if the individual was acquitted or the charge is dropped, the fingerprints and DNA had to be destroyed. The law has now been changed under the legislation and the police are given a discretion to retain the fingerprints and the DNA samples. In order to come to the conclusion that the new approach did not contravene the HRA the Court of Appeal had to weigh up the benefit which the fingerprints and DNA samples would achieve in the fight against crime as against the infringement of individual privacy which would be involved. In determining on which side of the line the answer fell the Court paid particular attention to the evidence on behalf of the police. This was because the police were in a better position than the Court to assess the scale of the contribution which the fingerprints and the samples could make to the prevention of crime.

However the position is different under the HRA. The HRA requires the courts to act in a manner which is compatible with Convention rights.¹⁴ While the Court's role is still supervisory, it is the task of the Court to decide for itself whether an article of the ECHR has been contravened. Most of the articles of the ECHR are qualified and the Court, while paying due respect to the decision of the executive, has itself to balance the different interests involved. This again constitutes a significant difference in the role of the courts. Before the HRA, the Court would ask has the public body come to a decision to which in law it cannot come. Now the courts ask themselves what is the right answer and, in deciding that question, take into account the views of the public body. Sometimes the interests to be balanced by the Court will arise because different articles involve conflicting interests. This happens particularly in the case of freedom of expression under article 10 and the interests of privacy under article 8. A classic example is the dispute between a newspaper, two young women and a footballer as to whether the footballer was entitled to keep his sexual indiscretions confidential. In this particular case, the court came down in favour of freedom of speech.

Article 3 is different. It contains an absolute ban on torture. When the actions of government are being challenged as not being in accordance with article 3 no balancing is involved. Even if it is suspected that a terrorist knows the whereabouts of a ticking bomb the courts cannot ratify even the use of limited torture.¹⁵ If what has happened contravenes article 3 that is the end of the matter. If, however, it is article 8 which is in issue, the right to respect for private family life, then that right is expressly qualified (as to interference which is necessary in a democratic society, in the interest 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 rights and freedoms of others). In the case of such a right the courts follow in the footsteps of Strasbourg, and in deciding whether or not the interference is justified will inquire whether the conduct which it is sought to justify was proportionate to the objective to be achieved. It is the Court which has responsibility of determining questions of proportionality. Admittedly, this is a more intrusive approach than was possible prior to the HRA, but the decision which results is more likely to be just than under *Wednesbury*.

The courts' powers are not unlimited. They remain fettered. They are controlled by appellate courts and the principles now established by the jurisprudence of the ECtHR. The decisions which the courts are required to make can be extraordinarily difficult as in the case of the separation of the conjoined twins. However in reaching their decisions the courts now have the advantage of these well-developed principles which are enriched by the judgments of courts around the developed world. Prior to the HRA, judges in this jurisdiction could derive little benefit, and contribute less, to those decisions. Now we can do so and, in the process, can assist in the development of those principles. This is true whether human rights are directly involved or not.

It is important also to bear in mind the effect of the HRA on the legislative process and the actions of the executive and other public bodies. When legislation is introduced to Parliament, the Minister is required to make a statement of compatibility. This assurance to Parliament is not given lightly. In the determination

¹⁴ section 6

¹⁵ see *Ireland v UK* (1978) 2 EHRR 25

of policy and in the drafting of the bill, considerable care will be exercised to identify and resolve any possible human rights issues. In the parliamentary process the bill will be scrutinised by the Human Rights Committee of both Houses of Parliament. In addition, in every government department there has been intense focus on the need to provide ongoing training in human rights for civil servants. A human rights culture is managing to survive even in the most dust-ridden corridors of Whitehall.

The advantages to be derived from the greater focus on human rights values far exceed the disadvantages. Just as the development of judicial review in the final quarter of last century improved administration in our increasingly complex society, so will the existence of the HRA protect our individual interests which are so easily lost sight of in meeting the demands of the global economy. The real test of the HRA arises when individuals or minorities attract the antagonism of the majority of the public. When the tabloids are in full cry. Then, the courts must, without regard for their own interests, make the difficult decisions that ensure that those under attack have the benefit of the rule of law. At the heart of the HRA, is the need to respect the dignity of every individual by ensuring he or she is not subject to discrimination. This is what Jackson J said about equality in 1948:

. . . equality is not merely abstract justice. 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. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Today we are confronted by dangers that may be as great or even greater than those which threatened this country in 1939 when we offered succour to those fleeing from Nazism. There are now pressures posed by the need to protect the public from crime; pressures created by an unprecedented number of asylum seekers which can cause us to forget (as the *Independent* pointed out on 10 October) the extent to which 'historically this nation has been enriched by generations of asylum seekers from the Huguenots in the 17th century to the Jews in the 20th.' Above all there are pressures created by the need to protect this country from merciless acts of international terrorists. These pressures will test the HRA. But the HRA is not a suicide pact! It does not require this country to tie its hands behind its back in the face of aggression, terrorism or violent crime. It does, however, reduce the risk of our committing an 'own goal'. In defending democracy, we must not forget the need to observe the values which make democracy worth defending.

It is Parliament and the government who have primary responsibility for defending both our democracy and its values. However, it is almost inevitable that, from time to time, under the pressures I have described, Parliament or the government will not strike the correct balance between the rights of society as a whole and the rights of the individual. If this happens then the courts can, as they could not before the HRA, act as a longstop. In doing so, as is their duty and as the law requires, the judiciary will make the difficult decisions involved in upholding the rule of law. Sometimes the

judicial role will be unwelcome. If initiatives which are thought to be in the interest of the public are interfered with by the judiciary because of their adverse effect on the human rights of a minority, the judiciary will not be popular. But the temporary unpopularity of the judiciary is a price well worth paying if it ensures that this country remains a democracy committed to the rule of law. A democracy which is therefore well worth defending.

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