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The Judges and the Constitution Transcript

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THE JUDGES AND THE CONSTITUTION

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1. In my lecture on the Human Rights Act last year, I drew two conclusions.

The first was that the Act secured a compromise between the sovereignty of Parliament and the protection of human rights.

The Act:

- a. Requires ministers when introducing legislation in Parliament to certify that, in their belief, it complies with the European Convention on Human Rights.
- b. Requires the courts to interpret legislation, as far as possible, so that it is compatible with the Convention.
- c. Requires the courts in England and Wales, if legislation cannot be so interpreted as to be compatible with the European Convention, to issue a declaration of incompatibility. Parliament can then amend or repeal the offending statute or part of a statute by means of a special fast-track method, if it wishes to do so.

It is worth emphasizing three features of this Act.

First, that, although the *Sun*, after a recent case concerning Afghan hijackers, which I will discuss later on, denounced what it called 'the European Union Human Rights Act', the European Convention has nothing to do with the European Union. The European Union played no part in creating the Convention or in enforcing it. It was drawn up by a quite different body, the Council of Europe, in 1950, well before the European Union was formed. Incidentally, a main influence on the formation of the Council of Europe, which, unlike the European Union, is a purely intergovernmental body, was Winston Churchill.

Second, a leading public figure told the 'Observer' a few weeks ago that the Human Rights Act empowered judges to strike down Acts of Parliament. In fact, however, the Human Rights Act does not allow judges to strike down Acts of Parliament. All that judges can do, if they find that legislation contravenes the European Convention, is to issue a declaration of incompatibility. It is then up to Parliament to put things right.

This clarification is worth making since the leading public figure concerned was the Prime Minister who seems not to have understood the significance of his own legislation.

Third, the Human Rights Act preserves the sovereignty of Parliament, but provides for the courts to play a much more influential role in the protection of human rights.

Under the Act, Parliament, ministers and the courts all have a role - complementary roles perhaps - in the vetting of human rights. Ministers must declare when introducing legislation that, in their opinion, it conforms to the European Convention. They are therefore required to scrutinize the human rights aspects of legislation carefully before introducing it to Parliament. There is, moreover, in Parliament, a joint Select Committee of both Houses which is also charged with scrutinizing legislation in relation to its human rights implications.

In this way, the Human Rights Act attempts to secure a democratic engagement with rights on the part of the representatives of the people in Parliament.

However, the arrangement is, as I have said, and inevitably, a compromise. Traditionalists opposed the Human Rights Act, arguing we should continue to rely upon Parliament and the courts to protect our rights as they had done for centuries. Radicals argued that the Act did not go far enough. For, unless judges had the power to strike down Acts of Parliament, as judges of the United States Supreme Court can strike down Acts of Congress, the Human Rights Act, so they argued, would be of little use. It might work in peaceful times, but in times of moral panic, Parliament and government might simply ignore a declaration of incompatibility made by a judge.

Moreover, the compromise depends upon a sense of restraint by both Parliament and the judges. Were the judges to seek to

invade the political sphere, and to make the judiciary supreme over Parliament, there would be great public resentment. Indeed, some would argue that this has already happened. Conversely, were Parliament simply to ignore a declaration of incompatibility by the judges, the Human Rights Act would prove of little value.

I asked whether the compromise was really workable in the long run.

2. My second conclusion was that the role of judges in the constitution would change. They would become more influential. They would become lions under the throne. There would be more likelihood of a conflict between government and the judges.

I thought, however, that these effects would be long-term and that the consequences would not be seen for many years.

I was wrong.

For, even the most cursory reader of newspapers will realize that the conflict has come much more quickly than I imagined.

In particular two cases have highlighted the conflict. I will consider these two cases in a little more detail since there has been much misinterpretation of them in the media.

BUT - I will inevitably have to summarise them in a very abridged and crude way. Anyone seeking more detailed information - or taking law exams - should consult the law reports, rather than relying on my summary. (Otherwise, they will fail - and deservedly fail - their exams!)

3. The first case: *Re: MB* dealt with the procedures for reviewing control orders.

Those who heard my lecture on the Human Rights Act may remember my discussing the Belmarsh case, *A (FC) v Secretary of State for the Home Department*, 2004. That case dealt with the legality of the detention of suspected terrorists. The law lords ruled that detention was not compatible with the European Convention.

Their decision led to much criticism. But it is perhaps worth remembering what Winston Churchill said about detention in 1943 at the height of the Second World War.

'The power of the executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgement of his peers, is in the highest degree odious, and the foundation of all totalitarian government whether Nazi or Communist'.

The government responded to the decision of the judges in the Belmarsh case with new legislation, the Prevention of Terrorism Act, 2005, replacing detention with a system of control orders.

These control orders restrict the freedom of suspected terrorists by requiring them, for example, to report at a police station at regular intervals, to remain in their place of residence, to surrender their passport, and to admit police officers to their home at any time to search their premises.

It is worth emphasizing that this control order is issued by the executive and not by the courts, and that no charge is brought against the suspects.

Moreover, because most of the evidence is based on intelligence sources, neither the suspect nor his lawyers are able to see the evidence nor even a summary of it.

In this particular case, the suspect denied that he had been involved in terrorist-related activity and said that therefore the control order should not have been issued.

In the High Court, Mr. Justice Sullivan declared that the suspect had been deprived of the right to a fair hearing under Article 6 of the European Convention. Indeed he declared that 'To say that the Act does not give the respondent in this case ---- a fair hearing in the determination of his rights ---- would be an understatement.' He added that 'The controlees' rights under the Convention are being determined not by an independent Court in compliance with Article 6 (1), but by executive decision - making untrammelled by any prospect of effective judicial supervision'.

The judge therefore said that he would issue a declaration of incompatibility. The government, however, has said that it will appeal, and so, for the time being, the control order remains in force.

This decision does NOT mean, as many in the press have argued, that control orders are necessarily incompatible with the European Convention. It is possible that, if the control orders could be made by judges, rather than merely being supervised by them, that would be acceptable. Alternatively, the government could charge the suspects so that they can be put on trial. The government does not wish to do this since it would involve revealing evidence obtained from informers or through intercepts. Nevertheless, a number of other democracies do admit intercept evidence. It might be possible, for example, for the closed evidence to be seen by three judges sitting *in camera*. That might be sufficient for a fair hearing under the Convention. We do not know. The government is in a sense under challenge to produce a system with effective judicial supervision, which meets with the conditions laid down in the Convention, conditions essential for the preservation of the rule of law.

Further cases involving control orders will be heard in the High Court in June. In these cases, the control orders will require those affected to remain in their place of residence for 18 hours a day. Thus, the control order becomes something akin to house arrest, and it is possible that this provision will fall foul of Article 5 of the Convention providing that no one should be deprived of his rights without due process of law.

4. The second recent case which has caused controversy involves Afghan hijackers. There has been even more misunderstanding about this case than about the control orders case.

In the year 2000, a group of Afghans hijacked a plane on an internal flight in Afghanistan to flee from the Taliban regime. They were then condemned to death by the Taliban as enemies of Islam. They landed in Britain and claimed asylum. In 2003, they were convicted for hijacking, but their conviction was quashed on appeal, on grounds of duress, and no retrial was ordered. It is worth saying that, nevertheless, all but two of the hijackers had already served their full term in prison allowing for time spent on remand and eligibility for parole.

The Home Secretary did not wish the hijackers to be granted Discretionary Leave to stay in Britain. But a panel of three independent adjudicators allowed their appeal against the Home Secretary's decision. The Home Secretary wanted to appeal against the decision of the panel, but was not granted leave to appeal. He then, after a considerable period of delay, issued a set of revised rules which were not, however, put before Parliament. Under these revised rules, the hijackers could be denied Discretionary Leave.

The case was heard in the High Court under the same judge, Mr. Justice Sullivan. He decided that the Home Secretary's actions amounted to 'conspicuous unfairness amounting to an abuse of power' by a public authority, and that the Home Secretary's actions were unlawful since they allowed interference with an individual's rights under the Convention 'otherwise than in accordance with the law'.

The judge therefore issued a mandatory order requiring the Home Secretary to give the Afghans Discretionary Leave to stay in Britain for a renewable period of six months.

IT IS IMPORTANT TO NOTE - since the point was hardly made in the press at all - that the alternative to giving the Afghans Discretionary Leave to stay was NOT deportation - the Home Secretary was not proposing that - but to give them temporary admission, which would mean that they would have to report to the police regularly and would be unable to work. With Discretionary Leave they would be able to work, which is, surely, to the common advantage.

IN ADDITION, it does not follow that the Afghans can stay here permanently. They have Discretionary Leave which must be renewed every six months.

Therefore, the decision did NOT, as many in the press - and also the Prime Minister - argued, mean that hijackers cannot be deported, or that action cannot be taken to discourage hijacking, only that deportation must be according to due process of law, and that ministers cannot introduce new rules whenever it suits them to do so, without securing the sanction of Parliament.

It is certainly the case that, under Article 3 of the Convention, no one can be deported to a territory where they may face torture or inhuman or degrading treatment. The Article declares simply 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. That is why the Home Secretary could not propose that the Afghans be sent back to Afghanistan.

That Article has come under considerable criticism in recent weeks. But, how many of us would really want, for example, to deport Jewish refugees back to Nazi Germany or refugees from Communism back to the Soviet Union.

5. Both of these cases deal with the rights of very unpopular minorities with whom perhaps many of us will have little sympathy; and both cases deal with the rights of defendants in criminal trials.

It is, however, worth pointing out that all of us could, potentially, be members, at some times in our lives, of unpopular minorities. Perhaps any of us could be wrongly suspected of planning a terrorist offence and wrongly accused. Intelligence officers are just as capable of making mistakes as the rest of us.

When, during the 2nd World War, detention without trial was introduced, many quite innocent people were interned.

In Northern Ireland, in 1971, when internment was authorized, the police seem to have detained many innocent Catholics. Great harm was done to community relations in Northern Ireland, and internment is now widely considered to have been a mistake.

It is possible that measures such as control orders used predominantly against Muslims, against whom no charge is brought, could alienate the Muslim community, and thus prevent Muslim cooperation against terrorism, which is almost certainly necessary if terrorism is to be defeated.

It is also worth noting that the 2005 Prevention of Terrorism Act which provided for the control orders, was rushed rapidly through Parliament. There was no proper Second Reading debate in the Commons, since the bill only reached its final form in the Lords. The Lords did not like it, but allowed it to go through after the government gave an undertaking that it would be brought back early in the next session. The government agreed, but following the 7th July bombings in London, the government said that its agreement had been overtaken, and further anti-terrorist legislation was introduced in the form of the Counter Terrorism Act of 2006.

This new Act contains two provisions which have become fairly well known. The first is to create a new offence of the glorification of terrorism, while the second gives the police the power to hold terrorist suspects without charge for 28 days – the government originally sought a 90 day period.

These provisions have not yet been tested in the courts. It is possible that the offence of glorification of terrorism could fall foul of the right of free speech in Article 10 of the Convention, and that the period of detention for up to 28 days could fall foul of Article 5 of the Convention that no one should be deprived of liberty except through due process of law.

We shall see.

6. The case of the Afghan hijackers caused strong political reactions. The Prime Minister said that 'It is not an abuse of justice for us to order their deportation. It is an abuse of common sense, frankly, to be in a position where we can't do this'. The Leader of the Opposition agreed, and the then Home Secretary, Charles Clarke, said that he found the judgment 'inexplicable'. But, as we have seen, the case was not about the deportation of the Afghans which was not being proposed, but the basis on which they should be allowed to stay in this country.

The Prime Minister further said that he thought there should be new legislation limiting the power of the courts in human rights cases, and thus, presumably, amending the Human Rights of 1998 passed by his own government. The Leader of the Opposition revived the pledge in the Conservative Party's 2005 election manifesto to 'reform, or failing that, scrap' the Human Rights Act.

That, however, is not as easy as it sounds. The provisions of the Human Rights Act are derived from the European Convention, accepted by all the democracies of Europe. The European Convention cannot be changed without the consent of all of the other members. The only other way in which we could avoid being bound by it would be unilaterally to depart from its principles, and that would make us the pariahs of Europe.

Moreover, the Convention is not as remote from reality as politicians suggest. It does allow governments to override many of the rights laid down 'if necessary in a democratic society in the interests of national security or public safety'.

In the Belmarsh case which I mentioned earlier, the case involving detention, Lord Bingham, the senior law lord, drew a careful distinction between matters which were political and which were for Parliament and government to decide, and matters which were legal, which were for the courts to decide.

It was, 8 of the 9 judges in the Belmarsh case agreed, for the government, and not the courts, to decide whether there was a threat to national security. What the court decided was that the means that the government employed to deal with that threat were both disproportionate and discriminatory as between British citizens and those who were not British citizens.

The government, however, would no doubt respond that, in their view, the means they were proposing to deal with the threat of terrorism were not disproportionate and that the discrimination was, in these exceptional circumstances, justified.

That is where the conflict essentially lies.

7. What is to my mind remarkable is the speed with which the Human Rights Act has led to a conflict between the judiciary and the government.

In the United States, it took 16 years from the writing of the constitution in 1787 to the first striking down of an Act of Congress by the Supreme Court – the landmark case of *Marbury v Madison*, 1803. After that, no further Act of Congress was struck down until the famous *Dred Scott* case in 1857, the case which unleashed the civil war. It was not until after the American civil war of 1861-5, that the Supreme Court really came to be accepted as having the right to review federal legislation.

In France, a new body, the *conseil constitutionnel*, - Constitutional Council – was introduced into the political system with the Fifth Republic constitution in 1958 – but it was not until the 1970s that it really assumed an active role.

Yet, in Britain, just 6 years after the Human Rights Act came into force – which was in the year 2000 – we can already see the outlines of a clash between government and the judiciary.

The implications of the Human Rights Act were not noticed because we do not have a codified constitution. In a country with a codified constitution, such as, for example, the United States or Canada, the Human Rights Act would probably have required a constitutional amendment, a special process of legislation, and much public debate and discussion.

But, in Britain, because we do not have a codified constitution, there was no special parliamentary procedure, and little public debate. This has the great advantage that we can alter our constitutional arrangements easily and without fuss or difficulty. But critics will say that the process is too easy and, as a result, we do not reflect enough about what we are doing.

Walter Bagehot, the great 19th century writer on the constitution said that ‘An ancient and ever-altering constitution’, such as the British, ‘is like an old man who still wears with attached fondness clothes in the fashion of his youth; what you see of him is the same; what you do not see is wholly altered’.

Moreover, under our system, the government can alter the constitution as it wishes, with the same ease as it can alter the law on, for example, pensions or education. Many years ago, Lord Hailsham, the Conservative Lord Chancellor, coined a slogan to describe this condition. He called it ‘elective dictatorship’. Perhaps this dictatorship is now being challenged by the judges, who are taking upon themselves the role of protectors of the constitution.

8. In any society, a balance has to be drawn between the rights of the individual and the needs of society for protection against crime, terrorism etc. But who should draw the balance – the government or the judges?

9. Most senior judges would, I suspect, claim that they have a special role in protecting the rights of unpopular minorities, such as, for example, asylum-seekers and suspected terrorists. They would say that in doing this they are doing no more than applying the Human Rights Act as Parliament has asked them to do. Their role in this area is, they might say, particularly important because the very small and unpopular minorities involved cannot use the democratic process to right their wrongs as larger groups can.

10. The government and, one suspects, most MPs, as well as much of the press, would disagree. The government and MPs would say that it is for them, as elected representatives, to weight the precise balance between the rights of the individual and the needs of society. For they are elected and accountable to the people, but the judges are not. They will say that the Human Rights Act provides for the judges to review legislation. But this should not be used, so critics say, as an excuse for judicial supremacy over the elected government and Parliament. It should not be used to override the sovereignty of Parliament. There may perhaps be a case for a Supreme Court on American lines, but this should be the result of a democratic decision by Parliament and people, not something introduced through stealth by the judges.

11. Whatever side one takes in this debate, it brings out something fundamental which has been little noticed. The European

Convention of Human Rights is coming to take on the status of a higher law in our system of government; it is taking on the status of a written or codified constitution. Yet, the traditional view is that there can be no such higher law in our system of government. The great 19th century constitutional lawyer, A.V. Dicey, declared that 'There is no law which Parliament cannot change. There is no fundamental or so-called constitutional law', and there is no person or body 'which can pronounce void any enactment passed by the British Parliament on the ground of such enactment being opposed to the constitution'. Formally, of course, these propositions remain true. Judges can do no more than issue a declaration of incompatibility if they believe that a particular statute or part of a statute cannot be reconciled with the European Convention. They cannot declare it void, and Parliament can still refrain from amending or repealing the offending statute or part of a statute, although it has not yet done so. Nevertheless, the European Convention of Human Rights is now, in practice, if not in form, part of the fundamental law of the land. It is the nearest we have to a Bill of Rights or a constitution.

12. There is, however, as we have seen, a basic conflict between the principle of the rule of law, as interpreted by the judges, and the principle of the sovereignty of Parliament. The Human Rights Act sought to muffle this conflict by establishing a dialogue between government and the judiciary. The judges and Parliament are required to act together to protect human rights. It is the judges who issue a declaration of incompatibility, but it is Parliament that puts things right.

The Human Rights Act sought to avoid the question - what happens if there is a clash between the two principles - the sovereignty of Parliament and the rule of law. But it presupposes that there is a consensus on human rights between judges on the one hand, and government, Parliament and people, on the other. The assumption of the Human Rights Act is that breaches of human rights will be relatively infrequent and inadvertent and that there will therefore be little disagreement between government and the judges. Perhaps the government and Parliament would be grateful to the judges for pointing out to them inadvertent breaches.

13. But, there is clearly no consensus between Parliament and the judges when it comes to the rights of unpopular minorities. Two issues, in particular, - asylum-seekers and terrorists - have broken whatever consensus may once have existed. The asylum problem was of course there in 1998 when the Human Rights Act was passed, but it has grown in significance and is now a highly emotive issue, capable perhaps of swinging many votes in a general election, and thus affecting the political future of the government.

14. Terrorism has also taken a different form. There was, of course, terrorism before the Human Rights Act, primarily in the form of the IRA. But, as Anthony Giddens said in his lecture on Tony Blair last week, the IRA was, in a sense, an old-fashioned terrorist organisation with a specific and concrete aim, the unification of Ireland. Global terrorism, on the other hand, of the kind championed by Al-Qaeda, is quite different. It is a new and more ruthless form of terrorism, with much wider aims - the establishment of an Islamic empire - and it apparently has terrorist cells in around 60 countries. To deal with this new form of terrorism, so the government argues, new methods are needed, and these new methods may well compromise traditional civil liberties. That cannot be helped. The judges, however, retort that we should not compromise our traditional principles - habeas corpus and the presumption of innocence - principles which have been tried and tested over many centuries, and which have served us well in the past.

15. But some senior judges have gone further. They have suggested that it is now time to supercede the principle of the sovereignty of Parliament. They would argue that the sovereignty of Parliament is but a judicial construct, a creature of the common law. If the judges could create it, they can now supercede it. In the case, *Jackson v Attorney-General*, 2005, which dealt with the validity of the Hunting Act, Lord Steyn declared, obiter, that the principle of the sovereignty of Parliament is

'a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism'.

In another obiter dictum in the same case, another law lord, Lord Hope of Craighead, said:

'Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled --- It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament --- is being qualified.'

BUT - does the principle of the sovereignty of Parliament rest merely upon recognition by the judges? Does it not have deeper roots in society?

The great 19th century constitutional lawyer, A.V. Dicey, whom I have already quoted, said that the roots of the idea of

parliamentary sovereignty `lie deep in the history of the English people and in the peculiar development of the English Constitution`.

If this is correct, then judges cannot alter this principle of the sovereignty of Parliament unless Parliament itself, and perhaps the people as well, in a referendum, agree. Survey evidence seems to show that people trust the judges much more than they trust politicians. Indeed, it might be argued that the judges are filling a vacuum. They are being asked to decide cases which entrench upon government precisely because politicians are less trusted. Perhaps there is, in the popular mind, a gap in the constitution which is being filled by the judges.

This is a striking development. For, after all, the House of Commons is more democratic and representative than it has ever been. A hundred years ago, when just 60% of adult males, but no women, had the vote, Parliament was trusted much more than it is now to protect civil liberties.

Nevertheless, the people might not support the judges in specific, highly emotive cases. Would they really be on the side of the judges in the protection of unpopular minorities?. The Labour government's White Paper, `Bringing Rights Home`, introduced before the Human Rights Act, declared that there was no evidence that the public wanted judges to have the power to invalidate legislation.

16. There is, therefore, a clash between two conflicting constitutional principles - the principle of the sovereignty of Parliament and the principle of the rule of law. This could easily lead to a constitutional crisis.

17. By a constitutional crisis, I do not mean simply that there are differences of view on constitutional matters. That is to be expected in any healthy democracy. What I mean by a constitutional crisis is that there is a profound difference of view as to the method by which such differences should be settled. The government believes that issues of human rights should be settled by Parliament. The judges believe that they should be settled by the courts. Moreover, both government and the judges are coming to believe that the other has broken the constitution. Government and Parliament say that judges are usurping power and seeking to thwart the will of Parliament. Judges say that the government is abandoning basic civil liberties and then attacking the judiciary for doing its job in implementing the provisions of the Human Rights Act. The British Constitution is coming to mean different things to different people. It is coming to mean something different to the judges from what it means to government, Parliament and people. There will therefore be a conflict and a struggle. How will it be resolved?

There are two possible outcomes. The first is that Parliament succeeds in defeating the challenge of the judges, and that Parliamentary sovereignty is preserved. The second is that, like almost every other democracy, we come to develop a codified constitution, in which judges, as in the United States, have the right to strike down laws which offend against human rights. We would then become what Lord Steyn, whom I have already quoted, has called a true constitutional state. He and other senior judges might well say that we are not at the moment a true constitutional state.

18. We are, at present, in a transitional period. Eventually, no doubt, a new constitutional consensus will be achieved. But that could well be a painful process. The path towards a new constitutional settlement could be a rocky one, and there may be many squalls, and indeed storms on the way.

Those who seek a quiet life should steer clear of the constitution.