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More on judicial expansionism

I find Lord Lester of Herne Hill's refutation of Michael Gove on judicial powers (2nd opinion, 22 November 1999) unconvincing.

Lord Lester rightly says that under the Human Rights Act the courts are not empowered to strike down statutes that are incompatible with the European Convention; all they can do is issue a declaration of incompatibility. However where such a declaration is issued the Government will be expected speedily to amend the offending statute to bring it into line.

The Human Rights Act contains fast-track machinery for this very purpose. It will ensure that Parliament's decision in passing the statute will in effect be overruled by the court's view of the matter.

Lord Lester gives the game away by saying that these judicial powers are needed in case Parliament acts oppressively. What is oppressive is often a matter of opinion. In future it will be judicial, not parliamentary, opinion that prevails.

Lord Lester correctly says that under the Human Rights Act courts must construe statutes compatibly with the Convention only where this is 'possible'. Again that is deceptive as a safeguard. European courts frequently stretch the meaning of statutes so as to give a creative result that they think is more suitable than what the words actually say.

The Lord Chancellor recently stated that under the Human Rights Act our courts are likely to follow these European judicial methods. He added that "the strong interpretative techniques" that can be expected to be applied by our courts to British statutes in Convention cases include "straining the meaning of words or reading in words which are not there" ([1998] *Public Law* p. 221 at p. 228). We have been warned.¹

¹ *The Times*, 26 November 1999.