

Introductory Note by Francis Bennion

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Fractured Law - or Three Strikes Against The HRA

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Introductory

Mr Tony Blair has announced that he is to resign as Prime Minister on June 27; and there has been much talk of his legacy. Iraq bulks large, but by thoughtful lawyers he will be most ruefully remembered for his work in mangling the British constitution. He knew little about that magnificent organism, but ignorance did not deter him. Without waiting to confer with those who did know, and determined not to allow the nation to ponder on projected measures of immense gravity, he set about his self-appointed task of rushed demolition coupled with hasty erection. His most destructive measure has been the Human Rights Act 1998 (HRA), thrown like a bomb into the works.

It is five years since I published in Australia a lengthy article pointing out the dangers of the HRA to the rule of law.² This I shall call the 2003 Bennion article. I was then unaware, and have only just discovered, that a fellow Balliol man Jonathan Morgan, senior law tutor at Christ's College Cambridge, had beaten me to it with a review article in 2002, which I shall call the 2002 Morgan article.³ In the meantime I have had further thoughts on the matter, and read many other people's thoughts as well.

The upshot is that I now consider the HRA to be a measure that has turned upside down the constitutional relationship between the legislature and the judiciary, with consequences that can only be gravely deleterious to our country. I have reduced the criticisms to what I call three strikes against the HRA, leading to the fracturing of our law. I shall come back to that later. First I want to give some detailed information about the two articles. I will take them in reverse order of time. Readers are enabled to read on my website writings I refer to in the 2003 Bennion article (see footnotes to this article).

The 2003 Bennion article

The HRA "incorporates" into British law the European Convention on Human Rights and Fundamental Freedoms (ECHR). In the 2003 Bennion article I mentioned that for many years

¹ The Postscript read: 'As this article went to press it was announced [*The Observer*, 13 May 2007] that Mr Gordon Brown, who we are told is shortly to be "crowned" as Leader of the Labour Party and putative Prime Minister, also intends to tinker with the British Constitution - though he too knows nothing about it. What is it with these people?'

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² F. A. R. Bennion, "Human Rights: A Threat to Law?" 26 *University of New South Wales Law Journal* (2003), pp. 418-441, www.francisbennion.com/2003/008.htm.

³ Jonathan Morgan, "Law's British Empire, a review of *Values for a Godless Age—The Story of the United Kingdom's New Bill of Rights*, by Francesca Klug (with Foreword by Helena Kennedy QC) (Penguin, 2000)", 22 *Oxford Journal of Legal Studies* (1 December 2002), p. 729.

I was against “incorporation” of the ECHR into British law. Back in 1978 I had two letters in the Times on the subject. In the first I criticised the ECHR on the ground that it cast judges in an unsuitable role.⁴ In the second I said that we could avoid the serious objections levelled against “incorporation” and still gain the advantages for civil liberty afforded by it if we first identified the areas where our domestic law fell short of the requirements of the ECHR, and then remedied the omissions by detailed legislation dovetailing into our existing law.⁵ In 1980 I returned to the attack over judges⁶ and also suggested that the House of Commons should appoint a Human Rights Select Committee, which has since been done.⁷

In 2000 I said that the HRA would prove a cause for concern in “bringing confusion to our laws with little corresponding benefit – except to legal practitioners in the field”.⁸ Legal practitioners have indeed exploited the HRA. They can plead that it is their duty to take every available point on behalf of their clients, and also that the HRA puts the law into a very uncertain state. Nevertheless the way in which, since its commencement on October 2 2000, the HRA has, with the general approval of the judiciary, been invoked in almost every case brought to court has added immeasurably to legal costs and delays.

In a 2003 letter I pointed out that the ECHR was largely derived from the common law, which if left alone could have developed on the same lines.⁹ In the 2003 Bennion article I suggested that the advent of the ECHR in 1953 began a popularising and distorting process that has gradually infected the judges’ power to develop the common law on sound juridical lines. This distorting process became more severe with the passing of the HRA.

Described in its long title as an Act to give further effect to rights and freedoms guaranteed under the ECHR, the HRA does not render invalid legislation of the UK Parliament which is inconsistent with the ECHR. Instead, it gives the courts power to make a declaration of incompatibility.¹⁰ Where this has been done it provides a “fast-track”

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procedure whereby a government minister may amend the offending enactment to bring it into line.¹¹ Ministers are expected to use this power in practically every case, just as they have for years been expected to comply in every case with a ruling of the European Court of Human Rights at Strasbourg even though not formally binding on them.

In the 2003 Bennion article I described two of the explicit distorting factors introduced by the HRA. The first arises from the obscure drafting of s 6, which says that it is unlawful for a “public authority” to act in a way incompatible with the ECHR. The wide term “public authority” is defined by s 6 in a most unsatisfactory fashion. It suggests, without stating definitely one way or the other, that under the HRA an applicant will probably not be able, as can be done at Strasbourg, to proceed against the United Kingdom on the ground that there is a lacuna in some aspect of British law.¹²

The other distorting factor, s. 3(1) of the HRA, is more serious. It reads:

⁴ *The Times*, January 25, 1978, www.francisbennion.com/1978/015.htm. See also *The Times*, April 14, 1980, www.francisbennion.com/1980/024.htm

⁵ *The Times*, April 5, 1978, www.francisbennion.com/1978/016.htm.

⁶ *The Times*, January 9, 1980, www.francisbennion.com/1980/023.htm

⁷ *The Times*, September 29 1980, www.francisbennion.com/1980/028.htm

⁸ *The Times*, August 29, 2000, www.francisbennion.com/2000/061.htm. The letter also contains other criticisms of the HRA.

⁹ *The Times*, February 28 2003, www.francisbennion.com/2003/018.htm

¹⁰ HRA s. 4.

¹¹ HRA s. 10.

¹² See my letter in *The Times* of December 8 1997, www.francisbennion.com/1997/007.htm

“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”.¹³

I have criticised this provision at length in various publications. It is offensive to the very idea of law because it instructs the courts to falsify the legal meaning of other Acts of Parliament, which hitherto has depended on legislative intention at the time of enactment. In regard to existing Acts, it is an objectionable example of *ex post facto* legislation. In regard to future Acts it is either an illicit attempt to bind future Parliaments or a statement of the obvious, since it repeats what is already an interpretative presumption.

Strangely, s. 3(1) does not apply in terms to rules of the common law and other *lex non scripta*. Perhaps such an express provision was considered unnecessary to achieve the object of distorting the development of the common law for the furtherance of so-called human rights. I have argued that the compatible construction rule imposed by s. 3(1) goes further than strained construction and requires the use of the European procedure which is called Developmental construction because in advancing the “spirit” it is always ready to depart from the letter. With this degeneration of meaning, the concept of human rights becomes an easy weapon to brandish whenever you have a grievance. It is one other tool in the armoury, and is often used as such.

There are, said the 2003 Bennion article, other threats to law presented by human rights formulations. For example it becomes difficult to rely on a codification of unwritten law if its precise phrases are always likely to be overthrown by an appeal to the vague provisions of an instrument such as the ECHR. A Times leader said in 2003:

“It is . . . unacceptable for this country to create laws and then be incapable of enforcing them. Such behaviour rapidly undermines respect for the law and the ability to make regulations stick.”¹⁴

It may be thought, the 2003 Bennion article concluded, that the concept of human rights is so deeply entrenched worldwide that it cannot be eradicated. Possibly this is so, but it does not mean the message must be delivered in vain. The article began by asking the question: What is the best sort of law for a common law country? It then submitted that the best sort of law for a common law country is, unsurprisingly, the common law – as moderated by the detailed decisions of a democratic legislature. Coke said that the common law is “nothing but reason which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of every man’s natural reason, for *nemo nascitur artifex* (no one is born an expert)”.¹⁵

The 2002 Morgan article

The 2002 Morgan article is very important, but so far its importance has not been fully recognised. Therefore I feel it to be necessary to give it extensive exposure here. This presents a difficulty. The article is lengthy, and needs to be read in full. To attempt to paraphrase it would not be adequate. My solution is to frame the remainder of this section of my present article in the form of verbatim extracts from the Morgan article.¹⁶

Morgan reminded us that A.V. Dicey, Victorian embodiment of the British constitution, wrote that the Rule of Law, controlling the dangers of unlimited discretionary power, was one of the twin pillars of our constitutional law. The idea, or ideal, of subjecting political rulers to higher-level, immutable principles of law, so as to safeguard the rights of the governed, conflicts with Dicey’s other central principle, that the Queen in Parliament is sovereign:

¹³ Broadly “the Convention rights” equate to the rights conferred by the ECHR, but there are some exclusions: see HRA s 1.

¹⁴ *The Times*, July 25 2003.

¹⁵ Sir Edward Coke, *Commentary upon Littleton* 97b.

¹⁶ The footnotes too are in Morgan’s own words, except where otherwise stated. To avoid inconveniencing the reader, breaks are not indicated. I am grateful to Jonathan Morgan for kindly permitting me to adopt this unorthodox method.

unlimited, illimitable and omnipotent. This, for Dicey, trumped even the Rule of Law: Parliamentary sovereignty was the “keystone” of our constitution.¹⁷ That view is now deeply out of fashion. To advocate leaving it to Parliament, or, in political reality, the governing party of the day, to protect the liberties of the British people seems risible, if not bordering on lunatic. Cynicism about the political process has reached grand proportions, in this age of irony and spin.

Human rights theorists must defend (and accept) this conflict with democracy. Courts enforce the limits which fundamental principles of human rights place upon even democratically elected bodies. This would amount to a reversal of the Diceyan position, with the Rule of Law prevailing over Parliament’s omnipotence. The law that is now to rule, however, is constituted by a concept of positive human rights alien to Dicey’s concentration upon liberties and freedoms, whereby we are simply free to do anything

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which the law does not forbid.¹⁸

It has been argued that the central, political objection to founding public morality on rights is the extreme individualism which may result. In a sustained critique of the “rights culture” in the US, Mary Ann Glendon wrote that the

“ . . . rhetoric of rights is less about human dignity and freedom than about insistent, unending desires. Its legitimation of individual and group egoism is in flat opposition to the great purposes set out in the Preamble [to the US Constitution].”¹⁹

Even rights enthusiasts recognise, though they are untroubled by, the individualistic focus of the rights society. McLachlin CJ describes the Canadian Charter of Rights and Freedoms as the full and inevitable consequence of the preoccupation with the individual which can be traced through Rousseau and Freud to “late 20th Century narcissism”.²⁰ However Ronald Dworkin argues that possible damage to a society’s communitarian spirit would be a price worth paying for ensuring protection of individual rights.²¹ The emphasis upon the rights of the individual weakens the recognition of duties owed to other individuals, and to the community generally. The threatened effect on society is corrosive, and atomising.

The European Court of Human Rights (ECtHR) has strictly interpreted the Convention requirement that restrictions on rights be “necessary in a democratic society”: there must be a “pressing social need”. One of many examples here is the Strasbourg analysis of the English law on contempt of court. In two high-profile cases, the ECtHR overruled the balance which the House of Lords had struck between the individual contemnor’s freedom of speech, and the public interest in the administration of justice. In the Thalidomide case²² the Court found a breach of Article 10, despite the House of Lords’ guiding philosophy that “the courts must not impose any limitations upon free speech or free discussion or free criticism beyond those which are absolutely necessary”.²³ F. A. Mann attacked the judgement on the basis that “it is probably no exaggeration to say that the gravest blow to the fabric of English law that has ever occurred has been dealt by [the judges in Strasbourg who] decided for the Sunday

¹⁷ E.C.S. Wade (ed.), *Introduction to the Study of the Law of the Constitution* (10th edn, 1960) at 70.

¹⁸ This is the principle of liberty removed not granted. It is further discussed in the additional material at the end of this article.

¹⁹ M. A. Glendon, *Rights Talk* (1991) at 171. See also Sir John Laws, “The Limitations of Human Rights” [1998] PL 254 and his Hart Lecture, *Beyond Rights* (Oxford, 7 May, 2002).

²⁰ B. McLachlin, ch 2 in C. Gearty and A. Tomkins (eds), *Understanding Human Rights* (1996) at 35–36. The author was then a puisne judge in the Canadian Supreme Court.

²¹ R. Dworkin, *A Matter of Principle* (1985) at 32.

²² (1979) 2 EHRR 245.

²³ *A-G v Times Newspapers* [1974] AC 273 at 302, *per* Lord Morris of Borth-y-Gest. And see 294 (Lord Reid) and 322 (Lord Cross of Chelsea).

Times”.²⁴ In the second case, the Court required no less than an “overriding requirement [of] public interest” before a journalist could be compelled to disclose the source of a damaging corporate leak.²⁵ It is clear that Convention rights will prevail over all but the weightiest countervailing public interests.

The argument is that human rights are the apolitical, non-ideological ground rules, and as such are uncontroversial, even uncontestable. This is worrying. It brings to mind Chomsky and Herman’s withering attack on the operation of the mass media, and the way in which they perpetuate the system of free-market capitalism, and suppress dissent, through a powerful (because invisible) series of “news filters”.²⁶ These filters “fix the premise of discourse and interpretation, and the definition of what is newsworthy in the first place, and they explain the basis and operation of what amounts to a propaganda campaign”.²⁷ As Chomsky and Herman wryly conclude, the US media

“ . . . permit—indeed, encourage—spirited debate, criticism and dissent, as long as these remain faithfully within the system of presuppositions and principles that constitute an élite consensus, a system so powerful as to be internalised largely without awareness.”²⁸

Moving from the inherent contestability of values generally to rights-based moral theories in particular, further objections have been raised. Baroness Warnock opposes the discussion of (contestable) morality in terms of rights, since the very words “a right” possess considerable rhetorical power, “an air of certainty, borrowed from the positivistic sense of ‘right’, and the implication that the right could be proved”. In other words, talking of “rights” gives a (spurious) sense of certainty and objectivity to the debate—whereas we are quite accustomed to disagreements about morality, when discussed openly in terms of right and wrong.²⁹ In the context of the HRA itself, it has been argued that the two paragraphs of Article 10 of the ECHR are “the statement of a political conflict purporting to be a resolution of it”.³⁰ Klug’s focus on the need for public debate might seem to concede this.³¹ But how is it possible that human rights can provide “shared moral values” and establish a common framework for society, when they are inherently and eternally contestable?

This admission that decisions about human rights are politically significant, are not self-evident and, therefore, that there should be wide public participation in their fulfilment, is welcome. Yet does it not fatally undermine the human rights project? Once it is conceded that rights are political and controversial things, rather than employing

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Dworkinian rhetoric about “seamless webs of principle”,³² it becomes clear that enforcing them through the courts is highly problematic. Public debate and decision on controversial

²⁴ (1979) 95 LQR 348 at 349.

²⁵ *Goodwin v UK* (1996) 22 EHRR 123 at 145 (para 45). Cf. *X v Morgan-Grampian* [1991] 1 AC 1: “Disclosure in the interests of justice is . . . clearly of preponderating importance so as to override the policy underlying the statutory protection of sources, and the test of necessity for disclosure is satisfied”, *per* Lord Bridge of Harwich at 45, discussing Contempt of Court Act 1981, s 10.

²⁶ E.S. Herman and N. Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (1994) *passim*, and esp. ch 1.

²⁷ *Ibid* at 2.

²⁸ *Ibid* at 302.

²⁹ M. Warnock, *An Intelligent Person’s Guide to Ethics* (1998), ch 3. See further, for the argument that interposition of reified rights “between the juristic fact and the legal consequence” is logically unnecessary, and bears “a considerable structural resemblance to primitive magic thought concerning the invocation of supernatural powers”: A. Ross (1957) 70 Harv LR 812.

³⁰ J.A.G. Griffith “The Political Constitution” (1979) 42 MLR 1 at 14.

³¹ This is a reference to Francesca Klug, *Values for a Godless Age—The Story of the United Kingdom’s New Bill of Rights* (with Foreword by Helena Kennedy QC) (Penguin, 2000), at p.166. The Morgan article is a review of this book. [Francis Bennion’s footnote.]

³² R. Dworkin, *Taking Rights Seriously* (1977) and *Law’s Empire* (1986).

political issues should take place in the societal forum expressly established for it: Parliament. It is a serious mistake to shift the forum to the courts, unelected bodies designed not for wide-ranging debate but for resolution of the disputes of the parties before them.

It may well be true that, from the strictly legal viewpoint, the HRA has no effect on Parliamentary sovereignty. Yet, as Lord Borrie suggested in the Human Rights Bill's second reading, "the political reality will be that, while historically the courts have sought to carry out the will of Parliament, in the field of human rights Parliament will carry out the will of the courts".³³ Lord Borrie went on to note that the Government's own White Paper stated that: "A declaration ... will almost certainly prompt the Government and Parliament to change the law".³⁴ A.W. Bradley comments that while judges might have no formal power to strike down statutes, they are "empowered to deliver a wound to Parliament's handiwork that will often prove mortal, even though life-support for the victim must be switched off by the Government or Parliament, not by the courts".³⁵

To concede merely, as Klug does, that Parliament "no longer has a free rein", and that its sovereignty has been "dented" seems aimed at playing down, or concealing, the anti-democratic power shift which has taken place.

The procedures with which the courts must work in balancing individual rights and the public interest are seriously inadequate for that task, and for the involvement of the public. The classic analysis is Lon Fuller's posthumous article "The Forms and Limits of Adjudication".³⁶ He argued that adjudication was not a suitable means by which to decide "polycentric" questions, that is, many-centred policy issues where "a pull on one strand will distribute tensions after a complicated pattern on the web as a whole".³⁷

The court, informed only by the parties to the dispute, is unable to predict such complex and far-reaching repercussions. As Lord Devlin once put it, reforming courts "turn themselves into law revision committees working perforce without the aids such committees have".³⁸ The solution might be to open up the process to allow the representation of wide ranges of interests (through generous standing and intervention rules) and the presentation of social and economic data to the court. Thus, adjudication would move away from the bipolar, adversarial paradigm, which is limited in the ways that Fuller described.

Such changes in public law procedure have occurred in the USA (see, for example, the "Brandeis Brief").³⁹ This may enable better resolution of polycentric issues, but the political implications of the procedural shift have not gone unnoticed. Chayes commented that

"... from the perspective of the traditional model [of procedure], the proceeding is recognisable as a lawsuit only because it takes place in a courtroom before an official called a judge . . . [Such judicial functions are parasitic], in the sense that they can be effectively carried out only by drawing on the legitimacy and moral force that the courts have developed through the performance of their inherent function, adjudication according to the traditional model."⁴⁰

Calls for a "human rights culture" and democratised debates about rights are all very well, but ultimately the very point of a judicially enforced Bill of Rights is that decisions are made in

³³ *Hansard* HL (3 November 1997) col. 1275.

³⁴ Cm 3782 (1997), para 2.10.

³⁵ In J. Jowell and D. Oliver (eds), *The Changing Constitution* (4th edn, 2000) at 56.

³⁶ (1978) 92 Harv LR 353, especially at 393–405. See J. Allison [1994] CLJ 367 and [1994] PL 452.

³⁷ Fuller, *ibid* at 395.

³⁸ P. Devlin, "Judges and Lawmakers" (1976) 39 MLR 1 at 12. He cites the extensive research assistance, and wide-ranging consultation exercises, which Law Commissioners enjoy and judges do not. For criticism of recent judicial tendencies in this direction see F. Bennion, "Consequences of an overrule" [2001] PL 450.

³⁹ The locus classicus is A. Chayes, "Public Law Litigation" (1976) 89 Harv LR 1281.

⁴⁰ *Ibid* at 1302, 1304.

cloistered courts by judges who cannot, unlike ministers, be lobbied.⁴¹ As one recent, detailed study has concluded, the result is, if not the end of politics, then its legalisation.⁴² As Loughlin puts it, “judicial review [of statutes] must be seen as the retention of some form of aristocratic rule” in a democratic state, where the aim is “no less than the elimination of the idea of the (political) sovereign and its replacement with the sovereignty of law”.⁴³

As Malleon says, the HRA “is widely recognised as a turning point in judicial activism”.⁴⁴ Who can doubt that as the judicial role swells in political importance there will be a proportionate increase in public criticism of judicial attitudes and decisions, and in political involvement with judicial appointments?

Lord McCluskey pointed out in his Reith lectures that “lawyers spend their professional lives thinking in terms of precedents, rules and remedies . . . the advocate is the father of the judge and neither is a social philosopher”.⁴⁵ The judicial role has always been limited to deciding the case before the court, not wider public issues, and, as argued above, the rules of procedure and evidence are tailored to that end. Judges should not make decisions of social policy since “it is not a role which, by tradition, training or experience they are qualified to perform”.⁴⁶ McCluskey added:

“We should not trust [judges] to write and rewrite the rules; because the judicial system has a powerful constitutional inertia which resists change, because judges balk at changing the settled law, because judges

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cannot reach out and create whole new systems of law, because courts are not equipped to assess the social merits of law reform and because judges are not the right people to make the necessary value-judgements”.⁴⁷

In sum, the proposal is for judges and the entire legal profession to be transformed, from “lawyers and arbiters”, into excellently wise, politically adroit, social engineers. Or, more exactly, they must become the philosopher-guardians recommended as the ideal rulers of society in Plato’s Republic: those rare creatures, that “discerning minority” who manage to combine love of learning, good memory, intelligence, quickness of wit, energy and greatness of spirit with “an orderly, sober and steadfast life”.⁴⁸ Naturally, the group that has tasted the “sweet and blessed possession” of philosophy will be a small élite: “It’s impossible for the masses to be philosophical”.⁴⁹ Law’s Empire is profoundly anti-democratic, with lawyers as its ruling aristocracy.

Those who share [Morgan’s] belief in the value of decision-making by the elected representatives of the people, or even by the people directly, must agree that the HRA is a backward step on the United Kingdom’s path to democracy. It could be that the democratic process is “a gamble” on the possibility that a people will learn how to act in the right way.⁵⁰ Removing ultimate responsibility to the courts, however, may serve only to promote irresponsibility in legislators, as it promotes activism in judges; “genuine and lasting respect

⁴¹ As Klug herself says at 182.

⁴² M. Loughlin, *Sword and Scales: An Examination of the Relationship Between Law and Politics* (2000) passim, and especially at 208–13, 229–35.

⁴³ *Ibid* at 213, 224.

⁴⁴ K. Malleon, *The New Judiciary* (1999) 24 et seq. Perhaps only the acceleration of an existing trend? See J. Rozenburg, *Trial of Strength* (1997).

⁴⁵ McCluskey, *Law, Justice and Democracy* (1987) at 4–5.

⁴⁶ McCluskey, *op. cit.*, at 24.

⁴⁷ McCluskey, *op. cit.*, at 33.

⁴⁸ Plato, *Republic* (tr. T. Griffith, 2000) 431c, 503c.

⁴⁹ *Ibid* at 494a. Compare the extensive education programme which Plato recommends for philosopher-guardians with Leigh & Lustgarten’s strictures upon legal education in England: I. Leigh and L. Lustgarten, “Making Rights Real” [1999] CLJ 509.

⁵⁰ R. Dahl, *Democracy and Its Critics* (New Haven 1989) at 192.

for the rights of others cannot be imposed by judicial fiat; it is most likely to emerge from the dialogue and compromise that characterise politics in a democracy”.⁵¹ Repeal of the Human Rights Act may be “unthinkable”, yet it should take place with alacrity.

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The Position Today: Fractured Law

The law in Britain today is very far from meeting the basic requirement of law, as it was laid down by the distinguished jurist and linguistic philosopher H. L. A. Hart. He said that if it is not possible to communicate general standards of conduct, which multitudes of individuals can understand, *without further direction*, nothing we now recognize as law can exist.⁵² By multitudes of individuals he meant ordinary citizens without legal training. Supporters of the plain language movement argued that the answer lay in persuading legislative drafters to use plain language when drafting statutes, but that proved illusory.⁵³

Quite apart from the HRA, the UK’s joining the EEC led to greatly increased complexity in the law, as shown by the following complaint by a Law Lord, Lord Walker of Gestingthorpe:

“ . . . it has become virtually impossible and almost unacceptable to decide points of this kind in short form. The legal materials on indirect discrimination and equal pay are increasingly voluminous and incredibly intractable. The available arguments have become more convoluted, while continuing to multiply. Separating the wheat from the chaff takes more and more time. The short snappy decisions of the early days of the industrial tribunals have long since disappeared. They have been replaced by what truly are ‘extended reasons’ which have to grapple with factual situations of escalating complexity and with thicker seams of domestic and

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EC law, as interpreted in cascades of case law from the House of Lords and the European Court of Justice”.⁵⁴

In another case Rose LJ criticised the “astonishingly complex provisions” of the Criminal Justice Act 2003 which he called “labyrinthine”, adding that there was much to be said for a sentencing system which, unlike the one laid down by the Act, “is intelligible to the general public” rather than being “decipherable with difficulty by the judiciary”.⁵⁵ And so it goes on.

However, the most potent fracturing agent as regards our law is the HRA - if only because it affects such a high proportion of cases. Like EC law, it imposes a vicious two-tier system. Parliament passes an Act, from which the legal meaning of relevant enactments has to be extracted by applying the usual interpretative criteria. That can be difficult enough, but then the HRA comes along and requires further scrutiny by the courts. It forces British lawyers to look on their statute book through a distorting lens. First they must read a relevant enactment without the lens, extracting the legal meaning that would apply in the absence of the HRA. Next, they must consider whether that legal meaning gives effect to all relevant Convention rights. If it does not they must put the distorting lens to their eye and see whether it is thereby made “possible” to render the enactment Convention compliant by applying the infamous s. 3(1), discussed critically in Part 1 of this article.

⁵¹ J.D. Goldsworthy, *The Sovereignty of Parliament* (Oxford, 1999) at 263.

⁵² H. L. A. Hart, *The Concept of Law* (Oxford, Clarendon Law Series, 2nd edn 1994), p 124 (emphasis added).

⁵³ See F. A. R. Bennion, “Confusion Over Plain Language Law”, 16 *Commonwealth Lawyer* (August 2007 - forthcoming).

⁵⁴ *Secretary of State for Trade and Industry v Rutherford and another* [2006] UKHL 19, [2006] 4 All ER 577, at [37].

⁵⁵ *R v Lang and others* [2005] EWCA Crim 2864.

The worst objection levelled at s. 3(1) is that nobody knows what it means. With typical understatement in the leading case of *Ghaidan* Lord Nicholls of Birkenhead describes it as “not free from ambiguity” and “open to more than one interpretation”.⁵⁶ He goes on:

“Parliament expressly envisaged that not all legislation would be capable of being made Convention-compliant by application of section 3. Sometimes it would be possible, sometimes not. What is not clear is the test to be applied in separating the sheep from the goats. What is the standard, or the criterion, by which ‘possibility’ is to be judged? A comprehensive answer to this question is proving elusive. The courts, including your Lordships’ House, are still cautiously feeling their way forward as experience in the application of section 3 gradually accumulates . . .”⁵⁷

In *Ghaidan* Lord Steyn joins in the criticism, again with understatement. He says “a study of the case law reinforces the need to pose the question whether the law has taken a wrong turning”.⁵⁸ (Of course he is not bold enough to answer his own question in the way his criticisms tend.) Lord Millett dissents in *Ghaidan*, having valiantly striven to bring his view into line with those of his four colleagues. As he wriggles on the hook like an impaled flounder one feels sympathy, even embarrassment, at the plight Lord Millett has been put in by the HRA. This is a difficult exercise, he says. It is one which the courts have not hitherto been accustomed to perform. Under s. 3(1)

“ . . . the court must take the language of the statute as it finds it and give it a meaning which, however unnatural or unreasonable, is intellectually defensible. It can read in and read down; it can supply missing words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point . . . Words cannot mean their opposite; “black” cannot mean “not black”. But they may include their opposite. In some contexts it may be possible to read “black” as meaning “black or white”; in other contexts it may be impossible to do so. It all depends on whether “blackness” is the essential feature of the statutory scheme . . . Again, “red, blue or green” cannot be read as meaning “red, blue, green or yellow”; the specification of three only of the four primary colours indicates a deliberate omission of the fourth (unless, of course, this can be shown to be an error).”⁵⁹

This is a scholarly mind driven to the end of its tether. In *Ghaidan* the Law Lords wrestle valiantly. Criticism is expressed with the diffidence we have come to expect of their Lordship’s House. Yet reading between the lines one senses fine lawyers’ outrage that so vital a provision should be expressed in so clumsy a way.

In fact the fault lies not so much in the drafting as the conception. The political desire was to empower the courts to distort the true legal meaning of legislative language so as to facilitate the full application of the European Convention on Human Rights. It is not the courts’ function to do this, and they should have said as much when the proposed HRA was under consideration by Parliament.

Section 3(1) is a supreme (and supremely disreputable) example of what I have called politic uncertainty.⁶⁰ The almost insuperable difficulties it has imposed on the judiciary (and therefore on the legal profession generally, and their clients) are illustrated by a table drawn up under the supervision of Lord Steyn which details the various ways in which the courts have interpreted it.⁶¹

⁵⁶ *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, at [27].

⁵⁷ *Loc. cit.*

⁵⁸ *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, at [39].

⁵⁹ *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, at [67]-[71].

⁶⁰ See F. A. R. Bennion, *Statute Law* (Longman, 3rd edn 1990), chap. 17,

www.francisbennion.com/1990/002/ch17.htm.

⁶¹ *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, pp. 429-436.

It could have been done differently. Lord Millett points the way:

“Section 3 is in marked contrast with the provisions in the constitutions of former colonial territories in relation to existing laws which are incompatible with constitutional rights. Such provisions commonly authorise the court to construe such laws “with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the constitution”. This is a quasi-legislative power, not a purely interpretative one; for the court is not constrained by the language of the statute in question, which it may

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modify (i.e. amend) in order to bring it into conformity with the constitution.”⁶²

It would have been more honest, and more in keeping with the requirement that law should be certain and predictable, for Mr Blair to have “brought rights home” in the old colonial way. It would however still have been a fracturing incursion into UK law, rendering it as seriously uncertain as s. 3(1) has done. In advance of litigation, one would still be unable to know exactly what the relevant law meant.⁶³

There are many other examples of the modern fracturing of UK law. The establishing by the Scotland Act 1998 of a Scottish Parliament with law-making powers set up a legislature competing with Westminster in certain areas of law. Devolution under the Government of Wales Act 1998 is heading the same way, as indeed is devolution in Northern Ireland. All this makes it more difficult for Hart’s enquiring citizen to understand the law “without further direction”.

Problems over human rights protection do not end with the ECHR and the HRA. There is a rival Charter of Fundamental Rights (CFR) of the European Union. This was adopted on 18 December 2000.⁶⁴ and became part of the Constitution for Europe which still awaits ratification. It does not merely duplicate Convention rights under the ECHR, which would be inconvenient enough. In some ways it slightly varies them, as UK judges have pointed out.⁶⁵ Needless to say Mr Tony Blair is an enthusiastic supporter of the CFR.

Three Strikes Against The HRA

It is now time to introduce the promised three strikes against the HRA, which are based on what is said in the two parts of this article.

- It legitimates individual and group egoism at the expense of society.
- It complicates our law unbearably, so that it is fractured and does not fulfil its function.
- It distorts our Constitution, so that the unelected judiciary is in effect placed above the democratic Parliament.

The rule in baseball is three strikes and you’re out. I join with Jonathan Morgan in suggesting that the same should apply to the HRA.

Additional material

After the above was published, further research led me to add the following.

⁶² *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, at [63], [64].

⁶³ For further details on the damage wrought by s. 3(1) see Jan van Zyl Smit, “The New Purposive Interpretation of Statutes: HRA Section 3 after *Ghaidan v Godin-Mendoza*” 70(2) *Modern Law Review* (2007), pp 294-306.

⁶⁴ *Official Journal of the European Communities* 2000/C 364, 18 December 2000.

⁶⁵ See e.g. *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 All ER 593, at [69]; *Coppard v Customs and Excise Commissioners* [2003] EWCA Civ 511, [2003] 3 All ER 351, at [38].

1. Lord Scarman called the ECHR ‘this strange and stringent legislation’: see *Morris v Beardmore* [1981] AC 446 at 763-764.
2. Regarding the principle of liberty removed not granted which is discussed in the 2002 Morgan article, the following citations are relevant.

Lord Goff of Chieveley said:

‘ . . . whereas art 10 of the [ECHR] . . . proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather upon an assumption of freedom of speech, and turn to our law to discover the established exceptions to it’.⁶⁶

This was cited by Brooke LJ as memorably expressing the difference between freedom-based law and rights-based law. He said:

‘English law, as is well known, has been historically based on freedoms, not rights . . . It is against this background of freedom-based law that the law of confidentiality has been developed.’⁶⁷

⁶⁶ *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283, [1988] 3 All ER 545 at 660 (the *Spycatcher* case).

⁶⁷ *Douglas v Hello! Ltd* [2001] 2 All ER 289 at [64]-[65]. See further F A R Bennion, *Statutory Interpretation* (5th edn 2007) s 263.