# THE HUMAN RIGHTS ACT 1998: THREE YEARS ON

***Human Rights Commission and Law Society of Ireland Public Conference, 18 October 2003***

***The Rt Hon Lord Justice Laws***

1 The general principle is to my mind nearly always more interesting than the particular rule. In this case, general principle requires me to start with some reference to what the English judges were doing *before* HRA became law in the UK. Just as we cannot understand the present (let alone the future) without some understanding of the past, it is certainly impossible to form any useful opinion of the impact of HRA on our domestic law without some treatment of the English courts' approach, before incorporation of ECHR in October 2000, to the very idea of fundamental or constitutional rights. This is an idea which historically had no distinct role in the panoply of the common law.

2 A major field of development in which the law has been dynamic both before and since October 2000 has been the control, principally by means of the judicial review jurisdiction, of public power conferred by statute. Obviously this has engaged the task of statutory interpretation; a task which, though given a sharpened edge by HRA s.3 to which I will come, has never been a value-free exercise. This itself is an important fact. The common law judges have in the past been no less creative when they have developed rules of statutory construction than when they have made new substantive law. They have never been only a medium, merely the voice of Parliament's thought.

3 The natural meaning of words, notoriously, is not for every case a conclusive measure of the statute's true interpretation. The natural meaning may quite often allow more than one construction. In that case, the judge must have another star to steer by: some kind of principle which will tell him which of two or more possible meanings he should adopt. One principle might be: take the meaning which more readily promotes the overall policy and objects of the statute. But this also may be inconclusive. The policy and objects of a statute may be complex; of two or more possible meanings of a particular clause it may be far from clear that one distinctly promotes the statute's policy and objects rather than another. Where does the judge go then? There are bound to be cases, there have always been cases, in which the judge has to fall back on a value system which is independent of the statute itself, in order to decide how a measure should be interpreted. This is why in *principle* the judges are not and cannot be merely the voice of Parliament's thoughts.

4 There is nothing new in this. When did the common law courts first lean against giving an Act retrospective effect? When did they first hold that penal and taxing statutes should be strictly construed? When did they first decide that where there are two irreconcilably inconsistent statutory provisions, the later impliedly repeals the earlier? What were the courts doing in all these instances? In denying retrospective effect they were repudiating arbitrary and unascertainable law. In applying a judicial asceticism to penal and taxing statutes they were upholding the liberty of the individual against the heavy hand of the State. In the doctrine of implied repeal (a doctrine which however, as appears later, I think now to be heavily modified), they were vindicating the sovereignty of Parliament and thus the

democratic principle. They did all these things long before there was any Human Rights Convention, let alone any Human Rights Act. What in truth they were doing was upholding what we would now call constitutional fundamentals.

5 So it is that in principle the business of statutory interpretation is not and cannot ever be entirely value-free. This is perhaps most acutely true in relation to the interpretation of written constitutions. Perhaps I may be forgiven for quoting a very brief passage from an essay of mine which appears in a collection published in 1998 under the title *Importing the First Amendment*[1]:

> "…the task of ascertaining the constitution's meaning *systematically* involves an ordering of ideals which cannot be done by resort only to the text. Plainly, if a constitution (or the part under consideration) is capable of more than one interpretation, the 'right' interpretation cannot be got out of the language alone. But there will always be more than one interpretation: the document's core provisions will inevitably be classed in general terms, and, no less inevitably, they will seek to uphold or vindicate more than one value – for example political freedom and national self-preservation – such that the values sought to be upheld are in potential conflict. If a constitution purported to uphold only one value it would be a recipe either for insecurity and anarchy or for dictatorship."

6 When I come shortly to HRA, and in particular section 3, I shall say that one of the things the Act has done has been to provide a lexicon for at least many cases where the court has to apply values in the task of statutory interpretation. The lexicon consists in the core rights guaranteed by ECHR. But let me first look briefly at what the English courts had been doing in the field of interpretation where constitutional rights were involved in the years before HRA.

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[1] Hart Publishing 1998, ch. 7: *Meiklejohn, the First Amendment and Free Speech in English Law*, pp. 124-125.

*Before HRA*

7 HRA came into force on 2 October 2000. About 15 months before that their Lordships' speeches were delivered in the case of *Simms* [2002] AC 115 Lord Hoffman said this at 131 E-G:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract form this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed 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 of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

Here, then we can see articulated, in the days before the coming into force of HRA, a principle of constitutional protection: protection of fundamental or constitutional rights in the name of the principle of legality, effected by nothing more nor less than the court's function of mediating Acts of Parliament to the public: in short, the function of statutory interpretation. "Fundamental rights cannot be overridden by general or ambiguous words." That is not Parliament's law. It is the judges' law. It points to the balance that has to be struck between the protection of constitutional rights and the vindication of majoritarian rule. The way in which this balance is

struck always marks the quality of a democratic constitution. It shows that, at least in the context of fundamental or constitutional rights, the law of statutory construction is very far from being some adjectival Cinderella. On the contrary it is the hand that steers the constitution's tiller; and this the overall theme of this paper.

8 The articulation of this balance has become more acute, and the means of striking it more sophisticated, since and because of the provisions of HRA. But before coming to that I must give one or two further instances of things done by the courts in England in this area before 2 October 2000.

9 *Ex p. Witham* [1998] QB 575 was a case decided in the Divisional Court of the Queen's Bench Division not long before the government of the United Kingdom changed hands after the general election of 1997. It was contended that amendment by the Lord Chancellor of an Order relating to court fees effectively barred indigent people from the court door, and this was unconstitutional. As it happened it was I who gave the first judgment, at the invitation of Rose LJ. At 581B ff I said:

> "The common law does not generally speak in the language of constitutional rights, for the good reason that in the absence of any sovereign text, a written constitution which is logically and legally prior to the power of legislature, executive and judiciary alike, there is on the face of it no hierarchy of rights such that any one of them is more entrenched by the law than any other. And if the concept of a constitutional right is to have any meaning, it must surely sound in the protection which the law affords to it…
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> In the unwritten legal order of the British State, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose vires

> in main legislation specifically confers the power to abrogate. General words will not suffice. And any such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it."

10 Rose LJ agreed in the result in *Witham*, and the decision was not appealed. My impression is that the reasoning in it is now largely regarded as uncontroversial. Of course there are other cases. I should mention in particular an earlier decision of their Lordships' House *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, in which it was held (I quote the headnote):

> "… since it was of the highest public importance that a democratically elected governmental body should be open to uninhibited public criticism, and since the threat of civil actions for defamation would place an undesirable fetter on the freedom to express such criticism, it would be contrary to the public interest for institutions of central or local government to have any right at common law to maintain an action for damages for defamation…"

Giving the only reasoned speech Lord Keith referred to much common law authority, including the very well known decision of the Supreme Court of the United States in *New York Times v Sullivan* (1964) 376 US 254, and said at 551F:

> "My Lords, I have reached my conclusion upon the common law of England without finding any need to rely upon the European Convention. My noble and learned friend, Lord Goff of Chieveley, in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283-284, expressed the opinion that in the field of freedom of speech there was no difference in principle between English law on the subject and article 10 of the Convention. I agree, and can only add that I find it satisfactory to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under the Treaty in this particular field."

11 This decision, if I may say so, was as surely based on a conception of fundamental constitutional rights and principles as were others in which the language of such rights is perhaps made more express. Accordingly we can see that for some years before HRA came into force the common law, in yet another instance of its ability like the phoenix to renew itself, was coming face to face with a species of rights that could indeed be called constitutional, or fundamental. A major weapon in the armoury for the protection of constitutional rights has been the court's power and duty to construe enactments in such a way that no such right could be abrogated by a mere implication. One of the lessons of this, I think, is that while HRA is without question a statute of very great significance – legally, politically, and constitutionally – the court's duty of interpretation was not radically changed by it into a different kind of legal creature. Before and after 2 October 2000 there was and is a span or continuum in which this judicial function of interpretation has not changed in kind, but only in the sharpness of its importance and the sophistication of its execution.

*The Human Rights Act 1998*

12 The means by which, in HRA, the draftsman chose to incorporate ECHR into English domestic law has been regarded by many commentators in England as involving an elegant reconciliation between the traditional conception of parliamentary sovereignty and the conferment of a legal priority upon the Convention rights. I think this is a justified opinion. The primary measure of incorporation is s.6(1): "it is unlawful for a public authority to act in a way which is incompatible with a Convention right". The elegant balance, if indeed that is what is, is to be found in particular in the provisions of sections 3 and 4. Here is s.3(1):

> "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."

S.3(2) provides that the section does not affect the validity of any incompatible primary legislation, or incompatible subordinate legislation "if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility". Of course, in promoting the Bill which became the Act, ministers appreciated that there might be a case in which it was *not* possible to read an enactment compatibly with the Convention rights pursuant to s.3(1). Hence s.4(2):

> "If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility".

It is then made clear (s.4(6)) that a declaration of incompatibility does not affect the validity of the provision in respect of which the declaration is made. S.10 gives the consequences of a declaration of incompatibility. It enables (but does not require) a Minister of the Crown to amend the legislation by order so as to remove the incompatibility which the courts have found.

13 It is useful to note what was said in the House of Lords by the Lord Chancellor on the second reading of the Human Rights Bill on 3 November 1997[2]:

> "The [Act] sets out a scheme for giving effect to the Convention rights which maximises the protection to individuals while retaining the fundamental principle of Parliamentary sovereignty. [Section 3] is the central part of this scheme. [Section 3(1)] requires legislation to be read and given effect to so far as it is possible to do so in a way that is compatible with the Convention rights. [Section 3(2)] provides that where it is not possible to give a compatible construction to primary

[2] Hansard HL, 3 November 1997, col. 1294.

> legislation or to subordinate legislation whose incompatibility flows from the terms of the parent Act, that does not affect its validity, continuing operation or enforcement. This ensures that the courts are not empowered to strike down Acts of Parliament which they find to be incompatible with the Convention rights. Instead, [s. 4] together with [s. 10] introduces a new mechanism through which the courts can signal to the Government that a provision of legislation is, in their view, incompatible. It is then for government and Parliament to consider what action should be taken. I believe that this will prove to be an effective procedure and it is also one which accords with our traditions of Parliamentary sovereignty. That is why the [Act] adopts it ."

14 As has been said more than once in the cases, s.3, the interpretation section, is undoubtedly a strong provision. It is instructive to consider how far the English courts have held that s.3 requires them to go in the construction of an enactment whose ordinary language most readily yields an interpretation which is incompatible with the Convention rights. One area where they have been quite active in that respect is in criminal law, not least in cases where the judges have had to confront a provision which imposes or appears to impose a burden of proof on the defence.

15 By way of introduction to this topic I should notice the decision of the European Court of Human Rights in *Salabiaku* (1988) 13 EHRR 379, dealing with the requirement of ECHR Article 6(2), which provides that "[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law". In *Salabiaku* the court said (paragraph 28):

> "Article 6(2) does not… regard presumptions of fact or law provided for in the criminal law with indifference. It requires states to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."

In *Lambert* [2002] 2 AC 545 the House of Lords was concerned with s.28(2) of the Misuse of Drugs Act 1971, which provides so far as relevant:

> "…in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which is necessary for the prosecution to prove if he is to be convicted of the offence charged."

The House was prepared to hold that s.28(2) could be read as imposing no more than an *evidential* burden on the defence – notwithstanding the words "it shall be a defence for him to prove". Lord Hope of Craighead proceeded at paragraph 78 ff to explain how s.3 should be employed. At paragraph 79 he said:

> "The obligation [sc. to construe enactments compatibly with the Convention rights], powerful though it is, is not to be performed without regard to its limitations. Resort to it will not be possible if the legislation contains provisions, either in the words or phrases which are under scrutiny or elsewhere, which expressly contradict the meaning which the enactment would have to be given to make it compatible. The same consequence will follow if legislation contains provisions which have this effect by necessary implications…. it is not for [the judges] to legislate. Section 3(1) preserves the sovereignty of Parliament. It does not give power to the judges to overrule decisions which the language of the statute shows have been taken on the very point at issue by the legislator."

In holding that s.3(1) entitled and required the court to read down s.28(2) so that it imposed no more than an evidential burden, Lord Hope at paragraph 84 referred to what Lord Cooke of Thorndon had said in *Kebilene* [2000] 2 AC 326, 373:

> "…for evidence that it is a *possible* meaning one could hardly ask for more than the opinion of Professor Glanville Williams in 'The Logic of "Exceptions"' [1988] CLJ 261, 265 that 'unless the contrary is proved' can be taken, in relation to a defence, to

> mean 'unless sufficient evidence is given to the contrary'; and the statute may then be satisfied by 'evidence that, if believed, and on the most favourable view, could be taken by a reasonable jury to support the defence'."

16 In *Lambert* Lord Hope referred to what had been said in *R v A (No 2)* [2001] 2 WLR 156. That case concerned s.41 of the Youth Justice and Criminal Evidence Act 1999, which provided that at the trial of a defendant charged with a sexual offence the leave of the court was required to adduce evidence or ask questions in cross-examination about any sexual behaviour of the complainant. S.41(2) allowed the court to give leave for such evidence or questioning only if it was satisfied (so far as relevant) that ss.3 applied. Ss.3(b) applied to cases where the evidence or questioning were related to an issue of consent to sexual conduct "and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of charge against the accused". S.41(3)(c) also allowed leave to be given where the issue was one of consent and it was said that the complainant's sexual behaviour was (I summarise) especially similar to any behaviour of his or hers taking place as part of the event which gave rise to the charge or which took place at or about the same time as that event. The House of Lords held (I take this from the headnote):

> "… that the temporal restriction in section 41(3)(b) could not be construed as permitting evidence or questioning other than in respect of Acts which were really contemporaneous with the incident charged: but that under section 41(3)(c), construed where necessary by applying the interpretative obligation under section 3, and always giving due regard to the importance of protecting the complainant from indignity and humiliating questioning, the test of admissibility was whether the evidential material was nevertheless so relevant to issue of consent that to exclude it would endanger the fairness of the trial under Article 6".

Lord Steyn said at paragraph 44:

> "It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings. It is an emphatic adjuration by the legislature: *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, per Lord Cooke of Thorndon, at p 373F; and my judgment, at p 366B. The White Paper made clear that the obligation goes far beyond the rule which enabled the courts to take the Convention into account in resolving any ambiguity in a legislative provision: see Rights Brought Home: The Human Rights Bill (1997) (Cm 3782), para 2.7. The draftsman of the Act had before him the slightly weaker model in section 6 of the New Zealand Bill of Rights Act 1990 but preferred stronger language. Parliament specifically rejected the legislative model of requiring a reasonable interpretation. Section 3 places a duty on the court to strive to find a possible interpretation compatible with Convention rights. Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: section 3 is more radical in its effect. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it: compare, for example, articles 31 to 33 of the Vienna Convention on the Law of Treaties (1980) (Cmnd 7964). Section 3 qualifies this general principle because it requires a court to find an interpretation compatible with Convention rights if it is possible to do so."

17 HRA s.3, and the manner in which the courts have deployed it, seem to me to raise important issues about the relation between the judiciary and legislature. The traditional doctrine of statutory interpretation was, of course, to the effect that the judges were supposed to do the best they could to divine the intention of Parliament in the legislative measure before them. They would start with the ordinary meaning of the words: if that produced an unreasonable result or one which appeared to be in conflict with other provisions in the Act which made it clear what were the legislation's policy and objects, then the court might adopt a secondary interpretation. HRA s.3 surely enjoins the judges to adopt a radically different view of legislative intention. Now, the *prevailing* legislative intention will be that contained in HRA.

Another statute – whether passed before or after HRA – might be entirely clear as to the policy and objects which are intended, and might contain a provision or provisions whose interpretation according to their natural meaning would support the Act's policy and object as so stated. If however, the fulfilment of the Act's purpose through the section or sections in question would in the court's view involve a violation of a Convention right, then the court is to *prefer* the legislative intention of HRA over the legislative intention of the other Act, and construe the offending provision accordingly, unless, in truth, it is linguistically impossible to do so.

18 In my opinion this rule of interpretation itself substantiates the view that the law of England now recognises a hierarchy of rights and principles which gives full weight and ample space to the conception of constitutional rights. The process involves a re-thinking of what is involved with the statutory interpretation. It is no longer concerned only with the ascertainment of Parliament's will in the statute before the court. It is concerned rather with the ascertainment of Parliament's will against a compulsory backdrop in which protected constitutional rights are now an axiom, a given in the debate. I believe this to be of a piece with some observations I made in the Divisional Court in *Thoburn* [2002] 4 AER 156, known in England as the "metric martyrs" case. I will just give this passage from paragraphs 62 and 63:

> "62 … In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental… And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional' statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights;

> (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998. The 1972 Act clearly belongs in this family. It incorporated the whole corpus of substantive Community rights and obligations, and gave overriding domestic effect to the judicial and administrative machinery of Community law. It may be there has never been a statute having such profound effects on so many dimensions of our daily lives. The 1972 Act is, by force of the common law, a constitutional statute.
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> 63 Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's *actual*—not imputed, constructive or presumed— intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes. I should add that in my judgment general words could not be supplemented, so as to effect a repeal or significant amendment to a constitutional statute, by reference to what was said in Parliament by the minister promoting the Bill pursuant to *Pepper* (*Inspector of Taxes*) *v Hart* [1993] 1 All ER 42, [1993] AC 593. A constitutional statute can only be repealed, or amended in a way which significantly affects its provisions touching fundamental rights or otherwise the relation between citizen and state, by unambiguous words on the face of the later statute."

19 Whether this view of an evolving constitution will take root or be regarded as heresy remains to be seen. For the purposes of this discussion I would only claim for it that it represents a kind of response to developments in our law which are no less than tectonic plates moving below the surface of our statutes and our cases. Our membership of the European Union requires us to confront the relation between the law of the Union and the home-grown law of England. It is to be done by re-shaping the rules of statutory construction. HRA requires us to confront the special

importance of the Convention rights. It is to be done, as in this case the statute tells us in terms, by re-shaping the rules of statutory construction. Both of these contexts drive us to an acknowledgement of something which in past years was alien to the law of England but meat and drink for written constitutions: it is, as I have said, the existence of a hierarchy of rights, and thus a hierarchy of laws.

20 The courts have of course been doing other things within the frame of HRA than applying s.3. I cannot deal with every instance. It is interesting that[3] since 2 October 2000, by May 2003 only some three declarations of incompatibility had been made under s.4; there had been a little over 20 applications. This suggests (though it does not demonstrate) either that the courts have applied s.3 with particular vigour, or that statutes of the United Kingdom touching the subject-matter of the Convention rights are in any event very largely ECHR-compliant. The likelihood is that there is a meld of both these factors. Either way, we are developing a legal culture in which fundamental constitutional principles are not alien, are not mere add-ons to the general law, are not optional extras. This generates many challenges. One of them which especially interests me is the limitations and downright drawbacks of a social and moral culture in which *rights* have pride of place; but that is for another seminar.

21 From all this we can see that the discipline of statutory interpretation has arrived at a new maturity. It is no longer a mere handmaiden of the law, dismissed by patronising descriptions as being no more than ancillary or parasitic upon what the law is really about. It is no less than a means of arbitrament between the democratic principle and the protection of individual rights. But this should not be any surprise.

It has, in reality, been no little part of the *métier* of judges for more generations than might be acknowledged, even in this role of arbiter. The truth is, it has now become naked; and so it constitutes a process much more open to scrutiny than previously. In confronting the balance to be struck between the exigencies of current legislation on the one hand and on the other the vindication of constitutional principle given focus by the Convention rights, the courts have been ready enough to give proper place to constitutional principle.

22 We have had quite a lot of litigation touching ECHR Article 6, the requirement of access to an independent and impartial court. Established practices have in that context more often than not passed muster but we have had to sharpen up in some instances. However we have encountered one particular problem relating to Article 6 which has generated quite a substantial body of litigation. It arises where a statutory scheme provides for a first decision, say as to a person's entitlement to a benefit of some kind, to be taken by an in-house official (typically, an officer of a local authority); it is accepted that that process does not of itself satisfy Article 6 because the official is not sufficiently independent or impartial, and the question is whether the deficit, as it were, is made good by the availability of judicial review or statutory appeal against the first decision. The problem has been most recently confronted by the House of Lords in *Runa Begum* [2003] 2 WLR 388, which concerned the homeless persons legislation. The House held that "having regard to the scope of article 6(1) as extended to administrative decisions which were determinative of civil rights, such a decision might properly be made by a tribunal which did not itself possess the necessary independence to satisfy the requirements of article 6(1) so long as measures

[3] According to the researches of Mrs Lynne Knapman of the Administrative Court, for which I am

were in place to safeguard the fairness of the proceedings and the decision was subject to ultimate judicial control by a court with jurisdiction to deal with the case as its nature required." Lord Hoffmann said this at paragraphs 57

> "57 National traditions as to which matters are suitable for administrative decision and which require to be decided by the judicial branch of government may differ. To that extent, the Strasbourg court will no doubt allow a margin of appreciation to contracting states. The concern of the court, as it has emphasised since *Golder's* case 1 EHRR 524 is to uphold the rule of law and to insist that decisions which on generally accepted principles are appropriate only for judicial decision should be so decided. In the case of decisions appropriate for administrative decision, its concern, again founded on the rule of law, is that there should be the possibility of adequate judicial review. For this purpose, cases like *Bryan* and *Kingsley* make it clear that limitations on practical grounds on the right to a review of the findings of fact will be acceptable.
> 58 For these reasons I agree with the Court of Appeal that the right of appeal to the court was sufficient to satisfy article 6. I should however say that I do not agree with the view of Laws LJ that the test for whether it is necessary to have an independent fact finder depends upon the extent to which the administrative scheme is likely to involve the resolution of disputes of fact. I think that a spectrum of the relative degree of factual and discretionary content is too uncertain. I rather think that Laws LJ himself, nine months later, in *R (Beeson's Personal Representatives) v Secretary of State for Health* [2002] EWCA Civ 1812, had come to the same conclusion. He said, at para 15: 'There is some danger, we think, of undermining the imperative of legal certainty by excessive debates over how many angels can stand on the head of the article 6 pin.'
> 59 Amen to that, I say. In my opinion the question is whether, consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators. If so, it does not matter that there are many or few occasions on which they need to make findings of fact. The schemes for the provision of accommodation under Part III of the National Assistance Act 1948, considered in *Beeson's* case; for introductory tenancies under Part V of the Housing Act 1996, considered in *R (McLellan) v Bracknell Forest Borough Council* [2002] 2 WLR 1448; and for granting planning permission, considered in *R (Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] 1 WLR 2515 all fall within recognised categories of administrative decision making. Finally, I entirely endorse what Laws LJ said in

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grateful.

> *Beeson's* case, at paras 21-23, about the courts being slow to conclude that Parliament has produced an administrative scheme which does not comply with constitutional principles."

23 There have also been important cases concerning the nature of judicial supervision of executive decisions by government and the question how far HRA requires a more intensive form of judicial review than was represented by the traditional *Wednesbury*[4] approach. This has been addressed quite recently by the House of Lords in *R (Prolife Alliance) v BBC* [2003] 2 WLR 1403, which concerned a prospective election broadcast showing the products of a suction abortion. The broadcasters had banned transmission of the video on taste and decency grounds. The Court of Appeal, in a decision to which I was a party, held the ban to amount to an unlawful restriction of free expression. That was overturned by the House by a majority of 4 to 1. I am not concerned here with the details of the case, but with the guidance to be had from it as to the necessary scope or reach of judicial "deference" in the review of executive decisions. There is general agreement that the intensity of review depends on the subject-matter; indeed this was clear before the HRA. In *Prolife* Lord Walker said this (paragraphs 143 – 144):

> "143 I add a footnote in relation to the article by Richard Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 MLR 859. This draws extensively on Canadian human rights jurisprudence and discusses the notion of human rights legislation as formalising a constitutional dialogue between different branches of government, with each branch being in a sense accountable to the other (see Iacobucci J in *Vriend v Alberta* [1998] 1 SCR 493, 565-566, paras 138-139). The article is critical of the British judiciary for being over-deferential and insufficiently principled in its approach to proportionality under the 1998 Act.
> 144 As to deference, I would respectfully agree with Lord Hoffmann that (simply as a matter of the English language) it may not be the best word to use, if only because it is liable to be misunderstood. However the elements which Mr Edwards puts

[4] [1948] 1 KB 223.

> forward, at pp 873-880, as his basis for a principled approach (largely drawing on Canadian jurisprudence: legislative context; the importance of the Convention right in a democracy; mediation between different groups in society; respect for legislation based on considered balancing of interests; recognition of 'holistic' policy areas which are not readily justiciable; and respect for legislation representing the democratic will on moral and ethical questions) appear to me by no means dissimilar from the principles which do emerge from *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 and other recent decisions of your Lordships' House. The *Wednesbury* test…, for all its defects, had the advantage of simplicity, and it might be thought unsatisfactory that it must now be replaced (when human rights are in play) by a much more complex and contextually sensitive approach. But the scope and reach of the 1998 Act is so extensive that there is no alternative. It might be a mistake, at this stage in the bedding-down of the 1998 Act, for your Lordships' House to go too far in attempting any comprehensive statement of principle. But it is clear that any simple 'one size fits all' formulation of the test would be impossible."

24 Ultimately we are concerned with a robust and beneficial tension between the two ideals that face each other in any modern and civilized state: democracy and the rule of law; utilitarianism and rights; the majoritarian principle and the protection of minorities; even means and ends: however you choose to put it. It is this tension that breathes life into constitutions. We are having to be acutely aware of it in the United Kingdom where we are famously said to lack a written constitution; I prefer to acknowledge that we have no codified constitution. Here in Ireland I am sure, if I may say so, that you will be treading familiar ground. But viewed from either shore of the Irish Sea, Confucius was surely wrong to say that it is a curse to live in interesting times.

16 October 2003