DURING the final decades of the twentieth century, there was a steady shift in power from politicians to judges, as judicial review, the mechanism by which public bodies are held legally accountable, became increasingly important. This shift received considerable impetus with the passing of the Human Rights Act 1998 (HRA), which came into force in England and Wales on 2 October 2000. It not only provides an additional ground for individuals to challenge executive action, but it also gives the courts wide interpretative powers and a set of principles against which the actions of public bodies can be measured. It is too early to determine the effect of the Human Rights Act on executive/judicial relations. However, there is already some evidence of how the courts will use their new powers. This article will examine this evidence, as provided by judicial review, private law and human rights actions brought in the courts during the year 2000. It will then consider the wider implications of the HRA.

Judicial decisions during 2000

Judicial review. At the beginning of the year 2000, the issue of General Pinochet still lingered. The legal intricacies of the case had preoccupied the courts since October 1998 but early in the new millennium the matter was resolved when the challenge of the decision of the Home Secretary, Jack Straw, to allow Pinochet to return to Chile on the grounds that he was unfit to stand trial was unsuccessful and the general left the country. The judges were, no doubt, relieved to see the end of the Pinochet saga, not only because of the highly charged nature of the succession of challenges and appeals to which it had given rise, but also because of the damage caused to the reputation of the House of Lords by the Hoffmann incident. Lord Hoffmann, one of the Law Lords who had heard Pinochet’s appeal against extradition, had a close association with Amnesty International and this was held by an appeal panel of the House of Lords to have given rise to a real danger of bias. As a result, the House of Lords had to rehear the case. The finding of bias produced a surge of challenges on similar grounds and confusion among judges as to when they should stand down from hearing cases. These culminated in the Locobail case, heard by the Court of Appeal in November 1999,¹ which sought to give some guidance. However, the issue of bias did not go away, arising in the context of the Human

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Parliamentary Affairs (2001), 54, 223–237
Rights Act and the European Convention on Human Rights in the year 2000 (see below).

One of the most high profile decisions of 2000 was the ruling by the High Court that the Lottery Commission had acted unfairly in ruling out Camelot’s bid to continue running the national lottery while giving Richard Branson’s ‘People’s Lottery’ more time to fine tune its bid. The Commission therefore had to remake its decision and this time found in favour of Camelot. Some regulatory bodies, like the Lottery Commission, have statutory powers enabling them to give effect to their decisions. Others, such as the Monopolies and Mergers (now the Competition) Commission, rely on ministers to act for them. Ministers cannot, however, use the opportunity to enforce requirements beyond those stipulated by the regulator. Hence, when the Secretary of State for Trade and Industry made an Order which imposed far greater restrictions on the demands tour operators could make of travel agents than those recommended by the Commission, the court held he had acted beyond his powers. This was the first time judicial review had been used successfully in the area of competition law and demonstrated the ever-increasing reach of public law remedies.

Two other instances where ministers were found to have acted beyond their powers, concerned the Secretary of State for Education and Employment and the Lord Chancellor. In the case of the former, his attempt to make an Order giving him the power to determine the threshold criteria which would give teachers access to higher rates of pay, was held to be illegal. It had been made without reference to Parliament and without consultation. Moreover, there were already criteria, which had been decided in the context of the performance management framework. The Lord Chancellor was also held to have acted illegally in making a Rule that an asylum seeker was deemed to have received notice of the determination of the special adjudicator on the second day after it was posted, regardless of whether the notice was actually received. This, said the Court of Appeal, had the effect of limiting the right to appeal, as an appeal had to be lodged within five days of the date on which notice was deemed to have been received.

Decisions made against ministers, such as the above, have the capacity to embarrass a government. Moreover, if they come at a time when there is already tension between judges and politicians, they can result in public conflict. This was the situation in 1995–96 when the Conservative Home Secretary, Michael Howard, and senior members of the judiciary seemed to be on a collision course. Labour ministers and judges have so far avoided any open dispute. There are a number of reasons for this. Firstly, Labour’s law-and-order and sentencing policies are less contentious than those of their predecessors. Secondly, the approach of ministers in general, and the Home Secretary in particular, is less confrontational than that of some ministers in the previous government. Thirdly, ministers would seem to be more concerned to
act within the law. Indeed, fourthly, some of the decisions found to be unlawful during 2000, such as the one against the Lord Chancellor, considered above, were made by Conservative ministers: there was therefore no need to defend them. Whether this relatively harmonious relationship will continue when human rights issues are to the fore remains to be seen.

Two important decisions, which did not directly involve ministers but have implications for the public purse, concerned the pension entitlement of public servants in risk occupations. In *ex parte Stewart*, the Court of Appeal ruled that for the purposes of the police pension scheme, if a police constable was not fit for operational duties she was entitled to be retired from the force. She could not be assigned office duties instead, as this did not constitute ‘the ordinary duties of a police constable’. Similarly, in *ex parte Lockwood* it was held that the incapacity to fight fires meant that a fire fighter was disabled within the pension rules. Both cases are the subject of appeal. Service personnel were not so fortunate when the House of Lords ruled that the scheme for compensating members of the armed forces who were victims of crimes of violence while serving overseas, would not apply to a service-man injured after his UN accommodation block was targeted by a Serbian tank while he was serving with the UN peace-keeping force in Bosnia. It accepted the government argument that the attack was military, not criminal.

PRIVATE LAW REMEDIES. While challenges of the decisions and actions of public bodies by way of judicial review have increased significantly over the last twenty years, the extent to which private law remedies can be sought against the state and its agencies has remained very limited. This is understandable. Awards of damages have to be paid out of public money and the benefit to the individual of receiving compensation therefore has to be balanced against the detriment to the wider community of a loss of funds. In addition, private law actions, which can be brought up to six years after the damage is discovered, create uncertainty for public bodies. However, during 2000 the courts extended the situations in which they would consider actions against public bodies in both contract and tort. In *Clark v. University of Lincolnshire and Humberside* the Court of Appeal accepted that, despite the public nature of universities, it had jurisdiction to consider actions for breach of contract within the new universities. The basis for its decision was that, unlike the old universities, new universities do not have a Visitor to determine disputes. In this case it found in favour of a student that there had been a breach by the examination committee of the examination regulations relating to plagiarism. While the Court of Appeal stated categorically that matters concerning academic judgement were not for the judges to consider, the ruling clearly had implications for new universities.
There were also implications for local authorities in the unanimous decision of seven Law Lords that a local authority could be held liable for breaches by those it employed, including their duties of care towards pupils of educational psychologists and teachers. These breaches could include the failure to diagnose dyslexic pupils and to provide appropriate education for pupils with special needs. Similarly, also in the field of education, the court found that where bullying was concerned a school owed a duty of care, which meant it ‘must take reasonable steps to minimise bullying and to address problems in a positive manner’. Sale Grammar School, Manchester, was held to have fallen down on its procedures and therefore to be in breach of its duty of care. There is likely to be a spate of damage claims, relating to bullying, under the Human Rights Act, using two Convention articles, the right to be free from degrading treatment and the right to an education.

Human rights cases. The Human Rights Act incorporates the European Convention on Human Rights and, by so doing, protects a number of fundamental rights and freedoms. It will not only impact upon judicial/executive relations but will have a profound effect on the nature and amount of litigation, the jurisprudence of the courts, the decision-making processes of public bodies and the relationship between the citizen and the state. It was in recognition of its impact that its implementation was delayed for two years. This has given time for judges and magistrates to undergo intensive training, as well as for government departments to conduct an audit of policies and procedures to bring them into line with human rights’ requirements. Ministers express confidence that they can withstand most challenges, although they are less certain about public bodies outside their direct control. The evidence from Scotland, where the Act took effect along with devolution legislation, suggests that there is likely to be an initial deluge of challenges. It also suggests that very few of these will be successful, only ten out of some 350 challenges having so far found for the applicant. However, while small in number, some of the decisions had far reaching implications.

In England and Wales, human rights could not form the sole basis for challenge before 2 October. However, rights issues, supported by reference to Convention Articles, were raised in conjunction with other grounds throughout the year 2000. Moreover, judges in the High Court and the Court of Appeal were careful to consider them, as failure to do so might result in a new ground for challenge on appeal if this was heard after the Act took effect. The year, therefore, provided a useful insight into the judicial handling of rights issues in England and Wales, as well as in Scotland. Rights raised during the year included the right to life, the right not to be subject to torture or degrading treatment or punishment, the right to liberty, the right to a fair trial, the right to free speech, the right to respect for private life and the right to non-
discrimination, all of which were subject to interpretation by UK judges, on occasions backed by decisions of the European Court of Human Rights.

The right to life (Article 2). The right to life is likely to arise in disputes concerning medical treatment and, while the courts will no doubt continue to defer to medical opinion, the consideration of such matters in the context of human rights makes the judges central to the debate. Such cases frequently concern parents seeking to challenge the decision of doctors and pose particularly difficult questions for the judges that hear them. This was evident in the case of D, a nineteen-month old child who suffered from a chronic, irreversible and deteriorating lung condition. The Health Authority wanted permission not to resuscitate the child in the event of a future respiratory or cardiac failure but to limit its role to providing full palliative care to ease his suffering and to let his life end peacefully. The parents argued that this infringed both Articles 2 and 3, the right not to be subjected to inhuman or degrading treatment, which includes the right to be allowed to die with dignity. The Court granted the wishes of the Health Authority but made it plain that the paramount consideration was the welfare of the child. Framing its decision in term of the rights argued, it stated that it was not approving a course of action which was aimed at terminating life or accelerating death but one which would prevent further suffering, through painful intervention, and allow him to die with dignity. It followed that there was no breach of the child’s rights under the Convention.10

The issue raised in D was non-treatment. In a test case brought before the President of the High Court Family Division, Dame Elizabeth Butler-Sloss, it was whether medical treatment could be withdrawn or whether this was contrary to the right to life. In granting her consent for two women who were in a ‘permanent vegetative state’ to be allowed to die, Dame Elizabeth argued that such patients were in effect dying and should continue to be allowed to die with dignity. Withdrawing treatment in such circumstances did not contravene the Convention.11

One of the most difficult decisions in the year 2000 fell to the Court of Appeal to consider. This was the case of the Siamese twins, Mary and Jodie. The issue was whether doctors should be allowed to separate them against the wishes of the parents. Without separation, both twins would die. Separating them would give Jodie a chance of life but condemn Mary to death. The Court of Appeal, which took full account of the right to life provision within the European Convention, ruled in favour of separation, as, in its view, Mary lived ‘on borrowed time; time borrowed from her sister.’12 The reasoning of the court was detailed, coherent and compassionate, as behove a decision around which there was personal tragedy and much public interest. Moreover, Lord Justice Ward broke the rule that judges do not speak publicly
about a case before giving judgment, telling the BBC of the ‘excruciatingly difficult’ dilemma he and his colleagues had faced.

A feature of the case was the attention paid by the media to the background of the judges involved. Particular reference was made to their religious backgrounds, as the beliefs of the parents, who were devout Roman Catholics, were central to the case. Thus Lord Justice Ward, who, it was reported, was once voted ‘the most human face of the judiciary’, was said to be a former pupil of Christian Brothers College in Pretoria, South Africa, a school which offers ‘holistic education based on Catholic traditions’, although he was married in an Anglican church and has subsequently divorced and remarried. Lord Justice Brooke was described as ‘a deeply compassionate man’ who ‘hails from a family with a strong Anglican traditions’. He was also noted as having been a critic of the tough sentencing policies of the previous Home Secretary, Michael Howard, and as ‘liberal-leaning’. For his part, Lord Justice Walker was stated to have been educated at a Roman Catholic School and ‘seen as intellectually rigorous’. Such attention to judicial backgrounds had been evident in the Pinochet case in 1999 and seems likely to become a feature of high-profile human rights cases. Inevitably, it means that the lives and value systems of judges will become subject to closer scrutiny than previously and the notion that judges make decisions in a vacuum, unaffected by their background and beliefs, will finally be laid to rest.

While challenges on the basis of the right to life are most likely in the medical context, they can arise elsewhere, as in ex parte Manning where, despite the verdict of unlawful killing by a coroner’s jury, the Director of Public Prosecutions (DPP) decided not to prosecute after a man had died in police custody. The Court of Appeal quashed his decision, holding that while there was no general requirement for the DPP to give reasons, he would usually be expected to do so in such circumstances because the right to life, enshrined in the ECHR, imposed high requirements when it had been violated. Its ruling demonstrated that a major effect of the Human Rights Act is that decisions which adversely affect individual interests will need to be reasoned and more fully documented than previously.

As regards the right not to be subjected to torture or to inhuman or degrading treatment or punishment (Article 3), the robust line taken by the Court of Appeal in ex parte Manning was also evident in its response to a challenge of the Home Secretary’s decision not to grant an asylum seeker exceptional leave to remain in the UK. The asylum seeker argued that he would be subjected to torture or to inhuman or degrading treatment or punishment if returned to his home country. Rather than accepting the minister’s view that this would not be the case, the Court of Appeal decided that it should examine the facts behind the decision to see whether or not these compelled a different conclusion to that arrived at by the Home Secretary. Such an approach
means that the courts are not simply looking at the lawfulness of the decision, i.e. was it made in the correct way, but also at it merits. Some would argue that this is not a new practice; this is what the courts have always done when considering whether a decision is unreasonable. However, when giving effect to the Human Rights Act, looking at the merits of a decision is more overtly part of the process.\textsuperscript{14}

The right to liberty (Article 5) and the safeguards provided when liberty is curtailed, were the subject of a Scottish challenge, which also raised, for the first time, a devolution issue. The applicants, who were detained in mental institutions, not only claimed that their human rights under Article 5 had been infringed by the Mental Health (Public Safety and Appeals (Scotland)) Act 1999 but that the Scottish Parliament, which is required to act in accordance with the Human Rights Act and therefore the European Convention on Human Rights, had acted outside its competence in passing the legislation. They were unsuccessful, the Court of Session unanimously holding that the rights of the individual could be infringed when this was in the interests of the community. In this instance, Parliament was justified in passing legislation which encroached on the right to liberty in order to protect the public. The Act was, therefore, compatible with the Convention and within the competence of Parliament.\textsuperscript{15}

The rationale behind the judgment was the need to protect the public, and this issue arose later in the year in one of the first cases to be heard in England under the Human Rights Act. The case concerned a challenge of Michael Howard’s ‘two strikes and you’re out’ policy, on the grounds that it was arbitrary and not proportionate and, as a consequence, breached the right to liberty.\textsuperscript{16} The policy had been given effect in the Crime (Sentences) Act 1997 which requires judges to impose an automatic life sentence when a defendant is found guilty of a second serious offence. Senior judges had opposed the legislation, arguing that sentencing should be a matter for judicial discretion, and the Conservative Home Secretary had made a small concession to judicial sensibilities by including a provision allowing a judge to deviate from imposing a life sentence when there were ‘exceptional circumstances’. However, judicial disquiet remained. The challenge to the legislation was therefore a test of the skill and diplomacy of the newly appointed Lord Chief Justice, Lord Woolf. He reasoned that the intention behind the Act was to protect the public and that imposing an automatic life sentence on someone who was a danger to the public did not contravene the European Convention. However, passing such a sentence on a defendant who did not present such a danger, could be disproportionate. To ensure compliance with the Convention, ‘exceptional circumstances’ should therefore be interpreted to include all cases where there was not a significant risk to the public.

Lord Woolf thus avoided the political controversy which could have arisen had he found that Act to be incompatible with the Convention,
but, nevertheless, returned some control over sentencing to the judges. He argued that the application of the Human Rights Act had improved both judicial administration and parliamentary policy and therefore implied that both judges and politicians should be satisfied with the decision. In practical terms, it resulted in two out of the five applicants having a sentence of three years substituted for life imprisonment, as Woolf did not consider they posed a significant risk to the public. It may yet produce some 250 challenges by other prisoners.

The right to liberty was also considered by the European Court of Human Rights in two cases, both of which had implications for prison policies. The first was brought against the United Kingdom government by a prisoner on the grounds that a two-year delay between Parole Board reviews was not reasonable, as it infringed the requirement of Article 5 that someone deprived of their liberty should be able ‘to take proceedings by which the lawfulness of his detention shall be decided speedily’. The Court found for the applicant and held that, as a consequence, his continued detention was unlawful.17 The second case was likewise brought by a prisoner, this time one who was being held at Her Majesty’s pleasure. His argument was that after the expiry of the tariff which set the term of his sentence, he was entitled to have the lawfulness of his detention reviewed ‘speedily’. The Court agreed. Moreover, it stressed that such review should be by a body offering the necessary judicial guarantees.18 This, of course, rules out the Home Secretary, an issue discussed below.

The right to a fair trial (Article 6) has a number of dimensions and challenges under it are likely to be the most frequent. They also have the most implications for government and its agents. One of the key requirements is the right to be heard and to have one’s sentence determined by an independent and impartial tribunal. This raises questions about the Home Secretary’s sentencing role, which in recent years has come under scrutiny in the national courts. In several cases judges have expressed their unease at a minister having the power to determine sentences and have sought to ensure that at least he exercised it fairly and reasonably.19 In 1999, the matter came before the European Court of Human Rights in a twofold challenge by Thompson and Venables, the two boys detained at Her Majesty’s Pleasure for the murder of Jamie Bulger. The first limb of the challenge was that their right to a fair trial had been breached because they had been tried in an adult court. The second limb was that their right to have their case heard and their sentence determined by an unbiased tribunal had been infringed because the tariff, that is the length of time they should be detained for purposes of retribution and deterrence, was decided by the Home Secretary, a member of executive.20 The ECHR found in their favour on both counts.

As a result of the ruling, the Lord Chief Justice, Lord Woolf, published a Practice Directive (17 February 2000), laying down princi-
ples for the trials of children and young persons. It stated that the ordinary trial process should be adapted to have regard for the welfare of young defendants, so that they were not exposed to ‘avoidable intimidation, humiliation or distress’ and were helped ‘to understand and participate in the proceedings’. This adaptation included all participants in a trial being on the same level, young defendants being able to sit with their families, proceedings being explained in a way that they could understand, frequent and regular breaks being given to them, and wigs and uniforms not being worn in the court. Also in compliance with the ruling, the Home Secretary asked Lord Woolf to review the tariffs of those sentenced for murder while juveniles and to set any new tariffs, pending the passing of legislation. In response, Lord Woolf, in another Practice Directive stated that before making a recommendation he would invite written representations from the detainees’ legal advisers and from the DPP, who would include representations on behalf of the victims’ families. He further stated that his recommendation would be made in open court with reasons given and would be subject to appeal. On 26 October 2000, following the process he had outlined, Lord Woolf gave his decision on Venables and Thompson, recommending that they should be freed as soon as possible.

The ruling of the ECHR concerning the Home Secretary’s powers and the subsequent assumption by the Lord Chief Justice of the minister’s sentencing role only applied to those detained at Her Majesty’s pleasure, that is to those who were juveniles when found guilty. However, it would seem likely to extend to adults who are convicted of murder and face a mandatory sentence of life imprisonment. They too have their tariff decided by the Home Secretary. The case of Myra Hindley therefore looms. A challenge by Hindley of the Home Secretary’s decision that, subject to periodic review, he did not propose ever to release her was heard by the House of Lords in March 2000. Jack Straw had argued that however long she served, it would not exhaust the requirement of retribution and deterrence in the circumstances of the case. However, he had made clear that he would be prepared to consider representations in the future on Hindley’s behalf. In this, his decision differed from that of his predecessor, Michael Howard, who had stated he would never contemplate freeing her; life should mean life. Thus while Howard had been held to have acted unlawfully by fettering his discretion, Straw’s decision was found to be lawful. Hindley was therefore unsuccessful on this occasion but is likely to be back for a further attempt under the Human Rights Act and the probability of a further challenge was no doubt the reason behind the Lord Chancellor’s insistence that Parliament would not necessarily always act in accordance with the view expressed by the courts. Thus while the courts might make a ‘declaration of incompatibility’ stating that the UK law prescribing the power of the Home Secretary in instances of mandatory life sentences is incompatible with the European
Convention, the government might find it politically expedient to ignore it, at least until the European Court of Human Rights makes a ruling.

A case which centred on a different aspect of the right to an independent and impartial tribunal, namely on independence, was heard by a Scottish court at the end of 1999. The applicant had been tried before a temporary Sheriff whose appointment was subject to annual renewal by the Secretary of State for Scotland, and he argued that this infringed his right to an independent and impartial tribunal. The court agreed, holding that ‘a judge who has no security of tenure and whose appointment was subject to annual renewal was not “independent” within the meaning of Article 6’. It was therefore unlawful for the Crown in Scotland to prosecute a man before such a judge. The decision had considerable implications for the 129 temporary sheriffs and resulted in the immediate appointment of more permanent judges, although not sufficient to prevent there being an increase in the waiting times for cases to be heard. Moreover, a similar challenge could be successful in England and Wales, where Assistant Recorders, who occupy the first rung on the judicial ladder, likewise lack security of tenure and are dependent on the Lord Chancellor, again a government minister, for the renewal of their positions and their progression to the second rung.

The Scottish decision was subsequently limited by the ruling that it is not an abuse of a person’s human rights for a claim for damages to be heard by a temporary judge appointed by the Crown for three years, as long as the Crown itself was not involved in the claim. It seems, therefore, that temporary judges can still sit on some civil cases. The Scottish courts have also held that Article 6 is not contravened when a person accused of contaminating a public water supply is sent to trial before a jury drawn from the area served by the supply, when this amounted to some 150,000 homes. It would be different, of course, if individuals on the jury had suffered personal injury from the contamination.

A further right embodied within Article 6 of the ECHR is the right to remain silent when charged with an offence and the Scottish High Court held that this right was breached by reliance in court of an admission obtained compulsorily under the Road Traffic Act 1988. The Act requires the keeper of a vehicle to reveal the name of the driver, when an alleged offence has been committed, even if this means the keeper incriminating herself, and the court considered that such self-incrimination was contrary to the Convention. On this occasion, the offence was drink driving and there were obvious implications for other traffic offences, including speeding. However, on appeal the Privy Council held that the individual’s right not to incriminate herself was not absolute but had to be balanced against the public interest in the enforcement of road traffic legislation. In making this balance, the requirement was that the curtailment of the right must be proportionate.
In its view, the Act was in compliance with this requirement. Moreover, it did not undermine the defendant’s right to a fair trial. Thus the use of speed cameras and other detection mechanisms can continue and those caught by such means, who had hoped to use the Scottish case as a defence, have been disappointed.

Also enshrined within Article 6 is the principle that, as far as possible, parties to court proceedings should be on an equal footing, such that neither side is disadvantaged in the presentation of its case. This principle, known as ‘equality of arms’, was applied by the High Court in a case concerning the proposed deportation of a failed asylum seeker who had a civil claim outstanding against the Home Office. The claim arose from a prosecution brought against him because of his alleged involvement in riots at Campsfield detention centre. The case against him collapsed and he sued the Home Office for malicious prosecution. The court held that to deport him before his claim was settled would offend the principle of equality of arms. He would clearly be at a disadvantage if he were no longer in the country.

The right to freedom of speech also provided the basis for a challenge in a case heard after the Human Rights Act came into effect. It concerned an injunction which had been granted to prevent a newspaper from publishing information about the fostering policies of a Local Authority. The judge ruled that as there was no convincing evidence of a pressing social need to prevent publication, the injunction should be lifted. Moreover, she made clear that where convention rights were concerned it was not a question of balancing the public interest in publication against the public interest in confidentiality. The right to free speech should always be upheld unless there was convincing evidence to the contrary. The position is different, however, where individuals are concerned. Here the right to freedom of speech needs to be balanced against the right to privacy. This arises from the protection afforded to private life by the Convention and, in December 2000, it was upheld by the High Court for the first time, when Catherine Zetter-Jones and Michael Douglas succeeded in their challenge of Hello! magazine. The need for a privacy law to prevent intrusive media coverage has often been mooted, but the preferred British model has been a system of non-legal regulation. This is now supplemented by the Human Rights Act. How much difference it will make to press reporting will depend on the judges’ view of when revelations about an individual are in the public interest. This will seldom be the case where private individuals are concerned and it seems likely that the more salacious coverage of the lives of public figures will be curtailed.

While the above Convention rights were raised in challenges before the UK courts during the year 2000, others were also raised in the European Court of Human Rights, with implications for the United Kingdom. The ECHR considered that the right to respect for private life was compromised by the prosecution and conviction of a man for
engaging in non-violent group homosexual acts in private. In its view, legislation which prohibited consensual non-violent sexual acts between more than two men in private went beyond what was necessary in a democratic society for the protection of morals or health or the rights and freedoms of others.\textsuperscript{26} United Kingdom legislation will therefore have to be amended. Indeed, many statutory sexual offences will need to be reviewed in the light of the Human Rights Act, both in terms of respect for private life and non-discrimination. \textit{The right to non-discrimination} was also raised in a case brought by two men whose wives had died leaving them with dependent children to bring up. They argued that they should receive the same social security benefits as widows, a point conceded by the British government which in a friendly settlement agreed to pay the men benefits in arrears and to continue to do so until the Welfare Reform and Pensions Bill came into effect.\textsuperscript{27}

\textbf{The role of the judges in the year 2000 and beyond}

The cases considered above are an indication of the effect of the Human Rights Act on the way in which the judges will be involved in generating social and political change. Some, for example J.A.G. Griffith, argue that they have long had this involvement. However, the Human Rights Act makes this more obvious. Judges will not only be scrutinising decisions made by those in public office but will also be giving effect to statutes in a way which is compatible with Convention rights ‘in so far as it is possible to do so’. This means that they will where necessary read words into statutes to ensure compatibility, even if this alters the substance of what Parliament intended. Moreover, through making a ‘declaration of incompatibility’ judges will in effect be initiating legislation, a role technically confined to politicians. In fact, this already happens in relation to EU law and judicial review, where the increase in applications can, in part, be attributed to the liberal ‘reading into statutes’ of the principles of fairness and reasonableness. However, in the main judges have camouflaged their policy and legislative roles by explaining their decisions in the language of statutory interpretation and the will of Parliament. This will be more difficult where rights are concerned and their role in the policy-making process will therefore be more overt.

As a consequence, questions about judicial accountability and independence from the government become more important. These largely centre on the appointment of judges. The judicial appointments system in England and Wales has frequently been criticised on the grounds that it is secret and discriminatory. The last two Lord Chancellors, Lords Mackay and Irvine, introduced some transparency into the system and in 1999 Lord Irvine commissioned an inquiry by Sir Leonard Peach (the then Commissioner for Public Appointments) to consider whether the system discriminated against women, ethnic minorities and those who were solicitors, rather than barristers. Sir Leonard found it did not.
Indeed, he commented favourably on the way in which judges were appointed. However, his conclusions, which did not apply to appeal court judges or the Law Lords, whose appointments were not within his remit, did not halt criticism from groups like Justice, which believe that the Human Rights Act makes it imperative for the appointment of all judges to be independent of the executive. Hence calls for a Judicial Appointments Commission, which either makes appointments itself or makes recommendations to an appropriate minister who has to give reasons if he does not follow its advice. The call for such a Commission is coupled with cries for greater judicial accountability. Suggestions include the publication of information on judges, including their business interests and membership of charities and other organisations (all new judges are already required to disclose their membership of a Masonic lodge) and the scrutiny of those appointed as Law Lords by a committee of Parliament which would not have power to confirm (as its US counterpart has) but could bring to public attention the views and values of those who will occupy positions of considerable power.

It is not only the appointment process that may need to be changed to give judges a greater appearance of independence. The Human Rights Act requires a more formal separation between the judiciary and other branches of government than has previously been the case. This was evident in the McGonnell case decided by the ECHR early in 2000. It concerned the Bailiff of Guernsey, who occupies a similar position to the Lord Chancellor in one of the Channel Islands, not themselves part of the UK but signatories to the ECHR through the Crown. The ECHR held that ‘any direct involvement in the passage of legislation, or executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over its interpretation’. The decision could challenge the position of the Lord Chancellor as judge and thus the validity of any panel of judges of which he is a part. It could also have a bearing on the position of the Law Lords themselves. At the least, it means they will have to be very careful not to express opinions on legislation which may subsequently disqualify them from sitting judicially should they be required to interpret it. In the long run, to protect their independence, the Law Lords may need to remove themselves from the House of Lords when that sits as a legislature, and disentangle themselves altogether from their links with the Lord Chancellor.

Conclusion

As is evident from the above discussion, the effect of the Human Rights Act is not confined to the nature of the actions which will be brought before the courts. It could result in fundamental constitutional, organisational and structural changes. It has, in fact, already been instrumental in the timing, if not the substance, of reforms in the High Court. Following the Bowman Report (March 2000), the division of the High Court...
Court, which hears public law cases, was renamed the Administrative Court, in recognition of ‘the continuing need for a special court to deal with public and administrative law cases’. This need is likely to increase with the Human Rights Act and it is no coincidence that the change in name was given effect at the same time that the Act came into force. To make the court more user-friendly, the names of the orders made by the court were also changed, an order for mandamus becoming a mandatory order and an order for certiorari a quashing order. There is also now a lead judge, Mr Justice Walker Scott, who has overall responsibility for the speed, efficiency and economy of the Court, although how he will be held to account for this responsibility is unclear.

The move towards the judicial management of cases and, indeed, the management of other judges, was also reflected at the most senior level by the appointment of Lord Woolf as Lord Chief Justice, Lord Phillips as Master of the Rolls and Lord Bingham as senior Law Lord, Lord Bingham’s elevation to this position on the retirement of Lord Browne Wilkinson breaking with the usual practice of the longest-serving Law Lord assuming the role. It is assumed that, with the Human Rights Act coming on stream, the natural successor, Lord Slynn, was not considered such a safe pair of hands.

However, the greatest importance of the Human Rights Act lies in its contribution to the development of a rights culture and to a new role of the judges. Moreover, the Human Rights Act may only be the beginning, for in 2000 the Draft European Charter, which constitutes a European Bill of Rights, was published. It is based on similar principles to the European Convention but is more specific, providing fifty rights which would underpin European life. If it comes into being, it will add another dimension to rights and to the judicial role. There is therefore the possibility of more power to the judges—and more power to the people.

2 R v. Secretary of State for Trade and Industry ex parte Thompson Holidays (The Times, 12.1.00).
3 R v. SOS for Education and Employment ex parte National Union of Teachers (The Times, 8.8.00).
4 R v. SOS for Home Department ex parte Saleem (The Times, 22.6.00).
6 R v. West Yorkshire Fire and Civil Defence Authority ex parte Lockwood CA (The Times, 18.7.00).
7 Clark v. University of Lincolnshire and Humberside CA [2000] 3 All ER 752.
9 (The Times, 24.10.00).
11 NHS Trust A v. M; NHS Trust B v. H (The Times, 29.11.00).
12 Re A (Children) CA, (The Times, 10.10.00).
13 R v. DPP ex parte Manning (The Times, 19.5.00).
14 R v. SOS for the Home Department ex parte Turgut (The Times, 15.2.00).
15 Anderson and others v. The Scottish Ministers and Another (The Times, 21.6.00).
23 Stott (Procurator Fiscal Dunfermline) v. Brown (The Times, 6.12.00).
24 R v. SOS for Home Department ex parte Quaquash (The Times, 21.01.00).
25 Richmond upon Thames LBC v. Holmes and Others (The Times, 20.10.00).