

The Human Rights Act 1998

by Jonathan Cooper

In this article Jonathan Cooper, Human Rights Project Director of JUSTICE, examines the new Act in terms of its likely role in modernising the constitutional framework for the protection of rights.

The *Human Rights Act 1998* (HRA), which gives further effect to the bulk of the substantive rights of the *European Convention on Human Rights* (ECHR), is acknowledged as marking a watershed in the UK system of government. It may also be the defining piece of legislation for this government. The Act, for the first time as a matter of UK law, recognises that all within the country have certain minimum and fundamental human rights. This represents a dramatic shift in the constitutional arrangement which was premised on the Diceyan assumption of negative rights, the theory of which was that individuals could do as they pleased unless Parliament or the common law said that they could not.

The HRA adopts basic universal, inalienable and inherent civil and political rights and affirms that their recognition is essential to the preservation of human dignity. Their inherent nature stems from the fact that they are the birth right of all human beings. They are not granted to citizens, but are given to people simply by reason of their humanity. They are inalienable because people cannot agree to give them up or have them taken away. They are universal because they apply to all persons regardless of their status, such as nationality, religion, sex or race. The Act, by defining the relationship between the government and the governed, lays down markers of acceptable behaviour and it is intended to nurture a new concept of citizenship based upon rights and responsibilities.

This paper reflects upon the design of the HRA, considers the method adopted to incorporate human rights and speculates on how successful its scheme will be in guaranteeing rights. At the same time it addresses the Act's strengths and weaknesses. It also explores the likely impact that the Act will have on the existing system of government and developing UK jurisprudence, practice and procedure.

RIGHTS v LIBERTIES: SETTLING THE DISPUTE

As far as the UK is concerned, the HRA would appear to have resolved the 300-year-old debate between those who advocate enforceable human rights standards as an essential component of maintaining human dignity, and those on the other hand who put their faith in the inherent goodness of human nature, as personified by the democratic process in Parliament, to protect against the ravages of individual governments and/or harsh laws. By definition, the existence of the HRA suggests that the debate has been settled in favour of those who believe in prescribing rights.

However, what is intriguing about the Act is the alchemy at its core, whereby the concept of parliamentary sovereignty is retained despite the guarantee of human rights standards. The Act accepts that Parliament could legislate contrary to the fundamental standards contained therein. In that event, all that a victim of such a violation could do would be to seek a declaration of incompatibility from the higher courts that the legislation in question was contrary to his or her human rights. Until the statute is changed, and there is no obligation on Parliament to remedy the defect, the violation remains lawful despite the inconsistency with the HRA.

WATERSHED IN UK LAW

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It will still be open to such a victim to petition the European Court of Human Rights and seek redress in Strasbourg. If that court upholds the UK courts' decision it then becomes incumbent, only as a matter of public international law, on the British Government to change the law. The theory of parliamentary sovereignty is therefore retained at the heart of government: Parliament may do as it wishes even where fundamental rights are concerned; even if, in reality, as now, those rights will eventually be enforced.

So what has changed? On this level the Act appears to maintain the status quo (although the immediate impact of s. 3(1), once in force, is to overturn *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696). As such, those who advocate the absolutism of human rights principles can in fact take little comfort from the HRA. On closer inspection, however, it may be that the Act's framers have stumbled upon a truly innovative answer to that conundrum of the modern constitution: how to ensure that all branches of government take rights seriously and have a responsibility for their implementation, maintenance and development.

BRINGING IN RIGHTS

By incorporating the substantive rights of the ECHR, the HRA is introducing the following universal and core rights into UK law: the right to life, protection from torture, inhuman and degrading treatment, protection from forced or compulsory

labour, right to liberty and security, right to a fair hearing, protection from retrospective criminal law, right to private and family life, freedom of religion, freedom of expression, freedom of assembly, right to marry, right to enjoyment of possessions, right to education, right to free elections and, in relation to these substantive rights, freedom from discrimination. The abolition of the death penalty, as a principle of human rights protection, has also been introduced into the HRA.

The Act, by simply relying on the main provisions of the ECHR, is arguably limiting its potential. The convention should be seen as a product of its time. It was drawn up in response to the atrocities committed throughout the 1930s and 40s. As a Council of Europe document, ratified in 1951, it should also be considered in the context of the emerging Cold War. Despite its interpretation as a 'living instrument', the document itself is dated. For example, it does not include in its definition of human rights a number of social and economic rights which can also be considered as synonymous with human dignity and integrity, such as employment, housing, welfare or healthcare, nor is there specific reference to the rights of children. Furthermore, the convention, significantly, does not guarantee an autonomous right to equality and non-discrimination.

INTEGRATING RIGHTS: THE ACT'S SCHEME

The Act shrewdly requires that the enforcement of rights should not be left exclusively to the courts, although clearly the courts will play a leading role in its implementation. Its scheme is as follows. The Act imposes a statutory duty on all public authorities to act compatibly with convention rights (s. 6(1)). Courts and tribunals are included within the definition of public authority (s. 6(3)(a)). Once the HRA is in force, the common law will be read to give effect to its provisions and, so far as it is possible to do so, all courts and tribunals will be required to interpret primary and secondary legislation consistently with it (s. 3). If the courts cannot read primary legislation to comply with the Act they cannot strike it down. The higher courts are only empowered to declare such legislation incompatible with the HRA (s. 4(2)). Parliament is under no duty to respond to such a declaration; however, if there are 'compelling reasons', the Act specifically provides for a fast-track procedure to amend an incompatible statute by way of Order in Council with Parliament ultimately being required to sanction this change in the law (s.10). It remains open to Parliament to amend inconsistent legislation through the traditional legislative process.

The positive benefit of ultimately leaving liability for incompatible statute law with Parliament is that its members cannot abdicate from their duty to legislate in compliance with human rights standards. If they do, the courts will now have a forceful method to draw their attention to any violation. Parliament cannot therefore wash their hands of an issue by legislating in breach of the HRA with the knowledge that the courts will ultimately assume responsibility for inconsistent policy. The negative effect of the new framework is that Parliament can choose not to respond and in that event the judges, as independent arbiters, are powerless. The violation – and its human consequences – would therefore remain unchecked.

Finally, the Act imposes a duty on government to state that all future legislation is compatible with it, thus seeking to nurture a rights culture at the heart of government and Whitehall (s. 19). This provision is already in force and it appears that these statements of compatibility are to be limited to bald assertions that the bill in question conforms, in the ministers' opinion, with the Human Rights Act. Any detail is to be teased out by parliamentary debate and questions. Whilst it is regrettable that the government's duty under s. 19 is not being developed further, the likely effect of the statements is that a much more potent rights culture will emerge in both Westminster and Whitehall than exists at present. Evidence of this is the commitment to establish a Parliamentary Human Rights Committee.

THE ACT'S FUNDAMENTAL FLAW

The Act's scheme specifically acknowledges that human rights should be integral to all aspects of government in a modern democracy. Despite this recognition, however, a fundamental flaw in the Act's structure is that it fails to include a human rights commission. Such an institution should have been an essential corollary to incorporation. The omission of a commission is likely to prove a false economy. It could have played an invaluable role in bringing rights to life. Interestingly, the government does appreciate the potential of such organisations. A new human rights commission is to oversee and keep under review the adequacy of human rights protection in Northern Ireland.

A commission or commissioner for human rights could have taken responsibility for overseeing the effective implementation of the Act and ensuring that all aspects of public life adopt its provisions to their best effect. In the absence of a commission, the primary means of enforcement will be through the courts. Therefore, this defining piece of legislation, on the back of which a new concept of citizenship is expected to be forged, will come alive principally through the adversarial process of litigation.

on the internet

<http://www.hms.o.gov.uk/acts>

The full text of the *Human Rights Act 1998* may be found on the Stationery Office website.

MAKING REMEDIES EFFECTIVE

Although the Act incorporates the majority of the main convention rights, the right to an effective remedy for breach of a convention standard, as guaranteed by art. 13 of the ECHR, has been specifically excluded. During the Parliamentary debates, the Lord Chancellor sought to justify this omission by stating that the remedial provisions in the Bill in general and in clause (now section) 8 in particular, were sufficient to satisfy the requirements of art. 13 and therefore to include it would be unnecessary (Hansard, HL, Nov 18 1997, vol 583, col 475). Section 8 empowers the courts to fashion remedies within their powers. However, the fact of the Act's existence and the presence of s. 8 may not adequately reflect the obligations imposed by art. 13 to guarantee an effective remedy.

The difficulty facing the government appears to have been how to reconcile the concept of a declaration of incompatibility

with the guarantee of an effective remedy, the problem being that there may be circumstances where a declaration of incompatibility would be insufficient to satisfy art. 13, especially if Parliament and/or the government choose not to act and amend inconsistent legislation. In such circumstances a potential victim's only remedy will remain in Strasbourg.

WEAKNESSES IN THE ACT

The Act has been criticised in two areas for being weak and ill thought-through. These are the definition of a 'victim' and the access to damages and compensation. As will be shown below, these weaknesses may stem from an attempt to integrate into the Act the approach taken by the European Court and its interpretation of the convention. The difficulty with placing an over-reliance on the procedural requirements of the convention, is that what may be appropriate for an international regulatory body, which is subject to the constraints of international law, may not suit domestic practice and procedure.

Definition of a victim

A controversial feature of the Act is the definition of a 'victim'. This is because the Act relies upon the same test which is used by the European Court of Human Rights. That court will only receive applications from victims or potential victims. This test differs from the broader standing test in English judicial review which permits 'representative standing', which has meant organisations who are not and will not become a victim may also petition the courts to challenge decisions which may affect that organisations broader aims and objectives.

A consequence of the adoption of the more limited test in the HRA is that confusion and possibly unfairness may follow. If the courts follow a literal approach, it could mean, for example, if an asylum organisation seeks to challenge a policy which will affect all asylum seekers, their human rights arguments could be heard if raised under the common law, statute or European Community law, but not if pursued under the more comprehensive Human Rights Act. For the sake of clarity and simplicity, if nothing else, it is regrettable that the HRA did not choose the same approach as laid out in the Rules of the Supreme Court. The existence of the two tests is likely to require a degree of judicial gymnastics to avoid potential injustice.

Compensation and damages

A further area where the Act may become subject to criticism is in relation to damages and awards of compensation. As already discussed the Act provides for judicial remedies. In relation to awards of compensation, s. 8(4) requires the UK courts to take into account the principles adopted by the European Court of Human Rights under art. 41 of the convention. However, the difficulty with the court's awards of damages and compensation is that they do not adopt a coherent approach. One of the reasons for this is that, as an international tribunal, the court is unable to fully assess a damages award. In the absence of detailed argument and counter-argument, that court's main function has been, as a court of principle and last resort, to offer declaratory relief. Even though, the court has taken advantage of its powers under art. 41 to award, if necessary, 'just satisfaction'. Any such awards have been ad hoc and bear no relation to UK statutory or common law principals for awarding damages.

The requirement for UK courts to take into account the European Court's powers under art. 41 is an unnecessary fetter on their jurisdiction which may cause confusion and uncertainty. A likely consequence is that much argument will be expended seeking to establish discernible Strasbourg principles appropriate to the UK from the court's case law. This in turn may result in the development of a hierarchical damages system: one under the HRA and the other under existing principles. Again the integrity of the Act may be called into question as lawyers, aware of the limits of art. 41, opt to pursue a human rights claim indirectly under, for example, Community law, instead of directly under the HRA.

CONSEQUENCES FOR UK GOVERNMENT AND JURISPRUDENCE

The Act will also profoundly alter the traditional approaches of the courts. The following touches upon how the Act and its interpretation will affect existing constitutional arrangements.

The globalisation of UK jurisprudence

The Act requires that the judgments, opinions and decisions of the European Court and Commission of Human Rights, and those of the Committee of Ministers of the Council of Europe, be taken into account, and thus introduces a whole new body of case law into UK law (s. 2(1)). However, they are not binding on the UK courts, and it is anticipated that a vibrant British human rights jurisprudence will emerge which acknowledges that Strasbourg provides a standard below which it cannot fall.

Additional sources of law which will help form the developing UK human rights jurisprudence are other international human rights obligations such as the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention for the Elimination of all Forms of Racial Discrimination* (CERD), the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW), the *Convention Against Torture, and other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT), and the *Convention on the Rights of the Child* (CRC). These are all United Nations treaties which are binding on the UK.

Other Council of Europe conventions, such as the *European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment*, should also be taken into consideration. The social and economic rights treaties of the UN, International Labour Organisation, Council of Europe and other international bodies will be persuasive. In addition 'soft' law from international organisations, such as rules, declarations and guidelines, will be relevant in the interpretation of HRA principles.

DUTY ON GOVERNMENT

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Further sources of inspiration will include decisions and judgments from other common law jurisdictions with guaranteed human rights. The decisions of the courts in the US, India, Canada, New Zealand and South Africa are likely to be particularly influential.

An inevitable consequence, therefore, of the HRA will be that the UK courts will have no option but to look beyond this jurisdiction to find aids of construction for human rights principles. Whilst this reliance on extra-jurisdictional case law has been a growing trend, particularly in relation to public law and European Community law, it is likely that it will become a feature of litigation in all courts and tribunals which seek to rely on human rights principles and/or standards.

The doctrine of implied repeal

The internationalisation of UK case law will not be the only constitutional by-product of the HRA. The Act will impact upon the traditional jurisprudence of the UK in a number of other ways. Where the Act's scheme will have an inevitable consequence is in relation to the doctrine of implied repeal. As is clear from the face of the legislation, the Act has unique legislative status in that all existing and future legislation is to be read to give effect to the HRA, where possible. However if no such construction is possible, the legislation remains in force. The Act therefore overlooks the traditional doctrine of implied repeal.

Acknowledging retrospective effect

A further, and novel, development of the HRA is that it permits an alleged victim of a breach of the HRA to rely on its provisions in proceedings brought against them by a public authority, regardless of when the act took place (s. 22(4)). The act does not need to have taken place once the Act is in force. This section is of great significance as it permits the Act, under those circumstances, to have retrospective effect. Those classified as public authorities for the purpose of the HRA already need to be fully aware of the potential impact of the Act and take their decisions in the light of its provisions.

FUNDAMENTAL FLAW

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A purposive construction

Human rights principles will demand a fundamentally different approach to construction and interpretation. The convention is a dynamic document, a 'living instrument' to be interpreted in the light of present day circumstances. These principles have meant that the European Court of Human Rights in turn requires that all law is given a purposive and teleological interpretation. This means that not only will the intention behind the legislation become more relevant, its interpretation by the courts will be examined in context and in light of the object and purpose of the law. Traditional principles of strict construction will therefore inevitably fall away as the evolving nature of the convention requires a correspondingly evolutionary interpretation. Inevitably, this development will have an impact on the doctrine of *stare decisis*.

Proportionality

The development of a general teleological approach to construction is not the only significant change to judicial

interpretation. A fundamental feature of human rights standards and their interpretation is that most decisions which affect those standards will now be measured against the test of proportionality. This principle, also used in Community law, is the lifeblood of human rights enforcement. It is possibly the introduction of this test more than any other feature of the HRA which will mark the most radical changes post-incorporation. It requires a reasonable relationship between the goal pursued and the means used. As such, when rights are involved any interference with them should impair as little as possible the right or freedom in question. Additionally, any measures adopted which may or will interfere with rights must be carefully designed to meet the objectives in question. Finally, they must not be arbitrary, unfair or based on irrational considerations.

Significantly, proportionality requires that even if the objective of the limitation is of sufficient importance and it has been carefully designed to limit the right as little as possible, it may still not be justified, because of the severity of the effects of the measure on individuals or groups.

The requirement for policy which affects fundamental rights now to satisfy the proportionality test is the area where human rights standards are likely to have the most significant impact on UK law, practice and procedure. Previously a decision which had been taken lawfully could only be challenged on the basis of reasonableness and then it could only be impugned if it was so unreasonable that no-one could reasonably have been expected to reach the same decision. The test was that of irrationality, not rationality. Now, all decision makers, from ministers to legislators, administrators to judges, will be required to satisfy proportionality principles. Surviving a proportionality challenge will be the art to formulating a successful human-rights-sensitive policy.

Enforcing rights between private parties

A further area where the HRA is likely to have a profound effect is on the interaction between public and private law. The HRA creates a statutory cause of action against public authorities which act in breach of its standards. However an essential issue which remains unresolved is the extent to which the HRA will apply in the regulation of affairs between private parties. Will the Act have horizontal as well as vertical application – i.e. will private individuals and/or companies be able to enforce their human rights against other private individuals and/or companies? Will the Act's scheme permit the rights contained within it to be enforced in private litigation? Has it created a de facto common law cause of action, a new constitutional tort? Can a plaintiff rely upon the horizontal application of human rights between private parties, or non-state actors? The concepts of horizontal and vertical application should be considered as the two extremes on a continuum, with a variety of approaches in between.

CONCLUSION

Although the constitutional consequences of the HRA are beyond question, some still cannot be anticipated until the Act is in force and up and running. What is not in dispute is that the Act will have a profound impact on the development of the UK constitutional framework, the system of government and jurisprudence. However, the fundamental question will be, can

the Act's scheme deliver? Can a system for the protection and enforcement of recognised human rights guarantee those rights in the absence of a judicial power to strike down inconsistent legislation? This quandary is compounded by the fact that the Act does not guarantee an effective remedy for a breach of fundamental rights and neither does it provide for an institution charged with responsibility for their maintenance.

Without question, the Act has increased the tools available to the courts, Westminster and Whitehall to promote human rights. Human rights will now be written into the language of government. A culture of rights will also emerge which will mean that the repeal of the HRA and a return to the *ancien régime* is as likely as a revocation of the *Parliament Act* 1911. If the scheme works, the government-inspired method of adopting prescribed human rights may also become a constitutional innovation to be followed in other jurisdictions. If there can be a genuine shared custodianship of fundamental rights between the different branches of government, a cardinal dilemma would be resolved.

However, ultimately the HRA system is based upon trust, and whilst there is no reason to believe that we cannot have every confidence in all branches of government, what if a constitutional crisis ensues where the courts declare legislation

incompatible and the government refuses to act, with Parliament accepting the government line? Although Strasbourg exists as ultimate arbiter of the Convention, to rely upon it to enforce those standards domestically makes a mockery of the Act. The debate therefore, may not be over, and those that believe in the absolute character of rights may be vindicated. However, even if such a scenario can be envisaged, it should not be anticipated.

The HRA's fascination is that it has the potential to produce a dynamic rights culture which engages government and civil society in a healthy dialogue. Under this scheme the promotion and enforcement of rights can take place at all levels and not just in the highest courts. This must be welcomed and the opportunities it presents developed. 

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