The United Kingdom's Statutory Bill of Rights

Constitutional and Comparative Perspectives

EDITED BY
ROGER MASTERMAN & IAN LEIGH

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RMWM and IDL
May 2012

Synopsis

By providing enforceable remedies for breaches of Convention Rights in domestic courts, and in allowing judges to scrutinise parliamentary legislation on human rights grounds, the United Kingdom's Human Rights Act 1998 marked a sea-change in the relationships between the individual and the state, and between the courts and the political branches of government, as they had been traditionally understood.

Despite the undeniable practical importance of the Human Rights Act, widespread political and popular scepticism over the nature of rights adjudication and the relationship between human rights laws and—for instance—measures designed to combat terrorism and crime has prevented the Human Rights Act from being seen as an established and essential part of our constitutional structures. This uncertainty has not, however, prevented the Human Rights Act from exerting significant constitutional influence within the United Kingdom, within the framework provided by the European Convention and European Court of Human Rights, and beyond.

This edited collection of essays therefore seeks to chart the lasting constitutional impact of the Human Rights Act at a point when its political future is far from assured. To that end, the essays examine the relationships between the Human Rights Act and domestic constitutional doctrine, with the Convention's enforcement bodies at Strasbourg and with statutory Bills of Rights in other common law jurisdictions. Further, the collection goes on to examine the permanence of changes initiated in domestic legal reasoning and process—including to judicial technique and in advocacy—before finally turning to examine how the experience of the Human Rights Act might influence the future development of a Bill of Rights for the United Kingdom.

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The United Kingdom's Human Rights Project in Constitutional and Comparative Perspective

ROGER MASTERMAN AND IAN LEIGH

Introduction

Narratives on the United Kingdom's Human Rights Act (HRA)—passed in 1998 and coming into effect, for the most part, in October 2000[1]—are typically characterised by their paradoxical nature. During its short existence the Act has been variously portrayed as both democratic and counter-majoritarian,[2] as an effective remedial instrument and as a 'futile' gesture,[3] as a virtually entrenched cornerstone of our constitution and as an ordinary statute susceptible to the ebb and flow of contemporary political opinion.[4]

In the legal realm, far-reaching statements of the Act's significance are not hard to find. The Act is hailed as a 'constitutional statute' which enjoys the limited protection from implied repeal that that status conveys.[5] It has been termed a 'higher-order' provision,[6] and has been referred to as one of the foundations of a new constitutional order, under which the established doctrine of parliamentary sovereignty—and therefore the primacy of political

[1] The protections afforded by the Human Rights Act 1998 had been operational in respect of the activities of the devolved administrations since their establishment in 1999 (see Scotland Act 1998, Northern Ireland Act 1998 and Government of Wales Act 1998).

[2] Cf. *A and others v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68, at [42] (Lord Bingham) with J. Allan, "Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-first Century" (2006) 17 K.C.L.J. 1.

[3] Cf. K. D. Ewing, "The Futility of the Human Rights Act" [2004] P.L. 829 with A. Lester, "The Utility of the Human Rights Act: A Reply to Professor Ewing" [2005] P.L. 249.

[4] Cf. *Jackson and others v Her Majesty's Attorney-General* [2005] UKHL 56; [2006] 1 A.C. 262, at [102] (Lord Steyn) and The Conservative Party, *Invitation to Join the Government of Britain* (2010), p.79.

[5] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] Q.B. 151.

[6] F. Klug, "A Bill of Rights: Do We Need One or Do We Already Have One?" [2007] P.L. 701, at 708.

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actors within the constitutional sphere—has irreversibly conceded ground to the substantive constitutional morality of the rule of law.[7] From this perspective, the Act is marked out as having tempered the absolutism of Dicey's conception of the legal powers of Parliament,[8] and has been argued to have helped to cement the United Kingdom's transition from parliamentary to constitutional democracy.[9]

Yet at the 2010 general election, the future of the HRA provided the backdrop to one of the many inter-party skirmishes of the election campaign, with the Conservative Party committed to its repeal and replacement with a British Bill of Rights.[10] In this sphere, the 'higher order' and 'constitutional' epithets count for little. The responses of the law and of politics could hardly be more starkly opposed.

Responses to the Act, and the protections it provides, have been—and continue to be—polarised. As a result, the broad-based 'culture of rights'[11] that the first Blair administration promised would be generated by its human rights project has failed to materialise. In the context of this continued popular and political uncertainty, this book seeks to examine the undoubted influence of the HRA across the three constitutional spheres within which it can be seen to operate: within the un-codified constitution of the United Kingdom, within the context of the supervisory jurisdiction of the European Court of Human Rights (ECtHR), and, finally, on the international plane as the subject of ongoing transnational 'conversations' on rights and the instruments that protect them.[12] In order to assess the potential legacy of the HRA—and to provide a counterpoint to the Act's continued political fragility—the authors seek to identify trends and developments that hold the potential to outlast the Act that gave rise to them.

This volume brings together a collection of internationally-renowned scholars and lawyers in order to examine the lasting constitutional legacy of the HRA at a time when its political future is yet to be secured. In the context of debates over the introduction of a Bill of Rights for the United Kingdom, this set of essays examines the clear effects of the Act on constitutional doctrine, on the formal (and informal) interactions between the branches of

[7] See, for instance, V. Bogdanor, *The New British Constitution* (Oxford: Hart Publishing, 2009) and *Jackson v Attorney-General* [2005] UKHL 56, paras [104]–[107] (Lord Hope).

[8] A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 3rd edn (London: Macmillan, 1889).

[9] J. Jowell, "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] P.L. 671.

[10] The Conservative Party, *Invitation to Join the Government of Britain* (2010), p.79. The Labour Party and Liberal Democrats campaigned for the retention of the Act: Labour Party, *A Future Fair for All* (2010), p.93; Liberal Democrats, *Manifesto 2010* (2010), p.94.

[11] HL Debs, vol.582, col.1228, 3 November 1997 (Lord Irvine of Lairg QC).

[12] C. McCrudden, "A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights" (2000) 20 O.J.L.S. 499.

government (at central and devolved levels), and on legal reasoning within, and before, the courts. It examines the nature of the relationships between national bodies and the enforcement structures of the European Court of Human Rights, examining the capacity of decision-making under the HRA to generate an extra-jurisdictional influence on decisions taken by the Convention on European Human Rights (ECHR). The migration of constitutional ideas and of jurisprudential trends of reasoning is also examined beyond the Convention system; with the interplay between the Human Rights Act, the New Zealand Bill of Rights Act, the Victorian Charter of Rights and the Australian Capital Territory (ACT) Human Rights Act demonstrating the spread of the statutory Bill of Rights model within systems of parliamentary sovereignty and the continued exchange of ideas across the common law world. Finally, the book turns to the United Kingdom's own Bill of Rights debate, asking what lessons from the HRA experiment—and from other jurisdictions' experiences of Bill of Rights design—can be carried forward to the debates over the future course of rights protection in the United Kingdom and what shape a future Bill of Rights for the United Kingdom might take.

The Human Rights Act 1998: A Short History

May 1997 saw the election of the first Blair administration with manifesto commitments to implement an unprecedented array of constitutional reforms: the abolition of the hereditary principle as a criterion governing membership of the House of Lords, the enactment of Freedom of Information legislation, devolution to Scotland, Wales and Northern Ireland, reform of the party funding mechanisms and reform of the House of Commons were all a part of the new government's ambitious scheme.[13] The introduction of a statute designed to incorporate the European Convention on Human Rights into domestic law was one of the key elements of this new constitutional landscape. The enactment of the HRA in 1998 marked the culmination of a 30-year campaign for access to the Convention rights in domestic courts[14] and, for many, provided a tonic for the steady erosion of civil liberties that had taken place during the preceding years of Conservative rule.[15]

The structure of the HRA differed from that associated with *constitutional* Bills of Rights elsewhere. The Labour government was careful in its

[13] *New Labour: Because Britain Deserves Better* (London: Labour Party, 1997).

[14] See, for example, A. Lester, *Democracy and Individual Rights* (London: Fabian Society, 1969); Lord Scarman, *English Law: The New Dimension* (London: Stevens & Sons, 1974).

[15] R. Dworkin, *A Bill of Rights for Britain* (London: Chatto & Windus, 1990); K. D. Ewing and C. A. Gearty, *Freedom under Thatcher* (Oxford: Oxford University Press, 1990).

attempts to provide a *statutory* protection for rights, while ultimately preserving the primacy of Parliament. As a result, the judges would not find themselves empowered to strike down legislation which contravened the requirements of the Convention, but would instead be permitted to interpret statutory language—so far as that was possible—in order to achieve compatibility.[16] If such an interpretation was not possible, then the Act provided courts with a novel, non-coercive, remedial order—the declaration of incompatibility[17]—which would serve to highlight to the government and Parliament the specific inconsistency between domestic statute and the Convention rights.[18] Hence, parliamentary sovereignty was preserved through denying the courts the power to invalidate legislation,[19] and by leaving the elected branches of government with the choice of whether or not to remedy legislation that the courts had identified as contravening the standards required by the Convention. While the protections to be afforded by the Act extended to *all* public bodies—making it unlawful for them to act in a way which was incompatible with one or more of the Convention rights[20]—and to private persons exercising public functions,[21] Parliament was explicitly excluded from potential liability.[22] Under the provisions of the Act, legal scrutiny was designed to run in train with 'political rights review'.[23] Upon introducing draft legislation into Parliament, the responsible minister would be required to make a statement as to the compatibility of the proposed measure in order to provoke rights-focused scrutiny.[24] Ultimately, however, Parliament's legislative power would not be subject to substantive restrictions; the autonomy of the legislature was, in form at least, preserved. In setting up this division of power, the HRA attempted to reconcile an expanded role for the judges in rights protection, with traditional constitutional doctrine and the scrutiny mechanisms of the political constitution.

Yet, in other respects, the HRA was a marked departure. While sovereignty was essentially preserved, the separation of powers—the constitutional division of labour between courts, executive and Parliament—was in practice quite radically altered. The HRA provided the courts with the tools to hold the executive to account for breaches of fundamental rights, and to scrutinise

[16] HRA 1998, s.3(1).
[17] HRA 1998, s.4.
[18] HRA 1998, s.1(1).
[19] See, for example, HC Debs, vol.306, col.722, 16 February 1998 (Jack Straw).
[20] HRA 1998, s.6(1).
[21] HRA 1998, s.6(3)(b).
[22] HRA 1998, s.6(6).
[23] The phrase is Janet Hiebert's. See J. L. Hiebert, "New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights" (2003–04) 82 *Texas Law Review* 163.
[24] HRA 1998, s.19.

parliamentary legislation—traditionally substantially immune from such scrutiny[25]—for compatibility with the protections afforded by the Convention rights. These new powers of review were, prior to the implantation of the HRA, thought of as being beyond the constitutional Rubicon.[26] As a result, the classic account of sovereignty, under which Parliament legislated subject to no constitutional reservations,[27] had—though ceding to the courts these powers of proto-constitutional review—arguably given way to a more cohesive system of checks and balances.

The design of the HRA therefore attempted to blend the radical with the orthodox; rights would be judicially protected, but not at the (explicit at least) expense of Parliament's sovereignty. It is perhaps no surprise then that, as a result, much of the substantive debate over the correct application of the HRA is to be found in the reconciliation of this expanded judicial role with the ideal of democratic governance.[28] In spite of its novel structure, the HRA has not been allowed to escape the anti-democratic accusations that dog constitutional Bills of Rights.[29] And for all its successes in making available remedies for the infringement of individual rights,[30] nor has it been able to escape the suggestion—levelled by Lord McCluskey on its introduction—that the Act would provide 'a field day for crackpots, a pain in the neck for ... legislators and a goldmine for lawyers'.[31] Throughout its short life the Act has provoked opposition from the popular press and (on occasion) from across the political sphere. It has become commonplace to read that the HRA provides convicted criminals with a 'right' to pornography,[32] that a culture of compensation—fuelled by the HRA—is 'running riot' in the United

[25] Cf. the limited exceptions to this rule in *R. v Secretary of State for Transport Ex p. Factortame (No.2)* [1991] 1 A.C. 603 and *Jackson v Attorney-General* [2006] 1 A.C. 262.

[26] F. Klug, "The Human Rights Act—A 'Third Way' or 'Third Wave' Bill of Rights" [2001] E.H.R.L.R. 361, at 370. Ewing has described the change brought about by the HRA as 'unquestionably the most significant formal redistribution of political power in this country since [the Parliament Act] 1911, and perhaps since [the Bill of Rights] 1688' ("The Human Rights Act and Parliamentary Democracy" (1999) 62 M.L.R. 79, at 79).

[27] G. Marshall, *Constitutional Theory* (Oxford: Clarendon, 1971), p.74.

[28] For one of the most compelling attempts to address this particular issue, see C. A. Gearty, *Principles of Human Rights Adjudication* (Oxford: Oxford University Press, 2004).

[29] A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis, IN: Bobbs-Merrill, 1962); J. Waldron, "The Core of the Case against Judicial Review" (2006) 115 *Yale Law Journal* 1346.

[30] L. Matthews, S. Sceats, S. Hosali and J. Candler, *The Human Rights Act: Changing Lives* (London: British Institute of Human Rights, 2008).

[31] *Scotland on Sunday*, 6 February 2000.

[32] See "Tories Target Human Rights", *Daily Telegraph*, 17 August 2004. Far from being successful, the applicant—the convicted serial killer Dennis Nilsen—was in fact denied leave to appeal at permission stage.

Kingdom,[33] that the Act allows judges to wantonly interfere with executive decisions in defiance of 'common sense',[34] provides an invitation to the unelected judges to illegitimately engineer a legal right to privacy,[35] and so on. A Department of Constitutional Affairs Review of the Act, published in 2006,[36] did little to correct the series of damaging myths and half-truths that had by that point virtually drowned out discussions of the Act's merits. By 2012, little had changed—the Equality and Human Rights Commission concluded in a far-reaching review that the Convention and HRA were a firm foundation but that, nevertheless, the government had some way to go (not least in its policies and legislation) in ensuring that the Convention rights were enjoyed by everyone living in Britain.[37] To say that the Act has 'failed to attract sufficient symbolic significance to become embedded in the national consciousness' is something of an understatement.[38]

Yet, at the same time, the Act *has* brought discussions of rights to the fore in both legal and political contexts. The protections afforded by the Act have formed the hub of discussions over the necessity and proportionality of anti-terrorism legislation,[39] have informed debates over, inter alia, the legal status of same-sex partnerships,[40] acquired gender recognition,[41] the availability of enforceable privacy rights against the press,[42] and have served to underpin

[33] Michael Howard MP, "Time to Liberate the Country from Human Rights Laws", 18 March 2005. At the time of Howard's speech, damages had actually been awarded in a mere three cases under the HRA. See I. Leigh and R. Masterman, *Making Rights Real: The Human Rights Act in Its First Decade* (Oxford: Hart, 2008), pp.273–82.

[34] Comments attributed to Tony Blair in the aftermath of the 'Afghan Hijackers' decision—*R. (on the application of S) v Secretary of State for the Home Department* [2006] EWHC 1111 (Admin)—("Afghans Who Fled Taliban by Hijacking Airliner Given Permission to Remain in Britain", *Guardian*, 11 May 2006). On appeal, the Court of Appeal found the criticised decision to have been 'impeccable' (*R. (on the application of S) v Secretary of State for the Home Department* [2006] EWCA Civ 1157).

[35] See the widely publicised comments of Paul Dacre (editor of the *Daily Mail*) in response to a series of decisions taken in the High Court by Mr Justice Eady; "The Threat to Our Press", *Guardian*, 10 November 2008; "Judge Has Created Privacy Law by Back Door, Says *Mail* Editor Paul Dacre", *The Times*, 10 November 2008.

[36] Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (July 2006), on which see Joint Committee on Human Rights, *The Human Rights Act: The DCA and Home Office Reviews* (2005–06), HL278/HC1716.

[37] Equality and Human Rights Commission, *Human Rights Review 2012* (Manchester: Equality and Human Rights Commission, 2012).

[38] Francesca Klug, "Enshrine These Rights", *Guardian*, 27 June 2006, and letter to *Observer*, "Parliament—A Danger to Freedom", 9 April 2006.

[39] See, for example, *A and others v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68; Joint Committee on Human Rights, *Counter-terrorism and Human Rights: Bringing Human Rights Back In*, HL86/HC111 (March 2010).

[40] Civil Partnerships Act 2004.

[41] Gender Recognition Act 2004.

[42] *Campbell v Mirror Group Newspapers* [2004] UKHL 22; [2004] 2 A.C. 457.