

Demystifying the Human Rights Act: a discussion on the significance of the Human Rights Act and the challenges it is currently facing

Professor Francesca Klug's notes for a Question Time style debate with Professor Vernon Bogdanor, organised by Rene Cassin, a human rights organisation, 28 March 2012, Doughty Street Chambers.

Q1. Do you think the Human Rights Act (HRA) is a British Bill of Rights?

INTRO

- This is what most of us thought we were lobbying for in 90's [and others in preceding decades]. Labour Party called it HRA – we all lobbied for a bill of rights (BOR).
- This is what the New York Times thought in its headline about the mother country finally going the way of the US on 1 Oct 2000.
- This is why the subtitle of my book *Values for a Godless Age* was *The Story of the United Kingdom's New Bill of Rights*¹ – no one batted an eye lid.
- In fact from late 1960 proponents of a BOR from all parties – and they were all parties – tended to argue for a BOR based on the rights in the ECHR because the state was already bound by it.
- When the Labour Party finally agreed to this in the mid 1990's, it called it a first stage bill of rights, to be followed up by consultation on a second stage based on social economic rights. But that was before it was in government of course.

I WILL ANSWER THIS QUESTION MORE FULLY BY ADDRESSING IT IN TWO PARTS A) IS THE HRA A BILL OF RIGHTS B) IS IT BRITISH?

A) Is the HRA a bill of rights?

Legally and constitutionally most commentators would agree that the HRA has acted as a bill of rights:

- Professor Philip Alston and virtually all legal academics (although not all) categorise the HRA as a bill of rights in the academic literature
- Obviously the HRA is not a *constitutional* or *judicially entrenched* bill of rights with a strike down power like US/Canada.
- Nor are the bills of rights in New Zealand and Hong Kong for that matter but they are still called a bill of rights.
- It was this absence of a strike down power and the adoption of a 'Declaration of Incompatibility' procedure instead that led Jack Straw, then Home Secretary, to call the HRA the 'British model,' designed to respect the British tradition of parliamentary sovereignty.
- Nor was the HRA simply the incorporation of an international/regional treaty – not all the rights were included and some additional provisions were added (on freedom of expression and religion).

¹ Penguin, 2000.

- When the Human Rights bill was going through parliament the Labour government specifically rejected an amendment (to what became s2 HRA) by the Conservative Shadow Chancellor, Lord Kingsland, to tie our courts to Strasbourg jurisprudence.² Backbench Conservative MP, Edward Leigh, rightly pointed out that as a result of the flexibility accorded to domestic judges under s2 “we are in danger of not simply incorporating the convention in our law, but going much further. What we are creating is an entirely new Bill of Rights.” In my view he was correct.
- Interpretation of s2 HRA by the courts following the *Ullah* case³ of course ignored this Parliamentary intention and started to treat the HRA as if it were the incorporation, not just of the ECHR, but its case law – lock, stock and barrel.
- But our research at the Human Rights Future Project suggests that the courts were never unanimous in this approach and following the case of *Horncastle*,⁴ confirmed by the ECtHR in *Al-Khawaja*,⁵ it has been established that not only will the Supreme Court disagree with the ECtHR in certain circumstances, but the ECtHR might disagree with itself and follow the UK courts when persuaded.

It is sometimes claimed that the HRA is not a bill of rights because it does not grant a “sufficient remedy.” This is partly a technical issue which we can discuss in the Q&A but I have a little list of the changes to policies and legislation created by the HRA which looks like the product of a bill of rights to me.

Following the 19 the declarations of incompatibility issued by the courts (under s4 HRA) which have become final, legislation has been introduced to:

- Reverse the onus of proof in mental health cases so that the mental health review tribunal has to show that detention is justified, rather than the patient showing that it is not.⁶
- End detention without charge under terror legislation (instead putting in place the control order regime).⁷
- Entitle a transsexual person to be treated in their acquired gender for all purposes, including marriage.⁸
- Allow a mother to name the father of her children on their birth certificates, when they were conceived by IVF after he passed away.⁹

² 583 HL 514,515 (November 18 1997).

³ *R (Ullah) v Secretary of State for the Home Department* [2004] UKHL 26.

⁴ *R v Horncastle* [2009] UKSC 14.

⁵ *Al-Khawaja and Tahery v UK*, ECtHR Grand Chamber, 2011.

⁶ *R (H) v Mental Health Review Tribunal (North and East London Region)* [2002] QBD 1. Sections 72 and 73 of the Mental Health Act 1983 were found to be incompatible with Articles 5(1) and 5(4). The legislation was amended by the Mental Health Act 1983 (Remedial) Order 2001.

⁷ *A and others v Secretary of State for the Home Department* [2004] UKHL 56. The detention without charge provisions in s23 of the Anti-terrorism, Crime and Security Act 2001 were held to be incompatible with Arts 5 and 14. They were repealed by the Prevention of Terrorism Act 2005, which put in place a new regime of control orders.

⁸ *Bellinger v Bellinger* [2003] UKHL 21. See also *Goodwin v UK*, ECtHR, 2002. A declaration was made that s11(c) of the Matrimonial Causes Act 1973 was incompatible with Articles 8 and 12. The government altered the law in the Gender Recognition Act 2004.

⁹ *Blood and Tarbuck v Secretary of State for Health*, 2003, unreported. Section 28(6)(b) of the Human Fertilisation and Embryology Act 1990 was declared to be incompatible with Arts 8 and 14. The law was amended by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003.

As a result of re-interpretation of legislation by the courts under their duty under s3 HRA:

- The discrimination against gay couples in the rent act was removed, so that where a tenant dies, his partner can take over the tenancy in the same way that a wife or husband would.¹⁰
- Inquests into deaths in custody are more full and open after the phrase "how...the deceased came by his death" was interpreted in a broad sense.¹¹

Due to the development of the common law to bring it in line with the HRA:

- Breach of confidence has developed into, essentially, a right of privacy.¹² Back in 1991 Lord Justice Bingham (as he was then) lamented "*the failure of the common law...to protect...the personal privacy of individual citizens*".¹³
- Free speech has been advanced through development of a public interest defence for the media in libel cases,¹⁴ an increase in open justice¹⁵ and protection of journalists sources.¹⁶

As a result of challenges made by judicial review under the HRA:

- Protest rights were upheld when anti-war demonstrators won their case against the police who stopped their coach reaching an anti-war demo.¹⁷ The court referred to the "constitutional shift" brought about by the HRA, so that its no longer necessary to debate *whether* we have a right to freedom of assembly. (Although demonstrators have been disappointed with the outcome of the recent kettling cases.¹⁸)
- When a woman was effectively treated as a slave by her employer, the Metropolitan Police accepted that their failure to investigate her complaints was a breach of the prohibition of slavery and forced labour (Article 4).¹⁹

The HRA has had bite outside the courtroom too, where human rights arguments have been used to:

- Help an older couple, who had lived together for over 65 years, stay together when they were faced with separation in a care home.²⁰

¹⁰ *Ahmad Raja Ghaidan v Antonio Mendoza* [2004] UKHL 30. Para 2, Schedule 1 of the Rent Act 1977 was found to be incompatible with Art 14, in conjunction with Art 8. Applying s3, the phrase 'as his or her wife or husband' in the Rent Act was interpreted to mean 'as if they were his wife or husband'.

¹¹ *R (Middleton) v Her Majesty's Coroner for the Western District of Somerset* (HL, 2004). The HL read s11(5)(b)(ii) of the Coroners Act 1988 so as to be compatible with Art 2. The phrase "how...the deceased came by his death" was read in a broad sense, to mean "by what means and in what circumstances", rather than simply "by what means".

¹² *Campbell v Mirror Group Newspapers* [2004] UKHL 22; *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB).

¹³ *Kaye v Robertson* (1991) FSR 62.

¹⁴ *Reynolds v Times Newspaper* (2001) 2 AC 127.

¹⁵ *A v Independent News and Media and others* [2010] EWCA Civ 343.

¹⁶ *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101.

¹⁷ *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55

¹⁸ *R (Moos and McClure) v Commissioner of Police of the Metropolis* [2012] EWCA Civ 12; *Austin and Others v UK ECtHR*, Grand Chamber, 15/03/12.

¹⁹ See <http://www.liberty-human-rights.org.uk/human-rights/victims/forced-labour/index.php>

²⁰ 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

- Secure a special double bed for a disabled married woman so that she could continue to sleep next to her husband and her carers were able to give her bed baths.²¹
- Prevent a woman fleeing domestic violence have her children taken into care and instead the family was offered help by social services to secure accommodation.²²
- Ensure CCTV in the bedroom of a couple with learning disabilities in a residential care home was switched off at night to respect their privacy (it was used during the day to assess their parenting skills).²³

B) Is the HRA British?

- We hear that the HRA is not 'owned' by the British people but it is not quite as simple as that - opinion polls point in different directions, depending on the questions.
- There are some signs of 'green shoots' in terms of popular acceptance of the HRA as more and more people have gained redress from it; from the parents of an autistic child handcuffed for refusing to get out of a swimming pool, to Sun journalists who we learn may claim they are being forced to reveal their sources.
- It is sometimes said that the project to create a British bill of rights would be more successful than the HRA as it would be based on 'British values'. As Lord Bingham rightly said, What are these values if they are not the right to life, freedom from torture, liberty, freedom of expression, freedom of conscience, protest etc?
- It is sometimes said what about jury trial? This is not a right now but of course a second stage bill of rights could add such rights to the HRA, but why would you need to repeal it to do so? There is no precedent in liberal democracies to repealing an existing bill of rights in order to introduce a new one e.g. the Magna Carta and 1689 Bill of Rights here or the 1960 Canadian Bill of Rights which is still on the statute book, along with the 1982 Canadian Charter of Rights and Freedoms.
- Human rights – as opposed to citizens rights for 'free born Englishman' – in the ancient phrase- don't have a nationality. That is the whole point of them.
- The Universal Declaration of Human Rights (UDHR) was described by Eleanor Roosevelt, its prime mover, as the 'Magna Carta of mankind'.
- Modern human rights treaties have many rightful parents. Winston Churchill had an important role in the ECHR but when I was recently in the Museum of Paris, the French Declaration of the Rights of Man and Citizen was declared as the source.
- The Preamble makes clear that the ECHR is effectively the European chapter of the UDHR.

²¹ 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

²² 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

²³ 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

- Rights evolve and the UK has had a major role in this – that is what makes the HRA a British bill of rights and given time it may be understood that way. It took over 100 years for the US Bill of Rights to have impact, beyond its role in legitimising slavery.

Q2: Could we in fact end up with a bill of rights giving less protection than in the HRA?

The terms of the coalition agreement mean that nothing will happen on this before the next election. I am therefore approaching this question from a post-election scenario, assuming that there is a Conservative majority where they repeat their manifesto commitment to repeal the HRA and replace it with a British or UK Bill of Rights.

I will let the Prime Minister answer in his own words:

“the problem is that the Human Rights Act, in my view, (has been) incorporated into British law in such a way that it's given the courts an ability to come up with a lot of very odd and perverse judgments. What's required is to write a British Bill of Rights so...that we don't have strange decisions handed down by Strasbourg.”²⁴

“We're ...looking at creating our own British Bill of Rights...The truth is, the interpretation of human rights legislation has exerted a chilling effect on public sector organisations, leading them to act in ways that fly in the face of common sense, offend our sense of right and wrong, and undermine responsibility.”²⁵

“...a commission will be established imminently to look at a British bill of rights, because it is about time we ensured that decisions are made in this parliament rather than in the courts.”²⁶

“we will abolish the human rights act and introduce a new bill of rights, so that Britain's laws can no longer be decided by unaccountable judges.”²⁷

- When you have marched your troops this far up the hill it is hard to see how you can march them down again.
- If the HRA were repealed and replaced with a British bill of rights which was effectively the same but repackaged, it wouldn't be long before there were the same banner headlines about prisoners, Travellers, asylum seekers and deportations. Only people will be far more angry when they have been deceived or feel they have been treated with contempt. Civil servants would advise this must be avoided at all costs.

²⁴ ‘So, prime minister, what are you ashamed of?: David Cameron takes questions from public figures who want answers’, The Guardian, 26 November 2011.

²⁵ Speech in Oxford following the riots, 15 August 2011.

²⁶ PM Questions, 16 February 2011, responding to question by Philip Davies MP.

²⁷ ‘Rebuilding trust in politics’, 8 February 2010, University of East London.

If the HRA were repealed and replaced, as I see it there are three possible scenarios:

- 1) The rights being the same as in the ECHR but with the limitations on rights that are written into most clauses of the ECHR altered to prevent 'irresponsible' or 'undeserving' people from claiming them [this is sometimes referred to as 'tweaking' the HRA].
 - A bill of rights which exempted prisoners, asylum seekers, Travellers, young people accused of anti-social behaviour etc would make the old Soviet constitution look liberal!
 - Is this how we should interpret 'Britishness' now?
 - Difficult to see how this could be maintained without withdrawing from the ECHR which is of course what some backbenchers are calling for but the Conservative leadership is still emphatically ruling out
- 2) ECHR remains the basis of rights which could be supplemented with the right to jury trial etc but most of the remedies available through the HRA (described earlier) would be no longer available because, as David Cameron has suggested, power would be returned from the courts to parliament; this is the opposite purpose of bills of rights world wide which is to hold the executive and legislature to account through the courts.
 - As parliamentary sovereignty is already maintained through the HRA this would be a pretty weak bill of rights, if it were one at all.
 - A report by the European Research Group in December, endorsed by ten Conservative MPs, showed how it could be done, including giving parliament a 'democratic override' over the ECtHR as well.²⁸
- 3) HRA repealed and replaced by a declaration of existing rights citing Magna Carta and the 1689 Bill of Rights as sources of fundamental liberties.
 - Would pass the 'Britishness' test but I'm not so sure about the bill of rights test.
 - This is the most logical conclusion of the Conservative position as most of the reasons Cameron gives for replacing the HRA are the same arguments for not having a bill of rights at all.
 - Lord Edward Faulks, who replaced Michael Pinto-Duschinsky on the Commission on a Bill of Rights, was part of the Society of Conservative Lawyers' submission to the Commission that suggested non replacement should be considered.²⁹

The HRA is sometimes referred to as the status quo. Amusing when this comes from people who cite the 1000 year old Magna Carta as the basis of our rights. In reality the HRA is extremely new, and though it is true that the common law is now fused with HRA principles which would be difficult to reverse, it would be easier to return to the pre-1997 *real* status quo, than legal commentators often suggest. Back to the future beckons!

²⁸ 'Human rights: Making them work for the people of the UK', Robert Broadhurst, European Research Group, 2011.

²⁹ Society of Conservative Lawyers response to the Commission on a Bill of Rights consultation, by Lord Faulks, Andrew Warnock and Simon Murray, 2011.

Q3. If the HRA was replaced by a UK Bill of Rights, what impact might that have on other countries' respect for human rights?

I will largely quote others in response to this question.

Thomas Hammarberg:

"[if the UK argues there should be a possibility to overrule ECtHR judgments at the national level] that would be very destructive ... That would be the beginning of the unravelling of the system and ... Would have serious consequences throughout Europe."³⁰

Russia and Hungary

There is anecdotal evidence that the debate in the UK on the HRA/BOR and the ECtHR, is having an impact in Russia and Hungary. The UK is seen in some circles in Russia as the 'other country currently rebelling against the ECHR' particularly in the light of the *Hirst* case.³¹

The Voice of Russia (a Russian radio show, broadcasting internationally):

"the current prime minister thinks that at present the British society has a distorted notion of human rights which lets some people evade personal responsibility for their behaviour."³²

Iran

Following the riots, the *Tehran Times* in a piece headlined 'Cameron calls for less human rights'. The paper paraphrased Cameron as saying that 'human rights...can interfere with morality, and are thus not always a good thing'.³³

Egypt

Shami Chakrabarti quoted³⁴ Hossam Bahgat, veteran of the Tahir Square uprising of 2011 and director of the Egyptian Initiative for Personal Rights as saying:

" the most important thing that the British can do to support human rights in Egypt is to support human rights in the United Kingdom. We have all heard of your government's attempt to repeal the UK's Human Rights Act. It is significantly more difficult for us to fight for universal human rights in our country, if your country publicly walks away from the same universal rights."

³⁰ Interview with London Met University, November 2011, in 'The UK and the European Court of Human Rights', Donald, Gordon and Leach, EHRC report, 2012.

³¹ *Hirst v UK*, ECtHR, 2005.

³² 'Will David Cameron "mend" the British society?', The Voice of Russia website, 16 August 2011.

³³ 'Cameron calls for less human rights', *Tehran Times*, 16 August 2011, reported in 'The UK and the European Court of Human Rights', Donald, Gordon and Leach, EHRC report, 2012.

³⁴ See 'Citizens' Privileges or Human Rights? The Great Bill of Rights Swindle', speech on 20 March 2012, to be published in *Political Quarterly*.