

Protecting Parliamentary Sovereignty: A Justification for Repealing the Human Rights Act (1998)?

Annette Haddad

Introduction

The legislative framework for safeguarding human rights came about because of the need to protect people from the overweening power of the state – as witnessed by Nazi and Soviet atrocities in the 20th century. As one of the first countries to ratify the European Convention on Human Rights (ECHR), the UK should embrace the Human Rights Act 1998 (HRA) as a source of great pride. Since its inception it has entrenched greater transparency and imminence of human rights protection in the UK.¹ However, over the last few years the notion of 'human rights' has simultaneously developed into an unnecessarily politicised term, which has polarised the debate on what role different institutions should play in protecting human rights in the UK. With the general election fast approaching in May 2015, the fate of the HRA is being tested as the Conservative Party has pledged to repeal it and replace it with a "British Bill of Rights". This could effectively end the binding force of the ECHR on the UK. A central theme dominating the repeal debate has been that of restoring parliamentary sovereignty to Westminster. The following article outlines the deficiencies of this argument and suggests that repeal would weaken the promotion and protection of human rights in the UK.

The Argument in Detail

The Conservative Party's eight-page strategy report² published by Chris Grayling MP argues that the HRA 'undermines the sovereignty of Parliament, and democratic accountability to the public'³ through the application of section 3(1) of the HRA. This section requires the courts to give effect to legislation passed by Parliament in a way which is compatible with rights under the ECHR 'so far as it is possible to do so.'⁴ The Conservative Party claims that this rule has been abused by judges who have gone to 'artificial lengths'⁵ to ensure the meaning of the legislation is reconcilable with Convention rights even in cases where this interpretation is inconsistent with Parliament's legislative intention.

¹ Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act (2006)* 35.

² Conservatives, 'Protecting Human Rights in the UK: The Conservatives' Proposals for changing Britain's Human Rights Laws,'

<https://www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf>.

³ Ibid 4.

⁴ Human Rights Act (1998) s 3(1).

⁵ Above n 2, 4.

This argument is flawed for two main reasons:

1. The court has no control over Parliament's law-making abilities and is thus unable to infringe on its sovereign powers. Under section 4 of the HRA, judges can only highlight human rights abuses by making a 'declaration of incompatibility,'⁶ it is then up to Parliament to exercise its sovereign power to respond to any declarations.
2. The judiciary is designed to provide checks and balances on Parliament's power. Courts may only interpret legislation in a way that is inconsistent with Parliament's intention when that intention has put human rights protections at stake. This is a realistic and necessary safeguard to ensure the rule of law is upheld in the UK.

Ancillary to these arguments, concerns about parliamentary sovereignty divert the repeal debate away from more important issues such as the purpose of the HRA; to uphold human rights and which institutions in the UK can best achieve this.

Declarations of Incompatibility

While section 3(1) of the HRA requires courts to give effect to legislation passed by Parliament in a way which is compatible with rights under the ECHR, it does not require them to do so at all costs. Courts have the power to declare legislation incompatible,⁷ but not invalid or unenforceable.⁸ Such a declaration has no practical effect. Parliament can either amend or repeal the offending Act itself, but is under no legal obligation to do so. Since the introduction of the HRA, 28 declarations have been made with only 18 becoming final, prompting Parliament to re-legislate.⁹ This model, coined as the "democratic dialogue"¹⁰ model by Alison Young, was deliberately designed to preserve parliamentary sovereignty through respecting Parliament's role as the UK's ultimate law-making body. This was affirmed in the White Paper which introduced the Human Rights Bill (1997):

"The Government has reached the conclusion that courts should not have the power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention. This conclusion arises from the importance which the Government attaches to Parliamentary sovereignty."¹¹

Furthermore, Young notes this model:

⁶ Human Rights Act (1998) s 4.

⁷ Human Rights Act (1998) s 4 (2).

⁸ Human Rights Act (1998) s 4(6).

⁹ Ministry of Justice, *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government Response to Human Rights Judgments 2012-13*, CM 8727 (London: The Stationery Office, 2013)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252680/humanrights-judgments-2012-13.pdf 43.

¹⁰ Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart, 2009).

¹¹ Rights brought Home: The Human Rights Bill (1997) Cm 3782

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf 1.17.

"...arguably compensates for the claim that a constitutional protection of rights is anti-democratic by providing the legislature with opportunities to respond to the assessment of rights by the courts."¹²

From this it is clear that the HRA provides appropriate safeguards against arbitrary interference with fundamental rights, whilst simultaneously leaving Parliament the autonomy to decide how to respond to declarations of incompatibility, thus protecting its sovereignty and upholding entrenched democratic values in the UK.

Parliamentary Intention

The Conservative Party's criticism that section 3 of the HRA allows judges to go to 'artificial lengths' to change the meaning of legislation is incoherent without a discussion of the rationale behind this section. This apparent omission remains a major shortcoming of its argument.

In *Ghaidan v Godin-Mendoza* ("Ghaidan"),¹³ a leading case on HRA interpretation, Lord Nicholls' majority judgment affirms that giving effect to legislative intention is a priority:

"In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question."¹⁴

However, the majority further asserts that it is inevitable to at times depart from this legislative intention in order to ensure the meaning of the legislation is 'Convention-compliant.'¹⁵ This framework has been described as 'judicial rectification,'¹⁶ an interpretative measure used to ensure the legislation conforms with the ECHR and HRA. Thus, section 3 could be seen as a sophisticated protocol for when Parliament inadvertently compromises rights of individuals (especially disadvantaged minority groups) that are enshrined in the ECHR and the HRA through misuse or abuse of its sovereignty.

The issue in *Ghaidan* turned on whether a homosexual man could succeed as a statutory tenant on the death of his partner (the original tenant) under the *Rent Act 1977* (UK) ("the Act"). This was dependent upon the meaning of 'surviving spouse' in Schedule 1 of the Act. Under section 2 'spouse' was defined as a person living together with the original tenant 'as his or her wife or husband,' which had previously been read only to include couples of the opposite sex.¹⁷ The rights advanced by the tenant were the right to respect for a person's home and the right to enjoy a home

¹² Above n 10, 112.

¹³ [2004] UKHL 30.

¹⁴ Ibid [30].

¹⁵ Ibid [30]–[32].

¹⁶ Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009) 114.

¹⁷ See *Fitzpatrick v Sterling House Association Ltd* [2001] 1 AC 27 where the House of Lords held that 'spouse' as defined in the very same provisions did not include a homosexual partner.

free from discrimination,¹⁸ as this piece of old housing legislation had the potential to discriminate against homosexual tenants.

Under the HRA the court was left with two options, either to declare that:

1. The legislation was to be expansively read to now include homosexual partners in order to prevent discrimination or;
2. The legislation was incompatible with human rights, a measure of last resort.

The majority of the court in this case went with the first option. Notwithstanding this decision, Parliament was left with two further options – to re-write the law using close-ended language or, if the court went ahead and declared the legislation incompatible, to ignore the declaration. Parliament would do neither of the two, as both would tarnish its reputation for upholding human rights standards. What is clear however is that the court in this case had no power to neither stop Parliament's law-making abilities nor impose on its sovereign powers.

Although the unique political orientation of the British constitution is embodied in the continuing sovereignty of Parliament,¹⁹ it is not absolute or unqualified. Just as parliamentary sovereignty has developed as a common law norm; it must compete with other fundamental common law norms, particularly the rule of law.²⁰ Allowing the judiciary to place checks and balances on the UK Parliament is a rational and realistic limitation on parliamentary power and creates a rights-conscious environment, which has contributed to the UK remaining one of the world's leaders in upholding human rights protections for its peoples.

Parliamentary Sovereignty Detracts from the Bigger Questions

The repeal debate has been misconstrued and framed around the wrong issues. The crucial question is how we can best protect the rights of UK citizens and non-citizens, rather than what model of protection will allow parliamentarians to maintain their supremacy. We need to embrace the positive outcomes that the HRA has had for the UK, such as protecting powerless minorities, instead of perpetuating fallacious rhetoric about how problematic it is. We need to be thinking of our role in increasing and maintaining the global promotion of human rights, instead of causing an unhealthy debate around the diminution of sovereign autonomy. We need to question the fundamental purpose of human rights and what they stand for, that is, basic rights that all are entitled to by virtue of being human.

Usurping the role of judges in interpreting the law and diminishing their ability to prevent parliamentary overreach jeopardises the protection of human rights in the UK. This may be the very effect of a "Bill of Rights," with the Conservative Party

¹⁸ European Convention on Human Rights, Articles 8 and 14 respectively.

¹⁹ Stephen Sedley, 'The Sound of Silence: Constitutional Law Without a Constitution' (1994) 110 *Law Quarterly Review* 270.

²⁰ Colm O'Connell, 'The Human Rights Act and the Slow Transformation of the UK's 'Political Constitution'' (Institute for Human Rights Working Paper No 01, UCL's Multidisciplinary Human Rights Institute, 2012) 16 < http://www.ucl.ac.uk/human-rights/research/working-papers/docs/colm_o_cinneide>.

proposing that when UK law is declared incompatible with the Convention, a 'Parliamentary procedure' will be in place to determine whether it will be binding or not.²¹ The chilling thought that rights will be qualified where Parliament thinks fit involves a degree of departure from rule of law ideals. Both Parliament and the courts protect and defend the public interest. However, while the legislature has a 'majoritarian conception of the public interest,' the judiciary 'prioritise[s] the need to identify enduring values which protect all, including minorities.'²² Giving Parliament an unchallenged say on human rights protections has the potential to weaken minority protection (e.g. of asylum seekers, who often rely on human rights claims to prevent deportation) and effectively undermine human rights standards in the UK.

Conclusion

Concerns about parliamentary sovereignty fail to provide a sound justification for the repeal of the HRA, which is designed in such a way that it can be neatly reconciled with parliamentary sovereignty by respecting the UK's ultimate law-making power. The court's remedial capacity to depart from legislative intention may only be exercised for good measure; to ensure the Act under scrutiny is consistent with human rights standards. As it stands, the HRA gets the constitutional power balance right between the most important institutions that hold together the framework of the UK Constitution – Parliament and the judiciary. Parliament must provide compelling and legally valid justifications for its repeal and an alternative model that will not weaken human rights protections.

²¹ Above n 2, 6.

²² Amy Street, *Judicial Review and the Rule of Law: Who is in Control?* (The Constitution Society, 2013) 56 <http://www.consoc.org.uk/wp-content/uploads/2013/12/J1446_Constitution_Society_Judicial_Review_WEB-22.pdf>.