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Abstract

This article discusses the implications of the Human Rights Act 1998 (HRA). It suggests that the HRA is designed to promote a classic liberal conception of political citizenship which protects the individual from the exercise of arbitrary state power and not to extend the role of the state as a welfare provider. It goes on to argue that the government has limited the effectiveness of the HRA by claiming that they are building a culture of rights and responsibilities whilst treating human rights as an issue for the courts rather than an issue for government and public authorities generally. The article concludes by discussing extending the HRA to include economic, social and cultural rights.

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The Human Rights Act 1998: A Bridge between Citizenship and Justice?

A recent report of the Parliamentary Joint Committee on Human Rights discusses the need to transform the rhetoric of the Human Rights Act 1998 (HRA) into reality (Joint Committee on Human Rights, 2003). It laments the fact that human rights have largely been seen as a matter for lawyers and the courts, and that consequently human rights have not been mainstreamed into the policy and practice of the UK public sector. In their view the government is failing to build a broad based human rights culture in the UK.

The conclusion of the Parliamentary Joint Committee shows that we need to be sceptical about government claims about building a human rights culture and strengthening citizenship. The Convention rights that were incorporated into British law by the HRA are over fifty years old and were never designed to provide social and economic rights for the citizen. Before considering these issues, which raise questions of a multi-disciplinary and multi-agency approach to human rights, we need to analyse the emergence and policy of the HRA.

Bringing the Convention rights home.

The debate over whether the incorporation of the European Convention on Human Rights (ECHR) could be seen as an interim step towards a home grown Bill of Rights spanned three decades or so from 1968 onwards. During that period there was “a gradual shift in establishment opinion from resistance or apathy towards any type of human rights

legislation to a situation where a Human Rights Act has been enacted which, ... will incorporate the ECHR into domestic law.” (Wadham, 1999: 354). This development marks a change in thinking within the political elite and the Labour Party (Young, 1999). While Old Labour was generally hostile to human rights legislation, believing that it would hand political power from a socialist parliament to a conservative judiciary (Ewing, 1990), key New Labour figures converted to espouse incorporation (Smith and Blair, 1993; Mandelson and Liddle, 1996; Straw and Boateng 1996).

The reasons for this change of heart were partly pragmatic and partly ideological. Historically the UK had had more cases taken against it than any other European state. It had also lost more cases before the European Court of Human Rights (the Court) than any other European state. In about half the cases involving the UK heard by the Court human rights violations were found (Farran, 1996). Over one hundred significant changes to regulations and other administrative procedures affecting citizens' civil rights resulted from decisions of the Court up to the late eighties. (Labour Research, 1989: 7).

The ECHR was signed by 15 European Countries, including the UK, in 1950. The relevant articles of the Convention are as follows: Article 2 - the right to life; Article 3 - the prohibition of torture; Article 4 - the prohibition of slavery; Article 5 - liberty and security of the person; Article 6 - the right to a fair trial; Article 7 - against retrospective criminal law; Article 8 - the right to respect for private and family life; Article 9 - freedom of thought and religion; Article 10 - freedom of expression; Article 11 - freedom of assembly and association; Article 12 - the right to marry; and Article 14 - prohibits discrimination in the enjoyment of convention rights. In addition to the original articles are a number of

protocols, which were added later; these include the right of education, the right to free elections, protection of property and the abolition of the death penalty.

Whilst most of these rights are political and civil rights, as opposed to social, economic and cultural rights, there is a degree of overlap. The right of freedom from inhuman or degrading treatment (Art. 3) could apply to conditions in a residential care facility, or a hospital or to mental health treatment. The right to a fair hearing (Art. 6) does not only apply to criminal trials but civil matters such as housing benefit review boards. The right to respect for private and family life (Art. 8) could apply to privacy in a residential care facility.

Prior to the HRA coming into force the Convention rights did benefit domestic minorities suffering from social exclusion: prisoners, immigrants, school children and people suffering from mental health problems (Gearty, 1993). The following may be seen as examples of cases relevant to the social policy community. The rights of mental health patients were strengthened by a ruling that a mental patient who was discharged from care but later recalled without the oversight of a court was entitled to have his/her detention reviewed by an independent tribunal.¹ In the field of education a decision of the European Court resulted in the abolition of corporal punishment in State-maintained schools.² A series of cases dealt with the issue of parents' access to their children whilst in local authority care.³ Finally, the impact of the Convention on the area of citizenship and immigration has been more mixed. Whilst a decision of the European Commission on

¹ *X v. United Kingdom*. (1981), 4 *European Human Rights Reports* (EHRR) 188.

² *Campbell and Cosans v. UK*. (1982), 15 EHRR 137.

³ *O v. United Kingdom*. (1987), 10 EHRR 82.

Human Rights led to a change in immigration policy in respect of East African Asians,⁴ a decision by the Court that immigration rules that allowed wives, but not husbands, of immigrants the right of abode were discriminatory on ground of gender led to a Government decision to withdraw the entitlement altogether thereby achieving formal equality.⁵

The Human Rights Act 1998.

Once the HRA became law UK citizens had, for the first time, rights instead of liberties. The Act makes it unlawful for public authorities to act in a way which is incompatible with Convention rights (section 6). The definition of public authority is a wide one - it includes central and local government, the police, immigration officers, prisons, courts and tribunals. Litigants will be able to argue their Convention rights in the courts at any level; there will be no separate constitutional court. The Act allows a person who is a victim of a breach of a Convention right by a public authority to bring proceedings against the authority (section 7).

The Act provides for legislation to be interpreted **so far as is possible to do so** to be compatible with the Convention (section 3). If, however, the courts decide that it is impossible to interpret legislation in a way which is compatible with the Convention, the Act enables a formal declaration to be made that its provisions are incompatible with the Convention (section 4). Only higher courts will be able to make a declaration of incompatibility. A declaration of incompatibility will, however, not of itself change the law

⁴ *East African Asian cases* (1973) 3 EHRR 76

⁵ *Abdulaziz, Cabales and Balkendali v. United Kingdom* (1985) 7 EHRR 471.

or help a litigant to win a case but it should prompt a dialogue with government which may lead to a change in the law. The HRA provides for a fast-track procedure for changing legislation in response to a declaration of incompatibility (section 10). The appropriate Government Minister will be able to amend the legislation by issuing a remedial order subject to the approval of both Houses of Parliament. Under the statutory scheme set out above the constitutional principles of the separation of powers and parliamentary sovereignty are upheld in that the courts have the responsibility for the interpretation of the Convention, and the Government has the responsibility for revising legislation.

Social policy implications

The Act's limitations include the following. Firstly, the Act was never intended to protect social, economic and cultural rights. Secondly, New Labour ideology has tried to redefine the Act to include citizens' responsibilities as well as State's rights. Third, the Government have done little to promote a rights culture. And fourthly, the Act only applies to public, and not private, bodies.

1 First and second generation rights

What should be immediately clear from the above is that the Convention is a conservative document, (Wadham, 1999; Wadham, 1996), which protects first generation at the expense of second generation rights (Van Bueren, 2002). These criticisms are of particular relevance to the present discussion. 'First generation rights' refers to political and civil rights. The classic liberal conception of political citizenship is mainly concerned to protect the individual citizen from the exercise of arbitrary state power - the right to life; the right

not to be tortured; the right to freedom of expression, association and religion; the right to a fair trial and so on.

‘Second generation rights’ are social, economic and cultural rights (Seneviratne, 1999).

These second generation rights are much more contentious as they involve issues of economic equality and resource allocation. These social and economic rights are enshrined in a number of international agreements such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (1976), and the sister document to the ECHR - the Council of Europe’s Social Charter (1961).

Examples of social and economic rights covered by the last of these human rights documents include: the right to social security and social welfare services; the right to health care; and the right to housing .Whilst the UK has signed up to these international human rights documents, so far the government has chosen only to incorporate into law the more limited civil and political rights and not to give parity of treatment to social, economic and cultural rights.

“...with the enactment of the Human Rights Act 1998, we have an unbalanced constitution, one which is now heavily tilted in the direction of liberty at the expense of equality.” (Ewing, 2001:301).

In a recent initiative the Parliamentary Joint Committee on Human Rights is seeking evidence on the issue of whether the International Covenant on Economic, Social and Cultural rights should be incorporated into domestic law (Joint Committee on Human Rights, 2003a). Such a step, if adopted by the Government, would broaden the concept of legally enforceable human rights from civil and political rights, which are protected by the

Convention and the HRA, to economic, social and cultural rights which are of most interest to the social policy community.

2 Citizenship - rights and responsibilities

There is an extensive literature in social policy on the nature of citizenship and human rights (Marshall & Bottomore, 1992). Some of the ministerial speeches on the HRA, particularly those by Home Office ministers, have tried to make the link between citizenship and human rights. “The new act is about a new citizenship for a new society and a new economy.” (Scotland, 2001). In her view the HRA was not just about positive rights, but it is also is a way of educating the public in core ethical values:

The Government’s aim therefore is to build a modern civic society based on the basic values of individual worth and equality of opportunity for all. These values are reflected directly in the ECHR, which through the Human Rights Act is now our system of law. ... One of the strongest arguments for incorporating basic values in Statute law is the increasingly diverse nature of UK society. Diverse societies cannot take shared values for granted. The core values need to be stated and affirmed so that everybody understands what they are, and so that we can all learn to interpret them in a similar way. (Scotland, 2001)

However the price of New Labour’s conversion to a rights culture is its insistence that rights also incorporate responsibilities. “New Labour perceives post-war social democracy as being too eager to extend the scope of individual rights without any corresponding concern with the responsibilities attached to rights and the duties individuals owe as members of families and communities.” (Driver and Martell, 1998)

In a speech made when he was Home Secretary, Jack Straw tried to explain how the HRA linked with New Labour’s agenda of strengthening citizenship (Straw, 1999). He rejected

what he called the old-fashioned libertarian idea that rights were solely about protecting the citizen from the exercise of arbitrary state power. He argued that the HRA was not just about citizens' rights but also about their responsibilities. He founded this argument on the ECHR itself: "The Human Rights Act bases itself on the ECHR. And the ECHR is nearly unique amongst human rights instruments. Because it balances and accompanies nearly everything it says about individual rights." (Straw, 1999).

It is undoubtedly the case that the ECHR is a document that balances and qualifies rights. Very few rights are absolute or unqualified so that courts have to weigh competing rights in order to decide conflicts between citizens and the state. But it is a very big logical step to posit, as Straw does, that these qualified rights "amount to a statement of responsibilities." (Straw, 1999), or to try to shift responsibility for human rights from the state to the citizen. "The responsibilities of citizens - as well as governments - to respect the rights of others." (Straw, 1999).

3 Establishing a Rights Culture

Arguably there is a contradiction between the New Labour's aim of promoting a rights culture and its claim that rights should be conditional on the acceptance of individual responsibilities. The potential impact of the HRA has been diluted, therefore, partly by the government's insistence that they are about building a culture of rights *and* responsibilities in the UK, and partly by the lack of "an authoritative and independent body to drive it forward." (Grosz, 2002). In its sixth report the Joint Committee on Human Rights found little evidence of a human rights culture emerging in the public sector outside of the

judiciary, a finding that was corroborated by a District Audit survey of local authorities and NHS Trusts. (District Audit, 2002).

It is clear that, by and large, public authorities do not consider mainstreaming respect for human rights in their policies and practices a priority. We conclude that the Government's enthusiasm to make the Human Rights Act come alive as a measure which places positive duties on public authorities, and which should promote a culture of respect for human rights in every aspect of public life, needs to be forcefully promoted. (Joint Committee on Human Rights, 2003).

There has been a sharp debate as to whether there should be an independent Human Rights Commission driving forward the rights agenda. (Institute for Public Policy Research, 1996; Spencer, 1999). Apart from promoting an individual test case strategy, a Human Rights Commission would be able to educate the public, advise individuals, scrutinise legislation and produce policy papers (Irvine, 1997). Despite the fact that Northern Ireland already has such a body and Scotland is to have one soon, the Government has so far ruled out the idea of a Human Rights Commission, although it has set up a Parliamentary Joint Select Committee on Human Rights. One of the first steps of the Joint Committee was to conduct an inquiry into the case for establishing a human rights commission. The result of those inquiries is the Committee's Sixth Report - *The Case For A Human Rights Commission*. (Joint Committee on Human Rights, 2003).

The decision not to establish a Human Rights Commission as a means of improving compliance with Convention rights has led critics to wonder whether the government is really committed to developing a rights culture or whether they are worried that the main target of a Human Rights Commission would be the government itself. (Fenwick, 2000: 15).

4 The public and private spheres

The decision by the government to confine the Act to “public authorities” gives rise to particular definitional problems and also points up the Government's general attitude to human rights. Whilst at the end of the Second World War it may have been states which largely threatened human rights, and were therefore the subject of human rights instruments, it is arguable that today human rights are equally threatened by large multinational corporations and media conglomerates. This issue of how we define public authorities is also of particular relevance due to the development of new forms of public sector governance with greater emphasis on contracting and the interpenetration of the public and private sectors.

Whilst the HRA definition of "public authority" still preserves a core distinction of public and private there has been a debate about whether the HRA will have horizontal effect i.e. affect non-governmental bodies. In the context of local authorities' increasing use of the private sector for the provision of statutory services, there is a danger that affected individuals will be left without an effective remedy for breaches of Convention rights. (Markus, 2003).

The Act in practice

After over two years of the Human Rights Act there has been neither chaos nor the politicisation of the judiciary. Nor has there been a constitutional revolution. Predictably most of the cases have been argued under Article 6, the right to a fair trial, but Article 8, the right to private and family life, has been a fertile source of litigation, particularly in

relation to immigration and asylum cases. Of 431 cases with human rights act implications considered in the High Court or above between October 2 2000 and 30 April 2002, in 318 cases the HRA affected the outcome of the case. In 94 cases arguments under sections 3, 4 or 6 succeeded (Starmer, 2003). So far there have been only nine declarations of incompatibility under section 4, of which three have been already overturned on appeal and three more are under appeal. (Starmer, 2003). In two of the remaining three cases Parliament introduced remedial orders to change the law. (Joint Committee on Human Rights, 2001).

Predictably the courts have made relatively little use of declarations of incompatibility preferring to use either section 3 - the interpretation section to read down Convention rights into existing law or to develop the common law to encompass Convention rights and jurisprudence. However it is still too early to discern stable judicial trends. In an early case the House of Lords considered the controversial “rape shield” law⁶ prohibiting courts from considering a rape victim’s previous sexual history. Whilst denying that the law was incompatible with the fair trial Convention right the, the Law Lords effectively re-wrote the section to allow the trial judge to admit such evidence if it was necessary in order to secure a fair trial.⁷ However, in a later case,⁸ the House of Lords decided that the appropriate test for the use of section 3 was the doctrine of judicial deference to the original intention of Parliament (Edwards, 2002; Klug, 2003).

Ultimately, one of the best ways of assessing the effectiveness of the domestic courts in implementing the Convention rights would be to see how many litigants, having failed to

⁶ Section 41 of the Youth Justice and Criminal Evidence Act 1999.

⁷ *R v A*, [2001] 2 *Weekly Law Reports (WLR)* 1546.

secure their Convention rights in the UK courts, go on to establish those rights before the European Court of Human Rights in Strasbourg. (Starmer, 2003). However it is too soon to make such a judgement. So far the only case that has been appealed from the domestic courts to Strasbourg has been the assisted suicide case. Diane Pretty wanted to establish that section 2 of the Suicide Act 1961, which made it a criminal offence to assist a suicide, was incompatible with Article 2 of the Convention. In other words that Article 2, the right to life, implied also a right to end life. This was rejected by both the House of Lords and the European Court of Human Rights.

Violations of Convention rights found by the courts include a case decided before the Human Rights Act came into force, but decided on Convention grounds, in which the House of Lords decided to lift its blanket ban preventing an individual from suing local authorities for alleged psychiatric damage caused whilst in care.⁹ The ban had been justified by the courts on the public policy ground that the courts should not get involved in “what are essentially social welfare questions involving budgetary limits and efficient public administration.” (Hoffman, 1999:164).

Other breaches of Convention rights with a public policy dimension include the first declaration of incompatibility. A paranoid schizophrenic murderer in Broadmoor challenged the Mental Health Act 1983.¹⁰ The courts ruled that section 73 of the 1983 Act, reversing the burden of proof, so as to put the onus on the detained mental patient to prove it was safe to release him, was incompatible with his Article 5 right not to be arbitrarily

⁸ *S (Children) (Care Order: Implementation of Care Plan) Re* [2002] 2 WLR 720.

⁹ *Barrett v Enfield LBC*. [1999], 2 WLR 79.

¹⁰ *R (on the application of H) v Mental Health Review Tribunal for North and East London Region*. [2001], 3 WLR 512

deprived of liberty. This case led to the first remedial order made by Parliament.¹¹ There have also been decisions that delays in hearings before the Mental Health Review Tribunal breached patients' Article 5 rights.¹²

A local authority policy to pay foster carers of friends and relatives less than the allowance paid to stranger foster carers was successfully challenged using Article 8.¹³ A local authority decision to leave a severely disabled woman and her carer-husband in unsuitable accommodation for almost two years was struck down on the basis of Article 8. They were awarded £10,000 under section 8 of the Act.¹⁴

Not all challenges based on Convention rights have resulted in changes to the law. In one of the most significant decisions to date, an attempt by the Court of Appeal to introduce 'starred milestones' into local authority's care plans which involved judicial supervision if Convention rights were at risk and the milestones were not achieved within a certain time, was condemned by the House of Lords as constituting amendment of the Children Act, not its interpretation.¹⁵

Conclusion

Having taken the first step towards a rights culture there is now no turning back. The HRA has the potential to affect key relationships such as those of the judiciary and the executive and the citizen and the state. However in the longer term the HRA will only succeed if it

¹¹ Mental Health Act 1983 (Remedial) Order 2001.

¹² *R v Mental Health Review Tribunal and Another, ex parte KB and 6 others (2002) ACD 85 Admin Court*

¹³ *R v Manchester City Council, ex parte L & Others.* (2001), *The Times*, December 10

¹⁴ *R v. Enfield LBC, ex p Bernard .* [2002], *The Times*, November 8.

manages to change not just the legal and constitutional culture but also the administrative culture so that public authorities incorporate convention principles into their decision making *ab initio*. (Jordan, 2001:1.8).

If the government really wanted to build a rights culture they would have established a campaigning Human Rights Commission, and perhaps considered amending the Human Rights Act to incorporate either the Council of Europe's Social Charter or the UN International Covenant on Economic, Social and Cultural rights (Robinson, 2003, Choudhury, 2003). Instead they seem to have adopted a minimalist executive-centred approach which stresses citizens' responsibilities and seeks to individualise rights within an essentially legal discourse.

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